

European Affairs Committee

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: Northern Ireland Protocol Bill

Wednesday 7 September 2022

4.50 pm

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Members present: Lord Jay of Ewelme (The Chair); Lord Dodds of Duncairn; Lord Empey; Lord Godson; Baroness Goudie; Lord Hain; Lord Hannan of Kingsclere; Baroness O’Loan; Baroness Ritchie of Downpatrick; Lord Thomas of Gresford.

Evidence Session No. 2

Heard in Public

Questions 11 - 24

Witnesses

I: Professor Alan Boyle, Emeritus Professor of Public International Law, Edinburgh Law School, University of Edinburgh; Professor Mark Elliott, Professor of Public Law and Chair of the Faculty of Law, Cambridge University.

Examination of witnesses

Professor Alan Boyle and Professor Mark Elliott.

Q11 **The Chair:** Good afternoon to both of you and welcome back to this public meeting of the Sub-Committee on the Protocol on Ireland/Northern Ireland. We are continuing our new inquiry into the Northern Ireland Protocol Bill with a second panel of witnesses consisting of legal experts. Professor Alan Boyle, emeritus professor at Edinburgh University and of Essex Court Chambers, is joining us in person and Professor Mark Elliott from the University of Cambridge is joining us remotely. You are both extremely welcome and we very much look forward to your evidence to us. I ask you to introduce yourselves briefly the first time you speak. Today's meeting is being broadcast and a verbatim transcript will be taken for subsequent publication. We will send that to you both to check for accuracy. I refer to the list of members’ interests as published on the

committee's website. Welcome to you both. If you could introduce yourself, I will then ask the first question.

Professor Alan Boyle: Thank you, it is a pleasure to be here. The height of every barrister's career used to be to appear at the House of Lords; I have finally made it. I am fundamentally an academic. I have spent 40 years at London University, Edinburgh University and various others, teaching mainly international but also constitutional and public law. I have written a great deal on international law, obviously, but shortly before I retired, I started practising again as a barrister. I now have quite a lot of experience in the International Court of Justice and the Tribunal for the Law of the Sea, so I do a lot of interesting disputes.

In a way, I view this as an interesting dispute. It is a case that has not yet happened but might still happen. It is at a stage that is not dissimilar from many of the clients I represent because you come in early on when there is an impasse and people do not know how to get out of it. Usually, the answer is, "You should go and talk to the other side". That is probably the essence of what I would say.

Professor Mark Elliott: Thank you very much for inviting me. I am a professor of public law at Cambridge University. As I am not an international lawyer, I think that, on some of the points that you want to raise today, Professor Boyle will be better placed than I am to comment. However, I take a close interest in the legal issues around the UK's departure from the EU and have written quite a lot about that, so I hope that I can help with at least some of the questions you might have.

Q12 **The Chair:** Thank you. I shall start by asking you both what you would identify as the principal legal issues and consequences arising in relation to the Northern Ireland Protocol Bill. Perhaps I could ask you to start on that, Professor Elliott.

Professor Mark Elliott: My general view is that, although the Bill obviously tries to address a practical, economic and political difficulty, there are some legal difficulties with it as it currently stands. Fundamentally, it seems there is a good argument, at least, that there is an incompatibility between the Bill and the provisions that lie at its conceptual heart, as I see it, and the obligations by which the UK is bound under international law through the UK-EU withdrawal agreement. Would you like me to expand on that now or to come back to the points of detail?

Q13 **The Chair:** We will probably come back to them as we go through the evidence, but if at any stage you feel that we have not asked you things that we should have, I am sure you will tell us anyway. We would certainly hope for that.

Professor Alan Boyle: What Professor Elliott has just said is interesting. I am not an EU lawyer; that might be my weakness. He says that he is not an international lawyer but he is an EU lawyer. I have not studied the withdrawal agreement in any great depth but the key point is that I have read a lot of politicians here and in Europe saying, "Oh, this protocol

violates international law". I have not heard a single one, nor have I read anybody, explaining in what respect it violates international law. It does not violate international law in the slightest unless it violates either the withdrawal agreement or the protocol itself. But, for me, the Bill can be justified in terms of Article 16—the derogation provision. If you can justify it under Article 16 then it cannot be a violation of the protocol or of the withdrawal agreement or of international law in general.

I quoted a passage from a law journal article in the copy of my text that I sent round. The author of that article, who has looked at the withdrawal agreement and all the relevant EU treaties, comes to the same conclusion as I have. Indeed, I have adopted her conclusion: that there is no incompatibility between the Bill and any of the international treaties by which the UK is bound, provided—this is the key proviso—that the Government can justify the bill's derogations in terms of Article 16.

