



HOUSE OF LORDS

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: enforcement and dispute resolution

Tuesday 27 February 2018

10.45 am

[Watch the meeting](#)

Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cromwell; Lord Judd; Baroness Ludford; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 4

Heard in Public

Questions 30 - 37

Witnesses

I: Professor Graham Gee, Sheffield University and Policy Exchange's Judicial Power Project; Professor Dr Christa Tobler, Institute for European Global Studies, University of Basel, Switzerland; Raphael Hogarth, Institute for Government; Professor Valsamis Mitsilegas, Queen Mary University of London.

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witnesses

Professor Graham Gee, Professor Dr Christa Tobler, Raphael Hogarth and Professor Valsamis Mitsilegas.

Q30 **The Chairman:** Welcome. It is very nice to see you. There are some familiar faces among you. You have travelled a long way. Some members of the Committee are missing because of the conditions where they live.

Welcome to this evidence session on enforcement and dispute resolution as we leave the European Union. We are delighted that you have all come to join us, and we are grateful to you for giving us your time. This session is open to the public. A webcast goes out live and is subsequently accessible on the parliamentary website. A transcript will be taken of your evidence, and it, too, will be put on to the parliamentary website. A few days from now, you will receive a copy of it and you will be able to correct anything in it that is wrong. If you want to add to or amplify the assistance that you are giving us, please submit it to us in written evidence. We will be happy to receive it.

First, please introduce yourselves in turn for the record and say briefly who you are, what you do and what expertise you bring to our discussions.

Professor Dr Christa Tobler: I am professor of European Union law at two universities: the University of Basel — at the Europainstitut (German name) / the Institute for European Global Studies (English name) — and the University of Leiden in the Netherlands.

Professor Valsamis Mitsilegas: I am professor of European criminal law and global security at Queen Mary University of London. In an earlier life, I worked for this Committee, so it is great to be back.

The Chairman: You did, and you were a very reliable and good source of advice on the law. Thank you. It is lovely to see you again.

Raphael Hogarth: I am a research associate at the Institute for Government, an impartial think tank that works to make government more effective. I wrote a research paper for the institute entitled *Dispute Resolution after Brexit*, which was published last October.

Professor Graham Gee: Good morning. I am professor of public law at the University of Sheffield and a member of Policy Exchange's Judicial Power Project. My interests lie in domestic constitutional law, with a special focus on the constitutional position and independence of the domestic judges, so I have a slightly different perspective and less expertise, I dare to venture.

If I may say so, I think the Committee's inquiry so far has cast much needed light on vital but terribly thorny questions, and I very much welcome it.

Q31 **The Chairman:** We are trying to tease out the things that are often glided over in public discourse and digging down into the more difficult

issues, so we will value your contribution to it. I know that many members of the public want some of these questions answered.

I will start by asking about the jurisdiction of the Court of Justice of the European Union. As everyone knows, a red line has been drawn around the European court, and there is clarity in the Government's position that the court will fall away in relation to the United Kingdom post Brexit. That has been the Government's position from the outset.

Our first question is therefore: what, in general terms, are the most workable alternatives to the European Court of Justice after we leave the European Union?

Professor Dr Christa Tobler: In my opinion, whether or not there is a realistic alternative to the European Court of Justice depends on the content of any future agreement that the UK might conclude with the European Union, be it the withdrawal agreement or any future trade agreement, because we in Switzerland have learned that as soon as there is EU law in such an agreement—elements that are taken from EU law—the European Union tends to emphasise its doctrine of the autonomy of the European Union legal order.

As you know, that means that the Court of Justice must be the ultimate court to rule on the meaning of that law. We have found that the European Union has become increasingly less flexible on that matter. We used to have agreements that were nothing like that; where the Court of Justice had no role. Our agreements have developed since the 1960s, even the 1950s. These days, however, the European Union is insisting that there is a role for the European Court of Justice in important matters.

That is the main issue that you, too, are faced with: will you have EU rule in those agreements or not? It seems clear to me from what I have read that in the transitional period in any case you will rely heavily on EU law, so it could be very difficult to get away from the Court of Justice in that respect.

The Chairman: But you are describing a shift, with the European Union becoming more—

Professor Dr Christa Tobler: Rigid.

The Chairman: —emphatic about the role for the European Court of Justice in relation to particularly to serious matters. What was the position before that shift? You said that you used to have agreements and so on. What happened if there was a dispute about any of those agreements? Who resolved it before?

Professor Dr Christa Tobler: We have more than 130 agreements these days, which, as I said, have developed gradually since the 1950s, and different agreements from different times also reflect a different level of institutional mechanisms. In general, we have a very minimal system of institutional elements in those agreements.

When it comes to dispute settlement at the highest level between the parties to the agreements, so far we have had a joint committee, only and exclusively, dealing with these matters; there is no element that gives the European Court of Justice a certain role. This issue is being debated at this very moment in negotiations between Switzerland and the European Union in relation to a number of important market access agreements only, not in relation to all our agreements. We find it an extremely difficult issue, I must say.

Lord Anderson of Swansea: You mention your joint committee. Is there any other way of finessing the role of the court that might satisfy some of those in the UK who are very sceptical of the Luxembourg court, such as having a more indirect relationship?

Professor Dr Christa Tobler: What has been put on the table in the negotiations between Switzerland and the European Union at the moment, according to media reports, is the Ukraine model, which you find in the EU association agreement with Ukraine and which involves an arbitration system for the settlement of disputes. If the arbitration panel is faced with an issue that involves interpreting EU law elements in the agreement, it is obliged to turn to the Court of Justice for an interpretation of the meaning of those provisions, an interpretation that is binding on the arbitration panel. The Court of Justice has indirect jurisdiction there; it does not formally decide on the dispute, because the decision goes back to the arbitration panel. However, it does decide, in a binding manner, on the interpretation of the law.

Even that kind of element is difficult to explain to the general public, who do not find it easy to distinguish between direct and indirect jurisdiction. Our Government have tried to make this clear to the public for a number of years—not very successfully, I am afraid. It is very, very difficult to explain.

The Chairman: You have described the process under the Ukrainian model, which is an arbitration system. There is talk of that operating for the UK as well. You say that in Ukraine, if there is a difficult issue of law there is a reference to the European Court of Justice, which will deal with that issue of law, and then it goes back to the arbitration system. You mentioned how difficult it is for that to be understood more widely. Does Ukraine have any representation on the European Court of Justice for those purposes?

Professor Dr Christa Tobler: Absolutely not. Quite honestly, it is unthinkable that a third country has representation on the Court of Justice. That is what makes an alternative model, namely the EFTA Court, so attractive from a certain perspective. But you have to understand that, from an EU law perspective, the EFTA Court cannot take a role in dispute settlement at the highest level between the parties to an agreement.

The European Union cannot and will not agree to that. The only possible role for the EFTA Court is in other kinds of procedures, such as a

preliminary ruling procedure, an infringement procedure, a damages action or something like that.

The Chairman: At a lower level.

Professor Dr Christa Tobler: Exactly.

Lord Anderson of Swansea: And limited to trade matters.

Professor Dr Christa Tobler: To trade matters, exactly—companies that have a problem and go to a court at the domestic level, which makes a reference to the EFTA Court in the EEA system. That is if you are in Norway, Iceland or Liechtenstein, and only for these kinds of things. The EFTA Court is not a realistic option when it comes to dispute settlement in the narrower sense of the term, meaning disputes between parties to the agreement.

