

LAWYERS
for
BRITAIN

**Adjudicating Treaty Rights in
post-Brexit Britain: Preserving
Sovereignty and Observing
Comity**

A fair, balanced and workable proposal

Martin Howe QC

Francis Hoar

Dr Gunnar Beck

www.lawyersforbritain.org

THE AUTHORS

Martin Howe QC practises in intellectual property law and EU law particularly on the free movement of goods and services. He is author of many publications on EU constitutional and legal subjects, including recently “*How to Leave the EU: Legal and Trade Priorities for the New Britain*”, Politeia, 2016. He is Chairman of Lawyers for Britain.

Francis Hoar is a barrister at Field Court Chambers who is a leading practitioner in the law of elections and whose practice encompasses immigration law and rights of free movement of persons.

Gunnar Beck, DPhil (Oxon), is a barrister and lectures in EU law at SOAS. He is a leading authority on EU law and author of “*The Legal Reasoning of the Court of Justice of the EU*” (Hart Publishing, Oxford, 2013) and of numerous other legal articles and chapters in legal works.

© Martin Howe, Francis Hoar, Gunnar Beck 2017

Promoted and printed by Lawyers for Britain

Lawyers for Britain is an unincorporated association, address: c/o Martin Howe QC, 8 New Square, Lincoln's Inn, London WC2A 3QP.

Adjudicating Treaty Rights in post-Brexit Britain: Preserving Sovereignty and Observing Comity

By Martin Howe QC, Francis Hoar and Gunnar Beck

28 September 2017

Summary

The current proposals by the EU Commission -- that the UK's future obligations in relation to the rights of EU citizens resident in the UK be adjudicated by the European Court of Justice (ECJ) -- are incompatible with near-universal international practice under which independent States do not accept the binding interpretation of their treaty obligations by courts of the other treaty party.

The nature of the jurisprudence of the ECJ, under which it frequently overrides the wording of provisions and imposes on them a meaning which in the view of the Court furthers the aims of European integration, makes the ECJ particularly unsuited to the task of impartial adjudication on bilateral treaty obligations assumed by a non-member state. The ECJ is neither an impartial nor a conventional court: it adopts an ultra-flexible and purposive approach which allows the ECJ to choose between various non-hierarchical interpretative criteria - literal, contextual, purposive and meta-teleological - and reach almost any conclusion it desires. This approach typically leads the ECJ to a pro-Union decision in disputes involving the allocation of powers between the EU and the other party.

The Prime Minister's speech in Florence on 22 September 2017

promised that the rights of EU citizens in the UK would be fully respected by UK courts, and acknowledged concern about possible divergence of interpretation of rights of citizens in the UK and in the EU27. She indicated that the prospective agreement between the UK and the EU relating to the rights of citizens would be incorporated fully into UK law so that UK courts can refer directly to it, and that UK courts should be able to take into account the judgments of the ECJ with a view to ensuring consistent interpretation.

It is entirely reasonable that there should be an impartial and balanced international mechanism for the resolution of any disagreements on the interpretation of the agreed treaty provisions. In establishing such a mechanism, it should be recognised that there are two distinct tasks: (1) resolving issues of interpretation of the treaty in probably numerous individual cases, and (2) resolving residual disputes at international level.

In order to deal with the first task within the UK, and in order to further the objectives announced by the Prime Minister in her Florence speech, we propose the establishment of an International Treaties Court, staffed by British judges and under UK law, which would act as a central point giving guidance to non-specialist courts and tribunals throughout the UK on the interpretation of the UK legislation which implements the treaty. We tentatively suggest that this Court be modelled on the Competition Appeal Tribunal, a specialist court which has jurisdiction throughout the UK and is at the same judicial level as the High Court in England and Wales and Northern Ireland, and the Outer House of the Court of Session in Scotland.

It would be possible to establish such a Court at a higher level in the judicial hierarchy, i.e. at a parallel level to the Courts of Appeal/Inner House, and therefore only subject to the Supreme Court; or even at a level coordinate with the Supreme Court (like the Privy Council). However it is possible that quite large numbers of cases could arise in the early stages and a higher level court would be likely to be more expensive both in terms of legal costs for parties and judicial resources.

Within the EU27, the ECJ would automatically act as a central point of reference for interpreting the treaty rights of UK nationals when cases are referred to it from the courts of the EU27 Member States, without this needing to be included in any international agreement. This jurisdiction arises under the *Demirel* and subsequent cases, and under this jurisdiction the ECJ's interpretations would be binding within the EU but would not bind the UK or its courts.

