

Brexit: What happens Next?

Sam Gandhi, Nick Brittain and Nicolas Lockhart

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Sam Gandhi:

Great Britain has been haggling over Brexit since the vote to leave in 2016. It hasn't gone smoothly, but with a new prime minister and a new mandate from voters, Brexit is here, and on the eve of departure, what actually will happen and how businesses should prepare for it still seems uncertain. As we'll find out in today's podcast, despite the uncertainty, there are things that businesses facing Brexit can prepare for.

Nick Brittain:

They should be examining over the next couple of months exactly how their business works, how it interacts with Europe.

Nicolas Lockhart:

Business has to plan for different scenarios, and properly plan for worst-case scenario.

Nick Brittain:

One would hope that London still stays as a major financial services capital.

Nicolas Lockhart:

It's a complex puzzle that the UK has to address in the course of this year. We're at the end of the road in terms of finding solutions, because they have to be found in 2020.

Sam Gandhi:

From the international law firm Sidley Austin, this is the Sidley Podcast, where we tackle cutting-edge issues in the law and put them in perspective for businesspeople today. I'm Sam Gandhi. Hello, and welcome to the podcast. What happens to businesses in the UK when Brexit finally happens? I'm pleased to have two guests today who can shed light on that issue, Sidley Austin's own Nick Brittain and Nicolas Lockhart.

Nick Brittain is a senior counsel in our London office, and has a broad range of experience in general banking and finance law, and practices principally in the area of structured finance and securitization. Nicolas Lockhart is a partner in Sidley's Geneva office, and focuses on the development and enforcement of international trade rules, in particular at the World Trade Organization. Gentlemen, welcome.

Nick Brittain:

Hello, it's nice to be here.

Nicolas Lockhart:

Thank you, it's very nice to be here.

Sam Gandhi:

Brexit seems to be extremely complicated, but a process in which not a lot of people know what's actually going to happen. What happens on January 31 of this year? Is that when the UK officially exits the EU?

Nick Brittain:

So, yes, that's fundamentally correct. January 31, 11 p.m. is the formal exit from the EU by the United Kingdom. From that time onwards, the UK is not directly subject to the EU rules in terms of being a member. However, because of the way that the withdrawal process works, we will be subject to EU rules indirectly. In other words, we will incorporate those rules independently onto our statute book, and so, we have to comply with EU rules for what's called implementation period, but fundamentally, it is the technical exit from the EU.

Sam Gandhi:

How long's the implementation period?

Nick Brittain:

It's going to last from the 31 of January up to the 31 December of 2020, again, 11 p.m. They say 11 p.m. because of the time difference between London and the EU generally. The implementation period is going to be hardwired into statutes so it can't be extended, although I think that's just in theory. In practice, the government may well extend it, but for the moment, we're committed to an implementation period ending on December 31.

Sam Gandhi:

When the UK withdraws from the EU, what laws apply in the UK? Are they EU laws? Are they UK laws? Are they EU laws incorporated into UK laws?

Nick Brittain:

Well, I don't want to err onto the side of politics, because one of the points that the leavers wanted was that it should be UK law for UK people. As a technical matter, it is EU regulation and EU law that's been incorporated onto our statute book, as implemented by Parliament, and as supplemented by Parliament over the implementation period.

Sam Gandhi:

If you're a business that operates in the UK, or is based in the UK, what's the first thing that you do on January 31?

Nick Brittain:

The process is designed so that you can continue with business as usual. I don't think any government would allow there to be some form of step in the way that you actually have to conduct business. The way that the implementation period is intended to work is that the same rules apply the minute before 11 p.m. as apply the minute after 11 p.m. on January 31.

What we are advising most firms to do is to, well, hopefully they should have done it by now, but if they haven't done it already, they should be examining over the next couple of months exactly how their business works, how it interacts with Europe, how it does business either through the UK into Europe or through Europe into the UK. You need to understand how your employees may need to move, where they're resident, where they're actually employed. You need to understand your supply chain, how your goods and services come into the UK from Europe, or go out from the UK into Europe, or out to the rest of the world from either of those jurisdictions.

So, primarily, at the moment, it is a period of diligence to exactly understand how your business works, and how it interacts with European legislation.

