



Select Committee on the European Union

Financial Affairs Sub-Committee

Corrected oral evidence: Brexit: “No deal” financial obligations

Wednesday 4 September 2019

10.05 am

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Members present: Lord Sharkey (The Chairman); Lord Bruce of Bennachie; Baroness Coultie; Baroness Liddell of Coatdyke; Baroness Neville-Rolfe; Viscount Trenchard; Lord Turnbull; Lord Vaux of Harrowden.

Evidence Session No. 1

Heard in Public

Questions 1 - 11

Witnesses

I: Samuel Wordsworth QC; Martin Howe QC.

Examination of witnesses

Samuel Wordsworth QC and Martin Howe QC.

Q1 The Chairman: Good morning and welcome to the EU Financial Affairs Sub-Committee public evidence session in the Committee's inquiry on no deal and the UK's financial obligations to the EU. You have before you a declaration of Members' interests. The session is being broadcast on parliamentlive.tv to the usual very large audience. A full transcript is being taken, and it will be made available to you to make any corrections shortly after the session.

Having said that, I can lead off with the first question. In your view, what is the legal status of the UK's financial obligations to the EU and the EU's financial obligations to the UK in the event of a no-deal Brexit? Your written submissions have been circulated and read by the Committee, so it is not necessary to repeat in detail exactly what you have said in writing, but that is the opening question.

Martin Howe QC: There are two questions, which are separate. One is a question of the substantive existence in law of any financial obligations and the second is the question of jurisdiction. Is any court or tribunal in a position to enforce those? In my view, they are distinct questions. Even if there are either difficulties or impossibilities in enforcing or adjudicating whatever the substantive obligations are, there may well be arguments for the United Kingdom, as a generally law-abiding country in the scheme of international law, agreeing to some form of neutral and acceptable adjudication.

On the question of what, if any, those obligations are, the primary starting point for analysis is provided by Article 50 of the Treaty on European Union, which indicates that as from whatever the cut-off date is, whether it is 31 October or not, which is a somewhat controversial point at the moment, the treaties cease to apply to the United Kingdom. Therefore, in principle, the treaties cannot create any new obligations on the United Kingdom or new entitlements on the part of the United Kingdom.

On the other hand, any obligations or entitlements that exist as of that date continue. That is a classic international law principle. But, like all these principles, there may be difficulty in distinguishing between obligations that have arisen and have accrued as at that date, and future obligations that would arise had the treaty carried on in force but, in the event, do not do so.

In the way I see it, it is helpful to analyse it by reference to the claims the European Union, and particularly the Commission, has been putting forward, which were most fully explained fairly early on in the course of negotiations. A number of those are weak or extremely weak. Their main claim is that the United Kingdom is liable to pay a share of so-called commitments in the European Union budget. Commitments in the European Union budget, as far as I can see, are entirely internal commitments within the EU budget process. The member states do not

assume, in relation to those commitments, any legal liability to contribute, which is distinct from the general legal liability to make payments into the European Union budget, so that claim is extremely weak.

There are other claims. The other most significant claim relates to the accrued pension deficit for European Union staff. I put that as certainly a more credible and arguable claim than the commitments claim. The argument is that, as time goes on, a deficit in the pension fund is accruing, and therefore you could argue that that exists as at the date the country leaves the European Union. On the other hand, whenever a member state joins, logically there ought to be an offsetting payment or credit to it for the state of the pension fund when it joins, if you are going to run this system.

I will defer to Mr Wordsworth's greater knowledge and expertise on this point, but, as I understand it, there is not a practice of cashing up the assets and liabilities when a state leaves an international organisation. That is a distinct situation from the total termination of an international organisation. If it is shut down and everyone leaves, you have to have a cashing up of assets and liabilities.

If it is a negative balance, the question of whether the contributing states are liable to contribute to it might not be clear cut. There is a series of cases involving the International Tin Council, where counterparties on tin futures contracts were left high and dry by the bankruptcy of this international organisation. Leaving that point aside, a situation where a country withdraws from an ongoing organisation is distinct from cashing up at the end. Those are the two main heads of claim, although there are others.

Samuel Wordsworth QC: I agree with much of what you have just been told. Certainly, it is correct to look at the issue of substantive rights and obligations under the EU treaties as a separate matter to the issue of jurisdiction. It is also entirely correct to look at Article 50 as the starting point in your analysis.

Of course, Article 50 exists as a provision in a treaty within the framework of general international law, and has to be interpreted and applied within that framework of international law. That is an entirely uncontroversial statement. Therefore, Article 50 has to be interpreted in light of the usual rules in international law, and has to be applied in the context of critical rules in this case, which include Article 70 of the Vienna Convention on the Law of Treaties, which I believe the members of this Committee are now fairly familiar with. There is no issue between us as to that point.

