HOUSE OF LORDS

Select Committee on the European Union

EU Internal Market Sub-Committee

Uncorrected oral evidence: The level playing field and state aid

Thursday 27 February 2020

10.15 am

Watch the meeting

Members present: Baroness Donaghy (The Chair); Baroness Kramer; Lord Lamont of Lerwick; Lord Lansley; Baroness Prashar; Lord Robathan; Lord Shipley; Lord Wigley.

Evidence Session No. 1 Heard in Public Questions 1 - 9

Witnesses

Dr Lorand Bartels, Senior Counsel, Linklaters, and Reader in International Law, Faculty of Law, University of Cambridge;

Dr Holger Hestermeyer, Shell Reader in International Dispute Resolution, King's College London;

Dr Damian Raess, Assistant Professor in Political Science, World Trade Institute, University of Bern;

Nicola Smith, Joint Head of Equality and Strategy, Trades Union Congress.

HOUSE OF LORDS

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 14 days of receipt.

Examination of witnesses

Dr Lorand Bartels, Dr Holger Hestermeyer, Dr Damian Raess and Nicola Smith.

Q1 **The Chair:** Welcome to the first session of our brief inquiry. This is a public session that is being broadcast and will be transcribed. You will get the opportunity to look at the transcript afterwards and make any corrections that you wish. I remind everyone that this session is intended to focus on a better understanding of what a level playing field means in trade negotiations and agreements, as there appears to be no clear definition in international law, or across existing EU trade agreements. We are expecting you to solve that problem for us so that we can include it in our inquiry report.

I open up the session in general by asking whether you would like to make a few remarks of your own before we start, or whether you would like to incorporate them in what you think is meant by a level playing field in international trade. What are the key reasons for including level playing field provisions in trade agreements, or not?

Dr Holger Hestermeyer: Thank you very much for the invitation. You have already clearly stated, and it is quite correct, that there is no fixed definition of level playing field. I would take the question in two parts and start with the purpose. If you think, for example, of environmental protection, a country might have very stringent environmental laws requiring production to be according to the highest environmental standards, while its neighbouring country does not have those protections.

What would happen if you allowed complete and frictionless trade and investment between the two countries? It is quite clear that everyone would outsource the production to the neighbouring country and the environmental laws would be pointless in that their only effect would be that industry left and products would come in from the neighbouring countries. You would lose your industry, and at the same time environmental legislation would have no effect because the production violated those standards anyway, just in another country. That is the purpose.

The question then is the scope of this level playing field. I will give a couple of historical examples. The argument has been made repeatedly, for example when intellectual property was not yet protected in world trade law but in a separate regime, an intellectual property regime, and developing countries did not protect intellectual property to the same standards.

The US accused Brazil of trading unfairly, because the innovation and finance was done in the US and Brazil could just copy it. That was one of the arguments it levied against Brazil. You can make the argument with a lot of things. In the US, for example, a senator proposed the Level the Playing Field in Global Trade Act of 2019, which is mostly about trade and conditions of labour. You can see that this is becoming more popular. The

US has included a clause in its trade agreements with Mexico and Canada that car parts need to have a certain content of well-paid labour.

The content is contingent on what the parties agree. We know from EU statements what the EU would like to have in there, and we know that the EU seems to regard this as mostly about the regulatory regime of a country and unfair regulatory advantage—environmental protection, labour protection, tax standards, state aid—but, as I said, this is contingent on what the parties agree, and the UK could come up with its own proposals for what would be required for a level playing field. This will in the end be a subject of the negotiation.

Dr Lorand Bartels: We have the same sort of approach, so it probably makes sense for me to speak here. The concept of a level playing field in this area dates from around 2006. It is an EU concept, as such, and what is interesting about it is that it covers not only values that are to be protected—Holger mentioned environmental standards and labour protections—but pure economic matters such as subsidies. That is interesting, because it makes it very clear that what is going on from the EU's point of view—I will focus just on the EU for the time being—is that it wants to ensure that production in the EU is not being undermined by exporting companies being able to produce more cheaply because they do not have to meet the same standards.

This is an ongoing issue in trade law at the multilateral level, and it goes back to the very origins of the multilateral trading system. The invention of the International Labour Organization is really a level playing field concept, because it is designed to raise labour standards in exporting countries to ensure that you are not undercut.

In that way, you can see there is a dual aspect to the level playing field, at least when it comes to the values dimension, which are labour, environment and human rights and so on. On the one hand, you can say, "We are just protecting our ability to have high standards, because if we were undercut we would be under pressure to race to the bottom". It is an anti-race-to-the-bottom type issue. There is also a slightly more missionary aspect to this, which is the idea that you probably should be encouraging the use of high standards in other countries for their own good. These two dimensions work hand in hand.

One could add to the level playing field, because if the overall idea is that you want to ensure that the exporters' costs are as high as your producers' costs, there is no limit. Theoretically, you could include a customs union in the concept of a level playing field, because a customs union—let us take it from the point of view of the EU—has the great merit of ensuring that any product that is imported into a member of the customs union, an input product, comes in at the same duty rate as it would if it came into the EU, the other part of the customs union. It is one reason why customs unions are popular. The only other way you can deal with that in a free trade agreement is to knock it down with rules of origin, which is time-consuming.

The point is that the level playing field is essentially about ensuring that the other side raises costs to your levels. You can dress it up as values, but really it is hard-nosed economics at its best.

Nicola Smith: Thank you very much for the opportunity to speak here today. From the TUC's perspective, it will not surprise you to hear that when we talk about a level playing field our core area of concern is employment and social protection—as well as environmental standards, but the focus of our work has been on a level playing field with respect to employment rights. From our understanding, as others have set out, what we mean by level playing field is a common set of regulatory standards as a minimum basis on which all countries participating in a trading arrangement agree to compete.

Your question in this area was focused on how we understand the concept of a level playing field generally. From my perspective, I do not think that this term is used generally in international trade, because it is quite particular to the trading relationship which the European Union and the UK are now seeking to negotiate. This is the only international trading relationship we can think of where both parties start from a point of common convergence to a set of minimum standards. In other international trading arrangements, you would not start from anywhere near a level basis or a common regulatory framework. You would have to make very significant changes in your internal regulatory protections to your domestic legislation to allow you to get to that point. This is a unique situation; we are starting with a very large geographically close trading partner with which we already have a common framework of minimum protections.

In terms of defining what the level playing field means in that context, the best source of information is what was agreed between the UK and the EU in the political declaration, which sets out very clearly that it is about seeking, at the end of the transition period and in the areas of state aid, competition, social and employment standards, environment, climate change and tax matters, to commit to retaining common high standards where there are already common high standards as the basis for trade between our very many nations.

Dr Damian Raess: Thank you very much for this opportunity. Based on my expertise on labour standards, I can perhaps add a little to the discussion, but essentially I very much build on what previous panellists have said. When it comes to a level playing field, first, the discussion is always in relation to sets of rules and practices that will ensure this level playing field; and, secondly, the level playing field cannot be dissociated from an idea or notion of fairness, in particular fair competition.

When it comes to labour regulation, there has been an early recognition that certain labour practices can provide unfair competitive advantage, creating distortions or difficulties in international trade. Historically, the best example is prison labour. If a country exports goods made through prison labour, by people who might be undernourished or who are not paid, clearly this undercuts the prices in the domestic markets that are

importing these goods and threatens the domestic producers. This amounts to social dumping.

The GATT in Article XX(e) allows reasonable market access concessions if the goods are produced under prison labour. This goes back to 1948, and of course, as my colleague on the right said, the question now is the scope of labour standards that countries need to uphold to ensure this level playing field. This has broadened over time, because countries have undertaken more international commitments, and I would argue that nowadays the fundamental labour rights, the eight core ILO conventions, to a large extent fall within the understanding of a level playing field, as a result of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

Also, increasingly, the ILO's Decent Work Agenda falls under this understanding of what a level playing field is. The ILO's Decent Work Agenda calls for acceptable minimum employment standards for employees. This builds on, for example, the ILO's 2008 Declaration on Social Justice for a Fair Globalization and, of course, the United Nations sustainable development agenda 2030.

