

European Scrutiny Committee

Oral evidence: [EU Withdrawal](#), HC 763

Wednesday 27 June 2018

Ordered by the House of Commons to be published on 27 June 2018.

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Members present: Sir William Cash (Chair); Steve Double; Mr Marcus Fysh; Kate Green; Kelvin Hopkins; Darren Jones; Mr David Jones; Stephen Kinnock; Andrew Lewer; Michael Tomlinson; David Warburton; Dr Philippa Whitford.

Questions 531 - 577

Witnesses

I: Dr Katy Hayward, Queen's University Belfast; Shanker Singham, Director, International Trade and Competition Unit, Institute of Economic Affairs; Dr Lorand Bartels, Reader in International Law, University of Cambridge; Professor David Collins, Professor of International Law, City University.

Examination of Witnesses

Witnesses: Dr Katy Hayward, Shanker Singham, Dr Lorand Bartels and Professor David Collins.

Q531 **Chair:** Good afternoon, everybody. I will ask the first question. It is very good to see you all and I hope we have a very useful session at this critical time.

I am going to start with the issue of the frontier traffic exception. Professor Federico Fabbrini recently suggested in a report that in the event of a no-deal scenario, the EU could invoke Article 24(3) of the GATT, which is known as the frontier traffic exception, to declare the entire territory of Northern Ireland to be a frontier zone to the EU customs union. I understand that this clause is also the basis of a proposal to create a buffer zone—a special economic zone—between Ireland and Northern Ireland. Mr Singham, to what extent does this mechanism represent a potential solution?

Shanker Singham: The frontier traffic exemption clause in Article 24 is designed to deal with situations where you have a customs union or a free trade agreement in a neighbouring country that would be potentially damaged by that new arrangement and so parties can voluntarily agree special arrangements. I would not quite see the nexus of that particular exception here. Either there is going to be a free trade agreement between the UK and the EU, which will cover arrangements between Northern Ireland and the Republic of Ireland, or there will be no free trade agreement in which case the parties can agree voluntary arrangements on the border, which arguably would be covered by that exemption.

Q532 **Chair:** Mr Bartels, do you want to comment on that?

Dr Bartels: Sure. The starting point is that we are dealing with the most-favoured-nation obligation, and the question really is about in what circumstances the EU, being Ireland in this case, and vice versa the UK could grant preferences to each other at the Irish border without having to grant the same preferences to all other WTO members. The most standard way of doing that would be, as Mr Singham has said, to have a customs union or free trade area, because that is the major type of exception to MFN that exists, and that is what you see in the remainder of Article 24.

The frontier travel exception is another one but it does not take you very far. The discussions on the frontier traffic exception at the time that the rule was drafted made it fairly that, where we were talking about situations where you had had a border running through a city, the traffic that counts as frontier traffic is about goods that are produced and consumed within a small distance of that border. The figure that was given by the United States, which drafted this provision, was 15km either



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side of the border. Essentially what we are talking about is market traffic. The idea was not to use this to extend free trade to adjacent countries so that you would end up with a sort of domino, where one country gives preferences to its neighbour, which gives preferences to its neighbour, which gives preferences to its neighbour. That is not the idea. It is not designed to cover whole territories. It is really just for market traffic on the border in those sorts of special circumstances. It is not really anything more than that.

With all due respect to my colleague, what he has said has been somewhat misunderstood and too much reliance has been placed on it. I can give you an example of why this does not extend any further. It is because the next paragraph along in Article 24(3) is the special exception in the GATT for the Free Territory of Trieste, which is much larger than 15km, and the point there is that the exception did allow for free trade without a special customs union or free trade agreement between the Free Territory of Trieste and Yugoslavia and Italy, both of which were arguing over sovereignty and in the end it was resolved in favour of Italy.

You would not have needed that exception if the frontier traffic exception were able to cover a larger territory. Quite clearly, the frontier traffic exception is of no particular use here except, if you really wanted to push it, to actual frontier traffic that extends in a very, very small zone either side of that frontier.

Professor Collins: It is important not to be too prescriptive about the reference to the 15km. The commentary that Dr Bartels refers to goes on to say that you need to be flexible in the interpretation of this provision. There is no case law on the border traffic exemption, so the way to look at it is in a pragmatic sense. Indeed it is about local traffic on either side of the border that is produced and consumed in that region. Whether that is 5km, 10km, 25km or 50km, the way I see it is that it is traffic that is taking place on a somewhat casualised basis in that area.

Is it going to cover the entirety of the island? No. I do not think you would be able to extend it to 200km but it seems to me that it is about traffic that is going across the border, possibly within the same day, and that is not negligible. In fact, this is the basis for the discussion in some circles about having a two-tier checking system, one for local traffic and then another for larger traffic that might have an international destination.

If you take the starting premise that the cross-border traffic on the border between Ireland and Northern Ireland is already very small, you can use that exemption under 24(3) to actually eliminate a good deal more of that traffic, and that could make the border even less problematic in terms of having the hard border than some might suggest in the absence of a free trade agreement.



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I should point out—I think my colleagues may have just said this—that you do not need a free trade agreement to access the border traffic exemption. This would be an option that would be available in the no-deal scenario. You can take a situation where there is no free trade agreement and you can use that exemption to deal with some of the traffic, though certainly not all of it. You can deal with some of the traffic, and given that the traffic is already small, you go some way towards having a not hugely problematic border.

Dr Hayward: I will not to go into the details of frontier traffic, but I just wanted to note that the traffic across the border or the trade across the border is small in UK terms but it is highly significant for the island of Ireland. It is notable and significant that 6.5% of goods vehicles operating in Northern Ireland have UK-only licences. The rest of them have licences that enable them to cross the border and then into the wider EU, and that tells you something about the importance of cross-border trade for businesses in Northern Ireland.

Figures released recently by NISRA—the Northern Ireland Statistics and Research Agency—showed that 30% of exports from Northern Ireland go into the Republic of Ireland and 39% of external services from Northern Ireland go into the Republic of Ireland, so in terms that are significant for Northern Ireland, we see how important cross-border trade is.

Q533 **Michael Tomlinson:** Welcome to all of the panel. Moving on from the Chairman's questions to the customs arrangement, Mr Singham, this question is directed at you initially. You wrote a paper earlier this year titled, "How to fix the Irish border problem", and you were looking at maximum facilitation in particular. Can you explain to us what levels of checks and infrastructure would be necessary in your proposal as outlined in that paper, and physically where they would have to take place?

Shanker Singham: I would just like to clarify one point on the frontier traffic. First of all, it has been rarely used, it is very case-by-case and, as my colleague Professor Bartels mentioned, it was designed for the Trieste situation, so actually if you look at the border and you look at the high frequency, low volume trade and particularly things that are going back and forth frequently, and the bits of the border that cross over people's back gardens and this sort of thing, it is actually helpful in that respect.

However, it only comes into play if there is no trade agreement. Our proposal on how to deal with the frictions and so forth on the Irish border is essentially that it depends what the goal is; there is no silver bullet here and no one thing that you can do to solve the problem. If the goal is to have no border at all, then that is not achievable. That is an impossible goal. That is not, however, the goal that was set out in the December agreement, which was not to have a hard border that damages the Good Friday agreement or the peace process, and therefore we have suggested a number of different things.



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The first thing that you would focus on is understanding the nature of the border now. There is a border now. There is a border for VAT. There is a border for tax. There is a border for numerous things. Understanding the nature of the trade that goes across the border is a very important point. There is about seven to eight times as much trade that goes from the Republic of Ireland to the mainland GB compared with that which goes into Northern Ireland. The figures for Northern Ireland are roughly the same. What you have across the border is high frequency, low volume trade. The question is how you deal with that, and there are a number of ways of dealing with that.

First of all, for the relatively small number of non-SME businesses on either side of the border, what we need to do is come up with a very advanced, special authorised economic operator programme that is mutually recognised by the EU in the case of the Republic of Ireland and by the UK in the case of Northern Ireland. This would go beyond what we have been talking about in terms of authorised economic operator programmes for the UK, mainland GB. Due to the relatively small number of businesses, it ought to be achievable.

What you want to do with any customs arrangement that is designed to promote a border at least as frictionless as you can make it is to separate out the movement of the good from the filling of the forms and the paperwork. There are a lot of examples of things that other countries have done. Perhaps the most advanced is the Canada self-assessment Platinum programme where essentially the entity does not deal with customs at all. It is more like a tax return that you would fill in. Clearly, if you miss the report on your tax return or your customs return you are committing an offence.

Typically there are about 100 Canadian companies that are beneficiaries of this, so that is the sort of thing that you could construct here. You want to do technical checks away from the border. We have suggested, in addition to that, a special economic zone. That could be a special economic zone in Northern Ireland. It could be one continuous with the border. That of course would require the EU to agree that such a special economic zone could exist.