The Chairman: Perhaps you might give us your view on this, Professor Mitsilegas, going back to my original question. What would be the most workable alternative, in your view?

Professor Valsamis Mitsilegas: I want to add a different dimension to Professor Tobler's very complete answer. It depends on the agreements, obviously, and on whether you have one overarching agreement or sectoral agreements. We saw last week that Theresa May is very interested, for example, in having an EU-UK agreement on security. This is an example of an area that the EFTA Court would not cover.

The Chairman: The EFTA Court does not deal with security matters. Things like the European arrest warrant and so on are absolutely not covered by the EFTA Court—

Professor Valsamis Mitsilegas: Exactly.

The Chairman: —so there is talk of some other mechanism being used in relation to those matters, which involve individuals' rights; you are talking about an arrest warrant being used to arrest an individual and to take them from one country to another, and there are serious considerations relating to the rights of the individual. So the argument that will be made is that there is a need for that to be dealt with not by arbitration but by a court. What is your answer to that?

Professor Valsamis Mitsilegas: The current precedent is the agreement on surrender between the EU and Norway and Iceland. They are both full Schengen members, which is the qualitative difference between the UK and these countries. There is a soft dispute resolution mechanism, which is similar to what we have heard so far, which is between the two parties at executive level, and a clause stating that both the courts of Norway and Iceland and the European Court of Justice should regularly review the evolution of case law in the parties, but without anything more concrete than that. As you said, things are more complicated in this field, because these decisions involve individuals, and we are facing the issue of individual remedies.

In addition to the constitutional questions, there is an issue of speed. We know that the Court of Justice has developed fast-track processes for when someone is in detention, for instance, so it should not take two years for the court to come up with an answer. These will be big challenges for the UK in its future relations.

I will make a broader point that is not only about dispute resolution in an agreement. If the UK has a relationship with the EU, the Court of Justice will remain relevant whether we want that or not. For example, if there is an EU-UK security treaty and the European arrest warrant continues in some shape or form, and, for example, a European arrest warrant is issued by a British authority to a French authority and will be executed under this agreement, nothing prevents the French judge sending a preliminary reference to the European Court of Justice on the compatibility of this request with EU law.

The Court of Justice therefore remains relevant, and its ruling will have a direct impact on the operation of the EU-UK agreement. We had a recent judgment from the Court of Justice called *Petruhhin*, which concerns an extradition request from Russia to an EU member state, or from a third country. This has gone to the Court of Justice, which interpreted the issue in accordance with EU law and said that, in the present case, surrender would be contrary to EU law.

Whatever the shape of dispute resolution post Brexit, the Court of Justice will remain relevant for a number of reasons, and the substance of the case law will have a direct effect on the relationship between the UK and the EU.

The Chairman: The Institute for Government—your organisation, Mr Hogarth—and probably you as the author of the report, have argued against giving in to current European Union demands to give the European Court of Justice the final say over the withdrawal agreement. You argue that it would not be neutral in disputes between the United Kingdom and the European Union. Would you flesh that out for us? What concerns do you have on this issue? Is it a question of perception or an issue of substance?

Raphael Hogarth: In that paper we argued that the Commission's current proposals on the governance of the withdrawal agreement, as set out in a Commission position paper in July last year, were probably not in UK interests and would be quite unusual as governance arrangements for international agreement.

That position paper suggested giving the European court the role of interpreting the meaning of basically any dimension of withdrawal agreement, which would include things like the financial settlement. That seems like an unusual agreement: to have dispute resolution mechanism for an international agreement with representation from only one side of the agreement. That is not normally how international agreements of that kind are governed.

What we did not say in that paper was that the European Court of Justice should have no role in dispute resolution or that it should have no role in the governance, either of the withdrawal agreement or of the future partnership agreement.

On your question about what workable alternatives there are to the Court of Justice, we set out a number of options, which I can briefly outline.

The Chairman: Please do, because it would be really helpful, and our listening public really want to know. This issue was pretty thin when it was debated at the time of the referendum, so people want to know what it would look like. What would we have instead?

Raphael Hogarth: We identified five main options as an alternative to the Court of Justice. The first is to dock to the EFTA Court, which I imagine Professor Baudenbacher spoke about when he gave evidence here.

The Chairman: Yes, he did. The whole point about docking, for those who are listening for the first time, was that the EFTA Court, which deals with the EEA countries—Norway, Liechtenstein and Iceland—could provide a source for us to use, as needed, for these purposes, so that the personnel could be expanded, or whatever, and that Britain could be attached to it without following all the requirements of the EEA countries. It would be used by us even if we do not have the same arrangement with Europe that those countries have. That docking arrangement would basically make use of the court. Of course, it would depend on the court being willing to have us.

Raphael Hogarth: It would depend not just on the court being willing to have us but on the EU 27 and the EEA EFTA 3, potentially the EFTA 4, being willing to have us. That is certainly important. The EFTA institutions, at least as they are embodied in Professor Baudenbacher, have made it pretty clear that they are interested in the idea, but I have not heard much on it from the foreign ministries.

Docking has a number of obvious advantages, essentially in negotiability. Historically, the Court of Justice has been a little resistant to courts in its back yard interpreting rules of law that are identical to rules of EU law, as rules of EEA law are. This is a court with which the Court of Justice has made its peace, and it seems reasonably satisfied with the arrangement that it has for the EEA EFTA countries. Indeed, there have been reports that it has proposed the same arrangement for Switzerland; in other words, it has proposed to Switzerland that it could dock in the way that some people have said the UK could dock.

Obviously, there are potential political disadvantages to docking in that it might not be considered a clean enough break by those for whom taking back control is particularly important. Scholars debate the closeness of the relationship between the EFTA Court and the European Court of Justice. As you know, the EFTA Court, as it works under the current set of agreements, regards pre-1992 Luxembourg jurisprudence as binding and

pays due account of post-1992 Luxembourg jurisprudence, and in general treats the two bodies of case law in a similarly deferential way. That is one option: an obvious negotiability pro and a potential political con.

Another potential option is to create an EFTA-like court, thereby drawing on the experience of the EEA EFTA countries, and try to replicate the so-called two-pillar system that underlies that agreement. That is a system in which the EFTA Court is competent to adjudicate on cases that arise in the EEA EFTA pillar, but the ECJ is still competent to adjudicate on cases that arise in the EU pillar. If a Norwegian company thinks that it is being mistreated by the German Government, the fact that it is a Norwegian company does not mean that that will get heard in the EFTA Court; it could easily be heard in the European court.

If you were to try to replicate that two-pillar structure, you might try to create a UK treaty court to sit above the UK Supreme Court, the sole purpose of which was to interpret the UK-EU agreement when some uncertainty arose about it and there was a reference up from other UK courts.

You could also envisage a scenario in which we had some kind of a surveillance authority, similar to the EFTA Surveillance Authority, which could bring infringement cases against the UK Government in that court. If we were to copy the EFTA model closely, the only representatives on that court would be Brits. That seems like something that the EU 27 would be pretty unlikely to accept, because, as I put in my paper, it looks very much like the Brits marking their own homework. It also prompts the question, "If you're going to have a court interpreting this treaty that is just full of Brits, why do you need a new one? Why don't you just get your Supreme Court to do it?"

The Chairman: Design something new.

Raphael Hogarth: That is option 2.

