

Committee on the Future Relationship with the European Union

Oral evidence: Progress of the negotiations on the UK's future relationship with the EU, HC 203

Wednesday 23 September 2020

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Members present: Hilary Benn (Chair); Joanna Cherry; Mark Eastwood; Sally-Ann Hart; Dr Rupa Huq; Antony Higginbotham; Stephen Kinnock; Nigel Mills; Mr Barry Sheerman; Jane Stevenson; Matt Vickers.

Questions 786 - 825

Witnesses

I: Professor Catherine Barnard, Professor of European Union and Labour Law, University of Cambridge, Shanker Singham, Chief Executive Officer, Competere, and Georgina Wright, Senior Researcher, Institute for Government.

Examination of witnesses

Witnesses: Professor Catherine Barnard, Shanker Singham and Georgina Wright.

Q786 Chair: Good morning. On behalf of the Committee, can I welcome our three witnesses today? Thank you for giving up your valuable time to help us in our deliberations. For the purposes of our records, could you please introduce yourselves?

Professor Barnard: Thank you very much for inviting us. My name is Catherine Barnard. I am professor of European Union and employment law at the University of Cambridge and also senior fellow in the UK in a Changing Europe programme, which is a non-partisan organisation.

Shanker Singham: Good morning. I am Shanker Singham. I am the CEO of Competere, which is a trade consultancy. I am a former trade adviser to the UK Secretary of State for Trade and the US Trade Representative.



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Georgina Wright: Good morning. I am Georgina Wright. I am a senior researcher at the Institute for Government, which is a think-tank based in London, striving to make Government more effective.

Q787 **Chair:** Thank you. As always, we have a lot of ground to cover and a lot of questions to put to you. Colleagues will direct their questions in the first instance to particular members of the panel. If you would like to come in, the easiest way to grab my attention is to stick up your hand. Do not feel under an obligation for all three of you to answer all of the questions. Giving answers that are as succinct as possible will help us to get through everything we want to cover this morning.

We will go into more detail on all of these things, but I would like to start with you, Catherine Barnard. In the light of the proposals contained in the United Kingdom Internal Market Bill, could you tell us in what way the dispute resolution mechanism set out in article 16 of the withdrawal agreement, to do with the Northern Ireland protocol, is not sufficient to provide the Government, apparently, with reassurance that, if things happen that they think are outwith the spirit of the agreement, they can take action to protect unfettered trade, the integrity of the United Kingdom and so on and so forth? What do you think the Government think might be wrong with article 16 and the process for arbitration that follows?

Professor Barnard: The safeguard clause is there. The interesting thing is that there seems to be little evidence that the Government contemplated using it. Certainly, what is striking is that there is no reference in the UK Internal Market Bill or any of the surrounding documentation as to why clauses 42, 43 and 45 of the Bill were being delivered as a unilateral Act under article 16 of the Northern Ireland protocol.

This leads me to believe that the aim of those clauses was more political than legal, but of course the legal consequences have been serious—they have attracted the attention not just of the EU, which was probably the purpose, but of the international stage. The question, then, is about what the EU might do if the Bill becomes law. As you know, clauses 42, 43 and 45 only contain powers. The argument is that there is no breach of international law until those powers are exercised.

A number of people have suggested that the UK, just by publishing the UK Internal Market Bill, is in breach of various provisions of the withdrawal agreement, specifically article 5, which is the general good faith clause, and article 184. Article 184 is the provision that says negotiations over the future trade agreement should be done in good faith and with best endeavours. The argument is that using such strong language and such strong proposed measures in clauses 42, 44 and 45 suggests that the UK may not be acting in good faith in respect of the future trade negotiations, because the threat is that we might be blowing aspects of the agreement we have just entered into, namely the withdrawal agreement, out of the water.



Q788 **Chair:** Let us take the example of the definition of at-risk goods. The default position is that everything is at risk if you have not reached an agreement about which things are and which things are not at-risk goods. Presumably, when the Government were negotiating the Northern Ireland protocol and they could not reach what they considered to be a sensible agreement on what an at-risk good was, would they not have thought, "What do we do in those circumstances?" and looked carefully at what was in article 16 and the dispute resolution mechanism?

Professor Barnard: You might have thought that would have been the case. It is true that the Northern Ireland protocol is not as clearly written as perhaps you might hope. The UK Internal Market Bill is not about those at-risk goods. The Bill deals only with west-east relations—i.e. exit declarations on goods going from Northern Ireland into GB. The UK Internal Market Bill does not cover the situation of goods going from GB to Northern Ireland—i.e. from Liverpool to Belfast.

Q789 **Chair:** Although the Government have hinted pretty clearly that further legislation will follow to deal with that point.

Professor Barnard: That is absolutely right, but of course we have not seen that yet.

Q790 **Chair:** No, we have not. That is very helpful. Can I turn to you, Georgina Wright, to comment on one aspect of the negotiations? We are told that state aid and competition policy is one of the two main outstanding items. Would it help the negotiations if the Government were to publish what their state aid regime is going to be?

Georgina Wright: Yes, state aid is one of the key stumbling blocks to reaching a deal by the end of the year, although there are other ones that are important.

If you take the EU's position, my view is that it was always maximalist because it was intended to be climbed down from. The EU did suggest—Michel Barnier made this reference in one of his press conferences recently—that the EU would be prepared to move if the UK set up a similar system to self-regulate its own subsidies. Obviously, the UK's decision to adopt a rather weak subsidy regime has not given the EU the reassurances it was looking for. That being said, the UK has always been very clear that it felt the EU's position was unreasonable and that the EU was not treating the UK as it had treated all its other trading partners.

The Institute for Government has just published a paper on state aid, making the point that having a legally enforceable subsidy regime is actually in the UK's interests. Beyond what happens between the UK and the EU, there are two other reasons why having a more legally enforceable subsidy regime is important. One is that it helps to avoid an intra-UK subsidy race. That means, for example, if you prevent Scotland from giving more subsidies than England, then you are preventing Scotland from luring business away from England. That is one aspect of



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why having quite a robust and legally enforceable subsidy regime is in the UK's interests.

Secondly, it actually provides good discipline on public money and it makes sure you are directing subsidies to projects that are the most effective and that are achieving the Government's overall policy priorities. If you make climate change or a green deal the priority, you can make sure you direct investment there. There are other reasons why this is important, but of course, to return, to the UK-EU trade negotiation, it does seem clear that the EU will want more than what the UK is prepared to offer so far.

Q791 **Chair:** On that very point, if the Government do not publish their subsidy regime before the end of October, when we have said that negotiations have to be concluded, where does that leave the prospects of there being an agreement?

Georgina Wright: Only those at the heart of the negotiations know exactly what is going on and what progress has been made. From the EU's perspective, it has always been very clear that the UK did want to do things differently. Otherwise, why would you vote to leave the single market and the customs union?

What the EU was concerned about was, "How do we deal with a UK that is our neighbour and both an ally but also potentially a direct competitor?" If we cannot have similar rules, we must find a way to manage this divergence going forward so that we can prevent this from coming to a situation where we realise that this divergence is disrupting trade, leading to delays and potentially bringing costs for businesses and consumers.

It really hinges on that governance structure. The question is about how to have an institutional framework where you are in regular dialogue to ensure that, if there is divergence, you address that early on and you try to resolve that diplomatically. You have to ensure you have a dispute settlement mechanism there to fall back on if you cannot resolve things diplomatically. If you look at the EU's trade agreements, there has not really been a trade dispute with the EU and a country that it has a trade agreement with, because it often resolves those disagreements early on and diplomatically.

The other reason to have a strong governance mechanism is because the WTO is grinding to a halt. There are lots of reasons for this. The US not wanting to appoint someone to the arbitration panel means that you could not rely on it.

If we are to find a solution, it will either be the UK putting forward some form of subsidy regime that is acceptable to the EU or pushing on the governance to see whether there can be a way to try to resolve disputes early on.



Q792 **Chair:** Finally from me at this stage, I would like to turn to you, Shanker Singham. The issue of third-country listing of the United Kingdom for the purposes of certain agricultural products suddenly appeared from nowhere, as far as the public are concerned, in the last couple of weeks. Do you think, with your long experience, that there is any prospect whatsoever of the EU refusing to give the United Kingdom third-country listing?

Shanker Singham: Given the number of countries that have third-country listing, which is well over 100—this includes countries with very different regimes in the area of SPS, sanitary and phytosanitary—it is extremely unlikely, although we have seen in this negotiation that things that seem unlikely sometimes seem to be floated, so one cannot rule it out. It would be quite an extraordinary thing for the EU to do, especially given the fact that there would be clear notice if the UK was going to change its current regime in the SPS area, because there would be some sort of parliamentary action. It is relatively unlikely, but in a negotiation all things are possible.

If I can just come back to a couple of points in the earlier questions, one was on trade between GB and Northern Ireland. The UK Internal Market Bill does actually say something about that. It sets up the future legislation you referred to, particularly with respect to the central point. The central negotiating point that the UK won, if you like, in the negotiation was the fact that Northern Ireland is in the UK customs territory, so the UK Internal Market Bill expresses and states that.

That is important because one has to read the whole Northern Ireland protocol in the light of the fact that Northern Ireland is in the UK customs territory on a *de jure* basis. Therefore, there is language in the UK Internal Market Bill about the free flow of goods from GB to NI. The protocol says it has to be unfettered between Northern Ireland to GB, but the words “free flow” are in the Bill. What that is doing is setting up the fact that there are two interpretations here: there is a European interpretation of the protocol and a UK interpretation. They are not always the same, particularly in the at-risk/not-at-risk area, and particularly on the precise application of UCC rules to trade that is “not at risk.”

