

Northern Ireland Affairs Committee

Oral evidence: [Brexit and the Northern Ireland protocol](#), HC 767

Wednesday 23 September 2020

Ordered by the House of Commons to be published on 23 September 2020.

[Watch the meeting](#)

Members present: Simon Hoare (Chair); Mr Gregory Campbell; Stephen Farry; Mary Kelly Foy; Robert Goodwill; Claire Hanna; Ian Paisley; Bob Stewart.

Questions 115 – 175

Witnesses

I: Dr Graham Gudgin, Honorary Research Associate, Centre for Business Research, University of Cambridge; Professor Katy Hayward, Professor, School of Social Sciences, Education and Social Work, Queen's University Belfast; Raoul Ruparel, Adviser, Deloitte; and Anton Spisak, Policy Lead, Trade and Productivity, Tony Blair Institute.

Examination of Witnesses

Witnesses: Dr Graham Gudgin, Professor Katy Hayward, Raoul Ruparel and Anton Spisak.

Q115 **Chair:** Good morning, colleagues. Good morning, witnesses. Thank you very much for joining us this morning for another evidence session with regards to our inquiry on the Northern Ireland protocol. Could I ask our witnesses, please, to introduce themselves, for the purposes of the record, and to state from which organisation they come? We will then turn to questions.

Dr Gudgin: I am Dr Graham Gudgin. I am affiliated to the University of Cambridge and am also chief economic adviser at Policy Exchange in London.

Professor Hayward: My name is Katy Hayward. I am professor of political sociology at Queen's University Belfast. I am a senior fellow at the UK in a Changing Europe think tank, working full time on the future and status of Northern Ireland after Brexit.

Chair: I understand that congratulations are in order. You are a relatively new professor.

Professor Hayward: I am indeed. Thank you.

Chair: Many congratulations on that.

Raoul Ruparel: I am Raoul Ruparel. I am currently an adviser to Deloitte, and formerly special adviser to the Prime Minister on Europe, under Theresa May.

Anton Spisak: My name is Anton Spisak. I am currently policy lead for trade at the Tony Blair Institute. Until April 2020, I was part of the UK negotiating team. I was involved in both the future relationship negotiation and the Northern Ireland negotiation last autumn.

Q116 **Chair:** We took evidence as a Committee back in the summer from both Michael Gove and Brandon Lewis, who left us with the impression that only the dotting of a few i's and the crossing of a few t's was needed. Everything in the garden was rosy. The protocol was fine and it was in perfect conformity with the Good Friday agreement, according to the Prime Minister last December. Suddenly, in the last few weeks, things have altered quite considerably. Could I open the questioning by asking what level of threat the protocol presents to the Good Friday agreement and to the Union?

Professor Hayward: The protocol is a compromise, and it involves compromise on both sides. The reason for that compromise is the Good Friday/Belfast agreement. This is on the basis that a zero-sum arrangement for the future of Northern Ireland simply will not work. In



particular, of course, we know there are a lot of the challenges around Brexit are the fact that it involves harder borders. That is part of the point of Brexit, if you like. The prospect of harder borders anywhere around Northern Ireland is one that induces insecurity, fears and concerns about the stability of the peace process. In the protocol, we have a compromise that involves new frictions all around Northern Ireland. Even if the protocol is fully enforced, we will have new frictions across the Irish land border and across the Irish Sea border, but they will be minimised. The way of minimising those is by having a comprehensive UK-EU deal, which I am sure we will come on to.

The situation in which we find ourselves now is, of course, one in which people of all points of view in Northern Ireland and beyond are expressing deep concern that the Good Friday/Belfast agreement is under pressure. There are several reasons for this. Fundamentally, we might consider it in light of the fact that if there is one flaw in the Good Friday agreement—it is not a perfect document, by any means—perhaps it is that it relies on a good relationship between the British and Irish Governments. Perhaps it assumed that relationship would continue to exist. It certainly assumed the continued membership of the European Union. When we have that relationship under pressure and strain, inevitably we have tensions and difficulties within Northern Ireland. Inevitably, that leads to tensions at the grassroots.

Q117 **Chair:** Could I interrupt you there? You have hit on the very important point of the two very important assumptions upon which the Good Friday agreement was predicated. Given the fact that the UK is leaving or has left the European Union, it is the only part of the territory that has a land border with the EU and we are going to have two single markets sitting cheek by jowl, is there an argument, as complex and difficult as it is, that suggests the Good Friday agreement should be revisited and be recast, where necessary, in the light of the UK leaving the European Union, because one of the fundamental presumptions has disappeared?

Professor Hayward: There have certainly been some people who would argue that. Certainly, there is a need for reconsidering the role of some of the institutions established by the Good Friday/Belfast agreement, perhaps most particularly the British-Irish Council and the role of the North/South Ministerial Council. Overhauling the agreement itself is a prospect that very few people would like to see. It is the Good Friday/Belfast agreement that gives us the conditions, such as they are, of stability and security for the whole political arrangements in Northern Ireland, including Northern Ireland's place in the Union at the moment and including the possibility of Irish unity down the line.

I do not think that fundamentally, outside of the EU, the Good Friday/Belfast agreement itself should be overhauled. In fact, it is all the more reason to strengthen the core elements of that agreement that give us the amount of security that we have at the moment.

Q118 **Chair:** Does the protocol, in its current form, represent a threat to the



Union?

Professor Hayward: The answer is no. The constitutional status of Northern Ireland is not affected by the Northern Ireland-Ireland protocol in the withdrawal agreement. There were concerns about majority consent. As you are well aware, the democratic mechanism for consent is now built into the Ireland-Northern Ireland protocol, which is something rather different.

Q119 **Chair:** Raoul, do you want to give us your thoughts on exactly the same question? For reference, it is the scale of the threat posed to the Good Friday agreement and/or the Union by the protocol in its current form.

Raoul Ruparel: In its current form, both sides agreed when the protocol was drafted and signed that it is entirely compliant with the Good Friday agreement, and supportive in a way. Both sides set out their interpretation of that when agreeing to the protocol. It is difficult now to see it and argue that it is a threat to the Good Friday agreement. My personal view is that it is not.

Building on what Professor Hayward said, EU membership provided the context for the Good Friday/Belfast agreement through customs union and single market membership and making border infrastructure not an issue. The protocol, and the backstop before it, tried to replicate that context in some way and, in doing so, tried to preserve the Good Friday/Belfast agreement.

Touching on your question previously about recasting or revisiting, I believe, in some senses, the protocol does that by revisiting the context and trying to replicate it. In that sense, there has already been that process to some extent. Ultimately, we are trying to replicate the context and the environment in which the Good Friday/Belfast agreement was struck, and therefore help to sustain it. In that sense, I do not see the protocol, as drafted, as a threat to the Good Friday agreement.

In terms of the Union, it presents challenges. Having the border checks and processes between Great Britain and Northern Ireland, as set out in the protocol, will always present a challenge for a Union. Any union that faces something close to a full customs border and an agrifood, sanitary and phytosanitary border inside its union is always going to have challenges. Implementing that, particularly given the differing views within Northern Ireland on the issue and the economic impact for businesses, was always going to be a challenge. I do not think anyone should be naive about that.

In my view, that was apparent when the protocol was signed and the challenges were inherent. I do not think that is a new development. I have always been of the view that the protocol, as drafted, would be a challenge for the Union. That is partly why the principle of democratic consent was built into it, obviously building on that principle from the Good Friday/Belfast agreement. It also recognised that the challenges



within the protocol and the impact it could have are things that need to be revisited and constantly consented to, because it is not necessarily entirely comfortable.

As Professor Hayward was saying, as with any imperfect compromise, there are going to be challenges for all sides. I would see it as not a threat to the Good Friday agreement but certainly something that presents challenges for the Union, but that has always been the case. As with the negotiation on the protocol or the backstop before it, there were going to be challenges somewhere. It was a question about how we try to square this circle. It was always going to have to be managed in some way.

Q120 **Chair:** Given the fact that the current Prime Minister had long trumpeted the mantra that no deal was better than a bad deal and there had been a pretty common acceptance on the Government Benches of Theresa May's position that it would be unconscionable to have a border down the Irish Sea, were you surprised when the Government signed up to what it signed up to in the withdrawal agreement? Do you buy this idea that it was all a terrible rush and nobody had time to read it and, still less, to understand it?

Raoul Ruparel: On the first question, I would not say I was surprised. I wrote at the time, ahead of the deal being agreed, that the approach taken was probably the only option, given the desires and views on both sides. If you understand or have a sense of the Prime Minister's view, in terms of the full future relationship between the United Kingdom, or at least Great Britain, and the EU, which is obviously a more distant relationship than the one Theresa May was pursuing and is a more standard, FTA-type relationship, the only way to achieve that kind of relationship for Great Britain would be to take the approach that was taken in the protocol. In that sense, I do not think it was particularly surprising that that was where things ended up.

What has been surprising is the approach the Government have taken afterwards. There were always parts of the protocol that were up for debate or interpretation. While the implications were largely clear in terms of the checks and requirements between Great Britain and Northern Ireland, there are elements of it that are inherently vague or up for further discussion. The Government have been very slow in setting out their views. We are now seeing a culmination of that, where suddenly they are publishing the UK Internal Market Bill and setting out a number of concerns regarding the protocol before they have properly raised those concerns in the Joint Committee, for example. That has been more surprising, in terms of their approach to the protocol, than where the protocol ended up, in terms of legal texts, last year.

