HOUSE OF COMMONS

Northern Ireland Affairs Committee

Oral evidence: Brexit and the Northern Ireland Protocol, HC 285

Wednesday 29 June 2022

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Watch the meeting

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

Questions 1085 - 1154

Witnesses

I: Professor Holger Hestermeyer, Professor of International and EU Law, King's College London; Professor Alan Boyle, Barrister, Essex Court Chambers, and Emeritus Professor of Public International Law, Edinburgh Law School, University of Edinburgh.

Examination of Witnesses

Witnesses: Professor Holger Hestermeyer and Professor Alan Boyle.

Q1085 **Chair:** Good morning colleagues, and good morning to our witnesses. Professor Alan Boyle is a barrister of Essex Court Chambers and emeritus professor of public international law at Edinburgh Law School. While I am ignorant as to what the collective noun of professors is, we are joined by another professor, Holger Hestermeyer, professor of international and EU law at King's College London. You are both very welcome and the Committee is grateful to you for joining us this morning for our inquiry into the Northern Ireland Protocol Bill.

Let us cut to the chase. I have little or no doubt that you will have followed the Second Reading debate on Monday. You have no doubt seen the legal opinion that the Government have published. You may very well have seen Speaker's Counsel's opinion, which was procured to this Committee and also cited on Monday—forgive me, that is not in the public domain, so you will not have seen it.

Does the Northern Ireland Protocol Bill breach the protocol, the withdrawal agreement and international law?

Professor Boyle: I have spent the past three days considering that question. I perhaps should say, because it is at least relevant, as it were, as a disclaimer, that I was briefed by the Government over six months ago to advise on the protocol, but that was when people were wanting to rip it up and tear it to shreds. The question was put to me, "Can we get out of this?", to which the blunt answer was no. "You have ratified a treaty that does not provide for unilateral withdrawal. It has no termination clause. The only thing that you could do, if the circumstances were right"—which they were not at the time—"is to derogate under article 16". That is the only advice that I have ever given the Government and, to their credit, they seem to have followed it, because they stopped wittering on about tearing things up.

I had never been asked to consider the consistency of the Bill with the protocol until you put the question to me, but I have spent the past few days considering it. The short answer is that, no, it does not violate international law. It does not violate the protocol. I have heard people who should know better saying that it does, but I am afraid that they are wrong. They are obviously not international lawyers.

The reason for that is quite simple; I can expand if you want me to. It is the derogation clause—article 16. I read the Bill as laying the groundwork for a notice of derogation that will have to be served on the EU from a limited number of articles. I think it is 5, 10 and another one—those dealing with trade, state aid and the ECJ. The Government are proposing to derogate from those articles, and article 16 allows them to do so, where they consider it necessary in one of three circumstances. The one that is relevant here is societal difficulties.

There could be a bit of argument about this, but the question might be what they mean by "societal difficulties". I was not party to the negotiations. Who knows—there might be what they call travaux préparatoires somewhere, in which they have set out their own view on what that means. I have not been shown anything along those lines, but I read it most obviously as the collapse of power sharing. If the collapse of power sharing in Northern Ireland is not a societal difficulty, I do not know what is.

I listened to the Foreign Secretary on Radio 4 the night before last, and I was aghast. She was defending this on the basis of the international law principle of necessity. I hope that somebody has a word with her and tells her not to say that, because necessity as in international law is a defence to a breach of international law. It is relevant only if you are already breaking international law, so the Foreign Secretary is virtually saying, "Yes, we are breaking international law, but it is all right, because it is necessary". That is utter nonsense.

Can you imagine counsel for the UK in the arbitration when they are faced with the other side saying, "The Foreign Secretary has admitted that there is a breach of international law"? She really is shooting herself in the foot. Unfortunately, my experience of international disputes—and I have long experience of that—is that most Governments and politicians shoot themselves in the foot at some point in the proceedings and you spend the rest of the case trying to pick up the pieces.

Chair: Of what—the foot?

Professor Boyle: You can choose which bit of the anatomy you want, but somebody needs to talk to her. The Prime Minister got it right at the G7 when he said that we are trying to save power sharing in Belfast. That is, I think, what they want to do. That seems to me to be a societal difficulty.

If you want to rely on the international law principle of necessity, it talks about essential interests. Again, if preserving power sharing is not an essential interest, what is? This is a personal opinion and you may disagree, but I have to say that, coming from Northern Ireland, I regard power sharing under the Belfast agreement as the single most important political development in the entire history of Northern Ireland. Without power sharing, there will not be peace or a long-term future, so it is vital. I absolutely think that that must be an essential interest and it must be a societal difficulty if you do not have it.

In the protocol itself, you can read the preamble. What is the purpose of the protocol? One of the purposes is to protect the Belfast agreement. What does the Belfast agreement do? It creates power sharing.

In my view, derogations that are carefully focused under article 16 for the purpose of restoring power sharing are lawful, legitimate and entirely consistent with the protocol.

Q1086 **Chair:** With regard to article 16, if you were advising the Government on this, which I appreciate you were not, you described a previous "wittering on" about shredding the protocol, that that had stopped, and that this was a legislative way of dealing with it.

Can I just ask two questions that flow from your opening answer? First, would you say that the legislative approach was, in essence, a shredding of the protocol, to use your phrase, albeit by legislative means? Secondly, you have referenced article 16. Were you to be advising the Government—and let us call article 16 the yellow card in layman's terms—would they have been better advised to have triggered article 16?

Professor Boyle: Absolutely, and the Bill is not shredding the protocol. The derogations are very limited. They deal with article 5, which is customs, article 10, which deals with state aid, and the jurisdiction of the ECJ. There is a very strange article in section 14 that tries, as far as we can see, to shred the arbitration provisions, and I cannot understand that for the life of me. Somebody needs to really think again about that, because, as I understand the thrust of the Government's position, they are happy with arbitration and not happy with the ECJ deciding disputes. That is right and sensible; it is consistent with normal international disputes. I do not understand—and I think it is section 14 of the Bill—why they are attacking arbitration, but we can come back to that.

Let me come back to your point. The Bill is not shredding the protocol. It is only those three points. Everything else is protected. All the provisions on cross-border co-operation remain in place. The Bill itself says expressly that it prohibits the Minister from introducing a hard border, so they are clearly protecting the agreement on no hard border. The protocol will remain in force. It will remain a binding treaty on the United Kingdom, frankly, for the foreseeable future.

Some of you may have read David Pannick's letter in *The Times* a few weeks ago. The irony of this whole thing is that, if the next Government wanted to go back into the single market and the customs union, all they would need to do is to agree a short amendment to the protocol, which applies the protocol to the whole of the UK. That would put us back in the single market and the customs union overnight, without reference to Parliament.

Ian Paisley: You are giving them ideas.

Professor Boyle: The Government are clearly not trying to terminate this treaty.

Q1087 **Chair:** I will bring in Mr Paisley, but we should hear some opening remarks from Professor Hestermeyer on precisely the questions that we opened with. In order to save time, if you agree entirely with Professor Boyle, say that you agree entirely with Professor Boyle and we can move on to Mr Paisley. If you want to add something new, please feel free.

Professor Hestermeyer: There is an old saying—if you invite two lawyers, you get three opinions. I suppose that I cannot agree entirely with my colleague. It would be a dereliction of duty.

Chair: And usually four bills.

Professor Hestermeyer: Unfortunately, you will not get a bill at all. I do this for free. First of all, we have to distinguish and take a step back. I entirely agree with Professor Boyle that article 16 would have been the better approach,[1] because it is in the protocol. It is the provision that is there to deal with these issues.

I am pretty sure that we are going step by step through the necessity analysis; I am willing to do that. I also feel that, rather than refer to quotations of the International Court of Justice[2] so that you can form your own opinion on whether that is a good defence, it already starts with the question of whether that defence is even available for this particular issue, if article 16 has been made for that purpose. Of course, article 18 is also there, precisely for getting out of those provisions, so you have to wonder whether the parties did not intend to contract out of the necessity defence. On that point, we entirely agree.

I do not feel comfortable with the word "shredding" the agreement, because it is not really a legal term. Shredding is in the eye of the beholder. Given the history of the negotiations, the difficulty was in finding an approach to how to deal with border control issues. That is also the main distinction between the model that Prime Minister May negotiated and the current version that we have. On that, the model is entirely abolished and changed. If you want to call that shredding, it is shredding, it utterly changes the model.

Chair: "Shredding" was not my phrase; it was Professor Boyle's.

Professor Hestermeyer: I am sorry about that. Then I disagree with your word "shredding".

Professor Boyle: I did not use it.

Professor Hestermeyer: I would say that it is an essential change that is highly problematic in that regard.

There is one thing on article 16, although we will also speak about it in detail, I suppose. For article 16, there is a procedure. If the Government decide to go down the necessity route, without using the procedure of article 16, they will be in breach even by doing things that would otherwise be permitted under article 16.

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[1] Follow-up from Prof. Hestermeyer 19/07/22: *For clarity's sake: this does not mean that I argue that the Bill would be justified under article 16 [see Q1148]*

[2] Follow-up from Prof. Hestermeyer 19/07/22: *I should have said: "I also feel that I would rather refer you to quotations of the International Court of Justice" in the sense that I would rather refer to quotations than just state my own opinion*

Q1088 **Chair:** That is an interesting point. Can I just ask you to clarify this for the benefit, if of nobody else on the Committee, then of me? My reading of the rules to prove necessity—and I take Professor Boyle's point entirely that the Foreign Secretary has not been sensible in advancing that as a defence, for want of a better phrase—is that, from recollection, article 25 says that the Government or the party need to demonstrate that all agreed avenues have been explored before. I am slightly paraphrasing.

Professor Hestermeyer: The wording is "the only way".

Q1089 **Chair:** Because article 16 exists—and I am, in layman's terms, going to call that the yellow card—there is also the opportunity for third-party arbitration, if both parties are unable to come to it. Professor Boyle nods at that, so that is helpful. Because the Government have leaped to third base rather than going through bases one or two first, is that helpful to the Government? Professor Boyle is now shaking his head. Have they just run before they could walk, if it were?