When interpreting Article 50, the critical thing to notice is that there is nothing in Article 50, including Article 50(3), to replace the default rules, existing as a matter of customary international law, that deal with what happens when a treaty is terminated or one party withdraws from a treaty. You are in a situation of identifying the allocation between the two

sub-rules in Article 70 of the Vienna convention. The first rule is that the termination or, in our case, withdrawal releases the parties from any obligation further to perform the treaty, and that is entirely what you expect.

The second rule, a very important rule in the current context, is that the withdrawal does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. That rule applies in this case. It applies as I set out in the written submission that I prepared with Mr Aughey. It applies either as a matter of the correct interpretation of Article 50, paragraph 3, or in terms of the application of Article 50, paragraph 3.

Then one gets to a very difficult, complex exercise in identifying what rights and obligations of the UK—in this case we are concerned with financial obligations—are created through the execution of the treaty prior to its termination. Here I would differ from Mr Howe, because I think there are certain financial obligations that one can definitely see as falling within that rubric. For example, when you have a funding commitment of a member state under Article 184 of the TFEU and the state has committed to funding a particular project, if the UK has done that, that has to be seen as a form of crystallised obligation that fits within Article 70(1)(b).

The rules on payment into the budget are hugely complex, but I would not see them as entirely removed from the treaty; they are not. Of course, they are contained in regulations and the so-called Own Resources Decision, but, pursuant to Article 288 of the TFEU, there is a treaty obligation of compliance, because these are binding regulations. The UK has to treat them as binding. If there is a failure of compliance with an obligation under the financial regulation, that comes back into the treaty and within the purview of Article 70(1)(b) of the convention or Article 50, as correctly applied.

There is then a very difficult exercise in identifying precisely where you would see what one might call, in loose terms, a crystallised obligation and one that is not. Where a budget has been adopted, there is an obligation under the financial regulation on member states to pay with respect to that particular budget. I would see that as an example of a crystallised obligation that falls within 70 (1)(b). That is reasonably straightforward.

There is a more difficult issue in relation to the multiannual financial framework, the so-called MFF, because it is much more difficult to identify a specific obligation of payment in the MFF regulation where you can say, "That particular obligation has become active or crystallised and the UK has, in effect, committed to meeting that". You have heard evidence on this before, so I am not sure to what degree it is helpful to go into it, but Professor Tridimas was saying before you, "This is a grey area". As I understood it, his basic approach was to say, "You read the MFF regulation, which does not contain a specific obligation of payment, alongside the Own Resources Decision, which does. You look at them as a

package and therefore you see that there is some sort of obligation on the UK”.

The other area that Mr Howe touched on was pensions. I would certainly agree that there is an obligation in relation to the pension deficit. There is also a guarantee in the EU staff regulations, which have been agreed to by the UK. There is a very difficult exercise of analysis in seeing precisely how the fact of that guarantee being given by the UK fits with the obligation that arises out of Article 70(1)(b).

I am not sure that one is going to be helped by looking at what has happened in relation to other international organisations, because they have their own constitutive instruments, which are going to be different from the EU. I do not think you are going to get help from other state practice or the International Tin Council case. It is just an example of what has happened in relation to a different organisation with a different constitutive instrument.

Q2 Lord Turnbull: I found Mr Wordsworth’s presentation convincing, or I could follow the logic of it. Mr Howe must have been well aware of these arguments in reaching his opinion. Why did he take a different view?

Martin Howe QC: I am completely at one with Mr Wordsworth in his analysis as to the applicability of Article 70 of the Vienna convention or, being hyper-technical about it, the applicability of the rules of customary international law that are codified in Article 70 of the Vienna convention, because the Vienna convention as such may or may not be applicable. That makes a difference, because the principles in it are applicable. It may be a question of how you apply them.

I personally do not agree with an approach that involves treating the MFF and the Own Resources Decision as if they were a package, and as if they were a free-standing treaty that had a status independent of the European treaties. It is clear, as a matter of European Union law, as distinct from public international law, that these are subordinate instruments to the two founding treaties. When the founding treaties cease to apply to the United Kingdom, so also do they cease to apply to the United Kingdom, in common with every other regulation, directive, et cetera.

Mr Wordsworth raised the issue that certain commitments are undertaken by member states as such, and I agree. Those are in a different category. The most significant of those is probably the European Development Fund, which involves funding technically outside the scope of the European Union budget by individual member states. That falls in a separate category. There is a different question as to whether obligations by the United Kingdom to fund that operation survive Article 50.

As regards the budget itself, there are two critical points. First, there is the indivisibility of the status of the multiannual financial framework and the Own Resources Decision from the treaties themselves, so they cannot create new obligations. A simple example is that the Own Resources

Decision operates from day to day. Every time a United Kingdom customs officer collects a tariff, there is an obligation to pay 80% of that over to the European Union. If a tariff is collected on 31 October, 80% is due to the European Union. Whether or not it is paid on that day, it is due. If it is collected on 1 November, none of it is due to the European Union. What seems to me, with respect, logically very difficult is an argument that somehow you can treat the expenditure side of the equation differently and that past member states have a continuing obligation to pay towards budget items expended after 31 October.

