

International Trade Committee

Oral evidence: Implications of arrangements for Ireland - Northern Ireland border for wider UK Trade Policy, HC 665i

Wednesday 13 December 2017

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Watch the meeting

Members present: Angus Brendan MacNeil (Chair); Mr Nigel Evans; Mr Marcus Fysh; Mr Ranil Jayawardena; Mr Chris Leslie; Julia Lopez; Stephanie Peacock; Faisal Rashid; Catherine West; Matt Western.

Questions 1-78

Witnesses

I: Dr Lorand Bartels, Reader in International Law, University of Cambridge, Senior Counsel, Linklaters, and Dr Sylvia de Mars, Lecturer in Law, University of Newcastle.

Examination of Witnesses

Witnesses: Dr Lorand Bartels and Dr Sylvia de Mars.

Q1 **Chair:** Good morning, panel. Thank you both for coming. Can I ask the panellists to give name, rank and serial number for the record, starting on my left, please?

Dr de Mars: Good morning. My name is Sylvia de Mars. I am a Lecturer in Law at Newcastle University. For the last two years I have been working with some colleagues on a project that specifically examines the impact of Brexit on Northern Ireland, and it is in that context that I have been invited to come here. My general specialism is EU law and I have a background in world trade law.

Q2 **Chair:** Thank you very much. Can I ask the stranger to the panel, on your left, to introduce himself as well, please?

Dr Bartels: My name is Lorand Bartels. I am a Reader in International law at the University of Cambridge, where I teach WTO law and also international law and EU law. I am also senior counsel at Linklaters, where I advise on Brexit and trade-related issues.

Q3 **Chair:** Thank you both very much, and thank you for coming as we discuss the implications for other EU borders between the EU and the UK,



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given what might happen in the island of Ireland with the UK-EU border.

By way of introduction, can you provide the Committee with an overview of the WTO rules that govern the treatment of goods at international borders? To what extent, specifically, do they allow for differential treatment of importing countries and different arrangements to be adopted at different segments of an international border?

Dr de Mars: I am happy to start with the basics of WTO law. When it gets more specific, I will pass over to my learned colleague over here.

WTO law is rooted in two sets of principles. The first ones of these are non-discrimination principles, meaning that every WTO member promises to treat all other WTO members at least as well as each other.

There are two of these principles. The one that applies at the border is called most-favoured nation, which means that whatever benefits you give one WTO member in terms of treatment at the border—so, customs, duties charged, border processing and so on—you have to also extend to every other WTO member.

The second non-discrimination principle is national treatment, which is the non-discrimination principle that applies once goods have been imported, and that is the point at which you cannot discriminate between domestically produced goods and goods that have been imported.

In the context of today's inquiry, I think we are primarily dealing with most-favoured nation as being the primary principle of interest, where you cannot discriminate between different WTO members when it comes to the importation and exportation of goods.

That is the basis of WTO law. However, since the signing of the GATT 1947, we have realised that countries keep on coming up with new and innovative ways to try to preference the domestic market in one way or another, so most of what the more-detailed WTO rules are concerned with is not necessarily non-discrimination so much as market access barriers, or non-tariff barriers to trade. In terms of what we are looking at today, rules on regulatory alignment are probably of primary interest, in which the WTO has two agreements, which all members have to sign up to, that try to deal with regulatory alignment in one way or another. One of these is the agreement on technical barriers to trade, which covers things like product safety, product marketing, product labelling, and so on. The WTO encourages harmonisation in those areas but does not require it.

The other one is SPS, which is sanitary and phytosanitary measures. That relates to—if I can be very quick about it—living things, in one way or another, and the risks that they perhaps carry with them when being imported and exported out of a given market. It is about scientific evidence that applies and whether or not, on the basis of that scientific evidence, you can restrict, for instance, agricultural products, coming in and out of a market.



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The WTO here again recommends international standards be used by members, where possible, but does not explicitly require harmonised rules at the international level.

Dr Bartels: I might add something on the major exceptions to the most-favoured nation obligation, which, as Sylvia has said, is the non-discrimination obligation that applies to goods and services from different WTO members and different countries more generally.

The main exceptions to the MFN obligation are, first, to do with free trade agreements and customs unions. To fall within this exception you need to have an agreement that covers substantially all the trade or substantially all service sectors, which is why you cannot have preferential treatment between WTO members on a purely sectoral basis, for cars or Prosecco, or whatever it might happen to be; it has to be a proper free trade agreement.

There is another minor exception that I might mention. It has been of virtually no importance in GATT history since 1947 but, seeing as we are talking about a border, it is worth mentioning. There is an exception in both the GATS, which is the agreement on services, and also the GATT, which is for goods, for frontier traffic. The idea is that it should be possible for WTO members to give preferences to each other for goods and services that are produced and consumed locally. "Locally" has not been defined but is generally understood to be within about 10 miles of the border, so those stories that one sees of farmers having to move across the border to get from one field to another could well be covered by this exception. It has never turned up in the WTO, so we don't know all that much about it, but it is worth mentioning. Of course, it is not nearly extensive enough to cover the whole of Northern Ireland.

There is also another point to mention, which is to do with services. As Sylvia said, services are subject to the MFN obligation. If we are talking about how this works, in terms of Northern Ireland as part of the UK and the rest of Ireland, it is important to know that "services" covers the movement of people providing services. This also means that the MFN obligation applies, for instance, to a service supplier from Ireland going to Northern Ireland to supply a service and going back. That means that, in the absence of a free trade agreement, the absence of a proper exception, that if Northern Ireland, or the UK through Northern Ireland, were to offer preferences to Irish service suppliers in Northern Ireland, and vice versa, those preferences would have to be given to like service suppliers from all other WTO members.

There are exemptions in the GATS—and this is another important MFN exemption to note, in addition to the customs union and free trade agreement exemption—which could be listed, and were listed, only in 1995. The European Union listed a whole raft of exemptions to the GATS, which cover, for instance, the ability of the UK to grant work permits to Commonwealth nationals who have at least one grandparent born in the UK. That is the right of abode. So, that is fine, there can be preferences



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granted to workers in that respect. However, for one reason or another, there was nothing mentioned in that list of exemptions about the Common Travel Area, which would be your main point of reference for talking about service suppliers travelling across the Northern Irish border, and I think that is a problem.

Q4 Chair: Thank you. I am thinking about the Common Travel Area but I am also thinking about the hard border and political rhetoric between the EU and the UK of no hard border on the island of Ireland. What does that mean for other borders, if that is not going to be a hard border between the UK and the EU?

Dr Bartels: I will start and then hand over. If we can look at it from the EU's perspective, there needs to be some sort of border around the EU. The question is: where is that border going to be? The second question is: how intrusive is that border going to be? One just has to look at a map, as I think everybody has been doing recently, to see that there is going to be either some sort of border between Ireland and Northern Ireland, which does not mean that it necessarily needs to be a hard border—the nature of the border is secondary—or, of course, something similar in the Irish Sea.

In terms of how intrusive this can be, it depends. Some of it can be solved with technology. At the moment, Ireland's external border—so, Ireland operating as the EU—is hard, in the sense that about 6% of customs declarations are actually checked and about 2% are physically checked. It is not hard for all products, and one does not want to overstate it but that does not mean that there aren't any checks. The same applies to other EU external borders, for instance, between Sweden and Norway, between Germany and other neighbouring countries, and Switzerland. There are border posts there; they are not manned all the time. There are spot checks. One question is: does there have to be a border? The answer is: yes, there does. The second is: what does that border look like? That is quite a separate question and, of course, particularly if we are talking about movement of persons in respect of Mode 4 service provision, which is what I was talking about before, that can of course look completely different.

Dr de Mars: Yes. I would say that what we are going to end up having around Northern Ireland border-wise is very dependent on what exactly we hope to negotiate—either for Ireland or for the UK as a whole—in terms of an agreement. The problems that Lorand has raised, in terms of what creates a border, are primarily customs-related at the moment, in that what the island of Ireland currently has to check is third country products: where they come from and to what extent they have complied with their obligations to enter the European Union Customs Union. That is not going, so the EU is going to have to keep doing that in order to keep calling itself a customs union. It will be unacceptable for everyone else that the EU trades with if, all of a sudden, it stops checking products because they happen to come in through Northern Ireland. Unless



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Northern Ireland, or the UK as a whole, forms some sort of customs union with the European Union, there will have to be checks on products coming from the UK or Northern Ireland into the European Union at the border.

Q5 Chair: The only way there cannot be a hard border is for both to be in the Customs Union, as they are at the moment?

Dr de Mars: If we are talking about fully avoiding a hard border, yes, I think that that is accurate. The alternative would be that Northern Ireland would be in a customs union with the EU, but the logical consequence of that is that there would be some kind of border in the Irish Sea.

Q6 Chair: What happens if they are not in a customs union but both are operating the same tariffs? What would be the implications there? Obviously, the collection of those tariffs would be at a different point.