On the state aid point, I shared with the Committee a draft of a chapter about competition and market distortions that I wrote in an FTA. I drafted a UK-EU FTA. I agree with a lot of what Georgina said about this. If there is a dispute about this and we are not making progress, there are two ways. One is for the UK to come up with its own anti-subsidy regime, which it said it would do, and let the EU know that. The other way, of course, is for the EU to put forward the kind of text that I have put before the Committee. That would have high-level disciplines on what the UK subsidy regime could be. This is how you would normally do it in a trade agreement. The EU would basically invite the UK to respond to such a proposal.



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I agree that the better approach from the UK Government's perspective is to put their own ideas on the table. If you do not, you are going to be subject to somebody else's ideas. If I am the EU and I genuinely want a resolution of this issue that is not simply the UK adopting the EU state aid regime, which is obviously not going to happen, the way to do it is to put that text on the table yourself and invite the UK to respond.

Chair: Thank you very much indeed. That is extremely helpful.

Mr Sheerman: There was an interesting remark made by Georgina about getting to the heart of the matter. There has been a lot of sound and fury and some pretty spectacular things happening in these last two weeks. Even today's leaked message from Michael Gove adds to this sound and fury. Getting down to the discussions about the future relationship, what is the feeling of our three experts—they certainly have their ears to the ground much more than I do—about what is really going on? If we can put what I call the sound and the fury to one side, what is going on at the heart of the negotiations on the future relationship?

Professor Barnard: Although there is quite a lot of sound and fury, as I say, the Government's addition of part 5 of the UK Internal Market Bill did come as a surprise, not least because, as the Chair pointed out, article 16 would have given the UK some latitude to do it in a much less dramatic way. Of course, article 16 would not have delivered what the UK wanted, because article 16 requires any safeguard measures to be limited in scope and duration, and that is not what the UK Internal Market Bill is delivering in clauses 42 and 43.

With that said, there seems to have been some shift in the negotiations. There are informal talks. Both sides have formal talks next week. We are working to an incredibly tight timetable. If you look at what was leaked to Politico, what we see is that there really needs to be an agreement in the first week of October so there is time for translation and legal cleaning, so that it can be looked at by the European Council on 15 October. We are really up against it. We think that the issues that are still proving difficult are complicated. State aid is one we have heard about, fishing being another. There are other aspects on level playing field and environmental and social protection. It is not straightforward to try to get all of this sorted out, essentially in a fortnight.

Q793 **Mr Sheerman:** Shanker, do you have a view on this, getting underneath the sound and fury?

Shanker Singham: There obviously is a lot of sound and fury associated with the negotiations at the current time. The problematic areas were state aid, fisheries, to some extent governance and the Northern Ireland protocol. What you are seeing in these different areas is that the EU's initial position, particularly on the state aid issue, was, "The way to solve this issue is for you to adopt the EU's state aid rules with full dispute settlement under the ordinary EU state aid provisions." The EU is moving from that towards making it clear, "You need to have a subsidies regime



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that delivers the same broad objective of ensuring that Governments do not intervene in markets and prefer particular competitors,” which the EU is rightly concerned about.

The difficulty for the EU in the state aid area is to put those two different regimes—their own state aid regime and whatever the UK’s anti-subsidy regime is—under a common dispute settlement mechanism in the free trade agreement. That will be very difficult for the EU to accept, but it is also necessary. If you are going to have two sets of disciplines like this, they do have to be justified by a dispute settlement mechanism in the FTA, not by one or other of the countries’ courts.

With that said, I have been working in the market distortions area for almost 30 years now, and that sort of mechanism would be a significant contribution of both parties to the international trading system, because the international trading system has been struggling with this issue of behind-the-border barriers and market distortions really since 1997, most recently, when competition was an issue that was brought in to the WTO agenda through the Singapore round. This would be a contribution.

To answer your question, what is happening is that people are moving off their initial positions. This was necessary for any deal to occur. What both parties will be looking to do is to ensure that, when they do come off their initial positions and they do come to some sort of agreement—I still continue to believe that an agreement is more likely than not—what they have to be able to do is to present that to their internal constituencies as a win. What you are seeing here is just the process of getting ready to present your climb-down position as a win to your domestic constituencies. That is what the UK and the EU are doing.

On governance, there is more room for manoeuvre. On fisheries, if I am a French fisherman, I would rather win the actual negotiation, which is the negotiation for access to the UK’s exclusive economic zone. Nobody has said that we are not going to have any access for foreign fishermen. In fact, we need foreign fisherman to fish in our exclusive economic zone. We need them to land the fish not only in our ports but also in EU ports for trade purposes and to ensure our product goes to the European single market. On fisheries, there is a definite landing zone. If I am a French fisherman, I would rather get that and do well in that negotiation than cause a breakdown of the ultimate EU-UK negotiations such that I have no access, because there is no agreement on that.

As soon as the EU recognises that the UK is going to be an independent port and coastal state, we can resolve that issue, which you know is resolvable because it is ultimately about a number—the UK will have its number, the member states will have their numbers. There will be a resolution. Macron and the fishing member states will have to be able to tell their domestic constituents that they got a win out of this arrangement. That is it.



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I have one quick point on the legal side of things. We are still negotiating. I have been involved in lots of negotiations, where we will use the lawyers to try to improve our negotiating position. Certainly, telling the UK, "We have all sorts of internal legal processes, and if you do not get your act together in a week this cannot be done," is certainly what I would be doing if I were the EU to leverage a better negotiating position.

The reality is that, if a political deal is done—this is where I would diverge from some of the commentary on this—by even the end of the year, no lawyer in the Commission or no legal process is ultimately going to get in the way of finding a solution. There are ways of finding solutions. The issue is whether or not a political deal can be done in the time. There are all kinds of ways, including implementation periods and specific periods to cover ratification processes, but no one is going to talk about this right now, because we are still negotiating.

Q794 Mr Sheerman: Can I push you a little on that? I totally agree with what you said about negotiations. The lawyers will come in and we can resolve things down the line. I am picking up from friends across Europe that the big difference over these last two weeks is that, in all negotiation, there has to be a basis of trust. What seems to have been damaged in these last two weeks is that fundamental feeling of trust. Yes, they were difficult negotiations; yes, it is going to be a pretty hard time to go through, and everybody is working on it against these deadlines; but the events of recent days have destroyed that feeling of trust. Is there anything in that?

Shanker Singham: First of all, this negotiation is unlike most negotiations. In most trade negotiations, there is a high degree of trust going in. There is a high degree of trust because the parties have said they want to do a deal with each other. This is different, obviously, because the UK has decided to leave the EU, so you start off with a trust deficit as we go forward.

What was going on in the June/July period was that the EU was essentially negotiating with the UK Government as they were prior to the new Administration taking over. The history of that negotiation was that, if the EU remained very firm with its very strong opening bid and did not deviate from its opening bid, the UK would cave in. From a negotiating standpoint, the EU has just assumed that would continue, and hence we have this issue with state aid, in which the EU puts forward, as Georgina described it, a maximalist position. I would describe it as an extremely unrealistic position that another country would adopt your own legal order. They are doing that because they think the UK will ultimately cave in and simply accept the EU demands.

I do not see this as a particular trust issue. What the UK had to get across—it has now finally succeeded in getting this across—is that it is not going to cave in as it has done in the past. That is quite hard. It is quite hard for the EU to understand that there is a completely different approach now. The election did not cause a change in the party in



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control; you still have the same governing party, so why should there be a difference, in the EU's mind? It is quite difficult to get that across.

A lot of the UK Internal Market Bill posturing has been about making that point very clear to the EU. Unfortunately for the Government, you have three different audiences.

Chair: I do not mean to interrupt here.

Mr Sheerman: I have had a good run.

Chair: Yes, you have. I did see both Georgina and Catherine put their hands up. If there is something you want to add very succinctly before we move on, please do.

Georgina Wright: I have a couple of things, and I promise to be succinct. Listening to this, it strikes me that there are two things here. There is the politics of negotiations and then the process and legal requirements.

On the politics, I agree with Catherine and Shanker. It was always clear that autumn was going to be the crunch point. At the moment, they are both looking at each other and staring each other in the eyes; no one wants to go first because they know that once you give in and you make a step forward, you are reducing your leverage in other areas. Inevitably, we are now going to enter a period of tunnels—or submarines, as I have heard they are calling them in Brussels. These are intense negotiations, in which no one will really know what is going on. That is where they will really hash out a deal. This is because both sides have persistently said they want a deal, and we should go with that.

On the trust issue, very quickly, trust is absolutely necessary to have a deal but it also informs the kind of deal you will have. High levels of trust will mean there might be more flexibility. Low levels of trust will mean that both sides will be less willing to compromise.

The third point is on the timeline. The only real, legal deadline is 31 December. The Prime Minister has said that he would like the outline of a deal by 15 October. The EU has said they want a deal by the end of October. That is because the negotiations are only part of the challenge; reaching the deal is only part of the challenge. You then need to factor in time to vote on that deal, time for businesses to prepare and time for legal scrubbing.

