HOUSE OF COMMONS

Exiting the European Union Committee

Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372

Wednesday 20 December 2017

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Watch the meeting

Members present: Hilary Benn (Chair); Mr Peter Bone; Joanna Cherry; Mr Christopher Chope; Stephen Crabb; Richard Graham; Peter Grant; Wera Hobhouse; Stephen Kinnock; Jeremy Lefroy; Seema Malhotra; Mr Pat McFadden; Stephen Timms; Sammy Wilson.

Questions 376-454

Witnesses

I: Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool; Professor Anand Menon, Director, UK in a Changing Europe; Stephen Booth, Director of Policy and Research, Open Europe.

Examination of witnesses

Witnesses: Professor Michael Dougan, Professor Anand Menon, and Stephen Booth.

Q376 **Chair:** Good morning. On behalf of the Committee, I will express a very warm welcome to our three witnesses today: Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law at the University of Liverpool; Professor Anand Menon, Director of UK in a Changing Europe; and Stephen Booth, Director of Policy and Research, Open Europe. Thank you very much for agreeing to come along here today. I begin with this interesting question of full alignment and the UK and the EU, because in a way that was the most significant part of the phase one agreement, because it enabled the 27 to say, "Right, that is sufficient progress. Off we go". We have a lot of questions to ask in the time and succinct answers would be helpful. What is your understanding of what it is the Government have committed to in what they describe as the fallback? In other words, if there is no deal, no other method, there is a clear commitment in the deal to this full alignment that ensures that there is no border. Can I start with you, Professor Dougan?

Professor Dougan: Sure. Thank you very much for the invitation. Would you like me to comment specifically in the context of Northern Ireland—the passage of the joint report that deals with Northern Ireland?

Chair: Yes, absolutely.

Professor Dougan: I will be brief on each of these, but there are four questions that arise out of that section of the text in the joint report about the third option—the default option of a unilateral commitment to full alignment with certain rules of the single market and the customs union. The first is that it is only certain rules of the single market and the customs union. The text gives a few indicative feels: they talk about the all-island economy, the north-south co-operation and the Good Friday agreement, but each of those is open to interpretation, so we are not quite sure yet what scopes of co-operation we are talking about here. It is clearly not the full single market and customs union; it is something less, but we are not quite sure.

Secondly, the phrase "full alignment" might well have a certain political resonance and a certain political symbolism, but it is very difficult for me, as an EU constitutional/EU trade lawyer, to translate it into something more concrete or more precise than that. The single market and the customs union are built on different combinations of legal techniques, mutual recognition, harmonisation, equal treatment, surveillance and supervision. They differ from sector to sector. They change over time. It is very difficult for me to get a sense of what full alignment means mapped on to the actual complexities of the single market and the customs union.

The third issue is that it is not clear territorially whether the full alignment is intended to apply only to Northern Ireland or to all of the UK, or whether that might change in different situations. For me it is interesting that that choice seems to be left primarily in the hands of the Northern Irish institutions rather than the UK Government, but the territorial scope of the full alignment is not necessarily that clear.

The fourth issue is that this is a unilateral offer. This is the UK saying unilaterally we will fully align ourselves with certain rules of the single market and the customs union. Of course, we know that unilateral offers to mimic the rules of another territory do not mean very much in international trade, because without the institutions, processes, structures and networks that underpin the interactions of rules, rather than a mere unilateral decision to mimic rules, they do not necessarily give you any greater market access or deal with customs barriers. It is interesting, for example, that the UK Government, in both their future partnership paper on customs with the EU and their position paper on Northern Ireland, explicitly say that unilateral solutions will not work: "We need agreed solutions, because unilateral solutions will not work".

To that extent the joint report is a departure from what we knew from the future partnership paper and from the position paper.

Q377 **Chair:** That is extremely helpful. I have one follow-up before I bring in Professor Menon and Mr Booth. If it only applies to certain sectors of the economy, the all-island economy, how can that be consistent with what is also written clearly in the phase one agreement: that there will be no checks—no infrastructure at all? The only way you can honour that commitment is if it applies to all parts of the economy: basically all movements between Northern Ireland and the Republic, and the Republic and Northern Ireland. Is that not the case?

Professor Dougan: It might be helpful if I give you my summary view of the position on the Northern Ireland part, at least the customs part of the joint report. For me, it is just a fudge. We are left with a position that has not actually changed. We are promising irreconcilable things to different groups of people, and we do not know how to solve it. We have come up with a form of words that people felt they could buy into to enable the political judgment that sufficient progress had been made, so that they could proceed with the negotiations, but it is very difficult for me to see how these solutions are carrying the situation forward. For me, this is just a postponement of the argument until the new year, and in certain respects it could make the resolution of the situation worse, or at least more difficult, because by putting it down in writing, giving very concrete commitments and generating expectations among different groups of people that these commitments are somehow binding or guaranteed or enforceable, we are entrenching an intractable problem and making the positions potentially more difficult to come to a compromise on, rather than offering any clear solutions. For me, the Northern Ireland section is a bit of a kicking it into the new year, but without any clear resolution.

Q378 **Chair:** That is very clear. Professor Menon?

Professor Menon: Thanks Chair. I will just add three things to what Michael said. First, Chair, as you said, this is a clear commitment, and indeed it is, but, of course, the legal status of this document is open to debate. It is a clear commitment in a document that might not be binding. What status that gives it, heaven alone knows.

Secondly, just to pick up on the points that both you and Michael made about scope, the other thing that the report stresses is the need to maintain the integrity of the single market, and it is very hard to see how that happens if you are picking off bits of the sector with regard to the all-island economy. There is a further tension to those that Michael has already underlined.

The third point is to do with this notion of a unilateral offer, because it seems to me that the missing element in all this is the question of adjudication. Lurking in the text of this document is “we will be aligned; trust us”, and that is simply not going to fly for the European Union, because the big question is who gets to say whether or not the rules are the same? What is the form of legal adjudication? "Actually, we have a very good institution here in Luxembourg that does it already, if you are interested". That has been pushed neatly to one side as well, because no one in international trade takes the other party's word for it, and this is the thorny question that haunts any agreement on regulations and standards.

Q379 **Chair:** Thank you. Mr Booth?

Stephen Booth: I agree with much of what has been said, and there is a risk of trying to analyse this too rationally when basically this is a political fudge, and it is quite hard to therefore find much meaning in it. The fact is, as you say, this is meant to be the contingency; well, if there is no deal, there is no deal, so how can a unilateral declaration from the UK somehow keep the UK in the customs union for practical purposes, ie to move the goods across the border? I do not see how this possibly achieves that. You could look at that either way: from the EU side, what does this commitment mean if the EU tries to ever bank this deal? How does that work? I do think that this is a very political section of the document and effectively means very little.

Q380 **Mr McFadden:** I want to keep going with this line of questioning, if I can. Professor Dougan, you described this a minute ago as a fudge and a postponement, so if things are not clear, I just want to ask a few questions about what we need to become clear in phase two of this to understand it better. First, on full alignment, it seems that the UK Government are defining this as the six areas for north-south co-operation stemming from the Good Friday agreement: tourism, transport and so on. Significantly those six areas do not cover the import and export of goods and services for the most part. Professor Dougan, is it your understanding that that is also the EU and the Irish Government's view of what full alignment means? If their view is different, what is it that needs to be clarified about this in phase two?

Professor Dougan: The north-south co-operation part of the phrasing in the joint report is the relatively clear criterion, in the sense that the two sides have been working on drawing up a list of areas that are the subject of north-south co-operation, underpinned by EU law and policy; it covers health and energy and so on.

The much more ambiguous criterion listed in the joint report is supporting the all-island economy. This could mean anything. This could mean everything, every part of the single market and the customs union in its entirety, or it could mean just single parts and selected parts, and we have no real idea what is meant. As I mentioned earlier in response to Hilary Benn's question, these criteria are very malleable and open to interpretation. They do not really tell us very much at all. That criterion especially—protecting the all-island economy—could be as broad or as narrow as you really want it to be.

Q381 **Mr McFadden:** In the end, we are going to have to have a legal text, by the end of phase two or at some point, so what in your view needs to be clarified? If this is all fudge and traditional constructive ambiguity and all those things, what needs to be clarified here, so that we know at least what full alignment applies to?

Professor Dougan: I can give a very direct answer: somebody needs to be told that they are going to be very disappointed with this agreement, and that is the actual answer that needs to be conveyed. It is worth bearing in mind that the Government set out a three-tiered approach. We have, first, that these issues could be solved via the deep and special partnership. That is problematic, as things stand, because, first, we do not know what the deep and special partnership might look like. The Government's ideas as set out in the future partnership papers so far have not gone down terribly well, or terribly credibly, either at home or abroad, I think it is fair to say. The timescales do not necessarily match up with the imminent problem of the Irish border, because it might well be that the deep and special partnership is only sorted out in five or six or seven years' time.

The next position is the special solutions—agreed solutions, not unilateral, unique to the situation of Ireland and Northern Ireland—but given, again, what we know from the Government's position paper on Northern Ireland, these are merely building on the deep and special partnership. These are extra additional things on top of the deep and special partnership. If we do not have the deep and special partnership in place, it is difficult to see how the Government have yet put on the table credible solutions specific to Northern Ireland. This is really a default position, but as a default position it does not really tell us very much at all, especially because of its unilateral nature.

The problem is that we have irreconcilable promises to different groups of people, and someone is going to be disappointed. It is really a matter of identifying who is going to be the most disappointed 12 months from now.

Professor Menon: The Irish Government want an invisible border, and it seems to me to get that you have to decide which bit of the United Kingdom stays in the single market and the customs union. This document singularly fails to do that. As Michael said, that is a question of deciding which constituency you want to disappoint with the outcome.

Stephen Booth: I am not sure that is entirely true. The only way this can be solved is through continued fudge, and the way that this process might unfold will allow the fudge to continue for quite a long time. If we do enter a transition or implementation phase in which the UK effectively replicates the single market and the customs union, we are going to face this exact same question at the end of 2018, early 2019, and the question is: is either side going to blink? We have got to this point now where clearly the EU, in effect Ireland and the UK were prepared to move forward with a fudge. Given the expectation is that we are not going to have the final trade agreement for the future partnership signed, sealed and delivered by March 2019, I can see every likelihood that we continue this fudge into the transition period.

At that point it may start to become easier to focus on and narrow the scope of the particular issues that the Republic of Ireland, the rest of the EU and the United Kingdom feel are necessary to keep open, and to focus on the alignment where you can keep an open border between north and south. However, we will be living with this question for a great deal of months or years.

Q382 **Mr McFadden:** The other side of this is that the following paragraph in that joint document published the other week also said that there should be no new regulatory barriers between Northern Ireland and the rest of the UK as a result of this. There has been quite a lot of attention on what this means north/south. I want to ask you about the implications for that second part of this. Could you spell out what you think they are in terms of what full alignment will mean for the whole of the UK with the rest of the EU on this, broadening it out from Northern Ireland, and do you think that has been fully understood in the political debate here?

Professor Dougan: It is a really interesting question. We are starting to talk a lot about the UK internal market—this new concept that has emerged since 2016—but we do not know very much about what that UK internal market consists of, what it will look like, how it will be organised, and so on. In a way, this joint report obliquely gives us the first glimpses of what the UK internal market might look like. One could say this is the tail wagging the dog, of course, and in many respects it is, but I can tell you what I learned about the UK internal market from the joint report.