Dr Bartels: Yes, someone needs to collect the tariffs. That is the essential point. Therefore, it might be useful to distinguish between three things that happen at the border. One is the collection of customs duties. Of course, if you are in a customs union then, as between the entities in that customs union, you don't need to collect tariffs at the border between those two separate entities, and that is what we have at the moment with the European Union. That is one of the main functions of a customs union. A second important function of border controls is to collect tax, so indirect internal taxes, VAT. A third is to make sure that products can be sold in other countries. It is that last aspect of this—that products can be sold in other countries—that is done away with by what is called the Single Market. One has to distinguish between the collections of customs duties, the collection of internal taxes, which are then applied at the border, and the checking of goods to make sure that they can be sold. This splits according to whether you are talking about customs unions or single markets, and you can have combinations of those.

Q7 Mr Ranil Jayawardena: One question on the Customs Union, which we have just discussed, and then one on the frontier traffic rules. If I could come to you, Dr de Mars, you said "some sort of customs union". The Chairman said, "The Customs Union" but the two are not necessarily the same. Could you expand on what you mean about "some sort of customs union" or a customs arrangement that would deliver the same benefits, in terms of providing certainty to other nations, which does not mean being in the current Customs Union?

Dr de Mars: This sounds like it will be a purely technical distinction but for once, even though I am a lawyer, it is not a purely technical distinction; there is actually a difference between the so-called EU Customs Union, which is what we are currently in, and all EU member states are in, and a customs union that other countries can close with the European Union.

The primary example of a customs union, which is not the EU Customs Union, is the Turkey-EU customs arrangement. I will call it that for



simplicity so as not to call everything “customs union”. The arrangement between the EU and Turkey is an example of the direction the UK or Northern Ireland would need to go in, in order to avoid a border. The problem that we see with the Turkey-EU customs arrangements is that they don’t cover absolutely everything that crosses a border. Off the top of my head, they cover what we call industrial goods, or goods generally, and then processed agricultural goods. I am not sure what is envisioned by that, but I know it does not cover all agriculture. I do believe when a cow itself has to cross the border, that is not automatic; that is something that has to be checked at the border and duties may have to be charged on that.

Q8 Mr Ranil Jayawardena: That is a matter for negotiation between the two parties, rather than set in rules somewhere else.

Dr de Mars: Yes, absolutely. There isn’t one specific agreement that I think the EU has at the moment with a non-EU member state that covers everything that the UK would require. For instance, if you look at a combination of what the EU has agreed on with Turkey and what the EU has agreed with Switzerland, in terms of SPS and the Common Veterinary Area, if you merge those two then you end up with all agriculture and all goods potentially being able to cross unimpeded. Of course I am smiling at you too now because this sounds very optimistic, but, if we go down that path, that does mean significant alignment with EU rules in these areas, so that would be all goods and all agriculture. The only way the EU has accepted these kinds of arrangements is with these third countries adopting the EU framework on this. It has not been a question of, say, mutual recognition of arrangements. It has been, “You take the EU law, and we will let your stuff move across”.

Q9 Mr Ranil Jayawardena: To date, though.

Dr de Mars: To date, yes.

Q10 Mr Ranil Jayawardena: In theory, it is a matter of negotiation.

Dr de Mars: Yes, absolutely. Again, I would hesitate to pin too many hopes on that, simply because the EU does try to be a world leader in standard setting. I am not necessarily sure they would be willing—especially with a country that already has the entire EU acquis on these fronts in place—to say, “Well, never mind. You do whatever you like. We will accept that as being good enough”.

Q11 Mr Ranil Jayawardena: Can I turn now back to the frontier traffic rules, Dr Bartels. Welcome back. I am pleased you referenced those, because although usually limited to 10 miles from the frontier, do you think that the WTO might accept a special case in the context of the Irish border and extend it? Or, indeed, given that it is deliberately defined in a very loose and variable manner, do you think that—given that it would be pro-trade to take it in a very loose and variable manner—the WTO would have objections?



Dr Bartels: It is unlikely that this could be pushed too far. I don't think that this can be used for an entire territory, such as Northern Ireland. On the other hand, the point you make is a good one because it raises the prospect of obtaining a waiver within the WTO. I think that is something that should be looked at very seriously. Of course, it is not for me to predict how the WTO might see a waiver, but, if one looks through WTO history, there are plenty of waivers for this sort of situation. For instance, the GATT itself provides for special treatment for special regions, historically, in 1947, between the Free State of Trieste and the rest of Italy. When Germany joined the GATT in 1951, it made special provision for intra-German goods, which was a reference to East Germany, which was not recognised at the time.

There is plenty of history in the GATT for dealing with politically sensitive and unusual situations and one should at least consider the prospect of MFN waivers, and other waivers that might be necessary, and there should be a good chance of obtaining those, particularly given the circumstances of Northern Ireland.

Q12 **Mr Ranil Jayawardena:** A final question. If I understand it correctly, the process of waivers, you are saying if we were to argue a case of the special circumstances here, the case of trying to prevent security and political hurdles from heavily impeding trade potentially that would be something that the WTO might look on favourably?

Dr Bartels: Of course, one first of all needs to make sure that there is going to be a most-favoured nation problem. We might get to that later. It is a little bit unclear because one has not seen before a situation in which a single customs territory is then broken down into separate customs territories without those then becoming separate GATT contracting parties, or WTO members. This is a novel situation. However, assuming that there is an MFN problem, the important point here is that one could expect at least generous consideration of a waiver to deal with the problem.

Q13 **Mr Nigel Evans:** I find the discussion of the border between Northern Ireland and Ireland a little bit like the cart before the horse, particularly when we have not had the discussions yet about what relationship we are going to have between the UK and the European Union. If it is a great deal, then of course the problems that we are talking about now evaporate.

However, everybody talks about the United Kingdom's hard border. Can you envisage, in what you said earlier on, that it actually is Ireland that imposes a border and not Northern Ireland at all?

Dr de Mars: No, not necessarily. That is too technical a differentiation in the sense that it does not really matter who puts the border in place; the border will be there if there are different customs territories. It would not be for the United Kingdom to unilaterally not apply a customs border, if it is treated as a separate customs territory. The WTO would not permit



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that. It is not as simple as saying, “We will not put up a border”. If you don’t put up a border to the EU, you would then have to not put up a border to the entirety of the WTO membership. That would be most-favoured nation.

That is genuinely not an option, unless we go for maximum deregulation and literally no borders, no tariffs, no controls, on anything ever coming into the United Kingdom again, which for us trade lawyers is an exciting, very hypothetical possibility, obviously, but I don’t think it is something that is going to happen in the next two years, to be sure.

Dr Bartels: If I could add to that, when I was talking about MFN waivers, I don’t think it would extend to that sort of violation of MFN. I was speaking only of treating Northern Ireland as a separate entity.

Q14 **Matt Western:** Could you elaborate on what are the different procedures applying at the border in the case of frontier traffic, free trade agreements and customs unions?

Dr de Mars: This is really asking after the difference between a customs union and free trade area, and how they are treated. A customs union is what we have now in the European Union. It has one big, external border, in one way or another; that sets identical tariffs to the entirety of the rest of the world.

A free trade agreement, on the other hand, is one where internal traffic is not controlled, so we have something like regulatory alignment, or mutual recognition, of all rules for intra-country trade but they each have different customs tariffs and relations with the rest of the world. The Customs Union is the extreme version of a free trade area, almost, is how you can look at this. Depending on what is done, you either have to check both for regulatory compliance and for customs duties—that is in the case of a free trade area—with goods coming in from outside, or you have to only check for customs because, once the goods go in, there is free circulation of them within.

The European Union really is—I hesitate to call it unique because that is something the EU lawyers are famous for calling the EU, in all circumstances—but it is unprecedented in the extent of what it has gotten rid of in terms of both external and internal differentiations, so more regulatory harmonisation than we see in any other type of free trade arrangements in the single market, and the largest customs territory in the world, I think.

Q15 **Matt Western:** I want to pick up on one example of, say, red diesel in Ireland and how that was a massive issue, I think, across the border, or non-border, between the north and the south, which led to something like a £0.25 billion loss in tax receipts to the UK Government. Does that give us an example of how difficult this might be in the future?

Dr de Mars: Yes, I think that is fair. I will not call myself an expert on VAT collection and how that relates to borders; this is an area I think



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very few trade lawyers look at in detail. I can think of one colleague who is very adamant that VAT is going to be the biggest problem that we have to sort out in the future arrangements. However, there is a lot of risk in terms of the potential for smuggling being a consequence of unaligned borders between Ireland and Northern Ireland, in one way or another. That is a serious concern.

Q16 Matt Western: Dr Bartels, you were referring to that a bit earlier, I think.

Dr Bartels: Yes, I agree. This comes down to the question of whether there has to be a border. I think there does, and the border has to do what borders do, which is check for customs, make sure that goods are properly identified in terms of their origin for customs purposes, to make sure that internal taxes are levied at the border, when necessary, and to make sure that the products can be sold. That has to be done and it has to be done both on the EU side and on the UK side. Where it is done, is a question for co-operative agreements. How it is done, and how intensive that is, how hard the border is that makes that able to be done, is in some respects a technical question, but there is no question, I think, that those functions need to be undertaken, both for EU purposes and for WTO purposes.