On the EU side, there needs to be a vote before the end of the year. You would need the European Parliament to approve it, and that is because in the past the EU has tried to give the European Parliament—as you know, it is the only democratically elected institution in the EU—more of a say over trade agreements. It has said it wants time to debate it at the committee and plenary stages, and then the EU Governments have to vote on it after that.



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I think the EU wants a deal. Negotiations could technically run as long as possible. It is just that neither side wants that for due diligence.

Professor Barnard: I admire Shanker's faith in lawyers, but lawyers also cause problems. The problem is that there is no obvious mechanism for extending the transition period for even three or four weeks into early 2021. Some people say you can use article 50, but the EU's view is that article 50 was turned off for the UK on 1 February. Others say it might be possible to have a sort of international agreement. The problem is that, if it means extending the transition period—to be clear, that is the period we are in at the moment—it is not at all obvious how you get there. You might say, "For a month or so, that is absolutely fine," but remember that the EU is based on the rule of law.

There was a second point I wanted to make. Shanker talked about an implementation period, and that is something we should watch out for. If the deal is not concluded until literally the end of the year, the last week in December, businesses still need time to adapt. The problem is that they will not have time, because they will not know what is in the deal. They need to do something on 2 January.

I think it is likely that there will be a proper implementation period, a period different from the one we are in at the moment, which the Government call an implementation period. Most trade deals have an implementation period of the best part of five years. That clearly would not be acceptable to the UK, but there may be a one or two-year proper implementation period to steadily turn off the position we are currently in.

Q795 **Nigel Mills:** The Government announced a couple of weeks ago that we will have a WTO-compliant state aid regime. Is that not enough, Shanker? Do we need to announce more detail on what we will do to make the EU happy with that position? Is that statement on compliance enough to get over this hurdle?

Shanker Singham: The EU state aid regime goes considerably beyond what is required by the WTO agreement on subsidies and countervailing measures. To some extent, the EU's state aid regime is also written for this, but the WTO agreement is written for the case where I give money to a particular company or undertaking, and that is deemed to be a subsidy. That is a very basic subsidy.

Under the WTO system, subsidies have to be specific in order to be actionable. I and many other people think the WTO code has gaps. Most notably, it has gaps for economies such as China, where you have a systematic distortion of the market. However, there is a possibility for the UK to develop a regime that builds on the WTO's subsidies agreement.

In fact, if you look at the UK Internal Market Bill, to Georgina's earlier point, there are disciplines that cover market distortions in the devolved nations that have a negative effect on competition, which is the way to



go and the way to deal with this issue. The way the EU state aid regime initially started dealing with this sort of issue was essentially to have disciplines on anti-competitive market distortions, which is what you actually want to tackle.

As I said, there are two ways of doing this. The UK does not have to come up with an absolutely perfect legal instrument to deal with subsidies or what the EU would call state aid—what I would call distortions. What it does need to do is to subject itself in the agreement to high-level disciplines on what its anti-subsidy regime would include and what it would not include. If you look at competition chapters in trade agreements, you see these sorts of high-level disciplines.

The UK position would be, “Why should we come up with a complete legal order when we do not have to? We have said that we are going to have an anti-subsidies regime. Why does the EU not tell us what sorts of things that anti-subsidy regime should have in it?” You could do that in an agreement. As I said to the Chair earlier on, it would be better if the UK were to put that text on the table, but you do not actually need to come up with the full text of what your law is going to be.

Q796 Nigel Mills: Would the text we have agreed with Japan be sufficient progress?

Shanker Singham: There was quite a lot of reporting on the text of the UK-Japan agreement on subsidies that was not actually very accurate. It is not true to say that the UK-Japan agreement basically goes much further than the subsidies code. It goes a little bit further in some ways, but it is basically a very similar agreement to the agreements you have around the world. You always have a chapter on trade remedies and subsidies, and you always have a chapter that essentially repeats the WTO commitments and says that countries will not subsidise in ways that violate existing WTO rules.

In this particular case, there is an opportunity for the UK and the EU to come up with better disciplines on distortion and subsidies. The EU, the US and Japan are part of a trilateral group in the WTO that has essentially acknowledged that the WTO subsidies regime is deficient in certain ways and want to introduce this. They have basically said, “We will use our trade deals with other countries to introduce these kinds of concepts in our agreements”. The most obvious agreement to introduce these concepts in is the EU-UK agreement.

I would think that both parties would want to do this. There is a very clear landing zone for this, but it does not require the UK to have a complete plan of, “This is exactly what we are going to do”. It requires both parties to say, “These are the disciplines we are going to subject ourselves to.”

Q797 Nigel Mills: I assume we are all going to need to know what we are going to do from 1 January at some time between now and 1 January.



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Shanker Singham: We will need to know what disciplines we are prepared to subject ourselves to, and I do not see a problem with that. This is more of a problem for the EU than for the UK, but they will need to know and be comfortable with the kind of dispute settlement mechanism that would ride over the top. Basically, if I am a EU company and I am complaining about an EU member state distorting its market in some way, I will have a course of action in the European Court of Justice under the European state aid rules, which I will bring. Similarly, if I am a European company, I want to have a course of action in the UK and the UK courts for UK violations of subsidies.

Obviously, both sides will always have the WTO to fall back on, but that is for a limited range of things. The difficulty is going to be if the country itself is violating its own rules. Then you need dispute settlement in the FTA, and that is where the EU is going to have a challenge, because it has not put its state aid regime under any kind of dispute settlement mechanism internationally before.

Q798 **Nigel Mills:** Is the covid crisis making this harder? It is probably fair that people have been hosing state aid around across the EU and across the UK in very large amounts this year. Presumably we would not want to be accidentally agreeing something that would have made the furlough scheme or something like that much harder. Is that context making it harder for us to agree to a discipline that before we would probably have agreed to quite easily?

Shanker Singham: I do not think so, because the various mechanisms the UK had for furlough, CBILS and all the rest of it were notified under EU state aid notification mechanisms and were fine. DG Competition, which is the directorate in the European Commission that handles these things, did not have an issue with any of the UK's proposals in terms of how it was going to handle these things. Any subsidy or state aid regime is going to have exceptions for emergency. You can write those in, and those are generally present in these kinds of disciplines. Covid is obviously such an existential threat that it would certainly be covered in any of those potential exceptions.

To be fair to the EU, it is not so concerned about that. It is not concerned about what the UK might do in the event of a crisis. What it is concerned about—I would say it is probably right to be concerned about this—is that the UK will distort its market and give competitive advantage to particular UK companies so that they would outcompete European companies.

Georgina Wright: I agree with Shanker. There are three reasons why the WTO subsidy scheme will not satisfy the EU. First, it relies on state-to-state enforcement. That really means you only tackle big subsidies; it is much harder to stop smaller subsidies and that distortion to competition.

Secondly, as I mentioned earlier, the enforcement mechanism is ineffective. If we want to try to resolve this, we really need to think



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creatively and constructively about governance and how you manage disputes.

Thirdly, the WTO subsidy regime does not cover subsidies in services; it is mostly on goods. I was talking to George Riddell from Ernst & Young about this. This is why the EU is pushing for something more robust, because of course a lot of the trade will hopefully be in services. That needs to be covered as well.

That is why we need to look at it. It is not just a question of the EU trying to impose its rules or trying in some way to manage competition as soon as possible; it is really because the WTO subsidy regime is quite limited, both in terms of enforcement and in terms of what it covers.

Q799 Stephen Kinnock: I have a question about the role of the European Parliament in all of this. On 11 September, the European Parliament issued a pretty unequivocal statement saying that the provisions in the UK Internal Market Bill that seek to override the legally binding withdrawal agreement were a breach of international law and not acceptable to the European Parliament. The European Parliament said that it would refuse to ratify under any circumstances any agreement between the EU and the UK that breaches the withdrawal agreement.

Perhaps I will turn to you first, Georgina. Can you give an assessment of the extent to which the European Parliament's position is influencing the position of the EU member states?

Georgina Wright: Thank you for the question. This is valid for the European Parliament but also for the member states. They have been very clear that there would only be a future agreement providing there is full application of the withdrawal agreement. That has always been a condition from the very beginning.

That being said, the European Parliament felt it had not enough time to deliberate in the article 50 negotiations. They have their own constituents who they need to stand up for. In a sense, they have to try to maximise that time and show that, yes, they are standing up for what they believe in. A lot of this is also politics. My conclusion is that, if EU member states are happy with the deal, I doubt very much that the European Parliament would vote it down.

That being said, the full application of the withdrawal agreement is very important. If the UK Internal Market Bill goes through unamended, I suspect it will decrease flexibility and compromise in other areas, particularly in the future trade agreement. I would not take that threat lightly. Of course, there is always the possibility that they will vote it down. More to the point, it really makes Michel Barnier's task a lot harder, because he has to go to the European Parliament and to member states and say, "Let us move away from our mandate. Trust me on this." They can then turn around and say, "How can we trust you on this? The UK is going ahead and trying to unpick the withdrawal agreement."



Would they vote it down? Probably not, but it will certainly make them more bullish on other aspects, particularly on future trade agreements.

Q800 Stephen Kinnock: Catherine, what assessment can you make of whether Bob Neill's amendment had any effect in terms of the EU's legal service? Has there been any success in terms of the objective of that amendment, to give some reassurance to the European Union, or is the amendment just seen as smoke and mirrors?