There are two critical points here. One is the indivisibility of the subordinate instruments from the treaty itself. They fall with the treaty. Secondly, the commitments under the multiannual financial framework to fund long-term programmes rest on the European Union itself, a body with its own international legal personality. They are not commitments by the member state; they simply are not, as a matter of legal analysis. Therefore, I cannot see any really credible basis on which it can be said that the United Kingdom after it leaves continues to be liable for forward commitments under the European Union budget.

Lord Turnbull: I suppose in fairness you should have a right of reply. The argument being presented is that, if the treaty falls, its component parts die with it. Mr Wordsworth's view is that they do not necessarily die.

Samuel Wordsworth QC: You are looking at application of the customary rules in Article 70. Going forward, there is no obligation further to perform the particular treaty, but that of course is not the whole answer. You have this second part of Article 70 that is expressly preserving the position with respect to such rights and obligations and the legal situation that has been crystallised. It does not matter at all that the obligations in relation to payment under the ORD or the financial regulation are in the form of subordinate legislation. On the plain reading of Article 70(1)(b), an obligation has been created with respect to payment under those instruments, if it is a crystallised obligation.

You can get to that in two different ways. You can either get to it through the prism of Article 288 of the treaty, where there is a treaty obligation of performance, which you have to give effect to, or you can just see it as a legal situation, an obligation of the United Kingdom. It is not necessarily saying in that provision that it has to be an obligation that exists as a matter of international law. For example, rights might conceivably have been created in the execution of a given treaty that exist as a matter of domestic law, for example property rights. The question really is to look for the obligation. The obligation is there in 288, which feeds into these regulations and the ORD.

The issue of expenditure, the UK having to be responsible for expenditure after 31 October, is simply a question of what the UK has committed to through what I am calling a crystallised obligation for the purposes of Article 70(1)(b). If it has committed to payment of the 2019 budget and the 2019 budget includes certain lines that go beyond whatever the date

is, that is the obligation the UK has accepted. It did not have to accept that; it has.

The Chairman: Maybe I should point out for the record that Mr Howe is shaking his head vigorously at this point.

Martin Howe QC: I do not want to be repetitious, but I disagree with that analysis for a very fundamental reason. In my view, Mr Wordsworth is mischaracterising actions taken by representatives of the United Kingdom in an intra-institutional context. When a Minister representing the United Kingdom votes for or approves a measure in the context of European Union institutions, in general, subject to some exceptions, that is not the same as the United Kingdom entering into an international treaty or agreement.

When a Minister of the United Kingdom Government, within the Council of Ministers, votes to approve the budget, it is not an international act on behalf of and binding the United Kingdom. It is an intra-institutional act as much as a vote on the budget by a Member of the European Parliament who happens to represent a seat in the United Kingdom is an intra-institutional act. It is merely part of the process that creates this budget we are talking about here as becoming a formal piece of European Union secondary legislation.

In my view, it does not create an obligation on those states that vote for the budget to stand behind the monetary commitments. I agree with Mr Wordsworth's fundamental analysis, but that is the reason I disagree with his suggestion that, in this case, it creates a legal obligation on the United Kingdom that can survive termination of the treaty.

The Chairman: Perhaps we should move on. We will get more opportunity to revisit this disagreement as we go through.

Q3 **Baroness Liddell of Coatdyke:** Can I add another wrinkle? How do the UK's financial obligations to the EU in a no-deal scenario compare to those agreed in the withdrawal agreement? Does the absence of any transition period have an impact on that?

Martin Howe QC: So far, we have been discussing this in the absence of an agreement. An agreement that deals with the financial terms will modify and supersede the underlying international law analysis that would prevail in a no-deal scenario. If the withdrawal agreement, as negotiated by the former Prime Minister, were agreed, there would be several components.

In principle, one component would be the creation of a transition period, during which the United Kingdom would continue to be treated as if it were a member state for the purposes of the budget, although in common across the transition period we would lose any voting rights or veto rights. There would then continue to be an obligation to pay into the European Union budget as now, as if we were a member.

I do not claim expertise in analysing the figures, but in my understanding there is an approximate net budget deficit of £1 billion a month, depending on the set of figures you look at, which would continue at something like that level through to whatever the end of the transition period was. The figures are not fixed, but the principles are fixed in the agreement up until the end of December 2020. If the transition period were to go past December 2020, which of course is also past the end of the current MFF and ORD framework, there would need to be a new negotiation on the basis of the United Kingdom's contributions in that period.