In terms of the rules inside the zone, you could have a different regulatory system in the zone. Lots of special economic zones around the world have different regulatory systems to the host country. That is not unusual in special economic zone law now. Those are the broad things that you would seek to do.

In terms of the way I would deal with this, one of the things that we have not yet done but that we need to do now is to actually put negotiating text on the table, and that text could include a customs and trade facilitation chapter of a UK-EU trade agreement with an Irish border protocol. That would deal with the very specific issues related to border questions and would also deal with the broader questions of the UK-EU



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relationship. Because of the volumes of trade, the border that the Republic of Ireland is most concerned about is actually the UK-EU border. That is where frictions need to be minimised and tariffs need to be reduced.

In terms of other things, the common travel area already exists. The single electricity market already exists. We are not suggesting there should be any change to that. The common SPS area already exists. The need for border inspection posts comes from the meat trade, so you need to maintain the common SPS area. Some may say that is a border in the Irish Sea and all of those things, but I do not think that is the case, because there are many examples of Northern Ireland having different rules from mainland Great Britain. There are different rules on energy, for example. The carbon taxes are different in order for Northern Ireland to be part of the single electricity market, so this is incremental. If you take that package and put that into an Irish border protocol as part of a trade agreement and as part of your customs and trade facilitation chapter, you are also at least giving the EU something to react to.

Q534 Dr Whitford: Obviously with what Mr Singham is suggesting, I am assuming there would still be some infrastructure on the border.

Shanker Singham: Especially if there are checks away from the border and a special zone, I do not think there need to be on-the-border checks. Even with this arrangement, the checks that exist now do not need to change; there are cameras in Northern Ireland, and those are primarily for security and surveillance and those sorts of things. I do not see any necessary changes.

Of course, the thing I did not mention, which happens on all customs borders, is the increasing use of technology. This is happening everywhere around the world. You have got countries such as Singapore, Korea, Japan and so forth using new technologies and smart ledgers and so forth. This also reduces some of the costs of the border itself.

Q535 Dr Whitford: Do you recognise that, quite differently to all the other borders around the UK, there is a specific issue about virtually any infrastructure on the Northern Ireland border, and would the zone you are talking about not just give us two borders?

Shanker Singham: There has been, in the Republic of Ireland, a history of having customs checks in the Republic of Ireland. Obviously they have had the Shannon Free Zone for 60 years. Before it was shut down it was the oldest free zone in the world. What you are always trying to do with customs is, for regular traders, separate out the movement of goods from filling of paperwork, so actually I think the Irish border could be a vehicle to accelerate that with a special programme for some of the larger traders and so forth.

I fully recognise that this is an incredibly emotional and difficult issue, but I would also say that it is very important that we try to find pragmatic



solutions to it, because one of the things that happened as a result of the December agreement is that there was an agreement to have no hard border, but what we are really talking about is not hardening the border beyond what it is now, given that there is a border. When you are talking about not hardening the border, you are recognising that there is a border for excise tax and VAT and so forth. In one of their recent responses to the UK Government, European Commissioners essentially wanted to change that, and to have no border for tax and excise and VAT. That is a significant change from the current arrangement, so what we should be trying to aim for is something that changes the current situation as little as possible.

Q536 Dr Whitford: Dr Hayward, we use the term “hard border” and “hard Brexit” and all the rest of it, but it is not simply at the Irish border an issue of infrastructure—there is the fear that infrastructure, no matter how simple it is to use, would be in danger of being attacked.

Dr Hayward: I am very pleased to hear Mr Singham say the points about wanting to see as little change as possible to the border. The idea of something particular for Northern Ireland in relation to regulation and a number of other areas is something that must be explored seriously.

There has been a concentration in the interpretation of “hard border” meaning infrastructure, and questioning how that might happen. There is no example anywhere in the world where you can facilitate a customs border with no infrastructure, particularly if you are using technology. You need more infrastructure to do that if you are replacing customs officers with technology.

I want to take a little step back and to frame the question in a slightly different way, which is answering your question, and that is about why are trying to avoid the infrastructure. The argument is that it creates a target for paramilitary violence, and then if you have cameras taken down, which is likely to happen, according to the PSNI, then of course you have to have the police coming in to help them set back up again. You can just see the escalation, and this is exactly what happened in the 1970s, when the customs border ended up becoming so fortified. Instead, what we have now is a representation of the peace process, and if you conduct research in the border region in Northern Ireland and Ireland, as I have done and as many other people have done, you see that the interconnection between peace and the border as it is now.

It is difficult for us to try to say what peace looks like, because it is taken for granted, but it is worth spelling it out because this is what is at risk in this process. The first thing that peace has meant in the region around the border is economic development. It has taken a long time. It has taken 15 to 20 years to begin to get there. Cross-border trade has increased by 21% in the last couple of years. It is a growing area of development, and this is particularly crucial in the border region with the legacy of peripherality, et cetera.



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Peace is also demonstrated by the fact that policing in the area is normal and people begin to approach police officers for normal everyday things that you would not think twice about here, but that are highly significant in this contested place. It also means trust in democratic processes as an alternative to violence, and we see that under pressure in an acute way in Northern Ireland, for various reasons, partly as a result of polarisation relating to Brexit—I can talk about that—but also, of course, given the state of affairs with the institutions at the moment.

More particularly, it is about trust in the British and Irish Governments, and this varies between communities in Northern Ireland. This is intangible but it is actually very significant: do we trust the UK state? For a camera that might be innocuous in relation to testing speed, if it is registering who is crossing the border and when, does it take on a different form? Is that something about surveillance from the British state? Those are very important questions.

Finally, the open border brings very tangible benefits. More particularly, north-south co-operation, as formalised and institutionalised in the Good Friday/Belfast agreement, has brought real benefits, and this is what the open border, or the border as it is now, means to people. It does not mean things in relation to VAT, et cetera. What it means is being able to use health services on the other side of the border, or being able to commute easily and live on one side and study on the other, for example.

Q537 Dr Whitford: Would people be afraid of going back to what we had, which was that of 270-odd crossings, only 30 were actually open and the others were closed, because obviously if you are using technology you are trying to funnel people through that. Is that a discussion on the ground among people?

Dr Hayward: Exactly. You make a very good point, because in enforcing a customs border, such as that between Norway and Sweden, commercial vehicles can only go across 11 crossings and they are all manned. As we know from the past, with the Irish border as a customs border in the past, you had approved roads and unapproved roads, and many of those unapproved roads were blocked. You can talk to people, and my “Brexit and the Border” study is full of examples of what having those crossings means to people. It is being able to connect with your family, being able to go to a sporting event, being able to shop, being able to sell goods, et cetera. You cannot have that openness when you have a hard border.

Q538 Mr Fysh: I just wanted to ask Dr Hayward a question. I have read your “Brexit and the Border” report and it is very useful. To pick up on what you were just saying about the fear of what recording movements of particular people might do in terms of the psychology, I just wanted to understand within your study what sort of questions you have asked about that, and how they were framed, and whether you think that if a system were used whereby data was sort of anonymised and used in a risk-assessed way, that might be some sort of solution to that type of concern.



Dr Hayward: The questions we asked in the survey, which was an online survey on both sides of the border, was, "Would you be willing to accept technological solutions for managing the border if it was away from the border and if it was basically invisible?" It would basically replace manned checkpoints with other things. One in five of our respondents said they would be willing to accept that, and 30% said, "Maybe; it depends". A lot of them would say, "We would prefer a camera to a soldier". Half of them said, "No, absolutely not". That is borne out in other studies such as John McGarry and Brendan O'Leary's study for UK in a Changing Europe, which showed the same kind of thing. This is particularly, of course, from the Catholic community.

Just to talk about technology, if you are applying technological solutions elsewhere in the world, and particularly in relation to border security, it is always a means of increasing efficiency. That is why people are willing to accept giving up their personal data and information about them, such as facial recognition and what-have-you, because it gets them where they want to be quicker and more efficiently. You should put that in an Irish context. As it is at the moment, technology automatically means more friction. In that environment of trust or distrust, which I was mentioning before, people are raising questions about where the data is going and a 16-year-old in a focus group said to me, "What about data privacy and data protection?" If the 16-year-old is alert to that, how much more so are other people?

As for the last question about anonymous data, that is not useful. It has limited uses if you are trying to enforce a border of this nature. The assumption would be that crossing the border is actually quite normal, and you want to encourage it as much as possible, and encourage trade, et cetera. Anonymous data about border crossings is useful if those crossings are unexpected. What you would need in order to have proper risk management would be data that would be very easily traceable and absolutely directly connected to individuals—individuals' vehicles, individuals' businesses and the like, which is a level of surveillance that would be difficult for many people to swallow anywhere in the UK, I would suggest, let alone in the Irish border region.