In so far as full alignment applies to the UK as a whole, that is obviously the easiest way to ensure that there are no regulatory barriers between Northern Ireland and GB, and it guarantees full market access for Northern Irish businesses into GB. But in so far as the full alignment only applies to Northern Ireland—because the Northern Irish institutions have agreed that that should be the case—and does not apply to GB, obviously there can be no new regulatory barriers for Northern Irish businesses going into GB, but there will potentially be regulatory barriers for GB businesses going into Northern Ireland.

That tells us, in a way, that the model of the internal market that is emerging obliquely from this joint report makes some very striking assumptions about the competence of the UK Government to deal with devolved matters, because the UK Government, in so far as full alignment covers the whole of the UK, are presupposing competence to regulate sectors that would belong within the devolved fields of competence. In so far as it covers Northern Ireland only, the UK Government are assuming they have the competence to determine the conditions of trade between the constituent nations of the UK. From what we can see so far, it is a fairly lopsided relationship, as in Northern

Ireland will have a special place. Will that special place extend to Scotland and Wales? Will it extend to other parts of England?

We are learning lots of interesting things from this document. It was probably not intended in that way, but we are learning that the internal market of the UK is going to be based on a relatively extensive conception of the UK Government's powers vis-à-vis the devolved regions, and that it might well be a relatively lopsided internal market that gives certain regions greater privileges than others.

Q383 **Mr McFadden:** Thanks. Is the Irish question reverse-engineering the type of Brexit we are going to end up with?

Professor Menon: To an extent. What is interesting is the asymmetry in paragraph 50, because it gives the Irish political authorities the ability to do something if they so wish and it promises, as Michael said, unfettered access in one direction but not the other, which is a curious form of wording. I have not quite managed to understand as yet what the implication of that is. It is asymmetrical both economically and politically and, in a sense, I suppose if you were a cynical political scientist you would say you are laying the ground for a bit of blame-shifting here. But it is ultimately up to these authorities to take a decision as to whether or not they will allow certain barriers to arise. Maybe that is the plan. I do not know, to be honest.

Stephen Booth: I have not got much to add to that.

Q384 **Sammy Wilson:** An aspect of the frictionless border, of course, that has not been mentioned and that the Irish Government are equally concerned about is the border east-west, not just north-south, because, of course, their main market lies in GB and about 80% of the goods that go to the EU go through GB. Given what you have said so far about this being a fudge, what prospects do you see within this document for a guarantee of frictionless trade in the direction of the east-west border? What implications does that have for regulations vis-à-vis the United Kingdom as a whole and the EU?

Stephen Booth: The first thing to say is that, if the UK leaves the customs union and the single market, it will not be frictionless; the question is how to minimise the friction. Again, on the notion of an invisible border, when the UK Government talk about that, it is clear they want to avoid physical infrastructure at the border, but everyone recognises that if you are outside the customs union there is going to have to be new paperwork that has to be done. The question is whether that can be done in a virtual sense, rather than through checking everything at the border.

As you say, there are going to be areas where the UK wants to be closely aligned to the customs union, for example with transit of goods through the United Kingdom, which would both help Irish exporters who currently export through the United Kingdom to the rest of mainland Europe and

UK exporters in terms of easing their access to the single market and the customs union as well. There is going to be a mutual interest in keeping a degree of alignment on certain rules that facilitate trade.

Q385 **Sammy Wilson:** The Government have already said that the term "full alignment" is flexible; it does not mean being part of the single market or part of the customs union. There are lots of ways: mutual recognition etc. Does the commitment in the document give enough leeway for the Government to be able to say, "We can be outside the single market and the customs union, as there are other ways in which we can meet the commitment made in the agreement"?

Stephen Booth: Yes. I think it does: that is precisely what the agreement says. It says "in the absence of a solution", so obviously the aim now for the UK and the rest of the EU, hopefully, is to find those solutions.

Professor Menon: I am less convinced, I have to say. There are two questions, are there not? One is how you minimise friction, because you are going to get friction. If we are outside the single market and the customs union, which is government policy, there will be friction. The other question is where that friction arises—whether it arises intra-island or east-west. That is the political choice. I could almost refer you back to what we said before: that is the political choice that has to be made.

Q386 **Sammy Wilson:** Professor Dougan, you talked about this being a fudge, could the fudge not be from the EU side where, for example, they fudge some of their requirements for border treatment in relation to the Irish Republic?

Professor Menon: One of the problems with Brexit is you do not have historical comparisons, but one historical comparison is when Poland joined the European Union. The Poles had a very open border with Ukraine to the east, and as a result western Ukraine flourished economically, because there was a lot of trade going on with the more developed Polish economy. The Poles begged the European Union to be flexible when it came to imposing an external EU border, because they said, absolutely rightly, "This will have a very detrimental effect on the west Ukrainian economy". The European Union just ignored that and imposed the border—it is an external EU border—and showed very little in the way of flexibility about that. If that is the precedent, the answer to your question is no.

Professor Dougan: I have a couple of small points, and then a potentially larger point, which you might want me to talk about or you might think you have heard enough of me. First, specifically on the issue of transit, which is very crucial, of course, they have explicitly reserved that for the second phase of the negotiations. They are going to come back to reach an agreement on transit itself.

Secondly, one of the most important of the borders that runs east-west is not the border for goods or the border on regulation; it is the border for persons and the common travel area. In a way, the one triumph of the section on Ireland and Northern Ireland in the joint report is that there has been an agreement on preservation of the common travel area, and that is really welcome. It has to be said it is not a guarantee that the common travel area will persist in all circumstances. It does not go that far, and there is work still to be done by the UK, Ireland and the UK and Ireland together to make sure that the conditions under which the common travel area can be preserved well into the future will exist into the future, but it is a significant achievement.

Thirdly, I described the section in the joint report on the customs and regulatory boarder as a political fudge. The problem is that this is a political fudge that cannot last for ever, because we are going to leave the EU; there is going to be a border, and it has to be a border of a particular type and character, and that does need to be sorted out. This is a fudge in the sense that it postpones the difficult decisions, but it does not take away the need to make the difficult decisions eventually. I am afraid that we cannot live with a fudge when we need to have solutions. Will there be border checks at that border or will there not be?

Your question, Sammy, raises wider issues that maybe come back to what Hilary talked about at the start: what regulatory alignment or regulatory convergence might mean, not just in the context of Northern Ireland but in the context of the UK-EU relationship as a whole. There is probably a lot to be said about that, and I do not want to go off on a monologue if you think it is not the right moment, but the issues of Ireland and the UK are much more wrapped up in the question of the future relationship between the UK and the EU as a whole rather than necessarily to do with the situation of Northern Ireland.

Q387 **Chair:** Thank you very much. In the agreement it says, "The United Kingdom also recalls its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls". That is very specific. Is there any border between the EU 28 and non-EU member states where that condition obtains—in other words, there are no checks, no controls, no infrastructure? If one takes the example of, say, Sweden and Norway, which is cited sometimes, does that apply there?

Professor Dougan: No, it does not.

Q388 **Chair:** It does not apply, as you said, Professor Menon, in relation to Poland and Ukraine, despite the Ukraine's association agreement?

Professor Menon: No.

Chair: That is very helpful. Stephen Crabb is next, to be followed by Richard Graham, because we have hit a rich seam and a number of colleagues want to come in on this particular point.

Q389 **Stephen Crabb:** Continuing that seam, I just ask Mr Booth to also answer the question Sammy put out there as to whether the circumstances of Ireland and Northern Ireland are unique enough to mean that the EU will feel motivated to compromise on how stringently it wants to implement its regulatory checks. Is there a fudge option there?

Stephen Booth: Ultimately that is a political question, but the only way that this does get solved is that both sides move a bit, and I agree that would require the EU to show some flexibility.

Q390 **Stephen Crabb:** Would that be viable long term?

Stephen Booth: It would be via the long-term deal. As I said, we are going to revisit this issue possibly two more times before we are done. We are going to revisit it at the end of this Article 50 process, but if the final partnership has not been agreed at that point, it will have to be put off again. What is crucial throughout this process between now and then is that we start to home in on the issues where this really matters, so defining what we mean by full alignment: what is the scope of what that might apply to? Clearly at the moment there is no agreement between both parties on what we are talking about. Is this just about agricultural products? Is it about wider manufacturing products? What are we talking about? At the moment this is still a very vague concept and we need to start homing in on what actual issues the EU is concerned about. When Anand says, "The EU wants to enforce its border," what specifically is the EU concerned will happen, and how can the UK seek to address those concerns? That is what we need to get to now.

Q391 **Stephen Crabb:** You would not necessarily agree with Professor Menon that there is no precedent at all for the EU not firmly implementing its regulatory requirements at borders.

Stephen Booth: On the border, there are not many precedents, but there are lots of precedents in the EU's history where it has fudged and mudged through a series of legal things that you might have said were unthinkable politically six months before. The EU has managed to find a way if there is a will, and that is what it comes down to in the end.

Q392 **Stephen Crabb:** To the wider panel, is there clarity and agreement between the UK Government, the EU Commission and the Irish Government about what no physical checks actually means?

Professor Menon: I am not in a position to say, to be honest. From reading the document and listening to what the various sides say, probably not, but that is a guess rather than based on knowledge.

Professor Dougan: I would probably go slightly further in terms of the expansion of the words used in the joint report beyond "hard border". "Hard border" could have been a phrase that was open to a degree of interpretation: you can have a bit of a border and it is not that hard and get away with it. Referring to "any physical infrastructure" but then going even further and referring to "checks and formalities" is creating a hostage to fortune. Customs are about checks and formalities; that is totally inescapable, and that is not just a matter of EU law, and it is not just a matter of UK law; that is a matter of international WTO law as well. Again you can have fudges and you can have room for wriggle, but borders and customs mean checks and formalities. It was probably a little unhelpful to add that expanded formulation of the words into the joint report; it is a potential hostage to fortune in the future.

Q393 **Stephen Crabb:** If you were drafting the free trade agreement between the EU and the UK, what would you include in it to make sure that you could deliver on no physical checks?

Professor Dougan: I do not think you can, and that is one of the main problems that we have come across, particularly with the Government's proposals on customs so far. Hilary mentioned the Norway-Sweden border before, and in a way the Norway-Sweden border is about as closely integrated a border as you can get without being in the customs union. Bear in mind that there are no customs tariffs or duties of any kind on most categories of goods between the EEA states that are also EFTA members and the EU member states, so Norway, Iceland and Liechtenstein. There are no internal tariffs between those countries; there are only the external tariffs, which involve third countries.

There is pretty much full regulatory alignment and convergence and co-operation within the context of the EEA agreement, but there is still a customs border. It still has to function as a customs border. You can manage it and control it. You can say that "commercial vehicles must go through these five checkpoints rather than use any road". There is a common border zone between Norway and Sweden, where the customs officials can travel across the border freely as if it were a single territory, but it is still a customs border, and that is about as co-operative and close as you can get. You still have checks, formalities, physical infrastructure and so on.

Stephen Booth: Tariffs is quite an interesting point, coming back to the start of this question of what happens in the event of no deal. In the event of no deal, there will be customs tariffs, so if the EU is correct in saying it wants to enforce its border, presumably the EU will set up customs posts to collect the tariffs it is due on goods entering the EU from the United Kingdom, including from Northern Ireland. Even if the UK unilaterally says, "We are going to have no border," presumably if the EU sticks to its word and its commitments in the treaties, it will have to impose a border.

Professor Menon: That would require the UK saying, unilaterally, "We are going to have no tariffs".

Professor Dougan: For the world, because, under the WTO rules, when you say you have no tariffs, you are saying you have no tariffs for anybody.

Stephen Booth: It would also require the EU to do that, because the EU presumably would want to collect its tariffs. I am trying to illustrate that, in the event of no deal, whether the UK unilaterally does X, Y, Z is beside the point, because it will require the EU to do something as well to avoid a border.