Lord Lamont of Lerwick: May I ask Dr Hestermeyer this question, although it also impacts on what Dr Bartels has said? That is all very fine. I think we understand, and you have all explained very clearly, what a level playing field is, but when you say protection—protecting environmental standards, say, or protecting food safety—surely one of the issues is there may not be objective agreement or objective facts as to the impact on the environment. There may be different views about what is harmful in food. Also, there may be the argument, "We agree with your objective, but there are different ways of reaching that objective", and therefore different regulations.

A level playing field is a good idea, and as Nicola Smith said we start from a point where by definition there is a level playing field, but what you illustrate by the way you put it, or possibly what you left out, is that this will come down to a bargaining about where there are objective facts and where there are not and where there are other ways of reaching the same objective. Again, as I think Dr Bartels hinted, this can be used for cheating as well.

Nicola Smith: Very briefly in response to that, I would not necessarily agree, because we have a common set of regulatory standards at the moment, so nobody is stopping us going beyond those. If the UK, or indeed the EU, wanted in the future to further progress social or economic agendas by building on the minimum shared standards and achieving objectives through those ways, that is fine. We are talking about retaining existing regulatory convergence between two sets of trading partners. I do not see there is particularly a point of dispute about that, and if there was to be a point of dispute about how any changes to regulations domestically or internationally continued to achieve the objectives of the level playing field, you would need to have some sort of dispute system in place, as we already have through the

European Court of Justice or through the EFTA Court, to decide whether or not the regulatory measure was indeed consistent with the agreement with respect to a level playing field.

It is important to separate out the minimum standards set by a level playing field and the national choices people make about how they want to build upon those. We are talking about setting a minimum basis for fair competition. Nobody is preventing further action beyond that.

Lord Lamont of Lerwick: I agree with that, but does that not mean, given that we start off with a level playing field by definition, what perhaps the negotiations should focus on is the future means of changing if, in the future, countries faced by new challenges or new information about particular standards want to change them? Would the British objective not be to have the freedom to set our own standards, possibly to be aligned, but to have a mechanism for agreeing how changes should be agreed?

Dr Holger Hestermeyer: Let me start by saying that I agree in principle. That is why I said at the end that this will be the subject of negotiation, of course. To simplify it, the debate is too black and white, as though there is a clear set of standards and it is the only set. The reality is that it is shades of grey. There are standards that we can all agree to. I do not think that a prohibition on slave labour, to give a very minimum standard, would be debated by anyone. From there, you progress continuously to greyer fields and end up with something that is very contested, where one side will say, "We regard this as a vital standard", and the other side will say, "We regard this as pure protectionism". The secret will be to find the right shade of grey to agree on and to find mechanisms to adapt for the future to keep it flexible; to adapt it upwards, but in cases of emergency and unforeseen developments at times changing it, if necessary, to change the standards downwards.

Dr Damian Raess: In terms of the objectives, there are internationally recognised labour standards that set minimum standards that all societies, all countries, need to agree and abide to. I mentioned the ILO core labour standards, for instance the elimination of forced labour/slave labour. It is also about the abolition of child labour; there is general agreement on that. It is also about the recognition of freedom of association and an effective right to collective bargaining, which, as you might know, is more contested across the world. None the less, by virtue of mere membership of the ILO, countries need to abide by these standards. That is as a result of the 1998 declaration that I mentioned.

The other core labour standard that I did not mention is non-discrimination in respect of employment and occupation. These are really non-negotiable minimum standards. Beyond that, of course, the discussion moves into EU laws and a level playing field and whether this is negotiable or not. I think this can be discussed further in some of the subsequent questions.

Nicola Smith: It might help to take it into a specific example and to look at one particular area of employment protection, the right to paid holiday. The minimum standard is 20 days per year. Many countries go above that; Sweden, France and Denmark have 25 days per year. However, when this was introduced there were various attempts by the UK Government to make the right more restrictive for UK workers, for example by saying that it could not be a day one right and that it could be paid at a reduced rate. Those attempts were stopped by the European Court of Justice.

As an example, I cannot see a case for why we would want to, if we wanted to continue to respect decent workers' rights, and I cannot see why the EU would want to allow us to move from 20 days' paid holiday a year, available as a day one right and paid at the same rate as the normal rate for the job. What would be the case for us wanting to move from that unless we wanted to compete unfairly on the basis of making workers' rights worse? I cannot see why the EU would want to allow us to do that, because why would it want to have a huge trading partner sitting on its doorstep trying to cut costs by treating workers more poorly than the requirements set by everyone else in the EU bloc? Why would any Government want to do that, because it would mean they would be making people's lives at work more difficult?

Lord Lamont of Lerwick: I think the word "allow" is rather questionable.

Nicola Smith: When you get into the specifics, what is a better way to enable workers to have more paid holiday? It is a minimum standard. If as a nation we decide we want workers to have more paid time off from work, that is fine. There is nothing stopping us doing that. Many other European countries have already done so. The European Union is asking in its negotiating mandate that, as part of the terms of trade, we do not have free access to its markets unless we agree to continue to provide workers in the UK with a basic minimum set of holiday days off.

Dr Lorand Bartels: The important point is the reference. You always need a reference to say, "This is the standard we agree to uphold". The EU's approach has been to say that it is the common standard applicable at the end of the transition period. Before the latest version of this came out, Holger and I had a discussion about what that means. My reading, even more so given the latest draft, is this basically means EU law. That is our reference point according to the EU's negotiating mandate.

It is also important to recognise that this is not cast in stone and this is also unusual when it comes to international trade agreements. The usual reference point for something like a level playing field type commitment is proper internationally agreed standards, which, as we heard before in the area of labour, is ILO standards. There are also some set out in multilateral environmental agreements, so that is the reference point there.

Other FTAs focus much more on not abusing your national law by failing to implement it to gain an economic advantage. That is a different concept. It is a bit blurred in the discussion on EU-UK negotiations, but that is quite a different type of obligation from one that says, "We take this common reference point, and we agree that we are not going to go beneath that". It is unusual in the EU-UK example that that reference point is existing law that binds the parties as of today without reference to international law.

Q2 **Lord Robathan:** What I am going to say rather follows on from what Dr Bartels has said. I think most of us agree that we should not be sending children up chimneys these days. The ILO has a role to play, absolutely. Is China a member of the ILO?

Dr Damian Raess: It is.

Lord Robathan: Oh right, that is interesting. These are the specifics, but the nub of the matter in these negotiations on a level playing field is who is in control. I will read you a couple of quotes, if I may. The first is from the Prime Minister's statement of 3 February: "Any agreement must respect the sovereignty of both parties … It cannot therefore include any regulatory alignment, any jurisdiction for the CJEU over the UK's laws, or any supranational control in any area".

I do not know if you have seen what I think is a very interesting speech by David Frost, who is now the negotiator against Monsieur Barnier, or negotiating with Monsieur Barnier. He said: "To think that we might accept EU supervision on so-called level playing field issues simply fails to see the point of what we are doing. It isn't a simple negotiating position which might move under pressure—it is the point of the whole project".

That leads to Monsieur Barnier's statement, and others who are saying, "Of course we cannot possibly give way on this, that or the other". Negotiation involves some compromise at some stage, but it seems to me that if the EU is going to view the level playing field as a so-called deal breaker, we are not going to get very far with this. What do you think is the rationale for this approach?

Dr Lorand Bartels: One can divide up how the rules are arrived at and how they are interpreted. How the rules are arrived at will be in the treaty itself, and if it follows the EU's mandate this will be by reference expressly, or more likely implicitly, to EU law. That will be by agreement, which is fine: if there is agreement, there is agreement. This is just an interpretation of the EU's mandate.

The interpretation is different, and it involves the role of the European Court of Justice. The EU has also made it clear that, in appropriate cases, where a question of Union law arises that should go to the European Court of Justice for an interpretation. That certainly makes sense from the EU's point of view, because it is saying, "This is EU law and we should be interpreting EU law". The fault, if there is any, should be the reference in the treaty to EU law in the first place. The argument should be—

legitimately I think—if you do not want the EU to be interpreting EU law, do not incorporate EU law by reference into your treaty in the first place. It comes down to the nature of the standard you are agreeing to in the beginning.