I do not see a difficulty in doing that. The collapse of devolved government in Northern Ireland is a societal difficulty, and part of the purpose of the protocol was to sustain power-sharing under the Belfast agreement. Well, it has not exactly succeeded in that, has it? It seems to me that the Government's purpose is to try to restore power-sharing; that is consistent with the objective of the protocol and the Government are entitled to pursue that objective. I do not have any difficulty with their derogations in terms of Article 16. Let me put it this way: I would be happy to defend those derogations in an arbitration, and that would not be very difficult. I would be lost for arguments if I were on the other side trying to attack them.

I will be interested to hear what Professor Elliott says and whether he fundamentally disagrees. Anyway, that is all I would say about international law. Either we are okay under Article 16 or we are not, but that is the only legal issue that arises. There is no other basis for saying that there is a breach of international law.

The Chair: We will come on to Article 16, which is an interesting question, in a moment or two.

Q14 **Baroness Ritchie of Downpatrick:** Professor Boyle, what is your assessment of the Government's legal position on the Northern Ireland Protocol Bill, as set out in the 13 June 2022 policy paper? I will then come to Professor Elliott.

Professor Alan Boyle: Fundamentally, I can see where they are coming from. They are trying to restore power-sharing and I think they are doing it in a way that is consistent with Article 16. Where I have problems is when the former Foreign Secretary, now our Prime Minister, keeps saying that she does not want to use Article 16; she wants to rely on the international principle of necessity. I think this is nonsense.

The international principle of necessity has no place in this debate or discussion. The focus should be on Article 16. I cannot understand why she did not want to rely on it. If her legal position is to try to avoid Article

16, then I think she is basically sunk because, if she refuses to rely on it and will not serve the derogation notice, and if the Government do not engage in the consultation envisaged by Appendix 7 to the protocol then they have had it. But if they engage in required consultation and locate their defence in Article 16 and the restoration of power-sharing, then I think they have a very strong case and in my view the European Commission will be lost for decent arguments.

Professor Mark Elliott: I do not think that the distance between Professor Boyle and me is very great. In my initial answer, when I said I thought there was some difficulty with the Bill, that was premised on the government position that Professor Boyle just outlined—namely, that they do not propose to rely on Article 16. If we take that at face value, and if Article 16 is not invoked, then it seems quite clear that the protocol will place the UK in breach of its obligations under the withdrawal agreement.

I shall refer to a couple of key provisions of the withdrawal agreement, of which the protocol is of course a part. Article 4 of the agreement specifically requires the UK to give effect in its domestic legal system to relevant parts of the agreement, including the protocol, in the same kind of way as we used to have to give effect to European Union law. That means effectively allowing relevant provisions of the protocol and other parts of the agreement to have what EU lawyers call direct effect and primacy. That was all catered for through the European Union (Withdrawal Agreement) Act 2020, which writes into the withdrawal Act of 2018 provisions that give that special legal status to the withdrawal agreement, including the protocol. I do not think that there can be any room for argument that the Northern Ireland Protocol Bill rides roughshod over that regime by specifically excluding parts of the protocol from the regime and stopping it having domestic effect, stopping it taking priority over domestic law and stopping UK courts enforcing it.

There are clearly specific provisions—indeed, the whole legal scheme of the withdrawal agreement—with which the Northern Ireland Protocol Bill is incompatible. Notwithstanding that obvious incompatibility, which I think the Government accept exist—they must accept that it exists otherwise why would they be relying on reasons for justifying their departure from the protocol?—if we recognise that that is the focus of the issue, the only real question is whether there is any legal basis for departing from the protocol.

On the Article 16 point that Professor Boyle mentioned, I agree that that provides a possible escape route but I draw particular attention to the fact that Article 16, unlike the international doctrine of necessity, does not simply lay out certain criteria that, if the UK thinks they are satisfied, allow it to deviate from the protocol; rather, it lays down a process, which is set out in Annex 7 to the protocol, that the UK would need to trigger before Article 16 would provide a legal basis for departing from the protocol. The bottom line is that, unless the UK is willing to go through and trigger that process under Article 16 and Annex 7, there is

no conceivable way in which Article 16 can provide a legal basis to reconcile the Bill with the UK's existing obligations under the withdrawal agreement and the protocol.

Professor Alan Boyle: I agree with every word of that. I think we are on exactly the same page. I would add—it is relevant here—that I do not see why the Government have not already activated that procedure and served the derogation notice on the EU, setting out the derogations and entering into the consultations that are required. They do not need to wait until the Bill is passed; as a matter of simple treaty law, they could derogate now and legislate subsequently to change the domestic law. As a public international lawyer, if I were asked, that is what I would advise them to do. I do not understand why they have not done it. I can understand why they paused the Bill but I cannot understand why they have not therefore served the derogation notice. Then they could sit back and wait, if they wanted. But if they derogate now, they are no longer violating the protocol.

- Q15 **Lord Hain:** Thank you for your evidence so far. Given that the Bill has been introduced without the agreement of the Irish Government or any of the parties save for one, how can it be compatible with the Good Friday agreement since the UK Government are saying that their reason for its introduction is to safeguard it?

Professor Mark Elliott: I have a general difficulty with this line of argument.