Nicolas Lockhart:

And I think one of the great challenges for business is that although we have this transition period which is relatively short, we don't know what will come at the end of the transition period. So, it's still very unclear what the future relationship will be between the UK and the EU, and that makes it very hard for business to plan. And so, I think business has to plan for different scenarios, and probably plan for worst-case scenario.

Sam Gandhi:

Nicolas Lockhart, from your experience, are most businesses trying to stay within the UK, or potentially leave the UK and move into the EU to create that greater certainty?

Nicolas Lockhart:

I think at this stage, most businesses are opting to stay in the UK. There are some UK businesses that have opened up shop elsewhere in the EU, in order to try to continue to do what they've been doing under EU law, but I think what happens in terms of current investments and future investments will depend very much on what happens in the next year.

Nick Brittain:

I can put a bit of a gloss on that as well. A thing that we've found is the banks latched on very early to the process of how to work with Brexit, how to take advantage of it. Where you're conducting a regulated activity like financial services, you've clearly got to pay attention to your continued ability to provide those services in the UK, but also to export those services, to actually conduct a regulated activity in the rest of Europe.

There's a process under the EU called passporting, where if you were authorized in the UK, under EU rules, you can also conduct the authorized activity in any other European jurisdiction. Banks, during the periods of uncertainty when we didn't know exactly how the exit process would work, what the continued relationship would be, started to plan on the basis of maintaining a presence in London or other parts of the UK, but also having a dual presence, so that they had significant offices in, some banks are using Paris, some banks are using Frankfurt, so that they can hopefully get the best of both worlds.

They can continue to conduct activity in London, but if, because of the exit process, that passporting process is stopped, which at the moment it doesn't appear like it will be, but if it was stopped, then you could switch services to Paris or to Frankfurt, and continue to conduct a European-wide business through both centers.

Sam Gandhi:

Is passporting the same as people moving back and forth from country to country?

Nicolas Lockhart:

I think, Sam, that the notion of passporting is one that does have some similarities to the passports that people use to cross borders. If you like, it's a regulatory passport. So, it's a passport that businesses, particularly in the financial services area, they get from their home regulator through compliance with certain requirements, and that passport then allows them to cross borders in terms of providing financial services. So, conceptually, I think there are some similarities, but it's a regulatory passport.

Sam Gandhi:

A lot of our clients outside the US, when they execute documents, it's mainly under English law. Does any of that change now, with Brexit?

Nick Brittain:

Short answer, no. I would say that as an English lawyer, I've got a lot of loyalty to my home jurisdiction, but for most purposes, the general view is that governing laws should not really change. Your ability to enforce English law judgments in European countries should be exactly the same, and vice versa. When the referendum result came out, that was some of the first questions that we were being asked as lawyers, should we choose another governing law?

I think the universal answer is generally no, English law is still a good, stable jurisdiction. You should be able to enforce English judgments in other European countries, on the basis of comity and reciprocity. We think it's unlikely that other jurisdictions, simply because we've left the EU, would be prejudicial to enforcing English judgments in other countries. It just, as I said before, may be more paperwork in order to do so, but the fundamental principle shouldn't change.

Sam Gandhi:

What happens during this transitory period? The UK, their main trading partner was the EU. The EU had trading agreements with everyone around the world, and now the UK has extricated themselves out of that arrangement. Do they have to renegotiate trade agreements with everyone around the world again, and do they have to do that in a year?

Nicolas Lockhart:

So, the first thing, I think, that the UK has to do, in terms of stabilizing its trade agreements is to work on the trade agreement with the EU, and that will be something that the two sides sit down and start talking about right after 31 January. The chances are that that negotiation will take more than a year, but it will really depend upon what

that future relationship looks like. If the two sides want to have an ambitious trade agreement that is comprehensive in its scope of coverage, then it will likely take some time to reach agreement.

If they want to have a looser trade agreement that is less extensive in terms of its scope, for example in areas of services, then it's something that can be done more quickly. Alongside that, the UK will be looking at all of its other trading arrangement. After Brexit, the UK will be in a position to set up its own independent trade policy with these countries. Step one in that for the UK has been to try to roll over the existing trade agreements with the EU.

During the transition period, the EU has asked each of its trading partners to continue to treat the UK as an EU member-state, so there will be rollover, in all likelihood, during the transition period. And then, after that, the UK has already rolled over around half of the trade agreements that the EU has with other countries, but there are some significant gaps. So, the UK has not rolled over the arrangements with Canada, with Japan, and with Turkey, and so, those are things that the UK should be looking at in the course of this year.