Dr Damian Raess: I will elaborate a little and give my view on the EU's rationale in insisting on this level playing field with very high labour and social standards and, as the reference point, essentially EU employment law.

Michel Barnier, the EU's chief negotiator, has said that the UK is not Canada in geographical proximity as well as volume of trade. To understand this insistence on a high level playing field one needs to get at the core issue, which is: what is the Union about, what is the EU project about?

Here I will be a little provocative, but I will do so using a British journalist, Jeremy Cliffe, who is Brussels bureau chief at the *Economist*. He wrote a column in January 2019 in the *Guardian* whose title says it all. It said that the EU's essential motivation is the quest for a quiet life, by which he meant protecting the safety and the prosperity of its citizens. The backbone of that, of course, is high labour and social standards such as short working weeks, long holidays, universal healthcare and the like. He also said, and here is the full title of his *Guardian* op-ed, "Britons don't grasp the EU's essential motivation—a quest for the quiet life".

This is why there is the potential here to create a clash around those values and around precisely what the Union is about. This is why the EU wants to insist on maintaining these high standards: it fears that, because of the huge volumes of trade involving the UK and EU markets, there is a real risk of undermining of standards if the UK was to deviate considerably from EU law.

Lord Robathan: May I pick you up on that particular point? I am not a regular reader of the *Guardian* you may be surprised to hear.

Lord Wigley: Shame.

Lord Robathan: I am not sure about that. The point is if there is no sensible agreement and we revert to WTO terms, that is surely the antithesis of a quiet life. Surely the quiet life is one where we have a cosy agreement and we get on with it, much as we are doing at the moment. What do you think about that?

Nicola Smith: I will address that point in my response. I would not accept the idea that for the EU it is a deal breaker. I think it has been very clear about what it is asking for. It has said if the UK wants barrier-free and tariff-free access to all of the single, market, it will not allow that access on terms that allow us to compete unfairly with it and undercut its regulatory standards.

If we do not want to comply with a minimum set of regulatory standards, as you say we have the option of saying that we will have no deal, and

the EU will go along with no deal, the economic and social impacts in our country will be far worse than across the EU, and from the EU's perspective it will run the risk of us undercutting its regulatory standards but we will be paying a very high price for the opportunity to do that in tariffs, increased regulation and reductions in our trade flows.

That is the choice from the EU's perspective. It is saying that it does not want a deal at any cost, as Monsieur Barnier set out recently. It is saying that a deal comes on terms that facilitate fair competition, which was what the UK agreed to in the political declaration.

If you get into the specifics of what you talked about, you said everyone agrees that they do not want children going up chimneys and several people have made reference to ILO standards. We have great respect for those standards, but they are the bare minimum standards for basic treatment at work. They outline things like slavery and preventing people freely associating to join a trade union, and where they are included in international trade agreements they are very poorly enforced. We are talking about something different here, which is an existing set of regulatory standards, as I have set out, where we are already starting from a point of alignment with a very large close trading partner.

In David Frost's speech where he talks about the sovereignty that he is making the case for, which particular rights do the Government want the sovereignty to reduce? Do they want the right to cut holiday pay? It would help me to understand better, because talking about sovereignty as an abstract is sometimes a bit confusing and it is better to talk in the specifics.

Lord Robathan: Let us not go down that road particularly, although I could wax lyrical about it.

Nicola Smith: That is the question under debate.

Lord Robathan: Is there any suggestion that the United Kingdom wishes to reduce standards of labour and employment? I do not think so. Furthermore, if I might say so, why do so many people want to come and work here? Obviously a lot of UK citizens work on the continent, but stacks of EU citizens come and work here. Is it so awful?

Nicola Smith: Our Home Secretary is on record as saying if we could halve the burdens of EU social and employment legislation, that would be a positive thing for the economy. The Government has a track record of trying to cut employment rights, reduce protections for unfair dismissal, introduce fees for employment tribunals, and choosing to interpret existing European standards in the bare minimum way.

Maybe we do not want to get into an argument about this, but from my perspective I can well see why the European Union might want to maintain regulatory convergence, because the evidence is when Governments here have the opportunity they want to cut labour standards. If the Government want the sovereignty to do that, they

should come clean to the British people and tell them what they actually want to do.

Dr Holger Hestermeyer: There is a theme running through what I say, which is mostly de-escalation. The same goes for Mr Frost's speech. I fear that at times we risk having a "dialogue de sourds"; we talk past each other. Yes, it is entirely understandable that we do not want EU supervision in the agreement, but if I look at the mandate that is not what the EU is mostly asking for, and in the bits where it is asking for that it cannot be agreed.

When we speak about the level playing field as a deal breaker, there are level playing field obligations in some way, shape or form in every agreement now. In fact, in the UK's own rollover agreement there are level playing field obligations, so having them is unproblematic. What we need is a methodology of assessing them. References to international standards, for example, depending on the standards, are completely acceptable.

You seem to suggest that a non-regression clause from current standards is acceptable, because we do not want to lower the standards, so why should we not commit to not lowering the standards that we currently have? Those come on a scale as well. There is an obligation to enforce your own laws. That seems unproblematic. I do not think the UK is on the way to not enforcing its own laws.

The most problematic, for me, is dynamic automatic alignment with EU standards that are then not agreed by the UK.

Q3 **Lord Lansley:** I wanted specifically to ask about that. Let us not talk about non-regression. Let us look specifically—Dr Bartels, you referred to this—at the part of the new sentence added by the Council in the new negotiating mandate agreed by the Council on Tuesday: "and corresponding high standards over time with Union standards as a reference point". That is what I want to focus on.

If I understood correctly what you said earlier, there are essentially two aspects to this. The first is that not only is the European Union Council putting into the negotiation the maintenance of high standards, no regression and international obligations, all of which on the face of it were entirely negotiable, it has deliberately put in two things. First, it has put in some form of dynamic alignment in the future, which on the face of it is less negotiable, given what David Frost said in his speech. Secondly, and again you have referred to this, it has put in "with Union standards as a reference point".

That was interesting. You said that in free trade agreements that might not necessarily be the way you would do things, and you would use international obligations as a reference point. Would we be right in saying that the European Council, in adopting this new language, has specifically put in two things which it knows are likely not to be in the negotiating objectives of the United Kingdom?

Dr Lorand Bartels: What this means is still ambiguous, but the ambiguity will certainly cover dynamic alignment.

I want to make another point, which is that when it comes not to the common standards but, rather, going back to what are sometimes called non-regression clauses—really, the only proper example of a non-regression clause is the one being talked about between the EU and the UK; others do not exist, at least not without a lot of ambiguity—there is an asymmetry.

The mandate in paragraph 110 has quite an important non-regression clause in it. Some people have called it a ratchet, and it is a ratchet clause. It says, "In addition, where the Parties increase their level of environmental, social and labour and climate protection beyond the commitments"—in the other paragraphs, and there is a typo there—but including the common standards, "the envisaged partnership should prevent them from lowering those additional levels in order to encourage trade and investment".

That is normal up to a point in FTAs. The difference is that usually you are not prohibited from lowering your standards; you are only prohibited from failing to implement the standards you already have. That is a significant difference.

There is some ambiguity in two agreements that I know of, but my reading is that it is the same in those agreements; one is the EU-Japan agreement and the other is the CARIFORUM-EU agreement. The asymmetry that I am referring to here is that it is not the same in the UK and the EU. The two parties are the UK and the EU. As was mentioned, there is a difference—I cannot quite remember where—between EU basic standards and higher national standards. From the EU's perspective, this applies only to EU law and not to higher national law, and from the UK's perspective this applies to national law. There is a built-in asymmetry in that the non-regression clause, which already goes beyond any other non-regression clause that I know of in an FTA, applies to high national standards only on one side and the common agreed EU standards on the other. That is highly unusual.