Lord Hain: Do you mean my question or the Government's argument?

Professor Mark Elliott: The Government's argument, not your question. Of course I understand that there is room to argue that, if the situation in Northern Ireland is so problematic that it creates some kind of existential threat to the political institutions of Northern Ireland, then that clearly places the values underpinning the Good Friday agreement in jeopardy. However, when we look at the Government's legal position paper that we have just been talking about, we find really thin assertions about the circumstances.

Because I do not know enough as a lawyer, I do not feel qualified to know sufficiently about the situation politically and economically in Northern Ireland to have a concluded view, but I worry that using the Good Friday agreement as cover for doing this, while clearly a politically expedient thing to do, might not hold a great deal of water. I add as a side note that, if I am right in suggesting in effect that the Government are invoking the Good Friday agreement strategically or politically, that view is backed up by the position that they have taken in relation to the Good Friday agreement and the European Convention on Human Rights. I am aware that the Government have signalled today that their current bill of rights is to be withdrawn but, in the wider debate about human rights law, the now Prime Minister told the Conservative Party leadership hustings in the summer that she was open to the possibility of withdrawing from the ECHR, which would be a clear breach of strand 1 of

the Good Friday agreement. So my underlying concern is that the Government are picking and choosing and invoking the Good Friday agreement when it suits them but, when you look at their legal position paper in relation to the Bill, their arguments are very sketchy.

Professor Alan Boyle: I have to say that I do not agree. I am Northern Irish. I left Belfast to go to Oxford in 1972, when the place was in civil war. On a daily basis, I could see bombs going off. I went into school one morning and the front door was riddled with machine gun bullets. I did not want to go back and my dad did not want me to come back. I recently went back to my school in Belfast and the place was like it was when I was a little boy. It was jolly, calm, peaceful and relaxed. It was what Northern Ireland used to be like. The transformation was unbelievable.

The Belfast agreement did what nobody had managed to do in 100 years: bring peace and semi-civilised governing. You will have experienced something somewhat similar yourself from your own political background. Bringing the communities in Northern Ireland together to give them the responsibility of ultimately governing themselves has been a nightmare for everybody in the past 100 years, but the Good Friday agreement has brought real progress. I have to say that I would not vote for or tolerate any politician who said that we should risk that wonderful achievement. In Northern Ireland's 100 years of lamentable history, the Good Friday agreement and power-sharing are the only decent achievements of the whole thing.

The first time my mum and dad went to vote was when, as a teenager, I persuaded them to vote for Terence O'Neill in his "Ulster at the crossroads" election, because he was trying to change the place and do what the Good Friday agreement does. He was brought down.

I cannot see any future for Northern Ireland without power-sharing, so I am absolutely with the Government if they want to do whatever is necessary to keep power-sharing under the Belfast agreement going. I would take that further: one of the fundamental problems with the protocol is that it was imposed on Northern Ireland without anybody bothering to ask the Northern Irish in any form whether they wanted it. It is a sort of colonial imposition. At some point, both Westminster and Brussels have to grasp that we have devolution in the United Kingdom. There are four nations with four Parliaments and four Governments, and Westminster needs to function in a way that brings them on board instead of dictating—

Lord Hain: What about my specific question on the legalities?

Professor Alan Boyle: The objective seems to be one that is supported by the protocol. It is there in the preamble to the protocol; it declares that part of its object and purpose is to support power-sharing under the Belfast agreement. That is fundamental to interpreting Article 16. You cannot extract Article 16 from the context, and the context is the Belfast agreement, and the Belfast agreement is power-sharing. That is why I

think what the Government are doing is lawful. That is what I would say if I had to stand up and argue the point: it is that object and purpose that will be crucial.

You could ask whether the Government are going too far. I have considered that. Here is the difficulty: we are trying to get the DUP to go back into office. I am not the DUP and I have no contact with it. I do not know what its terms are for going back into power-sharing—somebody would have to ask it—but I can only assume that what is in the Bill reflects what the DUP has said will bring it back into power-sharing. I would much rather that the Northern Irish parties got together and decided for themselves what the right outcome should be.

Lord Hain: We all would.

Professor Alan Boyle: That is the ultimate solution. My wife drew my attention to some article or speech by the new Prime Minister today. She seems to want something not dissimilar from that. If that is her thinking then she is right but politicians in London and Belfast, and to some extent Brussels, have to get together to come up with a solution that they can all agree on, otherwise it will collapse again. There is no point in the UK and Brussels coming up with yet another dictated solution, otherwise the Northern Irish will bring that down.

Q16 **Baroness Goudie:** Professor Elliott, what is your assessment of the EU's response to the publication of the Bill, including the recommencement of paused and the launching of new infringement proceedings? Further, what remedies is the EU likely to pursue, and what would the consequences be should it do so?