Professor Boyle: If you look at this, as I have to, through the eyes of a litigator, it is like being a general. You have to pick the right battleground. Choose the wrong battleground and you are probably sunk. The battleground here is article 16. Article 16 uses the word "necessary". The International Law Commission's views on what "necessary" means would be helpful in interpreting what it means in article 16. Article 16 is the battleground—derogation under the treaty, as permitted by the treaty.

There are other examples. If you take the European convention on human rights, there is a derogation provision there. My friend from Dublin reminded me, as we were chatting outside, that the very first case in the European Court of Human Rights involved a member of the IRA, who was, remarkably, called Mr Lawless, and Ireland had derogated from the convention during that IRA campaign, as we did in the 1960s during the IRA campaign in Northern Ireland.

Derogation in times of emergency is the normal thing for human rights when it is necessary. There is nothing unusual about the idea. Somebody must have thought, "Just in case, let's allow for some safety valve here". That is, essentially, what article 16 does.

Is it necessary? That is an interesting one. It is reasonable. There is human rights case law. I looked for the most recent derogation case, which involved Turkey. The Strasbourg court talks about giving the Government leeway to make their own judgment about what is necessary, so arbitrators would give the Government plenty of leeway to say what is necessary, but there would have to be some evidence.

It is the DUP that will not go into power sharing, as I understand it. Let us put it this way: if I were appearing for the Government, I would like to be able to stand up and say that the DUP had agreed to go back into Government when this Bill was passed.

Q1090 **Chair:** Sir Jeffrey Donaldson confirmed before the House on Monday that he would—I might look to Mr Campbell and Mr Paisley to correct me if my interpretation is wrong—instruct his Ministers to return to Stormont, were the Bill to pass the Commons unamended and then go into the House of Lords.

Bob Stewart: He did say that.

Mr Gregory Campbell: Paraphrasing it, yes.

Bob Stewart: At the same time, he asked if you would vote for the Bill if they did that. Do you remember?

Chair: I do indeed, which I took to be a rhetorical question, Mr Stewart. It was not a question to the Chair of the Committee, so I prayed that in aid.

Professor Boyle: You can see the point. It is going to be jolly difficult to defend the derogations if power sharing is not going to resume at the end of the whole thing. That is important.

Q1091 **Chair:** Professor Hestermeyer, do you want to give us a thought on the staging—i.e. article 16—and, indeed, on the wider point about third-party arbitration, were that to be required?

Professor Hestermeyer: What would you like me to talk about now—the necessity defence? There, I tend to disagree on the basis of Gabčíkovo-Nagymaros.

Q1092 **Chair:** As I say, my reading of the rubric of article 25 is that, in order to pray in aid necessity, the person who is praying in aid necessity needs to demonstrate beyond reasonable doubt, as it were, that they have exhausted any other avenues that have been set out in the document. There is article 16 and there is also recourse to third-party arbitration, should both parties—the UK Government and the EU—reach some sort of deadlock.

Professor Boyle: If I may also say—I think this makes your point—article 16 itself requires the parties to consult if one of them is proposing to derogate. It is also worth noting that the EU derogated under article 16 during the covid problem. I do not know whether there was consultation; you would have to ask somebody in the Government about that, but there is a consultation process before you get to arbitration.

Q1093 **Chair:** Yes. You have to give, effectively, pre-action notice. Professor Hestermeyer, could you just give us your thoughts?

Professor Hestermeyer: I would say that you have problems under several of the prongs of necessity. You start off with safeguarding and essential interest. We all agree that this is the least problematic prong and that case law tends to be very permissive as to what is an essential interest. However, it needs to be in "grave and imminent peril"; that is the wording of the ILC. The International Court of Justice defines "imminent" by saying that the "extremely grave and imminent" peril must

"have been a threat to the interest at the actual time", so there is some case law to that effect. The Act that is challenged must be the only way to safeguard the interest. That is, by the way, where a lot of the case law fails, so necessity has rarely been successfully invoked in international law. For Gabčíkovo-Nagymaros, that was when Hungary was trying to get out of an agreement to build a dam. There were other means, such as having a different water solution, but there were also negotiations under way. The advisory opinion on the wall, where necessity was invoked by Israel, failed because the ICJ was not convinced that it was the only means. There was also the Saiga case before the International Tribunal for the Law of the Sea, which failed on that particular prong.

Here, you would argue that negotiations, but also article 16, are available avenues, which you would have to discuss. By the way, on grave and imminent peril, that is a very factual test and I am not going to pretend to go here into whether there is grave and imminent peril and to what. It also depends on what the Government will argue. They do much better on peace in Ireland than on trade diversion—again, a difference in article 16, where trade diversion is mentioned. For necessity, trade diversion is highly problematic as an essential interest.

Q1094 **Chair:** When you say it is highly problematic, is it highly problematic to argue that it is grave?

Professor Hestermeyer: Is it even an "essential interest"?[3] You have to distinguish between two things. If there is a shortage of goods—not just missing your favourite sausage, but a shortage of goods—that is an essential interest that you can argue. If it is just that the goods arrive but are transhipped via Dublin, I do not think that you can argue an essential interest in that case. That will be a very factual inquiry.

Necessity is also excluded if the state has contributed to necessity. Unlike article 16, there might be a problem here for power sharing, because you could say that action of Northern Irish officials is action by and attributable to the UK and, accordingly, it is contributing to the problem. You also have other acts of contribution in the Gabčíkovo-Nagymaros case, where it was held that Hungary was well aware of the environmental problems with the dam when it entered into the agreement. Here, you have the impact assessment before the protocol was signed, so, again, that is problematic. It is then excluded if you have other provisions or if the parties wanted to deal with it through other provisions. Here I would say that articles 16 and 18 would cause problems—article 18, arguably, by saying that, for anything addressing democratic consent, the parties intended to go through article 18, whereas the other disturbances were addressed through article 16. I would entirely agree that going through article 16 seems the far better approach strategically than going through necessity.[4]

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[3] Follow-up from Prof. Hestermeyer 19/07/22: *Essential interest is a requirement of the necessity defence*

[4] Follow-up from Prof. Hestermeyer 19/07/22: *For clarity's sake: this does not mean that*

Q1095 **Chair:** Article 16 is an immediate lever to pull. A Bill is a lengthy-ish process. The House of Lords cannot be guillotined. There cannot be a programme motion. By going down the legislative road rather than the article 16 road, does that in any way bolster or undermine the "grave and imminent peril" argument?

Professor Hestermeyer: For necessity, you need the grave and imminent danger. Article 16 has slightly different requirements, and I do not see how you would do this without passing regulation, because of what the Government want to do. In fact, you could argue that all of the safeguarding of the EU border, for example, does not really seem to be very much in the Bill, yet there are a lot of ministerial powers. In fact, I have rarely seen so many ministerial powers in any Bill, and those will address the details of the dual regulatory regime. Given that we do not have them yet, it is too early to evaluate them, but it is difficult to see how to deal with these particular issues without laws and regulations.

Professor Boyle: I entirely agree.

Q1096 **Chair:** Professor Hestermeyer, my colleague Sir Robert Buckland, the former Lord Chancellor, has asked for, on the Floor of the House, the evidential statement that is the foundation for this. That call has been echoed by Bob Neill as Chair of the Justice Select Committee. Would you have expected, in order to help advance their case, the Government to have published a compendium of the evidence that they have collected, which acted as a trigger for this proposed action? Would you expect to see that at a later time, or might you not expect to see it at all? Is it an illegitimate expectation?

Professor Hestermeyer: It would definitely be relevant for all cases that will ultimately result. If you have a dispute about necessity, all of these issues are very factual and you will need a lot of evidence for that. As the House expects the Government to comply with international law, the House expects to form its own opinion on whether the defence invoked by the Government is applicable. In order to evaluate that, some evidence would have been helpful. I agree that that would have been helpful, although I do understand that it is not usual to publish the full legal advice.

Q1097 **Chair:** No, I do not want to set that hare running. There is a perfectly acceptable convention that Her Majesty's Government do not publish the advice. That is client-attorney confidentiality between the Attorney General and the Cabinet, which is, effectively, their client in the very peculiar way that our Law Officers are asked to operate. I was asking purely about the evidential file, which would have been seen, I would have guessed, by anyone who was asked to provide an opinion to the Government or which the Government used as the trigger to ask for the opinion. Would you think that it would, in any way, weaken the Government's case, for example in front of the ICJ, were that evidential

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I argue that the Bill would be justified under article 16 [see Q1148]

file to be in the public domain today?

Professor Boyle: If we were going into battle on the basis of interference with trade, you would be absolutely right. You would need evidence. You would need to get the chairs of Marks & Spencer, the road haulage federation and so on to give statements, but we are not going into battle on that ground. It is on the collapse of power sharing. I do not think that you need evidence of that. It is something that any court can take judicial notice of. It is there on the record; it is obvious.

It was problematic, and I think I can say this. Six or nine months ago, when I was involved, there was a question about whether article 16 could be invoked there, and that would have been difficult because power sharing had not collapsed. There was merely the risk that it would. How do you prove that? That was one of the problems then, so there was an evidential problem. I do not think that there is any evidential problem with proving that power sharing has collapsed and that there is the hope that this will put it back on the rails again, but that is the only point on which the Government are proposing to go into battle.

I agree with most of what Professor Hestermeyer just said. There would be difficulties in relying on the International Law Commission's definition of necessity. I agree with all of that, which is why I would not do that, why I do not think that we should go there and why the Foreign Secretary should not do that, but let me read out something that is relevant. I just copied out a small section of the judgment from Aksoy *v.* Turkey, the most recent derogation decision of the European Court. I think this is the approach that arbitrators would take in this case. The court held that "Contracting states have a wide margin of appreciation…as regards the decision to call a state of emergency…and as regards the choice of the measures needed to face it".

That addresses the question of whether it is necessary. That is how the court answers it. Arbitrators, faced with that kind of argument, would probably say that it is for the Government to decide what is necessary here, as long as it is not obviously outrageous or in bad faith. Power sharing has collapsed. We want to put it back on the road. That seems a pretty obvious point.