Q17 Catherine West: In terms of the movement outside and inside the EU—for example, Switzerland—how does that work? Lots of people would say Switzerland is right in the heart of it, and it manages. How does that work?

Dr de Mars: With a border, and a border, that by Northern Irish and Irish standards, would be considered quite hard in that there are controls, there are posts in place. It is all the stuff that the joint report that the EU and the UK have just now agreed to rules out as an option for Northern Ireland. They have now clarified what they mean by a hard border, both parties; it is any physical infrastructure whatsoever. At that point in time, what you have in Switzerland, which is not necessary because Switzerland is not in the EU Customs Union, is the opposite of what has been promised, so it is a very different situation.

Q18 Catherine West: A quick supplementary on the people side of things, because obviously lorry drivers, they would need passports, and so on. What kind of issues might there be around that?

Dr de Mars: Turkey is a good example here. Turkey has an arrangement for goods, but unfortunately not an arrangement covering the people who have to move the goods to and from. There are very long queues at the EU-Turkey border, primarily because whether or not the drivers can take the lorries into the European Union is something that has to be checked on an ongoing basis. Again, I would say that the UK is probably in a different position because at the moment we are starting from full alignment with all those rules, so depending on the extent to which we are willing to promise that we would continue mutual recognition of



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qualifications and things like that, and what kind of visa regime was going to exist between the UK and the EU, which all sides have indicated will be primarily light-touch, this should be easier in some ways.

Q19 Catherine West: Finally, people smuggling, with our modern slavery laws, and so on. Do you think there will be any implications for more of that? Or do you think it is the same? Obviously, it is an issue now. It is not as if it will not be then.

Dr de Mars: This is absolutely not my area but I will take a stab at it, simply because of the Common Travel Area, which we have now, and we will continue to have, so in that sense I genuinely cannot see anything changing.

I would add to Lorand's earlier comments that one of the ways to get around the Common Travel Area and the free movement of services, MFN problems, is to turn the Common Travel Area into some kind of trade agreement, to formalise it as an international treaty. At that point in time, you would say as long as we are covering most movements of people, and their related business activities, that would fall with the WTO and secure the exemption that a common travel area would need, if it does not have it already.

Q20 Chair: Before I move to Faisal Rashid, borders essentially, I think you might agree, are functions of different customs arrangements between two territories. Given what you said earlier, is Brexit likely to create a smuggler's paradise in the island of Ireland?

Dr Bartels: It depends on whether the border is properly enforced. It shouldn't.

Q21 Chair: The talk at Government levels is of no hard borders. If they have no hard borders they have to keep customs alignment because, if customs are not aligned, then it is not policed. That is an open goal.

Dr Bartels: It is a finance problem and it is a legal problem. I think it is not an option.

Q22 Chair: Therefore, something has to give here. You have either a customs union or a border. Is that right?

Dr de Mars: That is fair, yes. You would need either a hard border—which I have been told by the Northern Ireland Affairs Committee is almost impossible to imagine, not least of all because the actual physical border cuts across people's backyards in a wide variety of ways and there are maybe 300 different ways in which you can cross it—or there is customs alignment. Those are the only two options.

Q23 Chair: Before I bring Marcus Fysh in, for the purpose of this inquiry then, that would mean that that border extends to all the other EU borders because you have to do the same thing.



Dr Bartels: All other EU external borders are policed. The simplest way of understanding this is that, from the EU's perspective, it will police its own borders. If it does not, it runs into MFN problems and if the UK does not police its borders, it will run into MFN problems. That is in addition to finance problems that would arise from smuggling.

Q24 **Chair:** Both the EU and the UK would be in trouble for running a different regime in Ireland.

Dr Bartels: They need to enforce whatever they have agreed to do and they need to enforce it on a most-favoured nation basis.

Q25 **Mr Marcus Fysh:** How important is it, at this point, given what you have just said, for the Irish Government and the EU to allow Irish customs and other EU nations' customs authorities to engage with ours to talk about these issues?

Dr Bartels: I would say it is fundamental. Once one accepts the principle that there needs to be a border somewhere, the next question is: how can one make that as light as possible? This is a matter for those on the ground, those who are going to implement the border system. Clearly that has to happen in the most co-operative way possible.

Q26 **Mr Marcus Fysh:** But it is not happening at the moment?

Dr Bartels: I cannot answer that. I do not know.

Mr Marcus Fysh: Well, it isn't; I know it is not. That is not for the want of the UK trying to have those conversations. That is an Irish and an EU decision.

Q27 **Faisal Rashid:** A joint report was published last Friday—you must be aware of that—by the EU and UK Governments. I quote, that the UK agreed that, "In the absence of agreed solutions, [it] would maintain full alignment with those rules of the Internal Market and the Customs Union, which now, or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement". What is your understanding of the obligation to maintain full alignment?

Dr de Mars: That is the million dollar question, isn't it? Do you mind if I start first?

Dr Bartels: Go ahead.

Dr de Mars: It is very cleverly chosen wording, in that it is not the wording that either the EU or the UK has used to date to describe the extent of alignment or convergence in terms of their regulatory approaches. What I take that to mean is that, in any area that relates to anything crossing the border and needing to be checked at the border, the UK effectively promises to adopt the rules that the EU has in those areas.

I know the domestic interpretation tends to be mutual recognition is what is being promised by paragraph 49 of the Joint Report. I am sceptical



about that, largely because, in any free trade agreement or any arrangement the EU has struck to date, it has not gone for mutual recognition of regulatory regimes. It has gone for, "If you wish to be in an area with us, doing trade, and there being no border checks, you adopt our standards". It might be that there is an exception underpinning this, that they have something special in mind because of Northern Ireland, but my general understanding would be it is a promise from the UK to basically say, "We will go along with your rules, then, insofar as any policy area that relates to things crossing the border goes", such as trading goods and agriculture.

Dr Bartels: Just talking about the regulatory aspects of this, I largely agree. One way of dealing with that promise, one way of understanding that promise, is to say, indeed, that the UK will fully align with EU law. This is effectively saying that it will be part of what we now see as the Single Market. However, it is possible—of course, legally it is certainly possible—for this to be handled not by way of harmonisation but continued mutual recognition, pretty much, as the UK is able to benefit from as an EU member state. It is true that this has not happened before but I would be sanguine about putting this on the negotiating table. I think this is a realistic possibility. The principle of mutual recognition, it should be said, does apply to the EEA and it does, even in theory, apply to Turkey. How far it goes in practice is another question but it is there in principle, so I think that is something that should definitely be on the negotiation table.

That is one way of dealing with the situation. Another way is to look at these words in, let's say, a more legalistic way. It is possible to read these words slightly differently. To say that in paragraph 50, when the wording is that Northern Irish businesses will have unfettered access to the UK market, what that permits, is the following—of course, there are political issues and I am not speaking to the political issues—one way of reading this is to say that Northern Ireland will remain part of the EU Single Market, Northern Ireland will remain part of, or have a new customs union agreement with the rest of the EU, but Northern Irish products will have unfettered access to Great Britain.

You can think of this in terms of a green channel for Northern Irish products, where they would have to be checked to make sure that the products come from Northern Ireland, but that would be all there would be. What that would mean from Great Britain's point of view is that it would look at a Northern Irish product and simply accept it into the rest of the United Kingdom. There are some MFN aspects to this and there are also constitutional aspects to this, so I am not saying there are no legal problems with it. I think there are legal problems with it, but this is one way of reading what was promised in that document.

Q28 **Faisal Rashid:** Thank you for that. How does it relate to existing models of mutual recognition in international trade law?



Dr Bartels: As Sylvia said, mutual recognition, generally speaking, on the international plane, essentially does not exist when it comes to recognition of standards. Countries don't do it. There are some minor exceptions for recognising practices when it comes to vets, essentially. There are different ways of making sure that food can be safe. But that is essentially as far as it goes and even that is relatively rare. The rule in international trade, leaving aside the EU for the time being, is that, "If you want to export to my country, you will have to meet my standards". You find the same thing in every free trade agreement.

To take CETA, for instance, the EU-Canada free trade agreement, there is no mutual recognition of standards in that agreement. EU products have to meet Canadian standards; Canadian products have to meet EU standards. There is a promise to talk about this. There is often a promise to talk about this in free trade agreements, but the talking never leads to anything. This is the principle reason why TTIP never went anywhere.

This is not to be confused with mutual recognition of conformity assessment. This is what one sees in mutual recognition agreements. It is very important to draw this distinction. There are two types of mutual recognition. One is of standards, and it does not exist outside of the EEA space, including Turkey. The other is mutual recognition of conformity assessment. Essentially, all that is doing is saying, "We—for instance in the EU, or in the UK—recognise an Australian lab as competent to test its products for conformity with our standards". It is essentially trusting labs and technicians. It is not about saying, "We recognise your standards".

Having said all that, at the moment the UK is in an arrangement with the EU and with the other EEA countries, and with Turkey, based on the principle of mutual recognition of standards, which has been there since the 1970s. There is a debate about what that actually means in practice, but the principle is there. I would be relatively sanguine about putting that on the negotiating table and saying that arrangement should continue.