Professor Mark Elliott: It is important to remember that the Bill is only a Bill at this stage. An argument has been advanced that merely to promote the Bill is a breach of the good faith requirements laid down in Article 5 of the withdrawal agreement, but the fact that the enforcement action has been undertaken in the light of the Bill is an example of its wider political implications.

The political wisdom and diplomatic niceties of whether it is sensible for the EU to proceed in that way and how it might be sensible for the UK to respond is, again, beyond my remit as a constitutional lawyer. All I would say is that, if the UK signals its willingness to play fast and loose with its obligations under the withdrawal agreement, it can hardly be surprised if the European Union responds in this kind of way.

That raises a broader point, which is that this raises significant wider and reputational issues for the UK. It will inevitably shape how other actors on the international stage deal with the UK. If it is the case, as Professor Boyle has said, that all this can be covered under Article 16, then that puts a different complexion on things, but I go back to my earlier point that Article 16 not only has not been invoked but requires a process to be gone through that the Government have so far shown no interest in

engaging in. They cannot really complain that the EU has chosen to avail itself of legal processes that the agreement provides for.

Professor Alan Boyle: The infringement proceedings are because the protocol is still in force. We have not derogated yet, so obviously we are in violation of it. Again, I come back to the point Professor Elliott made: why have we not already deposited our notice of derogation? That would get us out of any future proceedings.

Some people have suggested that the EU might challenge the Bill itself. I can see no basis for doing so. One comes back to Article 16: if we are acting lawfully then there is nothing the EU can do. It cannot suspend scientific co-operation or the trade and co-operation agreement, or impose any other kind of sanctions. This is all covered in the ICLQ article that I cite in my text. The author of that has been through this issue in considerable detail and looked at it in the context of comparing it with other trade agreements. The fundamental point she makes is that there is nothing the EU can do unless we are acting unlawfully. If we were acting lawfully and the EU tried to impose sanctions, it would be acting unlawfully. We would not be breaking international law; it would be.

The Chair: That takes us on to Article 16.

Q17 **Lord Godson:** Indeed. My curiosity was piqued by Professor Elliott's contribution. If I might deviate a little from the batting order, you referred to how this whole discussion would affect how actors viewed the UK in the wider international context. I want to be clear on which actors you were referring to so that the committee has a full understanding.

Professor Mark Elliott: I had in mind most immediately the EU itself, but I also had in mind other states with which the UK may want to enter into treaty relationships. My point is that, as things currently stand, the Government have signalled their intention to depart from the protocol and the treaty obligations in it, and to ignore the mechanism laid down in Article 16 for dealing with issues of this nature.

They have instead relied on an argument that Professor Boyle and I agree is entirely untenable, and that almost any lawyer you talk to thinks is entirely untenable, based on the international law doctrine of necessity, which clearly does not apply here. The picture it paints is of a Government who are willing to pay relatively little attention to their international obligations and to dispense with treaty commitments when they feel that that is politically expedient. Just as a commercial party may look at a commercial counterparty that plays fast and loose with its contractual obligations and think twice about contracting with it, other states will be aware of the stance the UK has taken on this matter.

Professor Alan Boyle: Very few treaties have derogation provisions in them. The European Convention on Human Rights does—indeed, we have successfully derogated in relation to Northern Ireland in the past—and GATT does, but they are most unusual. Pacta sunt servanda, but what is the pactum? Article 16 is part of the pactum and, if we are complying

with it, we are not breaking our treaty obligations. At the House of Commons committee, someone put the proposition, "Would we not lose our reputation for complying with international law?", to which I had two answers. First, we would be complying with international law if what we did was justifiable under Article 16. But I also pointed out that we do not have a reputation for complying with international law—we invaded Iraq in violation of the UN charter. The General Assembly has condemned us twice in the past 20 years for violating our treaty obligations.

Q18 Lord Godson: Are you with Professor Elliott on the whole question of necessity? Do you agree with his view on the UK Government's invocation?

Professor Alan Boyle: Yes, I entirely agree. I have had the same conversations with international lawyers, and they all laughed. I can absolutely see where they are coming from, because it does not fit the parameters of the principle as set out by the International Law Commission. On protection of vital interests, yes, I can see that that fits. But there are problems if you look into the commentary. There is the foreseeability of the collapse of power-sharing. Obviously, the negotiators of the protocol foresaw that, and with Article 16 there, why would you want to rely on necessity? If I were the arbitrator, the first question I would ask counsel is, "Why are you relying on necessity and not on Article 16?". At that point, counsel would have no option but to abandon the necessity argument. Doing it that way just does not work.

Q19 Lord Hannan of Kingsclere: I have a supplementary question for Professor Boyle, but Professor Elliott is very welcome to come in. In response to the point you just made about Article 16, I think the Government would say that it was insufficient, that it did not build on a solid foundation—the legal framework they want for the dual regulation, the red and green channels and the new system of arbitration—and that therefore those things would be open to legal challenge unless there was primary legislation. Would you be kind enough to address that point?