Professor Hestermeyer: This is what lawyers thrive on, because I disagree entirely. I disagree as to the precedential value.

Chair: Could you direct your comments through me rather than directly to Professor Boyle?

Professor Hestermeyer: Yes, I am very sorry. I would refer back to the International Court of Justice in Gabčíkovo-Nagymaros and the ILC, which referred to necessity as being an extraordinary defence, to there being a high burden, and to it not being in the judgment of the state alone. While there are emergency clauses in other agreements that are self-judging, both the International Court of Justice and the ILC have made it very

clear that this is not a self-judging clause, so I would be careful in using precedent from other courts and tribunals here.

As to the essential interests invoked by the Government, I agree that power sharing is an interest that does not need a whole body of evidential support. However, the Foreign Secretary has invoked a number of essential interests, including the preservation of social and economic ties, so some of these would require more evidential support. On power sharing, you have the statements and they are rather clear.

Q1098 **Ian Paisley:** Thank you for your evidence, gentlemen. Professor Boyle, just to be sure, the current Northern Ireland Protocol Bill is not a breach of international law if enacted. However, the client—the Government or certain members of the Government—may have been careless in how they presented their arguments. Is that, essentially, what you are telling us?

Professor Boyle: They need to get their act together and sing from the same hymn sheet. This is a common problem with Governments. Getting politicians to sing the same song, even when confronted with litigation, can be a challenge. Sometimes one has to read the riot act to them. It occasionally works.

Q1099 **Ian Paisley:** But the essence is that, in your opinion, while some have been arguing that there is a breach of international law, whatever that broad concept means, this is not a breach of international law.

Professor Boyle: No. The most obvious defence in arbitration is that this is lawful under article 16, there is no violation of the protocol, and it is all perfectly legitimate. That is, frankly, all that needs to be said, in my view. As you can see, there is room for argument about what "necessary" means.

Q1100 **Ian Paisley:** I am going to stay away from the "necessary" bit, because there is a dispute about what is meant by "wide margin" versus "extraordinary". That is an argument that I will let you lawyers enjoy the luxury of bathing in for a moment; I am not going to ask questions on that. Professor Hestermeyer, if the lever was pulled for article 16 to be triggered, you are arguing that it would still require regulation/legislation anyway, which the Bill provides a mechanism for.

Professor Hestermeyer: Yes, but I would say that, first of all, I am not entirely sure I disagree[5] with the wide latitude that article 16 gives. I regard it as more problematic. If the procedure is not followed, there is not even a debate.

Ian Paisley: I do not think that anything is going to be straightforward in this, so there probably will be problems along the way.

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[5] Follow-up from Prof. Hestermeyer 19/07/22: *I should have said "I am not entirely sure I agree"*

Professor Hestermeyer: Yes. Just to test that, you would agree that clause 14 and the opting out wholesale of the provisions on arbitration—

Professor Boyle: Somebody needs to think about what that is doing there. That is crazy. In my view, that needs to come out. Somebody has made a mistake. Alternatively, they need to give a plausible explanation of what they are trying to achieve, because it is just self-defeating.

There was something else. The articles that the Government are proposing to derogate from—there are only three of them—are the ones that, in two years' time, the Northern Ireland Assembly will have to vote on as to whether to extend them. As I read the protocol, that gives both the DUP and Sinn Féin a veto over the extension of those articles and, indeed, over their replacement with anything else.

Although one could say that the UK and the EU should negotiate, you would have to negotiate with that thought at the back of your mind. You are going to need to come up with something that will satisfy the DUP and Sinn Féin; otherwise you are wasting your time. In effect, you are really going to need a four-way negotiation: the UK, the EU, Sinn Féin and the DUP. Otherwise, whatever replaces articles 5 to 10 in two years' time goes nowhere.

Q1101 **Bob Stewart:** I think I got this in your last answer and previously, but, in your legal opinion, fundamentally, they should have gone through article 16 rather than article 25. That is the clear thing, and yet they are doing it.

Professor Boyle: It may be belt-and-braces lawyering. You are not absolutely sure—

Q1102 **Bob Stewart:** I just wanted to be absolutely clear. Professor Hestermeyer, you said it might be more difficult going through article 16. That was the last thing that you said. I was quite happy until then.

Professor Hestermeyer: The first thing is that you have to go through the procedure. The annexe provides for a procedure that you have to go through. One of the difficulties with article 16 might be that, while the EU said at one point that it would derogate, it never did, so there is no precedent and no real interpretation that has ever been done of article 16.

We know that it is not supposed to provide for permanent measures; they are safeguard measures, but that is true for necessity itself. By the way, something that never enters the debate is that necessity works only for the duration of necessity, so none of these are supposed to provide for permanent measures. Much like necessity, you can discuss the scope of the safeguard provisions. In that respect, I would say that there is not a large difference.[6] For both, you have to show that this is what will help

[6] Follow-up from Prof. Hestermeyer 19/07/22: *According to its wording Art. 16 allows only measures "restricted with regard to their scope and duration to what is strictly*

and what will provide a more stable future. Quite frankly, at the moment, given the situation, I am at a loss, but who is not?

Q1103 **Bob Stewart:** So you two—"Profs Incorporated"—would say to the Government, "You should have gone through article 16. In our legal opinion, you have gone the wrong way, down article 15". That is what I wanted to get at.

Professor Hestermeyer: Article 25 of the ILC articles is the correct number.

Professor Boyle: Article 25 might be a useful reinforcement. If, when we get into battle, we find that article 16 is proving difficult, let us call in the cavalry. Article 25 is that, if I can use military terminology.

Bob Stewart: I like that terminology.

Professor Boyle: That is what lawyers do. You run into difficulties and you find other ways of reinforcing your argument. Article 25 is a way of doing that. That may be what the Government's lawyers were thinking and I can see that. Listening to Professor Hestermeyer, you can see why they might be slightly doubtful.

Bob Stewart: Could it be amended in Committee? They could maybe change the approach during the Committee stage. It is possible.

Q1104 **Fay Jones:** I wanted to ask about the principle of necessity, but we have covered that in some detail already, which is great. If I have understood correctly, you say that necessity is the wrong basis for this piece of legislation that the Government are proposing, so what I am about to ask is possibly slightly tautological. Could the UK be judged to have contributed to the situation of necessity?

Professor Boyle: As a lawyer, it is difficult to say "never". It could, but these are two political parties in Northern Ireland. I do not think that you could easily persuade arbitrators that they are the United Kingdom. They are just two political parties. These people live in the real world and will understand the problem that you have to get politicians co-operating here. It is a possibility, but I think they would say that it is the politicians in Northern Ireland who have been the problem and caused the difficulty, and the UK is trying to do its best to get out of it.

It also worth emphasising, because this is relevant, that the protocol commits both parties—the UK and the EU—to protecting the Belfast agreement, which I read as protecting power sharing, so we both have a shared responsibility for that. There is a question over how far the EU has taken that point seriously. The UK is taking it seriously. Whether it will work is maybe open to question, but I read the Bill as a serious attempt to put power sharing back on the road and I do not read it as a violation of international law.

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necessary in order to remedy the situation.".

I see all of Professor Hestermeyer's perfectly sensible caveats, and no doubt the EU will throw them at us, but I am enough of a barrister to think, "How are we going to deal with this, ladies and gentlemen? Let's go into battle. Here is our answer to that one". That is the way litigation goes. You get round the table and come up with bright ideas, and there is usually an answer to these things. The Government's position is defensible, provided it is based fairly and squarely on article 16. The word "necessity" is in article 16 so, whether we rely on article 16 or article 25, we will have to show some form of necessity. The question is how you interpret it.

I have had some discussions recently about some of our colleagues who we think have been too timid. I had one case where one of my colleagues told the client, "You are going to lose". The rest of us did not think that. We had written the pleadings and thought we would win. The client sacked us, so they went into battle in The Hague on the basis of the written pleadings and, lo and behold, we won. Timidity is not a virtue in litigation.

The first man I ever litigated for was an American litigator at the ICJ. Believe it or not, the first case I ever opened my mouth in was at the ICJ, so I needed a wee bit of guidance. He said, "Look, Alan. There is the usual thing. If we are weak on the facts, emphasise the law. If we are weak on the law, emphasise the facts". In some ways, the facts speak for themselves here. You read the Belfast agreement and you look at Northern Ireland power sharing, and it is a pretty powerful position from which to defend yourself on the law.

Professor Hestermeyer: If we are in the necessity defence—article 25 of the ILC articles—you have to show that the state did not contribute. It must be a substantial contribution. Here, there would be two lines of argument. One would be that it was pretty obvious that these risks existed when the protocol was signed. That would be argued on the basis of Gabčíkovo-Nagymaros, where the ICJ said, "You went into this agreement with an assessment of the risks". To what extent that was clear is an evidential question, but it was clear that there was a lot of dispute. The attribution question is also another risk, but, in reality, I would agree with going through the article 16 route.[7] This article 25 requirement is a requirement of the customary international law defence of necessity; it is not contained in the wording in article 16.

Professor Boyle: If you were the EU and I were the United Kingdom, I am afraid that I would stand up and dispute that argument, with all due respect.

Chair: "With all due respect" is one of those damning phrases in legalese, is it not?

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[7] Follow-up from Prof. Hestermeyer 19/07/22: *For clarity's sake: this does not mean that I argue that the Bill would be justified under article 16 [see Q1148]*

Q1105 **Fay Jones:** Professor Boyle, you mentioned that you do not read it as a breach, but is there any possibility that, when the Bill or subsequent regulations become law, any breach could appear?

Professor Boyle: You can never say "never—there is no possibility". I do not know what the EU's response would be, but it is in difficulty. As I understand it, it has already started legal proceedings. It cannot take countermeasures. Once you have started legal procedures, countermeasures are out, so it cannot impose trade sanctions. It certainly cannot have a trade war. We could not have a trade war anyway. People suggesting that, I am afraid, do not know what they are talking about.