I understand that in parallel with opening negotiations with the EU, the UK will also be opening negotiations with some of its other key trading partners, so, with countries like the United States, in particular, with Japan, with Australia, and New Zealand, and will be trying to put in place arrangements in parallel with what's happening with the EU. But there is something of a chicken-and-egg situation here, because most countries will want to know what relationship the UK has with the EU, because depending upon what access UK goods have to the EU will influence the terms that other countries might be willing to negotiate with the UK. So, it's a complex puzzle that the UK has to address in the course of this year.

Nick Brittain:

One of the issues that was of great concern when the referendum result came through, not many people were focusing on it, but I think there was a concern as to whether the UK actually had the bandwidth to be able to renegotiate so many trade agreements, and Nic Lockhart, I'm not sure whether you have a view about how long that process takes, and whether physically the UK has either the expertise or the number of people who can renegotiate so many trade agreements in the nine months that we have left.

Sam Gandhi:

Or, I guess, do they have the leverage anymore with those countries?

Nick Brittain:

Yeah.

Sam Gandhi:

I mean, you know, presumably if you're negotiating against a ticking clock, that seems to be not a position you really want to be in.

Nicolas Lockhart:

Well, I think, I mean, in the time since Brexit has taken place, I've personally been very impressed at the steps that the government has put in place to have the right people in the international trade area. They do have a very good team that is there to take up this challenge, and I think is excited at taking up this challenge. The challenge is large for the UK, and it's not just in the international trade area, but it's across government, in terms of identifying priorities for the negotiations with the EU, building support for that with business, and then in the public with the devolved governments, and then trying to execute that negotiating strategy with the EU.

All of these things will take time, and normally the way trade negotiations work is there are intense bursts of negotiation, and then there's a pause where each party goes back, goes to its stakeholders and figures out what are the next moves, and then there's another intense burst of negotiations. When you're facing an 11-month transition period, and the desire to move out of the EU's orbit at the end of that 11-month period without extending the transition period, there isn't really the time to undertake that type of exercise.

So, it will be a very unusual trade negotiation with the EU that will be conducted in parallel with all of these other trade negotiations. So, it is a big challenge, and then on top of that, the UK also has to look at a number of domestic institutions and domestic policy areas which will have to be reformed in the course of this year. So, for example, stepping out of the EU means stepping away from the Common Agricultural Policy, the Common Fisheries Policy.

There will need to be new legislation in these areas, in the area of immigration, which will change dramatically. There are going to be new public bodies set up at the same time as some of these competencies are taken back to the UK. So, across government, the scale of this challenge is enormous, but from everything I've seen, the government has taken steps to put in place some very good people who are, I think, more than up to that challenge.

Nick Brittain:

I think when you're out of the spotlight, of the chaos that led to the agreement, on the withdrawal agreement, to Theresa May having to resign, to a general election, to the press coverage of the exit process, once all of that has died down, I think that's when the government really gets into action, and out of that spotlight, one would hope they, I think having it resolved by December the 31 of this year is probably unlikely. But out of the glare of that spotlight, one would hope that they can really make some progress, and hopefully continue business as usual, and perhaps even take advantage of the leave process.

Nicolas Lockhart:

I think there really is an opportunity for business here, and I think also a need for business to engage with government. So, when you have a government which is setting out a new trade policy the way the UK is, really starting from scratch with its key trading

partner, but with all its other trading partners, then it's very important for the government to understand what business needs and what business wants.

The best trade negotiations are conducted as a partnership between business and government. Government needs to know where business faces challenges in other markets, and what it needs in order to be able to operate and develop its business model. And so, there needs to be a dialogue between business and government, and countries that I think are most effective in the international trade sphere are countries that work very closely with their business sectors, different business sectors and trade associations, and the UK has been doing that in the past three years.

The Department of International Trade has a consultative group with business, and from a business perspective, I think it's really important for business to engage now with government, whether directly or through a trade association, and not just with the Department of International Trade, which will not have, will not be undertaking the negotiation with the EU. That's going to be done centrally from the cabinet office and the prime minister's office, but making sure the business's voice is heard is going to be critical to the EU trade policy.