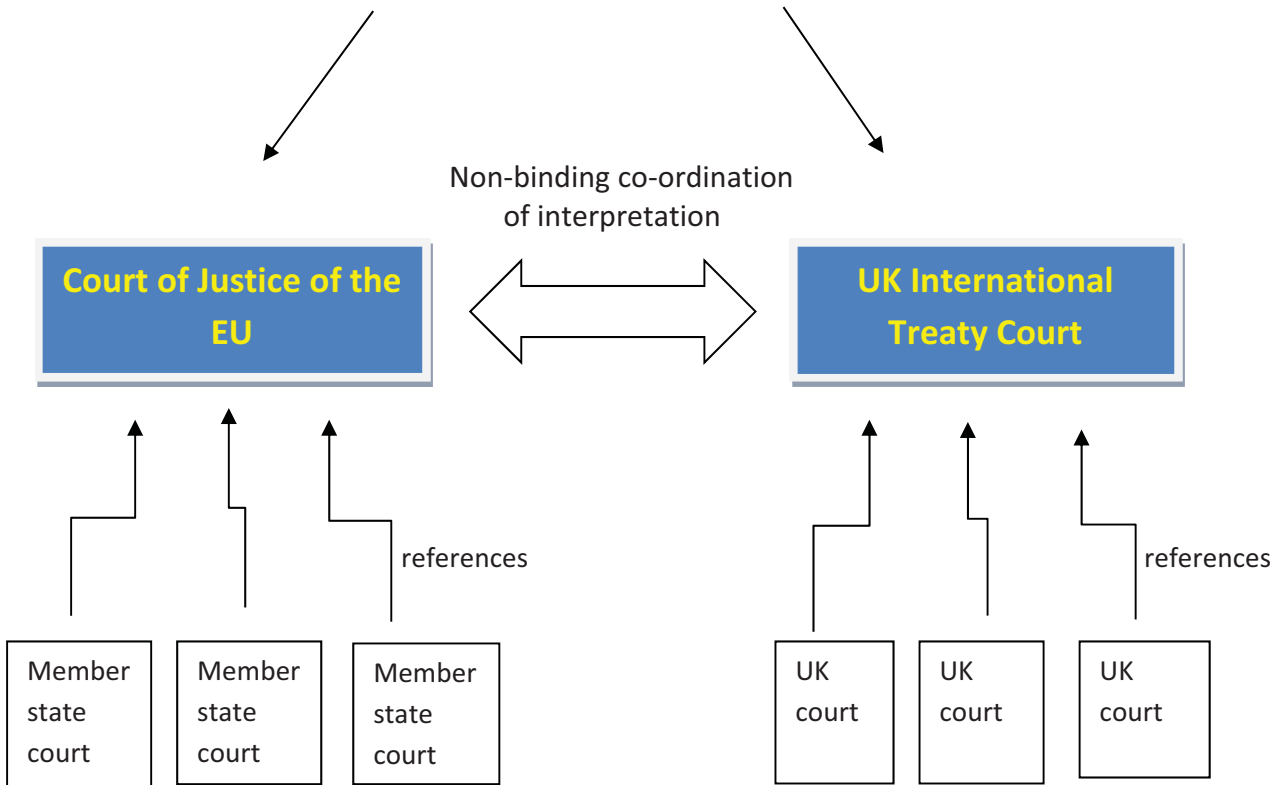
Our proposal would create a symmetrical system between the EU and the UK, where each would have a central court (the ECJ within the EU and the ITC within the UK) reaching decisions in individual cases on the interpretation of the agreed treaty provisions on the rights of EU citizens in the UK and UK citizens in the EU27. Under ordinary principles of international comity between courts of different countries which are interpreting common treaty provisions, it is to be expected that each court would pay respect to the decisions of the other and, although not bound to follow them, would seek to follow them if possible.

We envisage that this system would mean that the occasions when a

persistent divergence would arise between the interpretation of the treaty rights by the ECJ and by the UK's ITC would be rare, or possibly even non-existent. However as a fall-back in order to deal with such divergences, we propose a bilateral international arbitral body which would sit *ad hoc* when required.

If the model of the ITC is established in order to guide non-specialist UK courts and tribunals in relation to the rights of EU citizens under the withdrawal agreement, it could then also readily be extended to cover other international treaty-derived rights, such as the parallel rights of EEA and Swiss citizens, the provisions of the proposed EU-UK free trade agreement, the WTO Agreements and future UK trade agreements with non-EU states insofar as their provisions are reflected in UK domestic legislation.

Joint EU-UK Treaty Tribunal (binding)



Introduction

In our previous paper, "*A fair settlement, or a privileged caste with superior rights enforced by a foreign court?*"¹ we called for a fair settlement of the future rights of EU citizens resident in the UK, and urged rejection of the proposals advanced by the EU Commission that the ECJ at Luxembourg should have indefinite continued jurisdiction over the rights of EU nationals in the UK.