Lord Lansley: One might argue that the reconciliation of that is that not only do we start with shared EU standards but, in so far as there are presently national divergences from that in EU law, they must in theory not be trade distorting, because if they were trade distorting there would have been single-market objections to those divergences. If one builds in, as I think the UK's negotiating mandate is likely to do, the maintenance of high standards, international obligations, and a commitment not to adopt measures that would distort trade, the EU would take that on board.

Dr Lorand Bartels: Yes, I think that is a fair point.

Lord Lansley: We are trying to understand what "level playing field" means in the context of the forthcoming negotiation. The European

Union, on the basis that I was describing, has substantially changed what it means by "level playing field". It means a level playing field over time by reference to EU law, and the latter part the United Kingdom had made clear we were not going to do.

We had made clear that we were going to agree to the high standards over time, not on the basis of any commitment in the treaty but on the basis of making our own judgments about our own standards.

Dr Lorand Bartels: I agree, but the ambiguity in the additional sentence that I referred to could, as I said before, cover dynamic alignment, which is what you are referring to, but not necessarily, because it could also be more modest and end up being a clause which one sees quite commonly in FTAs; it is even elsewhere in the mandate. It says that the parties shall strive to ensure the achievement of high standards, and so on. That is a much softer obligation than dynamic alignment. There is a lot of ambiguity in this mandate, including, for instance, on dispute settlement.

Nicola Smith: I suppose the references that are made to the European Court of Justice are in there because that is the only court with authority to interpret EU law. It is also referenced in the EFTA Court where it makes reference to ECJ judgments. It is a practical issue of how, if you have a level playing field, you interpret compliance with it. It has to be the European Court of Justice, because it is the only means by which that law can be interpreted across the member states.

More broadly on the question of how labour standards or wider standards for social and environmental protections are enforced in trade deals, the answer is they often are not. They sit in chapters separate from other aspects of trade agreements, such as investment provision. Sometimes they lead to a strongly worded letter being written from an advisory body or joint committee to whichever side of the trade agreement has violated the labour standards, and very little action is taken.

We are talking about a higher level of supervision and enforcement activity, but that is because we are starting from a baseline of comparison with pretty much zero in relation to how labour standards or social protections are enforced across wider trading relationships. I would not present it as excessive, I would present it as a minimum requirement if you are realistic about incorporating level playing field provisions into your trading relationship.

Dr Lorand Bartels: I do not know whether we will deal with this later, in which case I am happy to wait, but is it appropriate to talk about the role of the ECJ now?

The role of the ECJ is unusual in free trade agreements. The analogy would be the UK Supreme Court, which would then interpret UK law. Trade agreements never say that the domestic law of one of the parties will be interpreted by its supreme court, because from the point of view of the international tribunal, domestic law on either side—so EU law on one side and UK law on the other side—are matters of fact that would be

determined by reference to the legal systems and the jurisprudence, case law and so on in the respective jurisdictions. But, ultimately, the tribunal would have the power to determine what the law means for the purpose of working out whether there had been a violation.

There are a few different reasons why the EU has insisted on the ECJ's role in this subsidiary way of determining a fact. Partly it is because the ECJ is a jealous god and does not like outside tribunals saying anything about EU law, which is why the EU was not able to accede to the European Convention on Human Rights. In addition, it makes somewhat more sense in the trade sphere, because you see these sorts of clauses in association agreements where the other party joins, or is supposed to join over time, the EU acquis. It is therefore much less controversial, because if you are the Ukraine and you are adopting the EU acquis, why not adopt the ECJ's interpretation of that acquis?

Of course, that is quite different in other situations. An example of where a tribunal interpreting an international agreement is able to interpret even EU law without reference to the European Court of Justice is in the investment chapter of CETA, the EU-Canada agreement; an investment tribunal can determine EU law without reference to the European Court of Justice. The ECJ even said that was okay, so its jealousy is somewhat impaired these days.

Dr Damian Raess: The UK says that it wants a Canada-style FTA with the EU, if I understand correctly. I thought it would be helpful if I highlighted in the domain of labour standards what additional commitments the EU would insist on as a departure from the standards that are currently in the CETA agreement, the EU-Canada agreement.

Under Article 101 of the EU negotiating mandate that was published the other day, the EU standards as a reference point include the following areas: fundamental rights at work, which are already in the CETA agreement; occupational health and safety, and a strong buy-in commitment in that area is also already included in CETA; and fair working conditions and employment standards, which is also referenced in the CETA agreement, although here the EU might want to insist on the European working time directive, from which of course the UK already has a partial opt-out but which none the less is the sort of regulation that might be added. We do not know for sure, because the EU has not revealed the detail of its proposition, but that is the sort of regulation which the EU might want to emphasise.

The next area is information and consultation rights at a company level. That refers, for instance, to the European Works Council directive, under which large companies that are active in more than two EU countries need to establish consultation and information rights at sites where they produce. It also insists on social dialogue, which is currently not present in CETA.

That highlights a little the areas where concretely the EU might insist on departing from the CETA level to have higher levels of protection.

Dr Holger Hestermeyer: I disagree with Lorand on two small points. First, I do not regard paragraph 110 as unbalanced. The second point concerns the interpretation of when the ECJ has to be involved. Under the case law of the ECJ, or the CJEU as it is now called, this is now a requirement because that is what the Court has ruled. When there is an interpretation of EU law that is binding on the EU, it has to done by the Court of Justice.

I would thus distinguish two cases. There is the application of EU law as fact, and accusing the EU for example of violating an agreement is done by international tribunal. That is not an application of EU law as law that needs the involvement of the ECJ. Interpreting EU law as law is relevant only when the international trade agreement makes EU law applicable. If you do not make EU law applicable, the problem of the ECJ requiring its involvement does not really arise because there is no EU law to interpret. The solution might be, for example, to copy some standards and perhaps make them a little different and make them applicable as trade agreement law rather than EU law. That could resolve some of the issues involving the CJEU.

Dr Lorand Bartels: I do not disagree. In fact, I think I have referred to those various points over the session.

The Chair: One last word from Nicola Smith.

Nicola Smith: I would caution against seeing the current discussion about a level playing field as in some way in contrast to other international trading deals or arrangements the EU has reached or the UK has already reached. It is a unique, unprecedented, completely new situation for us to be converged with a common trading bloc which we sit right next door to and where more than 40% of our trade flows go directly into its economy, and then to leave that and try to negotiate terms for free market access to continue to trade with it.

This is not a trade deal of the sort that has been reached previously in international trade agreements, and I do not think it is that appropriate to make comparisons with existing labour standards chapters in international trading deals. It is a unique and unprecedented circumstance. We are starting from a point of a political declaration where both parties have agreed to respect the level playing field, and by default that requires us to have an enforcement mechanism for how that level playing field and its interpretation will be agreed.

From the EU's perspective, if there is no CJEU oversight of whether the level playing field is being properly adhered to, and there are no enforcement penalties, there is no level playing field, because the UK Government would be quite able to instruct their domestic courts to disregard all CJEU case law and to undercut the EU on that basis, and the level playing field would cease to exist.

Given that both parties have committed to the level playing field, we need to accept that by default that requires a commitment to a new form

of enforcement that goes significantly beyond what we normally see in other international trade deals.

The Chair: If you are satisfied, Lord Robathan and Lord Lansley, we will move on to the next question.

Lord Robathan: I am de-escalated.

The Chair: Lord Shipley.

Q4 **Lord Shipley:** I would like to move us to the specifics of existing trade agreements. We have heard a bit about the Canada trade agreement. I am seeking a definition of what the standard provisions would be in all EU trade deals. The UK Government have said that a future trade agreement with the EU should not contain provisions that go beyond those "typically included" in a comprehensive free trade agreement. Could you define for us what "typically included" standard provisions may mean, and how provisions on labour standards and subsidies in existing trade agreements compare with the Commission's proposed approach to negotiations with the UK?