Q29 **Faisal Rashid:** Is it possible under WTO rules?

Dr Bartels: It is certainly possible. In fact, it is even encouraged under WTO rules to have mutual recognition of underlying standards. There are even obligations to say that if you mutually recognise one country's standards, then you have to afford an opportunity to other WTO members, in similar situations, to see whether you should also be mutually recognising their standards. There is a debate on how far that obligation goes but, certainly, the WTO likes mutual recognition.

Q30 **Faisal Rashid:** Having a different kind of agreement with Northern Ireland, under WTO rules, would not have any effect. It encourages it, basically.

Dr Bartels: It encourages it. Again, the difficulty there is not about mutual recognition, which is pro-trade, ultimately. The difficulty there is



that if you mutually recognise the standards of one country, then there is an argument that you should also be mutually recognising equivalent standards from another country. That is essentially the most-favoured nation obligation applied to mutual recognition. There is a debate about how far that is required to go, but certainly, at its base, mutual recognition is seen as a good thing.

Dr de Mars: I would add to that, that in the context of Northern Ireland, as you are discussing it, mutual recognition is very likely to form part of some kind of free trade arrangement, which would somewhat avoid the mutual recognition obligation to all the other WTO members. It is hard to imagine mutual recognition of standards without there also being agreements that actually let things move, in one way or another, in the context of the United Kingdom or Northern Ireland.

Q31 **Mr Marcus Fysh:** I want to get an understanding from you. You helpfully made the distinction between mutual recognition of certain bodies for standards and the mutual recognition in free trade agreements of the standards themselves. What would be the disadvantages, in our trade, if we were to make an agreement with the EU that was very wide-ranging with regard to mutual recognition of the certification bodies but not the standards themselves? What would be wrong with doing that? It does seem quite regular, even if it is only applied to particular products and to particular third countries at the moment. What would be the disadvantages of trying to enlarge that avenue, to utilise that?

Dr Bartels: None. I would say that is something of a no-brainer. One wants to accept certification bodies. It is a good thing. The only reason you would not want to do this, is if you want to use improper means to protect domestic industry. The famous example is of the EU saying that all Japanese VCRs had to be checked at Poitiers in the 1980s. That is the sort of game you can play if you want to but, from a free-trading point of view, there is absolutely no reason not to accept labs, provided, of course, they are properly accredited and you can trust them. Mutual recognition boils down to trust, so that is the limit.

To put it in a slightly different context, however, I do not think that that goes quite far enough in terms of trade. One also wants to push recognition, on the basis of trust, as far as one can, because that promotes trade.

Q32 **Mr Ranil Jayawardena:** Some of the EU's existing FTAs, such as CETA, include a most-favoured nation clause with respect to trade in services between the EU and other FTA parties. To what extent is the MFN clause in CETA, for example, relevant to the EU and UK's agreement to maintain regulatory alignment in certain circumstances?

Dr Bartels: I would say very.

Dr de Mars: Yes, I would agree.



Dr Bartels: It is a real issue. The clauses in CETA essentially say that any treatment that the EU grants to third countries in terms of services—and this applies across the board to all services, and it applies to all aspects of services; it also applies to qualification requirements, so it is a very general MFN clause—any benefits, any preferences, that are granted to service suppliers and services from other countries, which would include the UK, must be granted to Canada.

However, having said that, it is critical to note that there is a reservation, which the EU has included in CETA, and the reservation protects this obligation from fully integrated services agreements and it specifically names the EEA agreement and it also talks about EU-Swiss bilaterals, by which what is being referred to is a bilateral on free movement of persons. It is not even an agreement, but that is the arrangement that the EU has with Switzerland.

So, what does this mean for the MFN clause in CETA and in other agreements that are similar, from being an obstacle to giving the UK, from the EU's point of view, preferences in services? I think it is an obstacle in the sense that, if one does not fall within the terms of that reservation, then anything that the UK gets will have to go to Canada, and that reservation only applies to properly integrated arrangements, so it is a little bit of an all or nothing situation.

Q33 **Mr Ranil Jayawardena:** Could you expand a bit on properly integrated situations? Is it specifically those ones that you referred to or could it be expanded? I welcomed your reference to Switzerland because clearly banking is a very important sector to Switzerland. Do they have any special deals in respect of services that we might consider?

Dr de Mars: This is always surprising to me when I have to say it, but free movement of services with Switzerland does not cover banking.

Q34 **Mr Ranil Jayawardena:** They have a very good relationship, nonetheless.

Dr de Mars: Yes, but if you want to bank elsewhere in the EU, as a Swiss bank, you have to establish a subsidiary in that member state country. In the hypothetical scenario, where the UK goes to the negotiating table and says, "Here are the things that are really important to us" the services economy and the financial services economy, in particular, would be at the very top of that list.

Q35 **Mr Ranil Jayawardena:** How important is it for Ireland?

Dr de Mars: Financial services?

Mr Ranil Jayawardena: Services; financial services, services.

Dr de Mars: I have no idea, sorry. I can't answer that.

Dr Bartels: I would imagine—I do not have the stats—but, given that we are talking about two industrialised economies, the figures tend to be



similar for all industrialised countries, which is that, domestically, services make up about 70% to 80% of the economy and in terms of trade, it is probably about 40% to 50%.

Q36 Mr Ranil Jayawardena: Given that the City of London is regarded as not only the financial capital of Europe but, arguably the financial capital of the world, how important is good access to the City for Ireland, and, indeed, for the rest of the EU? In that context, surely Ireland and the EU would want to see financial services, and indeed broader services, professional services, included in any post-Brexit trade agreement that also has an impact on Ireland, arguably more than many, because of the intertwined nature of our economies.

Dr Bartels: I cannot really comment on finances. I am not a specialist. All I would say is that Delos was once the capital of the Delian League.

Dr de Mars: I would agree. This is where we end up in the complicated territory of economics, politics and law all being in a blender in one way or another. There are two ways to view what the EU's options are. One is to restrict the services deal with the United Kingdom, which is easier for the EU in light of its trade agreements with other countries—like South Korea and Canada—and, in a way, might enable them to move the financial services capital of the world to somewhere else.

I am sure we all saw the somewhat inflammatory tweets by the Chairman of a certain bank, which will not be named, about how lovely a city Frankfurt is, for instance. There is a lot of stuff there. Basically, the politics and the law do not necessarily align about: what is best to do here from the EU perspective? Is it to keep the United Kingdom as this financial services capital, despite the United Kingdom indicating it would like to diverge on regulation? It does not wish to be in the EU. It definitely does not want to be in the Eurozone to any extent. Or is it to say, "If you wish to be out then you are out, and we will move the services within the EU, insofar as that is of interest to those service sectors"? It is hard to say.

Q37 Mr Ranil Jayawardena: My final question then is: do you think the EU would seek to do that and be obstructive if it also cost their businesses the access to the capital markets that they can access in the City of London, unparalleled capital markets? Or do you think that they would be willing and that there are mechanisms that could be used to enable that positive access to the City of London when we leave, particularly for Ireland, because the Irish economy is more linked to ours than any other part of the EU?

Dr de Mars: I am sorry if I gave the impression that I think the EU is going to be obstinate. I think that is one of the two sides of this that you have seen around the press. I personally think that, if the EU can do this in a way that respects its international trade obligations, that does not force it to give financial-services access to Canada and South Korea in a way that it has not wanted to until now, then something is absolutely



doable. The UK side of things has to recognise that that is going to cover a broad range of services and a broad set of alignments, not just saying, "We love financial services, so we will follow you on that, but in every other service industry we want to go do our own thing". That just would not be possible in light of the EU's commitments.

Dr Bartels: I will add, if I may, when the EU talks about cherry picking, financial services is clearly a cherry to be picked. I think we all know by now that one of the negotiation balances is going to be the UK's desire for a services market, including a financial services market, which may well come with the special aspects that you mention in terms of the EU's needs, and the EU's interest in the UK being a market for EU workers. I think that is the head-to-head clash that we are going to see.

Chair: Good answers to a blend of questions there of politics, law and economics. Thank you.

Q38 **Mr Marcus Fysh:** You mentioned that proper integration is one aspect, but are there any other ways in which a free trade agreement could be sufficiently different to what is in CETA or South Korea for the MFN clauses not to be triggered?

Dr Bartels: It is possible. The FTA MFN clause, of course, is different from the WTO one. The FTA MFN clauses in the EU FTAs have a set of exceptions. One is for economic integration agreements, essentially, which are the EEA model, or the Swiss model, insofar as that applies. The other is full alignment. The question there is: what does "alignment" mean? Alignment is a word that has been very much talked about in the last couple of weeks. What it has meant in the past is gradual and increasing alignment of regulations from countries that are on the periphery of the EU that are in some form of close association with the EU, such as Ukraine, or Georgia, or Moldova, or pre-accession talks, for instance the ex-Balkans countries.