On the EU side, that's something that they already do very effectively, but again, there is an opportunity here for businesses in the EU to make their voice heard with the EU to ensure that the EU is directing negotiations the way they want.

Sam Gandhi:

You know, since the vote, and even before the vote, when he was campaigning, Prime Minister Johnson continued to emphasize the importance of making the UK an attractive, or a more attractive country for foreign investment. Does Brexit make that harder or easier?

Nick Brittain:

I think the uncertainty, unfortunately Brexit, for the last couple of years, has meant nothing other than uncertainty. We didn't know when the formal exit would occur, we didn't know what shape the withdrawal agreement was. We still don't really know the shape of things that will occur after the end of the implementation period. So, the uncertainty has been hurting business. Now, I think that things are a little bit clearer. We know what the process is going to be.

We know that, we started to see the positions that the EU and the UK have taken in negotiations. There's some more certainty, now I think is the time that people can start to really take advantage of this situation, particularly in the financial services industry. That's something in which London is very strong, and one would hope that London still stays as a major financial services capital within the EU, and continue to conduct business in the way that it did before exit.

Nicolas Lockhart:

I mean, again, I think whether the UK, how attractive a place the UK is for investment will depend a little bit on how these negotiations unfold. Clearly, there's an objective on

the side of the UK to ensure that the UK is a very attractive place for business. That has been one of the objectives of Brexit. One of the concerns on the EU side is that the UK would become too attractive as a place for investment by lowering standards, and I think that's one of the areas that's going to be very sensitive in the negotiations that take place in 2020.

The EU has a number of different EU laws which are designed to ensure a level playing field across members of the European Union, and today, the UK is subject to all of those rules. And so, one of the questions will be, to what extent are those rules applicable in the future trading relationship between the UK and the EU, and that, I think, will help to influence the question of investment.

Nick Brittain:

One of the opportunities, I think, that the government sees in being able to negotiate new trade arrangements is freedom. We've got the freedom to choose the level of regulation that we have, our attractiveness to outside investors, but as you say, Nic, the question of divergence from EU standards could damage that relationship and make negotiations harder if we set out our stall now to say that we intend to significantly diverge from the way in which Europe regulates itself.

Sam Gandhi:

And do you think there will continue to be political pressure to continue to diverge from EU rules, given that the whole premise of the Brexiteers was to move away from the EU?

Nick Brittain:

Yes, I think it's an important part of the leave argument, is our freedom to do what we want. I think, going forward, it would be a sensible choice to align ourselves as much with major markets that we want to export to, but I think the voting public needs to feel that they are UK laws for UK people.

Nicolas Lockhart:

I think there's a line to be walked. The UK's main trading partner is the EU at the moment, and I'm sure that business in the UK will want to maintain those opportunities in the EU, and to do that, and to maintain good access to EU markets for both goods and services, which are so important for the UK economy, is going to require some level of compromise as to the regulations that apply.

At the same time, opening up opportunities with other markets, in particular markets like the US, may require some degree of divergence. And then, there's another dimension to this as well, which is many countries will look at their trading relationship with the UK in terms of the UK's ability to access the EU. So, if you have a relationship, say, with, a trading relationship between Japan and the UK, one aspect of that will be, to what extent can goods that are produced in the UK, or imported into the UK, to what extent do they have access to the much-bigger EU market?

So, third countries, like Japan, like the US, they will be looking at the UK/EU relationship as well. So, as I said earlier, it's a very complex puzzle, and certainly there are opportunities for the UK that an independent trade policy represents, but there is a line to be walked, and trying to balance all of these different interests. And if I may say, again, business has a key role, I think, in helping the UK government walk that line, and identifying where the interests are and how best to achieve those different interests.

Sam Gandhi:

Let me ask you all a question that has kind of confused Americans here, in terms of what the status of Northern Ireland is, and their place in the Brexit argument. How Northern Ireland is going to be treated kind of arguably led to the downfall of Theresa May's government. Can you explain how Northern Ireland fits into Mr. Johnson's Brexit plan?