If we leave that one aside, the second main component of the financial obligations under the agreement is that it, depending on your view, either solidifies or creates a series of obligations in international law to make payments. These are the two most important, although there are others. The first is the obligation to pay what are described as commitments that are in the budget at the end of the transition period. Whether Mr Wordsworth's view or mine is right or wrong, if that agreement were ratified, the United Kingdom would be liable at the end of the transition period to continue to fund its share of any commitments in the budget at that point.

The second main clause is an obligation to contribute to financial obligations incurred by the European Union during the time of the United Kingdom's membership. The pension fund deficit is specifically identified. Depending on your viewpoint, it would either solidify or create very substantial obligations on the United Kingdom. Then the important procedural point is that the conversion of these, perhaps, not totally precise principles and their application would be within the jurisdiction of the European court. It would have a clear and explicit jurisdiction over the amount that we, the United Kingdom, would have to pay.

Samuel Wordsworth QC: If one is focusing solely on the financial obligations, comparing the current position as a matter of general international law and what has happened in the withdrawal agreement, I would see them as roughly in line. That is not particularly surprising. There is an obligation to pay into the EU budget up until the end of 2020. That is consistent with the obligation to pay annual budgets that have actually been adopted, which I mentioned earlier. It is consistent with Professor Tridimas's view as to how you approach the existence of an obligation under the MFF regulation and the Own Resources Decision.

Likewise, it is consistent with how matters work so far as concerns the rights of the United Kingdom. You have to consider those rights as well under Article 70(1)(b). The UK has certain rights, at least with respect to the rebate and possibly with respect to discrete EU funding commitments. Those are encompassed within the withdrawal agreement, possibly just as a matter of negotiation, possibly as a reflection of the parties' understanding of the relevant principles of international law.

In certain respects, the withdrawal agreement might be seen as more favourable to the United Kingdom, because so far as concerns the

European Investment Bank the UK would be getting back its share of its capital contribution to the EIB, whereas it is rather doubtful that there would be such a right in the absence of an agreement. At the same time, it might be said that the withdrawal agreement is favourable to the Union in terms of whether there is a payment obligation on the UK in relation to the MFF.

Q4 Lord Vaux of Harrowden: We have heard quite a lot about the possible use of this £39 billion as lubricant in future discussions. Could we delay the timing of payments, linking them to the progress of negotiations on the future relationship?

Martin Howe QC: We can certainly do that by agreement. If it is agreed, it is agreed. There is no barrier to it. There is a difficult political question as to whether it would be agreed.

Lord Vaux of Harrowden: If we have not received an agreement but we feel there are these obligations, to what extent can we use them as leverage or lubricant?

Martin Howe QC: Perhaps I can put it this way. Analogously, in private litigation, where claims are brought against you that are arguable—let us leave them in the category of arguable but not certain, with a divergence of views on how strong some of the claims are—it is certainly possible for the parties to agree on payment of a certain amount that reflects the respective positions, or on timing or other clauses that give benefits.

I cannot see any legal issue that would prevent an agreement under which the United Kingdom would make payments subject to conditions such as progress towards an acceptable long-term agreement. I cannot see any legal principle against that. I am not going to comment on the issue of how easy it would be to negotiate that.

Samuel Wordsworth QC: Yes, I would broadly agree with that. It is a question of agreement. If you can reach an agreement, you can do this. Otherwise, as Mr Howe says, if there is a financial obligation and you do not comply with that obligation, i.e. pay the money at the due time that has been specified, there is a breach. There is nothing in the treaty, as I understand it, that enables you to withhold performance. You could not justify withholding performance under any other principle of international law.

Lord Vaux of Harrowden: It comes down to a question of enforcement, which we are coming to later.

Q5 Baroness Couttie: Mr Wordsworth, you mentioned that the financial obligations are intrinsically linked to the treaty obligations. If that is the case, what is the legal mechanism for agreeing the financial settlement if no withdrawal agreement has been reached?

Samuel Wordsworth QC: There is no legal mechanism for agreeing it. Either one comes to a negotiated package, in which case, fine, that could be in the form of a withdrawal agreement; it could be in the form of a

much smaller agreement that simply deals with the financial obligations. If the relevant parties are unable to reach such an agreement, it simply comes down to a question of the parties' rights and obligations under international law. I do not know whether this is the appropriate moment to consider the issue of how those rights and obligations may be enforced as a matter of international law.

Baroness Couttie: Is this not exactly the grey area we have been talking about? What exactly are those obligations under international law? If we do not have an agreement, we are into this grey area.

Samuel Wordsworth QC: Yes, but that is always going to be the case in any legal dispute. The claimant will be saying, "These are the obligations, and you have breached them", or, "These are my rights and you have failed to respect them". The respondent state will be saying, "No, that is not the case". There will be a debate as to precise amounts, if it is a case about financial obligations.