If one reads "alignment" historically, one has to look at this and say it is not applicable because the UK is going in the other direction. If one reads "alignment" in a more static way then if the UK is able to say, "We are prepared to align with the EU in these certain sectors", and if these are broad enough, then I think it is possible that the exception to the reservation may well apply. Of course then a second question is: what does "alignment" mean?

Q39 **Mr Marcus Fysh:** Sorry, can I interrupt for a minute? Would that be applying to cross-border trade or would that apply to within the UK market?

Dr Bartels: It would apply to both.

Dr de Mars: To both, yes. What we are effectively proposing here, if I may give it a term, is a disassociation agreement rather than an association agreement. Effectively reaching for one step short of being a member, which is where association agreements tend to want third



countries to go. If you could pitch at that level and say, “We are looking for that same base line. What you find acceptable for countries trying to join should also be acceptable for countries trying to leave in one way or another”, then you would fall within that exception.

Q40 **Mr Marcus Fysh:** Sorry, I interrupted you.

Dr Bartels: Alignment can mean two things. It can mean harmonisation, and I think it can also mean equivalence or mutual recognition, which is effectively the same thing. It is a little bit of a shame that Canada keeps being talked about as the model here. I think—and the European Parliament takes the same view—that a better model is an association agreement. I know that politically some don’t like to talk about association agreements because it implies too close a relationship with the EU and, historically, most association agreements have been precursors to accession with the EU. This is absolutely not required by the concept of an association agreement. One can have an association agreement where the two parties are associated because they are friends, and they have a lot in common, and they like to have mutual recognition and a sufficient degree of alignment and so on.

That sort of model is one that should be seriously looked at. In addition, another advantage of an association agreement is that—at least in law, even though not in practice—they can be concluded as a matter of exclusive EU competence, albeit with unanimous voting. You don’t need to go to national parliaments. For all these reasons, I think that that is an avenue that should be seriously pursued.

Dr de Mars: I would concur. If you talk about a deep and comprehensive free trade agreement you don’t mean Canada. You mean something that covers more than just trade at the outset, and you would be looking at something like Ukraine rather than like Canada.

Q41 **Mr Marcus Fysh:** To finish I come back to the MFN clauses themselves. If we move to a trade world where we are trying to reform trade globally through the WTO agreements, so that we can try to take account of the services that are embedded within manufactured products, to try to make them appropriately treated in the international trade network, what impact does that have in terms of these MFN clauses that cover services? Would that definitely trigger that services aspect of the MFN clause?

Dr Bartels: No. Services that are embedded in products as a general rule are dissolved into the product. Where it is still an issue is in terms of rules of origin, where you take account of the value of services in a product in working out where the product comes from. Just in terms of working out whether it is a service for MFN purposes or a good, it is clearly dissolved and becomes a goods issue.

Chair: Thank you. You are stimulating the grey matter of the Committee panel, because I have two before I go to Julia Lopez; first to Catherine West.

Q42 **Catherine West:** On the associate membership model, as you say, we



are trying to go down a step on the ladder. Everybody else wants to go up the ladder, but we want to come down while trying to maintain as many of the good things as possible. I want to ask about some of the progressive things the European Union is doing on tax avoidance and evasion. As an associate member, would we still be in step with all of the work that is being done? We are talking about the banking sector, the financial services and so on, and standards. I wonder what the implications might be if we are not a member of the EU; how that would work. Are there certain requirements that we would have to meet to maintain an associate membership?

Dr Bartels: It is difficult to give an answer to this. Suffice to say that that sort of co-operation can be conducted in any arrangement, essentially. It can be done with the UK as a third country via OECD mechanisms. It could be done at the moment as an EU member, and it could be done as something in-between. I would see that as delinked from these questions of membership.

Also, just in terms of terminology, I would not say that being party to an association agreement makes you an associate member of the EU. It is a separate state that you would be in an association agreement with the EU. It does not imply membership of the EU in any way.

Q43 **Mr Ranil Jayawardena:** To follow up on that point and the point you made there about being in association, not associate membership, does that preclude concluding free trade agreements with other third parties?

Dr Bartels: Absolutely not. These are free trade agreements. It is perfectly possible to have free trade agreements with a variety of other countries. This is the norm, in fact. No, perfectly possible.

Dr de Mars: I would add to that the caveat, obviously, that being in association with something like the EU does not necessarily automatically solve the Irish border problem, however. Then we do start looking at customs again, and if customs are aligned then there are more limitations in terms of how much flexibility you can offer in terms of free trade agreements with third parties. It is a matter of agreeing, as all these things are.

Dr Bartels: Just to round it out, I suppose one should also add that similar issues come up with regulatory alignments. It is impossible in some cases to align with two different regulatory models. It is possible in some other cases. For instance, when you have a quantified limit—you can only have so much chlorine in the model—it is possible to meet a higher standard and at the same time to meet a lower standard. Sometimes it can work. If you are talking about two different types of headlights, you have to choose.

Q44 **Julia Lopez:** Looking at last week's agreement that sufficient progress is being made on negotiations, to what extent do you think that agreement will require further devolution to Northern Ireland?



Dr de Mars: That depends on if we go for scenario one, scenario two, or scenario three in terms of alignment. Scenario three is the one where we are saying, “In the absence of anything else, full alignment for the entirety of the UK”. That would not require devolution. Paragraph 50 is a clause to say, “In light of the Good Friday Agreement, if Northern Ireland would like to exercise some sort of divergent policy, the UK would ensure that no internal barriers are created”. Again, that is not necessarily a matter of devolution.

Devolution is implied by the second scenario, which is “specific solutions to the island of Ireland”. I believe that is the wording that paragraph 49 uses. It is very difficult to imagine how those would work without some part of trade policy being devolved to Northern Ireland to a significant extent. I think I can leave this vaguely in the middle by saying that is likely to have devolution consequences across the UK in one way or the other, if you will let me get away with that.

Dr Bartels: I could add to this a little bit. From a WTO perspective, if we are talking about Northern Ireland having a separate customs union agreement with the EU, which would then make it separate from the rest of the UK—Great Britain, in other words—and I am saying nothing about the political implications of this, purely from a legal point of view the neatest way of dealing with this in the WTO would be to treat Northern Ireland as a separate customs territory and also as an independent WTO member. That would essentially bring the Northern Ireland and GB relationship in line with what one sees with Hong Kong and the Republic of China. I think maybe I will just leave it there. That is the legal position.

Q45 **Chair:** You are saying that there is a real possibility, but it depends how politically palatable it is?

Dr Bartels: All I am saying is one can envisage from a legal point of view one country, two systems.

Q46 **Chair:** We have heard that somewhere before. If the UK reneges on agreements and a hard border comes into Ireland, it looks like both sides would have to maintain a border, because the EU has to maintain a totality of borders and the UK will have to maintain a totality of borders. What stick does the EU have to threaten the UK with not to force a border in that part of its frontier.

Dr Bartels: Not to enforce a border?

Chair: Yes. The political mood music and the political sweet talk over the last week has been, “No hard border in Ireland”. As we are establishing here, it is very hard to have no border if you have different customs arrangements. If the UK is de facto, and in reality starts to create a need for a border that the EU has to comply with for WTO purposes, what can it do to bring the UK into line—for lack of a better word—to ensure that it sticks to the word of last week’s agreement?

Dr Bartels: If one is talking about sticks to enforce borders, one is in a—



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Chair: Sticks to enforce agreements; and “sticks” are maybe not the best word either.

Dr Bartels: To enforce agreements, yes. How does one enforce that sort of agreement? It is likely that an agreement that is reached in the end will be subject to dispute settlements and those sorts of agreements tend to be enforced to the extent that they involve trade by trade sanctions. One also has to bear in mind, as we were saying earlier, if there is non-enforcement of a border or if there is discriminatory enforcement of trade at a border then one can expect action from third countries as well to make sure that they are not discriminated against. It depends a little bit on what the end result is in terms of enforcement and non-enforcement, but there are plenty of sticks.

Dr de Mars: As for the joint report itself, is part of what you are asking is if it is legally binding, the promises that have now been made?

Q47 **Chair:** Yes and no. The big political buzz is that there will be no hard border in Ireland. There are two implications to that, the borders for the UK and the EU. If one party reneges—in this case the UK—and a hard border is effectively created in Ireland, what can be done by the EU to make them stick by their word?

Dr de Mars: At the moment, we do not have this agreement as a treaty that would be subject to international dispute settlement in any particular way, whether it is taken to the International Court of Justice or anywhere else. At the moment what we have is a gentleman’s agreement. I think that is the wording that has been used.

Q48 **Chair:** Of course the gentlemen in question here, or the gentle ladies, or whatever, on either side have a gallery of audience watching as well from the rest of the WTO. There are not just two players in this; there is a whole other gallery watching as well.

Dr de Mars: Absolutely. I think the entire world is very interested to see how this is going to be resolved in one way or another. You have now touched upon the difficulty with international law generally, which is: what do you do with a country that does not stick to a promise it has made? You cannot throw it in jail, can you? Political pressure would have to be applied by the EU in a wide variety of ways to say, “If you come back on this our willingness to trade with you, our willingness to open up our services markets, for instance, goes away to some extent”.