Professor Barnard: The Bob Neill amendment allows the House of Commons to approve any exercise of these powers. It is just the House of Commons; the House of Lords is to note. The point is that the powers themselves, if exercised, will breach article 5 and article 10 of the Northern Ireland protocol and articles 4 and 5 of the withdrawal agreement itself. It does not make that much difference, because the fact is that clauses 42 and 43 say clearly that there will be powers to disapply or modify article 10 of the Northern Ireland protocol and, likewise, to turn off article 4, which is on direct effect, in respect of clauses 42 and 43.

The fact is that there is a breach of international law. Now, we know the argument: under domestic law it would be lawful because of section 38 of the 2020 Act. Section 38 reasserts parliamentary sovereignty. It was always clear that Parliament was always sovereign and thus the UK Internal Market Bill, as a later Bill in time, will prevail over the European Union (Withdrawal) Act 2020, but that is at domestic level and not at international level. It would be a breach of international law.

Q801 Stephen Kinnock: Just to probe that further in terms of the implications of breaching international law, given your legal expertise and perspective on this, to what extent might that influence British attempts to strike other trade deals or, indeed, to enter into any other legal arrangements? By doing this, are we sending our trade negotiators naked into the conference chambers, to quote Aneurin Bevan? Are we affecting other aspects of the United Kingdom's standing in the world, for example even things such as our sovereign debt status?

Professor Barnard: I would not necessarily say naked, but maybe semi-clad. It has not helped our position very much. We also know that the UK concluded the trade agreement with Japan after the UK Internal Market Bill was published, so it is perhaps not devastating. On the other hand, it raises a difficult moral point. When we criticise other states for non-compliance with international law, we have traditionally done it from the perspective of having been acting in compliance with international law ourselves. The fact is that there is a breach. Brandon Lewis has said it is a specific and limited breach, but nevertheless it is a specific and limited breach of something that is fundamental to the withdrawal agreement—namely, key parts of the Northern Ireland protocol. It might be limited, because it is about the Northern Ireland protocol, but it is also fundamental to the Northern Ireland protocol, which was entered into less than a year ago.



Q802 **Stephen Kinnock:** My final question is to Shanker and it is on negotiation strategy. One of the running themes of the Government throughout these negotiations, certainly since this current Government have been in office, is that by threatening no deal you increase your chances of getting a deal and you increase your leverage. Can you give a single example of where that strategy has succeeded? Is there any evidence at all that threatening no deal or threatening to break international law in any way has led to a softening of the European Union's position or in any way increases the chance of getting a deal?

Shanker Singham: This is a sui generis negotiation, as we said. It is not like a normal trade negotiation that the EU would do with other third parties. The challenge that the UK Government have here is to get the European Union to understand, as David Frost said in his Brussels speech, that the idea that the UK is going to be, in the case of fisheries, an independent port and coastal state and, in the case of other aspects of the negotiations, an independent country with its own legal order, which would not put another entity's legal order over its own, was not a negotiating position. In his words, this was the purpose of the project.

It has proved to be quite difficult to get that message across to the EU. The Government have manifested various degrees of desperation to get that message across. That message has now finally landed, and that is why we are seeing some movement.

Q803 **Stephen Kinnock:** Can you give an example of the movement we are seeing?

Shanker Singham: The most obvious one is this movement on state aid. The initial EU position was, "You can only satisfy our concern about the level playing field and market distortions in your market by adopting our own legal order, the EU state aid rules, and having the European Court of Justice as the dispute settlement mechanism over the top of your legal order. That is the only way you can satisfy us". That is not their view now. Their view now is, "Yes, there are other ways you can do it, but we want to see some evidence that you are going to". That is a massive change, because one is impossible to achieve and the other is eminently possible to achieve and has quite a big landing zone. That would be one example.

I also had a follow-up on the issue of the UK Internal Market Bill. I do not particularly understand why Brandon Lewis said what he said about that. I do not see that this is a violation of international law because it gives Ministers powers that would not be exercised except in the event of no trade deal and no agreement in the Joint Committee. Those powers have not been used yet. In terms of the international law violation, that would relate to the withdrawal agreement and the Northern Ireland protocol. One has to differentiate international law from European law. Setting aside direct effect and so forth are matters of European law. You have two entities here: you have the EU and the UK, and they both have their own internal legal orders.



If there is no free trade agreement and no Joint Committee agreement, we are going to have a problem here, because the NI protocol is full of inconsistencies and ambiguities. It provides that Northern Ireland is in the UK customs territory, and that has to mean something. Similarly, it cannot have been the intention of the parties that EU state aid rules would apply to the whole of the UK through the backdoor of the Northern Ireland protocol, which is the case here. Therefore, there needs to be some clarification on that point. We would not be having this deep debate about state aid if the EU knew that the state aid rules would be covered in the event of no deal anyway.

There are important clarifications that need to be made, perhaps the most important of which is about what you do across the GB-NI boundary for products coming from GB into Northern Ireland and how you manage the at-risk/not-at-risk category. The UK would no doubt say, "Because Northern Ireland is in our own customs territory, we can determine what is not at risk and we can show the Joint Committee that there is a particular class of products that is absolutely not at risk, because we have track and trace and everything else to prove that."

The UK would want that not-at-risk category for movements only GB-to-NI to be a pretty large category of goods, perhaps as much as 70% by value of the goods that move across the GB-NI boundary. The EU current position is that everything is at risk unless the Joint Committee says it is not at risk. There are significant changes.

Q804 Matt Vickers: In his comments after the seventh round of talks in August, Michel Barnier added mobility and social security co-ordination as an area where our positions remain far apart. Where do you see the sticking point on mobility and social security co-ordination?

Shanker Singham: It is not an area that I particularly closely follow, because it is not really a trade-related area. The only thing I would say about mobility is that generally—obviously, in this agreement there are going to be different provisions—the starting point would be mode 4 services mobility, which is where you would ensure that both parties would have better arrangements for things like business visas and other arrangements to go to work in both jurisdictions. In this case, because we are starting from the point of free movement, better mobility provisions could be agreed.

I am not particularly knowledgeable about social security, so I will leave it to the other witnesses.

Georgina Wright: Social security co-ordination does not typically feature in FTAs. This is one example where the EU might be saying, "Clearly, you are not seeking a Canada deal; you are seeking a Canada-plus deal."

The other thing is that social security co-ordination is not an EU competence; it is a mixed competence. Some of that falls under member-state law, so that has implications for ratification as well. For any EU



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trade agreement, there would need to be a vote at the EU level by member states and the European Parliament before the end of the year.

If there are any bits that cover member-state law, there would need to be ratification by the EU-27 national Parliaments and possibly regional Parliaments. Those votes can take place after, and the UK and EU can agree provisional application, but usually provisional application is in areas of EU law only, not in areas of member-state law. There are also all sorts of implications around provisional application. I suspect that is where part of it comes from. One is that this is something that is seen as a bit of a cherry, and the other might just be from a process perspective.

As I said, we are very much at the heart of negotiations. At this point, it is not a foregone conclusion. It might just end up in that final deal, if there is one.

Q805 Mark Eastwood: My question is for Georgina first, and then Shanker could follow up. There have been various sticking points in the negotiations, which we have already gone through, such as state aid, fisheries and the level playing field. We have discussed them in quite a few sessions previously. Which areas of the negotiations, if any, have now been provisionally agreed between the two parties?

Georgina Wright: That is an excellent question and one that is probably best directed to those who are in the negotiating room. I go with what has been said on the record and some of the reports you hear. There has been progress, but it has been almost "three steps forward, two steps back." There has been much more progress in areas such as energy co-operation, for example. There has been a lot of progress on scientific research co-operation and aspects of goods. The problem is that we only talk about the big sticking points, because that is what prevents a final deal from happening.

Reuters published an article last week saying there had been some movement on fisheries as well. As Shanker was saying earlier, it seems that there has been a recognition on the EU side that there might need to be movement there. The big one is really around state aid and the subsidy regime. There are some other things as well that do not feature as prominently but are important, such as rules of origin and other level playing field requirements like high-level environmental protection and stuff like that.

It will really depend on how the next round of negotiations goes, what progress has been made and whether both sides actually decide to go into tunnel mode to hash out a deal. It is very difficult to say, at this point, where a tick-box exercise has been done. Also, the EU has always said that there will be no agreement unless there is progress across the board. It did not want to say, "Let us move forward and progress where we can," and then leave the tricky points to the end; it very much wanted everything to be held in the balance.



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Shanker Singham: In any trade negotiation, the general rule is that nothing is agreed until everything is agreed. Because of that, because it is a single undertaking, you are not going to hear very much about progress in some of these more difficult areas until, lo and behold, a deal emerges.

In looking at this deal compared with other deals, I do not see a massive impediment to agreeing this. There would be a problem if we had a Government in the UK that had said they wanted to subsidise, to distort their markets and do these sorts of things. Then you would have a genuine problem and it would probably be very difficult to get to an agreement. The EU's view that it does not want to have the UK subsidising its companies for competitive advantage is a very reasonable view to have, but that is not the case here. This is in fact across the board in the UK; this is not just a current Government thing. The UK relies on state aid much less than, say, France or Germany. I do not see that as a particular impediment. What had to happen is that the EU had to agree that there were other ways of satisfying that concern, and they have done that.

To Stephen Kinnock's earlier point, it reminds me of the final stages of the Uruguay round, when the EU on agriculture was not coming to the table. Agriculture is always a big problem in trade agreements. George Bush the first basically announced a \$5 billion farm Bill; that brought the EU to the table. Sometimes these things have to operate in that way.