Q539 **Dr Whitford:** Just imagining the no-deal scenario, which obviously we are not looking for, there have been suggestions that the UK Government might simply waive all customs and regulatory checks completely, suggesting that the volume of trade in Northern Ireland was quite small and that that risk was reasonable, rather than having the border infrastructure. If I could start with yourself, Dr Bartels, how significant or insignificant would such effects be of having this uncontrolled border?

Dr Bartels: I cannot really speak in terms of volumes. Dr Hayward and my other colleagues would probably have a better sense of what that would mean on the ground. I can only speak about what that would mean legally. It would be something of a problem, essentially. The reason is that it would be granting the EU preferences that would not be



shared with other WTO members. I do not think, I should say, that the WTO should in reality present this as a major problem. First of all, I have to insist as a WTO lawyer that WTO rules are binding and are law. However, the reality is that it takes a long time to enforce them. It requires countries to complain. They might not see any value in complaining. More importantly, though, it would be appropriate to ask for a waiver of the WTO to cover this sort of situation, and there is a very good chance, given the circumstances of the Northern Irish border, that that waiver would be forthcoming. It is a technical problem but one that is relatively easily solved. Again, I do not know what this actually means on the ground.

Q540 Dr Whitford: You do not think it would then become a leak in and a leak out of the EU. Obviously the EU itself is a very legal structure to try to enable the security of a level playing field.

Dr Bartels: It depends on who is doing it. If it is the UK allowing a free flow into the UK, it is, if anything, a problem for the UK. It is not a problem for the EU. We would not anticipate the EU reciprocating.

Dr Whitford: There would still be checks in the other direction.

Dr Bartels: For sure. You cannot stop that. It is the EU's border. It is going to protect it.

Professor Collins: I broadly agree with that. If you have an open border that has been declared by the United Kingdom you would have a breach of most favoured nation, Article 1 of the GATT, because it is giving preferential treatment to the EU and not to other members of the World Trade Organization.

The only issue to add is that you need to be aware that under the trade facilitation agreement, Article 7, there is reference to specific public policy issues and circumstances. The public policy is one that we have already addressed, and this is the very important social issue—peace issue—taking place in the particular context of Northern Ireland. That would have to be viewed, I am sure, in terms of how serious the transgressions were, and in particular the issue that you alluded to of whether it was a backdoor to Europe, in which case it would be perceived negatively, and if it was just a case of, again, local traffic. I suspect that it would not be.

To make a probably very controversial point—I am not saying this would work—we have already made reference to peace, paramilitary violence and warfare and so on. I cannot help but wonder if Article 21 of the GATT and national security exemption might potentially be relevant here. It probably would not be, because it is meant to be used in extreme circumstances. You may be aware of this because it has come to light recently because of some of the activities of the US in relation to the steel tariffs. Article 21 of the GATT refers to the essential security interests of a member. If there was an indication that any kind of a



border could lead to warfare or civil unrest or violence or damage to the peace process, there may be a purview to fit it under Article 21.

Shanker Singham: I would just add to that that you also need to differentiate between different things here. With respect to the earlier question, there is the issue with respect to people and movement of people, and preserving the feeling that you can cross easily and see relatives and all the rest of it.

With respect to people, the critical thing is the common travel area, and there are two critical things there for it to be administered properly. Neither the UK nor the Republic of Ireland can now join Schengen. As long as the Republic of Ireland is not a member of Schengen and as long as the UK does not start seeking tourist visas for EEA nationals, then the common travel area, with enforcement through employment checks and national insurance checks, might work. You are not that concerned about people coming over. What you are concerned about is illegal working—people coming over and then working, for which insurance checks can be done. The people issue is therefore very distinct from the goods issue.

The goods issue is that right now the Republic of Ireland checks about 1% of goods. There is no reason why that would change. That is the WTO traffic. Most of our proposals are dealing with the goods issues. The other part of it is that you have got this thing in the middle, which is people with goods. This is the famous truck from one of them that goes across the border. The way we suggested dealing with that is by opening up the exemptions for very small micro-enterprises in terms of customs, which I think you can do. To the extent that there are WTO issues associated with this, again you have to differentiate with the tariff issue, which is an MFN problem. You could not only open up to the EU. You would have to open up to the rest of the world.

However, this is a broader question, because in the event of no trade deal at all, it is quite likely that the UK would have to, certainly on some food and agriculture products, unilaterally lower the tariff to zero on an MFN basis to everyone, to avoid food price inflation. Some 60% of our mainland GB beef comes from the Republic of Ireland, so were that to happen, that puts Irish beef farmers immediately in competition with much, much larger industrial strength manufacturers. No deal poses a huge risk to Irish beef farmers.

That customs and tariff issue is to be differentiated from unilateral regulatory recognition or recognition of standards, which is again something that, on a broader basis, the UK might seek to do in the event of no deal. Unilaterally, regulatory recognition works in a slightly different way from the tariff side of things.

Q541 **Dr Whitford:** Could that be done purely to recognise the EU regulatory standards without doing it to other countries?



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Shanker Singham: You could do that. We could unilaterally recognise, through recognition agreements, many countries. That is done on a regular basis.

Q542 **Dr Whitford:** Within a no-deal scenario, obviously the EU would not be recognising the UK.

Shanker Singham: Clearly there would be deals struck in lots of different areas and you would fall back to regulatory recognition deals.

Dr Bartels: We need to distinguish when it comes to recognition of regulatory standards. What we are really talking about is recognition of products that are made according to different regulatory standards. At the moment, there is not an example in the world outside of the EU, with a very partial exception of what happens between Australia and New Zealand, of recognition of products that are made according to different regulatory standards. I do not think that could be done without complying with the MFN principle.

Secondly what is done, which Mr Singham is referring to, is there is the recognition of checks on products to see whether they are made according to your standards. That can be done with respect to a country or a group of countries or whatever, but that is something that is quite different. At the moment, we have not faced the question of whether it would be discriminatory to recognise, say, a bicycle from Ireland and not recognise an identical bicycle from Australia. I do not think that would be legal.

Shanker Singham: We do have an example of the New Zealand-EU meat trade agreement, which as an underlying product regulation agreement is perhaps the only one. As Lorand said, most of these regulatory recognition mechanisms are to do with testing and conformity assessment. There are examples, now, of underlying product regulation, which is the case with the New Zealand-EU agreement, where they actually manufacture, in terms of risk assessment and how they produce, very differently. The EU has agreed to that.

There is scope for this, but the broader point is that these are all going to be very limited because we are talking about a scenario where there is no free trade deal for any of this to be in the realm of what we are discussing, and in that event there is going to be enormous good will from the rest of the world to ensure that this does not create massive problems in the island of Ireland. The likelihood of a WTO member raising this as a problem, if it is limited to the all-Ireland economy and internal island of Ireland trade, is negligible.

Q543 **Dr Whitford:** Is that not the challenge: that you cannot actually say that once you set up a leak and an uncontrolled situation? We need to move on but, Dr Bartels, do you want to come back on that?

Dr Bartels: I do not want to turn this into a legal seminar, but I will just say that when it comes to SPS standards like agriculture, the MFN



principle does not apply in the same way. It covers that but it does not cover industrial products.

Q544 **Mr Fysh:** I just wanted to focus a little bit more on that, because you mentioned the MFN obligation that the EU might have in terms of recognition, and you mentioned SPS and the difference. Just for clarity's sake, would the EU be in breach of its obligations if it refused access to its territory of goods from the UK even though, on exit day, the UK's regulations will be the same or equivalent to the EU's?

Dr Bartels: That is the logical conclusion to be drawn from what I was saying before, yes. There are actually two principles that apply. One is that you cannot discriminate between like products, and that is what I was referring to earlier with the Australian bicycle versus the Irish bicycle. They should be treated the same way. The second rule that applies here is that you cannot impose regulations that are more burdensome than necessary to meet a given objective.

If on Brexit day the regulations that the UK has are considered by law and in fact the EU to be no more burdensome than necessary to achieve the EU's objectives, and that is because they are the same as the EU's regulations, I cannot see how that changes on Brexit day plus one. Down the track, things change, of course, and there are other aspects to this. One has to also look at the rules on checking for regulatory compliance and that depends on trust and there are slightly different rules that apply to that.

Just in terms of the underlying standards, yes, that is my view. I should say that it is an unpopular view, in Brussels and elsewhere and among my colleagues, but that is my view.

Professor Collins: I agree with that. I just want to add that the no change on Brexit day is further supported by the SPS agreement itself, which says that you are not allowed to discriminate where like conditions prevail. We are to understand that the UK's regulations will not change on Brexit day so the conditions would be like. In future that could be a problem, if there is a change, but immediately afterwards I would say no.