Q394 **Richard Graham:** Leading on from that, can I just gently challenge the language that all three of you have been using, which is consistently to use the word "fudge". Negotiations are about people with different starting points, and compromises are always required to make them succeed. "Fudge" is a negative word. "Compromise" is a positive one. I am interested that you all talk about fudges, as if reaching agreement through something you describe as a fudge is a sort of negative achievement. Michael, why do you not use the word "compromise" and recognise that compromises have already been made to achieve the first phase and get us through to the next phase? What makes you believe that it will not be possible to achieve similar compromises to achieve a similar agreement in phase two?

Professor Dougan: We have probably used the word "fudge", because you started off by asking us about by Northern Ireland, and that is most definitely a "fudge". There are other parts of the joint report that are definitely compromises and definitely deliver positive results: the citizens' rights part of the joint report is based on a series of compromises, both by the UK and the EU, and it has produced a not complete but close to full political agreement, which can now be translated into a legal text. That is a positive compromise.

I mentioned the common travel area; that is not a fudge; that is a clear achievement, because it is a positive thing, and it is clear, and it is settled. The difference with the customs border—

Q395 **Richard Graham:** Just to come in on the common travel area, the reason that was so easy to arrive at is that both sides wanted the same solution.

Professor Dougan: There were different reasons why it was straightforward to achieve.

Q396 **Richard Graham:** But both sides wanted the same solution.

Professor Dougan: It had relatively little to do with EU law.

Q397 **Richard Graham:** If both sides want the same solution in terms of an absence of physical infrastructure, what makes you believe that it would be politically impossible to arrive at that? Just saying that there is no precedent for it or that existing customs posts look different is not necessarily an obstacle to arriving at some new method. You said that a customs union requires a particular type and character of border, but particular types and characters of borders have been changing throughout history all the time. Why do you believe that it would be so impossible to arrive at an agreement on what the border could look like?

Professor Dougan: It will be possible to arrive on an agreement; it depends on which compromises are eventually made. The point about the Northern Ireland section on the customs and regulatory border being a fudge for the time being is that they have not reached any solutions. They have not reached any agreement. They have simply said, "We are going to come back to this at a later date".

Q398 **Richard Graham:** Except that both sides have said they do not want physical infrastructure.

Professor Dougan: When they come back to this at a later date, they are going to have to square the circle. It is a square and a circle, rather, that many more people than just us sitting at this panel have observed. If you are going to leave the customs union and the single market as the United Kingdom, but you do not want to have any physical infrastructure between the Republic of Ireland and Northern Ireland, and you are not willing to have any border between Northern Ireland and GB, you have got a serious problem.

Q399 **Richard Graham:** Stephen, if that is the case, why does that not act as a further incentive for the Republic of Ireland to give positive impetus for making sure that we do not arrive at a no-deal end to the negotiations?

Stephen Booth: For the record, I do think a compromise could be found in the long term, but at the moment it is quite difficult to see what that is, because we are still talking about everything, rather than narrowing it down to the areas in which the compromise might be found, ie agricultural standards, where the UK might align itself, for example.

Q400 **Richard Graham:** But on this particular point, since the UK has said, "We are not going to put up physical infrastructure," the obvious implication of that is the only side that could do so is the Republic of Ireland. What degree of political enthusiasm do you deduce in the Republic of Ireland for doing that?

Stephen Booth: I am not going to speak for Ireland. I do not think that they would want to do that, but it is not just their decision; it is also the EU 27's decision. There are three parties to this: the UK and Ireland, and the question is how much the EU 27 wants to force Ireland to put the border up, if that is the situation. What has been quite interesting in this process of the joint report is that effectively it looks like the EU 27 has been quite happy for Ireland to take the lead in negotiating this in terms of the position with the UK. If the UK and the Irish Governments can come to an acceptable compromise, it is going to be quite difficult for the EU to turn around at that point and say, "We do not accept this".

Q401 **Mr Chope:** When David Davis said that this joint report is a statement of intent, and not legally binding, he was absolutely right. Do you agree that David Davis was absolutely right in saying it was a statement of intent and not legally binding?

Professor Dougan: It requires a more nuanced analysis than that. It is clearly not legally binding. I think we can all agree on that. It is not a legally binding agreement, but it is more than merely a statement of intent. We can give what the expectations are, and then we probably have to qualify those expectations in several really quite important—really quite important—ways. The expectation, and this is in the text of the joint report, is that the joint report will be respected in full; that it will be treated as a package that will be translated into a final legal text as quickly as possible; and that it will not be unpicked.

The joint report says quite clearly that attempting to unpick what has already been agreed will have adverse consequences for the rest of the negotiations. It is not legally binding. It is not just a statement of intent. It is clearly—I think the Commission used the phrase—a gentleman's agreement, breach of which will have concrete consequences in the future negotiations. Now, having said all that, we have to nuance this idea of those clear expectations in at least a couple of different ways.

First, these are not complete agreements. I mentioned citizens' rights before. Citizens' rights is the most advanced part of the agreement that has been reached under the joint report. It is the one that comes closest to being ready and finalised and able to be translated into a legal text. Even the citizens' rights part has gaps, and some quite significant gaps, that will still need to be worked out in the future.

Secondly, I suggested earlier on that when it comes specifically to the question of Northern Ireland and the customs and regulatory border, rather than the common travel area, there are irreconcilable commitments in there, which you might not necessarily want to concretise in a way that will pin down the ability for future negotiation.

Thirdly, and probably most important, the European Parliament, in its resolution after the joint report was published, welcomed the joint report and said, "We are happy with what has been achieved so far, but, of course, we want to revisit some of these issues, particularly on citizens' rights. We want to look again at future partners. We want to look again at the binding nature of rulings of the Court of Justice". Already there is a bit of a political expectation, on the European Parliament's side anyway, that parts of the joint report agreement could still be up for re-discussion.

The final qualification, of course, is the transitional deal, if there is one, could have a significant impact upon the way that some parts of the joint report have to be considered or construed, for example the effective date at which certain parts of the agreement might come into force. It is not a legally strictly binding agreement but there is a clear expectation that it will become one—but it has to be nuanced by those qualifications.

Q402 **Mr Chope:** Mr Verhofstadt has said the text in that joint report should be converted into a form that is legally binding, thereby suggesting that the European Parliament does not want to amend any of the substance in it, which is slightly inconsistent with what you have just said.

Professor Dougan: The European Parliament have probably not used the words "amending what has been agreed". They probably used the words "extending what has already been agreed to new and additional things". I will just give a couple of examples from the list, and this is the text of the European Parliament resolution. "There are still outstanding issues … which must be resolved before the Withdrawal Agreement can be finalised". They then give a couple of examples: "Extending coverage of citizens' rights to future partners", which we thought that had been settled but apparently is not quite; "the binding character of the CJEU decisions in relation to the interpretation of citizens' rights provisions"; "the role of the future independent national authority … created to act on citizens' complaints"; and, of course, a very important one, "guaranteeing future free movement rights" across the EU 27 for current UK migrants in the EU 27.

Some of those issues are on the table or were going to be on the table for future negotiation; some of them are issues that we thought were pretty much settled in the joint report, but the European Parliament resolution suggests that they can be revisited. They do not use the phrase "revisited or reopened"; they use the phrase "an extended scope of application".

Q403 **Mr Chope:** Can we now look at what the Taoiseach said, because he described this fudge as a "politically bulletproof and cast-iron" fudge, and was he correct in that?

Anand Menon: Are you referring to paragraph 49 in particular?

Q404 **Mr Chope:** I am referring to what the Taoiseach said immediately following this agreement, this joint report. He said that this joint report was "politically bulletproof and cast iron", when some people were suggesting that it might be rather vague or fudge-like. The Taoiseach was saying to his people in the Republic of Ireland, "Do not worry, people; this is politically bulletproof and cast iron". Was he correct in saying that?

Professor Menon: This goes back to what Michael was saying about this agreement at the moment being all things to all men. This takes us back to the discussion about fudge versus compromise. For me, the difference between fudge and compromise is a compromise is justiciable and implementable, and there are bits of this agreement that might be now just about. There are other bits, particularly the paragraph we talked about earlier around alignment, that frankly are not, because the choices necessary have not been made. That, for me, is the distinction between fudge, where you clearly need to make a choice still, and compromise, where you have arrived at something that you could probably implement fairly quickly. It takes us all the way back to the fact that those choices have yet to be made and will have to be made.

Q405 **Mr Chope:** These preliminary questions are leading up to this point, which is I and I know a number of other people are concerned that this issue may be referred to the European Court of Justice by one or other of the parties. If it is so fudged, so vague, so open to different interpretations, are we not increasing the possibility that the European Parliament, or some other player, may refer it to the European Court of Justice with a consequent delay of anything between six months and two years?

Professor Dougan: Are you talking about the status of the joint report or the final withdrawal agreement?

Mr Chope: Not the joint report itself, but where we are heading—the final document.

Professor Dougan: There is a range of issues that could be referred to the Court of Justice for a resolution. I would not say that the legal status of the joint report is one of them; different people will give their domestic audiences different interpretations of this document, because that is what people do after a major summit, but I do not think anybody would seriously believe that this is a question worth asking the Court of Justice. It is just a phase; it is another step in a lengthy, complex negotiation.

There are future issues that are probably more amenable to litigation before the Court of Justice, or at least a request for advice. One of them, which has been discussed many times before, and I will just raise it, because it is an example, is the revocability of a notice to withdraw under Article 50. However, within the context of these negotiations, for example, whether Article 50 provides a sound legal basis for an extensive transitional regime or whether a sophisticated transitional regime can be based on Article 50 is an open question. There are questions about the procedure for a transitional regime: whether it could be done by the EU institutions acting under Article 50, or whether it might also require national ratifications by every member state and their regional parliaments, which would obviously be very undesirable from everyone's point of view.

On the one hand, there is a real incentive for people not to ask the Court of Justice, because it just adds more time into the process. It does not need to be 12 to 18 months. The Court can do things very quickly when it knows that things need a very quick answer. There have been judgments where the Court has managed to deliver judgment in the space of four weeks—when it is really required to do so. The time is unfortunate, but it is not necessarily as bad as your question might have suggested.

Having said that, there is a range of difficult issues on which the Court might be called upon to adjudicate, but really even a small delay in time could be very difficult. Somebody described the transitional arrangements as a wasting asset: the longer it takes to get this finalised and sorted and offer certainty, the less valuable it is, so even a relatively minor delay before the Court can be difficult. I suppose the other factor is that this is not within the hands of the Governments alone. A national parliament or national parliamentarian might decide that they are not happy with what their Government are agreeing to politically. There might be a reference from a national court to the Court of Justice, simply bypassing the member states and the EU institutions. It is not entirely within the control of the actors at the negotiations themselves whether the Court of Justice becomes involved.

Q406 **Mr Chope:** Does anybody else want to add anything to that?

Professor Menon: No. Going back to your original question, there is a possibility that this ends up before the ECJ—the withdrawal agreement itself—which is going to be in the minds of the negotiators when they draft the legal text, because they want it to be legally solid, legally sound, and in accordance with EU law.

Q407 **Wera Hobhouse:** Good morning, gentlemen, particularly Professor Dougan; you came to Bath a bit more than a year ago to talk to a packed audience, so I remember you from there. To what extent has the joint report made a no-deal scenario more or less likely?

Professor Menon: I do not like these sorts of games, but I would suspect politically the fact that we got sufficient progress both makes a no-deal scenario less likely and makes a no-Brexit scenario less likely as well. It makes the extremes slightly less likely, I would say.

