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Adjudicating Treaty Rights After Brexit

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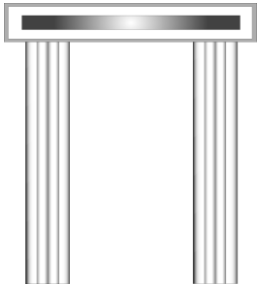

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I

What Role for the ECJ

This focus on the Transition arrangements after Brexit has served to concentrate minds on the real deal which comes into force on January 1st 2021. That, it has been emphasised must return full sovereign powers, not prolong the status quo. And it must apply to the sovereignty of UK Courts.

Yet, one of the most bizarre features of the wider media 'debate' accompanying the negotiations for the United Kingdom's exit from the European Union is the ready call in many quarters, and the acceptance of precisely such calls in many other quarters, for continued indirect or even direct jurisdiction of the European Court of Justice (ECJ) over aspects of the UK's exit arrangements. Astonishingly, such calls are not confined to the envisaged transition period but extend far into the future. Some commentators, and not only die-hard Remainers, want ECJ jurisdiction to continue more or less indefinitely.

As part of the provisional Phase I Brexit deal the UK Government has already accepted that the UK courts will continue to make requests for binding preliminary rulings by the ECJ in UK proceedings involving the determination of EU citizens' rights issued up to eight years after Britain's final departure from the EU.

It is important to emphasise just how extraordinary the demands for a continued role for the ECJ in post-Brexit Britain actually are. As from 20 March 2019 or, at the very latest, from the end of the transition period, the ECJ will convert from being a joint court in which the UK (and a British judge and Advocate-General nominated by the UK) play an equal part, into being a wholly foreign court established under the EU Treaties over which the UK will no longer have any degree of control. Nor will the UK have any say in the appointment of the judges of the court. It is extremely rare for any sovereign state to submit in an international treaty to adjudication of disputes by the courts of the other party to the treaty. The reasons are obvious. Such acceptance of a party to a treaty of the jurisdiction of the domestic court of the other treaty party is i. demeaning and degrading to its status as a sovereign state, and ii. carries with it the practical and very real risk that such a court will be biased and partial in its rulings.

II

Dispute Resolution: The Options

The resolution of disputes by binding international adjudication is of course both a common and often necessary feature of bilateral and multilateral treaties. Adjudication can be by bilateral tribunals or arbitral bodies set up under a specific treaty, or sometimes by permanent international courts or bodies, such as the International Court of Justice (ICJ) at The Hague, or the WTO Disputes Panels and Appellate Body. In all such cases, great care is taken to ensure that the body is balanced between the parties.

International adjudication by an impartial and balanced tribunal is the general and near universal international practice. It is also the general practice of the European Union in its treaties with non-Member states (so-called "third countries" one of which will be the UK from 20 March 2019). The EU has upwards of 50 trade or association agreements with third countries. Of these there are only two which come close to imposing ECJ jurisdiction on non-Member states, and only one creates direct ECJ jurisdiction over another country. The *EU-Turkey customs union agreement* requires Turkey to follow the case law of the ECJ in applying the common rules of the customs union. This requirement arises from the special nature of a customs union, which of necessity requires all customs authorities at its external borders to enforce and interpret the common rules in a rigidly uniform way.

The second EU external agreement which effectively imposes ECJ decisions on non-Member states is the *EEA Agreement*. This is done in order to ensure that the common rules of the EU internal market are interpreted consistently across the EU and across the EEA States. But even in this case, there is no direct jurisdiction of the ECJ over the non-Member states which belong to the EEA: instead, a special EFTA Court has been established consisting of judges from Norway, Iceland and Liechtenstein which interprets the rules of the internal market in their application to those countries.

Because the UK will leave both the EU single market and the customs union, neither the EU-Turkey customs union agreement nor the EEA Agreement can serve as a model for the future EU-UK trade relationship. The UK Government should therefore unequivocally reject any suggestion for continued ECJ jurisdiction further and beyond the accord reached in the phase I negotiations and in respect of Northern Ireland, irrespective of whether agreement is or is not reached. Not even tiny Andorra or San Marino accept the jurisdiction of the ECJ and instead follow a normal international dispute settlement procedure in their trade relations with the EU, under which disputes are decided by a panel of three arbitrators, one appointed by each side and the chairman being jointly appointed.

Not only is it largely unprecedented for a sovereign State to accept the jurisdiction of the domestic court of another state or international organisation of which it is not a member. There is also a very real prospect that the ECJ would not discharge that function impartially.

III

The ECJ: Neither Impartial nor Conventional?

The ECJ was established at the same time as the EU (then the European Economic Community) to settle disputes between the EU's institutions and its national Member states and to provide authoritative interpretative rulings of the EU Treaties and EU legislation. It has never discharged that function impartially or in accordance with the established practices of international law. From the early 1960s the ECJ developed a range of principles, such as those of the uniform application and effectiveness of EU law which it then expanded into the general principles of the supremacy and direct effect of EU law over national law. None of these judge-made principles had any basis in the EU Treaties; they are judicial creations which have been accepted and applied by national courts and governments because they suit the integrationist agenda of most EU politicians and senior judges. National courts and governments do not oppose the ECJ, because ECJ judicial activism allows integrationist governments to impose on their countries what most of their electorates would not accept voluntarily, 'ever closer European union.'