The UK presumably has its own views as to its financial obligations, just as the EU or the member states presumably have their own views as to the extent of the financial obligations. There is no independent mechanism for establishing those, absent the parties deciding that they are going to agree either the sums or the mechanism by which they would be decided.

The Chairman: To be clear about that, there is this question of making an adjudication and trying to generate an agreement about what is owed by whom to whom. As I understood you to say, there is no obvious tribunal for settling such a difference.

Samuel Wordsworth QC: There certainly is not, subsequent to a withdrawal by the United Kingdom, because, as you are aware, the treaty itself establishes a rule that has the member states agreeing to the exclusive jurisdiction of the CJEU, so far as concerns disputes on the interpretation or application of the EU treaties. That would put a member state in very real difficulties so far as concerns seeking to bring a claim subsequent to UK withdrawal. Of course, there would be an issue as to whether the CJEU could have jurisdiction over a former member state.

As I see it, one possibility would be for a claim for infringement to be brought right away, prior to withdrawal, while the UK is still a member state. There are various international law authorities, to which we have referred in the written submission, to the effect that, if the claim has been lodged prior to the expiry or termination of a given treaty, the tribunal will still have jurisdiction in relation to that. You can see that as making sense within the context of Article 70(1)(b), because you can see the claim that has been lodged as a form of legal situation, and Article 70(1)(b) refers to rights, obligations and legal situations. That very claim, the dispute, could be seen as a legal situation created through the execution of the treaty. Absent that, there are real difficulties in terms of the CJEU. So far as concerns bringing a claim to the ICJ, there are obvious difficulties there.

Martin Howe QC: Mr Wordsworth may have superior knowledge on this but, as far as I am aware, there is no tribunal that would have compulsory jurisdiction over the dispute. Therefore, it strikes me that, as Mr Wordsworth says, either the whole thing can be settled by agreement or an alternative is to agree on a mutually acceptable adjudication mechanism, which could be ad hoc arbitration or one of the permanent or semi-permanent bodies.

Q6 Viscount Trenchard: Mr Wordsworth, you expressed the view that the financial settlement with regard to the European Investment Bank could be said to be in the United Kingdom's favour, which is interesting against the background that the United Kingdom has already not been favoured. It has been disadvantaged by the fact that lending to the UK has fallen off by 90% since 2015, and investment in UK enterprises by the EIF, the subsidiary of the EIB, by a similar amount.

If we cease to be a member or shareholder of the EIB—I believe the two terms are synonymous—we can no longer be a member of the EIB. Effectively, our shares are being bought back for cancellation or our membership is being cancelled. It follows that, equitably, we should be paid out for the fair value of our shares at the date of cancellation. If you look at the 2018 EIB accounts, the EIB itself recognised this in application to the offer it is making for the shares in the EIF that it does not already own. It says that the offer it makes is the value of the shares based on the paid-in capital and the proportionate share of the retained earnings and other reserves.

I am therefore interested to know why you think this is a fair settlement, given that we effectively give to the other shareholders or members of the EIB our pro rata €7.6 billion share of the value of the EIB. We receive back €3.5 billion over a period of 12 years without interest, even though the EIB has already more than made up for the capital redemption by the UK by placing a further call on the continuing members. Is this really to the UK's benefit?

Samuel Wordsworth QC: One has to separate out different questions. There is a question as to what might be perceived as fair or seen as a benefit to the UK, and an issue of the strict legal rights and obligations. I am analysing this from a perspective of what happens in the context of there being no deal and there being a withdrawal.

You are entirely correct in saying that, if there is a withdrawal, the UK ceases to be a member state and a member of the bank. That might be seen as leading to an unfair situation, given that the UK has of course made capital contributions under Article 4 of the EIB statute. The difficulty from the legal perspective is that nothing in the statute provides any right to recover those sums if a member state ceases to be a member.

In fact, when one looks at the statute, if anything the provisions are suggesting the contrary. Once the money is paid in, it is for the bank to dispose entirely as it sees fit. There is a provision that your share in the bank cannot be transferred, pledged or attached. It is very, very different

to the usual situation, where you buy however many shares in a normal bank and you can essentially do what you like with them.

In agreeing to be bound by the statute, which the UK has done through Article 308 of the TFEU, it might be seen that the UK has put itself in a difficult situation. Of course, it was not conceiving the possibility of withdrawal. Possibly nobody was seriously conceiving the possibility of withdrawal and the details of what would happen. I have difficulty in seeing that the UK has a right that would filter through to Article 70 of the Vienna convention to the recovery of that sum.

That may be seen as a rather inequitable situation; I do not disagree with that. If there were some available forum, there could conceivably be a claim for unjust enrichment, because you could be saying, "The bank has this money and we are now not getting any benefit from it". That could be seen as a form of unjust enrichment, but that is slightly speculative.