I was looking at this and thinking about what the EU could do. It could suspend the provision that talks about no customs tariffs on either side. It could suspend that and impose customs tariffs, but, as I say, it has already started litigation and, in the International Law Commission's view, you cannot adopt countermeasures of that kind if you are already in litigation, because it is for the court or arbitrators to decide whether you are acting lawfully. The arbitrators might then say, "Yes, the UK is violating the protocol and we authorise countermeasures", but it would be for the arbitrators to do that.

I cannot say that this is a slam dunk, to use an American phrase. You cannot possibly to say to anybody, "We are bound to win". It will not be easy, and the Foreign Secretary is making it harder, but it will be harder if we try to go into battle on article 25. It will be easier if we do it on article 16, and we have a good chance of winning on that basis. That is all that you can say as a lawyer.

Professor Hestermeyer: Can I speak to the possible consequences in dispute settlement? Right now, in the withdrawal agreement, there are two routes for dispute settlement—the Court of Justice of the European Union and arbitration. The International Court of Justice is not an option. It cannot be an option, because the European Union is an international organisation and, under the statute of the ICJ, you need to be a state, so that will not happen.

If I have kept count, the European Union has now started three infringement proceedings before the Court of Justice, although none of them are at the stage of the Court of Justice. They start with a formal letter and go into a reasoned opinion, and then they go to the Court of Justice. In one of the proceedings, we are now at the reasoned opinion stage and, in two of them, at the formal notice stage. The formal notice gives the UK two months to reply, and reasoned opinion usually another two months. If there is no compliance, there is a reference to the Court of Justice. If the court finds a breach, action will have to be taken. If it is not taken, there can be another case before the Court of Justice, which ends up in a lump sum payment or penalty payment ordered by the court, if breach is found.

The withdrawal agreement arbitration route looks a lot more like what you find in normal trade agreements. There is arbitration before arbitrators. There is a procedure for appointing those arbitrators. Usually, those procedures end in countermeasures, but this one, unusually, ends with the possibility of a lump sum payment or a penalty payment, and there is the possibility for cross-retaliation, which means that you can retaliate in another agreement—in this case, in the TCA. Both the withdrawal agreement and the TCA provide for cross-retaliation. That is the other option.

There is a more creative option if the Government go with the necessity defence, but it will not be creative at all if the Government go with article 16. Article 16 provides for rebalancing. Nobody quite knows what rebalancing really means, particularly if you speak about societal difficulties. A lot of this comes from trade law, which often has this very obvious logic, "You hurt £4 million of our trade, so we will hurt £4 million of your trade". That logic is really difficult to apply to the Northern Ireland protocol and to things like—the Court of Justice won't want jurisdiction, which actually kills the model and all of the EU law solutions, because EU law requires the Court of Justice to be there. By the way, that is another option for amending the Bill.[8] If EU law really is applicable, which even the Government provide for, the Court of Justice needs to be there through preliminary references. Nobody quite knows what rebalancing that is supposed to mean. Do you rebalance that through trade sanctions? That is an open question.

There is then a final option, which is that the TCA is riddled with termination clauses. None of these termination clauses needs cause. All of them come with a timeframe, so they can be invoked by either party without a reason, and will terminate parts of or the entire TCA.

Q1106 **Chair:** Could those termination clauses be implemented even if there were legal proceedings either applied for or underway?

Professor Hestermeyer: I do not see a reason why that would exclude using termination clauses. They usually come with a timeframe, but you can terminate at will. As this is under the TCA, it would not stop proceedings under the withdrawal agreement, because, to that extent, the agreements are separate.

I do not know how likely that is. The European Union has at one point said, "We regard the current model as vital for preservation of the Good Friday agreement", which is also why I find a lot of these arguments really difficult. Which solution really protects the Good Friday agreement is in the eye of the beholder, apparently. It said, "For us, our trade relationship is dependent on this". I do not know to what extent that is grandstanding and to what extent it is an announcement. It is difficult to tell.

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[8] Follow-up from Prof. Hestermeyer 19/07/22: *I should have said "issue where the Bill requires amendment"*

Q1107 **Chair:** I cannot quite remember who asked this question to the Foreign Secretary on Monday, but you told us that the ICJ would not hear this, because the European Union is not a state. It is an organisation with a political dimension but is not recognised as a state. Who does hear it?

Professor Boyle: Arbitrators.

Q1108 **Chair:** Yes. Which? Would one default to the World Trade Organization?

Professor Boyle: No, the parties would have to agree arbitrators. The normal way to do this is to go to the Permanent Court of Arbitration, which is also in The Hague. It has a permanent secretariat to deal with this sort of thing.

My first ever case that involved the EU was the first time it was sued under the law of the sea convention. Professor Hestermeyer is absolutely right that you cannot take the EU to the ICJ, but you can take it to arbitration in the International Tribunal for the Law of the Sea. It was arbitration under the law of the sea convention and I was called in to advise the EU. I said, "Yes, you have been sued, so you have to appoint arbitrators". Sadly, it was supposed to have provided a list of nominated arbitrators, which it had not done, so it had to scrabble around to find somebody that it could nominate. Eventually, we found a retired British judge from the tribunal, who was appointed the EU's arbitrator. No, the parties have to agree.

Q1109 **Chair:** So these are experienced individuals, appointed by agreement, whose decision is final, or is there a route to appeal?

Professor Boyle: No, it will be final and binding. That is what an arbitration always is.

Q1110 **Claire Hanna:** Professor Hestermeyer, you mentioned Israel's use of the necessity grounds. Are there other examples that you can identify for us that were successful or unsuccessful?

Professor Hestermeyer: There are quite a few. The defence goes back in history quite some time. The Caroline incident, when Britain shot down a ship in the US, is adduced by the ILC even now as an example. Most pertinent will be the examples that you have seen in arbitration or in courts. Before the International Court of Justice, the longest[9] precedent, because it really discussed it in detail, is Gabčíkovo-Nagymaros, which I have already quoted at length. The wall opinion does make a reference, but it is rather brief. The International Tribunal for the Law of the Sea dealt with the defence in M/V Saiga. The Rainbow Warrior arbitration also referred rather briefly to necessity.

There are then a number of investment arbitration cases. There was the Argentinian financial crisis in 2000-01, and Argentina always invoked both the necessity defence and an emergency clause in the bilateral investment treaty with the US. In all of those cases, necessity was

[9] Follow-up from Prof. Hestermeyer, 19/07/22: *I should have said "most important."*

discussed. Investment arbitration is, of course, structurally slightly different, but, because they always refer to the ILC articles, it is helpful to look at that. Von Pezold *v.* Zimbabwe is the most recent one that I can think of.

Professor Boyle: Holger, with all due respect again, this argument misses the point. Gabčíkovo was about building two dams on the Danube under a Soviet-era treaty that Slovakia wanted to terminate, because it did not want to build the dam. It had a treaty and was trying to use environmental necessity to terminate it. It could not make it out on the facts, but courts do not like terminating treaties. There are virtually no examples of courts holding that a treaty has been terminated in international law. They do not like doing it and they did not do it in Gabčíkovo. The parties are still negotiating. The case is still on the list of the ICJ.

This is totally different from that. Here, we have a treaty that provides for derogation. The Slovak-Hungarian treaty did not provide for derogation, and neither do your other examples, so the context is totally different. The law as set out in Gabčíkovo is irrelevant to this case.

Professor Hestermeyer: Some of the others do also provide for derogation. That is particularly true of the Argentina cases in arbitration. I would also say that this is about the interpretation of a certain provision and a certain principle. If you refer to a customary international law principle, referring to the cases that have used it is the most helpful aid. I find it, to be honest, far more helpful than referring to emergency clauses in other treaties that are entirely different.

Yes, the situation is very different, but Gabčíkovo also says that there is a broad choice of possible essential objectives that you can reach. I would argue that all of these are really helpful, but, of course, you have to take into account in the interpretation that the facts in this case are quite different. I agree that, in court, you have to see the differences, but you go to the application of this principle in precedent, and that would be more pertinent than the application of other clauses that refer to emergency or necessity.

Professor Boyle: But we are not applying this principle. We are just interpreting article 16, which is not quite the same thing.

Professor Hestermeyer: On the question related to the necessity defence, I entirely agree with you. To what extent this is enlightening on article 16 is entirely a different issue. Article 16 is quite different. In that respect, I agree, but the question, as I understood it, was on the necessity defence under customary international law.

Q1111 **Chair:** Could we just look at the test of reasonableness?

Professor Boyle: We have just illustrated why the Foreign Secretary should shift her ground and talk about article 16, not necessity.

Q1112 **Chair:** Forget the narrative, but, by the action, is it a reasonable action against that test, as there are other avenues or levers capable of further exploration?

Professor Boyle: What would those be?

Q1113 **Chair:** Negotiation, arbitration on proposals, whether it was the Command Paper or some other one.

Professor Boyle: Will negotiation bring back power sharing? The EU would have to agree, in effect, to what the Government—

Q1114 **Chair:** To quote your words, Professor Boyle, never say "never". As an act to publish a Bill, in your professional judgments, does that meet the test of reasonableness?

Professor Boyle: Yes, because, if you are going to derogate, you have to tell the other side what the derogations are and how you are going to deal with complying with what is left of the protocol. That would be true in human rights cases. You send Strasbourg the text of the law. There is going to be a derogation, an emergency provisions Bill or whatever, so this clearly has to be the preliminary to derogating.

Q1115 **Chair:** Forgive my ignorance on this as a legal process or legal nicety, but does the unilateral publication of a Bill, without briefing your counter-signatory to a treaty about what you are seeking to derogate from, meet the test of reasonableness? Allied to that, I think it was Professor Hestermeyer who referenced the very heavy use of what we would call Henry VIII powers. Is that reliance on, effectively, blank regulation reasonable?

Professor Boyle: There are two totally different questions there, if I may say so.

Chair: Yes, I am aware of that.

Professor Boyle: You were being far too modest earlier. You have been a good client; you have asked exactly the right questions.

Chair: Well, thank you.