Sorry, the second question has escaped me.

Q121 **Chair:** That is always the trouble when I ask an ex tempore question. I did not write my question down, which is never a good thing to do. We



have dealt with whether you were surprised. The other one was whether you think there is any truth in the fact that some in Government are saying, "We were rushed and did not understand the implications."

Raoul Ruparel: My apologies.

Chair: It's all right. It took me a while to remind myself of my own question. Don't worry about that.

Raoul Ruparel: There was obviously an element of speed to this negotiation last year, but I do not think that is an excuse to say people were not aware of the implications or that it was too rushed. There was a lot of commentary and analysis around at the time of the implications of the protocol as drafted, and I think the negotiating team were well aware of the implications. There were parts that were subject to interpretation or discussion or where the two sides had different views of what the text meant, but that should have been aired and set out from the start of this year, rather than being left until this late on.

I do not really see that the speed or the negotiation that took place last year is an excuse for not understanding the implications, as I think most people were clear about what the implications were. If there were differing views, that should have been aired earlier and through the formal processes of the Joint Committee.

Q122 **Chair:** This is my final question to you, Raoul. In your assessment, would the EU have grounds today to institute the arbitration process, arguing that the UK Government have acted in bad faith?

Raoul Ruparel: The concept of good faith enshrined in the withdrawal agreement is a legal concept and its definition is tricky. I would refer to the definition provided by the then Attorney General, Geoffrey Cox, when he provided his legal advice on the original protocol of the withdrawal agreement, which contained the same clause of good faith. In that sense, the EU would have a case to say the good faith agreement has been breached. I do not think it has gone as far as saying that yet, although it has been strongly implied. We will see in due course if it begins any legal proceedings on this point. That is where, ultimately, just the proposal of the UK Internal Market Bill and the clauses that seek to take powers that could breach the withdrawal agreement in the future actually already breach the withdrawal agreement now by breaching the good faith principle.

Q123 **Chair:** Mr Spisak, what is your take on the protocol as a threat today, in its current form, to the Good Friday agreement and the Union? You can take them in either order.

Anton Spisak: I very much agree with what has been said. The one point I would add is that the nature of the protocol changed throughout the course of negotiations. The original protocol was envisaged as a temporary solution. Then the protocol evolved into a permanent solution for the future relationship between Northern Ireland and the EU. When that happened, there was a degree of flexibility built into the protocol



through the democratic consent mechanism. That is really important, because that is the reason why it is there, to give that possibility to revisit aspects of the protocol that may be potentially damaging in the future and to give some democratic legitimacy to that process. That is just one addition to what has already been said.

On the question of the threat to the future of the Union, it really depends on your definition of how integral the internal market is to the future of the Union. I agree with what Raoul said. There are aspects of the protocol that raise questions about the degree of friction between Great Britain and Northern Ireland. In many ways, the Government's assessment that the protocol, in its current form, raises some difficult questions is legitimate. The method by which the Government have tried to address those concerns is deeply problematic. We need to be able to distinguish between those two things.

On your last question about whether these issues were raised during the negotiation last year, it is the job of the civil servants and Government lawyers to scrutinise the texts they negotiate. It is the job they did last year. I am sure there was advice put to Ministers and the chief negotiator, David Frost, at the time, about some of the implications of those difficult clauses in the protocol. I do not think it is right to say it was rushed or the Government were not aware of some of the implications. I am sure there was advice from officials on those points.

Q124 **Chair:** Even if there was not advice from officials, I certainly recall what members of the DUP, in the House and elsewhere—Mr Paisley, Mr Campbell and others—pointed out to the Government. I am not putting words in their mouth. It is why they did not vote for it, because of the east-west construct. There was official advice, legal advice and political commentary on it, was there not?

Anton Spisak: It is black and white on the paper. I absolutely agree with that. There were aspects of the protocol that were quite difficult to negotiate and needed a lot of time to be done. One of them is the definition of goods at risk. That is a technical process. That is a process that is, to some degree, contingent on the future relationship of the whole UK with the EU. Those aspects of the protocol were left open for the future discussion, and there was a good reason for that. We know there are some ambiguities in the protocol, but it is not a coincidence that those ambiguities exist. They were there for a reason, and therefore to say that the protocol was rushed is not the right conclusion to draw.

Q125 **Chair:** Dr Gudgin is waiting very patiently for us. It is exactly the same question to you. What is your assessment of the protocol in its current form as a threat to the Good Friday agreement and to the Union?

Dr Gudgin: The protocol claims to protect the Good Friday agreement, but in my view it does just the opposite. I agree with Lord Trimble, who, as we all know, was an architect of the Good Friday agreement and got a Nobel prize for his role in it. His view was that, far from protecting the



Good Friday agreement, the protocol runs a coach and horses through it. It has driven the Good Friday agreement into a ditch. It does this by imposing a series of new institutions on Northern Ireland outside the Good Friday agreement and without the consent of either the people of Northern Ireland or the Northern Ireland Assembly.

I was special adviser to Lord Trimble, David Trimble as he was then, as First Minister at the time of the Good Friday agreement. I well remember the incredible sensitivity of north-south relations and the North-South Ministerial Council. The whole thing was set up very delicately, set up step by step, with a lot of consultation. Here we have a protocol that comes along and sets up, I think, three new institutions outside the Good Friday agreement. In Article 11, it suggests that there may be new elements of north-south co-operation. These will be made by the United Kingdom and Ireland, but there is no mention of the consent of the parties in Northern Ireland or of the Northern Ireland Assembly. Yes, the protocol clearly damages the Good Friday agreement.

Q126 **Chair:** Could we pause there for a moment? It has been said that the withdrawal agreement was in “perfect conformity” with the Good Friday agreement?

Dr Gudgin: Where is that a quote from, please?

Chair: That is a quote from the current Prime Minister, describing the withdrawal agreement and the protocol as being in “perfect conformity” with the Good Friday agreement. Why do you think he was led to saying that, if you and Lord Trimble are correct and it drives a coach and horses through it?

Dr Gudgin: He knew Lord Trimble’s views at the time. I think the reason is fairly obvious. It is the huge difficulty that the Johnson Administration found themselves in before the last general election. After the Benn amendment, the Government were faced with a position whereby it could pretty well accept most of the protocol and drop the bits of the protocol that applied to Great Britain. The European Union were very happy to do that, but they were unwilling to drop almost anything else. Therefore, Boris Johnson was faced with the position of perhaps losing Brexit altogether or having to sign up to the protocol.

The only new bit of the protocol they got in was the four-year consultation, and my information is that was over the dead body of Dublin. There was a huge row in Dublin to get that in, but they got it in. That was the only real change that they managed to get in, other than taking out the references to Great Britain.

It was a period of intense political weakness. I think most Brexiteers in the House of Commons Conservative party and outside of the Commons supported the Prime Minister in just getting Brexit done: “Get us out of the EU and we will have to sort out these other difficulties later.” That



HOUSE OF COMMONS

was far from satisfactory and, of course, it is thrown back in Boris Johnson's face at every opportunity.

Q127 **Chair:** As one of several who were in the Commons at the time, can I put it to you that this was a Government the vast majority of whom, Mr Johnson's Ministers, had subscribed to "no deal is better than a bad deal"? They had, albeit unlawfully, attempted to prorogue Parliament and were clearly gearing up for a general election. Those are three rather muscular positions to be in. Are you serious in your belief—let me phrase it that way—that this was an Administration who were panicked into signing up to something that they knew in their heart of hearts was contrary to the Good Friday agreement, with all the associated risks to peace that posed, and could potentially damage the political integrity of the Union of the United Kingdom?

Dr Gudgin: I would not use the word "panic". I think they were in real, extreme political difficulty, mainly because of the Benn amendment. They were faced with either losing Brexit or having to sign up to this protocol. I was in touch with several pro-Brexit Conservative MPs at the time. I think the view of all of them was that the protocol was a terrible document, but, nevertheless, it was one of the bits of baggage that had to be accepted or swallowed in order to get us out of the EU and respect the referendum. It was an incredible time in British politics. Things were done that, of course, should have been done much better, but that was the position in which the Government found themselves, and we now have to deal with that.

Q128 **Chair:** Do you find it politically strange? Every Conservative Member of Parliament was asked to sign up to the withdrawal agreement in order to be a candidate at the general election, and one has to presuppose that we had all read it—I certainly had. I recall no Conservative candidate speaking out against the iniquities of the protocol. Do you?

Dr Gudgin: I have just explained to you why I think that is the case. Privately, that is exactly what Conservative pro-Brexit MPs were saying to me. If they were not saying it to you, I am somewhat surprised.

Q129 **Chair:** They were not saying it on the Floor of the House.

Dr Gudgin: Presumably they were saying it to you privately. You cannot have escaped that, surely.

Q130 **Chair:** If they were, it was so sotto voce I did not hear it, but maybe they would not mention it to me. I am not sure. There is no reason why they should. What about the threat to the Union?