Dr Damian Raess: I would be happy to do that, as we did a comprehensive mapping of labour social provisions in EU FTAs in particular as part of a project. There is such a thing as a consistent current EU approach to linking trade and labour issues in its EU FTAs, and it is based on four main pillars.

The first is a range of substantive commitments to international labour standards as well as domestic law standards. With respect to the first category, it means commitments to the International Labour Organization's core labour standards, which I already referred to. With respect to the latter, it is domestic commitments on non-derogations, so a commitment not to derogate from existing levels of labour protection in order to boost trade or attract foreign direct investment. The second aspect of domestic law commitments is the effective enforcement of one's own domestic labour laws. Importantly, in the EU agreements those commitments have a great degree of obligation, so they are strongly legally binding.

The second pillar of the EU approach is institutionalised co-operation on the labour issue. That refers to the institutional mechanism. As you know, the EU's approach, in contrast to the US's, emphasises social dialogue capacity building to address shortcomings and violations, for example, in trading partner countries. Here, the commitments are typically a range of commitments on labour-related co-operation issues combined with a separate body in charge of the monitoring and implementation of those commitments and the inclusiveness of these separate bodies, which means that social partners, for instance, have a voice at the table and can sit in this committee and talk about progress on the ground and report on the progress or the lack thereof on the ground.

The third aspect is a compulsory review mechanism. It is an impact assessment on labour over time, which has to happen on a regular basis.

The fourth and final aspect relates to the dispute settlement mechanism, which includes, at the first level, government consultation in the case of non-compliance by a partner; and, secondly, an independent arbitrator—that is, the establishment of a panel of experts who can make recommendations in the case of persistent non-compliance by a trade partner. Importantly, in the UK-EU case, the potential remedies to non-compliance exclude trade sanctions, so they exclude the withdrawal of trade concessions and monetary fines. This is the bottom line of the EU template on labour standards in its trade agreements.

With respect to CETA, it is a little more ambitious. CETA includes an additional commitment to promote health and safety at work as well as minimum standards of employment obligations. That covers the decent work agenda. As I highlighted before, what would come in addition to the CETA level is in the current agreement in relation to what the EU standards are about. I mentioned this before, but I am happy to repeat it if you would like me to.

Lord Shipley: There are current negotiations going on with Australia, and there are existing arrangements with Switzerland and a trade agreement with Korea. Is it easy to produce the grid that you referred to, which shows the standard provisions in each of those trade agreements, because the UK Government are talking about provisions that are "typically included"? That seems to me a very important phrase that we need to understand better.

Dr Damian Raess: I will follow up on that and then I will give the floor to my co-panellists.

As part of a project I led, we did a comprehensive coding of the content of the labour provisions in all existing trade agreements from 1990 onwards. It is a dataset called LABPTA, which allows you to compare systematically, for example, the differences in the labour provisions between EU and Japan, EU and Canada, EU and Central America. This dataset is not yet publicly available, but I am the contact person if there is any interest in having a systemic comparison of 140 items coded within labour provisions.

The Chair: That sounds like a substantial piece of work, but it would be of real interest to the Committee. Nicola Smith, you wanted to come in on this.

Nicola Smith: Others are far more expert than I am on the precise detail of the trade agreements, but I have a broad overview, and it is incumbent upon me to say that, from our perspective and from the unions' perspective, the provisions in current agreements for protecting labour standards go nowhere near far enough to have any particular impact on how people are treated in these countries or to maintaining anything like the level of protection that a level playing field would provide. They contain commitments on paper, for example the UK-South Korea free trade agreement to core ILO conventions, but there are no enforcement mechanisms, as I have already referenced. I think it is

important to recognise that those core conventions are vital but very far below the levels of standards that we currently adhere to, or previously adhered to before we left the Union European as part of the single market.

The Chair: The Committee recognised that the South Korea agreement was at a suboptimal level of protection on workers' rights. Dr Bartels.

Dr Lorand Bartels: I want to illustrate how this works in practice. Damian, as one would expect with his database, gave a very comprehensive and yet concise analysis of what existing provisions there are, so I will not repeat that, but as to the two levels, you have the basic common levels and you have the national levels where the typical provision is: do not derogate, do not waive, do not fail to enforce. It does not say, "Do not change". It will be interesting to see what the coding says on that. There is some ambiguity in the EU-Japan and the CARIFORUM-EU text, but I still read that as allowing change, including getting rid of labour law, until you get to the minimum standard.

In terms of enforcement, yes it is true that there is a big difference in the EU's approach to enforcement of labour and environmental standards and the approach, for instance, of the United States and of Canada—and Chile, incidentally. They allow for fines and for trade sanctions. The EU's approach has never been to have fines and trade sanctions. In fact, the EU is coming under a lot of pressure internally from the trade unions to have fines and trade sanctions to upgrade its enforcement of these sorts of provisions.

That is not to say that it is completely dead in the water, as illustrated by a case which the EU itself is bringing under the EU-Korea agreement for violation of ILO labour standards. There is a request dated 4 July 2019 for the establishment of a panel, which says that Korea's ~~trade~~ Trade ~~union~~ Union Act defines a worker to exclude some categories of self-employed persons and this violates ILO standards. So says the complaint, so we will see what happens.

This gets treated as a normal dispute by a normal panel, but the big difference is that the panel's report is not binding on the parties; it just has to be taken into account, which is obviously very soft, and is not enforceable by trade sanctions. However, it is not quite correct to say that there is no dispute settlement. There is; it is just not enforceable. Dispute settlement is not enforceable at the end of the day.

However, this is not the end of the story for labour standards; environmental standards are more difficult. This is because, in so far as labour standards constitute human rights, in particular all core labour standards—unquestionably, the ILO has now stopped trying to draw a dividing line between those standards and human rights and has accepted that the core ILO labour standards are human rights—the EU has another tool, under its so-called essential elements clause, for imposing trade sanctions unilaterally, often without reference to dispute settlement, in a case where there is a violation of human rights.

The EU has imposed sanctions under these sorts of clauses many times, not for that sort of violation of human rights but, rather, for violations of human rights in the context of military coups and so on. There is absolutely no reason, on the face of these clauses, why unilateral trade sanctions would not be available for a violation of labour standards or any other human rights.

One also has to take that into account. It is specifically referred to in the EU's negotiating mandate. In fact, this is not just about labour standards being human rights. What the EU wants to do, and the French have been pushing for, for some years, is to add elements to the essential elements clause so that it covers not only human rights, weapons of mass destruction, and terrorism sometimes, but, relevantly to the topic of this session, the Paris Agreement on climate change.

The Chair: What about intellectual property?

Dr Lorand Bartels: Intellectual property is not there, just climate change. The Paris Agreement is one of the essential elements of the treaty. I am not saying whether it is a good or bad thing, but from a purely legal perspective it would mean that if the UK failed to abide by its nationally determined contributions—NDCs—which are the voluntary commitments that are made under the Paris Agreement, the EU could respond by way of trade sanctions.

Baroness Kramer: I am slightly troubled that the conversation deals with the lowest of standards as if they were the heart of this negotiation, which they are not. In your interpretation, would the UK, in using essential rights as the mechanism to achieve or to enforce a level playing field, have to apply those standards universally globally, and would they therefore not be captured by the specifics of an individual free trade agreement? In other words, only if it is willing to use this in every case would it be able to use that essential standards mechanism?

Dr Lorand Bartels: No. All that is required is a violation of human rights or, if the Paris Agreement comes into it, a violation of your commitment under the Paris Agreement.

Baroness Kramer: I am obviously not being clear. If you were to say, for example, that we believe the UK has violated this particular labour standard, and we have expanded our notion of essential rights, would it also have to apply that same standard to any other person with whom it did trade?

Dr Lorand Bartels: No, and it never has.

Dr Holger Hestermeyer: It is also important to see that both of these areas are shifting sands internationally. If you look at what the US is doing at the moment, there is a feeling that it is being mistreated because there is no level playing field, so it has tried to strengthen conditionalities in its trade agreements, and in the most innovative and strange move it has attached a labour condition to rules of origin and said

that car parts manufactured under the USMCA—NAFTA 2.0—need to have a minimum content of labour paid at a certain rate per hour, which is entirely unheard of in rules of origin.