As we pointed out, the ECJ after Brexit will become a wholly foreign court with no British Judge or Advocate-General. It is almost unheard of in international relations for a State which is party to an international treaty to accept the jurisdiction of the courts of the other treaty party over the interpretation or enforcement of the treaty provisions. Not only is such a notion contrary to international practice, it is also (as we pointed out in that paper) entirely contrary to the established practice of the European Union. There is no other trade or association agreement between the EU and a non-Member State in which the non-Member State accepts the binding jurisdiction of the ECJ in the way proposed by the Commission for the UK, not even Andorra or San Marino, both of which have conventional bilateral international arbitration procedures.

There are only three instances where non-EU States accept (indirectly rather than directly) to be effectively bound by the future (i.e. post-

1. www.lawyersforbritain.org/files/eu-citizens-privileged-caste-foreign-court.pdf

agreement²) case law of the ECJ. These are (1) the EEA States under the EEA Agreement via the EFTA Court which shadows the ECJ, (2) Turkey under its customs union agreement with the EU, and (3) Moldova under its pre-accession association agreement with the EU. Each of these instances are cases where the States concerned have agreed to sign up to and follow an evolving body of rules. These are the EU's internal market rules in the case of the EEA Agreement, and the EU Custom's Union's rules on tariffs, quotas and other matter in the case of Turkey.

Moldova has agreed to align wide areas of its domestic law with EU law, and also to align the interpretation of that law, in preparation for its hoped-for accession to the EU. The key mechanism by which this convergence in interpretation is to be achieved is, under Article 403(2) of the EU-Moldova Association Agreement, an obligation on the arbitral panel in an EU-Moldova dispute to refer issues of interpretation of provisions of the Agreement which reflect EU law to the ECJ, rather than deciding those issues for itself.

All three of the above models where indirect but effectively binding shadowing of future ECJ jurisprudence occurs have the common feature that they were entered into in anticipation of full EU membership, even though in the case of Norway and Turkey for

2. Being bound in a specific area by pre-agreement case law of the ECJ is a different matter. In such a case, the international obligations being assumed are a known quantity, whether they are defined in the words of a treaty provision or by cross-reference to past judgments of the ECJ. By contrast, assuming an obligation to follow or mirror future judgments of the ECJ means that the meaning of the international obligation being assumed can be altered by later “interpretation” of that obligation by the ECJ without the consent of other party to the obligation.

different reasons this prospect now looks either distant or non-existent. A regime under which a country shadows the rulings of a foreign court for what is envisaged to be in interim period before becoming fully subject to, and a participant in, that Court is one thing -- it would be quite another thing for the United Kingdom which is departing from the EU and whose long term future lies outside it, to agree to be bound by such arrangements.

These instances are irrelevant to the adjudication of the rules relating to the rights of EU nationals after Brexit, which will be residual and essentially fixed, and will not evolve to match internal developments in free movement law and practice within the EU.

The principle that international treaty provisions should, in the event of a disagreement which cannot be resolved by other means, be adjudicated upon by an independent and neutral tribunal is very well established in general international practice and in the EU's external agreements. Given that the UK has made its proposals for the continued rights of EU nationals in good faith and intends to comply with them, there can be no objection in principle to such a mechanism provided it is neutral and fair, and indeed provided it also applies reciprocally to the EU so that the rights of UK citizens resident in the EU27 can equally be protected.

It is important however to understand what needs to be resolved at the international level and what does not. Some public suggestions - notably an interview given by the German Foreign Minister Sigmar Gabriel to which we refer below - seem to imply that an elaborate joint

court should be set up at international level which would be equipped to process large numbers of individual cases. Such an arrangement is highly undesirable for a number of reasons, quite apart from the expense of setting up and permanently staffing such a structure with judges and legal, administrative and other support staff remunerated with international-level salaries and allowances.

More fundamentally, such an idea conflates in one body two different functions. The first function, which must be performed by an international body, is resolving any disagreements which arise between the UK and the EU over the interpretation or enforcement of the relevant treaty provisions. The second function, which does not need to be performed at international level, is the day-to-day application of the agreed treaty rules to individual cases inside the UK or inside the EU27.

The government's position paper "*Enforcement and Dispute Resolution*"³ recognises two of the key points which we make in this paper. First, that a treaty adjudication mechanism which involves one treaty party submitting to have the treaty interpreted by the courts of the other party in the event of a dispute is contrary to near-universal international practice and would be unacceptable to the United Kingdom after it has left the EU. Secondly, that the task of applying treaty provisions (or treaty-derived domestic law) to individual cases is a distinct task from that of international dispute resolution. It follows that no gigantic shining white palace international court

3. www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper
23 August 2017.

structure with hundreds or thousands of litigants and cases is needed for the effective adjudication and enforcement of treaty-derived rights after Brexit.