Dr Gudgin: Yes, it is. It is a subtle threat to the Union. Clearly, it contravenes the 1801 Act of Union by imposing a customs border between Northern Ireland and GB. This is an incredible state of affairs and one that Theresa May herself, as I think you quoted earlier, said that no British Prime Minister would ever agree to, but we now have agreed. If common sense prevails and we can get a reasonable set of—



HOUSE OF COMMONS

Q131 **Chair:** Dr Gudgin, I am sorry to interrupt you. I asked the Library of the House to provide a note on this, because I am not an expert on the Act of Union. The note from the Library of the House of Commons, which I think we all take as the fifth gospel, as it were, tells me that, essentially, the European Union (Withdrawal Agreement) Act 2020 supersedes the parts of the Act of Union 1800 that might be thought to apply in this case. In cases where the 1800 Act conflicts with the protocol, the 1800 Act has no legal weight.

Dr Gudgin: I take my legal advice on this from Martin Howe, a barrister, who disagrees with that advice, so it is clearly a matter of legal controversy, but there we are.

Q132 **Chair:** I am not sure even Martin Howe QC would argue with the Library. It is a very brave man or woman who argues with the Library of the House of Commons.

Dr Gudgin: I have just told you what his view is, so if it conflicts with the Library view then he does. The Act of Union said there could be no customs border between Ireland, as it was then, and GB. We are now facing that possibility, and that is surely an incredible state of affairs.

Chair: It is an arguable legal point.

Dr Gudgin: Yes, apparently. I was going on to say that this could still be managed with a degree of goodwill and a degree of common sense. First, we need a free trade agreement so there are no tariffs. The trade support scheme by which HMRC will pay the costs of customs declarations is another step in that direction. In the short term most people, and perhaps most firms, in Northern Ireland will not notice too much difference and will not face terribly strong difficulties. The problem comes in the long term, if there is regulatory divergence. For instance, if the UK signs a trade agreement with the US that allows hormone-treated beef, cheap beef, into the UK, that beef will not be allowed into Northern Ireland, so Northern Ireland consumers will be faced with the position of having to pay more for their beef.

Q133 **Chair:** The British Government have said we are not going to have hormone-treated beef in the UK market in any event.

Dr Gudgin: As you know, trade negotiations are negotiations. I think that is one of the things the US will insist on. We cannot dictate the terms of a trade agreement with the US. It is a negotiation. We will have to swallow something.

Chair: Let us not get into trade agreements. I am conscious of the time.

Q134 **Ian Paisley:** I am currently engaged in a project that includes Dr Gudgin, to put that on the record. It is good to hear from our guests. I suppose what flows from that set of questions is probably the elephant in the room. It is not disingenuous, despite people's calls. If you have a series of answers from expert witnesses that say there is no threat at all to the Belfast agreement, its integrity is not breached, and you also have



HOUSE OF COMMONS

a witness that says actually the integrity has been undermined, there is a coach and horses through it, the real question is if there is a threat to peace, because it is a peace agreement. It is a peace accord. I would be interested in hearing from our witnesses whether they have any view on whether it is an actual threat to peace. That is where the rubber hits the road in all this. I suspect all of them take the position that actually there is not a threat to peace, but I would be interested in hearing an answer to that.

Professor Hayward: The question of whether there is a threat to peace is a vital one. There are two ways of understanding that. Does it mean, "Is there a risk of a return to violence?" We know that paramilitary organisations on both sides continue to exist and are active, but I do not think that is the most pressing concern at the moment.

When we are talking about the threat to peace in this current environment and the instability caused by what is going on at the moment, we are talking about whether people can have trust in the democratic process. Most particularly, if you think about what the Good Friday/Belfast agreement means, it means the commitment to democratic and peaceful means of achieving political ambitions and interests. This is where we have some concern, because there is this sense of confidence in the democratic and peaceful means of expressing political opinion and this sense of growing polarisation within Northern Ireland. The pressures are quite acute and they run across all three strands of the agreement.

We see that very much in Northern Ireland. The grassroots polarisation is occurring and we see growing divergence between Unionist and Nationalist opinion and anticipation about what is going to come next, and anxiety on both sides in relation to that. That puts pressure on the peace process in that regard.

Ian Paisley: Divergence of opinion has been a feature of Northern Ireland life for the last century.

Professor Hayward: That is what we have in the Good Friday/Belfast agreement: a means of managing this through peaceful means, trying to find consensus where we can, through sharing power where necessary. When we have a situation set up as zero-sum interests and competition, of course we have direct tension. I go back to the British-Irish relationship. We cannot get away from the point that the conditions that enable compromises are continually necessary in Northern Ireland and will be necessary for the foreseeable future. Those conditions of compromise are enabled by that good British-Irish relationship.

This is where there are some doubts about the conditions for peace, because of the sense of Northern Ireland being the pressure point between the two of them. Before, we have managed very difficult points of tension and difference within Northern Ireland through a very close British-Irish relationship and trust at that level. Where we have a



breakdown of trust and a sense of using Northern Ireland and potential tensions in Northern Ireland for whatever purposes, we have pressure.

Q135 **Ian Paisley:** I am sorry to rush you, but do you think the pressure on the peace is more from loyalists who feel the Union is being threatened by an accord that is separating them further from the British mainland, or do you think it is threatened by republican extremists, who would see an agreement that is separating them more from the British mainland? Where do you think the threat would most come from?

Professor Hayward: I think it comes from the wider conditions. This is what I am saying. It is not about the loyalist or republican threat per se. It is about the sense that we have an environment in which both sides, if you put it that way, although it is not that simple, think that their interests are directly threatened. The situation that we had almost come to take for granted was one in which everybody felt not completely happy but relatively comfortable in the environment and in the sense that their political views could be taken into account and respected under the principles of equality and mutual respect. If we have that under pressure, we have concerns about the agreement itself.

Also, there is a huge amount of political responsibility here. When it is seen as if relations on the island of Ireland are being jeopardised, as if the close north-south relationship is under pressure and being jeopardised, or as if Northern Ireland's place in the Union is being jeopardised, of course that raises the stakes. On all sides there is a responsibility there. The fundamental point is, if we are going to have peace in Northern Ireland, we will need compromise and nobody is going to be 100% happy. The current situation in which we find ourselves is one in which there are going to be difficult decisions to be made.

Q136 **Ian Paisley:** Can I ask the same question of other witnesses? Do you think there is actually a threat to the real peace?

Raoul Ruparel: In terms of the threat to peace, it depends if you are asking in the context of the protocol or not. If there was nothing there, obviously it would be much more uncertain and the challenges would be much larger. With the protocol there, there is a framework, which reduces the challenges and tension somewhat, but it also creates other challenges from the Union perspective. That is why I have tended to agree with the Government's interpretation in parts of the protocol and their attempts to make it as light touch as possible, recognising those challenges to the Union and the concerns of the Unionists and loyalists to try to minimise the friction and the distance between Great Britain and Northern Ireland that this might create.

There are ways in which it can be approached and implemented to try to minimise those challenges. I would not go as far as saying that represents a threat to peace, but I recognise there are challenges there. It has always been about trying to strike this balance. If you look at earlier versions of the protocol, for example the ones that were



negotiated under Theresa May, they had their own challenges but they kept more UK-wide and therefore put less pressure and asked less of the loyalist and Unionist community to accept, in terms of the distance between Northern Ireland and Great Britain. That was part of the objective of those approaches. Seeing this version of the protocol, I accept it puts greater pressure on that, so I continue to support attempts to try to implement it in as light touch a way as possible. That would help. I would not go as far as saying it represents a threat to peace, but I recognise the challenges it presents.

Dr Gudgin: The issue of peace has been used as a sort of political football throughout the negotiations, in my view somewhat disgracefully, by Tony Blair, John Major and, of course, Irish-Americans. The facts, in as far as I can discover them, are that Gerry Adams has said several times in public that the extreme republican movement is not going back to violence. Indeed, they could not do so politically. They are running at the low 30s in the polls in the south. They are on the verge, in some ways, of achieving power in the south, although it is difficult for them. Any hint of violence in the north would kill that, so clearly they cannot do that.

Gerry Adams also says that dissident republicans have, in his words, essentially no support among the Nationalist community in Northern Ireland. We can also deduce that the small dissident republican groups are well penetrated by the security forces, as has been shown by the recent arrests of, I think, eight prominent people in those organisations. There does not seem to be any real danger from the republican side.

If there is any danger, it would come from the loyalist side. Clearly, loyalists and Unionists are pretty unhappy with what they see as a threat to the Union from the protocol. Whether they really will take this as far as violence, I do not know. You, Ian, are obviously closer to that than I am, living in Cambridge.

Q137 **Ian Paisley:** In your paper, you said 6% of trade flows north to south and about 60% flows from Northern Ireland to Great Britain. This protocol appears to make trade north-south easy but trade from Northern Ireland to GB more difficult. Does that in itself pose a threat that would cause enough anger within a community that says, "This is not working. This is damaging trade. Therefore you are damaging our place in the Union"?

Dr Gudgin: On north-south trade, the figures show 6%. That is 6% of total output of goods and services in Northern Ireland go south. A third of that is things like second-hand cars and oil, things that are not actually produced in Northern Ireland that are just coming through Northern Ireland.

Q138 **Ian Paisley:** The real mark is about 4%, is it not?



Dr Gudgin: Yes. I think I say in the paper that it is perhaps a little more than a footnote, but it is not that much more, really; it is pretty small. The much more substantial trade, as you suggest, is west-east, which is obviously a huge market compared with the market in the Republic, and much nearer, of course, than most of the continental EU. The key thing here for Unionists is that this is now a border in the Irish Sea. It does the opposite of what the 1801 Act says. It is driving something of a wedge between Northern Ireland and GB in a way that is going to be intensely uncomfortable and unpopular with Unionists. I hope this does not lead to violence at all. It certainly leads to a lot of bad feeling.