Option 3, which has been floated at various times in public remarks by politicians, is the idea of a joint or bilateral court—a court with some representation from the UK, some representation from the EU, and potentially, in order to deal with the necessities of odd numbers, some representation from a neutral third party.

This obviously has major political pros in that it makes us look like equal partners and is a significant deviation from the status quo. But I very much agree with previous remarks that the appropriate dispute resolution mechanism depends very heavily on the content of the agreements that mechanism is used to interpret. If the agreements included rules of law that were identical to EU rules of law or even concepts of EU law, that kind of bilateral court arrangement is one that the Court of Justice and the EU 27 would find it very difficult to get behind, the reason being that we know that the EU is very protective of its legal autonomy, and if this bilateral court could interpret a rule of law identical in substance to EU law in such a way as would bind the EU institutions, that would somewhat

demote the Court of Justice, because the Court of Justice would in that case have to say, "We are interpreting this law, but the EU is bound by the interpretation given by that bilateral court". We know that something vaguely along those lines was tried in the first draft of the EEA agreement, and the Court of Justice rejected that idea in Opinion 1/91. That is option 3.

Option 4 is arbitration, which we discussed. Again, that depends on the content of the agreement. This is what ordinary free trade agreements do.

The Chairman: Absolutely. Just so that people know, arbitration is used the world over to resolve disputes between countries or between countries and governments, and so on. The problem is that it does not work successfully for other kinds of dispute, such as those involving individual rights. What is the answer?

Raphael Hogarth: That is one problem but possibly not the only one. Another problem is that some people worry that arbitration is not as good at promoting the rule of law as a court-based system, because it might be less transparent and less good at ensuring that the law is interpreted consistently across time.

The Chairman: It is about creating case law, which is—

Baroness Shackleton of Belgravia: It is about precedent.

The Chairman: It is about precedent.

Raphael Hogarth: Indeed. People debate the extent to which a system of informal precedent has grown around, say, the WTO dispute settlement system, which, although in WTO law is not referred to as an arbitration system, is what most people would recognise as an arbitration system. A lot of scholars think that some informal or de facto system of precedent has grown up around that system, but there is no de jure precedent in that system. The very nature of the beast is that you have a different set of adjudicators looking at every case. That means that they may take with them a different set of conceptual and legal commitments, values and the rest of it.

Baroness Shackleton of Belgravia: Is not one of the features of arbitration quite often that the parties want the outcome to remain secret? That is one of its attractions.

Raphael Hogarth: That is really up to the negotiators of your agreement. In so far as arbitration is a dispute resolution mechanism in, say, trade agreements, it is one that exists on paper and in the form that the negotiators want it to. So you could include in your treaty transparency requirements or the requirement that the arbitrators be allowed to accept amicus curiae submissions. You need not approach arbitration in the way you might approach it if you were taking a case through the Permanent Court of Arbitration or some body like that. You

could design it as you wanted it, and that would be up to negotiators. People have had that worry about the system in the past.

Arbitration, again, could fall foul of the legal autonomy of the Union. As we heard from Professor Tobler, one of the ways in which previous negotiators have tried to get around this is by bolting on the Court of Justice to the end of it, saying, "If a concept of EU law is involved in the case, the arbitration tribunal can refer the matter to the ECJ for a binding ruling". That is in the Ukraine agreement and in the association agreements with Georgia and Moldova. I think Moldova was for some reason singled out in the Government's future partnership paper last summer.

The final option, or approach, identified in my paper was dispute resolution by joint committee. As we have heard, that is in general the dispute resolution mechanism that has been used for EU-Swiss relations. The one thing I would add is that it is not only that the EU has been dissatisfied with that approach and, indeed, has halted further negotiations on market access while it tries to persuade the Swiss to adopt more robust institutional arrangements to translate ECJ case law into Swiss law. It is not just that there is a negotiability problem. There is also possibly a desirability problem. The nature of dispute resolution by joint committee is that disagreements can linger unresolved for a long time; there is no moment at which the case gets decided and everybody has to lump it, whether they like it or not. That obviously has potentially detrimental impacts on legal and business certainty.

Those five options are my survey of the realistic landscape.

The Chairman: It is a very helpful survey, and I thank you for it, because it helps to set the tone for the rest of these discussions this morning and for our questions to you.

Finally, some people say, "We want to bring back control. We want everything decided in Britain. We've got great courts of our own and we have our own Supreme Court. Why should we have any other courts deciding things?" They take a blanket position on that. Is that even feasible?

Raphael Hogarth: It would be extraordinarily unusual for a treaty between two countries or two international parties to be subject to governance arrangements in which only one side was involved in interpretation and adjudication.

The Chairman: It is marking your own homework, to use your expression. It would be an institution making its own decisions.

Raphael Hogarth: The EEA EFTA case is an interesting precedent in this respect. The gritty legal work of interpretation is done within the pillars, which is to say that the EEA EFTA states collectively mark each other's homework in that arrangement and the EU does not have to check the answers with a red pen. The relationship between the two pillars is

governed by joint committee; there are joint committees that bridge the EEA EFTA pillar and the EU pillar, and one of the jobs of the joint committees is to keep the development of that case law under review.

That is as close as any relevant agreement has got to a marking your own homework arrangement. But I emphasise that in that case there is still an element of external review for, say, the Norwegians, because an Icelander is going to be marking their homework, even if a German is not.

The Chairman: I am very conscious that I have not yet given you an operation to speak, Professor Gee, but I am also aware of the questions that others around this table want to ask. So I will ask Lord Polak to come in with his question and ask you, Professor Gee, to lead on it.

Q32 **Lord Polak:** I know that we are talking about enforcement and dispute resolution post Brexit, but from listening to all this conversation I think we need some dispute resolution now to sort these things out. I am not a lawyer, I want you to know, and I do not think this should be left to lawyers. You may remember Mohammed Ali and his boxing. There is a lot of sidestepping, and nobody has actually laid a blow, but everybody is negotiating in the public domain, which is unhelpful because people become intransigent and dig their heels in. Certainly the EU side seems not to realise that change is a practical thing; it is new, it is different, nobody has left before, and we will have to deal with these things. Only when there is a proper sit-down discussion can we move forward, because realistically something new is happening.

However, I go back to the problem for the British Government, who have talked about taking back control, as the Lord Chairman mentioned. We are going to take back control. This is what the popular people who are listening and watching and who are not lawyers want. We have to come up with a resolution. Raphael, your five things are very much there. It will be a variation on a theme, but it has to have the two sides to be able to do it. Somehow the EU will have to come along, or I think it will, and say to Britain, "Okay, you'll be able to have this and have that".

Saying no, no, no to everything will not work, so how will we help the British Government to take back control?

The Chairman: Professor Gee, I would like you to come in, because I have heard you speak on constitutional issues and this goes to constitutional matters, too, so I am interested in your view.

Professor Graham Gee: Thank you, Lord Chairman. It is a good question, Lord Polak.

The conversation so far has already demonstrated that this is wicked problem—wicked in the sense that it is resistant to ready resolution because of multiple competing, and at times apparently wholly incompatible, requirements. The UK's red line, according to the UK Government, is that the UK will not submit to the 'direct jurisdiction' of the Court of Justice, allowing some ambiguity as to indirect jurisdiction.

The EU's red line, on the other hand, is that for reasons to do with preserving the autonomy and homogeneity of the EU legal order, the EU envisages a continuing role for the Court of Justice supervising the UK's compliance with any international obligations that arise under any treaty agreed between the EU and the UK.