Interpretation and application of agreed treaty rules inside the UK

The first possible model might simply be to leave the interpretation and application of agreed treaty rules inside the UK to whatever court or tribunal an issue happened to arise in. Once Parliament had (whether by primary or secondary legislation) translated the agreed treaty terms into domestic law, it would of course be the duty of every court and tribunal to apply those rules if relevant to the case before it.

However, issues relating to the rights of EU citizens in the UK could arise in a wide range of different courts and tribunals. Immigration issues would probably arise mainly in specialist immigration tribunals, but issues related to discrimination in the workplace or elsewhere or in pensions or benefits etc could arise in non-specialist civil courts or in employment or social security tribunals. Issues relating to the rights of EU citizens could also arise in ordinary criminal courts.

Some courts, for example the Administrative Court which is a subdivision of the High Court, are very experienced in applying existing EU law and would be expected to be equally skilled and knowledgeable in interpreting and applying the post-Brexit treaty-based rules relating to the rights of EU nationals. The same cannot be said of the general run of courts and tribunals before whom many such issues will arise. This is not to detract from or disparage the

skills or expertise of such courts and tribunals when dealing with the ordinary range of cases which come before them: it is just that if unfamiliar treaty-based arguments are raised with which the court concerned has no experience in dealing, a wrong answer can be given or a right which should be dealt with can be ignored.⁴

In order to address this problem, we propose the establishment of a special court, provisionally to be called the International Treaty Court ("ITC"). This would be an entirely British court, established and operating under UK law with British judges. Its function would be to interpret laws which Parliament has passed to give effect to international treaties, when other courts or tribunals need guidance. We envisage that it would start with the treaty rules relating to EU nationals in the UK, but on the assumption that a wide-ranging free trade agreement is concluded between the UK and the EU, its jurisdiction would naturally be extended to the interpretation of UK legislation which gives effect to the free trade agreement. In addition, as the UK concludes trade agreements with non-EU countries as it leaves the EU, the Court's jurisdiction would naturally extend to those as well.

This would involve giving any court or tribunal before which the interpretation of a treaty-based UK arises the right to refer the case to

4. To give an illustration from the personal experience of one of the authors of this paper, in *Turner v Stafford Crown Court* [2011] EWHC 490 Admin, the Administrative Court was obliged to quash a judgment of the a Crown Court which had decided to refuse to hear argument about the EU law on free movement of goods and services in a criminal case involving the use of a satellite decoder card to receive foreign broadcasts. This refusal wasted many thousands of pounds and caused acute anxiety and stress for the individuals involved until it was eventually overturned in the High Court.

the ITC for it to give guidance. This is similar to the system under which courts and tribunals can refer a point of interpretation of EU law to the ECJ by the so-called "preliminary reference" procedure. However the process of referring cases to this Court established under UK domestic law could be made a lot cheaper and more effective, and certainly much faster than a reference to Luxembourg.

We propose that the ITC should be established at the level of the High Court - i.e. a senior court, but still below the level of the Court of Appeal in England and the Supreme Court. It should be a court having United Kingdom jurisdiction, rather than part of the court system of England and Wales. Thus, it would sit in Scotland and Northern Ireland as well as in England and Wales and would have members from Scotland and Northern Ireland. This model is in fact based on the existing Competition Appeal Tribunal, which is a specialist United Kingdom tribunal.

The ITC would have the specialist expertise needed to guide other less specialist courts and tribunals in the interpretation of treaty-based rights. The reason why it is important that this job should be done by a specialist and knowledgeable court arises from a very well known principle of UK law which was explained by the law lord Lord Diplock in a case called *The Jade* [1976] 1 WLR 430 at 436:

"As the Act was passed to enable Her Majesty's Government to give effect to the obligations in international law which it would assume on ratifying the Convention to which it was a signatory, the rule of statutory construction laid down in [two previous

cases] is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the Convention, the statutory language should be construed in the same sense as that of the Convention if the words of the statute are reasonably capable of bearing that meaning.

In the instant case the obligation assumed by Her Majesty's Government under the Convention was to give effect to it in all three jurisdictions of the United Kingdom. So there is also a presumption that the Act was intended to have the same consequences as respects the right of arrest of ships in Scotland as it has in England. Accordingly if the language used in the English list is capable of more than one meaning that meaning is to be preferred that is consistent with the language used to describe the corresponding claim in the Scottish list."

This same principle is widely recognised by the courts of other countries, for example by the Supreme Court of Canada in *Ordon Estate v Grail* [1998] 3 SCR 437 at para 137: "*Although international law is not binding upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments*" Similar principles have been expressed by the High Court of Australia and the New Zealand courts.