It is quite common in EU trade agreements to have provisions on subsidies—usually, first, that they conform to WTO law, and adding some additional obligations such as transparency, consultation and so on and so forth. Of course, the neighbourhood agreements go far further, for example the Ukraine agreement with references to the TFEU. It is interesting to note that the 1972 EU-Swiss free trade agreement has a clause on state aid in Article 23, which seems a little similar to Article 170 of the TFEU, which is in the UK's rolled over free trade agreement as well. It is not uncommon. State aid is another major concern of the US in the WTO. One reason why it is shooting so sharply at the WTO is because it thinks that WTO law is not able to capture, for example, the Chinese state-run system properly, so it needs the tools to counteract that.

In all these fields, we are on shifting sands of what is done in international trade. When it comes to the EU stance, there are two aspects. It can have a hard stance because it can, because of its market power, but it also has a hard stance at times because it must, because of internal pressures within the EU to be very stringent on these standards.

The foreign affairs committee of L'Assemblée Nationale held a scrutiny session on the Brexit mandate, and the rapporteur of the dossier, referring to statements by the Prime Minister on deregulation, said, "We really need to drive a hard bargain to not allow this, because it will lead to unfair competition". Besides what is common we also need to think of what perhaps we as the UK side would want from the agreement.

Lord Lamont of Lerwick: I want to go back to Dr Bartels' answer to Baroness Kramer about rights. You touched on a very important point about the morphing of what some people might call welfare into an expansion of rights. I did not understand your answer to Baroness Kramer's question why, when we talked about rights and they were classified as rights by the EU, they would not be not applicable to absolutely everybody. If they are fundamental rights, surely they would be applicable to everybody.

Dr Lorand Bartels: Sorry, I must have misunderstood.

Lord Lamont of Lerwick: Am I misunderstanding?

Baroness Kramer: I think you are getting to what my question was about. I am just trying to work out whether this is a mechanism whereby the parties could find common ground as a way to manage the outcomes, so the answer is key.

Dr Lorand Bartels: Sorry, I think I might have misunderstood. Let me divide it into two. The standards themselves are defined as standards that apply universally, but not only universally because they also include standards that apply between the parties. For instance, the European

Convention on Human Rights is referred to in the mandate as something that should be in the essential elements clause.

The EU typically refers to two levels of rights. One is normal international human rights, customary international law, the international treaties and so on. The other is whatever regional human rights instruments apply between the parties, and that can differ according to which parties you are talking about. The reference point is not unilateral; it is at least bilateral and mainly universal.

My answer, which may have been an answer to a question you were not asking me, was: does the EU have to enforce these obligations equally? In other words, if it says that the UK is in violation of certain labour standards, does it need to hunt around for all its essential elements clauses and enforce these equally? The answer is that it does not do that.

The Chair: Lord Lamont, do you think your question has been covered?

Q5 **Lord Lamont of Lerwick:** It was about the non-regression clauses, but perhaps we have flogged it to death. How would they operate in practice? I think you have explained that. To what extent might they limit the UK's ability? I think the answer would be, "Very considerably". This is a bit of a false drama we are setting up, in a way, because these are negotiating positions and the emphasis will be on tribunals and methods of adjustment in the future. The UK is trying to avoid setting all its laws in stone so they can never ever be altered, and to have the freedom to alter its laws but not intending to alter its laws.

Q6 **Baroness Kramer:** In a sense, we have probably covered a lot of this question. So that you understand, it looks at the benefits and the drawbacks of the UK retaining its ability to depart from EU-derived social and labour standards. We have heard very effectively and very fully from Ms Smith, but if there is anything to add to that, would you take this occasion to do that?

Nicola Smith: Hopefully I have made my point of view and the TUC's point of view pretty clearly. We do not see huge benefits from the ability to depart from existing core minimum standards, and we see very large drawbacks, because in this case we risk the market access upon which millions of workers' jobs and livelihoods depend if we say that we are not going to sign up to the core minimum standards in a level playing field.

The wider risk, of course, is that if workers in the UK do not have those protections, they may find in the future that their rights are reduced. Why would anyone working in the UK at the moment want to sign up to a future relationship where their basic treatment at work could be worse or where the chance of them and their children having a decent job would decline because of the trading terms we were forced to agree with the EU?

Baroness Kramer: Does anybody have a quick answer to this question? We have heard from around the table that the UK would never want to step back from the existing rights that it offers workers, but is it your

understanding that it is seeking a position where it could very clearly do so, and state that it has the freedom to do so, so that there can be a guarantee perhaps over what happens in this Parliament but nothing beyond?

Dr Holger Hestermeyer: This drives to the core of what is going wrong with the discussion. If there is no intention ever to take back standards, why not have an obligation not to do so? Build in flexibility for emergencies if that is what we are worried about. At least at times, the position of the Government is to say, "We don't want to be bound at all. We want the theoretical freedom to do everything". A theoretical freedom that we will never use is of questionable value if you take on very real costs for it. If the intention is not to go back, formulate the obligations in such a way that the flexibility that is needed as a minimum is in there, and see whether that flies.

Dr Lorand Bartels: But the argument can be made that precisely the opposite conclusion can be drawn, which is that if the assumption is that the UK will never change, why would you need an obligation? You can play this one in both directions.

Dr Holger Hestermeyer: It is because the EU does not trust the assumption. That is why you would need it. The question is what it is, and that is a debate to be had.

Lord Lamont of Lerwick: Why do we have to take the EU side in this argument?

Nicola Smith: We are the country that has chosen to leave the European Union and we are now asking them for terms of trade. It is incumbent upon us to listen to what it is going to offer us regarding accessing the single market.

My colleague put the point very eloquently. It is very important when we are talking about national sovereignty that we do not allow the debate to happen in the abstract. It needs to be specific, because, as others have said, if there is no intention to change employment protection, take away holiday rights or stop people having paid time off for antenatal appointments, say it and then there will be no problem. Why would we have any problem agreeing to a minimum set of standards which every Government have every intention of continuing to protect for the years ahead, particularly if that is the means that will get us preferential trading terms with the EU, which is in everybody's interests?

Dr Lorand Bartels: It might be easier to agree on a notion of high standards and low standards in the area of labour than it is to agree on this in the area of environmental protection; I think Lord Lamont referred to this earlier, if I am not mistaken. There are references throughout the mandate, for instance, to the precautionary principle and so on, which, at least from the United States' point of view, is a controversial issue. How the precautionary principle relates to policies that are based on scientific evidence is a topic of perennial debate. Quite what environmental

protection might mean in every situation is harder to put your finger on than whether the workers have a better deal or a worse deal. That is probably easier to figure out.

Dr Holger Hestermeyer: It is important not to take sides. What is really important is that we also think about what we would want. The UK is not the largest user of state aid, for example, by far in the European Union. What do we want from a level playing field? Strangely, the debate is all about whether we want to lower standards. However, perhaps we do not want to lower the standards but to raise them, and we might want the EU to comply with higher standards as well.

Lord Wigley: Might I chip in here on a slight tangent? There is a perception out there, and it may be totally untrue, that the UK sometimes has lower rules but applies them, whereas in the European Union there may be higher rules that are not applied. If that is the case, for there to be a level playing field there has to be both the standard of the rules and the mechanism of application. How does that work out in this situation?

Dr Holger Hestermeyer: The obligation to enforce your own laws becomes relevant then, and if the EU does not enforce its own laws it would be the UK that could use sanctioning mechanisms, if those were in the agreement. This cuts both ways. The debate is too focused on the idea of sovereignty, without a concrete idea of how to deregulate, rather than what we want. On subsidies, for example, this is a great opportunity for the UK to build a model that perhaps can also help in the WTO field. With a partner that wants stronger rules, why not use the opportunity to build that rather than say that we do not want to be bound, we want to subsidise, which, historically at least, we do not really do that much.

Q7 **Baroness Prashar:** I want to move on to enforcement and dispute resolution. Could you give us an overview of the provisions on enforcement and dispute resolution in existing EU trade agreements? Are there any differences in what is being proposed going forward?