Nicolas Lockhart:

So, Northern Ireland is, I think, a very thorny issue, has been since the referendum. The reason it's a thorny issue is because of the peace process resulting from the Good Friday Agreement, and there is a commitment on both sides, the UK and the EU, to ensure that there is no hard border in Ireland, and that has been, seemed to be a very important part of ensuring the continuation of the very successful peace process. How you achieve that when Northern Ireland is part of the UK's customs territory and not part of the EU's customs territory is very hard to try to envisage, and what the negotiators have done in the withdrawal agreement in a special protocol on Northern Ireland is tried to square this circle.

And the solution to that has been novel, innovative, and will not be easy to implement. The solution is that Northern Ireland forms part of the UK territory formally, for trade purposes, but at the same time, goods in Northern Ireland are subject to EU's trade laws and customs rules. Now, so, what does that mean in practice? It means in practice that when goods come into Northern Ireland, they're in principle subject to EU customs, duties, and regulations, and the whole problem here was to try to avoid a hard border in Northern Ireland.

And so, this innovative solution has dissolved that border between Ireland and Northern Ireland, and has moved it into the Irish Sea, between Northern Ireland and the rest of Great, or in Great Britain. And so, the challenge in implementing this will be to come up with ways that ensure that Northern Ireland is seamlessly part of the UK economy, and at the same time seamlessly part of the European Union, and that's a challenge for 2020, for a committee, a joint committee that's been established by the UK and the European Union to try to work out the rules, and I'm confident that they will achieve what they're trying to achieve, that seamlessness in trade for Northern Ireland, both with the rest of the UK and with the European Union.

And I think what's really interesting about this and what hasn't garnered a lot of attention is the opportunity that this represents for Northern Ireland, because Northern Ireland will be in a very sweet spot, where it has the potential to trade frictionlessly with the rest of

the United Kingdom and simultaneously trade frictionlessly with the European Union. And that's an opportunity for investment in Northern Ireland which I hope business will seize, because it would be a very good thing for Northern Ireland.

Sam Gandhi:

We've been speaking with the aptly-named Nick Brittain from Sidley's London office and Nicolas Lockhart from Sidley's Geneva office, as we await Brexit officially occurring on January 31 of 2020. What if in a couple years this whole thing doesn't seem like it's really working out for the UK? Can they ever reenter the EU?

Nicolas Lockhart:

Let me just say first of all that I think two years will not be a long enough time to establish whether this change, which you could describe as a cataclysmic change, it's certainly one of the biggest changes in UK regulation in generations, whether that's a success or not is going to take much longer to figure out. It will take more than two years, for example, for the UK's trading relationship, probably with EU and then with third countries, to be put in place.

So, I think we're looking at a longer timeline to figure out whether this has been a success or not. I think it's also true that it would take more than two years to persuade the EU to have the UK back.

Nick Brittain:

Return of the prodigal son.

Nicolas Lockhart:

Yeah. So, if there comes a time when the UK feels that there is public support for reentering the European Union, I think there will be challenging conversations with the UK's partners in the EU, because they will not want to face another Brexit two years after that, for example. So, yes, I think the European Union will always hold the door open to the United Kingdom...

Sam Gandhi:

Don't hold your breath.

Nicolas Lockhart:

...but I don't think it'll be in two years.

Nick Brittain:

It's also true to say that the UK's history in the EU was to exempt itself from the application of certain regulations. We didn't adopt the Euro. Some would say, and I don't want to err too much into the side of politics, but the UK got itself, got a sweet deal within the EU. Opinions clearly differ on that, but any attempt to reenter, I'm sure, wouldn't be on the same terms. It may be that the price of reentering is to adopt the Euro.

It may be that our economy isn't in a sufficiently strong position to negotiate a favorable deal with getting back in, so I would say that although the prodigal son might come back one day, it would certainly not be on the same terms.

Sam Gandhi:

In your experience over the last three years in terms of advising businesses, what are the businesses that are very significantly disadvantaged by Brexit, and what are the ones that you think, you know, have potential advantages going forward?

Nicolas Lockhart:

I think the businesses that face the greatest risk from Brexit are the ones that are most closely integrated with the rest of the European Union. So, the greater the degree of economic and legal integration between, for a business, the greater the risk Brexit presents. A good example would be financial services. We talked earlier about the way the EU's market in financial services works, which is that you get this regulatory passport, and you can then operate throughout the European Union, and in the case of financial services, you can be based in one place, like London, and then you can provide services throughout the entire European Union.