Professor Alan Boyle: Yes, but that does not mean the challenges would win. I am no expert in trade regulation, but I thought what they had done was a reasonable attempt to try to satisfy the EU's concern for its internal market. The protocol has two purposes: to sustain the Belfast agreement and to preserve the EU's internal market. As I read the Bill, it is trying to balance both those objectives. Whether it will do so successfully over time, who can tell? But there is a consultation procedure and a joint committee. If the EU is worried, it can derogate or bring legal proceedings, but there is an assumption that the parties will co-operate.

Lord Hannan of Kingsclere: Do you think that the things proposed in this legislation could have been done under Article 16 and that it would have been a sufficient mechanism?

Professor Alan Boyle: Yes. A derogation notice would say more or less what is in the Bill. I cannot guarantee that for everything. I would be a

dumb lawyer if I were to say I could guarantee that everything would be hunky-dory—but fundamentally the architecture of the Bill sets out, as I see it, five derogations, and I think they can all fit with the objective of restoring power-sharing in Northern Ireland and dealing with the societal difficulties.

Lord Hannan of Kingsclere: Professor Elliott, do you concur that the effect of the Bill could have been done under Article 16?

Professor Mark Elliott: My assumption had been the one you outlined at the beginning of your question to Professor Boyle: that a potential reason why the Government had chosen not to go down the Article 16 route was that they were not confident that Article 16 would cover the full range of things that they wanted to do. That might be in terms of the extent of the derogations, but it might also or instead be, as I said in answer to previous questions, that Article 16 is an ongoing process, not a magic wand that gets you out of jail free as soon as you invoke it. I refer to Annex 7 to the protocol, which lays down the process. It is not that once you exhaust the process you can derogate. The position is that there has to be consultation every three months, for instance, in an ongoing process.

The general tenor of Article 16, as I read it, is that departing from the protocol is not just an exceptional course of action but that it is implicitly assumed to be a temporary set of circumstances pending the stabilisation of whatever issues triggered its application in the first place. So I do not disagree with Professor Boyle that the language of Article 16 provides significant scope for doing things of the kind that the Bill envisages. I suppose the attractiveness to the Government, if the argument of using necessity worked, is that it is more of a “get out of jail free” card. Once you have shown that that hurdle has been cleared, you do not have these complications and ongoing process that Article 16 envisages.

Professor Alan Boyle: I fully agree with that. I will add only one small point, but it is important. One might ask whether everything in the Bill is necessary for restoring power-sharing in Belfast. I cannot answer that; maybe the DUP can. That is where I think there is a weakness. But also, let us not pretend that we do not read the newspapers. What the newspapers say is that there are Brexiters in the Conservative Party who have wanted things to be in the Bill that may not be necessary for the restoration of power-sharing. There you have a problem. How can I or any other counsel stand up in an arbitration and defend those bits of the Bill if they are not necessary for the restoration of power-sharing? Answer: I could not. So you have to ask whether these derogations are necessary. It would be interesting to hear from the DUP at some point—not the Members here, unless they have a brief to do so. At some point, the leader of the DUP might want to rise to this challenge and say what he wants the Government to do. There is also the question of how else you are going to bring about power-sharing, unless you do something.

Q20 **Baroness O'Loan:** To some extent we have been discussing this for quite a while, but in general what are the legal implications of the

approach in Clauses 2 and 3 of the Bill that remove the effect of excluded provisions of the Northern Ireland protocol in UK law and connected parts of the withdrawal agreement?

Professor Mark Elliott: Clauses 2 and 3 are pivotal. They are key to how the Bill operates because they provide for the concept of excluded provisions of the protocol, and they tell us what it means in domestic-law terms for a provision to be an excluded provision. Clause 2 in particular, very cleverly, carefully unpicks all the things that I outlined earlier. As I explained at the beginning of the session, Article 4 of the withdrawal agreement itself not only requires the UK to give effect to the protocol and the agreement but to give them a particular kind of legal effect by reimporting these EU law concepts of direct effect and primacy. That means that, at the end of the day, if a provision of the agreement or the protocol were to be found inconsistent with an Act of Parliament, a domestic court would be required to give effect to the protocol or the agreement in preference to the Act of Parliament, just as courts used to have to do in relation to EU law. All of that is provided for in Section 7A of the European Union (Withdrawal) Act 2018.

Effectively, Clause 2 of the Bill removes all that machinery from parts of the protocol that are designated by the Bill, or by Ministers using delegated powers under the Bill, as excluded provisions. As soon as a provision becomes excluded by the Bill or by Ministers, none of those special legal consequences applies and Section 7A of the withdrawal agreement Act falls away. That then becomes inconsistent with what Article 4 of the withdrawal agreement requires—subject of course to the question of whether or not the withdrawal agreement really requires that, because if we have derogated from it lawfully then it does not. Leaving that point to one side, though, it dismantles the special legal machinery that has been constructed to give the special legal effect that the agreement and the protocol need to have in domestic law.