Martin Howe QC: I take a different view from Mr Wordsworth on this issue. The status of the European Investment Bank is rather different from that of other property of the European Union. For any capital asset, such as the Berlaymont building or whatever, you could say that we have contributed via our budget payments towards it. Therefore, should we not, in fairness, get a share of the asset back? That is a sort of fairness argument.

The European Investment Bank is different, because the contributing member states each contributed identifiable share capital into that bank. That is a specific item of property. Mr Wordsworth is making the point, "Is that property not just expunged by operation of law?", because it is right that the statute says only member states can be shareholder members of the European Investment Bank.

On the other hand, that strikes me as a somewhat bold argument. I would have thought that the existence of that property, those shares, is clearly an accrued right before the treaty ceases to apply to us. If it ceases to be possible for us to exercise our rights as shareholders within the bank because that is restricted to member states, we have a claim for the fair value of that property. I put it as a legal claim rather than merely a moral claim.

That fair value would include the equity capital, the accrued reserves of the bank, over and above what we paid in, but in fairness, in valuing it, one would need to net off the present-day value of the contingent liability, which is the uncalled share capital. It is called, loosely, a guarantee. Technically it is not. Each member state agreed to subscribe a large amount of share capital, of which only a very small percentage was paid up.

The residue, effectively, acts as a guarantee, should the bank get into trouble because the bank can call that capital in. The release of the United Kingdom from its contingent liability to pay in further capital should be taken into account in that valuation exercise. Subject to that

point, I would have thought we had a reasonably strong legal claim to the value of the shareholding interest as at the date the treaty ceases to apply.

The Chairman: I am struck by the phrase “unjust enrichment”.

Q7 **Lord Turnbull:** Can I come back to this question of enforcement if no agreement is reached? We have different views about how big the sum of money might be. Mr Wordsworth thinks it might be larger than Mr Howe, but both of you made this distinction that enforcement applies in each case. I would like your views on which court would have jurisdiction to hear such a case. As the EU is not a state, could any of the individual member states bring an action?

Martin Howe QC: Very briefly, the question is what courts have compulsory jurisdiction. If there is an agreement to submit a dispute, that founds the jurisdiction.

Lord Turnbull: This was your reference to an arbitration body. What if we leave that aside?

Martin Howe QC: Leaving that aside, is there any route by which an international tribunal has compulsory jurisdiction over the United Kingdom? I will defer to Mr Wordsworth, who has much greater knowledge of the International Court of Justice, but my understanding is that the European Union, because it is not a state, is not subject to the compulsory jurisdiction of the International Court of Justice.

Could member states bring the claims? Again, I have not studied that. There is a big issue with the International Court of Justice’s compulsory jurisdiction that you have to look into each of the party’s submissions to compulsory jurisdiction and check that the dispute falls within both. If you had a lot of member states, you would have an issue as to whether each and every member state had a submission to jurisdiction that would cover this dispute and whether the United Kingdom’s submission would cover this dispute.

Leaving that aside, the further problem is that the claims would appear to be at least primarily claims by the European Union, which in international law has a distinct legal personality from the legal personality of the member states. At the moment, I cannot see a practical route by which this claim could be brought before either that court or any other by way of compulsory jurisdiction.

Samuel Wordsworth QC: Yes, I agree with that, subject to two points. First, it is very important to identify that we are very used, in a domestic set-up, to see obligation and enforcement as two issues that go hand in hand. As a matter of international law, that is not the case. You always have to have consent to jurisdiction, which is usually in the form of a treaty.

Many of the foundational treaties that one refers to all the time, such as the UN charter or the 1949 Geneva conventions, do not have compulsory

jurisdictional provisions. This is to make the point that, just because a breach of obligation is not accompanied by a compulsory jurisdictional provision, it does not mean it is somehow less of a serious breach of international law. They are two entirely separate questions.

In terms of the existence of compulsory jurisdiction, as I mentioned earlier, it may be possible for an infringement proceeding claim or, conceivably but much more complicatedly, a preliminary reference to be brought while the UK is still a member state. Leaving that to one side, I agree with what Mr Howe has said in terms of the difficulty in bringing a case in front of the International Court of Justice. The jurisdiction of the ICJ is limited to states, so you would have to find a member state that wished to bring a claim on the basis of the declaration the United Kingdom has made under the ICJ statute, accepting the compulsory jurisdiction of the ICJ in certain circumstances.

There are member states that would meet those circumstances, so it is a possible route in theory. It is a matter of jurisdiction, but there are difficulties. One obvious difficulty is the provision I mentioned earlier, Article 344 of the TFEU. You have member states there undertaking not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein.

That can be interpreted as meaning that they will only ever go to the CJEU or such other forum as is allowed by the treaties, and they will not bring their EU treaty claims elsewhere. You could interpret that as meaning that rule applies, but only if there is a mechanism within the EU treaties. I see that as a slightly less convincing interpretation.