The Lord Chairman tried to tempt Mr Hogarth to discuss the EU's red line and elaborate on the paragraph in the Institute for Government's very valuable paper on *Dispute Resolution after Brexit*. I wonder if I can elaborate on that. The EU's red line is at first blush an extraordinary and unprecedented requirement—extraordinary because it runs counter both to international practice and to the EU's own general practice.

The international practice is that international treaties commonly provide for dispute resolution through binding adjudication, but sovereign states generally do not agree in an international treaty to submit to adjudication by a court to another party to that international treaty. The reason is simply stated: any state so agreeing would be at the mercy of the other party.

Instead, in disputes about the interpretation and enforcement of the international treaties, you would normally have the relevant international tribunal or arbitral body constituted in such a way as to be neutral and evenly balanced between the parties. After exit and possibly transition, the Court of Justice will be a different court and our relationship with it will be different as well; it will be a foreign court. That is international practice.

The EU's own general practice is to follow international practice, which is to say that it does not require the direct jurisdiction of the Court of Justice. This is true for most of the association and trade agreements which the EU has settled. Even very small states, such as San Marino and Andorra, have resisted the direct jurisdiction of the Court of Justice. There are only three main exceptions, and we have discussed some of them already: the EEA agreement, the customs union agreement between Turkey and the EU, and the pre-accession agreement with Moldova.

The EU's red line is a very strong red line, and, as I say, it is extraordinary. The only historical parallel that one can find is back in the 19th century, when the UK and European countries insisted in treaties with China that UK and European citizens would be tried not in Chinese courts but in extraterritorial courts. That is a very unhappy historical parallel, which harks back to gunboat diplomacy. So I have tried to elaborate on the question which the Lord Chairman posed to Mr Hogarth as to why the red line might seem to be unappealing.

On the idea of taking back control, it is important to say for the public record that, on one view of these matters, excluding the jurisdiction of the Court of Justice is vital to the project of restoring legislative freedom. People have differing views on the importance and appropriateness of that project to restore legislative freedom. On its own terms, excluding

the Court of Justice is vital to that project, and it is difficult to make sense of the Government's negotiating position unless you are aware of the critique of the Court of Justice—a critique that has now grown wearily familiar over the last two or three years.

However, this is a court that does not adhere to Article 31 of the Vienna Convention on the Law of Treaties, which places prime importance on the ordinary meanings of terms used in international treaties. Instead, the Court of Justice, to a greater extent than other supranational institutions such as the WTO Appellate Body or the International Court of Justice, adopts a highly flexible teleological interpretative approach that has tended to be a motor for EU integration.

That critique of the Court of Justice is at the heart of the UK Government's position to exclude the continuing jurisdiction of the Luxembourg court. People made that critique in the referendum, but it remains relevant today within the terms of the Government's negotiating position, because from exit day the UK court will no longer have an equal say in the Court of Justice. We will not have a judge and we will not be able to nominate an advocate-general. Nor will we be able to have privileged locus standi: the right to intervene in proceedings, the right to make observations. There is no procedure for having an ad hoc judge as in the Ukraine model. It is not the same as the Strasbourg court. The only possible exception would be to have an assistant rapporteur, which is the provision that is permitted in the Court of Justice's rules of procedure.

This will be a foreign court, which is why the Government's position, if you agree with it, is intelligent. If you do not agree with it, it is intelligible if you keep that critique in mind.

I hope that has been helpful in elaborating where that position is coming from.

The Chairman: It certainly has. Lord Cromwell wants to pursue some particular issues, but, first, can I just say to our guests, and so that the public know, that money is always saved here in Parliament and we are all freezing to death because the heating is so low? It is always low in these Committee rooms. There is always very little heat. I want the world out there to know how carefully the public funds are allocated to the heating distribution in this building.

Baroness Shackleton of Belgravia: This Committee is not hot air.

The Chairman: No. Perhaps they expect hot air to do the business for us. All I can say to you is that if you would like to put your coat on, as I have done—others have put scarves on—please do so, because it is incredibly cold. Professor Mitsilegas in particular might like to put his coat on or something. Do wrap up. I am sorry about it, but there is nothing we can do.

I now ask Lord Cromwell, robust and without a coat, to fire away with his

question.

Q33 Lord Cromwell: I will ask my question before hypothermia sets in.

One of the interesting things about the discussion today is the diversity of possible avenues to go down and the pros and cons of each. Of course, that is a hotbed for negotiation and discussion. But, equally, there is often a temptation to try to find a single system, a single body, a single algorithm if you like, that will solve all these disputes.

Interestingly, our Secretary of State for Exiting the European Union told us recently, in front of the European Union Committee here, that we could well have different models of enforcement and dispute resolution operating, whether on trade, citizens' rights, justice and home affairs. Is that sensible, is that deliverable, or is it just a road to chaos?

Professor Dr Christa Tobler: It is certainly sensible from a legal perspective, because, again, it depends on the content of the different parts of your agreement. We come back to what we said before: that as soon as there is EU law in it, the EU will insist on a role for the Court of Justice. If there is no EU law in it, you are free to have any other sort of system.

On your question about why the EU is not more flexible and why it does not realise how difficult your Government's position is, we have one legal element that makes it very difficult for the European Union: It is most likely that these agreements will be sent to the Court of Justice for an opinion under Article 218 TFEU, and there the court can hold that if there is any sort of system that is not in line with its doctrine of the autonomy of Union law, the agreement cannot go through. That means that there is a legal challenge quite independent of all political realities and sensible approaches.

So from a sensible perspective, yes, it would be possible to have different approaches, but do not forget that as soon as there is EU law in it, the EU will insist on the Court of Justice. That leaves you in the uncomfortable position of saying, "If we really want to get rid of this court, the ultimate consequence is having no EU law element in our future agreements". We know that at least for the transitional period and for citizens' rights, that is probably totally unfeasible. Whether you want it for the other aspects is also very questionable. That is why we have such a difficult position before us.

In Switzerland, critics of the European Union say that it behaves like a colonial power; it imposes, so to speak, its own legal system on the others. The European Union takes a different view. It says, "We offer our system to selected third countries, which can then participate, but obviously they then have to follow the rules of the game". These are two wholly different perspectives, which we are caught between. That is the uncomfortable reality.

Lord Cromwell: But can you imagine a system whereby, let us say, for citizens' rights we have some kind of informal political fudge about the

Court of Justice remaining involved, but on trade or on other rights we go down a different route so that we have a kind of pot-pourri of “sometimes it’s in, sometimes it’s not”?

Professor Dr Christa Tobler: In theory I can, because there are different issues, and should the trade relationship be more like the Canada agreement, for example, in theory nothing hinders you. In reality, the EU tries to get a one-size-fits-all approach. We saw that in Switzerland, where it tried to make sure that everything follows the same rules. However, it has realised that that is not possible. In the Swiss-EU negotiations, the EU has in a way retreated on the position: “Where there is EU law, we insist on some role for the Court of Justice. On other matters, we can show a certain flexibility”. I imagine that that could also happen in your case.

Lord Cromwell: Do you sense that that is probably where the British position will end up; that it will be something like in the case of Switzerland—sometimes involved and sometimes not? Is that a credible outcome for us?