In terms of what is going to happen—it is moving now—once you have overcome that idea that the UK can only satisfy European objectives by subjecting its legal order to the European legal order, the momentum will increase quite rapidly. Despite the media reports, despite the external stuff going on and despite the sound and fury, we are in a process now where we are in that momentum-gathering phase on those issues.

On the other non-regression clauses, such as labour and environment, it is important to note that the UK has already agreed, in the context of the US-UK negotiation, not to lower its environmental and labour standards in order to seek trade advantage. The US's negotiating objective with the UK is that the UK may not do those things. We have already agreed this. We cannot lower our labour and environmental standards to seek trade advantage if we want to do a deal with the US, and there is no suggestion that this Government or any other are going to do that.

Those issues are easier, although, if the EU's position is that there must be non-regression in the sense that we have to change our laws to mirror theirs in labour and environmental areas, that is not going to work. What we will have is a similar discussion to the discussion on state aid in that context, and that is a resolvable concern. Again, if we were a country deciding that we were going to lower our labour and environmental standards and deregulate massively to outcompete the EU, there would be a serious problem in getting to a deal. This Government and any other



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potential UK Government would not have that view, so I do not see that as a particular issue

Q806 **Mark Eastwood:** Shanker, you mentioned earlier—Georgina touched on it as well—that there has been some movement and compromise from the EU on state aid. Where, in your opinion, has the UK compromised on its initial demands? Has there been any compromise?

Shanker Singham: As Georgina said, there are negotiations going on about this that are not public. Essentially, the EU had to move first on this, because the EU's opening position was, "You have to be under our legal order. EU state aid law has to apply." Only when the EU says, "There are other ways that you could satisfy our negotiating demand," is the UK in a position to say, "Okay, here are some other ways we want to do it." The easiest way for the EU to force this particular issue is simply to put the text of what they want the UK's subsidy regime to cover on the table and invite the UK to respond to that. I think the parties are much closer than people think in terms of what those disciplines might actually be.

From a UK perspective, why would you offer a full text of what it is you want to do? Let us remember that the full text of what we want to do in terms of subsidy would be a major piece of legislation. This would have to go through Parliament; it would have to be scrutinised. They cannot really put something on the table in that regard. What they can do is say, "Here are the sorts of things that our anti-subsidy regime will cover. This is how it is going to go beyond the quite limited WTO agreement on subsidies and countervailing measures. This is how it will deal with the systematic distortions the EU is rightly concerned about." I think you can then get to a deal on it.

Q807 **Mark Eastwood:** Can I ask you all one final question? Shanker, the term "bad faith" has been used quite considerably—I know Catherine brought it up earlier. Would you say that some areas of the negotiations could be open to accusations of being conducted in bad faith by the EU?

Shanker Singham: The problem with this negotiation is that the EU's approach to the UK has been very much the same sort of approach the EU has to countries in its near jurisdiction. It has adopted the same approach to the UK as it would do to countries such as Morocco, the pan-Mediterranean countries and the accession countries in central and eastern Europe. The UK's view is, "No, we are the fifth biggest economy in the world. We want to be an independent country."

There is a fundamental misalignment of the EU's approach to the UK and the UK's view of itself. A considerable amount of progress has been made in this area, and I would argue that progress has been made because, if you want to behave like a G5 economy, you need to start acting like it. Because the UK has signalled that it is not going to cave in to European opening bids, they are more respected than they were before. It would be reasonable to say that previously the UK was not very well respected by



the EU, because the EU's view was that it would simply collapse and do whatever the EU said in terms of its opening bid. The EU's negotiating history has always been to have an opening bid way above their bottom line, so this is not unexpected.

Q808 Sally-Ann Hart: I was going to ask a couple of questions on the amendment to the UK Internal Market Bill, but that has already been covered by Stephen Kinnock, so I will not repeat those questions.

I want to pursue something on the UK Internal Market Bill in domestic legislation. Catherine, the Bill is domestic legislation, and given that in the UK international law holds only in the form of British laws in our domestic legislation, how does this then fit in with a breach of a treaty? I want to explore that a little bit further.

Professor Barnard: Your question is a good one, in the sense that you are absolutely right that the UK Internal Market Bill is compatible with the principles of parliamentary sovereignty and domestic law. It is absolutely right that an Act of Parliament later in time prevails over a previous Act of Parliament.

With that said, there has been an evolution in the approach to our constitution through the case law of the Supreme Court, which recognises that certain Acts of Parliament have something of a higher status, of which the European Communities Act and the Human Rights Act are examples. It was also thought that the 2020 Act would have that higher status.

That means there would need to be express statement in a subsequent Act that there was an intention to reverse aspects of those higher pieces of legislation, and that is the case in this Bill. Of course, it sends a very clear statement that there is an intention to disapply or modify, for example, article 10 of the Northern Ireland protocol on state aid. There is a clear statement that this is what the Government intend to do, or that this is what the Government intend to give Ministers powers to do.

Equally, it also sends out a clear statement that we are proposing to be in breach of international law. This is where it does get tricky, and I absolutely understand the confusion here. We talk about a breach of international law, which is the breach of, primarily, the withdrawal agreement. The withdrawal agreement is the article 50 divorce text. There are clearly potential breaches of the withdrawal agreement in respect of the Northern Ireland protocol if Ministers exercise those powers, but possibly actual breaches already of article 4 on direct effect and article 184 on negotiating in good faith and, some people say, article 5 on the general obligation for the UK to co-operate with the EU and vice versa.

Shanker said that direct effect is an EU concept, which is absolutely right, but the fact is that it is in the withdrawal agreement and we have signed up to the withdrawal agreement. Likewise, the withdrawal agreement was



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always intended to stand even if there was no trade deal. Indeed, the Northern Ireland protocol was always intended to be the default position in the absence of any other future trade agreement. I am afraid I disagree with Shanker on this specific point: non-compliance with the withdrawal agreement does put us in breach, either actual or potential, of the withdrawal agreement.

The question then is about what can be done about this. In respect of the Northern Ireland protocol provisions, there are two possibilities. There is a possibility in the Northern Ireland protocol itself that the Commission can start enforcement proceedings against the UK under Article 258. Another possibility, once the transition period has come to an end, is that the dispute resolution mechanisms in the withdrawal agreement itself get triggered. The EU has already said that it is looking into exercising those dispute resolution provisions. It may be the case that, if the UK decides to slow down the passage of the UK Internal Market Bill through Parliament—and thus, as Shanker indicated, it will not become operational until just before 31 December—it is then likely that the EU may start proceedings against us using the dispute resolution mechanism.

To remind you of what that is, the dispute resolution mechanism under the withdrawal agreement is, in essence, consultations with the Joint Committee. If that does not work, there is arbitration. If the arbitration panel thinks there is a matter of EU law at stake, the matter goes off to the European Court of Justice.

Q809 Sally-Ann Hart: I hear all that, Catherine, but how does clause 38 in the withdrawal agreement fit in with all of that? Clause 38 basically says that nothing in the withdrawal agreement can abrogate parliamentary sovereignty. I would like to hear how that fits in with the explanation you have just given.

Professor Barnard: Clause 38 is not actually in the withdrawal agreement; it is in the UK implementing legislation.

Sally-Ann Hart: Yes, sorry. I mean the 2020 withdrawal Act.

Professor Barnard: Yes, that is right. Section 38 of the European Union (Withdrawal) Act 2020 says that Parliament is sovereign, and it also says that Parliament is sovereign notwithstanding the various sections that give effect to the direct effect of the withdrawal agreement.

You are absolutely right to say that, under domestic law, there is an express recognition in section 38 that Parliament is sovereign. Arguably, there was no need to put that section in there, because Parliament is and has always been sovereign. It was thought to be there as a form of reassurance, but clearly now we see that it is being used more aggressively in order to give the UK permission in the UK Internal Market Bill to reverse the position on direct effect.



All of this is at domestic level; it does not impact on the international or European level. Any statement that is in internal law is of irrelevance to the international regime. Specifically, the Vienna Convention on the Law of Treaties states very clearly, in article 26, "Pacta sunt servanda"—agreements are binding. In article 27, it says that just because there is an issue of internal law does not make matters right on the international plane.

Q810 Sally-Ann Hart: Georgina and Shanker, do you want to come in?

Georgina Wright: Catherine covered it perfectly. The withdrawal agreement is crystal clear that neither party should adopt measures to undermine it. The Bill unamended is a non-starter for the EU.

The Prime Minister said that the Government see this as a safety net that may never get used. Again, that makes no difference. Even if the provision is never used, it is still in breach of the withdrawal agreement. That is the starting basis for the EU. How would they approach that? Catherine has outlined dispute settlement and infringement procedures as well.

The point Shanker was making earlier on is that there has clearly been a difference in interpretation in the role of the Joint Committee in the Northern Ireland protocol. The EU see it as weatherproof and just identifying the criteria that are clearly listed in the protocol, whereas when Michael Gove was giving evidence to this Committee in March he said that it was an opportunity to build a protocol and elaborate on it. That difference in interpretation probably explains why the UK Internal Market Bill contains some of the provisions it does.

As Catherine has said earlier, there are actually lots of things in the UK Internal Market Bill that cannot be resolved in the Joint Committee. It will remain to be seen how the EU will Act if the Bill does sail through Parliament unamended.