If the EU stands behind Ireland, in the way that it has said that it does, I think it would be applying that kind of pressure rather than trying to do anything necessarily via judicial recourse in the first instance. Would you say that is fair? It depends on how badly the relationship has broken down at that point in time. Are we still talking to each other if the hard border goes up at any point in time, or is that such a breach of the relationship that we have no choice but to try to go for dispute settlement?



Dr Bartels: It is also important to bear in mind what the default position is in the event of a no-deal. That default position is a hard border.

Chair: Well reminded. Thank you.

Mr Chris Leslie: My apologies for arriving so late to the Committee and if you have already covered this, tell me so. There seems to have been quite a lot of focus on this concept of full alignment since the agreement on Thursday night or Friday morning last week. I wonder whether it is going to come up at the European Council again tomorrow, because the Prime Minister's interpretation, subsequently, was that this was to be narrowly referenced into the Good Friday Agreement accord.

When I looked it up—and she in fact said this in the Chamber—it was agriculture, education, transport, environment, tourism and, I think, energy. Of course it says in the accord the “all-Ireland economy”. I wonder whether on the Republic of Ireland side or the EU side they interpret “full alignment” to mean everything, including, for instance, trade in goods, which does not seem to be part of that Good Friday Agreement list. Trading goods is a pretty big missing component if that is outside the UK's definition of full alignment. Are you watching how these two different interpretations are going? Where do you predict this is going to end up? It seems quite a different interpretation to me. What is your expectation around this?

Dr Bartels: I would be a little loathe to talk about the politics of this too much but, just in terms of what it could mean and what would make sense in terms of an overall trade agreement, there are options. One option is that “full alignment” means full alignment of all of UK law for the whole of the UK with Irish law, which would mean EU law, in relevant respects in all sectors. One could say that. At its narrowest, one could say that there is mutual recognition of standards for production in sectors of the Northern Irish economy which are important for maintaining peace and the Good Friday agreement on the island. I think one can legitimately read the term “full alignment necessary for the Good Friday Agreement or in support of the Good Friday agreement” anywhere along that spectrum.

Dr de Mars: I would sort of agree. I mostly agree. This has been my entire life since Thursday. I have barely had any sleep. It has just been, “What is alignment?”

Dr Bartels: That sounds like full alignment.

Dr de Mars: Yes, absolutely. I think that particular wording has to be read in light of the entirety of the joint report where there are other distinct promises made. One of them is the avoidance of all physical border infrastructure and the reference, as you said, to the all-island economy and that being preserved. I find it very difficult to see how you could avoid all border infrastructure and maintain the full-island economy if you are not promising to align—whatever alignment means—at least in all trade in goods.



Q49 Mr Chris Leslie: If your narrow definition of full alignment did not include trading goods, it would necessitate a border, because that was said we won't do that elsewhere. You have to assume that the UK was also signing up to full alignment to include trade in goods, which isn't quite what the Prime Minister said when she was here. It is confusing, and what I don't know is whether this is a deliberate bit of obfuscation to simply get past phase one and into phase two, for political reasons, or if there is a genuine, textual misunderstanding between the EU and the UK about what full alignment entails.

Dr de Mars: If I can hazard a guess—and this is just a guess, I am neither the Prime Minister nor the European Union, obviously—I would say that it depends on the type of alignments as to what willingness there will be to cover a broader range of laws. If mutual recognition is going to be the thing that is agreed, I think that the UK is very likely to say, "Sure, I will trade in goods". Whereas, if it is full alignment, this is going to become a much more difficult negotiating battle in phase two, if that makes sense.

Dr Bartels: I agree. I think it is likely that it has to cover trade in goods in some form. I would say the real question is not that; the real question is whether we are talking about goods from Northern Ireland or goods from the rest of the UK as well. My reading of it is that it must include trade in goods. The only thing that I would add is that the term "alignment" appears in CETA in the reservation to the MFN clause, so it is a term of art. That term or terms very similar to it—approximation—are terms that exist in other EU free trade agreements.

Q50 Mr Chris Leslie: Is it because, if trade in goods is included in the full alignment definition, that would inhibit and restrict the ability for the UK to make free trade deals elsewhere, because it would be primarily tied to the trade in goods rules with the EU? In other words, if it then made a deal with the States or whoever else, it would be departing from that concept of full alignment with the EU?

Dr Bartels: It depends. If what we are talking about is, in both cases, harmonisation, then definitely. If the UK has to make headlights in a particular way to sell them in Ireland, or in the rest of the EU, and then a different way to sell them in the US, you just have a clash, you have to choose. If you are talking about mutual recognition on either front—and, in particular, on both fronts—then you have many more possibilities.

Imagine that the UK starts to make headlights according to US standards in order to be able to sell cars to the US, just to use that example. If there is a mutual recognition agreement with the EU, the EU could say, "We think those headlights are good enough for us". Of course, there is a political economy problem there, which is if the EU essentially says, "We recognise UK-made US headlights" then the US is going to say, "How about you recognise ours as well?" There are negotiation issues there. In terms of the strict logic, the way out of harmonisation and the way to greater flexibility is mutual recognition of standards.



Dr de Mars: I would agree. If you take the implied reading of “all-island economy” and “alignment” in one way or another, you are potentially looking at the arrangement that the UK currently has with the Channel Islands. Yes, I know I compared the United Kingdom to the Channel Islands, my apologies. They have signed up to the Single Market in goods, basically in its entirety, but not any of the rest of it. That seems to be what the EU has said; “We are willing to do this, and we will facilitate no borders and free movement of goods at least”. I think in the ideal, we would be asking for something a bit more divergent than that.

Chair: I think the Channel Islands might accept your apologies.

Q51 **Mr Marcus Fysh:** I have a couple of questions, just to go back to the agreements themselves and what you were saying about an association agreement. Clearly, where we are in the negotiations is we are supposed to be negotiating a withdrawal agreement that has a transition agreement element to it. Where does that transition arrangement sit in terms of WTO rules? Does that have to be akin to or explicitly a free trade agreement itself to be with the WTO? Or could it be called an association agreement?

Dr Bartels: Yes. That has a very easy answer. So long as the arrangement between the UK and the EU meets the requirements of a free trade agreement, or a customs union under WTO law, it really does not matter what it is called. A continuation of the *acquis* for two years, I am not even sure whether that would need to be notified to the WTO and, even if it is, there is absolutely no issue.

I might take this opportunity to say that there has been some misunderstanding in terms of what the WTO says about interim agreements. The idea that has been wrongly put about in the press is that the WTO is fussy about interim agreements. When the WTO talks about interim agreements it does not have anything in mind in terms of a time-limited, full free trade agreement or full customs union, which is what this sort of transitional agreement would be. There is no time limit, so long as your agreement substantially covers all sectors and all areas in trade in goods. It can be for a day, a month, one year or two years; it makes absolutely no difference. It is not an issue.

Q52 **Mr Marcus Fysh:** From an EU law perspective, would it require a treaty change, or can it just be extended *ad infinitum*?

Dr de Mars: I don’t think it would require a treaty change. I am trying to imagine that horror happening now. That would really complicate these negotiations in a way no one would like them to be complicated, so I cannot imagine that would be necessary. The bottom line is, as long as the substantive rules do not change for a period of two years, as they apply to both parties, I cannot imagine anyone would be that difficult about it. I think the withdrawal agreement itself guaranteeing this would cover the arrangements.



Dr Bartels: I think the question is: what does Article 50 cover in terms of its material substance? I am sceptical that the reference to framework for future arrangements means that Article 50 can allow for a normal sort of trade agreement, but I think what Article 50 would allow for is a continuation of the acquis while that sort of agreement is negotiated with the UK as a third country, which it would be from 29 March 2019.

Dr de Mars: I agree. The framework for transition could include the transition, in other words.

Q53 **Mr Marcus Fysh:** Is it not the case that the EU and its guidelines, as suggested to the Council, is suggesting that the transition agreement should be an agreement with the UK as a third country?

Dr Bartels: I have to confess, I am not certain about that.

Q54 **Mr Marcus Fysh:** Yes. I have it in front of me, and they are looking to negotiate a transition period covering the whole of the EU acquis, "While the United Kingdom, as a third country, will no longer participate in or nominate or elect members of the EU institutions". Is that the same thing?

Dr de Mars: That is a technical distinction. What it is effectively saying is that everything else will continue to apply, but you would not have a seat in the Council, Parliament anymore. I think that is the only way in which you will be treated as a third country by that statement. The rest of it suggests that it can be done under Article 50.

Q55 **Mr Marcus Fysh:** It goes on to say in paragraph 4, "As the United Kingdom will remain a member of the Customs Union and the Single Market—with all four freedoms—during the transition, it will have to continue to apply and collect EU customs tariffs and ensure all EU checks are being performed on the border vis-à-vis other third countries".

Dr Bartels: Yes. I think that confirms a reading, which is that Article 50 is sufficient to allow for a continuation of the acquis minus the UK's participation in political institutions for a transitional period and, during that transitional period, the UK is technically a third country. It operates for all substantive purposes as though it were an EU member, minus the political parts. It collects customs duties, it applies the Single Market. It is also in that period able to negotiate free trade agreements, not only with third countries but also a free trade agreement with the EU.