Professor Dr Christa Tobler: At the moment, our negotiations are pretty much stuck on these institutional matters, because so far no solution has been found so far that is acceptable to both sides. We still hope that there will be a way to get out of them, perhaps based on the Ukraine model, but that does not look likely at the moment.¹

To be honest, the problem for the UK is much larger. To some extent, Switzerland will face economic difficulties if we cannot find a solution, but your economic and political difficulties if you cannot find a solution are immeasurably larger. We have a set of agreements, and you are leaving, and you do not have a set of alternative agreements for the moment you are leaving, so you have to create one. That is much more of a challenge.

The Chairman: And a limited time frame.

Q34 **Lord Judd:** There is one aspect of this which some people talk about, which is the EFTA option. Right back when we joined the common market, I was in favour of our staying in EFTA, as I thought it would be a much more sensible arrangement for the sort of country we were. However, having joined, I thought that the only possibility was to be second to nobody in our commitment to the Union. Indeed, I became Minister for European Affairs at that time and tried to pursue that policy. I feel passionately about it now, because it is a consequence of that decision that we made.

Having given that background of my own historical bias, I want to ask about people who say, “What about the practice of docking with the EFTA Court to ensure more comprehensive dispute resolution mechanisms?” What would be the limitations of such an approach?

¹ After the hearing, on 5 March 2018, the Swiss Government indicated that it wants to continue the negotiations based on an arbitration model. This seems to be well received in the public.

Professor Valsamis Mitsilegas: I will also follow up on Professor Tobler's comments on how we view the Court of Justice after Brexit. The other difference between the UK and Switzerland is that the UK is bound by much more EU law than Switzerland. It is a full EU member, with some opt-outs, and that is the main challenge. There are three main issues—this also relates to your question—which the Committee needs to consider.

One is dispute resolution *sensu stricto*: what happens if there is a disagreement about a specific clause of the agreement. The second is access of citizens to courts, which, as we discussed, is important in EU law because currently EU law is much more than about trade; it has to do with immigration, refugee, and criminal law, European arrest warrants, citizenship of the Union—you name it. The third is, of course, the interpretation of EU law, which will be relevant to the United Kingdom whichever form of relationship with the Court of Justice you accept.

Other colleagues have explained the intricacies of docking. It is not ideal in the sense that the EFTA Court does not cover all areas of EU law, so you will have to find something for the elements that are not within the trade or the single market remit. The European Court of Justice also gives a large constitutional underpinning to the presence and the interpretation of the European Charter of Fundamental Rights, which we may also come to, which the EFTA Court will not necessarily provide.

We need to look at this more holistically. I agree with Professor Tobler that you might have different arrangements for different areas of EU law. I was interested to see Theresa May's speech in Munich on security, when she said that we would like to be associated with EU agencies in the field, including Europol and Eurojust, and that in doing so the UK would like to accept the remit of the Court of Justice, whatever that means.

Baroness Ludford: Respect the remit.

Professor Valsamis Mitsilegas: Respect it. We can discuss what that means. However, it is a gesture of good will on the part of the United Kingdom, which says, "If we have an agreement on that, we may have a role for the Court of Justice, which may be different, for example, from the role that we want it to have on trade, free movement and on other things".

Lord Polak: May I ask a clarification point? Again, as a non-lawyer, if an EFTA-like solution is found, what stops this new EFTA or super-EFTA—call it what you like—taking on more responsibilities or dealing with some of the issues that it does not deal with now? Why cannot it deal with security and other things if the situation is new?

Professor Valsamis Mitsilegas: It depends on whether it is a new court. If it is the existing court, you would probably have to change its own statute and have a different constitutional charter in a sense, and I am not sure whether the EFTA or EEA member states will be agreeable to that.

The Chairman: The answer that was given by the former President is that Norway, Liechtenstein and Iceland specifically wanted the court to deal with trade disputes, so the expansion of the remit of the court would involve getting the consent of those other main parties, so there would be an issue. I pose this back to you, Lord Polak: if you create a court that deals with your trade disputes, which is a court and not an arbitral system, and will also deal with security, the freedom of the individual, the European arrest warrant, Interpol, and so on, are we not just recreating the European Court of Justice but calling it by a different name to dupe the general public?

Lord Polak: Maybe, but it is still taking back control.

The Chairman: Is it taking back control if you are just transferring control to somebody else but you are trying to save face? That is what it could look like to many people.

Professor Dr Christa Tobler: Of course, if you were to do that, it would look very like the Court of Justice. The Court of Justice itself had to expand its knowledge and its jurisdiction. The many things that were just mentioned were not originally within the remit of the Court of Justice, so in theory the court taking on new tasks is absolutely doable.

However, as was said before, everybody involved has to agree on that. That means, as was said quite rightly, that not only the EEA EFTA states but also the EU states would have to agree on giving that court a new mandate. At the moment, the court is a mini court, as you know, consisting of three judges only, with some personnel around them taking a few cases per year. It would have to be enlarged considerably; I cannot imagine only three people—or possibly four, with a UK judge—dealing with the many cases coming from the much larger fourth country that you (the UK) would then be.

So practical challenges are there, but these can be overcome if there is a will to do so. I do not think there is any legal element that would limit the possibility of enlarging the mandate of such a court if the parties want it.

Raphael Hogarth: I will make two very brief comments, the first on the question of expanding the remit of the EFTA Court. I am a non-lawyer, like Lord Polak, so I cannot comment on the legal constraints associated with that.

One administrative thing that it would also be important to think about is the role of the EFTA Surveillance Authority in that kind of new arrangement.

The Chairman: It is important to point out that “surveillance” in that case does not mean surveillance in the way we all think of it. It is the French word, meaning oversight.

Raphael Hogarth: Exactly. The EFTA Surveillance Authority is a body that carries out some roles for the EFTA states that are similar to those performed by the Commission in the EU. In other words, it looks out for

when governments are misbehaving and tells them, "You're misbehaving and we're taking you to court because you are breaking the law".

There are different ways of thinking about docking; you could dock only to the EFTA Court and try to come up with some new arrangements for surveillance, or you could dock to both the EFTA Court and the ESA. But if you were to dock to the EFTA Court and expand its remit, you would also need to build a new administrative apparatus to do the job of surveillance in those areas, which is something to bear in mind.

I will also comment briefly on the point about different dispute resolution mechanisms for different bits of the agreement, which is incredibly important. There are three forks in the road when it comes to the structure of these agreements.

In the first instance, you need to govern the withdrawal agreement, the transitional arrangements and the future partnership. It is plausible enough that you could have different arrangements doing those three things. The chances are that the governance arrangements for the transitional arrangements will be pretty much status quo, and the Government seem broadly to have accepted that.

The Chairman: So with the European court operating at that time.

Raphael Hogarth: Exactly. In turn, the transitional arrangements are provided for in the withdrawal agreement, which will have its own governance system, so there is a sort of telescoped dispute resolution system in the withdrawal agreement.

The withdrawal agreement also has lots of EU law stuff in it, including citizens' rights, so the chances are that whatever governance arrangements you have for the withdrawal agreement will include a starring role for the European Court of Justice.

The Chairman: So the European Court of Justice could be present in the withdrawal agreement but with some new telescoped dispute resolution mechanism at the same time—

Raphael Hogarth: There could easily be.

The Chairman: —and present, in the transition, in all the roles that are continuing in which EU law is involved. What about thereafter?

Raphael Hogarth: When it comes to the future partnership, as we discussed, it is helpful to distinguish between trade elements and non-trade elements. Again, you could easily have different dispute resolution mechanisms for trade elements and non-trade elements if you thought that were desirable.