Shanker Singham: On Brexit day, in March 2019, on the day we leave the European Union, we will have ported over all the acquis, so we will have identical regulations. Any discrimination at that point would be a violation of the SPS agreement. You would have to look for forward changes. You would have to look at the TBT and the SPS agreement and their provisions, which broadly say that as long as the regulatory goals are the same, technical differences in regulation should not defeat equivalence in recognition.

That is obviously going to be a subject for cases. There is one wrinkle to this. If we assume that there is a withdrawal agreement and we continue into the implementation period, technically, my understanding of the Government and the EU's position is that we remain in the customs



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union; nothing has changed, so the operative date becomes 1 January 2021. Whenever it is that we are actually a separate customs territory and a full WTO member in our own right, with all that that entails, then we could rely on both the TBT and SPS agreements for any actions the EU might take against us.

Chair: I would just like to mention that I have actually got a copy of the Act here, which received royal assent yesterday, and the date is firmly set out in the Act itself, but it might be helpful for those who are listening to this to know that there is such a thing as the Act that has actually now being published, as it were.

Q545 **Mr Jones:** Returning to a potential no-deal scenario, I wonder if maybe Dr Bartels in the first instance could summarise the principal international obligations that would apply both to the United Kingdom and to the continuing European Union.

Dr Bartels: There is really one key obligation, and that is the most-favoured-nation obligation. There are many other derivative obligations that implement this obligation in specific circumstances, but really that is the one that matters the most. The UK is removing itself from being in an arrangement that benefits from an exception to that obligation. That is the most important difference.

There are some others that might be worthy of note. For instance, because of the single market within the EU it is possible to have SPS standards and common regulatory standards that are based on risks to a part of the EU's territory but not necessarily another part of the EU's territory for products that are grown there, because of the free flow of goods within the EU. If the UK leaves then SPS standards would have to be based on UK territory alone.

It is the same with trade remedies and anti-dumping and countervailing duties and safeguards. These are all defensive measures that have to be based on the territory at issue, and so for the UK, being a separate territory, those defensive measures will have to be devised and implemented separately but I would say it is those and the resurrection of the MFN obligation as between the UK and the EU.

Professor Collins: I agree.

Shanker Singham: There is not much more to say. We will be a WTO member and will have all the obligations that WTO members have.

Dr Hayward: If we are talking about a no-deal scenario, so no trade agreement, this is where the backstop kicks in. This is the whole rationale for the protocol on Ireland and Northern Ireland, which does not just deal with trade, of course; that is just one small part. The protocol on Ireland and Northern Ireland in the withdrawal agreement is to avoid a situation in which no deal creates the requirement of enforcing those procedures at the Irish border.



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Mr Jones: The scenario I was actually asking about was no deal at all.

Dr Hayward: Are you talking about no withdrawal agreement, even?

Mr Jones: Yes; no deal.

Dr Hayward: In that case there is no transition period and no common travel area.

Mr Jones: The common travel area would continue.

Shanker Singham: That is right.

Dr Hayward: The common travel area is secured in the protocol.

Shanker Singham: The common travel area precedes the European accession.

Dr Hayward: Yes, but the EU recognises and allows the Republic of Ireland to uphold the common travel area. That is agreed in the protocol.

Q546 **Mr Jones:** In the event of withdrawal without a deal, would not putting any customs controls in place either on the border or anywhere else be in breach of the UK's MFN obligations?

Dr Bartels: It depends on whether the waiver of customs duties benefits products from a WTO member, such as the EU, for example, and not other WTO members. I would say yes, that would be the conclusion.

Shanker Singham: I would say that applies to duties, certainly. If you want to unilaterally remove duties in any area, in that case you would have to do it on an MFN basis. With respect to making your customs clearance work better, coming up with things like better methods of warehousing relief and inward storage relief, which we have suggested would be an association of customs professionals, anything that is unilateral to simply making your customs system work better is something that all countries can do, and in fact are encouraged to do through the WTO Trade Facilitation Agreement itself. That is as long as you are not doing that only for one party. Clearly you would have to be doing it and you would be doing it for all parties, and it would only make sense to do it for all parties and for all trade. Then you could carry on doing that.

Q547 **Mr Jones:** Is that a credible scenario?

Shanker Singham: Absolutely, in terms of what we can do ourselves unilaterally on our customs. We should be doing it now. It is quite interesting that, regardless of Brexit, the UK's customs operations—I am not saying anything remotely controversial here—are much less advanced than the Dutch or even the Belgians. The Dutch have a self-assessment procedure, for example, for customs that works very well. It is completely compliant with the UCC and we could do it tomorrow. We could have done it two years ago but we have not.



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Our AEO programme is cumbersome and difficult to use. We have very few AEO companies. We have about 500. Germany has about 5,000. We can do a lot better on customs anyway, regardless of Brexit and regardless of any of this discussion. The fact that we are leaving the EU ought to concentrate the minds of HMRC and encourage them to do some of these things that could be done anyway, and we should be doing that right now.

Dr Hayward: I just have an important point to note. Obviously a customs border is two-way traffic, so you cannot unilaterally enforce a customs border. There is always the other side, so it is about imports and exports, of course. A lot of what will happen at the border after Brexit depends, of course, on what the EU is going to do, and that point has already been made.

If the UK is anticipating free trade agreements with other countries, the divergence between the UK and the EU is going to increase, which therefore increases the incentive for smuggling. Smuggling may be a small part of the world, but smuggling on the Irish border would be highly significant. It already is. That puts citizens at risk. It puts other things at risk. It puts legitimate businesses at risk, it is a loss to revenue and, more to the point, smuggling funds organised crime, which, in this particular case, is linked to paramilitary activity.

Q548 **Mr Jones:** Did Mr Juncker not say the other day in the Irish Parliament that the EU would not insist on any infrastructure at the border in the event of a withdrawal without a deal? I am just wondering how you can square what you have just said with that statement.

Dr Hayward: The question was posed by Richard Boyd Barrett. It was quite a convoluted question.

Mr Jones: I saw it, yes.

Dr Hayward: Mr Juncker replied, "Yes", so you can interpret quite a lot from that and different people have interpreted different things in that. I would be wary. I am concerned about what is going to happen in this case and a wary analysis would suggest that it certainly does not guarantee that the EU would not enforce a customs border if it came to that in this case, if it was put with no withdrawal agreement or anything.

Professor Collins: I would repeat the point essentially made by Mr Singham. With respect to tariffs, if the UK were to unilaterally waive tariffs in a no-deal scenario, we would have a breach of MFN. That is less so with respect to customs procedures, because arguably, under the trade facilitation agreement, there is an expectation for member states of the WTO to make borders as smooth as possible, and there is quite a bit of reference in that document to some of the technology we have been hearing about. I do not think that would not represent an MFN violation on the part of the UK.



Whether it would represent a violation on the part of the EU, were the EU to do the same, thing, which is doubtful, then you have to look at the EU's other borders with other countries, such as Latvia and Russia. Under the expectation—this is hypothetical—that the EU were to somehow agree to these cameras and barcodes and whatnot taking place in Ireland and not put them in place at the Latvia-Russia border, then it would look like you might have discriminatory treatment to two WTO members—Russia, in my example, and the UK.

I would then take you back again to the Trade Facilitation Agreement Article 7, which talks about public policy objectives and special circumstances. Again, given that we have this heightened situation, social unrest and potential for warfare and peace issues, a greater commitment on the part of the EU to more smooth traffic on one particular border and not another one would probably be justified.

Q549 Kelvin Hopkins: My question is to Mr Singham, Dr Bartels and Professor Collins primarily. There have been suggestion that if our current trading arrangements with the EU came to an end without a new free trade agreement being in place, Article 24(5)(c) of the GATT agreement would permit the UK and the EU to continue with current preferential arrangements on tariffs and regulatory standards for up to 10 years while a new trade deal was being negotiated. Alongside the frontier traffic exception, which you were mentioning earlier, is there a temporal buffer zone of this kind in existence?

Shanker Singham: The way the article on interim measures actually works is if you have two parties who are contemplating negotiating a free trade agreement or a customs union and they have notified the WTO—there has to be an agreement between them, so in a no-deal, no-agreement situation there is no application of this—there would have to be an agreement. There would have to be some sort of plan. In relation to the issue of how specific the plan has to be, there have been a number of different decisions in that area; some have suggested less specificity than others, but you would have to have some kind of plan and some kind of schedule.

You have to be negotiating an FTA within a reasonable period of time. The 10-year period means that people have suggested that beyond 10 years would be unreasonable. It does not mean that you get 10 years. It means that you may notify the WTO that your intent is to negotiate a free trade agreement or a customs union, and you have a plan for doing that. The plan has to be reasonable and has to be believed by other WTO members. It has to have enough specificity that it can work, and then you can do it for a reasonable period of time but a fixed period of time. You cannot say, "We want to have interim measures of zero tariffs and so forth for an indefinite period of time until we negotiate an FTA". You would have to say it was three years or whatever it would be. That is how that works. It is not a fall back to having no deal. It in fact requires a deal. It requires both parties to agree to have a deal.