Anton Spisak: I would add that the objective of the protocol itself is to provide a degree of certainty. That certainty may not be perfect, but it is better than nothing. It is really important to bear in mind that any attempts that undermine aspects of the protocol, especially those that put the UK in contravention of its international obligations, create a point of pressure on the functioning of the protocol and more widely. The reason for that is that, as we have seen in the last few days, the European Union said very clearly it would launch a formal dispute against the United Kingdom with respect to the breach of obligations under the protocol.

The consequences are really important. There was a Secretary of State for Northern Ireland before this very Committee last week who said this is all very hypothetical. It is not hypothetical at all, because the consequences would be quite damaging. It would allow the European Union to take legal measures against the UK. The EU, depending on whether the UK Government comply with the ruling of the arbitration panel, would then be able to cross-retaliate across the whole breadth of the withdrawal agreement, including the Northern Ireland protocol.

Q139 **Ian Paisley:** Do you think that retaliation would look like a hard border north-south? Would that be the only retaliation Europe could put in place?

Anton Spisak: From a strictly legal point of view, under the withdrawal treaty, the EU would be able to take any measure it wants. It could suspend obligations to treat the goods coming from Great Britain to the EU via Northern Ireland in a way that it wants. My personal view is that is quite unlikely to happen, because the European Union has an interest in ensuring the Good Friday agreement functions well and that the elements of the protocol function well.

Q140 **Ian Paisley:** Do you honestly think the Good Friday agreement would even feature? What would feature would be hard goods coming across from GB to the EU, where there is a surplus in trade.

Anton Spisak: It is possible. There may be a whole range of options for cross-retaliation in that scenario. The point I am trying to make here is that breach of the Northern Ireland protocol may trigger a sequence of events that are quite unpredictable and may include retaliation by the EU and then challenge by the UK Government about the proportionality of



that response by the EU, and so on. You can see very easily how this can become a very complex dispute, which can have quite unpredictable consequences. That is why I do not think this is only about some hypothetical, as the Secretary of State said last week. It may lead to further consequences.

Q141 Mr Campbell: Welcome to the witnesses again. On this issue of the hard border, the concept keeps re-emerging every so often. I would like to hear each of the witnesses' take on it. Anton mentioned that it is unlikely to happen. Is it not a bit more emphatic than that? Michel Barnier said they had no intention, under any circumstances, of constructing some sort of structures on the border. Most people realise that politically it is not doable. There is no support for it. Practically, it could not be done. If they tried to do it, everyone could avoid it, because there are 300 crossing points. Is it not a bit more than unlikely to happen?

Anton Spisak: You are right. It is extremely unlikely, but it is very difficult to predict the events that unfold after a breach of an international treaty, given the wide scope for retaliation. As I said, my personal view is that I see it as extremely unlikely that the European Union would retaliate with respect to any commitments under the Northern Ireland protocol. It has much wider interests and can retaliate in areas that are more painful for the UK, especially in the space of financial services and so on. It is extremely unlikely, but who knows how events might unfold in that complex scenario?

Q142 Mr Campbell: I would like to hear from the other witnesses, Professor Hayward and Dr Gudgin, if they have a brief comment. I know we are getting rather long questions and answers, so I am trying to keep it short.

Chair: Let us have a one-line answer, please.

Professor Hayward: It is slightly bizarre that we are back here at this point. Fundamentally, what were we looking for in the withdrawal agreement? What does the protocol give? It is certainty. That is not just about what the border is but about the status of Northern Ireland goods. If we have a situation in a no deal with no implementation of the protocol, the question is what that means for Northern Ireland goods and trade from here. Fundamentally, it would make Northern Ireland seem an extremely dodgy place, so people trading with Northern Ireland would not know what they're dealing with. It puts Northern Ireland in a really uncertain position because of the fact that we have integration in Northern Ireland with Britain and with Ireland as well.

I would like to make a small correction for the record. The UK Command Paper on the protocol states the percentage of trade north-south of Northern Ireland's external sales is 16%. It is larger, 51%, with GB but that is beside the point. The point is what the conditions are for Northern Ireland to trade with certainty and for Northern Ireland to have as much stability as possible in economic terms. Fundamentally, that relies on a



HOUSE OF COMMONS

close UK-EU deal, the implementation of the protocol and an ability to plan for the future.

Q143 **Chair:** That was a very judicious use of multiple semi-colons to get a one-sentence answer there, Professor Hayward. That is possibly why you are a professor and I am not, so well done. Mr Ruparel, let us see if you can do a one-sentence answer with less reliance on the semi-colon.

Raoul Ruparel: I will try. The only point I would emphasise is the uncertainty. It would leave people not knowing where they stood, where businesses stood and what the law was. You may say things will just continue as they do now, but that is a conscious choice by Northern Ireland to essentially continue to align with EU rules anyway. It would be a bizarre state of affairs where businesses and people would not know the framework or the law under which they operated, manufactured, transported and traded. I do not see that as a sustainable position.

Dr Gudgin: Can I respond to what Professor Hayward said about trade? She said 16% of trade. I said 6% of the output of goods and services in Northern Ireland, so we have different denominators. These are not contrasting figures. They are the same figures with different denominators.

On the question itself, no, of course we are not going back to a hard border, even though the technology does exist. This can be sorted out with a degree of goodwill and a degree of sensitivity. The EU has not gone very far down the road of sensitivity, at least so far, but I hope it will in the last few weeks of the negotiations.

Chair: Dr Farry is the great exemplar of the pithy question.

Stephen Farry: I will aim to keep up my low standards in that regard.

Chair: Don't follow me, for God's sake.

Q144 **Stephen Farry:** I will be as quick as I can. I want to come back to the issue of consent, which has been addressed to a certain extent so far. This is particularly for Katy and Graham, with the most direct experience of Northern Ireland. In one sense, we have the principle of consent, which is something that is very much defined in the Belfast/Good Friday agreement. Beyond that, we are using "consent" in very loose, generalised terms. I have a question for Katy first, talking through the issue of consent a bit more, particularly going forward. What are the potential advantages or disadvantages of the consent mechanism, where the Assembly is asked to give its views on the protocol, its continued application, on a periodic basis?

This question is for Graham. Bearing in mind your thesis on the issue of consent, is there not logic in saying that if you want to go through all those different layers of breaches of the Good Friday agreement, it surely begs the question of whether the issue of Brexit itself was a breach of the agreement, in that Northern Ireland did not consent to it. I appreciate



that is an academic point to an academic. If we go down this line of different layers of consent for this and for that, outside the broad, formalised principle of consent, surely that is the logical conclusion of that particular academic point of view.

Chair: Who wants to have a go at that one first, before we enter the SCR and open a bottle of port?

Professor Hayward: This democratic consent mechanism is a key element of the protocol, and we saw an interesting use of the term "consent" yesterday in the vote in the Northern Ireland Assembly. The majority voted saying that they do not consent to the UK Internal Market Bill and are asking for it to be withdrawn. We can see the Assembly playing a critical role in the effectiveness of the protocol.

Possibly in some cases there has been a slight misrepresentation of what that vote will be, in the sense that it may make the protocol somewhat temporary. It should be made absolutely clear that the vote the MLAs will have, at the end of 2024 in the first instance, will be just on the operation of Articles 5 to 10. The decision to be made is not whether to align with the EU but whether to step down those articles in the protocol and align instead with UK rules. The remainder of the protocol will continue in force, regardless of that vote. Then, of course, it is up to the Joint Committee, UK-EU, to make a decision about what happens next.

Fundamentally, there is this sense of the protocol potentially becoming an electoral issue. People who have written on this, including myself, have been quite critical of it in that regard. There is a real danger in setting up yet another layer of division over the operation of the protocol, especially if it is viewed in Unionist versus Nationalist terms. The Northern Ireland Executive and Assembly will need to be operating the protocol, assuming it comes into force, in the best interests of Northern Ireland long term. This continuing sense of instability, or a vote on this matter on a regular basis, could be quite divisive and unstable.

Q145 **Stephen Farry:** That is fine. There is then the question to Graham, as I outlined, around the logic of the principle of consent and if that surely therefore extends to the Brexit vote itself.

Dr Gudgin: Stephen, it is good to see you again, even at a distance. Can I begin by quoting again from Lord Trimble? He said, "If the committees created by the protocol to the withdrawal agreement can operate without the consent of the Northern Ireland Assembly and the parties, then that is completely destroying the basis of the Good Friday agreement... It is a complete abandonment of the principles that led to the success of the 1998 agreement and a return to the methods that failed in 1973-4, 1985 and 1995". As I said before, I agree with those views and the protocol is very damaging to the Good Friday agreement.

Your question to me was whether Brexit itself damages the Good Friday agreement. This is a difficult one. You can argue it both ways, but there was no reference to this in the Good Friday agreement itself. Indeed, the



European Union is hardly mentioned in the Good Friday agreement, and the European Union played virtually no role in the negotiations. It is true that both parties were in the European Union at the time and that perhaps was in the background, but it was not in any sense in the foreground.

The referendum was a referendum about whether the UK should leave the EU. Nationally, we know what the result was. Local results do not count. I am talking to you from Cambridge. Cambridge voted far more to remain in the EU than Northern Ireland did; there was a much bigger majority in that direction. Of course, there were many other parts of the country that did the same. Although it is of some interest, it is of no legal standing at all. Parties will argue this backwards and forwards, but I cannot see any strong legal basis for arguing that Brexit undermines the Good Friday agreement.