But it is also important to remember—this is where I come to my third fork in the road—that even within the trade elements you may seek to have a range of dispute resolution mechanisms, because, as we know,

provisions of the agreement on trade could include more or less EU law and could also be related more closely or less closely to EU law.

In recent weeks, we have heard a bit about the idea of the three-baskets model for trade, which in very broad-brush terms is that, first, in some areas you basically harmonise—you copy and paste the EU's laws. Secondly, in some areas you have some kind of equivalence framework, so you say that we achieve an equivalent outcome and so get market access, and if you judge through some decision-making process that we do not achieve an equivalent outcome then we lose market access. The third basket is for areas in which we are autonomous; we are free to do whatever we like.

That poses lots of new problems for dispute resolution. It is pretty obvious that in basket one you will need some arrangement that is reasonably close to the European court. It is also pretty obvious that in basket three—

The Chairman: You do what you like.

Raphael Hogarth: —you would probably do what you like. As soon as you have come to that conclusion you have already introduced quite a lot of new complexity into the way businesses are regulated, which they might be resistant to.

Another dimension of complexity emerges in the middle basket, because on the one hand you might say that governance arrangements for the middle basket ought to look quite a lot like governance arrangements for the first basket, the harmonisation basket, because the whole point is that we are trying to maintain market access, so we want them to say, "Yes, your rules look broadly like our rules or achieve the same outcome as our rules".

At the same time, however, in scenarios where the Commission, or whatever the decision-making body was, said, "No, actually, we don't think the rules are equivalent, you do not achieve the same outcomes, so market access will be withdrawn", you might reasonably ask, "Why should we use the same EU law toolkit?" Obviously if you do not, that introduces yet another layer of complexity for business in that it needs to say, "Which basket is this regulation in? Which dispute resolution system underpins the interpretation of this basket? Has the toolkit that we need to use to interpret this provision changed as a result of market access decisions made in the last few years, that is, about whether this provision in the second basket falls into category A in the second basket or category B in the second basket?"

Baroness Ludford: The EU is a model of clarity compared to all this.

Lord Cromwell: Could you not make it a bit more complicated?

Raphael Hogarth: All I am saying is that you can definitely see advantages to different dispute resolution mechanisms for different parts

of the agreement, but once you start digging in to the possibilities on trade, this can get very, very complex very, very quickly.

The Chairman: All I can tell you is that lawyers must be absolutely rubbing their hands at the prospect. Many young people who are studying law ask me, "Is there any point in studying European law?", and, "Shouldn't it be taken out of the curriculum?" I say, "No. If you really want to mop it up, go into European law, because it will be a long time before it is sorted".

Lord Judd: It has been said that the difference between academics and politicians is that academics argue the conclusions, but politicians have to argue the decisions. Time is not on our side in the situation that we are in, so we have to think about decisions. I am anxious that we do not waste a lot of time talking about docking with EFTA and so on if it is not a realistic practicality.

If we are adamant in our stand against the single market, is there any point talking about docking with EFTA?

The Chairman: Is docking with EFTA a flyer? Your starter for 10. Would any of you vote for it? Do you think it is a good idea?

Raphael Hogarth: I believe it is probably negotiable.

The Chairman: Improve it and get it to work for and it is definitely a player, a possibility.

Raphael Hogarth: Yes, in a negotiation.

Professor Graham Gee: It has all the advantages that Mr Hogarth mentioned: first, it is an existing institution with about 25 years' working experience, so it is there, and can be used; secondly, it is a known entity to the EU, which is very important, for all the reasons we mentioned earlier, such as the autonomy of the EU legal order and given how the Court of Justice jealously guards its own role in interpreting EU law; and, thirdly, as Professor Tobler said, the idea of docking itself is a familiar concept to the EU, because the EU has been discussing that possibility with Switzerland.

There is just one more point that I would like make to Lord Judd. As well as the practicable problems of how you upscale a tiny court with three judges, 20 staff and a budget of €5 million and whether you will get the agreement of the EU and EFTA states, the real problem for the UK Government will be that they said no to direct jurisdiction of the Court of Justice. Does docking lead to indirect jurisdiction, which will be indistinguishable from direct jurisdiction, because the EFTA Court will hew so closely to the case law of the Court of Justice and will not depart from it in any substantial way and over any standard period of time? Actually, if the two look indistinguishable, you do not end up saving face, which the Lord Chairman mentioned earlier.

The Chairman: So it does not square with the phrase "taking back

control”, which was the brand for the referendum. If “taking back control” created in the imagination the idea that there would be no involvement in any sort of foreign court, the docking arrangements certainly would not secure that.

Lord Anderson of Swansea: Neither would any of the five alternatives, whichever of the five of Mr Hogarth’s alternatives is adopted, although the slogan has been “freeing ourselves from foreign courts”. With EFTA, there is very little divergence between the decisions of this very small court, with 18 cases a year, and the European Court of Justice. So whatever alternative is accepted, the shadow of the European Court of Justice would loom over any such arrangement.

Professor Dr Christa Tobler: This is true, but you may want to take into account one psychological factor, which we mentioned before. Most likely, you could send a judge to the EFTA Court for these purposes, so that court would, psychologically speaking, not be a foreign court but one in which you are represented. That makes a lot of difference in terms of psychology. It is true that the shadow of the Court of Justice looms behind it, but I am sure that President Baudenbacher told you how the EFTA court very often rules as the first court on a matter, so it does not always follow the Court of Justice.

Lord Judd: I am interested that it has been said that it is negotiable. Let us look at the four freedoms—the freedom of movement, and so on. There will be have to be a hell of a lot of change in the Government’s position on the points on which they are being intransigent at the moment. Do you agree that that has to happen if there is to be any thought of negotiating with EFTA?

Professor Dr Christa Tobler: On the four freedoms, perhaps one should say more fundamentally that if you do not want any EU law in your future relationship, it makes no sense to want to dock on to the EFTA Court. This whole question comes up only as soon as you have any EU law elements in your future relationship. It always comes back to the same question. Forgive me for being blunt, but looking from the outside, one has the impression that your Government do not have an ultimate clear idea as to where there should or should not be EU law in it, particularly in the trade relations part. Before you have solved that, you cannot honestly think about the best institutional mechanism to have. Everything depends on everything else.

Raphael Hogarth: As to what the EU is thinking about this question—this also speaks to a question that Lord Polak asked earlier when he wondered why we cannot make progress—there are some pretty big clues. In Brussels in January, there was a seminar for representatives of the EU 27 on governance, and the Commission published the slides from that seminar. In that seminar, the Commission presented the way in which the EEA system, the standard trade agreement system and the Ukraine system work. The slides were explicit about the fact that the Ukraine system—that is, arbitration plus the ECJ—is a “conceivable” outcome either for the withdrawal agreement or for the future

partnership agreement. There was also a lot of discussion of the EEA model and how it works. The discussion of the CETA model in those slides made it clear that that model can work if there is no EU law in play. So in terms of negotiability, some quite strong signals are coming out of Brussels.

- Q35 **Baroness Shackleton of Belgravia:** We are hearing that there are some viable alternatives. But if the Government were to take a completely purist view and say, "Being controlled by the CJEU is a red line issue, and we do not like the idea of docking with EFTA because that is a fudge, and transparently, it bounces back, and the two are too closely connected for us to do what we set out, which is to be a little island and be controlled by ourselves—we will mark our own homework here", what effect and limitations would this place on our country and on the future relationship with the EU in general?