Professor Alan Boyle: I agree with that entirely. You would have to do something about the primacy of European law. It is the same point with dispute settlement. If this ends up in the court of justice, they will say that the protocol is European law and therefore it has exclusive jurisdiction to hear the dispute, and they will ignore the arbitration provisions. They have done that with investment treaties. They did it with a law of the sea dispute between the UK and Ireland. The court of justice said, “We can’t have this as an arbitration. This is for us to decide”, although that was actually good for the UK because the arbitrators threw the whole thing out. We have to reach into the heart of the EU’s legal architecture here for the whole thing to work. Professor Elliott has set that out perfectly, and I entirely agree with him.

Q21 **Lord Empey:** On the question of removing the requirement for Northern Ireland to apply EU law on customs and goods regulations for qualifying movements of UK or non-EU-destined goods and introducing a dual regulatory regime for goods, what are the legal implications of the Bill’s provisions for those two areas?

Professor Alan Boyle: I wonder if I could leave that to Professor Elliot. He may know more about it than I do.

Lord Empey: Professor Elliott, you have been passed the ball whether you want it or not.

Professor Mark Elliott: I am not sure I do know more about it. I would not want to go beyond what I can talk about with authority so, if it is acceptable, I will make a more general point. It seems to me that those are significant changes to the protocol, not marginal ones. There has been some disagreement about that. I was looking at what different people had said about this before coming along today. On the one hand, for instance, the former Prime Minister said when the Bill was first published that it was a relatively trivial set of adjustments. In contrast, my Cambridge colleague, Professor Catherine Barnard, a professor of EU law, has said that the Bill drives a coach and horses through the protocol. I am not fully qualified to say exactly where things lie between those two views, but it seems difficult to justify the view that the former Prime Minister adopted that it is merely a trivial set of adjustments. The Government's position, whereby they claim that the protocol as it stands is causing problems that are so grave as to allow them to invoke the principle of necessity, sits in tension with the narrative that these are just minor technical changes. So, in terms of the scale of the changes compared with what the protocol requires, they seem to go well beyond the way that the former Prime Minister described them.

Lord Empey: Are you saying or suggesting that the Government were acknowledging when they produced the Bill that their initial negotiating strategy over the withdrawal agreement had perhaps not been as good as they felt or said it was at the time?

Professor Mark Elliott: Again, I am not sure I am equipped to comment on that. What I can say is that, in thinking about whether the doctrine of necessity could apply, one of the criteria that would have to be satisfied is that the state invoking it, the UK, not be responsible for the situation that it was now trying to address. The Government's argument in their legal position paper argues that that condition is met because, they say, the protocol is being applied in a different way from what was anticipated. However, if you look at official publications by the Government in relation to the EU withdrawal agreement, including the Government's own impact assessments, it seems difficult to justify the view that the Government have somehow been caught entirely by surprise by the situation they now find themselves in. That is a long-winded way of saying that my answer to your question is perhaps yes.

Lord Empey: Could I tempt Professor Boyle to make a comment on that?

Professor Alan Boyle: In a sense, I will comment by asking the question that I asked the economists outside the Room. You will have read in the paper that steel imports to Northern Ireland will have 25% tariffs. I did a quick Google as to whether Harland and Wolff is still in business, and it is; it is not building supertankers, but it is into heavy

engineering and so on, so it needs steel—and the aircraft industry needs aluminium. So what will tariffs do to industries that historically have been part of the Anglo-Scottish economy? It is certainly not going to help them. If these provisions take away EU customs duties, I should have thought they would be delighted. That is more or less what I think the economists said, but if they said something different then maybe I misunderstood them. That is possible.

Q22 Lord Dodds of Duncairn: I want to tempt both of you to comment on a couple of other provisions, if you would care to do so, relating to state aid and the application of VAT, which are sometimes not talked about in relation to the protocol—it tends always to be about trade, customs, SPS rules and so on. The fact is that Northern Ireland is subject to the EU's state aid regime. For instance, our companies in Northern Ireland could not benefit from the reduction of 5% in VAT on sustainable energy announced by Rishi Sunak some months ago. There is provision in the Bill to take Northern Ireland out of the EU state aid rules altogether and to give Ministers powers in relation to VAT. I wonder what your thoughts are on those particular provisions.

Professor Alan Boyle: If I was a Northern Irish politician, I would absolutely want those provisions to be eradicated. You have only to look at the Northern Irish economy. In the aircraft industry, Short Brothers was, for many years, sustained by state aid. The shipyard was sustained by state aid. I would hate to have to run the Northern Irish economy if we could not ask Westminster to come up with some subsidies every so often. You absolutely need to get out of the state aid controls. I am only a lawyer, but I would have thought, given Northern Ireland's economic history, that it would be madness to remain subject to state aid provisions. If I were a Northern Irish politician of any political persuasion, I would want a derogation on that precise point.

On VAT, I have not thought that one through, but would you want differing VAT rates in Northern Ireland from everywhere else?