It is difficult to overstate the case why the ECJ is neither an impartial nor a conventional court. Central to the problem of judicial activism in the ECJ is the court's unique approach to treaty interpretation which is unlike that of any other international court. The general principles of treaty interpretation are laid down in the Vienna Convention on the Laws of Treaties (VCLT). Article 31 VCLT assigns a primary importance in treaty interpretation to the 'ordinary meaning' of words. It states that treaties shall be interpreted in 'good faith' and that their terms should mean what they say unless, according to Art. 32 VCLT, the meaning is genuinely 'ambiguous or obscure' or 'manifestly absurd'. The EU is not a party to the VCLT. However, Article 5 VCLT makes clear that the Convention applies to the EU Treaties just as it applies to all other treaties. Article 5 states: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization." In manifest breach of this provision the ECJ has never regarded itself as bound by the terms of the VCLT and it does not apply the methods of treaty interpretation contained in Articles 31 and 32 VCLT.

Unsurprisingly, in interpreting EU law the ECJ does not therefore accord the same primacy to the ordinary meaning of words as most other international courts including the ICJ or the WTO Appellate Body. Instead the ECJ adopts an ultra-flexible approach which allows the ECJ to choose between various non-hierarchical interpretative criteria -

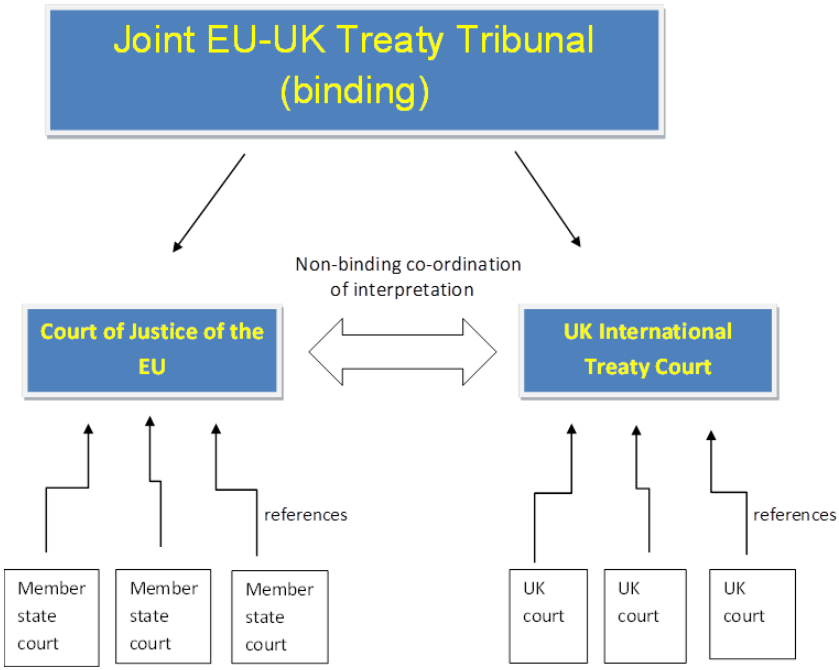
literal, contextual, purposive and meta-teleological - and to give the greatest interpretative weight to whichever criterion best promotes a pro-EU outcome to the case. For instance, this approach allows the ECJ to depart from the wording of the EU Treaties or legislation in favour of a teleological, i.e. purposive, interpretation even where the wording of the relevant provision is neither obscure nor ambiguous nor lead to an absurd outcome. Purposive interpretations generally give courts far greater interpretative room for manoeuvre than text-based interpretations. Specifically, the problem with purposive interpretations of law is that courts, and the ECJ more so than any other court, do not confine themselves to purposes written into the documents they are asked to interpret. Drawing inspiration from its own distinctively integrationist vision of 'ever closer union' between the EU Member states, to which the court also refers as the 'spirit', i.e. a kind of political holy ghost, the ECJ had detected in the EU Treaties, the court has used the purposive approach consistently to resolve legal disputes concerning the distribution of powers between the EU and its members in a pro-integrationist manner. In this manner, the court has over time and without textual support in the Treaties substantially extended the scope of EU law and established its own judicial oversight over many areas of national law. It has usually done so in the absence of Treaty authority and not infrequently in a departure from clear language in the Treaties or EU legislation.

The ECJ was set up to act as an arbiter between the EU and its Member states but it has never been a real arbiter who applies agreed rules impartially. Once the UK leaves the EU and no longer has either a judge or Advocate-General on the court, the ECJ will accord the UK even less respect than it has done so during the time of British EU membership. The ECJ, let there be no doubt, is particularly unsuited to the task of impartial adjudication on bilateral treaty obligations assumed by a non-Member state.

IV

A Symmetrical Adjudication System

International law provides many impartial alternatives to ECJ jurisdiction. One such alternative system of impartial adjudication has been proposed by me, Martin Howe QC, and Francis Hoar.



This proposal would create a symmetrical adjudication system between the EU and the UK, where each would have a central court - the ECJ within the EU and the International Treaty Tribunal (ITC) within the UK - reaching decisions in individual cases on the interpretation of the agreed provisions of any EU-UK separation and trade agreement. Under ordinary principles of international comity between courts of different countries which are interpreting common treaty provisions, it is to be expected that each court would pay respect to the decisions of the other and, although not bound to follow them, would seek to follow them wherever possible. This system would mean that the occasions when a persistent divergence would arise between the interpretation of the treaty rights by the ECJ and by the UK's ITC would be rare. To deal with such

divergences, a bilateral international arbitral body (the EU-UK Treaty Tribunal) would be available at bilateral level, which would sit ad hoc and lay down binding rulings which would be followed by both the ECJ and ITC. The proposed impartial adjudication would follow established international practice in that it is impartial and balanced in composition between the parties. It would respect both the ECJ's position as the highest court with the EU as well as the UK's post-Brexit status as an independent and sovereign subject of international law.

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