Q146 Mr Campbell: If we could possibly move on, I want to ask Anton and Raoul about their experience of EU negotiators. In your experience, is the EU negotiating from a position of purely dealing with Brexit and focusing on Brexit, or is there one eye ahead further down the road, whenever the dust settles, at whatever point it does? Obviously the EU budget has to be renegotiated with a significant hole in it from the UK's contributions and the accession countries are coming to the table looking for money, rather than bringing money to the table. It is that question. Is it purely focused on the Brexit issue and that is it, or is it one eye on Brexit but another eye on what is coming down the road beyond Brexit?

Anton Spisak: In my experience, whenever I was involved in the negotiations and there were technical negotiations, those were very narrowly focused on specific issues of the protocol, the withdrawal agreement and then the future relationship. There was never any indication from the EU side that they would have any wider interests in those negotiations or that they would want to bring any wider interests into that discussion. Of course, there may be political drivers that may induce the EU to have certain positions in some places that are consistent with broader objectives, but it has never been my experience that that was what was happening in the room.

Q147 Mr Campbell: Maybe I did not make my view clear. I was not as much asking you if it was an issue at the negotiating table. Was it a consideration in their mind as they negotiated, with one eye to beyond the Brexit process? That is the issue I was trying to get at.

Anton Spisak: There is definitely a consideration, of course. Given that the United Kingdom has made it clear to the EU that it intends to leave the single market and the customs union, that creates a new context for dealing with the United Kingdom as a third country. It is a country that is able to pursue its own independent trade policy and sign trade agreements on its own terms, including with countries that might have different standards in some areas from those of the EU, for example in the area of animal welfare if we think about the FTA with the US. In the



background I am sure there was always a consideration for the EU to protect the single market against any potential threats that might arise from those different circumstances, including the ability to sign trade agreements with other countries.

Raoul Ruparel: This has manifested itself in the emphasis on unity on the EU side. There was a concern early on about what a country leaving the EU would mean for the future of the EU and unity of the remaining 27 members. We have seen, from Michel Barnier, his team and the wider EU, a very strong emphasis on maintaining that unity and sticking together. That has been a theme throughout the negotiations, and an understandable one in many ways. It has manifested itself in some odd ways. Sometimes, that emphasis on unity tends to lead to a lowest common denominator. Moving 27 member states in lockstep is always challenging, and it is a challenge the EU faces every day. That has manifested itself in the negotiations at times. That would be my sense of how your question and your point about the longer-term view of the EU have manifested themselves. That has been the focus.

On the budgetary point, early on there was a bit of concern about this, trying to get the financial settlement part of the withdrawal agreement sorted. Once that was finalised, and even during those negotiations once the UK started engaging in detailed technical negotiations on that, the concern receded. More recently, we have seen much more focus from the EU on the wider budget and how it will be used in terms of responding to Covid-19. Those sums far outstrip the levels that were talked about for the UK contribution and that approach. That focus has shifted quite a lot since 2017 or 2018, but the unity point still remains.

Q148 **Mr Goodwill:** I will start with Raoul, if I may. Staying with the negotiations and the need to make very rapid progress if we are to meet the deadline by the end of the year, has the Government strategy made agreement in the Joint Committee more or less likely? For example, could the Government's determination to get the UK Internal Market Bill on the statute book be described as a measure that could jeopardise the attainment of the objectives of this agreement, which is something that we agreed not to do?

Raoul Ruparel: What is a bit strange about the Government's approach here is that my understanding is things were actually proceeding in a reasonable manner in the Joint Committee. While there were challenges early on around the implementation of the protocol, progress was being made behind the scenes. The introduction of the UK Internal Market Bill and the approach the Government have set out has set that back significantly and has significantly undermined that progress in the Joint Committee. It certainly has harmed it in that sense.

There is also a strange point that, by publishing the UK Internal Market Bill, the UK Government have conceded the interpretation of certain parts of the protocol to the EU. Take, for example, the reach-back on state aid. My understanding of the UK Government's position was always that the



reach-back was very limited, not least because the amount of trade north-south on which this state aid provision is focused is very low. In terms of trade in goods, we have had figures quoted, but the figure I had in my head for the latest data is around £3 billion or £4 billion a year. The reach-back of state aid from that into the rest of the protocol and the rest of GB would always be quite limited. By publishing the Bill in the way they have, the UK Government have essentially conceded that the reach-back could cover the entire United Kingdom. That seems a very strange approach when, actually, they had a very good case to make in the Joint Committee to try to secure their view on that.

There are some peculiarities coming from this approach, but overall it has seriously undermined the Joint Committee process and, obviously, the wider negotiation process. The EU is not yet stepping back from the table more widely, either in the Joint Committee or in the future relationship, so that is positive, and talks are continuing, but the lack of trust between the two sides means that any breakthrough coming at the negotiator level, between David Frost and Michel Barnier, is very unlikely now. If there is to be a breakthrough in negotiations, it will most likely only come between the Prime Minister and other EU leaders or the leaders of the EU institutions. That needs to happen quickly for there to be that progress and unlocking of talks, if it is going to happen. Broadly, this has significantly harmed both the Joint Committee process and the future relationship process, unfortunately.

Q149 Mr Goodwill: Anton, do you concur with that analysis?

Anton Spisak: I completely agree. I find it very unfortunate that the first point of action on the UK side has not been to raise that question of concern within the Joint Committee. That is precisely the job of the Joint Committee, to consider questions on which different parties may have different views. If the UK and the EU disagreed on the scope of certain provisions of the protocol, there is a mechanism within the withdrawal treaty to deal with those disagreements. Instead, the Government have pursued the option of last resort. In doing so, they undermined their position in the Joint Committee, as Raoul said. I find that very odd.

The only way I can explain that—and this is my view—is that the risks of no deal may have become material by now. That means that the Government are looking for every possibility to protect themselves against any different interpretations of the Northern Ireland protocol from the ones they have, and that has led them to legislate in the way they want to.

Q150 Mr Goodwill: The UK has made some concessions during the last week that I think were aimed at trying to get some consensus. Do you think those concessions, those moves, are going to yield any progress, or is it such a logjam that we are unlikely to make progress until we get a European summit-level discussion to try to move forward?



Anton Spisak: The two concessions that I think you are referring to are the role of the Parliament in approving the regulations that Ministers may want to make, under clauses 42 and 43, and then the use of the dispute settlement mechanism within the withdrawal treaty, alongside the legislation. Those concessions will very likely be quite unconvincing for the EU because they do not change the nature of the breach of the international treaty. In my view, the triggering of the dispute settlement mechanism alongside using the legislation creates further uncertainty. The point of the dispute settlement mechanism is to resolve differences. If the UK has already said and legislated for its own view of what the outcome of the process is, the process itself is a bit pointless. I do not think it has been a helpful concession by the Government to say, "We will trigger the dispute settlement mechanism alongside using the legislation."

Q151 **Chair:** Could I ask all the panel literally a yes/no question? Are the good-faith clauses in the withdrawal agreement and the protocol an effective way for one party to pursue redress?

Dr Gudgin: I would have thought not, but I am not a lawyer, so my view does not count for much.

Anton Spisak: I think not, but it also depends on how demonstrable that bad faith is and what exactly happens in the circumstances. My inclination would be not.

Raoul Ruparel: They can be but the bar to their use is very high, so probably not, although the breaching of the withdrawal agreement qualifies, as I said before. In that case, they are.

Professor Hayward: I am not sure I quite understand the question, if I am honest with you.

Chair: I was wondering if the good-faith clauses in the agreement and the protocol are an effective way for one party to pursue redress.

Professor Hayward: There is so much else in the protocol, including the clear mechanisms for resolving and settling disputes.

Q152 **Chair:** Is the arbitration process, the presumption being that both sides would abide by the output of an arbitration, an effective way to pursue redress and then abide by the outcome?

Professor Hayward: Yes.

Q153 **Mary Kelly Foy:** I would like to ask Professor Hayward and Dr Gudgin about the impact that the Government's strategy will have on future relationship talks. First, to Professor Hayward, if the future talks were to collapse, what would be the implications for the Belfast/Good Friday agreement?

Professor Hayward: It has been clear that, over the past few weeks, we have had a merging of the future relationship talks with those on the



implementation of the protocol, which leads to a great deal of insecurity for Northern Ireland. As I mentioned before, it is not necessarily about pointing to a particular article in the Good Friday/Belfast agreement. It is about the conditions for that to function properly being put at risk by growing pressures. Those pressures are not just on the British-Irish relationship but on the sense of the rule of law.

This is fundamentally important, bearing in mind that the Good Friday/Belfast agreement does not have anywhere near the detail or depth of dispute settlement mechanisms such as we see in the withdrawal agreement. With the exception of the European Court of Human Rights, a crucial element of the agreement, neither does it have recourse to an international court. The sense of vulnerability to the whole agreement itself and the conditions that it has established is quite acute at the moment, with this apparent willingness of the British Government to break international law.

Q154 **Mary Kelly Foy:** Dr Gudgin, do you think the UK Internal Market Bill makes it easier for the Government to manage a situation where there is no trade deal between the UK and the EU?