Shanker Singham: On the Northern Ireland protocol, if you read the protocol, it is fairly clear from the negotiating history of this that the parties were trying to come to a deal on this fairly quickly. There are provisions in the protocol that are obviously drafted by the UK side, in terms of, essentially, close to unhindered flow of trade from GB to NI, and there are provisions that are clearly drafted by the EU side, and they are not always consistent with each other.

It is very much a political agreement. It really does not stand up legally. That is why the Joint Committee has to interpret it. What you may be seeing here is a clash not only between domestic law and the international treaty obligations that have been agreed by the UK but also, frankly, a clash between common law and civil law traditions. The EU's way of reading the Northern Ireland protocol is to read black-letter law of the agreement and to look at the different conditions for the determination of at-risk and not-at-risk. The UK's way of reading it is to



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read that the overriding provision is that Northern Ireland is in the UK customs territory, and that cannot be a throwaway line on a de jure basis. That has to mean something.

Therefore, the UK reads the rest of the protocol with that context in mind. Flows from NI to GB are much easier, because they are clearly unfettered under the clear language of the protocol. The issue there is quite a small issue, which is the issue of exit summary declarations between NI and GB, which frankly I would not be terribly concerned about either way on that point. They are not especially difficult to deal with.

The issue is GB to NI. If you take the European interpretation of GB to NI, you would essentially have a pretty firm customs border between GB and NI on the GB-NI boundary. If you take a UK interpretation of the protocol, then it is our customs territory and we can essentially propose to the Joint Committee, "This is how we are going to handle our customs territory. This is how we are going to handle GB-to-NI movements."

Clearly, the UK approach is going to be, "Look, if companies can be absolutely certain about their flows, there is no risk to the European single market and customs union. The constraints we are operating with are that we have to protect the European customs union and single market because there is a porous border. As long as we are able to do that and demonstrate that, there is absolutely no reason why the Joint Committee should not agree with our view of what is not at risk".

Chair: That is very clear and very helpful.

Q811 Joanna Cherry: Good morning, panel. My questions are primarily directed at Catherine, but I would like Georgina and Shanker to come in if they wish to do so. Catherine, you earlier mentioned that under article 5 and article 184 of the withdrawal agreement, the EU and UK have a duty of good faith and also a duty to use their best endeavours. I am looking at article 5 here. It says, "The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this agreement". Then it goes on to say, "They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this agreement". Article 184, dealing specifically with the negotiations on the future relationship, says that both parties "shall use their best endeavours, in good faith and in full respect of their respective legal orders".

I am interested in what the words "good faith" mean here, because Brandon Lewis, the Northern Ireland Secretary, told the Northern Ireland Affairs Committee that he is still of the view that the Government are extremely confident that the EU are acting in good faith, but the Prime Minister told our Chair at the Liaison Committee that he did not think that the EU was negotiating in good faith. We have a bit of a conflict there



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between what the Northern Ireland Secretary has said and what the Prime Minister has said.

What I want to know from you is whether the question of whether someone is acting in good faith is primarily a legal or political judgment. Presumably, because the words "good faith" are used in the withdrawal agreement, they must have some legal meaning. I wonder whether you could give us a flavour of what the legal meaning is.

Professor Barnard: Thank you for that very helpful question. In respect of the UK Internal Market Bill and clauses 42, 43 and 45, there is a stronger argument that the UK might be in breach of article 5 of the withdrawal agreement than article 184. Article 184 is essentially prospective, looking to the future agreement and saying that both sides should use their best endeavours to conclude a free trade agreement, whereas article 5 requires the parties to ensure the effective operation of the withdrawal agreement, which includes the Northern Ireland protocol.

There is an argument that the UK, even by tabling the UK Internal Market Bill, even before it becomes law and even before the powers are exercised, may already be in breach of article 5 and, as a subsidiary, possibly article 184.

If you want a definition of "good faith", as you are probably aware, the International Court of Justice has given the definition of "good faith" in the nuclear tests case. It talks about how good faith is one of the basic principles governing the creation and performance of legal obligations. Trust and confidence are inherent in international co-operation. It is a manifestation of article 26 of the Vienna Convention, which talks about "pacta sunt servanda"—agreements are binding.

This might bring lawyers into disrepute, and I do not wish to just be bandying about article numbers, but you might have a look at article 18 of the Vienna convention, which says that states are obliged to refrain from acts that would defeat the obligations and purpose of the treaty. That is the international law equivalent of what you read out in article 5 of the withdrawal agreement. It seems to me that there is a case to be made that the UK, by tabling the UK Internal Market Bill, may already be in breach of good faith.

What about the other side? Is the EU not acting in good faith? This is more difficult. We have already heard that Brandon Lewis has said that the EU is acting in good faith. The EU has not tabled a particular measure that is as overt as the UK Internal Market Bill. We have, of course, heard about the third-country status issue, and there is some argument that maybe the EU is not acting in very good faith. The counter-argument is that it is not clear that the UK had actually asked for the process under the relevant regulation to be triggered. It is also not clear whether the UK itself has laid down the process or the procedure whereby the EU, which will be a third country to us, can also benefit from allowing EU goods into the UK.



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Here we are on a finer line between good faith and negotiating tactics. As Shanker has very clearly and articulately explained, we are at the most sensitive stage of our negotiations, so each side is doing what they can to get the best deal for themselves. The UK Internal Market Bill, in my view, particularly clauses 42, 43 and 45, goes beyond just positioning, because of the problem with article 5 of the withdrawal agreement.

Q812 Joanna Cherry: You are really saying that there is no overt evidence that the EU has acted in bad faith, but arguably the UK Internal Market Bill, and specifically clauses 42, 43 and 45, is overt evidence that the United Kingdom might be acting in bad faith.

Professor Barnard: Under article 5 of the withdrawal agreement, yes.

Q813 Joanna Cherry: Are you able to give us any examples of when these sorts of good-faith provisions have been used successfully in international law?

Professor Barnard: I cannot give you an example of that, but I can give you an example of a parallel case before the European Court of Justice where a state was under an obligation, as all member states were, to implement a particular directive. As you know, directives have a period for implementation, say two years. In the course of that two-year implementation period, the state concerned did the opposite thing to what the directive required. Even though they were not formally in breach, because the deadline for implementation of the directive had not expired, the European Court of Justice nevertheless said that the state was in breach of its obligations to act in good faith under what was then, confusingly, article 5 of the EEC treaty, which is now article 4(3) of the Treaty on European Union.

Q814 Joanna Cherry: What is the name of that case?

Professor Barnard: It is called Inter-Environnement Wallonie, and I will give you the number in just one moment.

Q815 Joanna Cherry: While you are getting us the case reference, I can see both Georgina and Shanker want to come in.

Georgina Wright: I will not add anything on bad faith from a legal perspective, but I just want to come back on something Shanker said earlier about the EU treating the UK as it treats its other neighbouring states. I would disagree slightly with that. The EU has approached this negotiation in exactly the same way it approaches all negotiations with trading partners. It protects its own national interests. It is not that the EU does not compromise; it is just that it knows when to compromise. It was always clear that compromise was only going to happen very late in the negotiations.

The reason why, perhaps, the EU has a maximalist position on fisheries and state aid is also because this is the first time in history where you have a trade agreement that is going to put two parties further apart



rather than bring them together. That might also explain why the EU has used some of the language it has.

Finally, is the EU acting in bad faith by not adding the UK to its country listings? This is not a negotiation; it is a unilateral decision the EU makes. As Catherine was saying, there is a question about whether the UK has asked and whether the EU is in fact withholding and using that as leverage. Possibly, but this is not something that is negotiated; this is very much a unilateral decision. I suspect that we will see the EU agree to add the UK. If it has some reservations, it might even choose to do something like provisionally add the UK to its third-country listings. I suspect there will be movement on that fairly soon.

Professor Barnard: The case name is Inter-Environnement Wallonie, and it is case C-129/96. I will just read you the one sentence that is relevant in the dispositif at the end, talking about what is now Article 4(3) of the TEU. It says that the relevant articles “require the member states to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed”.

Shanker Singham: In terms of how the EU has approached negotiations with other trading partners, I do not think there has ever been any negotiation where the EU has ever suggested to another trading partner, in a normal trade negotiation, that it should be under the European state aid regime. There are a number of different ways in which the EU does approach the UK like a neighbouring state, particularly with respect to law. It is normal for neighbouring states to accept the rules of the single market as a stepping-stone to coming in. That has been its approach.

With respect to good faith, the Chair has talked about the third-country listing process. Threats on that score, when you have 130-plus countries that are listed, rise beyond normal negotiating posturing. These might be things like threats to cut off Northern Ireland from GB trade and so on.

I do not want to get hung up on this issue of who is in good faith and who is in bad faith. The reality is that the Northern Ireland protocol is full of inconsistencies. It is quite likely—we should not be afraid of this—that we will be in litigation on the Northern Ireland protocol, and that is not the end of the world. In fact, litigation is quite often a very good way of clarifying the obligations of the parties between themselves. Litigation is a constant feature of the international legal order. The UK will be in litigation in the WTO on its changes to its tariff-rate quotas, for example, in agriculture, and so will the EU. The UK and the EU will find themselves in litigation, as I say, probably on the Northern Ireland protocol.

The point is that the difficulties the parties have with respect to the interpretation of the Northern Ireland protocol is the implementation of how you handle the GB-to-NI boundary. We have radically different interpretations of how that should be handled. The UK interpretation is very much based on the fact it is in our customs territory. That is hugely



different from the European Union interpretation. That will probably have to be resolved through litigation. That is basically the way this will go.