The second difficulty is one of standing. It is a well-established principle in ICJ jurisprudence that the court cannot rule on an issue if it inevitably is going to have to decide on the legal rights and obligations of a party not before it, if that is a necessary step in its analysis. In this case, you can see that having a very real resonance, because, even if a claim is brought by member state X against the United Kingdom, in order to find liability you may well have to make findings in relation to acts of the European Union, and the European Union would not be a party before the court.

Q8 **Baroness Couttie:** I am slightly puzzled by the mechanism by which a member state would be able to go to the ICJ in this circumstance. Presumably, it would go as a member state, and would have to show damage to it as a state, whereas the obligation and the damage is to the EU, if you see what I mean.

If Germany went, it could only do it on behalf of any damage to Germany, and the damage is not directly to Germany; it is to the EU. Even if all the states in the EU do it together as individual states, I do not think there is a mechanism for them to do it as a group, or maybe there is. Even if there was, it would still not be damage directly to them, because it would be via the EU. Do you see what I mean?

Samuel Wordsworth QC: I entirely agree with that. The claim would have to be constructed as a claim of breach by the United Kingdom that caused damage to the relevant member state. It would have to say, for example, "The UK committed to fund such-and-such a programme. Because of its failure to fund that programme, we are under an obligation to fund that programme. That has created damage". It would have to be a very carefully confined claim.

Baroness Couttie: Therefore, it would be limited to various things that they could define very specifically rather than the whole, potentially.

Samuel Wordsworth QC: Yes, it would have to be. A payment into the budget goes in as a general payment.

Baroness Couttie: It covers staff costs and all sorts of woolly things such as that.

Samuel Wordsworth QC: Yes.

Baroness Couttie: It would have to be limited to specific projects, such as a road, within the member states that brought these claims, so it would be a very much smaller number, one would assume, than the overall number that we are considering under the withdrawal agreement.

Samuel Wordsworth QC: I would say so. There is a scope for more than one state bringing a claim at the same time. There are examples of that.

Baroness Couttie: Even so, if they all did it cumulatively, it would still end up being a smaller number.

Samuel Wordsworth QC: Yes.

Q9 **Lord Vaux of Harrowden:** We have just been talking about the obligations that we might owe and how those would be enforced. Is it the same the other way round for the EIB element that we talked about previously, or is there a different enforcement mechanism or process for that?

Martin Howe QC: I do not think so, no. There is no compulsory mechanism we could invoke relating to the EIB. If a dispute were to go to ad hoc arbitration, one would need to ensure that counterclaims by the UK were within the scope as well as claims by the EU against the UK.

Q10 **Baroness Neville-Rolfe:** About that last exchange, if you did frame a claim, I would be interested to know how long that classically takes. If you were the EU, would you be better off trying to get your money by refusing to negotiate an FTA? This is, as it were, a bill to play. Do you see that as an alternative way of dealing with it, if you are the EU?

Martin Howe QC: An alternative to pursuing a claim via legal mechanisms is to pursue it via political mechanisms. Refusing to agree a long-term relationship is something the European Union could well consider. I would have thought there are problems, from their point of

view, of going down that road. For example, suppose we are contemplating a free-trade agreement with zero tariffs. Due to the lopsided trade pattern between the United Kingdom and the European Union, in which we have a very large deficit in goods, although it is a lesser overall deficit because we do better in services, in the last year on which this exercise has been done, a zero-tariff FTA would save UK exporters into the EU 27 about £5.5 billion a year, but it would save EU exporters into the UK something like £12 billion.

That study is on the basis of 2016 figures, so it is not quite up to date, but there is a very lopsided benefit of having a zero-tariff agreement, because the European Union's goods exports to us are so much greater than our exports in the opposite direction, and because they tend to be concentrated in high-tariff sectors such as agriculture, cars and other vehicles, and so forth. Indeed, they could impose what might be seen as a form of economic sanction in declining to move forward into a trade agreement, but it would cost them as well as costing us.

Baroness Neville-Rolfe: Thank you. That is very helpful. The question I was going to ask was about what happens if we do not pay the financial obligations. Could this count as a debt default and affect the UK credit rating? The agencies have said that would not be the case, but I wondered whether either of you had a perspective on that.

Martin Howe QC: I cannot claim to be an expert in what financial markets would treat as a debt default, but it is certainly very different from the classic debt default obligation, where you have a completely clear legal obligation to pay up interest or repay a bond, and it is therefore clear-cut. States frequently have disputes between themselves that involve financial elements. I am not aware of any practice in the credit markets of treating the involvement of a state in such a dispute as a default. As far as I know, I cannot see that as a likely prospect at all.

Samuel Wordsworth QC: It would depend on the relevant debt instruments. If that was treated as a default under the relevant debt instrument, yes. As I understand from the way the question was put, at the moment credit rating agencies do not appear to be too troubled, but I recall the Attorney-General's remarks in the House of Commons when he was envisaging a negative adverse reaction if the UK were not to meet existing financial obligations. How the broader market reacts, I do not think I am in any position to assist you on.