Professor Valsamis Mitsilegas: "Taking back control" is a heavily loaded phrase that does not do justice to the fact that we live in an interdependent world. I will give an example to address your question. Assuming that there is no docking or a direct role for the Court of Justice of the European Union, the UK will still have a relationship with the EU—the EU will not go away.

Take the issue of data protection, which exercises people who work within the security field as well as companies, and the flow of data across the private sector but also between the private and public sectors and the state authorities. After Brexit, for the United Kingdom to ensure that its companies can be part of the data flow system across the European Union, the Commission will have to adopt an adequacy decision, which attests that the United Kingdom's system is essentially equivalent to the system of the European Union, and EU data protection law also has extraterritorial effect.

That means that, even if the UK is not ultimately bound by the Court of Justice, and even if there is no docking with the EFTA Court—this also relates to trade; it is not only a matter of security—the European Commission's assessment, which will be a unilateral assessment, will be based on the case law of the Court of Justice. So whether the United Kingdom wants it or not, it will have to comply with the assessment of the European Commission if it wants its companies to have any relationship as regards the flows of personal data—

The Chairman: And we will not be contributing to the assessments of the Commission.

Professor Valsamis Mitsilegas: We will be subject to the assessment—

The Chairman: But we will not be contributing.

Professor Valsamis Mitsilegas: No. There was an important case in the Court of Justice in Luxembourg recently, the case of Schrems, involving the EU-USA safe harbour agreement, which is a trade agreement, not a security agreement. The Court of Justice said that the Commission made

a mistake in finding that the US provides an adequate level of data protection to enable the safe harbour rules, because the Commission ignored the large-scale surveillance of citizens that is happening in the US under the NSA surveillance scheme. So we have a clear precedent in the Court of Justice and the Commission taking account in a judgment of how third countries will be treated.

We can believe that we can crawl back to our shelter after Brexit, but if you want to have any relationship with the European Union, you have to take the cases of the Court of Justice into account.

The Chairman: We will move on because we are running out of time. I would like us to deal with these last matters, because we have had a full and helpful survey of the possibilities. Baroness Ludford, we have almost covered security, but you might want to almost synthesise it.

Q36 **Baroness Ludford:** Can we move to security and criminal justice issues, taking the European arrest warrant as an example? In Munich, the Prime Minister cited the European arrest warrant and the European investigation order, as well as Europol and the Schengen Information System. How will we continue to make use of those mechanisms without recognising the jurisdiction of the ECJ?

As a subtext to that, there was the recent refusal in Ireland of a UK request for an EAW because of the uncertainty about the future application of EU law. How do we throw all this into the mix—the application of the charter, the relevance of EU law—and how does it fit into the Prime Minister’s ambitions for a UK security treaty?

Professor Valsamis Mitsilegas: The key word in your question is “recognising”. Does that mean accepting a binding jurisdiction, taking full account of it, or respecting it even if it is not binding? As a minimum, if there is a future treaty with the EU on security or specifically on the European arrest warrant, the United Kingdom will certainly have to take the cases of the Court of Justice into account.

We also see it with regard to Court of Justice case law on extradition with third countries; EU law is always a benchmark there. The Charter of Fundamental Rights, even if it is not directly enforceable in British courts, is part of the EU acquis—the European benchmark—so in any future agreement, EU member states in their external relations must behave in full compliance with EU law. So in the case of a European arrest warrant between the UK and France, again, referring to my earlier example, if France wants to execute it, it needs to be in compliance with EU law, regardless of the UK arrangements—

The Chairman: So even if we do not have the Charter of Fundamental Rights, when it comes to our dealings with Europe, Europe will insist on the principles that underpin it, and so on, so we will get it at one remove. Do any of you disagree with the position that you cannot have the European arrest warrant, Europol or Eurojust if you do not have a court that is basically like the European Court of Justice? You might find another one and call it by different name, but you need eventually to

have that kind of court.

Professor Dr Christa Tobler: I think we probably all agree, but I think we should add one point: it is not only the Court of Justice. Should the European Union change its law on these issues, it will also require the third country to go along with these changes in the law. In other words, it is not just a matter of interpretation but also of updating the legal acquis that relates to that matter. That is precisely one of the institutional issues that we are negotiating at the moment in the Swiss-EU relationship. You will find yourself in precisely the same position. It is not just the court but also the law.

Baroness Ludford: When the French authorities issue a European arrest warrant to the UK to extradite a French person back to France, and that person wants to contest the EAW, where do they go? How do they enforce their individual rights? If it is a Briton in France, they can go to the ECJ. What happens here?

Professor Valsamis Mitsilegas: The first port of call would be the domestic court. The question there is whether a domestic court has any power to escalate to the European Court of Justice. That avenue would be stopped.

Another point is that, currently, the United Kingdom is in a peculiar position, because it has opt-outs in this area. It participates in the European arrest warrant. In my view—this can be minuted—it is a scandal that it does not participate in the directive on access to a lawyer in criminal proceedings—

Baroness Ludford: Hear, hear.

Professor Valsamis Mitsilegas: —which is a defence right and relates to harmonisation; Baroness Ludford played a key role in getting this measure adopted at EU level. If there is a relationship after Brexit, the irony will be that the UK will also have to be bound by—rather, to be more accurate, will also have to respect—legislation under which it is not currently bound as a full EU member state. In the future—

The Chairman: —our opt-outs will not be available to us.

Professor Valsamis Mitsilegas: There will be no opt-outs if there is a future EU-UK security treaty.

Lord Anderson of Swansea: Is there any conceivable mechanism by which, after Brexit, we could influence the evolution of the jurisprudence of the European court?

The Chairman: Could we influence the decision-making in any way, for example through dialogue between our Supreme Court and the European Court of Justice?

Professor Dr Christa Tobler: The only thing I can think of is a mechanism such as under the Lugano convention, by which you would

have a right to appear before the Court of Justice and give your view on the issue that is before the court.

The Chairman: So you could send someone there, who would be given locus—they would be allowed to present an argument.

Professor Dr Christa Tobler: But you are not a party. You are simply allowed to appear before the court and give your amicus curiae brief, so to speak, and that would be all.

Q37 **Baroness Shackleton of Belgravia:** This Committee produced a report, *Brexit: Justice for Families, Individuals and Businesses?*, in which we identified that there was a problem with regard to the continuation of what is known as the Brussels regime. We urged the Government to get a move on, in the politest terms, and to come up with a plan. To date, no plan has been forthcoming.

Do you have any insight as to whether there is a plan in the pipeline, and do you consider it as grave a situation to have a vacuum in this area of the law? By the way, it is the one I trade in. I think we would all be interested in your views in this respect.

The Chairman: Mr Hogarth?

Raphael Hogarth: It is not my area of research, so I will not comment.

Professor Graham Gee: Private international family law is not my area of research either, but I have looked at your report and share your concern. I am not aware of anything in the pipeline, but I very much hope that the Government have not lost sight of this. I hope that when it comes to family and maintenance matters, it might be possible to agree a parallel instrument.

Professor Dr Christa Tobler: The Lugano convention is a parallel instrument. However, at the moment it is open only to the EFTA states other than the EU.

The Chairman: In the evidence we heard when we produced that report, it was said that it relied on mutuality: "We do it for you because you do it for us". So there is a recognition of orders and enforcement, which was outside the experience of many of us but which Baroness Shackleton deals with in her daily working life.