Dr Gudgin: That is a good question. It is hard to say in some ways, but my short answer would be yes. It makes legal arrangements for what the Government intend to do in that scenario. If there is no free trade deal, the protocol and the withdrawal agreement will stand. The Government should be bound by them, but in the UK Internal Market Bill they are making their own interpretation. In my view, those interpretations are very helpful for the UK. They are the sorts of things that should be, and perhaps still could be, agreed within the Joint Committee. Others may have more information than me, but my understanding is that they have not yet been agreed within the Joint Committee. Indeed, that is probably the main reason why the Government brought forward the protocol amendments of the UK Internal Market Bill.

Can I just say one thing? If we do not have a free trade agreement and the protocol stands, Northern Ireland will be in the somewhat fortunate position of facing no tariffs in either direction, either into the EU or into the UK. It may therefore be in the interests of some firms from Britain to relocate their activities, or part of their activities, into Northern Ireland to take advantage of that situation. There may be some advantage to Northern Ireland in that situation, but it would have fairly horrendous implications for the Union. There are no real implications for the Good Friday agreement, so, as I have said, I do not think that is a major part of this.

Q155 **Chair:** May I just ask a very quick question of all of you? Distinguished parliamentarians like Theresa May and Geoffrey Cox have expressed very significant concern about their fear of the impact on the reputation of the United Kingdom, vis-à-vis as an upholder of the rule of law, as a result of the clauses in the UK Internal Market Bill. Do you share that anxiety or not?



Dr Gudgin: There is obviously something in that. It is not a good look to break treaties or break words. I am not an expert in this area.

Raoul Ruparel: I agree that it is not a positive look, and I do not think it is one that the UK should be pursuing. That being said, I do not think it will manifest itself as countries being unwilling to sign trade agreements with us. It is a hit to the UK's standing globally and is not something people would have expected the UK to pursue.

Anton Spisak: I agree with that. I would add that there is an important difference between having a different interpretation of an international treaty and then treating that treaty in domestic law in a way that we want. The Government have chosen the latter. It is not unusual, and there are precedents in international law, for countries to have different interpretations of a treaty but still be determined to comply with the obligations. The Government have decided to do the latter option, and that is what is really problematic for the UK's reputation.

Professor Hayward: I would agree. I would stress that it was particularly concerning to community and civic leaders in Northern Ireland that it was the Secretary of State for Northern Ireland himself who made that statement.

Q156 **Claire Hanna:** Thanks to the witnesses. We have touched on this a little bit, and Raoul touched on it in his responses to Robert, but I would like to put it to all the witnesses. To what extent do you think businesses in Britain are impacted by the provisions of Article 10 of the protocol on state aid? What is your analysis of the extent to which they are included or captured by that?

Raoul Ruparel: To build on the remarks I have already made, the scope of it is likely to be, in practical terms, fairly limited. The protocol just covers goods, not services, which is important to remember. It is fairly limited trade. In my experience of working with businesses on preparing for Brexit, the number of GB businesses that have and do trade across that border is even more limited. It tends to be Northern Ireland-specific businesses. In my view, in practical terms and if assessed fairly objectively, the reach-back would actually be very limited. There are obviously always risks when going through a Joint Committee process, an arbitration process, that people will take a different view, but the evidence in terms of the economic flows is there to support that view.

Dr Gudgin: I rather agree with what Raoul just said. I do not think the effect would be huge. Nevertheless, this is the wrong way to deal with it. This is a back-door way of the EU trying to get some control over state aid in GB. The right way to do this is to have an agreement in the main free trade agreement—to have a free trade agreement and to incorporate this in the main agreement—not to do it through a back-door mechanism.

Anton Spisak: I agree with that assessment. If the Government had an FTA with the EU that set out clear and enforceable rules on state aid for



HOUSE OF COMMONS

the whole of the United Kingdom with the EU, which would primarily apply to GB of course, that would effectively supersede part of the protocol in a way that provides more clarity to interpretation of Article 10. That is why having some rules on state aid in the FTA is actually in the UK's interest. It plugs the gap that Article 10 leaves with respect to what the effect of trade between the EU and Northern Ireland is, which it could be argued is actually a consequence of EU law. There is a bit of ambiguity around that, which means that the EU could take a very maximalist interpretation of what that means, and so could the European Court of Justice if there was ever a dispute. If there was an FTA that set out clear rules, that would, in my view, prevent that situation from happening.

Professor Hayward: I agree with all the other witnesses and have nothing further to add on that.

Chair: Gosh, that is the sort of answer I like. I am going to tapestry that and put it over my bed or something of that nature.

Q157 **Claire Hanna:** I do not want to make it too big a question, but does the UK adequately use the state aid provision that it currently has, given that it seems to spend a fraction of what other EU nations spend on state aid? If the Government got it approved and decided to exercise those powers, would clause 43 of the Bill do what they seem to want it to do, as regards state aid? You have only 20 minutes to answer the question.

Dr Gudgin: I wanted to come in because of the Northern Ireland connection here. No region of the UK has gained more from state aid than Northern Ireland. It has had a lot of industrial subsidies. They have worked very well, in my view, especially during the Troubles. They brought in a lot of American and other inward investment. They have led to some pretty big firms coming into Northern Ireland in legal services, for instance, cyber-security and so on.

The amount of subsidies has been constrained by EU state aid rules. Almost in each period, the EU has set a lower limit on the amount of money that can be given to firms. The reason for that is that Brussels wanted the money to go to eastern Europe and not to relatively prosperous areas like Scotland or Northern Ireland. The state aid regime and experience in Northern Ireland shows that it works and is quite valuable. It therefore could be quite a valuable aspect of the Government's levelling-up agenda for the UK.

Raoul Ruparel: We have seen that there is a lot of flexibility within the state aid regimes. We have seen it during Covid-19 but also previously and in the way other EU member states deploy their state aid, as you touched upon. There is flexibility there, and therefore including some kind of agreement in the future relationship that looks at a framework or at least some principles on state aid, as well as some level of enforcement and oversight, would not be particularly constraining on the UK or Northern Ireland and would provide clarity and order for business in this area. In practical terms, it should not be too difficult to reach that



HOUSE OF COMMONS

agreement, but obviously there is an aversion at the moment to getting into anything that might even hypothetically constrain state aid. In reality, the constraints prove to be fairly minimal in practice.

Anton Spisak: There is an interest, and a political interest, from the UK side in having a reciprocal commitment on state aid. There are some protectionist tendencies within some of the EU member states, and there have been for many years now. Some of the member states would like some looser state aid rules. Obviously they have the current regime by the Commission, but it is not inconceivable that that regime might change in the future. In my view, it should be in the interest of the UK Government to have a reciprocal commitment within the FTA that would ensure both sides maintain a robust regime on their own terms within domestic law.

Q158 **Chair:** Professor Hayward, do you want to add anything? No? You are proving to be my star witness. You can come again, as they say.

How serious do you think is the reported threat that the EU would refuse to list the UK as an authorised country for agrifood imports? There is quite a lot of confusion. We keep hearing this word, “blockade”. One has this idea of a flotilla of warships, bristling with munitions, up and down the Irish Sea, patrolling things. How does this blockade manifest and implement itself? Don’t all jump at once.

Anton Spisak: My view is that it is not a serious threat at all, because the EU gives third country listing to almost all third countries. The reason the EU has been reluctant to do that yet—and we may have an argument about whether that was for negotiating reasons, and I do not have an insight into that—has been that the UK Government have not set out full details about their future, post-transition period, sanitary and phytosanitary regime. We are still awaiting details about the implementation of that regime in UK law. My expectation would be that, once that is cleared up and there is more clarity about that, the EU will approve that listing. It can be done in a matter of days. It is not a complex technical process.

Q159 **Chair:** Do you not find that strange and almost deliberately inflammatory from the EU? We have a relationship of more than 40 years with it. All parties have said we want to remain on friendly trading terms, collaborative in terms of security, climate change and other things. Something as basic as being listed as a third country should just be a table stake in the negotiations. It is peculiar, is it not, that they have reserved taking a decision on that?

Anton Spisak: The EU has taken time to take that decision. It may have done that for negotiating reasons. I do not know. It is possible.

Q160 **Chair:** Anywhere else in the world, places that have had no historic relationship with the EU, is listed as a third country.



Anton Spisak: That is right. The EU makes that assessment on the basis of the rules that apply—the sanitary and phytosanitary rules. Those are not the rules there will be at the end of December. Those are the rules that will start from 1 January. As you know, the UK Government will have the freedom to change the SPS regime in the way they want. The EU was expecting to know some details about the way the UK Government want to implement those potential changes in UK domestic law. My understanding is that is where the disagreement between the two sides was.

Raoul Ruparel: I would add a couple of points. One is that, if this were a real concern, the powers taken in the UK Internal Market Bill do nothing to address it. In terms of a motivation for the powers in the Bill, it is a bit strange in that sense.

The second thing to say is, if this were real and it came to this, it would be a breach of good faith and would allow redress under the withdrawal agreement in that sense.

Thirdly, there is the implementation of this form of blockade, as you questioned. The UK Government are responsible for the implementation of the protocol in Northern Ireland and Great Britain, so it would be UK officials supposedly blockading themselves, which I find unrealistic. In that sense, in practical terms, I find this kind of outcome very unlikely.

If the EU has been dragging its feet on this—having been involved in negotiations before, there are certain mundane points where the EU has dragged its feet, unfortunately, and that is expected in negotiation—it is frustrating, but I expect it will be ironed out in the end. I do not think it would have gone as far as wielding it as a threat. It seems unlikely, but that is just my sense from previous experience.