It follows that where a court is interpreting legislation which Parliament passed in order to give effect to an international treaty, it

is important that the task of interpreting that legislation is undertaken by a court which has the knowledge and expertise to interpret the treaty. This rule or principle is not in any way in opposition to the sovereignty of Parliament: rather, it is fulfilling Parliament's intention that its law shall give proper and accurate effect inside the UK to the international treaty which Parliament intended to implement.

The interpretation of EU-derived law and of the provisions of a future EU-UK trade agreement in accordance with the principle of interpretation established in *The Jade* would bring to an end the obligation on the UK courts to adopt the ECJ's interpretative approach with its integrationist and pro-Union default position in their own interpretation of EU-related domestic law. At the same time the ITC could continue to look at the purposes of provisions of any EU-UK trade agreement and treaty-derived law subject only to express language to the contrary in domestic legislation. This approach should also be followed in any future EU-UK trade agreement where the parties agree (as is common in free trade agreements) on provisions which prevent cross border trade in goods or services being restricted by discriminatory measures or measures which are not objectively justified, and in relation to the regulation of financial and other services.

The workings of the ITC could however be made faster, cheaper and more effective than those of the ECJ on a preliminary reference. On a preliminary reference, there has to be a rigid distinction between the functions of national courts, which are to find facts and apply the law to those facts in order to give judgment, and the task of the ECJ which

is to interpret EU law. This division can give rise to practical problems and to multi-step proceedings. The case has to be sent by the national court to the ECJ asking questions of EU law; the ECJ gives a judgment answering the questions, or at least its own interpretation of the questions; and then the national court needs to interpret the ECJ's answers and apply them to the facts of the case before it. This step can not infrequently be problematical. To give an example, in one case there was a substantial hearing in the High Court (additional to the original trial after which the questions were referred to the ECJ) in order to interpret the ECJ's answers and apply them; then followed by a 3-day hearing in the Court of Appeal in which the High Court's judge's interpretation of the ECJ's ruling was challenged: *SAS Institute v WPL* [2013] EWCA Civ 1482.

The ITC as a national court can be given wider powers which would reduce this kind of danger. First, it should have the power similar to that normally enjoyed by an appeal court to exercise itself any of the powers of the court which has sent the reference, if that course is preferable to sending it back for further hearings; secondly it should have powers to find additional facts in a similar way to appeal courts; and thirdly it should have the power to answer the questions of law which the referring court should have asked, instead of the questions actually asked, if that is appropriate.

In practice, we would expect that in most cases a reference to the ITC would be a substitute for a normal appeal from the referring court (which might be to a non-specialist appellate court) rather than being additional to such appeals.

The numbers of cases would be difficult to predict in advance and we would envisage the Court as being highly flexible. It would probably need a full-time or nearly full-time judicial chairman but we would envisage that most of its membership would be made up by 'double-wigging' existing members of the judiciary (including deputy High Court judges) who have relevant expertise. For example, most of the judges who regularly sit in the Administrative Court currently have EU law expertise and could be designated to sit in the International Treaty Court. Thus, judicial review applications could be dealt with in a highly flexible way in that if they contain a point of treaty interpretation, they could be dealt with the judge sitting in his or her capacity as a member of the ITC without involving the need for any new judge or indeed any new courtroom.

As we have pointed out at the beginning of this section, it would of course be possible to leave issues of the application of treaty based law which involve interpretation of the EU-UK treaty to be decided as and where they arise in the ordinary courts. However, we see distinct advantages in our proposal for a International Treaty Court, as follows:-

- (1) It would involve applying specialised expertise to issues of interpretation of treaty-based laws which would otherwise arise and be decided in a wide range of different courts and tribunals of varying expertise. We envisage that both the quality and the consistency of decisions would be improved.
- (2) The ITC would effectively do the job which would otherwise have

to be done by appellate courts. However, given the range of different first instance courts in which treaty-based issues would be likely to arise, the ordinary routes of appeal from those courts would lead to the issues being decided by different appellate courts which themselves might or might not have treaty expertise. While the Supreme Court sits at the apex of the appellate system from all parts of the UK (apart from criminal cases in Scotland) the number of cases with which it can deal per year is small and it could not be expected itself to handle significant numbers of treaty-based cases in addition to its normal workload.

- (3) When negotiating treaty arrangements, the ITC would provide assurance to the EU that treaty-based laws within the UK would be interpreted fairly and effectively within the UK's judicial system, by providing a mirror for the preliminary reference system that would prevail inside the EU under the *Demirel* jurisdiction, as explained in the next section.
- (4) Decisions of the ITC interpreting treaty provisions are likely to carry greater international weight when the ECJ or the courts of EU member states are called upon to interpret the reciprocal treaty obligations which will apply to the EU.

Interpretation and application of agreed treaty rules inside the EU27

The other side of the picture is how the agreed treaty rules will be interpreted inside the EU27 when UK citizens seek to rely upon them.