Stephen Booth: Yes. I agree with that. It was a strong political signal that the EU would like a deal, which is an important political signal, but ultimately if issues such as the Irish border cannot be resolved, no deal is still a possibility. I agree that it is less likely now than it was three months ago, as a result of this agreement.

Professor Dougan: I agree. I think everybody wants a deal apart from perhaps some people at the fringes, but one of the difficulties as well I suppose is that, again, the more that time goes on and the closer we get to an actual withdrawal date, having banked all this on sorting these problems out amicably by agreement through multilateral processes, the less likely it is that people can just walk away, because they will not be in a position to deal with the consequences for themselves anyway—not in a way that would not cause serious disruption to their own citizens and businesses, let alone anyone else's. It has increased the likelihood.

Q408 **Wera Hobhouse:** But the elephant in the room is the customs union and single market. Will the deal scenario involve the customs union and access to the single market? We have been talking about the fudge, but how can that be fudged?

Professor Menon: There are two separate deals at play here; the first, which I was referring to, is the Article 50 deal, which will have to be negotiated and resolved by about October next year to go through ratification with the European Parliament. The second is the trade deal. I do not expect that to be more than a statement of intent about a trade deal in place. We are certainly not going to be getting anywhere near ratifying a trade deal at the time we are ratifying Article 50. When I was talking about no deal, I was talking about the no Article 50, rather than anything to do with the trade deal itself. Issues to do with the single market and customs union will be in the trade deal.

Q409 **Wera Hobhouse:** When we went, as a group of Liberal Democrats, to Brussels we were told by the European Union then—that was in September—that a transition period is not just an extension of the status quo. We know before we enter a transition where we are going to. How can that be done so that, by March 2019, with a withdrawal agreement, we also know where we are going to in order to have a transition? How is that going to work out?

Professor Menon: We have an idea about direction of travel, if not ultimate destination.

Stephen Booth: I would agree with that. In the statement of intent it has to be very clear to both parties what the ultimate objective is, and from the UK's side that is very clear: to be outside of the single market, outside of the customs union, and negotiate a best possible free trade agreement. The EU, again, by virtue of agreeing this text, has tacitly agreed that that is what the UK has said, so I think we all understand that is the direction the UK is going in. As to how that is dealt with in detail, clearly there is a lot left to be answered.

Q410 **Wera Hobhouse:** Did I hear you say you think the tacit agreement is that the UK will be outside the single market and the customs union?

Stephen Booth: Yes. I think the EU had understood that is the UK's position, yes.

Professor Dougan: There has been an interesting change in the EU's approach, in fact. I have been working on the question of transition for a little while now and obviously was looking very carefully for what happened at the European Council meeting to see how they phrased transition. There were a number of issues that we were concerned about regarding transition, but one of the issues that concerned me was precisely your point: that the EU guidelines from April 2017, the EU 27 guidelines, had said that transition cannot just be an abstract thing. It has to be a bridge to a reasonably foreseeable future destination. It is not a petering out of an existing relationship; it has to be a bridge to a new relationship, which even if not fully crystallised is at least reasonably clear.

For me, that meant really quite a difficult potential problem in the phase two negotiations, because we know so little about what the UK's positive vision of its deep and special partnership is. We know the negative bits—we do not want to be in the customs union, and we do not want to be in the single market—but we do not know that much about the more positive aspects of that future relationship. One of my concerns was how you can then square this with the April guidelines. What is very interesting is that the EU has redone the sequencing of the transition and future agreement negotiations. They are now perfectly happy to begin talking about transition in January and hopefully get transition sorted out fairly quickly, possibly by March. It might take longer—there are lots of issues—but they will not even have adopted the new guidelines on the future relationship until March anyway.

The EU itself seems to have changed its position here. It seems to be willing to sort out a petering out transition without necessarily having agreed a clear destination into the future, which is what we thought they might insist upon. From that point of view, there has been a change of policy rather than just a change of emphasis.

Q411 **Wera Hobhouse:** But you would agree that, for all the businesses that are telling us they need clarity, this has not added any clarity.

Professor Dougan: Not yet.

Stephen Booth: It has not given concrete legal clarity, but it has given a strong sense of political assurance that both sides want the transition to happen, which from a business point of view is important. A lot of businesses have been saying that an agreement in principle on transition by March would go a long way to reassuring them.

Q412 **Stephen Kinnock:** Good morning, gentlemen. Just to be clear on the terms of the transition, the European Union has been pretty consistent, if you look at resolutions, previous negotiating guidelines and the European Parliament resolution, that the transition will in essence be a carbon copy of the status quo. All existing union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. Could you just very briefly all say you absolutely agree with that: that, in effect, we will continue membership in all but name following 29 March 2019?

Stephen Booth: Yes. I think that is right, and I think that is the UK Government's understanding. The Prime Minister said in Parliament several times that accepting the role of the ECJ during the transition is her understanding of how that would work as well. The potential quibble point is about what happens to new EU laws and regulations made during the transition period, and whether they will have effect in the UK. Politically the EU will insist on that, and it may be difficult for the UK to negotiate its way out of that, but in practical circumstances, if we are talking about a transition that lasts until December 2020, which is the date that Michel Barnier is talking about, most directives have an 18-month grace period before you implement them, so in practical terms there are lots of things the EU might say and do in that period that the UK would never have to implement anyway. To answer your question, yes, I think the UK and the EU both have agreed that it is basically going to be extending the current terms under a different legal form.

Professor Menon: I do not like the formulation "membership in all but name"; membership implies that you get a say. A fundamental difference between a transitional stage and membership is it will be all the obligations and very few of the rights—or none of the rights when it comes to political participation. It seems to me for reasons of time, apart from anything else, that the European Union is saying, "We cannot negotiate anything bespoke now. It will be too complicated. It will be too time consuming. We have only got until October, so basically the status quo minus participation is what we can offer you at this point when it comes to transition". The phraseology of paragraph 4 very strongly implies that the EU has a position on what happens to new EU laws, which is that we will have to adopt them. That is a very clear distinction between the two sides at the moment.

Professor Dougan: I would go slightly further than one quibble point. In the work I have been doing on transition over the past several weeks I have identified eight different quibble points. Some of them are not that serious. For example, when the UK says that it wants to have the ability to negotiate new trade deals but they will not enter into force until after the transition is over, even the European Parliament in its resolution from earlier this month has said that they can live with that. Potential quibble points are being resolved as the situation develops.

Other quibble points are a bit more serious. For example, the UK has suggested that it wants full participation in all of the EU regulatory agencies during transition. The EU has clearly said, "You can have operational participation; you cannot have decision-making participation". That is a potential sticking point. Other concerns include, for example, Gibraltar. We have no idea yet whether Gibraltar will be covered by a transitional period. There have been noises from Spain that it should not be.

Politically there is still a range of issues that need to be discussed and debated on transition. From my perspective, legally there are two big questions that are outstanding on transition. The first is the one I mentioned before: could a sophisticated transitional agreement be agreed purely in terms of Article 50 or might it require national ratifications as well? At the moment, the EU's political stance is that Article 50 is an exceptional competence and it is an exceptional procedure, and the member states politically have said that the EU can do this alone, even if it touches upon matters of national competence, and it will not require national ratification. That is extremely useful, of course, because it takes away potentially months or years of waiting time as national parliaments debate this agreement and decide to vote on it, but it is only a political understanding. It is still vulnerable to legal challenge if a disgruntled parliamentarian in, for example, Portugal or Spain decided otherwise.

The other big issue relates to what we call the autonomy of EU law: how far can a third country—which the UK will be by then—participate in or influence the internal functioning of the EU itself? This is where I think, for example, the issue of the EU regulatory agencies is very clear. The EU does not want UK decision-making participation in the EU regulatory agencies, because it might well render a transitional agreement vulnerable to legal challenge before the Court of Justice, for infringing the autonomy of the EU legal system.

There are political issues, there are legal issues. One of the big questions remains, of course, the appropriate vehicle by which to do this. We could have just extended membership under Article 50 by unanimous agreement; we could have agreed a deferred date of entry for the withdrawal agreement without unanimity; we could have different dates of entry into force for the withdrawal agreement for different purposes. We could say that the institutional provisions of the withdrawal agreement should enter into force on 30 March 2019, but the substantive provisions to do with the internal market or policymaking will only enter into force after two years.

They are all legally neat ways of achieving a transition. As Anand suggested, to try to negotiate a parallel system of transition from scratch is a potentially incredibly time-consuming thing, and could almost involve as many difficult questions as simply trying to negotiate the future partnership.

Professor Menon: It is probably worth adding a third category to that, which is the EU's international agreements. No one is quite certain yet what to do with those 1,000-plus agreements, political and economic, signed between the European Union's member states and third countries. It is far from clear what our status would be in regard to those agreements during a transition when we are no longer a member state.

Q413 **Stephen Kinnock:** Thank you very much. We are having obviously a relatively technical and legalistic conversation today, but I do think it is worth thinking also about the broader political implications of this. I would be interested in your perspective on this: do you feel that there has been enough discussion in terms of public discourse about the fact that the country voted to leave on 23 June 2016, but in effect both the British Government and the EU have now signed up to a transition deal, which will in essence be a carbon copy of the status quo, minus our voice at the table, at least until December 2020? That, of course, is subject to how long it will take to negotiate the future relationship; I would like to come on to that afterwards. I would just be interested in your perspective on what I say to the retired steel worker in Port Talbot, in my constituency, who voted leave. When he voted leave, he probably had a certain set of expectations about what it would mean and how long it would take, and that clearly now is not going to happen. I would be interested in your assessment of the risks around that particular issue.

Stephen Booth: Part of the reason December 2020 has been talked about from the UK side is that obviously that is before the next general election. It is quite important that we are obviously having left and in the process of substantively leaving by that point. From the EU side, it is also convenient in the sense that they certainly do not want to push this transition into a new budget round, which would start post 2020. In the first instance, yes, it needs to be explained to people this is more complicated than was perhaps expressed in the referendum campaign, and this is going to take several years to unwind. But I do think that the Government and the EU will want to start taking steps that take effect from 2020 and quite obviously substantively mean a difference from the status quo.

In terms of a transitional period, we are looking at effectively two periods, one of which is the standstill transition, which will probably end in 2020, and then you are still going to go through a process of effectively implementing whatever has been agreed hopefully in that process, so moving to a new customs system, a new trade regime, a new regulatory regime on the services and so on. That will obviously take longer than many people may have thought, but in order to have a smooth and orderly Brexit, that is what will be required. That is not necessarily a bad thing, as long as we get to the point where we are entering a new election on which the terms of our engagement with the EU are clearly changing.

Professor Menon: I am not sure this is the time or place to talk about what you should say to your constituent, but it does occur to me, following on from what Michael said earlier, one obvious, easy way to do transition that would circumvent all the problems that we have mentioned in passing would be to do it via an extension of the Article 50 time. You extend it by a couple of years and you call it transition. It is very much with a view to the kinds of issues you have raised that that is being seen as politically unacceptable—that the moment of leaving is very important in all this. The Government are very keen not to put back the moment they can turn around and say, "We have left the European Union".

That might mean transition will be quite a fraught period; it will be a period when the country is chafing at the bit of being out but still bound. Politically that is going to be very difficult. In terms of the adjudication mechanisms in place to ensure that system holds, it will be quite a fragile state of affairs for those two years, in many ways, because of the political pressures that you have mentioned. As for saying, "We have left. Can we not start doing the things we said we would do?" the answer will be "no".

The real tensions around this will come after we have left and nothing much has changed.