Q161 **Chair:** On the basis that it would be a perversity for any Government to deliberately starve their own people, there is no opportunity for a blockade because, as you say, the UK Government would be blockading themselves. Even in these strange and uncertain times, that stretches credulity, does it not?

Raoul Ruparel: That would certainly be the case on trade Great Britain to Northern Ireland. When we are talking about trade from Great Britain to the EU, obviously it is different. The EU controls the ports there and could hold things at ports.

Q162 **Chair:** That is a given, but we were hearing 10 days ago that the EU was going to be blockading food imports to Northern Ireland and cannibalism and botulism would break out in the streets of Belfast and Ballymena, because food would not be getting through to Northern Ireland supermarkets. That is just nonsense, is it not?

Raoul Ruparel: As I said, I think it is very unlikely.

Q163 **Chair:** I know the British civil service like to goldplate things, but I think



HOUSE OF COMMONS

the idea of manning a blockade to stop food going into Tesco in Belfast—other supermarkets are available—would be eccentric.

Dr Gudgin: It is important not to take this seriously. I am sure you do not believe everything inflammatory you read in the newspapers. I remember a very senior Australian trade negotiator telling me at the time of the referendum that, “The EU will negotiate extremely hard, but do not listen to a word they say until the last three weeks.” This is one of those situations. They have been very tough negotiators. The UK Internal Market Bill is an example of the UK returning that toughness, but in this case we can just roll our eyes and get on. It will be sorted out.

Q164 **Chair:** I am not believing everything I read in the newspapers. I am not entirely sure the last time I read a newspaper. Senior Ministers were suggesting a sort of starvation blockade from the EU, so this is Ministers at the Dispatch Box on the Floor of the House of Commons, not journalistic tittle tattle.

Dr Gudgin: Northern Ireland is a major exporter of food. Nobody is going to starve in Northern Ireland if nothing gets in.

Chair: That is also true.

Professor Hayward: I agree with what has been said. It is not a serious threat. You can imagine the kind of insecurity that the fact it has been used provokes, particularly that kind of inflammatory language about blockade, which, you are absolutely right, evokes those kinds of images. Generally speaking, people do not have the knowledge to be able to put it in context and to realise how much of a negotiating tactic, such as it is, this is, rather than a serious threat.

It is my understanding that the UK is still to list the EU on the same basis, to be able to import goods of animal origin from the EU, so it definitely works both ways. We have always had this point of Article 16 in the protocol offering the safeguard that such a situation should never arise if it is jeopardising Northern Ireland’s economic wellbeing quite so acutely, but it was never a serious threat.

Q165 **Mary Kelly Foy:** If the Government were to use their part 5 powers to disapply the checks and processes required under EU law, would businesses in Northern Ireland be operating under UK law, EU law or both?

Dr Gudgin: Again, I am not a lawyer, so I am not sure what my view would count for on this, but my understanding is that firms have to operate under UK law. Anything from the EU has to be carried across into UK law.

Anton Spisak: Legally speaking, they would be operating under UK law. The clause switches off the direct effect of EU law provisions floating from the withdrawal treaty into UK domestic law. There would be potential legal uncertainty created by that. The Government claim that what they



HOUSE OF COMMONS

want to do with the Bill is to offer greater certainty, but in fact the opposite can be argued. It introduces greater uncertainty because of that.

Raoul Ruparel: I would agree, so I have nothing particular to add.

Chair: Good. You are my second favourite witness of the morning. Well done. You are all doing very well.

Professor Hayward: This is the interesting thing in part 5. Effectively, the Government are saying they will implement the protocol. Those clauses do not apply if the Government have no intention of implementing the protocol. They only come into play if they do, and then these two elements are specifically about exit summary declarations and state aid, which we have already discussed. The other witnesses are absolutely right that it would be UK law, but Northern Ireland will be following EU rules on the standards of goods entering Northern Ireland and produced in Northern Ireland.

Chair, you asked a very good question in the Committee last week about what Northern Ireland businesses prepare for. That is a very real question and a very live one. As you know, there are many issues still outstanding on which businesses here are seeking clarity.

Chair: Professor Hayward, not only are your answers short but you are flattering the Chairman. You are now *primus inter pares* in the list of witnesses. You will get a Cadbury selection box for Christmas.

Mary, do you want to come back on anything?

Mary Kelly Foy: No, how could I follow that?

Chair: Well, just the thought of a Cadbury selection box. I am told that other selection boxes are available.

Q166 **Bob Stewart:** I can almost ask this question and answer it. Once we have UK trade deals, what difference is there going to be for Northern Ireland? Almost straightaway, the answer is none. If Northern Ireland is part of the rest of GB, there should not be an answer. Anton looks really expectant. Anton, do you think there will be any difference in doing trade deals for Northern Ireland? Do you think there will be an advantage for Northern Ireland or a disadvantage? It seems to me there will not be.

Anton Spisak: Even though Northern Ireland will still follow some EU rules, especially with the application of the single market, it will still formally be part of the UK customs territory, so it will benefit from FTAs, free trade agreements, that the UK signs for the whole of the UK. There can be some discrepancy in the way that some of the regulatory commitments in those deals might impose different criteria, different conditions, for what could qualify as imports into Northern Ireland. There can be some discrepancy in that respect. Northern Ireland will be under



HOUSE OF COMMONS

an obligation to follow EU single market rules. It depends on what the FTAs say on those things.

Q167 **Bob Stewart:** Professor Katy, do you think there might be some advantage for Northern Ireland in any way?

Professor Hayward: Do you mean with respect to the future FTAs?

Bob Stewart: Yes, if there is a trade deal. Do you think they could spear it for advantage?

Professor Hayward: Something that has been overlooked a wee bit is the importance of an anti-avoidance regime. When the UK is doing deals with other countries, they will want to be clear about what they are getting in that deal. As has already been pointed out, Northern Ireland will be in a distinct position. There is a need to be able to distinguish between Northern Ireland goods that are entering GB and then circulating in the UK internal market and those that are not NI ones. This is a challenge that needs to be addressed when exercising and implementing the unfettered access commitment. There needs to be a lot of progress on that matter. Early on, there were claims about Northern Ireland being in the best of both worlds. Of course, that requires a lot more certainty and detail than we have at the moment.

I should make one point. There is concern among business in Northern Ireland that originally they had been promised or told that there could be access to EU FTAs, which makes a lot of sense, given how much of the supply chains and production go across the Irish border. Without that, there are challenges for Northern Ireland's exports abroad. That reflects how integrated Northern Ireland is with Ireland, as well as with GB.

Dr Gudgin: I agree with Anton on the FTAs. The protocol is extremely clear that Northern Ireland will benefit from any free trade agreements that the UK signs. We have already signed one with Japan, as you know, and there will be others. To give an example, as you probably know, Northern Ireland produces very good whiskey. I think the tariffs on whiskey imports into India when I last looked were 150% or something like that. Obviously, it would be a great advantage to Northern Ireland whiskey producers if we could have a free trade agreement with India. That will take some time, though.

Q168 **Claire Hanna:** Could the witnesses comment on how new trade deals and devolution interact? While it has always been reserved, it is completely new terrain for us, because we have not had new trade deals coming in. In theory, can the Assembly decline things that are provided for in new trade deals but that are not appropriate for our market. I will use the chlorinated chicken example. Is that something that the Assembly would have the power to resist, the way things stand at the moment?

Dr Gudgin: No, I do not think it can. The UK Internal Market Bill is quite explicit on that. This is a big issue in Scotland, of course. Scotland



already has some different rules from England on ingredients in fizzy drinks and that sort of thing. The UK Internal Market Bill says no, devolved regions cannot refuse to take any products for sale that are okay in another part of the UK.

Raoul Ruparel: On the specific example of chlorinated chicken, because Northern Ireland will continue, under the protocol, to apply EU SPS rules—sanitary and phytosanitary rules—it will not be allowed to import chlorinated chicken into Northern Ireland. Graham is right in his diagnosis of how the UK Internal Market Bill sets out the framework, but in that case, in that specific example, it would not be allowed. That is one of the points under the FTAs. While Northern Ireland will be part of them, in parts it may clash with the operation of the protocol on the regulatory and, particularly, the agricultural parts. In that sense, I do not think we would ever see chlorinated chicken coming into Northern Ireland.

Q169 **Claire Hanna:** As we are talking about devolution and the operation of the Bill, we have concerns around clause 46 and financial assistance, and whether the UK Government could come in over the head of the devolveds in the name of strategic spending. They talked about acquiring infrastructure. I asked the Minister at the time if that, for example, allows them to acquire things like Northern Ireland Water or transport infrastructure, and they did not say they could not. I wondered if, in the analysis of any of the witnesses, that aspect interacts negatively with strand 1 in that regard.

Dr Gudgin: I am not entirely clear on this, but my understanding is that the relevant Minister in the Assembly, Edwin Poots, has been told by Defra to go ahead and allow the building of what I think is essentially a lorry park in Larne to do with customs checks. It looks as if the legal framework is that the Assembly can be overruled in a matter of this sort.

Q170 **Claire Hanna:** I probably did not explain the question. I do not just mean as regards the infrastructure for the implementation of the protocol. I mean the wider reaches of the Bill, in terms of the financial assistance aspects in clause 46. That is what I mean. I mean everyday infrastructure internally in Northern Ireland. As I say, it specifies water. That is why my question specifically related to Northern Ireland Water, which is currently public.