Issues may arise in a wide range of different courts, for the same reasons as explained above in relation to UK courts. Further, the issues may arise in the national courts of 27 different Member States.

The answer is that, unless something special is done to create a different system, the ECJ will interpret those treaty provisions inside the EU and will give guidance to the courts of Member States before which issues arise through the preliminary reference procedure.

The ECJ established its own jurisdiction to do this in the case of *Demirel v Stadt Schwäbisch Gmünd* Case C 12/86 [1987] ECR 3719. Mrs Demirel, a Turkish national, sought to rely on the provisions of the Association Agreement between the EEC and Turkey in order to rejoin her husband who was working in Germany, since that Agreement contained certain provisions for progressively securing the free movement of workers between Turkey and the EEC.

The first question was whether the ECJ had jurisdiction to interpret the EEC-Turkey Association Agreement for the purposes of the case. The ECJ held that it did, because the Agreement was an act of an EEC institution (the Council of Ministers) and upon its adoption became part of the Community legal order. And because the Community had assumed an obligation towards an external country to perform the obligations in the agreement, in turn it became an obligation of the Member States towards the Community "*within the Community system*" (Judgment, para [12]) to perform those obligations.

It is important to understand that this case provides no basis at all for the ECJ exercising jurisdiction over non-Member states under

international agreements concluded by the EU. In the *Demirel* case the ECJ's role was no different from the role of a federal domestic court within a federal state which has concluded an external treaty. For example, if the USA enters into a treaty with another state, the US Supreme Court may be called upon to interpret the treaty in order to decide what obligations it imposes on US citizens or on individual States. Its ruling will be binding within the USA. But in no way does that make its ruling, as a domestic court of one of the parties, binding on other states which are party to the treaty.

The withdrawal agreement under Article 50 TEU will be an international agreement to which the EU is party, and it is intended that the rights of UK citizens within the EU are to be protected under that agreement. As an agreement concluded by the EU acting within the scope of its powers, its terms are binding on the Member States - in other words, they will be obliged under the EU treaties to comply with the obligations which the EU will have assumed towards the UK. Therefore, the ECJ will have jurisdiction to interpret and enforce those obligations within the EU.

How it all fits together

It can be seen that within the EU, the ECJ under the *Demirel* jurisdiction will act as a central point which interprets the terms of the withdrawal agreement and guides the courts of the Member States how to apply its terms in particular contexts.

Under our proposal, the ITC will similarly act as a central point within the UK interpreting the provisions of the agreement. The provisions

protecting EU nationals in the UK will of course mirror the provisions protecting UK nationals in the EU27.

This is where a further principle of treaty interpretation comes into play. That principle is that the courts of countries which are signed up to a treaty will look at each others' decisions and try, if possible, to apply a consistent interpretation. This principle was for example supported by Justice Scalia (despite his well-known general reluctance to give weight to decisions of non-US courts) in the US Supreme Court in *Olympic Airways v Husain* 540 U.S. 644 (2004), where he argued that the US Supreme Court should follow a decision of the English Court of Appeal:

"We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. ... Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration."

This principle means that the ITC would be expected to look at decisions of the ECJ in interpreting the treaty, and the ECJ would be expected to look at decisions of the ITC. Neither's decisions would be binding on the other, but it is to be expected that both courts would approach questions of interpretation of the treaty with the aim if possible of being consistent with each other. It is important to realise

that this is a system where judgments of foreign courts are treated as persuasive rather than binding authority. This means that if, for example, the UK courts were satisfied that the ECJ had reached a decision by basing itself on incorrect legal principles of interpretation of the treaty, they need not follow it - and vice versa in the case of the ECJ.

This system however should mean that issues upon which the ECJ and the ITC diverge and are unable to agree with each other's interpretation should be comparatively rare. It is at this point that the international tribunal can step in and do its work. But the need for it to adjudicate should arise very rarely, and ideally never.

The international tribunal

In a negotiating position paper on EU citizens' rights communicated to the UK Government on 12 June 2017 (European Commission, '*Essential Principles on Citizens' Rights*', https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_0.pdf), the EU Commission calls for all EU nationals currently in the UK as well as their third-country family members, to be guaranteed existing EU law-derived rights for both their and their children's lifetimes. On 18 June 2017 the German foreign minister Sigmar Gabriel (in an interview with *Die Welt*) signalled that instead of extra-territorial ECJ jurisdiction over Britain, the EU might accept "*a joint court that is staffed by Europeans and Britons which in principle follows the decisions of the European Court of Justice*".

Mr Gabriel's proposal comes close to accepting in principle that, in accordance with established international practice, any future legal relationship between the EU and the UK must involve an impartial dispute settlements mechanism which is free from bias and based on the principles of equality and neutrality between the parties. In practice, however, the German proposal would reintroduce ECJ jurisdiction through the back door.