Professor Dougan: I will focus on a slightly different motivation for a transitional period, and for me this is probably the most important motivation of the lot. The Prime Minister has said, quite rightly, that everyone would benefit from having more time to prepare for what is coming. In many respects, that has been interpreted as getting our ports ready for new customs restrictions, getting our airports ready and so on.

The problems run far deeper than that. I suspect nearly everyone in this room will know this very acutely. When you look at the volume of work that has to be done under the European Union (Withdrawal) Bill when it is eventually enacted—we are talking about potentially thousands of changes to our legal system, many of which are fundamental and go right to the heart of the various sectors in which they are operable—we still have to construct new regulatory regimes on fisheries, agriculture, trade, customs and nuclear safety. We have to effectively rewrite large parts of our own legal system.

Anand mentioned an incredibly serious problem, which is very fundamental. There are well over 1,000 EU external agreements with third countries and international organisations, which we either participate in or benefit from. We have no idea what the status of those is. We have seen what the initial reaction was to our attempt to sort out, together with the EU, a joint proposal and regularise our membership of the WTO; it was virtually slapped back in our face by a whole range of countries.

We are not even in a position to say that we can fall back on WTO rules, because we are not quite sure what our WTO membership is going to look like and how far it is going to be accepted and regularised by the others. When you put together this enormous range of challenges, we simply need more time to be ready to leave the EU internally without causing enormous disruption to ourselves.

This comes back to the point I made earlier. This is not about relations with the EU. It is not about leaving or staying. This is about whether we leave the EU without enormously damaging our own citizens, our own economy and our own businesses, because there is simply so much work to do and we have so little time left to do it. That is a major motivation behind a transitional regime. If you are a dyed-in-the-wool leaver and you just cannot wait to get out, you might be persuaded that not ruining your own economy and society in the process would be worth waiting a little extra for.

Q414 **Stephen Kinnock:** Maybe.

I have one more question, and I want to connect this to the financial settlement. Ministers, and the Prime Minister herself from the Dispatch Box, have indicated that the financial settlement is contingent on striking a deal on the future relationship. But article 96 of the joint progress report indicates that the financial settlement is in fact contingent on agreeing the divorce items and the transitional deal, because, as Mr Barnier and others have said, there clearly will not be an agreement on the future relationship before we leave the European Union. There will just be the scoping of the principles. Is it also your understanding that the financial settlement is a done deal, assuming that the divorce items and the transitional deal are in place, and it is not actually connected to the future relationship?

Anand Menon: This speaks to that infamous phrase: "Nothing is agreed until everything is agreed". For the European Union, that is a reference to phase one. Everything has to be tied up together in phase one. It is not a reference to a link between phase one issues and the trade talks. From the EU's perspective, there is no link between the financial settlement and any future trade talks, for a very practical reason, which is the one you have just stated. We are not going to be in a position to sign off a trade deal until several years after we have been paying the money we have already agreed to pay anyway, because this agreement has to be signed and sealed in October next year. The timing is simply wrong. Except when it comes to the heads of terms which are not going to be binding in any serious way, there is no way to play off the financial settlement against the terms of a future trading relationship.

Q415 **Mr Bone:** The Prime Minister has always talked about an implementation period and not a transition. If you are implementing, you have to know what you are implementing. The timetable has started with phase one. You are quite right to say that there was a fudge on Northern Ireland. Might I suggest that the reason there was a fudge on Northern Ireland was that the sequencing was wrong? It would have been much easier to deal with Northern Ireland after you knew what a future relationship looked like.

The second big marker is the end of March, when we should have an implementation agreement. The next one is October, when everything is supposed to be in place so that it can be ratified. I think the Prime Minister understands that to include the special relationship, i.e. the trade deal. It seems to me that, so far, everything has actually been following that schedule. You have all talked about transition and not implementation. Is the Prime Minister right or are you right?

***Anand Menon*:** It is worth noting that the Government's rhetoric has changed. The initial schedule, as laid out by David Davis before the talks started, was that the trade negotiations would carry on concurrently with the Article 50 negotiations from the start. The timetable has slipped according to the original timetable that that Government laid down. You are absolutely right that the Prime Minister keeps referring to an implementation period. I do not have a crystal ball; I do not know who will be proven to be right. I find it very, very hard indeed to believe that a set of trade talks that can only start in March are going to be anywhere near even the end of the preliminary stage by the time that this agreement has to be signed in October.

***Michael Dougan*:** I will completely agree with Anand and maybe push the point a little further. The Government's White Paper in February of this year set out a timescale that we would have a withdrawal agreement with a future framework agreement by the time that we leave, and then there will merely be an implementation period for the gradual bringing into force of the new framework relationship. That had already been contradicted by most of the people who work in the field, like me, who said that the timescale was not very credible and, legally speaking, the

EU cannot negotiate a trade agreement with a member state. It can only do so with a third country, so you have to wait until after you have left.

Those positions were affirmed by the European Council, the Commission and the European Parliament. The Florence speech in September was the Government's admission that they had miscalculated the timing. The Prime Minister recalibrated the government strategy in Florence and said, "We are looking at a withdrawal agreement and discussions about the framework for the future" but explicitly recognised that that could not be progressed and concluded until after withdrawal. The language of "implementation period" was retained, but the reality is that the implementation period as it was originally meant in the White Paper is no longer the case. We are now talking about a pure transition period.

You could almost say that the answer I gave earlier is the EU's recognition that that has happened within the UK: "We will no longer wait until we have a clear idea of the future relationship before we start talking transition. We will just start talking transition now because we all know that the context has changed". There has been a very significant change in events. Some people—although not me—use the term "implementation period" to give the impression of continuity, that not much has changed. There has been a very significant shift in Government policy, even if it is difficult to admit it more publicly than would feel comfortable.

***Stephen Booth*:** I would agree with most of that. As far as the Government and the EU are concerned, the special relationship is not just trade. We are going to have to talk about migration, security, research and development, and all the other programmes the UK is currently a part of. As to the language of "implementation", there may well be issues that we can resolve sooner rather than later in that transitional phase as a result of negotiating the wider future partnership. We may well implement a new policy on X, Y or Z that is not necessarily the trade deal during that period.

I agree with the general sentiment that we are not going to have a detailed trade agreement by March 2019. The details of that will still be being negotiated. Given that the withdrawal agreement is tied to the future framework agreement, the UK can rightly insist to have a fairly detailed discussion about what that future framework is looking like and the sense of direction. If the UK does not feel like there is a sense of direction being agreed with the EU, the UK would legitimately say, "We are not going to sign a withdrawal agreement and you are not going to have the money". That will be an option open to the UK Government at that point, if they feel that is necessary.

Q416 **Mr Bone:** That will be October 2018 on the timetable.

***Stephen Booth*:** If we are getting into that type of situation, I think it will be a minute to midnight in March 2019. But, yes, ideally this has to be wrapped up by October 2018.

Anand Menon: The European Parliament has to ratify it. That is where the timeline comes from.

Q417 **Mr Bone:** That is why we have all been working, Mr Barnier and everyone. It seems very sensible. This is why the talk of the last minute on 29 March 2019 just seems like nonsense to me. We should really be concentrating on October 2018, should we not?

Stephen Booth: Yes, I agree with that. If we are in a situation where the UK feels there has been no progress whatsoever on discussing the future framework, we could time out. That is still a possibility.

Michael Dougan: That would be cutting our nose off to spite our face. Remember that the bulk of these negotiations are about what we do with people who currently have licences or permits to do their jobs, who will be the main losers of simply walking away from negotiations. What would happen to those people's lives? What do we do with intellectual property rights that have been granted and are recognised under EU law? Will they simply disappear so you lose your protection?

The range of issues being dealt with under the separation part of the withdrawal agreement should not be so politically controversial. Some of them are, of course, but they should not all be. They will directly affect the lives and livelihoods of millions of people. To simply say, relatively at the last minute, that we are not getting our way on a future trade relationship and it is not moving as quickly as we would like it, when we have been told repeatedly that it is not going to move that quickly and it is going to take time, would be cutting our nose off to spite our face. The main people we would be damaging would be ourselves. Our businesses, our citizens and our economy would suffer the consequences.

This brinkmanship does not come across as very credible. We all want to get an agreement and stop damage being done to people and their lives and business. To link up, in a highly contingent way, the separation issues with the future relationship issues is not coming across terribly credibly.

Q418 ***Mr Bone***: Is that not probably the Government's strategy, to stop me complaining about what is going on? By the time we get to October 2018 they will say, "Actually, Peter, you were probably right, but we are too far down the road now so we cannot possibly have a no deal". Would that not be quite a reasonable diplomatic strategy—not a fudge strategy—for the Government?

Anand Menon: That is not the most compelling argument. The compelling argument about no deal is not that we have wasted time and effort negotiating a deal. It is, as Michael said, the sheer human cost of no deal.

Mr Bone: You could do a no deal now, tell British industry you are coming out on global trade rules and give it effectively from now all the way through to March 2019. You cannot do that at the end of October

2018, because it will be too short a period.

***Michael Dougan*:** It would not make any difference if we did that now or in October 2018. We are in a situation, as I mentioned before, where we are effectively asking every other member of the WTO to regularise our membership status, because we have no idea what the terms of our world trade would be, even now. Saying no deal now is no different from saying no deal in October 2018. We are not in a position to cope with the consequences without causing enormous damage to our own economy and society.

Mr Bone: We are the fifth biggest economy in the world and it would somehow cause huge damage if we decided to go it alone. Is that the case? Some huge damage would be done to the British economy—the fifth biggest economy in the world—just because it makes a decision that it wants to run its own affairs.

***Anand Menon*:** There are two separate issues. The first is Article 50, which, as Michael said, is sorting out the loose ends of membership, to do with issues of legal certainty, regulation and safety in industries like the airline industry, where everyone has an interest in getting this agreement. It just makes life easier for everyone.

Then there is a second issue about falling back on world trade terms, having got the Article 50 deal. Most economists would think that that would probably be less good for the economy than other options, such as having a deep and meaningful trading relationship with the European Union. I do not think anyone is suggesting that that would be Armageddon. The real nightmare scenario would be the first part, not having the Article 50 deal, which means that all certainty gets drained out of business interaction and we do not know which frameworks we are operating under. It is very, very important to distinguish between the two.

***Stephen Booth*:** For the record, I do not think a no deal is particularly desirable. I was merely pointing out the statement of fact that the UK can hold to the position that nothing is agreed until everything is agreed if it so wishes. Politically, that would be quite difficult, for the reasons you have said, at that point.

Q419 **Peter Grant:** We spent quite a lot of time earlier on talking about the options for Northern Ireland and the Republic of Ireland, and we looked at what deals, compromises, fudges and agreements might be needed and might be possible. It seems to me that there are two things that are immovable. The United Kingdom, including Northern Ireland, is going to leave the European Union at some point in some process. The peace process in Northern Ireland—the Good Friday agreement, the Belfast agreement—has to be maintained in its entirety. I think everyone wants us to find a way of making sure that those two things are delivered.

If, as some are still proposing, we leave the European Union without any deal whatsoever, what happens to all this talk about deals, compromises, negotiations and agreements around the border of Northern Ireland? Does that all go as well? If there is no deal, what happens to the external EU border between the Republic of Ireland and the United Kingdom, in the event of us leaving without any deal whatsoever?

Anand Menon: There will be a hard border involving customs checks. It will be a normal EU external border. I know the Secretary of State for Exiting the EU once talked about the fact that, even if we crash out with no deal, we can deal with some of the issues bilaterally with the European Union to avoid the worst. The political fallout of a decision to simply walk would be such that we would not find many willing negotiating partners on the other side of the table either. They have politics too. It would become a political storm in all member states. The notion of us being able to do any sort of meaningful business having walked, in the short term, strikes me as fanciful.