Q56 **Mr Marcus Fysh:** When the UK enters into an agreement with the EU on transition under the withdrawal period, will it be a third country?

Dr de Mars: That is a very technical reading of what an EU member state is. According to this document an EU member state is a body that is in the Single Market, and the Customs Union, and the political institutions, whereas if you take any one of those three factors away you are effectively a third country. The way in which the UK would be a third country is only that it does not participate in the EU institutions any



more. There is not really a precedent for that because the other EU members we have are not in the Customs Union. If I may, I think this is very technical phrasing.

Q57 Mr Marcus Fysh: It is, but it is important because is it not open, therefore, to the UK to argue that the EU is perfectly able to sign a free trade agreement now with the UK on exactly the same basis?

Dr Bartels: I disagree a little bit. It is quite clear that the UK will be a third country at 11 o'clock on 29 March 2019. I don't think this is a technical issue, with all due respect. I think that is quite straightforward. When the UK is a third country it is, therefore, released from its obligations of loyal co-operation, for instance, which the EU has always said prevents the UK from negotiating free trade agreements. That is important, as I said before, because that means that, as of 30 March—presuming civil servants are not working at 11 o'clock that night but rather celebrating—they will be able to formally negotiate free trade agreements with third countries and, also, begin negotiating a free trade agreement with the EU. Otherwise there is a difficulty.

I have a view, which is also now the duty of loyal co-operation would not prevent the UK from negotiating free trade agreements with third countries. That is a view that is a little bit more extreme than the Government's view, which has adopted the EU's view that, until 29 March, formal negotiations cannot commence.

Chair: Thanks, a bit wide of border implications as well.

Q58 Catherine West: In the Northern Ireland position paper, published back in the summer, the Government proposed adopting an agreement on regulatory equivalence for agri-food, citing Switzerland as an example of a deep agreement allowing for the free flow of agri-food products across borders. We have already talked about this a bit. What are implications of a similar agreement in respect of Northern Ireland for wider UK trade policy? I know we have covered some bits but there is just a little bit to tease out here. To what extent are Switzerland and other micro states, such as Andorra and San Marino, required to adopt EU laws on sanitary and phytosanitary measures to maintain the free flow of agri-food products across their borders. We have covered it but is there anything else you want to add on that?

Dr Bartels: I would say they do. They apply SPS standards on agriculture. That is necessary for it to be possible to export a cow or beef across the border without having it checked separately.

Q59 Catherine West: What would the steps be to constitute an agreement to approximate EU laws on sanitary and phytosanitary measures for Northern Ireland?

Dr Bartels: I would say probably just continue with what you have. It is already approximated. The real question is whether on Brexit day—for this purpose let's talk about Northern Ireland's rules—if they don't



diverge at all are recognised by the EU as being equivalent to EU rules. My view is, under WTO law, that would have to be the case, but I know the EU takes a slightly harder position.

Q60 **Catherine West:** Then the impact on the wider UK trade policy?

Dr Bartels: The more that the UK diverges from EU law in agriculture or any other sector, the easier it is going to be for the EU to say that they do not accept the UK's regulations as equivalent, and that presupposes that what we have in fact is a system of mutual recognition. If what we have is no mutual recognition then as soon as UK products start to diverge from EU products, and if that means that UK products don't meet EU standards, then they simply cannot be sold in the EU.

Q61 **Catherine West:** Just finally, if the UK adopted a common veterinary area—because animal welfare is one of the issues at the Northern Ireland/Republic of Ireland border— what implications would this have for animal welfare checks at UK ports?

Dr Bartels: It is probably a specific example of the more general issue, which is: if you have harmonisation that essentially means that UK and Northern Irish products meet EU standards, so that aspect of border controls falls away. If there is divergence then, in absence of a mutual recognition arrangement, you have a problem. With a mutual recognition arrangement that problem may well also go away. I think that applies to animal welfare issues as it does to health issues or any other SPS-type issues.

Q62 **Mr Chris Leslie:** If we have agreed to full alignment with the Republic of Ireland and the EU on sanitary and phytosanitary measures, I am taking it that we have, de facto, ruled out hormone beef, chlorine chicken coming into the UK in some future potential US deal because it would not be compatible to have that US arrangement and continuing the EU full alignment. Can we come to that conclusion that those aspects of the US deal are off now?

Dr Bartels: Technically it is possible to do it but that would mean keeping the two product lines completely separate from each other. It is technically possible to say that, as far as UK consumers are concerned, they can eat the chlorine chicken—let's just use that example—because we decided in the UK that in fact they are safe.

At the same time, if they want to export to the EU, UK producers of chickens must meet EU standards. If you have a line of products that are just made for export according to EU standards that can happily continue and, at the same time, UK consumers can eat products that do not meet those standards. The difficulty there is a practical one. Again, it boils down to trust. Will the EU trust that there is not any—let's say, to be neutral—cross-fertilisation or cross-pollination of the product lines? That is really the issue. Technically, if you can keep the product lines separate it can be done.



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Q63 **Mr Chris Leslie:** What it is ruling out is the importation of hormone beef, chlorine chicken for the purposes of further sale of food products thence into Europe. It keeps chlorine chicken on the menu for British consumers but not for food processing to then be sold on into the EU. That bit of any trade deal with the US is gone.

Dr Bartels: Yes.

Q64 **Julia Lopez:** Can you give an example of where the EU has had a mutual recognition agreement with a third country where that third country has subsequently strayed from the regulation at the time that the agreement was made, such that the EU does not recognise?

Dr Bartels: No, because they always converge. That is the whole point. They have been given money to converge most of the time. This is partly because the EU is a powerful entity that likes to draw the surrounding countries into its regulatory web, and I mean that in the most positive way possible. Also because in a number of these cases these countries have an interest in doing that, because it helps their exports, but also some of these countries are pre-accession countries and so they have to align with EU law anyway. There hasn't been any interest in a country that has aligned with the EU then seeking to dis-align from EU standards, so it would be unprecedented.

Dr de Mars: I would add to that that the only types of outright mutual recognition agreements which the EU has at the moment are mutual recognition of conformity assessment agreements. Again, those are in very, very limited sectors, even with a very developed economy. Just off the top of my head, I believe the US mutual recognition covers cars and telecommunications and nothing else so it is not comparable to what we have, vis-à-vis the UK and the EU.

Dr Bartels: Sometimes one sees mutual recognition in free trade agreements and thinks it might apply to standards because of where it is located. Whenever that happens in reality, it is harmonisation with EU standards. Sometimes harmonisation is dressed up as mutual recognition probably for domestic political purposes.

Q65 **Mr Nigel Evans:** Do not panic at the ringing bells. We love chlorinated chicken in this Committee and when we go to America next year I am asking the Ambassador to serve us chlorinated chicken. I am definitely going to do that.

Let's say we do have chlorinated chicken imported into the United Kingdom and we are able to keep the two lines separate, then a French shopper does the Calais run in reverse, heads to Tesco in Dover and buys American chlorinated chicken off the shelves and then takes it back into France, technically would they be breaking a rule?

Dr Bartels: Yes, they would be importers of an illegal product.

Q66 **Mr Nigel Evans:** Absolutely, I wanted to establish that. I want to also



want to make Guy Verhofstadt's Christmas and get this absolutely clear in my head. I am going to send him some chlorinated chicken. No, I won't. That would be breaking the law as well, I guess. Guy Verhofstadt thinks that the answer to the Northern Ireland/Ireland problem is Northern Ireland staying in the Customs Union and the Single Market. Can they—and I think you have answered this anyway—do that within WTO rules?

Dr Bartels: It is not straightforward. What it would require is to treat Northern Ireland as a separate customs territory from Great Britain. There are two ways in which this could be compatible with WTO law, I think. The first is for Northern Ireland to become a WTO member in its own right, and the second is to obtain a waiver from the most-favoured nation obligation. The reason for this is unclear. I have looked into this, the precedents are very murky, I have discovered all sorts of shenanigans going on with overseas territories and the most-favoured nation obligation, but the only WTO rule is that if, when you join the WTO you have a separate customs territory as part of your country, that does need to be treated as a separate customs territory and it must apply MFN treatment to other WTO members.

If one extrapolates from that and says if one creates a new separate customs territory then the same rules applies, then one needs one of these absolutions.

Q67 **Mr Nigel Evans:** It brings us to the politics. I have listened to all the variations this morning that are there but, of course, politics does play a role. If I read the politics as I understand it then could you tell us what is left because maybe that is the solution? No hard border between Northern Ireland and Ireland; no hard border in the Irish Sea; no payment to access the European Union single market and, indeed, we are out of the single market and we are out of the Customs Union. There is no free movement of labour and there has to be no justiciability by the European Court of Justice. Now, what is left?

Chair: Don't say "La La Land".

Dr Bartels: The easiest answer would be to say that one has a set of conflicting conditions.

Q68 **Chair:** Are you saying "La La Land"?