Professor Boyle: If you are going to derogate under article 16, you have to start by setting out what the derogations and the law are going to look like at the end of the day. That is entirely reasonable. We have to do that. That is what the EU would ask for, and it would be right. It would be reasonable to do so.

You invited me here to talk about international law, but I have to say, as a former public lawyer at London University, I did look at all the other stuff in the Henry VIII clauses rather askance. Lord Hewart would probably be foaming at the mouth at this moment with all these Henry VIII clauses and the idea that you can amend primary legislation by regulation without going through Parliament. Draft Bills are not my normal bedtime reading, so I do not know whether this is unusual, but I

have never heard of anything like this, certainly in my career as a lawyer. I would have thought that it is something that the Committee should investigate rather carefully.

Q1116 **Chair:** For the record, Professor Boyle, could you quantify the number of years you have been a lawyer? You said that it was in your experience as a lawyer.

Professor Boyle: I started doing law at Oxford in 1972 and I can remember the tutorials on Henry VIII clauses. This is vaguely relevant. I ended my career in Oxford as a part-time lecturer. My first student was a young man called Ian Burnett. I can remember that one of the tutorials would have been about delegated legislation and Henry VIII clauses. Ian Burnett is now the Lord Chief Justice. I went to a lecture at my college the other week that he gave and he was talking about the rule of law. I think that, if you asked him about this, he would be worried about all of this undemocratic excessive regulatory authority for Government.

I do not want to come here to lecture anybody, and I am sure that they are already on the ball, but, if I were a Northern Irish MP, I would be wondering what impact this has on devolution to Northern Ireland. There is very extensive power given here to the Minister, whichever Minister that might be, and I wonder whether it is all necessary.

This has nothing to do with international law and nobody in Brussels will be worried about all these regulatory powers, but we in the United Kingdom should be. We should scrutinise this power grab rather carefully. Is it necessary? Is the power being given to the right body? Is it somebody in Westminster or somebody in Stormont who should exercise it?

Q1117 **Chair:** Professor Boyle, you have been careful with your language, I know. Do you see it as a power grab?

Professor Boyle: You are all politicians. You can tell me, but it looks like that. One would have to think through the precise implications and I do not know. Who would they be grabbing power from? The only alternative is that maybe the Northern Ireland institutions are losing power.

Somebody has to regulate these matters. That is clear. Previously, it was done by the EU, so now it is being done by Government. Implementing EU law is normally a matter also for the devolved Administrations. If you were dealing with Scotland, I have the feeling that Nicola Sturgeon would probably be jumping up and down and saying, "No, this should be devolved to Scotland". That is a question I cannot answer, but it is a question that somebody should address. Is this taking power away from the devolved Administration? Is this really the right way to do it?

Q1118 **Sir Robert Goodwill:** Professor Hestermeyer, you have made it very clear that, as this is not an agreement between member states, it would not go to the ICJ. If there were disputes, as I suspect there will be, it would either be the ECJ of the EU or arbitration. As I read it, I think that

the British Government would be happy with arbitration because it is a balanced process. The arbitrators are agreed. If this then becomes an issue of EU law relating to the single market, the ECJ would be asked to rule. I suspect that, if you had a Government Minister here, they would be saying, "This is their court. We are being judged by them, not judged by an agreed process". To what extent would the matters that are likely to come to arbitration or to court fall into the arbitration category or the ECJ category?

Professor Hestermeyer: Any international court or tribunal needs to be empowered through a treaty. There is no default international dispute settlement system that exists. You can sign a treaty. If there is no clause in it on dispute settlement and you do not give the power to a court, there will not be a court that can settle the dispute.

In the withdrawal agreement, in the Northern Ireland protocol, the Court of Justice is empowered to rule in article 12(4). You will see, of course, that this is disapplied internally by the Bill, but the internal disapplication—that is the disconnect between the international level and the national level—does not matter for the Court of Justice. It matters for preliminary references, so if the Bill comes into force, Northern Irish courts will no longer be able to make references, because they have to follow UK law, but the Court of Justice is still empowered by the agreement still in force.

That is the provision that empowers the court and that is limited to some matters in the Northern Ireland protocol. There are other matters in the withdrawal agreement, but most of them concern heritage cases and citizenship cases. For other matters—and that is article 170 of the withdrawal agreement—it is arbitration. There we get to something really interesting in the Bill as well. The arbitration procedure is, to the largest extent, what you would also find in other international agreements. Following article 170, there is article 171 on establishment of the panel—and I think that they use the Permanent Court of Arbitration as a secretariat—and then rules of procedure.

There is one provision that is particular and that results from a line of cases in the Court of Justice. If there is a ruling on EU law, it can only come from the Court of Justice. Otherwise, the EU cannot sign that agreement. Article 174 gives the Court of Justice power to rule on disputes raising questions of EU law. The way that works in the arbitration is that you have an arbitration, the arbitrators decide, "Wait a second—this particular issue is actually an issue of EU law" and then they refer the question, very much like a normal reference proceeding.

Q1119 **Sir Robert Goodwill:** If the British Government consider that a matter is one that should be dealt with by arbitration, but the European Union thinks that this is actually a matter of EU law and should go before the ECJ, who arbitrates on that decision?

Professor Hestermeyer: That is a very good question. At the moment, I do not have an answer, but I will look that up—whether there is some sort of "fork in the road" clause governing that or how that precisely works. If it comes up in arbitration, it will not be for the EU to decide that it is a matter of EU law. If the parties decide to go to arbitration, and, within the arbitration, the EU argues, "This is a matter of EU law", it will be the arbitrators who have to decide whether they agree with that statement. If they agree, they refer.[10]

Professor Boyle: There is a problem there. Professor Hestermeyer is absolutely right. Sorry, you have brought me to the obvious case, have you not, probably deliberately?

Professor Hestermeyer: Yes, I set you up.

Professor Boyle: It is called MOX plant. Most of you probably have not heard of it. The MOX plant was a nuclear fuel reprocessing plant in Cumbria that the UK was building. The Irish got a bit worked up about it. They thought that it would pollute them, so they started arbitration proceedings under the law of the sea convention, alleging that it was going to pollute the Irish sea.

This was my first time in arbitration on the UK team, because I specialise in international environmental law and law of the sea, so I was the obvious person. I was the most junior member of the team, but never mind. The key point is that the law of the sea convention is an EU treaty.

When Ireland began the arbitration proceedings under the law of the sea convention, the Commission started proceedings in the ECJ against Ireland, saying that this was a violation of their obligations under EU law, that this was an EU treaty and that they could only bring proceedings in the ECJ against the UK. The ECJ accepted that, so the arbitrators had to throw the case out.

That was fine for the UK, because that meant that we won, but it would not be fine if we were arbitrating against the EU. There is a serious risk. I think that you will agree with that, Holger. Even if we go to arbitration, the ECJ might say, "No, you cannot arbitrate that dispute because it is EU law".

Q1120 **Sir Robert Goodwill:** That was quite a spurious claim. There were more radioactive isotopes coming from a fertiliser plant that was discharging

[10] Follow-up from Prof. Hestermeyer 19/07/22: *If the case is brought to the Court of Justice, the Court of Justice will have to decide whether it is competent to hear the matter. If the case is brought to arbitration under Art. 170, the EU or the UK can make a submission arguing that the dispute raises a question of interpretation of a concept of EU law, a question of interpretation of a provision of EU law referred to in the Agreement or a question of compliance of the UK with Art. 89(2). It is the arbitration panel that then decides whether to make a reference or not, providing reasons for its assessment. Either party can request the arbitration panel to review that assessment. (See Art. 174)*

into the Irish sea than from the west Cumbria nuclear industry. There was a politically motivated campaign.

Professor Boyle: You are absolutely spot on.

Sir Robert Goodwill: I was in Parliament at the time and I can remember all the facts.

Professor Boyle: I still remember the Irish Attorney General standing up. The first thing he said was, "Arbitrators, we have no evidence that there is actually any pollution".

Professor Hestermeyer: If I may, I have one thing to complete the point. The Government, through the disapplication in the Bill of article 12(4) and through the general statements, make it clear that they have a problem with the Court of Justice. Interestingly, if you read clause 14(2)(e) of the Bill, that is a disapplication of ancillary provisions to exclusionary provisions. It refers to the entire arbitration procedure in the withdrawal agreement as well.

I have to say that I cannot really wrap my head around that provision. I am not entirely sure whether it is just very poorly drafted, because I do not understand why you would want to disapply the entire arbitration procedure. I wonder whether this was meant to disapply only in certain circumstances the references to the Court of Justice. There is a lack of clarity in that provision that I find worrying.

Professor Boyle: I entirely agree with that. Somebody has to explain this or remove it from the Bill, because it is silly.

Q1121 **Sir Robert Goodwill:** Can we talk timescales? If we had to go to arbitration, or if we went to the ECJ, how long would it take before a ruling on any appeal procedure, or whatever it might be, would actually be decided? In the meantime, would that mean that, if we were eventually found to be on the wrong side of the law, the penalties that were levied would cover the entire period or just the period until the court action was started?

Professor Boyle: I would have thought that arbitration of this kind would be a minimum of two years.

Professor Hestermeyer: The ECJ will be an infringement proceeding. [11] You have the pre-proceedings. I think that I gave the timeframes. There is the first letter with two months of reply, usually, that can be shortened a little bit. There is the second letter with two months of reply.

The Court of Justice is now actually comparatively quick, so you could think that in 18 months[12] it would have its first ruling, by which time you

[11] Follow-up from Prof. Hestermeyer 19/07/22: *I should have said "If the case goes to the ECJ, it will be …"*

[12] Follow-up from Prof. Hestermeyer 19/07/22: *The statistics of the court indicate that 20 months is a better prediction.*

know whether the court considers there to be an infringement. It would not yet come with the lump sum and the penalties. That would then come in the second infringement proceeding—at least that is my understanding. There are some limited cases where you can impose a lump sum and penalty in the first infringement proceeding.