Q550 **Kelvin Hopkins:** In theory, it could be up to 10 years.

Shanker Singham: Yes. Two parties could say, "We are negotiating a free trade agreement. We are notifying the WTO. We think it is going to take 10 years, and here is our schedule of things that we ultimately want to have lower tariffs on". There was one example where two parties did this and it was about 22 years, and that was deemed to be too long. The WTO thinking on this is that a 10-year period would not be unreasonable.

Dr Bartels: I broadly agree. I would maybe add a few points of detail. First, the 10-year period is set out in the understanding of Article 24 of the GATT, which is a document with treaty status. What it refers to, as Mr Singham was saying, is an agreement leading to the formation of a customs union or a free trade agreement. It is not actually a notification that you are negotiating on. It is an agreement that you are implementing over the course of 10 years. That agreement needs to be notified, so the 10-year period is not to give you free space to negotiate something. It is 10 years during which you build down your tariffs and other regulatory barriers to trade, which is what happened with the EU. It began in 1958 and it took 10 years, until 1968, for the customs duties to come down, but it is the same agreement. In fact, in practice, in the law, if you look at 24(5), it refers to an interim agreement leading to the formation of a customs union or free trade area, and then it talks about free trade areas and then it talks about customs unions.

There are three separate types of agreement. In reality there has not been for many decades a separate interim agreement. It is always a free trade area or a customs union that is notified, and that free trade area or customs union has a period of implementation within it, just like the original Treaty of Rome did, of about 10 years, give or take—they are not all completely compliant—during which those internal barriers are removed.

Q551 **Chair:** Of course in practice, this has been going on for some time. It is not a completely novel situation, in the sense that when you have an adjustment on the scale, quite clearly people have got to make their own adjustments within it. For practical purposes, when we came into the European Union, we had to make adjustments. Equally as we go out the same applies. Would that not be right?

Dr Bartels: Yes, but the question is what sort of adjustments they are, and in which direction. I do not really understand why this interim agreement issue has become important in this debate. To me, it is completely irrelevant. It is of no consequence. We are talking about whether or not there is going to be a continuation of a free trade area or a customs union. Given that, at the moment, there are no barriers, the only way in which this 10-year period could at all be relevant is if on real Brexit day—let us say it is either 2019 or 2020, whichever we choose—there is no deal and then you have a deal to create a new free trade area or a new customs union. Those are the only circumstance in which we should even be talking about this 10-year period, and no one is



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suggesting that that should happen. I wish it would just disappear from the debate, frankly.

Professor Collins: I agree with the last two comments, broadly. It is important to recognise that Article 24 speaks to the interim arrangement leading to a free trade arrangement or a customs union. It is predicated on there being one. It is not, "We will try to get one"; it is, "We have agreed to have one but it is going to take us this degree of time to get there". If it does not conclude with a customs union or a free trade area it is not really in the spirit of Article 24.

Dr Hayward: I would like to make a brief comment that the Committee might find helpful, and that is to not even look 10 years but to look at the next 270-odd days and what we have on the table, which is of course the protocol and the contentious issues that are there. We know from border studies that a chaotic environment increases the likelihood of border problems, so what we aim for is certainty in relation to legal procedures, economic rules, et cetera. This is what is intended to happen with this protocol. It is intended to give certainty, not just in economic terms but also of course in political terms as well in relation to the Irish case. That is why the protocol exists.

The EU would be thinking that it is being very flexible in relation to Northern Ireland and this backstop. It is a first step for negotiation on this. It is allowing Northern Ireland to be part of a customs territory or suggesting that that could happen, and also allowing Northern Ireland to be part of the single market for goods. In the mind of the EU, that is its flexibility and that has been reiterated several times.

This is why it is so important at this particular stage, rather than thinking about jumping through hoops in relation to WTO rules some way down the line, the EU is pressing for certainty on this and this is what is on the table. What it would require from the UK side is flexibility with regards to Northern Ireland.

Q552 **Kelvin Hopkins:** Essentially it would have to be mutually agreed between the two sides. It could not just be one side unilaterally pleading for more time.

Shanker Singham: No, there has to be an agreement. People can disagree about the level of specificity of the agreement, and there have been lots of different examples of this, but it does have to be an agreement. That is one of the reasons why it is so important that we get into the actual trade discussions of the future framework of the trade relationship, which we should have done post the December meeting. As I said earlier on, the only way that that happens now is by the UK actually submitting a negotiating text and putting it on the table for the EU to react to. The EU would welcome such a move.

Dr Bartels: Just to say, there is not that much disagreement about the level of specificity that you need to put into your plan and schedule for a



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new free trade agreement or customs union. The WTO has a document that spells out in quite a lot of detail exactly what you have to do. It is called the transparency mechanism decision. You can look at them. They are on the WTO website. Every time there is an FTA there are negotiations that go on in great detail about exactly which tariff is going to go down at exactly which point and all the rest of it, and then all WTO members meet in the Committee on Regional Trade Agreements and debate it, and complain if they feel it is not going fast enough or whatever. It is not an intention that is somehow notified smokily and then things get figured out later on. It has to happen on day 1. You have to say what you are going to do and then you have to do it.

Q553 Stephen Kinnock: I just want to touch on the backstop and the two different ideas that have been floated for the backstop: the UK idea and the EU idea. Obviously, the British Government are opposing the EU's idea of, in essence, a border down the Irish Sea due to the constitutional integrity of the UK, and the EU has so far put a lot of question marks, to put it mildly, over the various proposals that have been put forward by the UK Government. What potential do you see for common ground between these two different proposals? Do you think that there is a risk that the entire negotiating process could founder on the rock of this issue of the backstop?

Shanker Singham: As Dr Hayward just summarised, the EU has one position on the backstop, which is essentially a Northern Ireland/Republic of Ireland solution, and the UK's response has been, "You cannot have a border down the Irish Sea". Our proposal essentially was a customs union and single market for the whole of the UK as the backstop, which inevitably means you are a rule-taker and anything else the EU might require for you to be in the customs union and the single market on an indefinite basis, assuming there is no agreement.

The problem with this is that, of course, it takes away any incentive the EU would then have to negotiate any kind of trade agreement with the UK. What you would likely see in that case is the EU simply sitting back and saying, "That is the arrangement; you are now locked into the position of being a rule-taker".

All the difficult things that we would want out of the agreement with the EU, particularly with respect to regulatory recognition and things like financial services regulatory recognition, would be very difficult to get. They will be difficult to get anyway but if the EU knows that the backstop arrangement is customs union/single market/rule-taker, then they are very unlikely to grant any flexibility in thinking on that.

Were such a backstop agreed, that backstop would become the agreement. It would also have significant implications on your WTO transition process. We are in a process now of negotiating the agricultural import quotas, the TRQs that we need, from other countries in order to fully take up our WTO seat and present our schedules in the WTO. If countries believe that we really are going to end up in a customs



union, then there is no reason, of course, for those TRQ negotiations to go forward so they will pull back from those. Of course, if you are also going to be in a customs union/single market as a rule-taker, then there is no possibility of any kind of independent trade policy so your potential trading partners that you are talking to, such as the US and other countries, will pull back from that discussion as well, which will leave the UK in a no-man's land for an indefinite period of time.

Dr Hayward: First, I do not see what the UK has proposed in its technical note on customs arrangement as constituting a backstop. The protocol on Northern Ireland in the draft withdrawal agreement covers all sorts of things, not just trade and not just customs and regulation. North-south co-operation and rights—very importantly for the Good Friday/Belfast agreement—are included as well, of course.

The UK has just put forward something that sounds rather like a transition period on top of a transition period for customs, basically suggesting that it would benefit from the EU's permission for Northern Ireland to be part of the customs territory for the UK as a whole to be in that form. That does not cover those other things that the EU's backstop would cover.

It is important to note that the backstop issue is an insurance policy. It is intended only to kick in if the future trade relationship does not avoid a hard border and does not protect the Good Friday/Belfast agreement. It is very clear that it is a protocol for Ireland and Northern Ireland; it is not a protocol for the UK and the EU. That does not make any sense. The future relationship is something that comes afterwards, obviously after withdrawal, and so there is a danger here of trying to squeeze in something for the whole of the UK that is specifically intended for the unique and particular circumstances of Northern Ireland.