The German plan for the establishment of a new tribunal jointly - and presumably equally - composed of European and UK members meets one necessary impartiality requirement, namely, that the composition of the court be balanced between the parties. A formally balanced court, however, is not sufficient. Mr Gabriel is explicit that the new EU-UK tribunal should '*in principle ... follow the decisions of the European Court of Justice.*' This idea seems modelled on the so-called EFTA Court to which Norway, Iceland and Liechtenstein, the three non-EU members of the EU-dominated European Economic Area (EEA), had to sign up to gain full access to the single market. The EFTA Court extends and enforces written EU law and the case law of the ECJ to and within the three non-EU members of the EEA, although its non-EU members do not participate in EU law-making or in the decision-making of the ECJ.

This is precisely why Switzerland did not join the EEA. Instead, Switzerland has its own bilateral trade relationship with the EU and refused to accept the jurisdiction of either the EFTA Court or the ECJ.

In this context, it is important to distinguish between the EU

Commission's demand for extra-territorial jurisdiction of the ECJ over the interpretation of a bilateral treaty with the UK and the purely internal role discharged by the ECJ in issuing preliminary and direct rulings on actions concerning the internal application of an international treaty, which are brought by natural or legal persons resident or established in the EU. The EU-internal role discharged by the ECJ in interpreting any EU-third country agreement at first instance, as for example on a regular basis in relation to various agreements between the EU and Turkey (see the *Demirel* case cited above, and Case C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland*), is analogous to the internal role which we envisage should be assigned to the ITC in connection with a future EU-UK agreement. It is entirely appropriate, and indeed both cost-effective and generally less time consuming, for domestic tribunals to deal with the application of an international treaty to internal situations.

In contrast, it is contrary both to international practice and the principles of procedural fairness and natural justice, for the competent internal tribunal of one party to a bi- or multi-lateral international treaty to assume the function of an international arbitration and appellate body which issues authoritative interpretations of that treaty at inter-state level. It is unacceptable for the internal court of one party to a treaty to assume that level irrespective of whether it does so directly, as demanded by the EU Commission, or indirectly through an 'agency' court, as proposed by Mr Gabriel on an analogous basis to the role of the EFTA court in relation to non-EU members of the EEA.

The EEA agreement is very rare amongst modern era international

treaties in that it effectively assigns the final and transnational settlement of inter-party legal disputes to a court which either is, or is bound to follow, the decisions of the domestic court of one of the parties to the agreement itself. The role of the EFTA Court is extremely unusual in inter-State relations and arises from an exceptional situation. That situation is that the rules governing the EU internal market are a dynamically evolving body of rules which change over time as a result of legislative changes and also as a result of "interpretation" by the ECJ.

In order to ensure the coherent functioning of the internal market to which they have agreed to belong, the non-EU EEA States (Norway, Iceland and Liechtenstein) have agreed to accept both that they will follow the EU in implementing new internal market legislation, and also that that legislation should in principle be interpreted in relation to their own countries consistently with the dynamic interpretation of those common rules by the ECJ. No such logic applies to the treaty rules relating to the status of EU citizens in the UK or UK citizens in the EU27: those will be an agreed settlement of existing rights which will in principle be static and not dynamic.

If, as the German proposal suggests, the EU-UK tribunal were required - albeit indirectly - to follow past and future ECJ case law, it would be committed (implicitly) also to apply the ECJ's teleological and strongly integrationist interpretative approach. The ECJ, it cannot be emphasised often enough, does not follow a conventional judicial approach. It chooses between an open-ended number of interpretative criteria and, in cases involving the basic fundamental political and

economic interests of the European Union, generally adopts a communautaire or pro-EU approach even if the preferred interpretation is incompatible with the wording of the EU Treaties or the EU legislation in question. On the German model, the EU-UK tribunal would simply extend such decisions to free movement (and presumably trade) issues affecting the UK. This is unacceptable. The EFTA Court - though formally separate from the ECJ and staffed with judges from the non-EU EEA states - is not in substance an independent and impartial tribunal, and over the twenty years or so since its inception it has not taken a single decision which significantly departs from the jurisprudence of the ECJ: and indeed, in important areas it has reversed its own initial approach in deference to a later decision of the ECJ. An EU-UK court along the lines of the German proposal would essentially be an EFTA Court Mark II.

To be fully impartial and independent, any EU-UK bilateral tribunal would not only have to be formally balanced between the parties, it would also have to be independent of the legal systems of either party, including the interpretative traditions, institutional interests and proclivities of their judiciaries. Instead of tying the proposed court to the legal and interpretative approach of one party only, as proposed by Mr Gabriel, the better, i.e. more impartial, view must surely be that this court should be bound to apply an interpretative method on which both parties are agreed or can agree. There are two obvious examples of an alternative impartial and therefore patently preferable model for the future bilateral EU-UK tribunal.