Baroness Shackleton of Belgravia: But there is also a timetable. There is a rule that if you file first for a divorce under Brussels II, provided that that court has jurisdiction the competing jurisdiction stays in our country under the Brussels convention. If that does not exist for us, we will be back to forum conveniens arguments up and down the country, which will not be very helpful to our already overlogged courts, with no legal aid.

Professor Graham Gee: I share your concern. It is an issue that the Government have to keep an eye on and move on quite quickly. I recommend that people take account of the work of Professor Adrian Briggs of Oxford University on private international law. He gave a lecture

to the Commercial Bar Association this time last year—he may also have given evidence to this Committee at one point—in which he suggested that there will be gains and losses in private international law terms but there will be no radical reform of our private international law. He was hopeful that it would be possible to have a parallel instrument drawn up. But, obviously, it should not be lost sight of, so this Committee should take every opportunity to remind the Government of it.

Baroness Shackleton of Belgravia: As the Lord Chairman said, there has to be mutuality, because it does not work without reciprocity.

The Chairman: That parallel instrument could create that reciprocity, but we have to keep nagging government about it.

Lord Judd: Meanwhile, in the real political world, what worries me is how far we are ignoring the anxieties in the European Union, and among some of its prominent members. With the new nationalism in play in Hungary, Poland, and so on, if they start to play games with us, the whole thing may begin to unravel.

The Chairman: I think people will take that comment to heart. A number of questions remain to be asked. Lord Polak has a question about UK citizens.

Lord Polak: It is on direct right of access to the new court—the EFTA Court or whatever. Will an individual be able to watch it?

Professor Dr Christa Tobler: No. Even under the present Union system, there is very limited direct access for people to the court. Usually, real-life disputes go through the preliminary ruling system, in which the national court asks questions, not the individual. The individual does not have any power to force the courts to use that mechanism.

That is the same in the EEA, and I assume it would be the same in your system, should you introduce such a mechanism. So there is no direct access. However, that is already a lot more than what you have traditionally under public international law, where the dispute settlement is only between states.

Lord Anderson of Swansea: The court has already flexed its muscles with regard to the Strasbourg court and the EU joining that. Is it likely that the withdrawal agreement could be referred to the Court of Justice? If it were, what do you think could be the result? There is also the question of delay. Could such a matter be made part of a fast-track arrangement?

Professor Graham Gee: First, as Professor Tobler already said, there is a standing risk of referral, because paragraph 11 of Article 218 confers the right on member states and EU institutions to refer agreements to the Court of Justice to test those agreements for compatibility with EU law. It is a standing risk. Further, Article 218 provides that, if the Court of Justice finds that the agreement is incompatible, it will have no legal

effect if and until that agreement is changed or the terms of the EU treaties themselves are revised.

That is a standing risk, not just a theoretical risk; as Professor Tobler has already said, there are a handful of occasions where the Court of Justice has been jealous of the adjudicatory arrangements in agreements that the EU has sought to undertake. We mentioned Opinion 1/91 on what was to be the predecessor of the EFTA Court, and we should look also at the draft accession agreement to the European Convention on Human Rights and the unified patent court litigation. So it is a real, not just theoretical, risk.

That said, I disagree with Professor Tobler somewhat in that if the Council has agreed the EU-UK treaty and it has been ratified by the European Parliament, I suspect the Court of Justice would balk at the idea of finding the agreement incompatible. The Court of Justice is an assertive court but it also knows when to—

The Chairman: Pull back.

Professor Graham Gee: Exactly.

Lord Anderson of Swansea: What sort of delay might there be?

Professor Graham Gee: My colleagues, who are expert in EU law, might know better.

Professor Dr Christa Tobler: There is no fast-track possibility for that procedure as set in the treaties, but I imagine that if such case comes to the court, it will deal with it as quickly as possible. However, you have a language regime, which requires a lot of translations, also of the written documents, so it would still take quite some time.

The Chairman: It would be hard to imagine it getting in there before the deadlines.

Professor Dr Christa Tobler: Yes. First, you have to negotiate the agreement—you must have it—and then you can submit it to the court for its opinion. That means that it would probably be quite close to the deadline.

Raphael Hogarth: I wanted to add one comment in relation to the previous question. Direct access to the enforcement mechanism or the dispute resolution mechanism for individuals and private parties is an extremely important point. I agree that it would be unusual for individuals to have access to the dispute resolution mechanism itself. However, the current arrangements under the EU treaties are very different from ordinary international trade agreements in that dispute resolution mechanisms in ordinary agreements are usually state to state.²

² Much EU law, by contrast, has “direct effect”, meaning that citizens and businesses can access their rights under EU law before their own domestic courts, or the domestic courts of other EU countries. There is no need to go to the ECJ.

Reliance on state-to-state mechanisms has two important implications, one of which, as I put in my paper, is that economics plays diplomacy. If ever you have a business that is worried that it is being discriminated against or in some way mistreated by a Government on the other side, it has to lobby its own Government to say, "Can you kick up a fuss, please?" Its Government might say, "We understand that this is very inconvenient for you, but we are currently trying to negotiate some other treaty with this country, and we do not want to"—

The Chairman: Diplomatically, it would not be helpful to muddy the field.

Raphael Hogarth: That is one implication. The second, related, implication is that as far as government is concerned it is worth kicking up a fuss only when quite a lot of money is at stake. This presents problems.

The Chairman: So small businesses are not likely to have a shout in all this.

Raphael Hogarth: Exactly. There are two possible ways to mitigate those risks. One is to try to adopt the approach of EU treaties and ensure that private parties can enforce their rights in their own national courts by giving your agreement direct effect or something like it. That could be quite a negotiation challenge, and we may not want to do it for political reasons in any event, but that is one policy option.

The other option, which I alluded to before, is trying to construct some kind of pretty robust surveillance mechanism.

The Chairman: Oversight mechanism.

Raphael Hogarth: Exactly. Among economic agreements, the EU is quite unusual as regards how big, powerful and well-resourced that apparatus is. Most bilateral trade agreements do not have anything like that. A big advantage of that kind of set-up is that you have offices and people whose job it is to look out for violations and take up the case.

More than that, because those oversight bodies are to some extent politically separate from governance, the point about economics playing diplomacy in any potential dispute is muted a little, because you can always just blame it on the Commission.³ Those are two important policy levers to think about when considering how to ensure that private parties can enforce their rights after Brexit.

The Chairman: That is very interesting indeed, Mr Hogarth. Thank you.

This has been an incredibly stimulating discussion, and your evidence has been important. I think there is agreement on the Committee—you can

³ In an EU context, if your trading partner is upset about being taken to court, you can blame it on the Commission. In a UK-EU context, you could blame it on your new oversight body.

tell by members' questions—that it has been invaluable to have you come and help us through the different possibilities: the ups, the downs, the positives, the negatives and the complexity that is presented to us in trying to see our way through this and how government will find its way through it in negotiations. I thank all four of you. It has been stimulating, and I am very grateful.

As I mentioned at the outset, if you would like to add to what you said, or if there is any supplementary written evidence that you would like to submit to us, please do so. However, an element of speed is required, because we have to get it out quickly.

Thank you so much indeed. I am so sorry about the conditions in this room. It is so cold that I saw that people have wrapped their knees up in their coats under the tables. Thank you very much—you have performed very well in the circumstances.