Baroness Neville-Rolfe: Are there precedents in other areas where there are wider consequences beyond the legal claims, which we have already examined well?

Samuel Wordsworth QC: It is very important to bear in mind that the UK has a very good reputation for complying with its international law obligations. That has permeated through the international law world. It has a reputation for having excellent judges on the International Court of Justice, for example. It has a high reputation in the world of international

law, and that reputation would be damaged if there was a perception that the UK was failing to comply with treaty obligations.

- Q11 **Lord Bruce of Bennachie:** The Government have been playing hardball, saying, "If we leave, we are not going to pay anything, or certainly not up front. They really need that money, because we are 15% of the budget and they will really feel it". What effect would that have on the EU's financial commitments? How would it react practically? Would it be cuts or would it be trying to go round the other members? Would it lead to any reinforcement of legal challenges? You were talking about the EIB. Could they turn round and say, "In that case, we are not going to give you the shareholding"?

I was at a university open day with my son, and the official line from the university was to say, "We have no idea what is happening with Erasmus. If you are starting on a university course now, looking for an Erasmus programme, we cannot tell you what it will be, certainly not if it is your third year from now". How will it affect the EU in practical terms from your point of view and what might be the legal implications for how it reacts?

Samuel Wordsworth QC: I will answer that from the legal perspective, because in the broader political sense I cannot really be of any assistance. It is important to bear in mind that, at least on my analysis, there are UK financial obligations, but the UK also has crystallised rights, to which attention must be paid under Article 70 of the Vienna convention. If the UK has rights, there is nothing in the EU treaties that allows the withholding of performance. A failure to make committed payments to the UK can be a breach.

There is a possibility, as a matter of customary international law, for acting in what would otherwise be a breach by way of a countermeasure. A countermeasure in this case would be, classically, like the example we were looking at. The UK is failing to make its funding commitments and member state X says, "I am not going to fund this project either". That would be lawful if it were proportionate. The proportionality there would be fairly obvious: "You are not paying; I am not going to pay either". The purpose of the countermeasure cannot be in a sort of negotiation. It can only be to induce performance by the state that is breaching international law.

When considering proportionality, it is also important to consider to whom a funding commitment might be owed. If the UK refused to pay financial sums due in relation to a budget, I can see as proportionate a refusal to pay a rebate, for example. If the funding obligation is not to the UK but to a third party, that raises rather different issues. In relation to the university example, if the university has the benefit of a commitment from the EU or another body, it is very difficult to see how a countermeasure that impacted on a third party would be proportionate.

Martin Howe QC: I suspect there are many aspects to that question that are far more political than legal.

Lord Bruce of Bennachie: Yes, of course. I could take another example. If the EU is suddenly faced with a 15% or £39 billion shortfall, it may have to take action, which could have legal consequences, in terms of how it manages its funds. Is that not where they could turn round and say, "We will have to cut budgets" or "We will have to cut programmes"? Does that have legal obligations?

Martin Howe QC: This is an issue as to whether they are internally committed under the European Union constitutional order to continue making what budget programmes they are committed to internally.

In terms of its impact on the United Kingdom in a no-deal scenario, obviously we will no longer receive payments out from the EU budget for forward programmes. The issue there is that the United Kingdom Government, if they want those programmes to continue, will need to fund them insofar as they are internal programmes, such as regional assistance.

You mentioned the Erasmus programme. I may be wrong on this, but I thought the position there was that the UK Government had proposed that the UK will continue to pay in and fund its share of that programme after exit.

Lord Bruce of Bennachie: That is not the line the universities are putting out.

Martin Howe QC: I confess I had thought that was the position, or that they may reach that position. Then there would be a question for the European Union. They could say, "We do not like the UK. Therefore, we are going to punish our students who want to carry on with courses in UK universities and UK students who want to do courses in EU universities". They can do that. Whether they would carry through on it if the UK was offering to fund the programme, if it reached that scenario, is a second question.

There are all sorts of things they will no doubt say or threaten they might do as a lever to try to secure payment of these budget contributions. What it would be sensible or in their interest to carry through on in the event of that happening is a different question.

Samuel Wordsworth QC: Can I come back to Baroness Neville-Rolfe's question on timing? I did not respond to that, with apologies. Unsurprisingly perhaps, claims in front of the International Court of Justice are lengthy proceedings. In a case such as this, there would unquestionably be objections to jurisdiction and admissibility. Factoring that in, you are looking at a period of three, four or possibly more years. One thinks that is an inordinately long time, but we should remember how long cases take in domestic jurisdictions too. The CJEU can operate much more speedily. There is an instance of it dealing with a case in six months.

The Chairman: That brings the session to an end. Thank you very much

indeed for your evidence.