Michael Dougan: I would add a nuance, like the reply to Sammy Wilson's question. We should disaggregate the different types of borders that we are talking about. No deal for Northern Ireland would be a catastrophe, it is fair to say. The customs and regulatory borders would be there. It is not just a matter of the EU imposing its border. The UK would have obligations under international law to impose and police its customs border as well. The fact that we do not know what our customs policy is yet is merely hiding the problem. It is not resolving the problem. We would be obliged under the WTO to have our customs policies and our customs checks as well. It is not a purely EU-side thing.

We should disaggregate the different types of border. There would be nothing to stop Ireland and the UK maintaining the common travel area at least. Even if there were customs and regulatory problems, there would be no need for persons checks and passport checks between Ireland and Northern Ireland, the Republic and the UK or Northern Ireland and GB.

Stephen Booth: I will echo Anand's point. If we got to that point, it would be a signal that political relations were so low that it would be very difficult to organise anything effectively at that point.

Q420 **Peter Grant:** I now want to come on to another of the three key strands of the stage one talks, citizens' rights. Because we have all been so concerned about Northern Ireland, we have not spent as much time on that this morning as we might have liked to. What happens to all the agreements and new agreements on citizens' rights that have been reached so far, in the event of a no deal? Do all those agreements get put on the backburner and have to be negotiated again from scratch? I am seeing nodding heads from two of the witnesses.

Stephen Booth: Yes. This agreement has yet, as we discussed earlier, to be put into legal text and ratified. That is the one area where there would be a strong moral and political case for both sides to resurrect that element of the deal. The deal has effectively been done and, as Michael said, this is the closest we have got in the agreement to a nailed-down solution to some of the issues that have been raised. The option would always be open to recover that part of it, but strictly speaking, yes, that is the case.

Anand Menon: In such a circumstance, the British Government can decide of their own volition to legislate, as they have to legislate under the terms of the agreement anyway, as a gesture of good will. You can resurrect parts of this agreement, but the bit that involves us agreeing something with the European Union, the bits about oversight and reciprocal rights, would all go. It would be up to each side to do it individually.

Michael Dougan: That would have particular consequences in certain respects. A lot of the citizens' rights provisions could be adopted unilaterally by each side, even if there were no firm agreement. They could say, "We are still going to guarantee this list of things for current migrants". It would not work for everything. A good example would be social security co-ordination. If you are a UK national living in Spain who is dependent on the exportation of your UK passport at the uprated rates, and suddenly that agreement no longer exists, with no means of carrying on the co-ordination system, that will have a very tangible impact on you. You might have your residence rights, but your residence rights will not mean very much if you cannot afford to eat or pay your rent.

Anand Menon: Presumably that applies to health as well.

Michael Dougan: Yes.

Stephen Booth: That is the one area that could, in theory, be done bilaterally between member states. The UK could negotiate bilaterally with individual member states.

Q421 **Peter Grant:** Does that mean that no deal is a very bad idea, and the way to mitigate the damage caused by no deal is to look for lots of little individual deals elsewhere?

Stephen Booth: I do not think so. The point is that, if the relationship with the EU via the Commission had broken down, there would be opportunities to revisit some of the issues bilaterally with other member state Governments.

Michael Dougan: That would be particularly true of social security. It is a field in which the EU has very few external agreements with other countries or organisations, so it is often done on a bilateral basis. That would not be the case, for example, in customs.

Anand Menon: Again, bear in mind that, politically, that sort of agreement tends to rely on mutual good will, even at a bilateral level. That would be in short supply.

Q422 **Peter Grant:** There seems to be a general recognition now that we are not going to face the doomsday scenario of anyone—either EU nationals in the UK or UK nationals in the EU—having to move as a result of Brexit. It looks highly unlikely. There are still questions to be agreed as to exactly what rights they will enjoy. Access to healthcare, rights for future family members and retention of rights if they move to other parts of the EU are the big ones. It is likely that these will all be covered in the second stage of the negotiations.

What are the potential barriers to achieving the agreement on the more detailed citizens' rights, given that both sides have said they want to protect the rights of everyone's citizens as far as possible? What is it that would get in the way of reaching an early agreement, particularly in those matters?

***Stephen Booth*:** This comes to the point we have just discussed. What the kind of partnership are we trying to achieve? Is migration going to be traded off against market access in terms of the overall relationship? Ultimately, for some of these issues, if we become a third country, it will be down to the individual member states. Under one scenario, the individual member states could decide the immigration status of UK nationals entering their countries. The question is about the level of ambition we are aiming for in the deal. Is the EU going to have the competence to negotiate as a bloc on these issues? We will not know that until we see the future guidelines of the EU and what the UK is looking for.

***Anand Menon*:** I would differentiate, perhaps more than I thought Stephen did, between the issue of people already in situ, which is clearly an Article 50 issue, and the future immigration policy. It seems to me that, on the former issue, family unification might be problematic simply because we have certain provisions here to discourage people from coming. I detect unwillingness on both sides to compromise around that. The second question is one for Michael. Reading the text of what has been agreed, I wonder whether this is an area where, should this appear before the European Court of Justice, notions of due regard to the ECJ might appear a little too woolly for a court to sign off.

***Michael Dougan*:** I will make two comments. First of all, I agree with Anand that we should clearly differentiate between current migrants and future immigration relations between the EU and the UK. In terms of the current migrants, when we look at the list of issues that are left open by the joint report and still to be settled, we are really talking about the nature of the UK public authority that will oversee citizens' rights enforcement, and a mechanism for incorporating future changes to social security co-ordination. These are not big issues. They should not cause a failure of negotiations. They might be technical and might raise some difficult questions, but they are perfectly resolvable.

The other issues are ones that are on the agenda for the future, but they are not necessarily going to reopen. We mentioned before that the European Parliament, using different phraseology, would like to extent the benefits of the citizens' rights agreement to other categories of people. The actual agreement itself is pretty near complete.

On the governance question raised by Anand, it is probably worth pointing out that what has been agreed in the citizens' rights part, when it comes to the treatment of the European Court of Justice, is virtually identical to what is proposed under the European Union (Withdrawal) Bill when it comes to the treatment of case law from the European Court of Justice. Pre withdrawal, cases are going to be binding precedents with the status of UK Supreme Court judgments under the Bill. They are going to be binding precedents for the purposes of the citizens' rights provisions of this agreement. We will have due regard to future case law under the Bill. Under the agreement, they will have due regard. I cannot remember the exact words but it is effectively, "We will take it into account".

Joanna Cherry: The wording in the Bill is "need not have regard".

***Michael Dougan*:** They can take into account, if appropriate, in the next draft clause of the Bill, all actions of the EU institutions, which includes the European Court of Justice.

Q423 **Joanna Cherry:** Yes, but I would suggest that is very different from what has been agreed in relation to the citizens, which is that the courts in the UK will "pay due regard to relevant decisions". I am very seized on this, because I had an amendment—amendment 137—to the Bill, which sought to amend Clause 6.2 to read that "courts in the UK should pay due regard to relevant decisions". That amendment had the support of all opposition parties apart from the DUP, and was only narrowly defeated. Now, of course, the Prime Minister has agreed that that will be the test in relation to EU citizens. We have to be quite careful here, for the record, because there is quite a different emphasis.

***Michael Dougan*:** I apologise. I painted with slightly too broad a brush.

Joanna Cherry: This is just my hobby horse, so I apologise.

***Michael Dougan*:** The systems are not identical; I agree absolutely. I was making the point that they are comparable to focus on where the much more significant contrast is. I am sorry if I was not quite accurate enough on that particular point. The big contrast is of course the potential to make preliminary references to the Court of Justice for eight years after the entry into force of the citizens' rights provisions. That is where there is a very significant difference between the European Union (Withdrawal) Bill and the citizens' rights provisions of the withdrawal agreement, as it is likely to be. It is not a huge change from the system as it is today, but it is certainly a major point of comparison with the European Union (Withdrawal) Bill.

Q424 **Peter Grant:** As recently as last week, the Brexit Secretary and the Prime Minister were both repeating the phrase that no deal was better than a bad deal. Can any of you envisage a credible scenario in which

David Davis and his colleagues come back with a proposed deal that was so bad that we would be better to walk out and suffer the various implications you spoke about earlier? Is it possible to imagine a bad deal that was so bad that no deal would be better?

***Stephen Booth*:** The test of a bad deal is less economic and more political. A bad deal would be one in which the EU said, "You can have access to the single market, but only if you follow our rules and regulations in perpetuity". That would be a bad deal for the United Kingdom, because it would mean that we would lose our say and for ever be dependent on that in order to access the single market. That would be a bad deal.

***Michael Dougan*:** That would be a future deal, which would not be what we are talking about under Article 50. I cannot imagine a situation where that would happen. It would reflect very badly on the negotiating prowess of the UK Government if they manage to achieve it. I cannot imagine any situation in which that would happen

***Anand Menon*:** Particularly given where we have got to.

Q425 **Joanna Cherry:** I would like to briefly revisit this issue of the transitional or implementation period. It seems clear to me that there is a degree of divergence between what the United Kingdom and the EU envisage for the transitional or implementation period. Could I clarify what each of you gentlemen envisage? Will we be in the single market during the transitional or implementation period? Do you have a view on that?

***Stephen Booth*:** The language used by Donald Tusk was quite interesting. He spoke about continued membership of the single market and the customs union. The Government's position is that we will leave the single market and the customs union, and recreate the same thing. It is a semantic difference.

Q426 **Joanna Cherry:** In her statement to the Commons on Monday, the Prime Minister said, "As I proposed in Florence, during this strictly time-limited implementation period which we will now begin to negotiate, we would not be in the single market or the customs union, as we will have left the European Union". Clearly, Donald Tusk seems to envisage the opposite: that we will be in the single market and the customs union.

***Stephen Booth*:** There is agreement on substance but the form is the question.

***Anand Menon*:** Strictly speaking, the difference is that we will be bound by all the rules but we will have no say in the new rules. It is a different status.

***Richard Graham*:** Strictly speaking, if we are outside the European Union, we will not be a member of the single market, which is a European Union body. It could not be simpler.

***Michael Dougan*:** It is a little more complicated than that. The first question is the legal form that transition takes. For example, I suggested earlier that one option, which has perhaps been underexplored but might be worth exploring further, is a differentiated date of entry into force for the withdrawal agreement, so that the institutional provisions that allow voting by the UK in the institutions enter into force on 30 March 2019 and that is it: we are leaving. Once you have gone that far, it is not going to go back. The substantive provisions on the single market, the customs union environment and so on will continue until a date of entry into force two years later.

Effectively, we are both in and out at the same time for different purposes. That would solve many of the problems. If the EU was willing to buy it, it would solve many of the problems that we are talking about. It would technically mean that we are in the single market and the customs union until the new date of entry into force comes in.

Otherwise, it is a bit of playing round with semantics. We have the experience, for example, of the EEA. Many people will casually talk about Norway, Iceland and Liechtenstein as being members of the single market. We then have other people who say that they are not strictly members of the single market. They are participating in the European Economic Area, which seeks to recreate the single market between the EU and those countries. There is a bit of semantics here, and it is not as important as where the other points of difference and discussion remain to be resolved.

Q427 **Joanna Cherry:** What about the Court of Justice during the transition or implementation period? Will courts in the United Kingdom still be subject to the rulings of the CJEU, and still be able to make references to the CJEU during the transitional or implementation period? What is the range of views on that?

***Stephen Booth*:** The EU position is "yes" and, as far as I understand, the Government's position is also "yes".

Joanna Cherry: That is one red line that has gone.