My understanding of the provision in the withdrawal agreement—I will go back and check for the record whether it is correct—is that lump sum payments and penalty payments are not supposed to be for past breaches, but are supposed to be threats to induce compliance and, accordingly, are levied from the moment of the ruling and not for past breaches.[13]

Professor Boyle: Obviously, it is not going to be soon. I would have said at least two years, but let us look at another point. What we are arguing about derogating here are the trade control provisions of the protocol. They are the ones that are under sentence of death in two years' time unless the DUP and Sinn Féin agree to them.

An arbitration might be concluded in two years' time. Whether it is or is not, unless the DUP is perfectly happy to continue articles 5 to 10 and can get the Assembly to vote for them with the requisite majority, articles 5 to 10 are defunct and we would be arguing about nothing. At that point, one would probably say that there is no longer a dispute and the arbitrator should throw the case out. We would be arguing about something that does not exist.

Q1122 **Sir Robert Goodwill:** Finally, our Chair has referred to the reasonableness of the Foreign Secretary, but it could be argued that, when we signed up to these agreements, we did not expect the over-zealous application. For example, 20% of the checks on all goods coming to the EU are taking place on that sea crossing.

There are a number of areas where I think that we have been surprised by the degree of compliance, particularly given that we have not varied our regulations to any extent from the current EU regulations and given the risk. It is bit like if I join a golf club and the rule says, "You have to wear the club tie in the clubhouse", but the tie costs £500. I did not know that. Would that be a reasonable assumption?

Chair: Come on, Robert. You could afford 500 quid for a tie.

Sir Robert Goodwill: I do not play golf.

Professor Boyle: I would be sceptical. Let us put it this way: if you were asking me to stand up and make that argument, I would say, "Okay, you want to make the argument; I will make it. Do I think it will have any effect? No". Either you are complying with the rules or you are not. The

[13] Follow-up from Prof. Hestermeyer 19/07/22: *The lump sum, however, can serve as a penalty for continuing to infringe after the first judgment.*

rules are there. You are entitled to apply them. I do not know; maybe appliers of EU law are different.

Professor Hestermeyer: No, I would agree with that. It is difficult to argue, "We did not expect the rules to be applied as they are". I would also add one point on democratic consent. In my understanding, the way it works is article 18, and article 18 refers to the unilateral declaration that the UK made. At least if I remember that correctly, that will be a majority vote in the Assembly. At the moment, that would mean that the Northern Ireland protocol would actually survive, as apparently there is a majority for it.

Professor Boyle: It is a qualified majority. I would have to read it again. As I read it, it requires enough votes from the DUP and Sinn Féin—no?

Professor Hestermeyer: No, it does not. I think it is really a majority vote in the Assembly. It is in the unilateral statement. Sadly, I have not attached that. I should have printed that out as well and I failed to.

Ian Paisley: I think that it originally was to be that.

Claire Hanna: It is only Northern Irish people's opinions. It is neither here nor there.

Stephen Farry: I want to pick up on this point, just to clarify around the consent mechanism.

Professor Boyle: Yes—I am sorry. I am correct.

Chair: You are sorry you are correct. That is very humble of you.

Professor Boyle: A majority of the Members "present and voting" and a "majority of the unionist and nationalist designations present and voting".

Professor Hestermeyer: Where is that?

Professor Boyle: I read that as giving the DUP and Sinn Féin a veto, or a majority of the Assembly a veto.

Stephen Farry: Ian will be delighted to hear that.

Professor Hestermeyer: Where is that—in what paragraph?

Professor Boyle: That is article 18(6).

Professor Hestermeyer: No, that is for the duration.

Chair: Gentlemen, as tempting as it is not to on these legal matters, if you could address your comments through me, that would be helpful.

Professor Hestermeyer: My understanding of article 18 is that the consent vote happens according to the unilateral declaration.[14] The length

[14] Follow-up from Prof. Hestermeyer 19/07/22: *Art. 18(2) provides that a decision*

of extension then depends on whether there was just a majority vote, in which case it will be extended by, I think, four years. If there was a cross-community consent vote, it will be extended by a longer period of time. Is that eight years?[15] I am not entirely sure. That, to me, is the rule on the cross-community consent there. It is rather complex, I have to say.

Chair: When is it ever not?

Professor Hestermeyer: As a lawyer, I will not complain. Complexity is good.

Chair: No, if it was all simple, you guys would be out of work.

Q1123 **Stephen Farry:** On that point, not everyone necessarily agrees with the way it has been set up, but it is the understanding, I think, of all the political parties in Northern Ireland that that is how this would be taken forward. It is worth stressing that, as things currently stand, a majority of those MLAs elected in the last election are committed to the retention of articles 5 to 10, though with this Bill, there may not be much left to have a vote on. That is another story.

I want to pick up on the point around necessity. I suspect that this has already been covered in the answers, but I will ask it anyway. If both of our witnesses are content that they have answered it, we will quickly move on to some other questions around article 16. How does a scenario where necessity is invoked differ from a scenario where article 16 is used? I think that both of you have already covered that, unless either of you has anything more you want to say on that point.

Professor Boyle: I do not think that article 16 has been used. It was proposed to be used by the EU during the covid emergency. There was obviously an emergency there. People were dying in the streets.

Q1124 **Stephen Farry:** To clarify for the record, from what was said earlier on, article 16 was not actually invoked by the European Union. The process was set in train, but the brakes were put on before the end. I will turn to Professor Boyle in the first instance. If I picked you up correctly, the essence of your argument is that the Bill is, essentially, lawful in your opinion, but the Government would be better using the argument of invoking article 16, rather than the doctrine of necessity to back it up. As things stand, unless I have picked this up wrong, the Government have

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expressing democratic consent shall be reached in accordance with the unilateral declaration made on 17 October 2019. That declaration provides in clause 3 that the democratic consent process consists of a vote in the Northern Ireland Assembly, consent to be provided if the majority of the members of the assembly present and voting vote in favour of the motion.

[15] Follow-up from Prof. Hestermeyer 19/07/22: *Art. 18(5) provides that where a decision is reached on the basis of a majority of Members of the Northern Ireland Assembly the subsequent period is 4 years, where the decision has cross-community support, the subsequent period is 8 years.*

not actually invoked article 16 at present. They are clear that they have not invoked article 16.

Professor Boyle: They have not said they have, but that is what they are going to have to do for this to be meaningful.

Q1125 **Chair:** They are going to have to trigger article 16.

Professor Boyle: Yes. They are going to have to send a notice to the EU saying that they are derogating under article 16 and here is the Bill. If they do not do that, I do not know where they are.

Q1126 **Stephen Farry:** In the event that they do not do that, would you then say that the Bill is therefore illegal, or that if the Bill was implemented, it would be illegal?

Professor Boyle: It would indeed. If they want to derogate—and it seems to me that this Bill sets out a derogation—it should be treated as such and they are going to have to go through the procedure for derogation that is set out in the protocol. If they do not do that, I have no idea where they are. They are then relying on necessity. I cannot see why you would not want to use the derogation procedure. This is something that you should really press the Government on.

Chair: We have tried.

Q1127 **Stephen Farry:** This issue as to whether they have triggered article 16 will be a fairly important pivot point. Are you suggesting that that can be implicit or does it have to be explicit?

Professor Boyle: The Bill itself does not have to say that. If I had been drafting the Bill, I would have put, somewhere in the preamble, some reference to article 16. It seems to me that that is the point of the Bill—to lay the ground for derogation under article 16.

Q1128 **Chair:** I think that we have all been interested to hear your legal critique of the narrative approach that the Government have taken, or the Foreign Secretary has taken, hitherto on this. When the Foreign Secretary has been pressed on this in the House, the answer—I slightly summarise it—is in these terms: "We looked at that and decided not to, so we are doing what we are doing". That suggests to me that there was a positive rejection.

Professor Boyle: I have friends and colleagues who are lawyers in the Foreign Office and that is the impression I get as well. I just do not understand it. It is certainly not the advice that I or my colleagues gave nine months or a year ago. We said, "Invoke article 16". The sense that I am getting is that they think, "No, that will not do. We need to rely on necessity". I do not understand that. I really do not and they need to be pressed hard on that. This perfectly fits an article 16 derogation. On necessity—no.

Q1129 **Chair:** You have just said something there that I think is important, but I

just want to check. I think that I heard you say that the advice you and colleagues gave her—by "her" I presume you mean the Foreign Secretary—was to trigger article 16 last year.

Professor Boyle: Please do not quote me. In theory, my advice is confidential. I think I can probably breach that confidence in Parliament.

Chair: I am afraid we are on live national television, Professor Boyle, so between the privacy of you and me.

Professor Boyle: Yes, I know. I am protected by the Bill of Rights.

Chair: You are under privilege, so do not worry about that, but that was the professional advice proffered to the Foreign Secretary last year—that the circumstances existed to trigger article 16.

Ian Paisley: It was in the White Paper that the circumstances had been crossed.

Stephen Farry: The Command Paper referred to article 16.

Ian Paisley: It was the White Paper of 16 July.

Q1130 **Chair:** Yes. The circumstances had been met so that article 16 was triggerable. That is a different piece of advice to, "It is triggerable but do not trigger it", but specific advice was given to trigger.

Professor Boyle: Well, to rely on article 16. The difficulty at the time I was giving the advice was that power sharing had not collapsed. There was merely the risk.

Chair: I take that, yes.

Professor Boyle: We all accepted, "That is going to be a hard sell". We were asking ourselves, "How the hell do we prove this? Who do we call as witnesses for the imminent demise of power sharing?" I can understand that, back then, they were not persuaded that article 16 was the right answer. Today, power sharing has clearly collapsed. It seems to me that it is the only answer.

Q1131 **Chair:** On this power sharing thing, I am going to try to be delicate in how I ask this out of politeness to Mr Paisley, but because Mr Paisley is of the DUP it has to be couched in that way. I take entirely the seriousness of the collapse of Stormont and the whole process of devolution. But that is predicated on a system whereby any party, if it is not getting its own way or does not like a particular policy or issue, outwith its competence, because treaty making is reserved to Westminster in this instance, can effectively—I am not using this in the pejorative sense of the term—throw its toys out of the pram, walk away and say, "We are not going to come back in unless or until we get what we want".