I just want to pick up on the language that you used there. The constitutional integrity of the UK is not diminished even as it is by distinct arrangements for Northern Ireland. The Good Friday/Belfast agreement changed the constitution of the UK itself, and the devolution of Scotland, Wales and Northern Ireland are a vital part of making the Good Friday/Belfast agreement work. As has already been noted, Northern Ireland has different systems, including regulation, in all sorts of areas—SPS for plant and animal health being a very obvious one—and it is the intention to keep that going. The language about the distinct arrangements for Northern Ireland never uses the language of there being a border in the Irish Sea. That is really not helpful when we need to think about what could work for Northern Ireland in this situation bearing in mind, as I say, that this is just an insurance policy just in case we do not get the future relationship between the UK as a whole and the EU that we would all like to see.

Q554 **Stephen Kinnock:** I would like to move to a slightly different angle on this. It has been suggested that, if the UK were to leave the EU and



remain as an EFTA country, that it could be possible to be part of EFTA and then have a protocol from EFTA into the EU customs union with special arrangements for the land border in Ireland. Clearly, there is hard infrastructure between Norway and Sweden but the issues are very different on the Norway-Sweden border to what they are in Ireland. Do you see that as a viable option for the UK—EFTA plus a protocol on a customs arrangement or customs partnership?

Dr Bartels: Yes, although there is no magic to EFTA and there is no reason to try to negotiate something like that with other EFTA parties rather than just going straight to the EU and negotiating a standalone. Yes, the UK is part of the EEA but on the side of the EU; it is not an EFTA state anymore—it left when it joined the EU—so the UK would have to negotiate to become an EFTA state and then negotiate, from within EFTA, an agreement with the EU. All of this is very long-winded and unnecessary. The one possible value of what the EEA arrangement is, which is not to be confused with EFTA—which, frankly, is just four countries—is that there is a court that, confusingly, is called the EFTA Court but is actually the EEA court. It has been said by Carl Baudenbacher principally that the EEA court is open for business. That is wonderful. Maybe we will join the EEA court or we will come up with a new one. These are all technical details that are neither here nor there. I would say, “Stay simple and negotiate in a straightforward way with the EU and do not run it through Iceland”.

Shanker Singham: Yes, I would agree with that. The issue with EFTA is that it is a trade agreement, so it does not give you, by itself, access to the European Union. What the countries have is the EFTA Convention, which provides for product regulation, et cetera, covered by EEA rules, so it is the EEA agreement that gives you the access to the European Union, which means you would have to be an EEA member or a party to the EEA agreement. The Swiss do it slightly differently but essentially we are talking about an agreement with the EU anyway.

Stephen Kinnock: The EEA agreement already exists.

Shanker Singham: There are consequences to the choices you make. You could do that. You could become part of the EEA agreement. However, if you are going to do that, you have limited your regulatory autonomy and you will therefore take your independent trade policy off the table in any meaningful sense, because the UK is a big services exporter and services trade negotiation is really a domestic regulatory negotiation and you will want to have maximum flexibility.

Q555 **Stephen Kinnock:** No, but you would not be in a customs union.

Shanker Singham: A customs union is only tariffs and goods. Even a customs union by itself does not solve the Irish border problem because it is product regulation that comes from the single market that is the issue here. The point is that, if you limit your regulatory autonomy through the EEA agreement or through the single market or through



whatever it is that you have done it by, then with other countries that might say, "In a trade agreement we actually want you to change your product regulation in the following way, your standards in the following way and your agricultural regulation in the following way", in the negotiation you have taken that all off the table, so you have made yourself not a credible trading partner to those countries.

Q556 Stephen Kinnock: My personal view is that that is disputable but it depends on how much autonomy you think the EFTA Court has. That is probably a topic for a completely different hearing and I do not want to go down that rabbit hole.

My very final question is based on this question on what it takes to deliver frictionless trade. Clearly, there is an ecosystem that is the single market and the customs union, and there are many false distinctions being drawn between the customs union and the single market; they operate as one. Looking at the Northern Irish border, in terms of resolving the issue, being part of a customs union alone would not solve the problem at all. That is your unanimous view across the panel. Some sort of EEA or single market regulatory alignment deal would be an essential part of delivering frictionless trade across that border.

Shanker Singham: It depends on what your goal is. If your goal is to have the same free circulation that you have now, free circulation will only be delivered through a customs union and single market. There will be frictions. In our proposal there would be frictions. What we seek to do is to minimise those frictions as much as possible consistent with having an independent trade policy for the rest of the UK.

Q557 Chair: Would Professor Collins like to comment?

Professor Collins: The only point I want to make with respect to the backstop, so having a separate customs arrangement for Northern Ireland and Great Britain, is to draw attention very much to this issue of the integrity of the United Kingdom economy. This is something that should not be taken lightly. I recognise that there are some regulatory differences between Northern Ireland and the United Kingdom with respect to agriculture and so on, but you need to be very careful about interfering with that. This is a very important aspect of the union and many countries around the world take this incredibly seriously. It is an aspect of the US Constitution if you look at the Commerce Clause. Canada recently passed a statute on internal trade to facilitate trade between the provinces.

If you start to interfere with this, it could lead to problems—not just political ones but economic ones—especially in terms of international law if you look at any potential divergence in tariffs. If you have a different tariff arrangement in Northern Ireland than you do in Great Britain, you might potentially run into problems with the international concept of best-in-state treatment, which is found in Article 27 of the Vienna Convention, which specifies—it is actually an investment law concept—that external traders are entitled to the best treatment within that state



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and within that territory. You could have an investor saying that, if Northern Ireland has a lower tariff than Great Britain, they are then entitled to the lower tariff that Northern Ireland is offering anyway.

I do not think that you can really have two separate tariff regimes within a particular state without raising the risk of problems internationally, unless you want to get involved in one of these arrangements as has been discussed with respect to Macau and China.

Dr Hayward: I agree that the customs border is a tricky one between Northern Ireland and Great Britain. Regulation is slightly different. Even within the United States you have some different regulations in different states, so I would not exaggerate that issue.

Dr Bartels: It is also not quite true to say that differential tariffs within the same sovereign entity is a problem. I am not sure entirely which Vienna Convention Professor Collins is referring to. I would have to study what he said in a little more detail. I would see this more as a political issue and an issue that is perhaps relevant to UK constitutional law; I do not see the international law dimension.

Q558 **Chair:** I am very glad you mentioned that, because actually we have here, as I said before, the Act itself, and what that clearly states is that the repeal of the European Communities Act, Section 1 of the Act, will take effect on exit day. Exit day is clearly defined in the Act. That therefore means that, with respect to our own enactment and our constitutional position, which is what you just referred to, the fact is that it would be completely inconsistent for us to remain in a customs union or a single market that is itself defined by reference to the treaties that will now be repealed by virtue of the enactment itself.

We are moving into a situation where we can be discussing these matters but, for example—and I discussed this with the president of the EFTA Court—it is almost unheard of for the EFTA Court, as it is called, not to be consistent and in harmony with the European Court of Justice. Without going into all that—as we said, it is a separate issue—it is important to remember that we now have a constitutional position that is set out in this Act. It is a very big change because before we were in and now we are going out. It is set out in that Act. Did you want to say something?

Shanker Singham: I just wanted to pick up on one thing that Professor Collins said at the end. The integrity of the UK single market is fully recognised. The Good Friday agreement talks a lot about the integration of the island of Ireland but it also talks about the integrity of the UK single market. I would just point out that separating and fragmenting Northern Ireland from the rest of mainland Great Britain would implicate that.

Dr Hayward: I am sorry; it does not mention the UK single market.

Q559 **Chair:** I do not think any of you can possibly disagree with what I have just said about the implication of the Act. That is for the record and I



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would be very surprised if anybody wanted to challenge the idea that, as of yesterday, this Act quite clearly states that the European Communities Act 1972 is repealed from exit day. That is a fact. That is what it says.

Shanker Singham: That is a fact.

Dr Bartels: I would not dispute that.

Chair: That is quite a simple concept to get a grip of, is it not?

Shanker Singham: Your point about the EFTA Court is also well made.

Chair: I just wanted that on the record because I know that there could be some discussion about that.

Q560 **Dr Whitford:** This really follows on from some of the discussion about whether arrangements would be Northern Ireland only or would either leak across to include the UK or would have to be extended to the UK. Could I start with Professor Collins? You talked about investors having, if you like, different benefits in different parts of the UK. Northern Ireland already has special arrangements around things like corporation tax, which in Scotland and Wales we do not have control over. Surely, as was referred to by Mr Singham earlier, there is already divergence before we get into this. Surely divergence to solve the Irish border is—

Professor Collins: I appreciate that, and the analogy with the United States is apposite. Different states within the US will have different various regulatory regimes and tax regimes and so on. Some are advantageous. Look at the Delaware and California effect and so on. I was speaking with respect to differential tariffs, and it seems to me that that could be problematic. Dr Bartels has indicated that it might not be; it is something that I would have to look into. This is probably unnecessarily technical and it may be irrelevant: Article 27 of the Vienna Convention on the Law of Treaties states that you cannot use the provisions of your internal law to justify breaches of international law, and I would be worried that there might be a potential there for transgressions. This is in the investment law literature.