Dr Lorand Bartels: The most important point to understand regarding the existing agreements is that there are three types of enforcement. Two of them fall under normal dispute settlement provisions. One of those is for normal violations, and there you have trade sanctions, but following a dispute settlement process and non-compliance. The second is for labour and environment, and there, as I said before, you have a dispute settlement process but no obligation to comply and no trade sanctions, in fact no sanctions, to enforce. The third mechanism of enforcement—

Lord Lamont of Lerwick: Could you enlarge on that middle one? What is the dispute resolution mechanism?

Dr Lorand Bartels: The example is the Korea dispute that I referred to before, where it is treated as a dispute, it is litigated in a normal way, there is a tribunal—it is called panel of experts, but it is a tribunal—and a report is issued at the end of the proceedings. It is just that there is no

obligation on the losing respondent to adopt the report to comply with what the report says. Not only is there no obligation formally to do it, but if the losing party does not do anything there is no sanctions mechanism for ensuring that this happens.

That is the weakness of the EU's typical environment and labour clauses. They are relatively strong in terms of the actual standards and in terms of what looks like a dispute settlement process, but the report in the end can be put in the bin. That is essentially what happens, which is controversial, as I said before, with the trade unions in the EU. That is different from the US-Canadian model, where the report is binding on the parties. They have to comply with it, and if they do not they are subject to trade sanctions, although those are defined a bit differently between the Canadians and the United States.

Then there is the third type of enforcement, which I mentioned before and which it is important to bear in mind, which is that the EU has mechanisms—this is all in the negotiation mandate—for unilateral enforcement. Quite aside from dispute settlement, these are dressed up as safeguard clauses, for instance, or it just says bluntly in the mandate that in the event that the essential elements of the agreements are not complied with there is the possibility of suspending the agreement, which basically amounts to trade sanctions. To get a full picture, one should not just look at the dispute settlement provisions as they are nicely packaged in the agreement, even acknowledging they come in two flavours; it is also important to look at the unilateral enforcement mechanism that exists.

The mandate is very strong when it comes to unilateral enforcement. When it comes to normal dispute settlement it is normal, which is strong. But when it comes to environment and labour it is very ambiguous. It is hard to know what is going on there. Having a fairly close read of the terminology used, I think it could be read as being both normal dispute settlement for labour and environment, meaning sanctions, but it could also be read as the normal EU dispute settlement for these provisions, which means that it is not really enforceable—and one can contrast that with what they say for state aid, where the language looks much more like properly enforceable dispute settlement.

Dr Damian Raess: Although I am not a specialist I would like to add a fourth layer to enforceability in EU trade agreements in light of recent developments. I do not know whether you have seen it, but the European Court of Justice expressed an opinion recently under the EU-Singapore trade agreement which allows trade suspension in response, for example, to labour violations as part of a trade agreement signed by the EU, even if that is not explicitly provided for in the PTA itself. It refers to Article 60 of the Vienna Convention on the Law of Treaties, which allows a treaty party to suspend part of the treaty in the face of a breach by another party. That is potentially a new layer that has been added but has not yet been used because it is very recent.

Dr Lorand Bartels: I do not remember that from the Singapore opinion, but I do remember the EU saying something similar in a case in 1996, where it misinterpreted Article 60 of the Vienna Convention on the Law of Treaties. What it forgets is that paragraph 4 of Article 60 says expressly that if a treaty provides for its own mechanism for dealing with disputes, you cannot suspend it. The ECJ does not seem to get that point.

Nicola Smith: The work that unions are doing in the European Union and the work that we are doing with the European Trade Union Confederation to seek to improve the terms of the trade deals that the EU reaches and the way labour standards are enforced has been referenced several times. To give a broad overview, I do not think there is anything inconsistent between what we are calling for there and how we would like to see a future level playing field between the UK and the EU enforced.

I would be happy to send on further details of what the calls included in that piece of work are, but they include work, for example, to ensure that enforcement allows for civil society and expert and trade union complaints to be raised so that the enforcement process takes account of what is happening on the ground rather than the politics of when a state chooses independently to raise a concern with another state. It also looks at penalties and at the basic monitoring of the labour standards and how that is carried out.

It is important to recognise that enforcement is not just about the mechanisms and how they work. It is also about how a complaint finds its way into a mechanism in the first place. You can have quite significant violations going on, but no political momentum or requirement on anyone to take action about those violations. The work we have done in the manifesto for what we think decent labour standards enforcement would look like covers all those topics.

The Chair: That would be very useful.

Nicola Smith: I can send something on afterwards.

The Chair: Lord Wigley, do you think your question has been covered by the discussion? Is there anything you wanted to add?

Q8 **Lord Wigley:** It has been largely covered, but let me ask it just in case there is anything anybody wants to add. You will have seen that it is an easy question to ask but perhaps not so easy to answer.

The UK and the EU's emerging negotiating positions on a level playing field seem to be at odds with each other. We heard earlier about Monsieur Barnier saying that he does not want a deal at any cost. What, in your view, might be the way forward towards a balanced outcome?

Dr Holger Hestermeyer: I would like to add two dichotomies which I find make the whole Brexit debate quite problematic. First, there are two ways to see this negotiation from a public international law point of view. The Frost speech spoke of sovereign equals—or perhaps it was the Prime Minister who said that—and that is one way to regard it. Both are subject

to international law. It is also perfectly valid to say that the sovereign equal is the UK and Germany, France, Spain, Luxembourg and so on, in which case it suddenly becomes a negotiation between one and 27 sovereign equals, which does not look equal at all. This dichotomy is problematic.

The second one, which I find rather interesting, particularly in relation to the level playing field, is that the EU mandate clearly takes the view that these are our common standards. We have developed them together while the UK was a member of the EU, so this is a good starting point because they are ours and not just the EU's. The Government take the equally valid point of view and say, "The EU is a different entity, so these are your standards", raising, of course, the question of what the UK standards are if they are not the same to some extent.

In those complicated debates the solution would be to de-escalate and to see the level playing field not as the black and white discussion that we have in public but as the rather more complex structure of obligations that will ultimately be in any deal, and to start thinking about what the UK wants from a level playing field and perhaps where we see our interests and what we would want protected in a level playing field and use that in the negotiation as well.

Dr Lorand Bartels: May I make two points? The first we have covered a little already, which is that, from the UK's point of view, the role of the European Court of Justice is a hot button issue. One can imagine ways to take the heat out of that, which should, given recent ECJ jurisprudence, also be acceptable to the other side. I do not see that reflected in the mandate, and I think there is more flexibility to be achieved.

Lord Lamont of Lerwick: What do you have in mind by that?

Dr Lorand Bartels: For instance, a recognition, as Holger also said, that when EU law, or for that matter UK law, needs to be determined as a matter of fact, the tribunal can determine that as a matter of fact with reference to what has gone on in each side's domestic legal system without necessarily sending it to the UK Supreme Court or the ECJ for a binding ruling. This is how it works in every treaty. The EU treaties saying that, when domestic law arises in a factual context, the domestic court has the final say on what that means is totally unique. I cannot think of another example in international treaties. Domestic law always has to be interpreted.

Baroness Kramer: Does the United States not take that position? I remember that in its relationship with Canada, in requiring a whole series of things as part of the NAFTA condition, it had to accept US standards for pharmaceuticals and whatever. It is in effect, is it not, embodied in US law?

Dr Lorand Bartels: But there is no obligation to ask the US Supreme Court what it thinks. What are the laws that you are referring to and incorporating that need to be determined? The question is who gets to

determine what they mean, and NAFTA does not say that the US Supreme Court has the final say.

There is Chapter 19, which is different. Chapter 19 is a unique mechanism for anti-dumping measures and countervailing duty measures that exist in NAFTA. Chapter 19 is completely unique, and effectively it is the opposite; it is the converse. It is an international tribunal applying the domestic law of the parties. It just goes to show that there should be no objection to that also being done. The treaties do not refer to the federal or supreme courts of their parties, and sometimes what those courts say can be overridden. This happens all the time in investment law, for instance, where it is really quite routine. Some thinking should be done to take the heat out of that a little. Recent ECJ jurisprudence should allow that to be acceptable on the EU side.