So, you have a very closely integrated business, both as a matter of customers, but also as a matter of law. So, for a business like that where you have such a high degree of integration, Brexit presents considerable challenges, and there are many other examples of that. People often talk about the automotive sector, which is highly, you have a highly integrated supply chain, where you can have a part that will start, let's say, in the United Kingdom, will then move to, across the water to another part of the European Union, where it will be processed into some bigger component, which will then move back into the UK, further processed into a bigger component, back into the EU, and so on and so forth.

And that can go on several times, until you end up with a vehicle, and that vehicle could be produced in the UK and then sold in the rest of the European Union. So, for a business like that, Brexit is a huge challenge. If the UK were to fall back on WTO terms of trading, then the movement of these parts would be subject to fairly high import duties at every step of the production chain. So, there you have a business which is closely integrated as a matter of fact, and the legal framework allows for that close integration.

Again, big risks. Where do we see low risks? Well, it's precisely the opposite situation, where you don't have that high level of integration. So, you're looking at businesses which are either predominantly focused on the UK, so, things like the retail sector, recruitment, tourism, things like that which are very UK-centric businesses, face low risks. Other areas where there are low risks would be businesses which tend to trade outside of the EU, but are located, let's say, in the UK. So, things like mining, where there are big mining businesses which are located in the UK, but most of their operations are outside the European Union.

Nick Brittain:

I'd add, saying that the biggest risk to business is to businesses that aren't prepared, ones who haven't taken the right advice, haven't examined their supply chain, haven't examined where they conduct business, what regulatory approvals they require to do so. If you haven't been through that process, then you're at risk. It isn't impossible to get 'round these problems. With the right advice, with the right reorganization of your business, you can take advantage of this process, but if you just sleepwalk into it, then I think you're at significant risk.

Sam Gandhi:

Pretty much everybody who talks about this seems to be walking around in the dark, until, and looking for that light. Why would anyone do this?

Nicolas Lockhart:

When you look at the UK's relationship with the European Union, there's always been an element of ambivalence to it, and Nick Brittain's already touched upon that. The UK stayed out when the European Economic Communities were first established. It joined late, and since it joined, it has, I think, consistently struggled with some elements of the European project. It's obtained carve-outs in some cases to allow it to sit out, and I think that ambivalence has stemmed in part from a perspective that from, that what the UK wants from a relationship like this is essentially a degree of economic integration, but perhaps less integration in terms of social rules and movement of people.

And that's been, I think, a big issue as the European Union has enlarged, is that we've seen a lot of immigration into the UK. And so, I think this constellation of elements brought about a situation where the prime minister at the time felt that it would be appropriate to put the question to the people, and the people have spoken very clearly now, that the UK should not be part of the European Union.

Nick Brittain:

It remains to be seen whether the decision to leave is one that's beneficial for the UK. At the political level, the decision was taken, I believe, to have some independence from the European project. Whether people fully understand what that independence really means and what the advantage of staying in are, I think that is perhaps a debate for a longer and different podcast from this one. But in the long term, one would hope the people will realize the benefit of staying in a large trading bloc like the EU, and also the benefit of being in a smaller trading bloc and having the ability to negotiate your own trading arrangements, and to go it out on your own.

I don't think I would care to say on this podcast whether I think that was a good decision or a bad decision. Now that the decision has been made, now that we are committed to this path, I hope it works out for the best.

Nicolas Lockhart:

Sam, you mentioned that we were struggling about in the dark and looking for the light. I think the light that has guided the leavers throughout all of this is the light of the opportunity that Brexit presents for the United Kingdom, which is an opportunity to forge

its own independent trade policy, to try to maintain close relationship with the European Union, and at the same time develop opportunities elsewhere. As Nick Brittain has just said, it remains to be seen how the UK succeeds in that, whether it manages to walk the line.

But if we're wondering, you know, why is it people would do this, I think it's that light of opportunity which has guided the decision.

Nick Brittain:

Or misguided it. Don't put that in.

Sam Gandhi:

We probably will. So, we've been speaking with Nick Brittain from Sidley's London office and Nicolas Lockhart from Sidley's Geneva office, as we await Brexit to occur on January 31, 2020. Thank you both for being on the podcast.

Nick Brittain:

You're welcome.

Nicolas Lockhart:

You're very welcome.

Sam Gandhi:

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