Richard Graham: It was said in the House of Commons about two and a half months ago.

Joanna Cherry: I have asked it a million times and have not been given a clear answer.

Richard Graham: She gave that answer to Jacob Rees-Mogg.

Chair: Can we have one voice at a time, for the record, instead of two?

***Stephen Booth*:** The point is that this is a time-limited period. As has been discussed by many people earlier, to secure an orderly Brexit, there may have to be some compromises on the way there. That is not a big problem, if we are talking about a period only until the end of 2020.

***Michael Dougan*:** I agree with that, with a minor qualification. This is one of my eight points of divergence. The Government have suggested that they would like to bring forward alternative dispute settlement mechanisms earlier than the expiry of the transition period. They are clearly envisaging that, although we might start off with a situation where full references can be made to the Court of Justice and new case law is binding in its interpretation of EU law upon UK courts, the Government would like to see that phased out before the rest of the transitional agreement. The EU says nothing about phasing out in its guidelines. That might just be an omission, because it did not think about it, or it might be a clear statement that it is not what it has in mind.

Q428 **Wera Hobhouse:** On the very point of these separate adjudication mechanisms, how much divergence from the ECJ would there be, or would we end up with something fairly similar?

***Anand Menon*:** It is very hard to say, because this has not been fleshed out by the Government yet, to be honest. They have hinted at the fact that we will introduce different adjudication mechanisms during the period of transition and, as far as I know, that is as far as they have gone as yet. There has been no detail added to that.

Q429 **Wera Hobhouse:** We could in theory end up with something very similar.

***Stephen Booth*:** This goes back to the Florence speech, in which the Prime Minister talks about the three areas in which we might want to achieve the same objective by the same means or the same objective by different means. If we are trying to achieve the same objective by the same means, we are going to look at something very similar. In the areas where we want to do it by different means, we are going to look for differences. It comes back to where we put the different baskets of issues or industry sectors into those different categories.

Q430 **Jeremy Lefroy:** This is just to obtain some clarification. The idea of no deal has been put over as though it was a single issue, whereas, from what you have all been saying, we are really talking about two completely different things. There is a no deal in relation to the withdrawal agreement, which may have some heads of agreement for what a potential future relationship with the European Union is like, but no more than that. Then there would be no deal on a future trading deal relationship. Is that correct?

***Stephen Booth*:** Yes. There is another nuance to that. There is a difference between having no preferential trade agreement and a no-deal scenario in which we have various agreements on aviation, mutual recognition of customs procedures and so on. There are shades of grey even on no deal in terms of the future partnership.

***Anand Menon*:** Analytically, you might want to distinguish between no trade deal and a trade deal that fails to get ratified. That is, we have agreed on a deal, but the roadblock is political rather than as part of the negotiations.

Q431 **Jeremy Lefroy:** What we are talking about now is, in October, having a deal on the withdrawal agreement. That is pretty much it, but with the idea that we will be in the middle or at the start of negotiations on a future trading relationship, which are likely to go on for at least two years and possibly longer, at the end of which there will be a ratification that has to go through all 35 or however many it is now.

Stephen Booth**:** There is a risk in this discussion of overstating the uncertainty we will have at that point about where we are heading. Michel Barnier is saying the UK must choose between being like Norway and being like Canada. The EU is prepared to engage in quite a high-level discussion about what the future relationship should look like. The EU is quite clear that we are not going to have it all written down in black and white, in terms of the full trade agreement. The EU is quite concerned about being engaged in a discussion to determine where the UK is heading.

There is a risk that we say, "We are going to have the withdrawal agreement and heads of terms, but not much else". There will be quite a detailed discussion at that point about whether the UK is going to be more or less aligned with the single market. After all, the EU is saying to the UK Government, "Decide". Presumably, it wants us to decide because it wants to discuss the answer to that question.

Anand Menon**:** The EU talks about an overall understanding of the framework for the future relationship. Interestingly enough, this is going to be a political declaration included in the withdrawal agreement, so it is anticipating that part having a slightly different status from the rest of the withdrawal agreement.

Michael Dougan**:** The main issue will be whether the political declaration of the overall understanding will have reached a stage where it is detailed enough that we can say, "This is for translation into legal text, because the scope of co-operation, the instruments of co-operation, the institutional and governance arrangements, and the dispute settlement have all been agreed politically", or whether we have just reached the point where we said, "We quite like the idea of being good friends into the future and these are the fields of co-operation, but we have not got much further than that". In that case, a lot of work will still need to be done, even at the political level, after withdrawal.

In any event, when we talk about no deal now, we talk about no deal in the sense of no separation agreement to deal with all the issues that need to be addressed for an orderly withdrawal. There is no real prospect of a deal on the future relationship that equates to a full and final agreement on trade, security and so on for the future.

Q432 **Stephen Timms:** Professor Menon, you commented earlier on about what happened in west Ukraine when Poland joined the European Union. What was the effect on the economy of west Ukraine when that happened in the way that you described?

***Anand Menon*:** It had a pretty immediate negative impact on the economy of western Ukraine.

Q433 **Stephen Timms:** How severe was the impact?

***Anand Menon*:** I do not have the numbers to hand. In a sense, there was not much of a border between eastern Poland and western Ukraine and it was a pretty integrated economic area at the time. The western part was more prosperous than the eastern part because Poland was more prosperous than Ukraine, but being cut off from that market had very obvious negative implications for the western part of Ukraine. It had to deal with the shock and re-orientate its trade back to the rest of the country, because of the border.

Stephen Timms: I do not know whether an account is readily available, but, if it was, it would be quite interesting to know what happened in that situation.

***Anand Menon*:** I can certainly have a look.

Q434 **Stephen Timms:** I would welcome that. Going back to this question of the Northern Ireland-Ireland border, if the commitment to no physical infrastructure on that border is maintained, how likely is it, in your view, that the UK will be forced to stay in the customs union?

***Anand Menon*:** First, if there is no physical infrastructure, it is customs union and single market, because both will require some sort of physical infrastructure. As Michael said, the wording is quite draconian in terms of what we are not going to have. How likely is it? I do not know. It depends on the political trade-offs the Government are willing to make. Again, it depends on who the Government are willing to annoy.

***Michael Dougan*:** I would go further and ask the question very directly. I am not going to look at Sammy Wilson when I say this, but I would ask the question very directly to the Northern Irish parties, given that the joint text suggests that the UK is placing this decision primarily in the hands of the Northern Irish parties. It is effectively saying the Northern Irish parties can tell us what is going to happen.

The deal that has been offered to the Northern Irish parties is, "Would you like to stay in the single market and the customs union with the Republic, so as not to have a hard border, but we guarantee you lopsided privileged access to the market in GB, all in one direction?" For the Northern Irish parties, that might seem like a pretty good deal, insofar as it is workable. We all talked before about the issues of what full alignment means, where it would apply and whether unilateral action would make any difference anyway.

In terms of what is in the text, insofar as it means much that is concrete at all, the ball is in the Northern Irish court. They are getting a lopsided advantage. They can have it both ways, if that is the direction they want to go in.

Q435 **Sammy Wilson:** That would not solve the issue of the Irish Government being able to have easy access to the GB market. It would also mean there would be physical checks between GB and the Irish Republic.

Michael Dougan**:** That is why none of the solutions are perfect.

Stephen Booth**:** As I said before, this is a three-way issue and it will require compromise. To achieve that outside the customs union but without the physical infrastructure at the border will require all sides to compromise. At the moment, it is very difficult to know what that compromise is. We are currently talking about customs union membership being black and white. If you narrow that down to the sectors in which it really matters on the island of Ireland, perhaps customs union membership is not black and white.

Q436 **Stephen Timms:** Will the question of whether we go for full alignment need to be resolved before we start trade negotiations? Could we start the negotiations without knowing whether we are going to have full alignment with the single market and the customs union.

Michael Dougan**:** Do you mean in the context of Northern Ireland or generally?

Q437 **Stephen Timms:** During the transition, I think the Government want to start negotiating these trade agreements. Can they do that if, at that point, we do not know whether we are going to end up with full alignment with the customs union and the single market?

Anand Menon**:** The European Union has signalled willingness to be flexible in terms of turning a blind eye to us starting negotiations. The real question is whether our negotiating partners will be willing to commit to anything, not knowing what our relationship with the single market is going to be. That would materially affect the nature of the deal they want to strike with us.

Michael Dougan**:** Looking at it in the circumstances that we find ourselves in, given the time that we have, bearing in mind our limited experience and capacity to do it in the first place, and bearing in mind that fundamental pieces of the jigsaw puzzle, such as our WTO membership, have not been regularised yet, I would not get too ambitious about what we are going to achieve in trade deal terms within a transition period. That is probably one of the reasons why the EU institutions seem quite relaxed about it. They are probably thinking, "You are not going to get that much done anyway, so it is not an enormous concession to say that we are happy and can live with it.

Q438 **Stephen Timms:** You have explained to us that, during the transition period, we are going to be sort of in the single market and customs union but not in, depending on whom you ask. It is clear that we will have repealed the European Communities Act 1972. Will the legal mechanisms to deliver the requirements of being in the single market and customs union and to obey all the rules still be in place for those two years, or however long it is?

Michael Dougan**:** It is a really important question, which links up with this issue of the legal vehicle for the transitional period in the first place. For example, if we had a differentiated date of entry into force for different provisions of the withdrawal agreement and that was our transitional vehicle—we are leaving the institutions, which basically means that we are leaving, but we are not leaving the substantive rules for another two years—it would make sense under the withdrawal Bill to have differentiated exit days for different purposes.

We could then say, "These bits of the withdrawal Bill will enter into force only after the two-year period is up, because we want to keep the easy flow of new regulations. We want to be able to implement any new rules or changes. They might be minimal or small, but this will be the legal vehicle to do so". It is difficult to answer the question of, domestically, how we create a transitional period until we know the answer in terms of relations with the EU: what will the transitional period look like in international law terms?

Anand Menon**:** I imagine the Government are looking to the withdrawal and implementation Bill as the vehicle via which they will take care of that. Presumably they will be slightly clearer on what the nature of the transition is, what the vehicle is and what the details are prior to that Bill being formally submitted to the House.

Q439 **Stephen Timms:** The withdrawal Bill repeals the European Communities Act. Are you suggesting the next Bill might bring it back again?

Anand Menon**:** I am saying that the next Bill might provide the mechanism whereby we manage to adhere to new EU laws passed during the period of the transition. The means by which they choose to do that I do not know.

Michael Dougan**:** It might be by recreating some of the powers under the European Communities Act in a separate Bill.

Anand Menon**:** It is possible.

Q440 **Richard Graham:** We have had an interesting discussion about the implementation arrangement. The European Council has made it pretty clear that the United Kingdom will continue to participate in the customs union and the single market during the transition. I am assuming that you are all clear on that, and we should all be too. The interesting thing, in a sense, is that that shows the creativity of political solutions where there is a will, because this is not using an EEA model or any other model that has previously existed. It is something new. That should give us all hope for political creativity over the next phase of the relationship.

I think you both said there was no need for national ratification of the implementation phase even though there could be legal challenges in theory. This seemed to me another good example of what I would call "positive political compromise", and I think your preferred word is "fudge". What does this tell us about the degree of optimism you all have for future positive political compromises to arrive at a sensible, deep partnership for the future that is more than just trade?

Stephen Booth: I am quite optimistic. As I said earlier, the EU has not said, "This implementation period is going to be extending the status quo and we are not going to talk about trade". The EU is already starting to engage in trying to define the kind of future relationship we will have. The starting points are, on the one hand, being closely aligned with the single market, i.e. Norway, or a traditional free trade agreement, i.e. Canada. The reality is that it will be somewhere in between. From the UK's starting position, it will be much closer to Canada than to Norway.