The second point is probably more fundamental to the topic of today, and Holger adverted to it in his opening comments. The big difference between level playing field obligations which the other side agrees to, to be accurate, and simply saying, "If you do these things, we will block the unfair trade at our border", is that if you do it by way of obligation on the other side, that effectively means that the other side has to do that regardless of where those products end up. If you get the UK to agree with all the standards, that means that the UK agrees with these standards in its manufacturing, even when the products made according to those standards end up in other countries, for instance the United States.

That is the great secret of TRIPS, the IP agreement. It was always possible by analogy to stop counterfeit products coming into your country; you could always do that. But by saying via TRIPS that every other country needs to adopt these basic standards, you are effectively multilateralising what they are able to do, even for trade that does not affect you at all.

That is the big difference with the EU's level playing field. Its explanation for this is that the UK is next door. Obviously we know, especially after seeing the European Commission's revised dot chart with the correct-sized dots, that proximity makes a difference in trade terms. The UK trades largely with the EU, but the UK does, of course, also trade with other countries.

Lord Lamont of Lerwick: Could there not be another explanation? The EU is very satisfied at having a hegemonic role in trade regulation, and it has been able to dominate international trade negotiations and set a lot of the standards itself, but with the lessening of the bloc and a medium-sized power coming, the power may shift a little towards international setting of standards rather than the hegemonic reach, if I may put it that way, of the EU.

Dr Lorand Bartels: That is a good explanation, but the EU's mandate indicates that it is adopting the same hegemonic approach, according to existing, or at least end-of-transitional-period, EU law, but that is a static

not a dynamic acquis as a baseline. To that extent, it is still the same approach, and the important point is that it is UK production that will be affected, no matter where UK production ends up.

Nicola Smith: I would also promote de-escalation. It is important with that in mind to take it back to first principles. Why are we talking about this issue in the first place? Because the EU is suspicious that as the UK leaves the European Union we may want to reduce commonly agreed standards that we are currently in compliance with, and that we might then want to use our reductions in those standards to compete with them and all the other countries in the trading bloc. For example, the EU does not want a situation where companies in the UK can make more money by cutting their costs by cutting holiday pay. They want a situation where we can make more money because we are competing on high productivity, innovative products and winning business—on those grounds—rather than unfairly.

If that is the suspicion—in fact, the UK Government have no intention of competing on that basis and do not want to see a situation of unfair competition—the way to take the heat out of it is simply to agree that of course we do not want to compete on that basis; we want Britain to become a strong independent trading nation that makes excellent products, and where we can command a huge competitive advantage because of the skills, knowledge and ability of our workforce and the excellent products and innovation that we are able to develop.

If we are confident in how our economy is going to develop outside of the EU, and in the scope that we have to build strong trading relationships and to achieve strong rates of growth, we do not need to worry about low-road routes to competing by cutting regulatory standards, so why not just agree? When you have agreed, of course you need some form of enforcement, and the CJEU is the only legal entity that is able to interpret and enforce EU law as it currently stands. It stands to reason that some form of CJEU oversight is going to be necessary, because you need a legal entity that understands and interprets the law to have some role in determining whether the agreement you have reached is working in practice.

I honestly think that the way forward is to take the heat out of it. If no one is willing to say on record that they want the sovereign right to deviate from these standards or to reduce them or to compete on a low-road basis, what is all the heat in the situation for? Why not be positive and optimistic about our capacity to compete on a positive basis, agree to the level playing field and use that as the basis to achieve preferential trading terms that will be for everyone's benefit?

Q9 **The Chair:** Do you think—these will probably have to be final points now—there is an element, thinking back to my background as chair of ACAS, that both sides have what might be called dog-whistle elements that have to be satisfied? The EU has made it clear in this revised document that it wants "with Union standards as a reference point". The UK wants to be in a position of not having to go to the ECJ, of having

sovereignty and of declaring an element of independence. Any negotiation has to be seen to be satisfying those dog-whistle elements and, at the same time, as you have just said, achieve some balance in the negotiations. To what extent do you think that could be achieved?

Nicola Smith: I would reflect that we need to focus on the core end point. It is incumbent upon all parties to be clear about what the benefits of a close trading relationship are and what the rationale for embarking on this negotiation is in the first place. If everyone can tone down the rhetoric and focus on the specifics under discussion of the basic core protections that people already have and the opportunities to sell into the European market and for trading backwards, that provides the opportunity for a sensible agreement to be reached that is in everybody's interests.

That has not really answered your question, but I would warn against the dog-whistle approach. We are talking about millions of people's jobs, rights and livelihoods, and a higher standard of honest debate and discussion is required because the impacts are highly significant.

Dr Damian Raess: I would like to make a quick final statement and go back a little. The core of the disagreement is on what the benefits are to the UK from departing from EU social standards. The UK, it seems, does not want to have its hands tied because there might be some economic benefits in particular from deviating and perhaps taking the low road to international competitiveness. We do not know whether the Government want to follow that in the long run, but that is, of course, the fear on the EU side and that of the British trade union movement.

My sense is that there is some misconception on the British side about how domestic labour standards and international labour standards relate to trade and economic growth, because the strategy of the low road is that by lowering standards one gains a competitive advantage, which boosts exports, which in turn leads to economic growth and job growth.

We did a study, as part of the research that I led, which looked at the introduction of labour clauses in preferential trade agreements and its impact on trade flows. There is a fear that this will increase labour costs and might reduce trade flows between the countries, especially in the north-south context, which would increase labour costs in developing countries.

Our study shows that for north-north PTAs, as the EU and the UK would have, there is no statistically significant impact on bilateral trade flows in manufacturing among the trade partners. In other words, whether or not north-north free trade agreements include labour clauses, trade flows among partners are the same. The implication is that it is not clear at all that by reducing or eliminating labour standards altogether in a free trade agreement with the European Union the UK would boost its exports. That is not what we have found in our study.

That is not that surprising, first, because advanced economies nowadays are knowledge-based economies that do not compete on the basis of cheap labour but on the importance of social investment and upgrading skills. Secondly, the literature in political economy is increasingly pointing to the fact that treating workers well pays off. Firms' compliance with social standards pays off because it leads to productivity increases, which in turn improves the international competitiveness of the firms. To me, it is not clear what the benefit would be for the UK in deviating from EU-level social standards, based on this study and others, which I would be happy also to provide you with references to, if you are interested.

Dr Holger Hestermeyer: I think there is a possible landing ground respecting many red lines of both sides, although possibly not all of them. I am worried about public discourse and spin when I read in the paper that the EU is violating the political declaration by backsliding on an agreement to assess equivalence of financial services by June, because it is not in the mandate, but then you read the document and you see its commitment to a unilateral assessment under the EU's regulation, so you cannot possibly say that it has been violated right now.

The Chair: That is why I called it a dog whistle.

Dr Holger Hestermeyer: This sloppy stance on what is going on might lead to so much animosity on both sides that in the end everything might break down, but unnecessarily so because I see a landing ground.

The Chair: Are there any other final comments before I close the session?

Dr Damian Raess: On the issue of alignment or divergence with EU law, the UK is facing a choice of historic proportions. There needs to be a broad-based consensus on the road ahead. It seems to me that the main opposition party or parties need, imperatively, to be brought on board to reach this broad-based consensus, as do the social partners, who are part of policy-making and input, otherwise there is a risk that what is done by one Government can be undone by the next Government in a political system like the British one, where there can be big majorities, which can change laws and pathways over time. The UK Government should listen to the Opposition and social partners to craft a broad-based consensus on this really essential issue for the future of the UK.

The Chair: Thank you. We have enjoyed this session very much indeed and got a lot out of it. We are very grateful to you for coming along. I remind you that you will receive a transcript of the session, and any of those items that you said you would send in to us would be very welcome. I declare this session closed. Thank you very much indeed.