Dr Bartels: It is difficult to see how all of this can be reconciled and at least some of this would need to be managed, to use that term. One way of handling it would be the model that I suggested earlier, and again it does not solve all of these problems but at least offers a different perspective on the common one, which is to say we just stay, de facto, essentially, close to. That is to say that, if GB gives preferences to Northern Ireland unilaterally, then you can, whereas Northern Ireland would have to essentially enforce EU law against GB products and third country products coming into GB. That is another way in which this could be done. Does that avoid a hard border for Northern Ireland on the



island? Yes, it does. Does that avoid a hard border for Northern Ireland in terms of exports to GB? It does if you say that the only hardness of the border there is a green channel where you check to make sure that products are actually from Northern Ireland. That is one way of dealing with this. But there is a hard border in the other direction, GB towards Northern Ireland. That cannot be avoided then. That is the only other alternative that I can think of.

Dr de Mars: I am going to suggest, with all due respect, the example that Lorand just raised is probably not going to be politically acceptable in Northern Ireland. Being part of the United Kingdom internal market is not a one directionally thing. The idea that the EU border would be enforced in the Irish Sea is not quite what the parties in Northern Ireland are looking for one way or another. They would prefer no border anywhere as far as I can tell, but also exit from the Single Market and the Customs Union. What is the solution to this? I think it is going to have to be extremely creative wording to make it clear that we are going to part of something that absolutely is not the Single Market and absolutely not the Customs Union. That might be something that broadly covers the same rules, in one way or another, with perhaps a different kind of international oversight body to the European Court of Justice?

Q69 **Mr Nigel Evans:** You mean shenanigans?

Dr de Mars: Yes, absolutely.

Dr Bartels: The problem with that is that, if one is really adding the Customs Union to this, it does not leave the Department for International Trade with very much to do.

Mr Nigel Evans: That is very true.

Q70 **Chair:** Before we go on, you said something there about if the UK joins the WTO. If the UK had devolved customs powers to Northern Ireland but then goes and says to the WTO, "We have two customs areas in the United Kingdom, the Great Britain customs area and the Northern Ireland customs area" is that a possible prudent step the UK could take to forestall problems later? It seems from what you have said you can't later go to the WTO and say, "Now we have two customs areas" but at the point of joining you could have two customs areas.

Dr Bartels: Prudent? I am offering an interpretation of what might be possible under the paragraphs 49 and 50 of the joint report. There are many obstacles; some of them mentioned by you, others according to the model that I am suggesting here would be constitutional. How would this fit in with the 1800 Act of Union, for instance, section 6 of which talks about free trade between Ireland and the United Kingdom of Great Britain as it then was? I foresee a lot of domestic legal as well as political obstacles to what I was suggesting.

Q71 **Chair:** I think it was just Great Britain before the Act of Union, was it not?



Dr Bartels: Yes, you are right, it was. Well, it was the United Kingdom of Great Britain, in fact, England and Scotland. Wales disappeared for some reason.

Q72 **Catherine West:** A very quick question on the chlorinated chicken issue, because isn't part of the thing that Brexit is essentially philosophically protectionist, but what happens is even though we say it—let me finish, because even though it is free trade—

Chair: Order, order.

Catherine West: Even though it is "free trade" what will happen to the producers in your constituency, for example? I don't have many farmers in Hornsey and Wood Green, but isn't that the point that—

Chair: Wait until Brexit is finished.

Catherine West: —part of the difficulty is your poultry farmers will go out of business because the chlorinated chicken is going to be cheaper, because part of the reason why they chlorinate it is because otherwise it is too costly to allow the chickens to roam and to—that is the real reason.

Chair: A debate has broken out in the Committee, which is inapplicable evidence.

Dr Bartels: If I can answer this in a slightly more general way, partly because I am not sure what everybody's constituency is. Regulations can, of course, be used for protectionist reasons but that is illegal. One is not allowed to do that. When it comes to SPS regulations, so sanitary and phytosanitary standards, of which chlorination of chickens is an example, the rule in WTO law—and this is exactly the same for every free trade agreement, which largely incorporate these by reference—is that you can only have a regulatory trade barrier, talking about chlorine or some other method of producing chickens is a regulatory barrier, it is regulation, if it scientifically justified as necessary.

Whether or not chlorination of chickens is an acceptable means of making those chickens healthy, or whether the EU's model is what is necessary, is a question that needs to be answered scientifically. It is not really a question of protectionism. There was, in fact, a US case commenced in the WTO against the EU's ban on chlorinated chickens, which disappeared. For these purposes that is a shame because if it had continued we would know whether the EU is allowed to ban chlorinated chickens in the same way that we know that the EU is not allowed to ban hormone beef, because the EU has consistently been unable to demonstrate in litigation that its ban on hormone beef is necessary for health reasons. It simply cannot show this.

Q73 **Catherine West:** The whole question of trade is about cost, isn't it, so the product is attractive essentially because of its cost?

Dr Bartels: Yes, that is absolutely true and that is precisely why having an SPS barrier that cannot be justified is wrong. That is why it has to disappear because ultimately you are trying to drive down cost and, if



there is a cheaper way of achieving the same result, then that has to be accepted. In the real world it is also important to note that one can have different markets. So it is possible for producers to move into high end, prestige production of certain products. Just because most of the production that might end up in mass-produced food might be chlorinated, does not mean that they cannot be a premium product generated by farmers who would otherwise be out of business.

If you look at the Italian fashion industry, for instance, it used to be essentially cheap. It has now moved more into premium fashion, so there are ways of surviving.

Q74 Matt Western: We have touched on this in previous responses you have given. It has been suggested in certain places that the way of avoiding a hard border is for the UK not to enforce customs or regulatory checks. Can you describe how that might work or what the implications would be for that on our trade?

Dr Bartels: There is no obligation to conduct any checks on any border. If you want to let everything in, that is perfectly fine. The condition is that you have to do this for products from all WTO members.

In terms of non-enforcement of the Northern Irish border, if the UK wants to allow EU products freely into the UK internal market, that is perfectly fine, provided that it lets in the same products from the US, Australia, Turkey, Ukraine, every other WTO member. That is the real problem. It is a problem of discrimination.

Q75 Chair: That problem of discrimination does not just apply to the UK, it applies to the EU. There is no hard border. Both have made a promise to the people of Ireland. Can they keep that promise because it is not just the UK that has made that promise to the people of Ireland; it is the Irish Government and the EU that have also made that promise to the people of Ireland?

Dr Bartels: It is very difficult to see how all of these promises can be reconciled. I think technology can do a lot but it cannot do everything. In reality, there may have to be some softening of what one understands by a hard border.

Q76 Chair: Maybe a soft border in Northern Ireland then? That is the only practical way to stop the gallery of other countries at the WTO chasing the EU and the UK for flouting rules on one particular border.

Dr Bartels: It may be that a sensible starting point would be to see whether a border of the type that exists between Norway and Sweden or between Germany and Switzerland is acceptable.

Q77 Mr Marcus Fysh: I want to go back to the WTO and GATS exceptions for Commonwealth right of abode and different ways of effectively treating the border without falling foul of WTO rules. The EU countries, including Cyprus and Croatia, have certain exceptions in respect of their border



arrangements. They are granting non-EU citizens within 30 kilometres of the border special local trade exception rights. How does that not fall foul of WTO goods policies and what are the implications if we were to do something similar for Northern Ireland, for UK trade?

Dr Bartels: One of the exceptions I mentioned very briefly in the beginning is for frontier traffic, so for local production and local consumption it is possible, both in terms of trade in goods and trade in services, to ignore the MFN obligation. It is very limited to 30 kilometres. The last time this was talked about in the WTO it was something like 10 miles; 30 kilometres is a little bit of inflation but it is within that ballpark. Again, I don't think this exception would work for the whole of Northern Ireland but it would work for frontier traffic.

Q78 **Mr Marcus Fysh:** Finally, because I like to ask this question to all of the guests, and it is relevant to that concept of a soft border or a softness, what are the opportunities for technology in the future to make these declarations that are going to have to happen and these adjustments for all the taxes that you mention happen away from the physical border itself?

Dr Bartels: I am not a logistics expert by any means, but my understanding is that, for the great bulk of imports, technology is on the move and is a satisfactory solution. If one is importing iPhone technology it can do a lot. The difficulty is if you are talking about certain product sectors where technology does not solve your problem. Those sectors are agricultural because it is very individual in terms of individual animals but, also, because the stakes are very high if you get it wrong. We are talking about human health. That is one major area where checks are much more frequently undertaken. Now, you can talk about what percentage of imports are spot checked; free trade agreements say this. They say something like 20% of products will be checked. It is written in the agreement. That is the sort of thing that is negotiated.

Given that is a large component of trade between Northern Ireland and Ireland, that is something that needs to be taken very seriously but one cannot confuse that with other types of trade where technology can do an awful amount with trusted suppliers and so on. It is really two separate issues.

Chair: Thank you. I thank both the witnesses for their evidence this morning. Very much appreciated. The Committee is now going to return to private session for a brief portion, so can I politely ask the public to clear the gallery, please, and the Committee will get together for a moment or two.