Ian Paisley: The term is "consent".

Chair: The term is "consent". Any party can do that. It is a typically

fudged approach to doing things. Is there a chance that arbitrators might just turn around and say, "This is not the right comparison, because these are two separate issues—the functioning of devolution and treaty making—and, therefore, to conflate the two is not a reasonable thing to do in these circumstances"? The protocol of itself does not create the circumstances whereby de facto Stormont has to collapse. Somebody may choose to collapse it, citing that as their reason, but it is not de facto.

Professor Boyle: Chair, you should have been a lawyer. Yes, I can see exactly where you are coming from. I cannot speak for the DUP; I would not wish to.

Q1132 **Chair:** I am not asking you to. I am asking you to speak on whether that is a potential dismissal of the argument likely to be put by Her Majesty's Government.

Professor Boyle: No, I do not think that. The DUP is saying that it is the trade arrangements and all the other arrangements. As I understand the DUP, it regards the protocol as a bit of a slippery slope to a united Ireland. They are a political party.

Q1133 **Chair:** That could not be prayed in aid, could it—"Something might happen in the future, therefore—"?

Professor Boyle: As I say, I do not want to speak on behalf of the DUP. I will not complete that sentence.

Q1134 **Chair:** I was asking you to speak more from the position of the arbitrator.

Professor Boyle: It is fairly easy to understand that the DUP is a political party. It is supported by a third of the electorate. It is entitled to share power in Northern Ireland, but it does not like what this protocol has done to the relationship between Northern Ireland and the United Kingdom. As a democratic political party, it is entitled to that view, just as other political parties are.

Other political parties in this country have done things recently that quite a lot of people do not like either. I think that the arbitrators will understand that. The arbitrators might also understand this point, because it is an important one. Nobody asked the people of Northern Ireland or the Northern Ireland Assembly to approve this protocol.

Q1135 **Chair:** No, sure. I take that point. Flowing from that—and I do not want to take us too much into the world of the hypothetical, not least because Sinn Féin has not said this—were Sinn Féin to say, in response to this Bill, "We will not go into power sharing", you would have the rather perverse situation whereby one party says, because of the protocol, it will not go into power sharing and the largest party in the Assembly at the moment says, "With this Bill, we will not". How do the arbitrators deal with that in practice? Irrespective of the reasoning for the Bill, it does not address

that societal deficit, namely a non-functioning Stormont and devolution.

Professor Boyle: That is also true. My wife put that question to me when we were debating.

Chair: If it is your wife sitting behind you, she is smiling and I noticed she nodded. She did not brief me on the question, so do not worry about this. There has been no collusion between Mrs Boyle and me.

Professor Boyle: There is no answer to it. That is the system designed by the protocol and the Belfast agreement.

Ian Paisley: It is mutual consent.

Professor Boyle: It is true.

Professor Hestermeyer: As a legal argument in arbitration, one of the things you might try to argue is to say, "Those are the issues that article 18 is there for". That takes account of precisely these incredibly complex difficulties. We are in a very uncomfortable situation. You do something that is regarded to be in favour of one side and the other side is offended. You do something for the other side and the one side is offended.

Q1136 **Chair:** No, hang on, because I want to be very careful. I am not saying in favour of one side or the other. If a decision is taken predicated upon devolution having collapsed, but devolution does not resurrect itself because, as a result of, for example, the Bill becoming the Act, the largest party in Northern Ireland falls away or does not take part in the resurrection of Stormont, that is a zero-sum game, is it not? There has been no purposeful addressing of the societal question. In those circumstances, you have one party saying—political party, not party to a legal thing—"We will not unless you do" and the other saying, "We will not if you do".

Professor Boyle: Maybe the Government then need to talk to Sinn Féin to make sure it does not take that view. Sometimes Governments have to make certain that they have cleared away the undergrowth before they get into litigation and that might be the undergrowth for this purpose. It is just as they need to make sure the DUP will go back into power. If the DUP will not go back into power when they pass this Bill, it is sunk anyway.

Stephen Farry: That was a long intervention, Chair.

Chair: We are back with you. You know what I am like when I start.

Q1137 **Stephen Farry:** It was very helpful and instructive. I have two more questions on the article 16 issue. Back to you, Professor Boyle, I will first make the point that, if they were serious about using article 16 to back up the Bill, it would have been sensible for the Foreign Secretary to have made that clear at Second Reading and not to actively say that she was not triggering article 16 at Second Reading. Certain weight is given by courts and, potentially, arbitrators to what is actually said by politicians

when they are introducing things.

Professor Boyle: Who knows? Maybe they are just keeping their options open.

Q1138 **Stephen Farry:** Would it be helpful for the Foreign Secretary to make that clear at the outset?

Professor Boyle: It is not so much that I think that it would be helpful for her to make clear that they are going to rely on article 16. I want her to stop relying on necessity, because that implies that there is a breach of treaty. To the extent that she relies on article 16, that also makes it clear that there is no breach of treaty. Yes, I agree with you.

Q1139 **Stephen Farry:** Professor Hestermeyer, to be clear, a lot of the discussion today has been framed around a choice between the Bill as set out and potentially article 16, but this is not an either/or choice. There are alternative ways forward short of either of those, including, potentially, negotiations. To be clear, in relation to article 16, that is not something that the UK can entirely unilaterally invoke in any event. The European Union has the right to challenge whether that is legitimate or not and to undertake, as you already alluded to, rebalancing, which is unspecified. Is that what you are saying, or do you want to add anything to that?

Professor Hestermeyer: Yes, indubitably. Article 16 has requirements and the EU can challenge the existence of those requirements. It can challenge the scope of what is permissible under article 16 and it can rebalance.

Q1140 **Stephen Farry:** The notion that article 16 is some sort of silver bullet on the table is not necessarily an accurate assumption to make. It is problematic in itself.

Professor Hestermeyer: I would not call it a silver bullet. Using almost anything to argue with the Northern Ireland protocol is difficult. I do not think article 16 is a silver bullet, particularly considering the factual evidence of what is appropriate for the different concerns on both sides and for both communities. You come from Northern Ireland. You know this far better than me. Finding a solution that appeals to both sides is incredibly difficult.

Stephen Farry: That is an understatement and a half, yes.

Professor Hestermeyer: You can assume that, if you go to dispute settlement, say, having to argue whether matters are appropriate and necessary and whether they help to safeguard certain societal interests, those will all be in dispute.

Q1141 **Stephen Farry:** Professor Boyle, you talked about this Bill being a limited number of derogations, essentially, from the protocol. Some people may read the Bill as very far-reaching in terms of, in some senses, actively and immediately scrapping some aspects of the protocol and, in

other respects, giving Ministers the power to rewrite large aspects. The way I read it, there are essentially only two or three elements that are left untouched, which are north-south co-operation and the common travel area. There is a third one that comes to mind. In terms of a party to a treaty having the ability to derogate, how usual or unusual would it be for a party to derogate from 70%, 80% or 90% of a treaty and still credibly be a party to that treaty?

Professor Boyle: They are not derogating from 70%, 80% or 90%. I would say that it is about 5%. They derogate from article 5 on customs and movement of goods, article 10 on state aid and article 12 on the jurisdiction of the ECJ. There is then that silly one that derogates from arbitration. That is all. It is a very long treaty. I have forgotten how many articles there are. There are about 38 articles, I think.

They specifically do not derogate from those that are protected. It says in article 15 that no derogations are permitted for any of the following articles of the protocol: article 2 on the rights of individuals, article 3 on the common travel area and article 11 on other areas of north-south co-operation. The vast bulk of the protocol remains in force and in effect.

Q1142 **Stephen Farry:** Most people would probably contest your assertion that those three articles represent the vast bulk of the protocol, not least because most of the issues in relation to the protocol probably relate to article 5. You might list numerically that there are X number of articles, but articles 5 to 10, to most laypeople at the very least, would be regarded as being the central crux for the protocol, rather than simply being a minor aspect of it.

Professor Boyle: That is not what the preamble suggests. It is true that one of the purposes of the protocol is to protect the EU's internal market, but that is only one of them. One of them is to promote co-operation and another is to protect the Belfast agreement. In that context, you cannot give article 5 predominance or pre-eminence over everything else. You have to balance the two. I am not an expert on trade controls, but none of us here is.

Q1143 **Stephen Farry:** Let us agree to differ in terms of how much they are derogating from this or not. On a hypothetical basis, if a state party was to derogate from 70% or 80% of a treaty, would it credibly still be a party to that treaty?

Professor Boyle: It is a good question, but probably not. I do not know. I cannot think of an example and it is a question that no student or politician has ever put to me before. There comes a point at which you could say that you are just repudiating the entire treaty.

It is relevant here to observe that, when you conclude a multilateral treaty—say, the law of the sea convention—with multiple parties, there is usually the possibility of ratifying it subject to reservations, which enable you to exclude particular provisions. That will not work in the law of the

sea convention, because they are prohibited, but in other multilateral treaties you can make reservations to exclude large chunks of the treaty.

Q1144 **Stephen Farry:** Of course, the Government did not make any reservations in relation to the withdrawal agreement.

Professor Boyle: No. This is not a reservations clause, but it serves something like the same function. It is an ex post facto reservation clause, in effect. Yes, if it went too far, there would be a problem.

Q1145 **Stephen Farry:** A reservation is something that is more likely to happen when you are talking about a multilateral treaty. Reservations are not something that you would see in a bilateral treaty.

Professor Boyle: That is a very good point, too.

Stephen Farry: It defeats the purpose of it.

Professor Boyle: You must be a lawyer. That is absolutely correct. But article 16 is there. They chose to put it there. It is not a straightforward, simple bilateral treaty. I agree that you cannot make reservations to a bilateral treaty. You are absolutely correct on that, but article 16 is there. It must have some purpose and effect. You cannot just ignore it.