The noises you have had from member states illustrate that they are up for something bespoke. As you say, it will be bespoke by its very nature. It will not simply be a trade agreement. We will be talking about other fields of close co-operation. The UK has a strong argument for why we should have an ambitious trade agreement in the areas where trade agreements have traditionally been deficient, such as services, for example, where the UK has a strong case.

It is going to be difficult and it depends, to some degree, on this issue of alignment: how far does the UK want to align itself with EU laws? The key thing is devising a mechanism by which we can do that. What happens when the UK says, "We want to do something differently?" That is going to be the million dollar question in terms of what the future relationship looks like.

Q441 **Richard Graham:** One thing that we have not touched on in detail is the agreements that the EU has with around 300 external bodies. Presumably, that could be relatively simply regularised, during the implementation phase, by the EU notifying those bodies that, as far as they are concerned, that agreement with the EU during the implementation phase includes the UK.

Stephen Booth: It depends, to some degree. On the more technical agreements with international agencies and so on, that is the case. When you are talking about actual trade agreements with third countries, those third countries will have a view. The UK Government are busy using diplomatic channels with those countries to explain why it is in their interests.

Q442 **Richard Graham:** I am not concerned about the FTAs because the bilateral channels are sorting that out. On all the other ones where the EU is a dialogue partner, with ASEAN for example, during the two-year implementation phase, the EU could simply discuss, confer, notify and confirm with ASEAN that, as far as it is concerned, it is happy for that arrangement to continue, on the basis that, as the European Council has said, all existing structures in practice will also apply.

Stephen Booth: It could do. The question is a political one of whether it will.

Anand Menon: ASEAN would get to have a say as well. That is the missing element. The European Council can say, "We are happy with this" but ASEAN has to say so to. On the broader question that you asked first, every trade deal is bespoke because every country is different. I suppose the crucial difference is the degree to which that bespoke deal is based on a pre-existing template.

Q443 **Richard Graham:** I was not really focussing on the trade deal. Michel Barnier himself has talked about a new and deep partnership. What is your interpretation of what a new and deep partnership means in terms of a future agreement?

Anand Menon: My interpretation of what Michel Barnier means is a new and deep partnership based on one of several existing templates that will be amended slightly to meet the particular needs of the United Kingdom. That is why Michel Barnier's position is that there is Norway, Canada and nothing very much in between.

Q444 **Richard Graham:** He has talked specifically about sectors included in the new and deep partnership, such as defence and security. Is there a model for those?

Anand Menon: No. There are security arrangements between states. I am not sure there is a model that will capture the full complexity and depth of what we are trying to do. Remember that, if you are dealing with security, some aspects of security, particularly when it comes to criminal databases and the like, will confront us with precisely the same trade-offs as the economic relationship, because they are governed within the European Union by the European Court of Justice.

Even in some areas that we might call "security", there are very similar trade-offs. When it comes to military affairs, things are actually a lot easier because they are far less within the ambit of what used to be called the first pillar of EU law. A lot of it is intergovernmental anyway. Even in some aspects of security, we will have to trade off.

My point is that, when you raised your question initially, you asked whether the progress on the Article 50 deal makes us more positive about the potential for striking innovative new deals. No, not particularly, because we have a treaty article that allows us to do transition under Article 50, we think, whereas what the Government seem to want from the European Union is something wholly new. The Government might say, "We think we can come up with wonderful ways to address the question of the Irish border using technology". To the best of my knowledge, no one has managed to do that yet. It might be that we come up with a mechanism, but I am inherently suspicious of trusting things that I do not know anything about. I have more faith in our ability to get something based on a template than something totally new.

Q445 **Richard Graham:** That is even though you recognise that what is happening during the implementation phase is something completely new in the history of the European Union: to continue participating in the single market and customs union without actually being in the European Union or the EEA ourselves.

***Anand Menon*:** It is completely new, but it is based on an explicit treaty article.

Q446 **Richard Graham:** To clarify, earlier you said words to the effect of, "Can we get on with the things that we want to do during the implementation phase? The answer is 'no'". However, with respect, is the answer not actually "yes"? During the implementation phase, we will be specifically having those negotiations with third parties to secure our arrangements with bodies outside the EU after the implementation phase is over.

***Anand Menon*:** I was referring specifically to our ability to change our laws and bring in new policies domestically. If we think that the template the European Council has set out is what the template will be for transition, we will not be able to do that, because we will still be bound by single market laws.

***Michael Dougan*:** Would you like me to comment, given the time?

Chair: I am slightly worried by the numbers. There are one or two other colleagues who want to come in.

***Michael Dougan*:** I will make two very brief points on the two separate issues. I do not really deal in terms of optimism or pessimism. I deal in terms of problems and solutions. One of the key factors that will influence how we find a solution to the problem of our future relationship with the EU is institutional structures. In a way, these are the key to ambitious and sophisticated trade agreements, security agreements or any other field of international co-operation.

It is very easy to make promises about the roles and the scope of co-operation. What really create ambitious, deep and special partnerships are the institutional structures. At the minute, that is probably what we know the least about in terms of the preferences of the UK and the EU. Until we have clarity on what a deep and special partnership translates into in institutional governance terms, and how willing we are to give up or share decision-making power with others, it is very difficult to know what it might look like.

To the second point on international agreements, the working assumption of nearly all the lawyers I have spoken to who are more specialist in this field than I am is that it requires a case-by-case analysis. There is no single solution. Every international agreement will have its own text, define its own territory and set its own rules. It is about, case by case, working it through and finding a solution.

Q447 **Richard Graham:** Is there a precedent for any other country in the world looking for a deep partnership with the EU where all the laws are in complete alignment at the starting point of those discussions?

Michael Dougan**:** It comes back to the governance and institutional issues.

Q448 **Richard Graham:** That is not answering the question.

Michael Dougan**:** Many countries in the world will say that they share the same values and the same aspirations, and they want to achieve the same things. If they are not prepared to put in the institutional structures to deliver it, they are aspirations. They are worthy aspirations, but aspirations.

Q449 **Richard Graham:** What do you mean by the institutional structures?

Michael Dougan**:** A political body will manage the agreement, adopt any necessary legislation, elaborate changes and provide for monitoring and enforcement. Administrative bodies will co-ordinate between the two sides and ensure that they are acting in convergence or divergence where that has been agreed. Most important is a dispute settlement mechanism, whether it is an independent tribunal from the two parties, borrowing tribunals from each party or having none and relying on national courts and international enforcement. Those are the institutional arrangements I am talking about.

Q450 **Richard Graham:** You deal in problems and solutions, so what is your solution to the dispute resolution issue?

Michael Dougan**:** This will be a matter of lengthy negotiation between the UK and the EU. There are no solutions. There are options, but the solution will be for agreement between the two sides.

Chair: Just for information, while we have been meeting, the Commission has published the draft guidelines on transition. This goes to the heart of Richard's first question. It says that, "In line with the European Council guidelines of 29 April 2017, it is also recalled that as from the date of its withdrawal from the Union the United Kingdom will no longer benefit from the agreements concluded by the Union, or by member states acting on its behalf, or by the Union and its member states acting jointly".

It goes on to say, however, "Where it is in the interest of the Union, the Union may consider whether and how arrangements can be agreed that would maintain the effects of the agreements as regards the United Kingdom during the transition period; the United Kingdom should however no longer participate in any bodies set up by those agreements". That has just been published. That is just for information.

There are two final, quick points. Then we will draw the session to a close, because you have been very generous with your time and with your answers, which have been very helpful.

Q451 **Stephen Kinnock:** Briefly, I wanted to come back to this point about what will be happening during the transition period in terms of the negotiation of the future relationship, and not just the negotiation of it, but the ratification. It seems highly likely that it will be a mixed agreement and, therefore, that that will happen under the aegis of Article 218 of the treaty, which requires ratification by all the national Parliaments.

Can you confirm that, if we are talking about a two-year transition period, in those two years, first of all, the negotiations would have to be finalised between the UK and the EU institutions in order to get the legal text agreed for the future relationship, and that future relationship text would then have to be ratified by 34 national and regional Parliaments? Is that correct?

Chair That is the case.

Anand Menon**:** It is national and subnational Parliaments if it is a mixed agreement and it goes through Article 218.

Q452 **Stephen Kinnock:** How realistic is it to achieve that in the given timeframe?

Michael Dougan**:** I am working on the assumption, in my own work, that the transitional agreement of two years will expire, and effectively it will just have delayed withdrawal under other terms. We will still be negotiating, in my view, the final text of a future agreement. It will still have to go through ratification processes. I might, of course, be proven wrong by circumstances. Who knows? My working assumption is that this transitional agreement is basically postponing the full effects of withdrawal until we are better placed to cope with them. We will have to cope eventually. It is not realistic to think that, even two years formally post withdrawal, while the transition period is going on, we will have managed to secure the deep and special partnership as a final text, and that it will have gone through national ratifications.

Q453 **Chair:** Am I correct in saying that, once the first of the stages that Stephen has just referred to—the agreement on the new trading relationship—is reached, there is provision for provisional application, pending ratification? It is not that you cannot implement it until all the 35 Parliaments have agreed. Can you confirm that that is correct?

Anand Menon**:** Yes.

Stephen Booth**:** Yes. We also do not know what form this will take. There may be more than one agreement to be ratified. There may be a separate treaty on security. There may be a separate agreement on trade. It is not a given that it is a mixed agreement. Say we end up with a CETA-style agreement. The Commission's own legal advice stated that

that was not a mixed agreement. The member states decided otherwise, and decided to go down the route of ratification, but the legal opinion of the EU institutions was that that was not a mixed agreement. It was a political decision taken to ratify it. That is always open but, if people want to find a way around it, there are ways to do so. Another method might be to divide certain issues: issues of security might well have to be nationally ratified, for example, whereas other issues on trade might be easier to do through agreement at the Council.

Q454 **Stephen Timms:** I wonder if you can expand on an earlier answer, Professor Menon. I asked whether maintaining no infrastructure on the border would force us to stay in the customs union, and you said that, if it did, it would force us to stay in the single market as well. I am not quite clear how membership of the single market affects the question of whether there is a hard border.

***Anand Menon*:** You are aware of the discussion about chlorinated chicken. Membership of the single market implies accepting the rules on health and safety standards, and so forth. You cannot have a border of the single market without some mechanism of checking whether those standards are being adhered to on the goods coming in. Even when it comes to the regulatory as opposed to the tariff issues, there will have to be some provision for checking. That will necessitate some kind of physical infrastructure that goes against what is down in the agreement.

Stephen Timms: These are food health issues.

***Michael Dougan*:** The chief function of customs checks is not to check and collect the money, but to ensure regulatory compliance with environmental standards, and in relation to counterfeiting, anti-money laundering and drug running, as well as on issues of food safety and rules of origin. Customs checks perform a very wide array of functions. It is not just about the tariffs or the money. They are about enforcing your trade policy at your own border.

***Stephen Booth*:** I agree with that. That illustrates that, once you start thinking about this, the elements of alignment with the single market are probably the biggest issue to avoiding a physical border, because collecting tariff money can very easily be done electronically. We do not need customs posts to do that. It really is an issue about alignment. It probably can be narrowed to quite specific elements of the single market. To answer the question that has been put several times, it does not necessarily require wholesale membership of the single market, if the EU is willing to be flexible, which is the big question.

Chair: Can I, on behalf of the Committee, thank you for your very full and extremely helpful answers? We have covered a great deal of ground and we are grateful. Happy Christmas to all of you.