Lord Hain: Sorry to interrupt, but the question is about the legal implications of it, not so much the political ones.

Professor Alan Boyle: I think you come back to the same question: is this part of the price you have to pay to get the DUP back into power? I wish I could say not the DUP but all the Northern Irish parties; I wish they would all get together. But suppose all three of them got together and said, "You must derogate under Article 16 otherwise we are going to collapse power-sharing". I would say that they were entitled legally to that view, because if the protocol is destroying power-sharing then something needs to be done about it. As I look at it, from reading the newspapers, it is a reasonable conclusion to say that it is destroying power-sharing.

Lord Dodds of Duncairn: The Belfast agreement is the prior treaty in all this. As Professor Boyle and I think Professor Elliott said, upholding it is referenced in the protocol. None of the institutions of the Belfast

agreement at Stormont, east-west and north-south, are operational, so it is hardly protecting the agreement. Professor Elliott, maybe I can tempt you to talk about the legal implications of the state aid and VAT provisions and how they fit within the Article 16 approach, if that is the basis that the Government use.

Professor Mark Elliott: I do not think I can usefully add to what Professor Boyle has already said. The extent to which they fulfil the criteria laid down in Article 16 is, in a sense, not a purely legal question; it would depend on an assessment of the economic implications of those provisions, which I do not really have any special expertise on.

Q23 **Lord Godson:** I want to pick up on Professor Boyle's point so that I understand it absolutely correctly. You said you disagreed with the idea that Article 16 was a violation of international law. I am trying to recall what you said in your opening statement.

Professor Alan Boyle: I think what I was talking about—I am sure that the chair will correct me if I have got it wrong—was that some people have said that the Bill is a violation.

Lord Godson: That is it. Would you say where you would dissent from some of the commonly expressed reservations of that kind in a little more detail?

Professor Alan Boyle: I have read quite a lot of politicians making that sort of statement and I do not understand where they are coming from at all. None of them has set out a legal argument, presumably because they do not have one; they are probably not lawyers. There is no legal argument for saying that the Bill is a violation of international law. What it does might or might not be a violation of the protocol or the withdrawal agreement, but that simply takes you back to Article 16: if it is justified by Article 16 there is no violation of the protocol or of international law and we are acting perfectly lawfully. No matter how often politicians in Brussels or elsewhere jump up and down, we are still acting lawfully, and they would be acting unlawfully to do anything else. I think I read that the UK has started proceedings against the EU for squeezing us out of the scientific co-operation programmes. We are right to do that because the EU has no right to take any kind of sanction against us.

This is probably obvious, but this really is not a legal problem at all; it is a political one. The people in Brussels do not want us to do it, the man in the White House does not want us to do it—surprise surprise—but they do not have a legal argument that they can use. Theirs is a policy argument. Our response should be that we are entitled to do it under Article 16. Nevertheless, it is sometimes wise not to push legal rights to the full. Politicians will have to continue to have relations with the EU, the Americans and the Irish, so they need to think carefully about where they see this all ending up.

At the same time, how else do you put power-sharing back on the road? You could call in Senator Mitchell again; he is still alive but he is now very

elderly and probably has had enough of the Northern Irish. It is not an easy challenge, but to my mind—I emphasise here that I am Northern Irish—restoring power-sharing is infinitely more important than our relations with the EU or the White House. The White House is not going to bomb us—I think. This is not a trivial objective; it is very important.

Q24 **Lord Thomas of Gresford:** Article 16 is part of the architecture of the protocol; it is the pressure valve.

Professor Alan Boyle: That is a very good way of putting it, yes.

Lord Thomas of Gresford: It is designed to resolve disputes through a process set out in Schedule 7. It is an ongoing process designed to reach agreement, but the Government have not invoked it.

Professor Alan Boyle: I do not know why.

Lord Thomas of Gresford: I am going to suggest a reason: at the end of the Article 16 process, in the event of a disagreement on the law you go to the European Court to determine it.

Professor Alan Boyle: No—with respect, you go into arbitration.

Lord Thomas of Gresford: But from arbitration you go to the European Court.

Professor Alan Boyle: No, that is not the way it goes. I checked this. Any dispute over the interpretation or application of the protocol goes to arbitration, which is binding on both parties—and the essence of arbitration is that there is no appeal.

Lord Thomas of Gresford: Well, there you are. I had believed that the reason why the Government will not use this pressure valve procedure is because the European Court was at the end of the road.

Professor Alan Boyle: Then someone has misread it. What is true is that the Court of Justice itself would probably say that it had jurisdiction over the dispute, so it could be that the EU would go to the Court of Justice and the Court of Justice would say that it was EU law and that it had jurisdiction, but that is why we derogated. That is why our derogations exclude the Court of Justice. We need to keep hammering on at that: any dispute about interpretation or application of the protocol, which means an Article 16 dispute, has to go to arbitration, not the Court of Justice, because we will lose in the Court of Justice; it would simply say, "It's EU law and for us to decide". We do not have a judge there any longer.