Dr Bartels: Can I answer that? Yes, that principle in the Article 27 of the Vienna Convention is quite true but it is only important if there will be a breach of international law. I cannot see any circumstance in which regulatory divergence within a sovereign state violates international law just for that reason. I also cannot see why having differential tariffs for different parts of the territory of a sovereign state raises any issue under international law just because it is that way. There are plenty of examples where this happens. Probably the most famous is China, which has four different customs territories. There are many other examples, so it is not unusual.

Q561 **Dr Whitford:** Mr Singham, you referred yourself to the comment about sanitary and phytosanitary regulations in that the whole island of Ireland for agriculture is treated as one and is different from the rest of the UK. I



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am just trying to understand why it would be seen as a problem for that to be the case to avoid the border. Would it not be better that it is focused on Northern Ireland? That now seems to be where the focus is in the backstop. Is it only to Northern Ireland, or will it include the whole island?

Shanker Singham: It is a question of degree. If you say there will be a single electricity market, a common SPS area, differential taxation and those sorts of things, the more you add to that, the more problematic it becomes. The question is what you can get away with in order to deal with this problem without having a significant impact on the UK's single integrated independent trade policy. People can legitimately disagree about where that line is drawn but there is a line somewhere.

I would merely say that the European proposal, which is essentially for a completely separate regulatory area in Northern Ireland from the rest of the UK, is quite a significant change because the big issues that people care about in most trade agreements now are behind-the-border barriers and regulatory issues. It creates a situation. The UK Government may be fine with that situation but you are basically saying to your trading partners, "You are really doing a deal with mainland GB", because all the benefits that you are able to give your other trading partners will not be shared with Northern Ireland. That presents a bit of a problem.

Q562 **Dr Whitford:** Is it not particularly around the industries that are important in Ireland? Obviously agriculture is one of the main ones but we already have differences in standards and labelling within the UK. There is a different standard that has to be reached to be allowed to be called "Scotch beef" and people in Liverpool can pay extra for Aberdeen Angus or not. That is not seen as a problem within the UK market at the moment. It is hard to understand. Are we not over-exaggerating how these things are a difference?

Shanker Singham: The very specific example you mentioned is not currently a problem because agricultural trade policy is with Brussels, so clearly the devolved powers will be different when the power that has been devolved for agricultural policy goes from Brussels to Westminster. That is a separate question that relates to how the devolved entities interact with the rest of the UK.

Q563 **Dr Whitford:** Surely then, if it is sitting in Westminster, there is nothing to stop Westminster agreeing that Scotch beef can still be Scotch beef.

Shanker Singham: It is the same question: what will your trading partners think of this? If they think it is not important—and they may well in those examples think it is not important—then it does not negatively affect your independent trade policy. If they think it is important, then it will.

Q564 **Dr Whitford:** Obviously, we know America does not like these geographical indicators, et cetera.



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Shanker Singham: Right, exactly. It depends how big that product is in terms of what they are thinking of with regards to what the benefits of the deal would be to them.

Q565 **Dr Whitford:** So you see the biggest problem in this as being in doing external trade deals rather than internal function.

Shanker Singham: Yes.

Dr Bartels: Can I say something about the third country agreements issue? The protocol that we have seen in the withdrawal agreement quite clearly states that Northern Ireland will be part of the EU's customs territory. That also means that third country agreements will apply to Northern Ireland. That is because all EU third country agreements have a clause in them that say that the agreements apply not just to EU territories—that is the member states' territories—but also to any other territory that is part of the EU's customs territory, and that clause is designed for Monaco. The protocol's treatment of Northern Ireland as an EU customs territory is essentially the Monaco option, which means that Northern Ireland will benefit from these agreements.

There would obviously have to be some sort of negotiation between the UK and the EU on how Northern Ireland can become part of those agreements in all respects, because we have an odd mix of a sovereign territory, or part of a sovereign territory, being in another—for these trade purposes—sovereign entity's territory. I do not think there is a precedent for exactly that situation so there would need to be some sort of negotiation. Of course, Mr Singham is entirely correct that what remains, which would be Great Britain, would have to conclude free trade agreements on its own with respect to Great Britain's territory.

Q566 **Chair:** I would like to make something quite clear. You referred there to Northern Ireland in relation to customs territories. That is the protocol that is being proposed by the EU. There is a slight implication—I am sure that it was mistaken—that you thought that that was something that would be actually applied in practice. That is a big issue of contention. There is no question in the mind of those in the United Kingdom that Northern Ireland will not be part of the, or a, customs union. We have debated this extensively during the withdrawal Bill, of course. I just want to get that clear.

Dr Bartels: Sorry, I am happy to correct myself. I was simply referring to the text that has been proposed by the EU of the backstop proposal.

Chair: That was just for the record.

Dr Bartels: Yes, I am happy to be corrected. Thank you.

Dr Hayward: There are quite a number of points. I will just refer to one or two of those. Northern Ireland is 2% of the UK economy, and a big part of the Northern Irish economy is, of course, cross-border trade. It is disproportionately significant for Northern Ireland. If you listen to



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businesses and civic organisations, and indeed citizens, in Northern Ireland, they do not want to see friction on either border, east-west or north-south. The anticipation that Northern Ireland would benefit from future trade agreements is simply very remote at the moment compared to the immediate implications of a hard border, which are already being felt in the border region in particular. Businesses are already moving and people are already losing business. This is a very real tangible effect of Brexit that is happening in the border region in Northern Ireland more widely. Concerns about future global Britain-based trade relationships are almost beside the point at this particular time. The majority of the people in Northern Ireland, including the majority of parties, say that their preference is for the UK as a whole to remain in a customs union and single market with the EU. That is just fact. That is what survey data says.

Q567 **Chair:** Who says that?

Dr Hayward: That is the UK in a Changing Europe survey. It is 61%. It is Catholics and Protestants. 58% of DUP voters say that that would be their preferred outcome. Indeed, if you look at what the DUP itself has said in manifestos, it recognises the particular circumstances of Northern Ireland—

Q568 **Chair:** Do you recognise that is actually impossible under the Act?

Dr Hayward: I am just repeating what the survey data has said when people have been asked what their preferred outcome would be for the future UK-EU relationship.

Q569 **Chair:** So you are really challenging the constitutional basis on which the Act has been passed.

Dr Hayward: I am just repeating what the survey data says. The next preferred outcome is for something specific to Northern Ireland. Although people would prefer it if there was no friction east-west or north-south—people across the community from different backgrounds all would prefer that there be no friction east-west or north-south—specific arrangements for Northern Ireland is something that would be acceptable. As I say, the business community is becoming increasingly forthright in relation to that.

Q570 **Dr Whitford:** You were mentioning that there are already problems happening at the actual border region itself. What kinds of things? Are these small local companies moving?

Dr Hayward: The history of the Irish border is one where you have back-to-back developments. Businesses on either side of the border would not work across the border. It was very difficult to do so during the Troubles, and so businesses in Northern Ireland trade into the UK and therefore we have a lower exporting rate in Northern Ireland businesses. Then, in the south, of course, they trade with the Republic of Ireland locally.



What you have seen over the last 20 years is the growth of this cross-border trade that has brought great benefit to the border region itself. Now what we are beginning to see is a return to the back-to-back developments. Things are still too uncertain so they are taking decisions, and those decisions are away from cross-border movement and trade towards being a bit more secure.

If businesses in Northern Ireland want access not just to the Republic of Ireland but to the single market, they go across the border. If businesses in the Republic of Ireland want access to the UK market, they do not go to Northern Ireland; they go to Great Britain. This is a problem for Northern Ireland in the longer term, and it relates to that much bigger point about peace in Northern Ireland and the connection to economic development. What has created the steady economic growth that we have seen is that environment that is now under pressure.

Q571 Kate Green: The next question immediately follows what Dr Whitford has just said, and it is one very specific question. At the very beginning of this session, you mentioned that attitudes in Northern Ireland—and perhaps in the Republic too—were becoming more polarised. Could you say a little more about what that polarisation looks like? Everything that you said most recently in response to Dr Whitford's questions suggests quite a coalescing of opinion.

Dr Hayward: Yes, it is interesting actually that, in relation to the Brexit preferred outcome, people are quite agreed. When we are talking about the future of the border, constitutional questions and the possibility of constitutional change, it is unsurprising that we see polarisation. A Sky News poll back in April showed that 51% of people in Northern Ireland think that there has been a "deepening division"—that is the phrase used—between the two communities within Northern Ireland. There have been several studies since to demonstrate what that actually means.

Now, people consider that putting the Irish border back as a point for not just discussion but dispute between the Irish Government and the British Government, not to put too fine a point on it, is a very dangerous thing to do in relation to Northern Ireland. Of course, people then begin to think more particularly about the constitutional future of Northern Ireland. The majority of people, regardless of background, think that a border poll is more likely to happen—so a poll about whether Northern Ireland should become part of a united Ireland.