With respect to the state aid provisions, though, the problem with article 10 in the Northern Ireland protocol is, if you interpret the Northern Ireland protocol as having the clear intention that Northern Ireland should be under the European state aid rules—because that is the way you have made a difference in the playing field between Northern Irish traders and Irish traders, which is a reasonable objective—because of the way it is written, it applies or could potentially apply to cover all of GB trade. The Court of Justice would certainly apply it in this way. All of GB would be covered by European state aid rules. This cannot be the actual meaning of the parties in the negotiation; this will have to be clarified as well. This is what the UK is signalling with the UK Internal Market Bill. We will doubtless be in litigation over this.

Q816 Nigel Mills: I want to move back to the issue of goods crossing between Northern Ireland and GB and the measures the Government are talking about bringing forward in the future. Are those measures likely to be equally provocative or will the EU accept that perhaps there is some need for more clarity about this situation?

Shanker Singham: The EU does understand that there is a need for clarity about this. What the EU was maybe expecting was a proposal from the UK about how it is going to handle the GB-to-NI boundary. I assume the UK will try to handle the situation like this. The large value of trade that goes from GB to NI is essentially carried by supermarkets and very large traders, who have very high visibility into their supply chains, so a combination of that and some mechanism to deal with the smaller traders should be offered to the EU in the Joint Committee as an affirmative way that the UK is going to handle this issue.

The European Union will essentially be asked, “Is this a reasonable way of handling the issue or not? Do you disagree with it?” rather than the approach the EU would like to take, which is for every single transaction to have some kind of interpretation about how that transaction would satisfy European UCC rules, including for those transactions that are clearly not at risk.

To do that would essentially put a customs border at the NI-GB boundary completely and would undermine the “free flow” interpretation that the UK seeks to have. The problem is that, in order to satisfy the Good Friday Belfast agreement, and in order to satisfy both the nationalist community and the Unionist community in Northern Ireland, you have to have some mechanism whereby there is somehow a porous border on the island of Ireland and free flow of goods from GB to Northern Ireland. That is an incredibly difficult thing to achieve.

As long as the UK’s proposals on this are reasonable, the Joint Committee will probably accept them, but the Joint Committee cannot really do



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anything until it sees what the UK proposals actually are. That is the struggle. That is the challenge we are faced with.

Q817 Nigel Mills: The solution here is that we could trust a supermarket supply chain. We do not have to prove for each individual category of good that it is not at risk of going to the Republic. It is a question of moving it in a trusted way.

Shanker Singham: Even if you take the position, as the EU does, that the UCC applies to everything in Northern Ireland, which would seem to undercut the whole notion that Northern Ireland is in the UK customs territory, the UCC has plenty of simplifications and facilitations that are very appropriate for large traders, who are typically Authorised Economic Operator-type traders, to do things that are more trader-based than transaction-based.

Certainly, you would imagine that the standard the UK will have to reach is that they have managed to protect the European single market and customs union as well as or better than exists on other European external borders.

Q818 Nigel Mills: Can we ignore the risk of somebody from the Republic coming up and shopping in Tesco in Londonderry, assuming there is one, and taking those goods back across the border? That could happen to anything at any point. That is not the risk we need to be able to manage.

Shanker Singham: That is not a customs risk, because that is a public-facing store. The issue for the supermarkets would be to make sure that somehow these products do not end up in stores in Ireland. They can satisfy that through the track-and-trace platforms they already have.

The issue then becomes about the goods that are violating European SPS and TBT rules. We have already agreed that the SPS and TBT rules of the EU will apply in Northern Ireland. You do not have to use a border control post in Northern Ireland to ensure SPS compliance. You can do in-facility SPS checks. Those are fully part of internal European rules now. There are ways of doing simplifications to ensure this is fully covered and that there is no risk that this would occur. You would also use market surveillance in Ireland. You would ensure that people would be checking the products.

Q819 Nigel Mills: You have just touched on something else here. I thought the reason we had to have some sort of check on goods going from NI to GB was because the Irish were required, under the Union Customs Code, to know what had left the customs union in effect. If we were not checking that at the Irish border, we would have to have some idea of what had left the customs union.

If we just refuse to do any checks or ask for any documentation of goods that come into the mainland, are we going to leave Ireland with huge non-compliance with the customs code that they will get infringed for at



some point, or is there a compromise here? Can we use market surveillance or check what is on ferries or something, to find some way of roughly knowing what is happening?

Shanker Singham: The difference between NI to GB and GB to NI is that you have the porous Irish border on one hand and then you have the Dover-Calais route on the other hand, which is a way to ensure compliance with the UCC. You would use Dover-Calais as the route for UCC compliance for Irish products that move in that way. However, having said that, the exit summary declaration is not a massive impediment in the way that the customs process GB to NI would be. It is not necessarily a hill I would die on.

The bigger problem for Ireland—it is fully covered in the Northern Ireland protocol—is where you have controlled goods moving from Ireland into outside of the EU. If the UK has a different export control regime from the European export-control regime, for example, then you would have to have some mechanism to ensure you were not unwittingly allowing products from Europe to violate their own export control regime by going into GB and then going to other countries where the UK export control regime was different from the European one. That is true of any treaty to which the European Union is a party. This is true of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and these sorts of things. That is fully covered, so there will be some process for NI to GB to cover off those areas, but that is a very small amount of trade. Certainly, the UK Internal Market Bill says we will not have to do export summary declarations, but I am not sure that is the big issue here. The big issue is GB to NI.

Q820 **Dr Huq:** I want to return to our old friend, the UK Internal Market Bill, to some extent. What lessons can be drawn from the experience of the last few weeks, particularly in terms of avoiding different interpretations of what people thought was agreed in the text for any future UK-EU agreement to come? Catherine Barnard, you said to Stephen Kinnock that this has made us go potentially in a state of undress to the conference chamber for future trade deals. Do you want to say more on that?

Professor Barnard: We would say that nothing is private; nothing is domestic anymore. The Government have been taken aback by the extremely strong response not just within the UK but also from overseas. The US or certain parts of the US are watching very closely what is going on. The first lesson we have learned is that nothing is a local issue. The Brexit process is being watched very carefully, not just by those who are immediate parties to it—the EU member states and the UK—but also on the global stage. There is a certain amount of surprise that a country that has always prided itself on being compliant and respectful of international law, even to the extent that it was part of the civil service code, should take a step as potentially radical as the one in the UK Internal Market Bill. These are lessons that we will learn.



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It may be that the Government, because they think they have made progress in the negotiations as a result of this, are prepared to take the international hit for the strategic advantage in the negotiation, but there will be long-term consequences of this, because it will always be said that we have gone back on our word. The key point is that the word we have gone back on, or at least the power to do so, is in respect of a treaty that we signed less than 10 months ago. We are not talking about some treaty with objectives that have been lost in the mists of time; this is a treaty that was highly controversial and painfully negotiated line by line.

Secondly, I agree with Shanker that the Northern Ireland protocol is obviously a compromise document. If you compare and contrast article 5(1) and article 5(2), article 5(1) essentially says there will be no customs duties on goods going from GB to Northern Ireland unless there is a risk that they could go on to the south, whereas 5(2) reverses that presumption and assumes that all goods are at substantial risk of going into the south. As Shanker rightly says, this has caused real tension.

I should also say that the Northern Ireland protocol is not well written in terms of comprehensibility. It is, of course, a genius document for lawyers.

Shanker Singham: On the subject of lessons learned, I would slightly diverge from Catherine in terms of the international reaction to this. As she noted, most of the negotiations that we are doing with other trade partners—we have done the Japan deal, there is also Australia, New Zealand, et cetera, and even the US deal with respect to the US Administration—have really not been affected by the UK Internal Market Bill.

There is a very specific issue with regard to the Irish-American caucus in the US and the fact that prominent members of the Irish-American caucus such as Richard Neal, the Chair of the Ways and Means Committee, which is ultimately the Committee responsible for trade agreement, have a powerful voice.

The lesson learned there is not, “Do not do this sort of thing.” The lesson learned there is, “Make sure you have explained what it is you are trying to do to your international partners before you do it.” This was certainly not well explained in the US. It is certainly quite difficult to explain in the US that there are two communities in Northern Ireland—they tend to hear only from one—and that the very fragile Good Friday Belfast agreement is built on gaining the consent of both communities. You have to be extremely careful before you tilt one way or the other. Certainly, the Irish-American caucus in the US is much more interested in one community than the other. Explaining these things to our trading partners will be very important.

I have found from our trading partners that they recognise that countries have issues with each other in terms of their international agreements and they are frequently in violation of international law. In fact, the EU,



particularly in the trade context, is constantly in violation of WTO rules and has essentially set aside the entire SPS regime. About 33 developing countries have complained about the EU's SPS rules. The major developed countries are united, and the EU is very much an outlier on those sorts of things. Our trading partners bear that in mind when they consider disputes between the EU and the UK, so I would question whether we are semi-clad in the international arena; I do not think we are.

Nevertheless, Catherine is absolutely right about the fact that for anything you do in the public arena you have multiple audiences. You have the audience of the European negotiators you are trying to win negotiating points on; you have a domestic audience; and you have an international audience. It is perfectly legitimate to prioritise one over the others, but you need to know what you are doing, you need to know what the blowback is going to be, and you need to have mechanisms to explain it. We did not necessarily do that well.