Professor Hayward: I have a couple of points in relation to devolution and the UK Internal Market Bill. To answer Claire's previous question about FTAs, there are concerns that have been expressed, by Scotland and Wales in particular, about the Trade Bill as it currently stands and the lack of consultation and engagement with devolved legislatures and Governments prior to the signing of any FTAs because of the consequence of that. We see in the UK Internal Market Bill the realities of not being able to have barriers to trade or movement of goods within the UK, particularly within GB. This has passed, so there are grave concerns about devolution.



The second point is something that has been overlooked, unsurprisingly, is the result of part 5 of the UK Internal Market Bill, but it constitutes a serious change to the competence of the devolved legislatures and Governments. Northern Ireland is in a unique position because of the protocol. None the less, the point about financial assistance and others really hollows out some aspects of devolution. It is a key part of the Good Friday/Belfast agreement that strand 1 is not a tokenistic thing and that the Assembly has weight and makes decisions, including in relation to spending.

To make one little point, I have written, with my colleague David Phinnemore, on governance of Northern Ireland after Brexit and I do think that the consent mechanism is not enough. We need to make sure Northern Ireland has a voice and an input into these new institutions that is meaningful, because of the importance of, particularly, democratic representation from Northern Ireland, regardless of the environment in which we find ourselves.

Dr Gudgin: My understanding of the new Bill is that the UK is taking over the powers of the EU in the regulation of financial subsidies. The Scots, in particular, have tried to argue against this and get the powers for themselves, but I think most people would agree that we do not want different parts of the UK being able to subsidise their companies in competitive ways so that regions are in a race to the bottom on subsidies. The UK wants to do exactly what the EU has always done, which is to prevent competition in subsidies. Therefore, we would not want Northern Ireland, or indeed the Scottish or Welsh devolved Governments, to take over those powers from the EU.

Q171 **Chair:** Pausing there briefly, the WDA and the SDA, in their time, did phenomenal work in attracting business and employment opportunities. It was not a race to the bottom, was it?

Dr Gudgin: What happened was that the EU set limits on the maximum subsidies that were given. Those limits tended to come down over time, especially once the eastern European countries joined the EU. The WDA, the SDA and the Northern Ireland equivalent had a degree of discretion in how they spent the money, but they could not go over the limits.

Q172 **Chair:** Yes, but it did not lead to a negative tension within the operation of the UK single market in that discounts, inducements and incentives could be provided in different territories that were not open to anywhere in England.

If all of you followed our evidence session before the summer recess with Mr Gove and Mr Lewis—you might have read the report we produced—the Committee was very clear on the need for certainty for business. That certainty about trading operations started to be made even clearer with the announcements from the Cabinet Office in late July or August-time about money set aside for all sorts of expenditure. This may be a yes-or-no answer, although that might be an illusionary hope of mine. Has the



HOUSE OF COMMONS

IMB given certainty to Northern Ireland businesses exporting to GB and for GB businesses exporting to NI?

Dr Gudgin: No, I do not think it has.

Raoul Ruparel: No.

Professor Hayward: In one respect it has. Businesses were looking for certainty with regards to market access from NI into GB. Their concern was not so much about whether there is paperwork or not but primarily about whether Northern Ireland goods will be recognised for sale in GB. In that respect, that element of the UK Internal Market Bill is welcome and gives some certainty, although the definition of qualifying status still needs to be set out. I presume that will come through statutory instruments. On the other hand, however, it does not give certainty for the reasons that we have already covered, primarily the doubt about whether the protocol will be implemented and, indeed, whether there will be a deal.

Anton Spisak: I have nothing to add.

Q173 **Chair:** Nothing to add? There is competition now. That is good.

Can we cast ourselves into the worst-case scenario? I am not using “worst-case” in a pejorative sense, but some form of customs checks to protect and preserve the integrity of the UK single market and of the EU single market are required between Northern Ireland and the Republic, and the Republic in its role as a gateway to the EU as a result of the land border. How and where do those customs checks and other checks manifest themselves? This is not a rhetorical question.

Dr Gudgin: One of the oddities in the negotiations is how little has been said about the protection of the UK single market. For instance, on goods that come into GB via Northern Ireland, as far as I know virtually nothing has been said about checks. It may be that this proposed lorry park in Larne is to allow those checks, but I do not know. It has not been said. There is quite a contrast between how relaxed the UK has been about protecting its domestic market and how maximalist and paranoid the EU seems to have been in the other direction. If the EU could relax a bit in the direction of the UK, we would all get on much faster.

Q174 **Chair:** If that relaxation is not there, how do these things manifest themselves?

Dr Gudgin: One of the things that has been said in the past—I have not seen it recently—is that there is a good way of doing checks on lorries coming in from GB to Northern Ireland, in that most of them have an hour or two hours on the ferry. The checks could actually be done on the ferry, which would mean there is no slowing down of the traffic whatsoever. Otherwise, I would have thought the checks would be most sensibly done at GB ports, such as Stranraer.

Q175 **Chair:** What about stuff that leaves GB, goes to NI and gets broken up?



HOUSE OF COMMONS

Part of the load is, let us say, processed in NI and then re-exported to GB, some of it is retained within NI, but an element of it then goes into the Republic and, ultimately, therefore has the potential to get into the whole of the EU single market. There is often an erroneous presumption that everything that is exported from GB to NI just stays in NI, and those are not the trading patterns we all know; otherwise, the element of north-south road traffic would not be there.

Dr Gudgin: The protocol says that the Joint Committee, or at least the Northern Ireland specialised sub-committee of that, should decide which goods are at risk of doing exactly what you have just decided. It looks like the default is that all goods are at risk before that committee has to start having a list that is shorter and more prescriptive, but it has not done so already. That is one of the main reasons for the UK Internal Market Bill. I do not know why they have not done it already. Why not? Get on with it.

Raoul Ruparel: It depends on whether your scenario is in the operation of the protocol. In the operation of the protocol, it will happen at the NI border, and it could happen on ferries, as Dr Gudgin suggests. That is an option. The UK Government have previously explored the option of potentially doing things before it leaves GB, so at ports at Stranraer and Liverpool, potentially, before it leaves, although that would require some flexibility on the EU side about how their rules are enforced and where they are enforced. That idea is unlikely now.

If you do not have a protocol, you then fall back into the world where it could happen in those places I have just mentioned, or it could happen, in theory, between the Republic and the rest of the EU, although that would then be a threat to the EU internal market and is very unlikely. We have obviously discussed the unlikelihood of there being any checks on the island of Ireland. You come back to there being some checks between GB and NI.

On the other way, on NI to GB, as Dr Gudgin said, UK Governments of various forms since 2016 have made a political choice to prioritise the Union over concerns about goods coming into the internal market. Personally, I am supportive of that choice. It is the right choice and reflects the reality that the likelihood of goods being routed in large volumes through the Republic into NI and into GB is, frankly, practically pretty unlikely. That is a sensible assumption that we have seen, which reduces the complexity of this.

As has been touched upon, there is the need for some kind of qualifying system, but I expect that will be relatively light touch. The UK Government are willing to accept any risks that go along with that of goods coming in from the EU via NI.

In terms of the UK Internal Market Bill motivation, the problem is that it does not address any of these issues. I agree with the frustration of Dr Gudgin about the lack of progress on the at-risk tariffs, but that has not



HOUSE OF COMMONS

been addressed. We are expecting that to be addressed in the upcoming Finance Bill. That is one of the points in all this that we have not really talked about—that there is more to come. There is the potential for further breaches of the withdrawal agreement, depending on how that it is set out in the Finance Bill.

As has been said, the at-risk tariffs were a point that was set out to be sorted in the Joint Committee and therefore is, by definition, uncertain. Even in the scenario where the sides do not agree, the process of arbitration within the withdrawal agreement would be the first step to try to sort that out, rather than taking unilateral action. That is an important point about the potential escalation of this. Things may get worse or be seen to get worse, particularly because, as we have discussed, what is taken and done in the Internal Market Bill does not actually touch on the core functioning of the protocol too much. When you get into at-risk tariffs, you start to touch on the much more core function of the protocol, and that is important.

Anton Spisak: I agree with all that. There is nothing to add from me.

Professor Hayward: I got confused as to what borders we are talking about now. One thing that has not been touched on is the fact that, in the 7 August guidance issued to businesses about trading with Northern Ireland, GB to NI, there was a promise made that there would be no new infrastructure for customs in NI ports, or indeed in NI-facing GB ports. That immediately raises the question of where those checks might happen. We know there are going to be checks, even beyond animal products and related products. This suggests they will be elsewhere across Northern Ireland. This raises the prospect of some concern, as it was raised even with the debate around the backstop and then the protocol as it was, before we had that, about how you manage customs checks in the field in Northern Ireland in a way that is not provocative.

Chair: I think we all have a concern that any installations, no matter how benign and civilian-looking, can provide a target for expressions of unrest. I think we have heard that from both the PSNI and the Garda on previous occasions.

On behalf of the Committee, could I thank our four witnesses for joining us? Thank you for answering our questions. I was going to say the topicality of this inquiry is fortunate, but maybe it is unfortunate. Anyway, it is a very topical inquiry. We are hugely grateful to the four of you, who clearly know an awful lot about this subject and have given great thought to the issues at hand. Thank you very much indeed. Thank you to my colleagues for joining us, and I close the meeting.