There are different results from different surveys according to what people think the outcome of such a border poll would be and whether Brexit has changed their viewpoint on it. The report from Lord Ashcroft Polls said that 28% of people who said they would prefer Northern Ireland to be part of the UK have changed their view now in light of Brexit to say that they would now want to be part of a united Ireland. Some polls—Lord Ashcroft Polls and LucidTalk polls—are saying that the margin between people wanting Northern Ireland to be part of the UK



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and those wanting Northern Ireland to be part of a united Ireland is diminishing in size. That is not replicated across all surveys.

The Northern Ireland Life and Times Survey is an interesting one because it is done year to year—I tend to rely on this for my teaching, in particular, and it has shown something interesting this year compared with last year, which is that there has been a change now amongst Catholic respondents. In 2016, the majority of Catholic respondents were saying that they preferred that the status of Northern Ireland was devolution within the UK. In many ways, that is a sign of the success of the 1998 agreement 20 years on. This year it has changed; it has regressed, or swapped around, so the majority of Catholics now are saying, according to the Northern Ireland Life and Times Survey, that they would want a united Ireland.

You can see that the border issue being back on the table has very direct effects. Of course, this is then replicated most particularly in the positions of parties. This is why it is important to note the similarity, or the evidence of similarity, across the parties on many things, including in relation to Brexit: the emphasis upon avoiding a hard border and indeed the preference, of course, for the UK to remain in the customs union and the single market.

Q572 Chair: You mentioned a border poll. You will agree that, in order to have a border poll anyway, you need to have consent. You cannot just say, “We are going to have a border poll”. It has to be consented to by the United Kingdom Government.

Dr Hayward: The Secretary of State for Northern Ireland would be the one to make that decision and to trigger the border poll.

Chair: So you agree with me.

Dr Hayward: Absolutely. It is the Secretary of State’s decision.

Dr Whitford: My understanding was that, if there was a majority wish in Northern Ireland for a border poll, they would have a border poll.

Chair: That is implicit in the arrangement.

Dr Whitford: In the Good Friday agreement.

Dr Hayward: If the Secretary of State thinks there would be a majority for a change to the constitutional status of Northern Ireland then she would trigger the border poll, or has a right to trigger that.

Q573 Dr Whitford: If the polls in Northern Ireland showed 80% of people wanted a border poll, could the Secretary of State still refuse that?

Dr Hayward: That is a good question. I do not know the answer to that question. If it seems that there would be a majority in favour of a united Ireland, it is up to the Secretary of State to trigger the border poll.

Chair: It is not done on a whim.



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Dr Hayward: No, and do we not realise now how important it is to take these plebiscites very seriously?

Q574 **Chair:** We are getting into the constitutional status question, and the whole basis on which these decisions are ultimately taken, and that is slightly outside what we are talking about overall. Fundamentally, the constitutional position is as stated in the constitutional settlement of the United Kingdom. Obviously, Northern Ireland is part of the United Kingdom. That is something that is uncontentious. What you are saying is that there are circumstances in which you could envisage the idea of enough people getting together to make a decision as to whether or not there ought to be a border poll, but then that in turn is related to the constitutional status of Northern Ireland within the framework of the United Kingdom; is that not right?

Dr Hayward: The conflict in Northern Ireland was about the legitimacy—

Q575 **Chair:** You are not advocating a border poll, are you?

Dr Hayward: No, I am just saying that the conflict in Northern Ireland was about finding an agreement between the British and Irish and the parties in Northern Ireland about the constitutional status of Northern Ireland. The Good Friday/Belfast agreement did not resolve that question in many ways. The border poll shows that actually this is still a live issue, hence we see the popularity and support for Sinn Féin and the DUP at opposite ends of the political spectrum in relation to the border. It is still a very live issue and hence any discussion or debate about the future status of the border, regardless of whether we are talking about movement of goods or movement of people or whatever, is highly sensitive and highly contentious. There has been a change. I would not exaggerate it. As I say, different polls say different things but there has been a shift towards people thinking that Brexit—especially a “hard Brexit”, as people would put it—makes a united Ireland more likely.

Q576 **Andrew Lewer:** Some of the topics that I have in mind have been covered already, so perhaps we can just have a brief comment from you all about some of the other ideas and things that we have discussed and that have come up in the media and been commented on by experts and officials for a way forward with this. One is Northern Ireland becoming an independent customs territory while part of the UK, which is the Macau/Hong Kong idea. Another is a system of dual classification where Northern Ireland goods are classified as either EU or UK goods depending on where they are going. Another is a channels model where checks take place at ports and airports for goods entering Northern Ireland but there is a different green channel for goods moving from Northern Ireland to Great Britain. I am not going to ask you whether those are the solution, because they are clearly not, but are any of those even possibly part of a viable solution in the future?

Dr Bartels: Could I just comment on the first of those? I see it not really as part of a solution, and this is the status of Northern Ireland as a



separate customs territory from Great Britain, both under the sovereignty of the United Kingdom. This is possible under international law and, in fact, the WTO agreements recognise that this can happen. I would only flag up that this actually raises a most-favoured-nation obligation problem. You can see the reference to this problem in Article 24, paragraph 1 of the GATT, which is one of the few paragraphs of Article 24 that has not made an appearance in the debate over the last couple of years. That would mean that there would need to be—not that this would at all be difficult—an agreement notified to the WTO providing for free trade between Northern Ireland and Great Britain. That would be the easiest way of solving that problem. Formally speaking, being a separate customs territory does trigger WTO issues.

Shanker Singham: I agree with that. A better approach would be to make it slightly narrower, and that is why we have focused on what a special economic zone would actually look like within Northern Ireland. You could have a separate regulatory arrangement in that special economic zone. There is certainly ample precedent for special economic zones that have different regulatory systems. You could even have facilities outside—and this goes to your third point—that would be able to opt in to such a regulatory environment so your special economic zone is not an entirely geographically contiguous zone; it could include a virtual element as well.

These are things that can be explored but I would just repeat that none of these things is a silver bullet. None of these things will by themselves solve the problem. The customs issue that you talked about are things that we need to be thinking about anyway. These are all part of the overall suite of things that you would want to do at the same time in order to try to achieve your goal of not hardening the border.

Q577 **Andrew Lewer:** Are there any other views on those three?

Professor Collins: I just want to add that the special economic zone idea is entirely sensible. I agree that it would not be an ultimate silver bullet solution. The only issue with legality for the special economic zone is where you start to get involved with subsidies and incentives; otherwise, they would, generally speaking, be compatible with world trade law.

I think you asked a question about the enhanced customs partnerships or the rebate idea. Were you inviting commentary on that? Were you seeking commentary on the enhanced customs partnerships as your third option?

Andrew Lewer: I just wanted to draw together numerous other ideas that have been floated about by people in this debate, so that you can either say that that is just a waste of time or that there is something in that.



Professor Collins: With respect to the enhanced customs partnership—so this idea of collecting tariffs on behalf of the EU and then offering a rebate and vice versa, which is a very complicated proposal—other than the fact that it involves tracking products, which is probably practically unworkable, the only potential legal issue that I can think of, which may not apply but is something that came to my mind, is whether or not refunding a tariff, in the event that the product ended up in a lower-tariff jurisdiction, would be perceived as a subsidy under the Agreement on Subsidies and Countervailing Measures of the World Trade Organization. It would effectively act as an export subsidy, and this could potentially be challenged.

Shanker Singham: Just on the new customs partnership, there are many problems with it. There are WTO issues. I think it is discriminatory with regard to an EU party as opposed to an external party.

Also, the major problem is that, even in a functioning trade agreement and a really well understood trade agreement, such as NAFTA, 30% or 40% of importers simply pay the MFN rate because they do not want to fill in the rules-of-origin forms and so forth. If you have a system that is this complicated, it is almost certain that most importers will not go through the process and so essentially what you are doing is you are creating around the UK, as it comes out of the EU, the common external tariff. That is what other countries will see when they are trying to contemplate whether you are a credible trading partner or not.

The other problem is that the only reason for it to exist is to give free circulation with the EU 27, and that is not a customs issue; that is an issue of product regulation in the single market. That requires either very tight regulatory alignment or being part of the single market, which again then tells your trading partners that you are not able to have that regulatory autonomy. If you are going to do that, you might as well stay in the customs union and the single market. That would be the logical conclusion.

Chair: We have had an interesting session. Thank you very much indeed. We have covered a lot of ground. I am very glad that we had it immediately after the Act went through and not before, because otherwise there might have been a lot of supposition as to what might or might not be the outcome. Thank you very much indeed. We will be reporting on this in due course. Thank you very much.