Georgina Wright: Most of the ground has been covered, but I just have three very quick points. First, as Catherine and Shanker have said, these negotiations are not taking place in isolation. The presidential campaign is happening in the US right now, and Joe Biden, the Democratic nominee, is very much trying to show himself as the bearer of the multilateral system, a defender of it and a defender of international law. Obviously, having your special partner going on record saying that you intend to breach international law did not go down very well.

As Shanker said, states breach international law all the time; it is just that they do not go on record saying that they intend to do it. In fact, that explanation would have been necessary from the very beginning. That also would have helped explain why the Government are so worried about unfettered access. That is an important consideration and an important worry that should be taken into account. More explanation on that front is important.

Secondly, this shows that there is a question around negotiation strategy. If the key concern was that the Joint Committee was not moving fast enough, this has been quite a baffling move, because obviously the Joint Committee negotiations have been paused now, and they have been paused until next week, so we have lost valuable time there, so that is probably questionable.

Thirdly, there is the misunderstanding around the Northern Ireland protocol for multiple reasons. One is that both sides want different things, but it is also about the way it has been worded.

Very quickly, the Joint Committee is responsible for identifying the criteria for which products leaving GB and going into Northern Ireland are not deemed at risk of going into the EU. We know those discussions are ongoing, but they have not agreed yet. Even if they do agree, even if



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they say, "All of these products will not be deemed at risk. These are the criteria", that would only eliminate customs duties and tariffs.

The Government have said they will set up a compensation mechanism, although we do not know what that looks like. It does not eliminate all the paperwork: entry summary declarations, customs declarations, export health certificates and all of that. That could be dealt in the future trade negotiations. If the UK and the EU find a satisfactory way and say, "Do you know what? Let us reduce checks and processes. We trust each other. We do not need this," and if that applies to Dover-Calais, that would apply to GB and Northern Ireland.

Again, any attempt to unpick the withdrawal agreement unilaterally, as the EU sees it, could affect the free trade agreement negotiations, which is precisely where we could tackle some of those questions around paperwork, checks and processes. Those are the three big things: the negotiations are not taking place in isolation; there has been some misunderstanding; and the fact that it has obviously paused the Joint Committee discussions, which is unfortunate at this time.

Q821 Dr Huq: We saw this entertaining of the idea of law-breaking in the illegal Prorogation a year ago. It is almost becoming habit-forming. We know this Government have done a lot of U-turns, but when does a precedent become a precedent? When does something become done so much that it then becomes a precedent? Is that a dangerous game that his Government are playing?

Shanker Singham: I would doubt so. I am not sure there was any need to put on the record that you intend to breach international law. The Government would argue that they succeeded in getting the EU to the table, but the clear language of the UK Internal Market Bill probably would have done that.

Q822 Dr Huq: It is a sort of hardball tactic, is it not? It is a strong-arm thing.

Shanker Singham: Yes. As I said, there is nothing wrong with hardball tactics, provided you understand the repercussions of them in different areas and different contexts, you make allowances for that and you explain that. That is the only thing where they probably fell short.

Q823 Antony Higginbotham: I want to return to state aid, because it does seem to be one of the major sticking points. If you look at the statistics, it is not entirely clear why. I looked it up, and in 2018 the UK spent 0.4% of GDP on state aid. That compares to Germany, which spent about 1.4%. It is not a statistical problem, where we have such a track record that they are trying to protect themselves.

I have looked at what organisations such as the UK State Aid Law Association have said, and part of the problem looks to be a focus on process rather than outcomes. I wonder whether this might be a suitable way forward. We could say that we will come to a form of words in any agreement that focuses on the idea that, if there is evidence of subsidies



being provided that stop fair and open competition, we will focus on that. This is instead of having the legalistic view of, "Here are the specific words we want in the agreement." Could I come to Shanker first and then work around?

Shanker Singham: That is right, and that is the best way to tackle this issue. There are going to be disciplines in the FTA on both sides in terms of how they approach what I would characterise as anti-competitive market distortions. The EU has a recognised approach to that, its state aid regime. We all know what that looks like, know how that has been interpreted in its history of interpretation.

For the UK, coming out of the state aid regime, we do not know what that is going to look like. Therefore, it is legitimate to put some high-level commitments and obligations in the agreement as to what the UK's regime will look like. If something has happened in the past, that does not necessarily mean it will continue in the future, and that is why the EU would want to have those disciplines in place. Given the history and given the fact that the UK is a much smaller user of state aid interventions, they should listen to what the UK's proposals are more than if the UK had been a very high user of state aid interventions.

The solution here is relatively straightforward, and I have set out in a competition and distortions chapter what those high-level disciplines ought to look like. Both parties would probably agree with those. Certainly, they fit into the international system and they take on and develop the WTO framework, which is the framework we all sit under.

Georgina Wright: That is an excellent question, because you are absolutely right: there are lots of member states that spend way more on subsidies and state aid. That is something the UK should also be thinking about in terms of the level playing field.

Again, the question comes down to the fact that, if you cannot agree the same rules, you have to instead focus on the process of how to resolve the dispute. As Shanker has said, why would the UK sign up to the EU's rules? One of the reasons the UK has decided to leave is to do things differently.

There are four questions that the UK and EU need to answer together. First, do they understand subsidy in the same way? As Shanker was saying, if the UK puts a credible proposal down and says, "We have looked at it. This is where we do not agree with your view of state aid; this is what we are prepared to agree to." Secondly, how do you enforce that? Thirdly, how do you resolve a dispute? Fourthly, what safeguards and remedies can you use?

Ultimately, the ones under the WTO subsidies scheme are weak, and that is why it is not working. You are absolutely right: if we can focus on the process rather than having exactly the same rules, that would get the EU to move. EU capitals, as I said, are under no illusion that the UK would



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like to do things differently. This is an opportunity for the UK Government to decide where to invest money and which areas, industries and sectors they would like to focus on. Those are opportunities the UK should be able to seize, so it is really a question of how we manage that divergence going forward, which is why it is all about governance at the end of it.

Q824 Antony Higginbotham: Can I add another dimension to the question? This is something you, Georgina, mentioned as well, and it is something the UK State Aid Law Association mentioned in the letter it sent to the Prime Minister last Friday. This is the idea of intra-UK competition. I wonder where that fear has come from. Is there a fear that the Scottish Government might do something to distort competition in the UK and ergo across the rest of the EU?

Shanker Singham: There are provisions in the UK Internal Market Bill that are quite interesting in this respect, because they do apply to market distortions in the devolved nations that have effects on the conditions of competition. That is quite an advanced set of obligations. You certainly do not want a situation in which the devolved nations are using tax advantages, for example, or other forms of intervention or Government distortion in order to pull investment from one place to another. That is quite counter-productive to a UK internal market. Those provisions are in the UK Internal Market Bill, and that is a place to build.

Professor Barnard: You are right: there are provisions in the UK Internal Market Bill on that specific issue. They say it can be a reserved matter for that very reason: so that they can keep an eye on what the devolved Administrations are doing.

Georgina offered four questions, and I would offer a slight variant of those four questions for any subsidy regime that needs to be considered. They are essentially confirming your point about process. These are my four questions: first, what is the starting point? Is the starting point that subsidies are presumptively lawful—i.e. they are lawful unless they are not—or presumptively unlawful? Secondly, what is the scope? Does it just apply to goods or does it apply to services as well? Thirdly, do you have to notify before the state aid is granted or is it retrospective? Fourthly, who can complain about it? Do individuals have the right to be able to complain or do companies have the right to be able to complain?

Q825 Antony Higginbotham: That is very helpful. Thank you. I am conscious of time, but I have one final question. Shanker, this is probably for you. The UK-Japan deal was done very quickly, probably far quicker than many thought, and went further than the EU deal in key sectors for us. We are also progressing quite well on Australia. We heard yesterday that the US negotiations are progressing quite quickly as well. We are advanced on a number of chapters, and an exchange of tariff offers has taken place. What do you think the impact of that will be on negotiations moving forward? Essentially, the Department for International Trade now has a very broad set of agreements being negotiated and getting through to completion.



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Shanker Singham: I have always said that the EU's response to the UK having an aggressive and somewhat successful set of negotiations going forward will be positive to the UK-EU trade negotiation. The EU would not tell you that before those negotiations started. They would say, "This will be terrible. If you do these things, you will negatively impact our negotiations," but of course they would say that. The reality, though, is that the more negotiations you have going on at the same time, the more potential there is for read-across in those negotiations and the more potential there is to use one to stimulate others. That has been very positive.

One of the big challenges for the UK was the fact that most of our trading partners' initial position—it is not their position now—was, "We will wait and see what your arrangements with the EU are before we contemplate doing anything with you". They have overcome that perception, and they have largely overcome it because they were concerned about whether the UK would be in a customs union, a partial customs union or a single market arrangement with the EU. When it was made clear to them that the UK would have a free trade agreement with the EU, then the UK became like every other trading partner they were negotiating with who could potentially at some point have a free trade agreement with the EU. That enabled them to start the negotiations properly.

This is a multidimensional chess game. You always want as many possible dimensions to be playing in so that you can do that read-across and you can deploy leverage when you need to. It has actually speeded up the EU negotiation.

Antony Higginbotham: That is very helpful.

Chair: That has brought us to the end of this morning's session. On behalf of all Committee members, can I thank our three witnesses for your really helpful evidence, as we all try to speculate on what is going on and how this is all going to work out? It will be of great assistance, as always, to us in our deliberations.