I agree with your underlying question that, if you go too far, it could be said that this is not good faith; this is, essentially, a repudiation of the whole of the treaty. I do not read a derogation from three articles as a repudiation of the entire treaty. In any event, it seems to me—but this is something you will no doubt have to consider in the Committee—that the red/green channel system and so on, which the Government are proposing as a replacement, is presumably designed to protect the EU's internal market. I obviously cannot answer the question of whether it will or not. It is not my expertise, but it is something I would have thought that you would want to consider carefully.

Q1146 **Stephen Farry:** I will then maybe ask another question here, conscious that we are moving on with time. To both of you, very quickly: what is your view on the argument that the Belfast/Good Friday agreement is of primordial significance?

Professor Hestermeyer: If you ask a professor a question, you will not get a brief answer. Internationally, there are very limited instances of hierarchy. There is article 103 of the UN charter and jus cogens. None of that applies. The only argument to be made in this context is article 1 of the protocol, which emphasises the importance, but is actually limited in scope and is not a clause that establishes a hierarchy for the whole Good Friday agreement over the protocol. Rather, if you read through the objectives, the parties express that they think that this model that they implemented was there to serve the Good Friday agreement.

Professor Boyle: If you asked somebody who grew up in Belfast whether it is of primordial importance, you would get a very large yes. The Belfast agreement has brought peace to the place. I was there two

weeks ago and in Derry. It is like going back to when I was in short trousers. It was peaceful, jolly, quiet and calm.

Stephen Farry: I was part of the negotiations.

Chair: Was that because you were in short trousers?

Professor Boyle: It was such a difference from when I left.

Ian Paisley: It is a time zone.

Chair: It is a time zone. It is a special thing.

Professor Hestermeyer: There was a Minister writing a column in *The Times*. A conflict of treaties does not lead to necessity. It is true that, if a state signs up to two conflicting treaty obligations—because there is limited hierarchy that can happen—the state then of course cannot comply with both of them, since they are conflicting. It will then choose one to comply with, but it breaches the other. Under international law, that is a breach and that is not justified.

Q1147 **Stephen Farry:** It is worth stressing that a lot of people in Northern Ireland do not see the two in conflict at all.

Professor Hestermeyer: That is the other thing. You would have to establish a conflict, of course. I agree that there is strong disagreement on whether there is a conflict. I very much care for the European convention on human rights clauses in the Good Friday agreement. At least in the political realm, take care not to lessen those. Then the argument that it has primordial importance is becoming more difficult.

Q1148 **Mary Kelly Foy:** Although you both concluded that this Bill is legal, there are other experts who do not agree, including a vice-president of the EU, who has stated that this is, in fact, illegal. Professor Hestermeyer, you outlined some of the infringement proceedings already under way. What else might the EU do outside a trade war? Also, what do you see as the consequences for the UK on the world stage, both at a diplomatic level and legally?

Professor Hestermeyer: I want to put in a caveat. I did not conclude that it is legal. I just said that article 16 is a better argument to make than necessity, but I would say that it is very difficult to justify under article 16 from my point of view.[16]

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[16] Follow-up from Prof. Hestermeyer 19/07/22: *There are a number of reasons why the Bill is very difficult to justify under Art. 16, i.e. why such a defence is highly unlikely to prevail. As stated previously there is agreement that the procedure for Art. 16 has not been followed. It is doubtful whether Art. 16 can be invoked to circumvent the democratic consent mechanism of Art. 18, under which democratic consent to the continued application of Articles 5 to 10 consists of a majority vote in the Northern Ireland Assembly, excluding the possibility of one community alone without a majority in the Assembly blocking the continued application of Articles 5 to 10 under Art. 18. Finally, Art. 16 limits scope and duration of safeguard measures to what is strictly necessary to*

What were the consequences? There will be the infringement proceedings. There is the possibility to act under the withdrawal agreement and in arbitration.

What will be the consequences on the world stage? Three years ago, I used to say, "I do not think that there will be consequences on the world stage, because partners recognise that Brexit is a very particular situation". Right now, with the Northern Ireland protocol, the European convention on human rights and the trade issue that there will be, I start to worry more about that than I did in the past. There is still, on the world stage, a feeling that Brexit is separate.

I was very happy to see that the Government are making a legal argument, because some of the statements made in public, based on dualism, are nefarious and dangerous to the system. Arguments were made that, because of parliamentary sovereignty, you can legislate and you are then not bound by an international obligation. It has to be stated clearly that that is humbug. Making such arguments does great harm to the UK.

Q1149 **Chair:** You agree with that, Professor Boyle.

Professor Boyle: Yes, that precise point. Your question is a good one, because I have listened to various politicians on the radio—was it Theresa May? Normally I respect her, but she was talking about this damaging the reputation of the United Kingdom for complying with international treaties.

Chair: As was I.

Professor Boyle: I would respectfully ask you and suggest that maybe our invasion of Iraq, in violation of the UN charter, has done vastly more damage to our reputation. We no longer have a British judge on the International Court, for the first time in 100 years, because of Iraq and because of the Chagos archipelago. In both those cases, we are violating the UN charter and we have lost friends and allies in Africa and Asia. We lose votes in the General Assembly now because of it. That has done far more damage. One reason there are so few Scottish Labour MPs in this House is because of the Iraq conflict. It was very unpopular in Scotland. That is why we nearly lost the referendum.

So is this about our reputation for treaty compliance? No. Talk to anybody else; we do not have that reputation. If I were to make that proposition in a conference of international lawyers, and I was at one last week in Lisbon, people would laugh at me. That is how embarrassing it is. I hate saying that because I am proudly British. I want this country to be a good country that people respect and admire, but at the moment they do not. Being unable to win votes in the General Assembly because of our

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remedy the situation with priority to measures that will least disturb the functioning of the Protocol.

treaty non-compliance over recent decades is shameful. This is not going to add to that, because this is perfectly lawful. That needs to be hammered home to Theresa May.

Mary Kelly Foy: A vice-president of the EU is suggesting that it is not lawful. I would imagine that President Biden would disagree as well about our reputation on the world stage.

Q1150 **Stephen Farry:** I was going to ask you a question in relation to clause 14 again. The questions I have been allocated seem to be ones that you have covered pretty well already. Just to maybe do it formally, does clause 14 of the Bill indicate that the UK would not recognise or comply with any arbitration procedure brought under the withdrawal agreement?

Professor Hestermeyer: Yes. Clause 14 is bizarre, because it refers to ancillary exclusions—ancillary to other exclusions. I am not sure whether they actually intend to exclude all the provisions named there, or whether they are supposed to be excluded in a limited manner. If you exclude the arbitration provision, it has no effect because the arbitration is in the treaty and the exclusion is under national law, so the arbitration would still go ahead. Yes, if that is honestly felt, I would presume that it is an indication that there is an unwillingness to follow the arbitration. Honestly, I have a hard time thinking that that is actually the case.

Q1151 **Stephen Farry:** As it is currently drafted, would this potentially be self-defeating for the UK, in that there may well be a potential scenario down the line when the UK may need to avail itself of arbitration?

Professor Hestermeyer: Yes, absolutely. I feel that, much like the UK can take measures that the EU dislikes, the EU can take measures that the UK dislikes. I feel that arbitration is a good way to resolve those disputes.

Q1152 **Stephen Farry:** I see you nodding, Professor Boyle. It is the same answer, essentially.

Professor Boyle: I agree 100% with that, yes.

Stephen Farry: I am glad that we have consensus on that point.

Professor Boyle: I think that we have more or less had consensus most of the way. We have illustrated that it is not a clear-cut case. No, there are potential difficulties.

Q1153 **Chair:** I wanted to ask one final question, which a number of people will cite as a significant concern about how the protocol has played out. Whether you agree with them or not, or think it is a reasonable argument or not, the Government could say, "As these things have moved on, we have learned more about it and we are surprised by what we have learned". I appreciate that this is still being argued in front of courts. From your legal perspective, could you give us some contextualisation of the protocol and the Act of Union? There are many who have argued in the courts that the constitutional settlement set up with the Act of Union

of free rights to trade, no customs and so forth—

Professor Boyle: You mean the Act of Union with Ireland.

Chair: Yes.

Professor Boyle: You have to remember that I live in Scotland, so when you mention Act of Union I have to think, "Which one are they talking about?"

Chair: I wanted to bring us to a more modern time of about 1800, rather than 1707.

Professor Boyle: I am not sure I can answer that question. I do not know about Professor Hestermeyer.

Professor Hestermeyer: Does that not go to the matter that was before the Court of Appeal and is now before the House of Lords?

Chair: Yes.

Professor Hestermeyer: I confess that, as a matter of English law, that is very hard for me. On the international law questions, I do not see how it has an impact. That is again because—I have not sensed that here at all—in public debate there is a commonly made argument: you cannot use national law ever to justify a breach of international law. There is article 46 of the Vienna Convention, but that is a very small exception.

Professor Boyle: That is absolutely right, but there is an important qualification. I was in Lisbon last week for an international law conference. Oddly enough, over lunch one day we were discussing the protocol. I said to my colleagues, "If your Government concluded a protocol like that divides the country in two for trade purposes, would it be constitutional?" Every one of them said no—the Greek, the Portuguese, the German, the Australian. Every one of them said, "No, it would be unconstitutional".

Q1154 **Chair:** Did any of them say, "And our Governments would not have signed it"?

Professor Boyle: Yes.

Chair: I rather suspected that.

Professor Boyle: You would not want to get to that point. You would hope that you have a Government that would have the wit to say no.

Chair: Ignorance is no defence.

Professor Hestermeyer: Can I make a reservation to that? Germany has signed such an agreement. There is a German city, Büsingen, that is part of the Swiss customs territory.

Professor Boyle: My German colleague—

Professor Hestermeyer: He was not aware of that treaty.

Professor Boyle: Perhaps he was not aware of it.

Chair: Your audition for the two guys who sat up in the gallery for "The Muppets" has gone very well. Gentlemen, can I thank you both? You have given us some fascinating and informed answers to our questions. I am tempted to say that it has moved my understanding of the issues and certainly the processes forward. If for nothing else, I have to thank you very much on behalf of the Committee for that.