Lord Thomas of Gresford: Well, precisely. Professor Elliott, do you have a view on this?

Professor Mark Elliott: The potential role of the court of justice may be significant, not because I am disagreeing with Professor Boyle but because one of the respects in which the Bill seeks to depart from the protocol is in relation to the jurisdiction of the court of justice itself.

Clause 13 says that for the purposes of the Bill any provision of the protocol or withdrawal agreement is an “excluded provision so far as it confers jurisdiction on” the court in relation to the protocol or “any related provision of the ... withdrawal agreement”. As I read it, this means that the court is not just being denied, for domestic purposes, jurisdiction over parts of the protocol that have been excluded; it is being denied jurisdiction over other parts of the protocol as well.

The reason I highlight this point again, as the background of the question that you asked Professor Boyle, is that it seems to me that trying to exclude the jurisdiction of the court in relation to parts of the protocol that have not themselves been identified by the UK as so problematic as to require being treated as excluded provisions is very difficult to justify, not just under the international law doctrine of necessity but by reference to the criteria in Article 16. Earlier, Professor Boyle considered the question of whether all the respects in which the Bill seeks to deviate from the protocol could be shown to be necessary for the purposes of Article 16. That seems to be a respect in which the Government would be on particularly shaky ground.

Lord Thomas of Gresford: Do you agree with Professor Boyle that the European court would have no part to play in anything to do with Article 16, such as to determine a legal point involving EU law that arose in the arbitration which is part of the process?

Professor Mark Elliott: I defer to Professor Boyle on that point; he has much greater expertise on this than I do.

Professor Alan Boyle: It rather depends on the arbitrators, but I entirely agree with what Professor Elliott said about the court of justice. That was a very helpful answer, if I may say so. He has addressed issues that I have no expertise in but yes, he is right. How can you say that the derogation—the one that Professor Elliott has been talking about—is necessary for the restoration of power-sharing?

That looks to me very much like a Brexit-ish derogation, which would be much more difficult to defend, but the proposition that disputes on the interpretation or application of Article 16 should go to arbitration is much easier to defend.

There is a long history of the EU refusing to arbitrate under investment treaties or the law of the sea convention, trying in effect to torpedo an agreed dispute settlement regime; then you have a problem. I do not know where you go if the EU tries to do that here.

Lord Thomas of Gresford: But you said to me that the EU would apply to the European court and that the UK would be in a difficult position if it did.

Professor Alan Boyle: Yes, I suspect it would.

Lord Thomas of Gresford: In what circumstances would the EU apply? When the arbitration failed or when a point of law arose?

Professor Alan Boyle: That is harder for me to answer. My expectation—my feeling—is that it would, but I cannot really answer that. I do not know whether Professor Elliott wants to.

Lord Thomas of Gresford: It would not make an application unless the European court had jurisdiction.

Professor Alan Boyle: That is simple: it would say, “This is all EU law and we have exclusive jurisdiction—arbitrators do not”. That is what it has said in investment cases and in the law of the sea case involving the UK and Ireland. They—the Commission and the court—have done that already in the UK/Ireland MOX plant case. I know because I was on the UK team.

Lord Thomas of Gresford: And we won.

Professor Alan Boyle: Actually, we won because, since the court had exclusive jurisdiction, the arbitrator said, “We cannot arbitrate”. Now, that is a risk here: we could go to arbitration and the EU might turn up and say, “Oh no, the Court of Justice has exclusive jurisdiction—this is not for the arbitrators”, and the arbitrators might throw up their hands and walk away.

On the other hand, there is a recent arbitration on Rockhopper oil, which I think operates from Edinburgh. Rockhopper oil had a concession to drill on the Italian continental shelf for oil and the Italians, in deference to their climate change obligations, have said, “No more drilling on our continental shelf”. So they revoked Rockhopper’s concessions and the arbitrators rejected the EU argument, as far as I can tell. It is a long case and I have not yet digested it in detail but, on a quick reading, they rejected the EU argument that it had exclusive jurisdiction. It may be that the tide is turning against the EU but there is a risk. Arbitrators might say, “The Court of Justice has exclusive jurisdiction”.

Lord Thomas of Gresford: This is in an Article 16 situation.

Professor Alan Boyle: Even in an Article 16 situation, yes.

Lord Thomas of Gresford: So it is possible that the European Court could be the ultimate decision-maker under Article 16—

Professor Alan Boyle: It is possible. You might think it bizarre that it finds itself the ultimate arbitrators in a law of the sea dispute; well, it did.

The Chair: Let us see whether Professor Elliott has anything to say on this.

Professor Mark Elliott: No, I do not want to add to what Professor Boyle has said on this point.

The Chair: Thank you both very much. You have been extremely helpful to us and we are very grateful to you for giving evidence this afternoon.

Professor Alan Boyle: It has been a pleasure.