The first of these are the rules adopted by the World Trade

Organisation (WTO) of which the EU, the UK and all other individual EU member states are members. Article 3.2 of the WTO Dispute Settlement Understanding (DSU) requires WTO panels and the Appellate Body to "*clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*". Article 17.6(ii) of the Anti-Dumping Agreement restates the language of Article 3.2 DSU and provides additional guidance to the effect that in applying those rules the panels and Appellate Body are to give clear priority to the wording of the WTO texts and their ordinary meaning. The WTO Appellate Body generally follows this literal approach not only in anti-dumping cases but in other cases which arise under the WTO agreements. As the parties to international agreements should be able to rely on the accord they reached, and since there is generally no better guide to the meaning of that accord than its actual text and ordinary meaning, the WTO's interpretative approach is clearly to be preferred to the more malleable and manipulable non-literal approach favoured by the ECJ.

The second example can be found in the Vienna Convention on the Law of Treaties ("VCLT"). Articles 31 and 32 VCLT, broadly speaking, codify the customary rules of interpretation of treaties under public international law. Article 31 emphasises the primary importance of '*good faith*' and '*ordinary meaning*' in treaty interpretation, whilst Article 32 states that international tribunals may have recourse to '*supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion*', but only if the meaning of the provision in issue is genuinely '*ambiguous or obscure*' or '*manifestly absurd or unreasonable*'.

The general principles prescribed by the VCLT and those applied by the WTO Appellate Body are two expressions of the same underlying approach to international inter-state dispute settlement: the VCLT codifies the customary interpretative principles of international law with their emphasis on the text as the best guide to the meaning of a treaty, while the WTO Appellate Body provides a relevant subject-domain example of such a 'good faith' judicial method and applies those principles in the context of trans-national trade agreements.

A quasi-EFTA court of the type proposed by the German foreign minister, by contrast, would be contrary to the basic legal rule against bias that '*no one shall be a judge in this own cause.*' Instead, we recommend the establishment of a bilateral EU-UK Joint Treaty Tribunal ("JTT") which would be authorised to consider (after exhaustion of initial attempts to resolve the issue by agreement) at the request of either the UK Government or the EU Commission points of legal interpretation arising under the EU-UK withdrawal and trade treaties. The JTT would be bound to follow the general principles of interpretation of the Vienna Convention on the Law of Treaties and be able to review decisions by both the ITC and the ECJ.

The jurisdiction of the JTT would not permit a re-hearing of individual cases which have been dealt with before either domestic court (the ECJ or the ITC) and would be restricted to inter-state appeals on points of treaty interpretation only. It is to be expected that most issues arising under the EU-UK treaty will be settled at domestic level by either the ITC or the ECJ, and the JTT will be a residual fall-back mechanism.

The limits on the jurisdiction of the JTT will ensure that it will not be overburdened by appeals from aggrieved private parties at first instance. We therefore recommend that the JTT not be constituted as a permanent court but as an *ad hoc* body with its members selected for each case from a panel of eligible and suitably qualified individuals from the EU and the UK.⁵ Permanent tribunals readily develop strong institutional interests and sometimes a pronounced institutional ethos - the best example of this is the ECJ, which from its inception, has developed a strongly pro-Union and integrationist collegiate mentality. With qualifications, the case law of the European Court of Human Rights in Strasbourg also shows a strong tendency towards judicial activism.

Instead of such permanent bodies with judicial members appointed for minimum terms of five years or more, we recommend that the JTT be constituted as a three-member (or possibly five-member) body on a case-by-case basis. Its members would be drawn from a panel of 20 appropriately qualified persons with proven expertise in at least two of the following: WTO and international trade law, EU law, UK commercial or public law, and international investment and commercial arbitration. The EU Commission or Council of Ministers

5. Although suggestions have appeared in the media that some form of joint court or arbitral body could contain sitting judges drawn from the ECJ or the UK Supreme Court, there are serious difficulties of conflict of interest in such a proposal, quite apart from the practical difficulties of drawing members of these busy courts away from dealing with their normal judicial workloads. Given that one essential function of the international arbitral tribunal would be to choose between differing approaches to interpretation of the treaty, it would not be appropriate for judges who had participated in judgments adopting one or other of the approaches in contention to then sit as a member of that international body.

and the UK Government would each appoint ten panel members for a renewable five-year term. The JTT's rules of procedure including detailed and strictly impartial rules for the appointment of JTT members in each case heard before it, would be agreed by the EU and UK as part of a future trade and mutual citizens' treaty or set of treaties.

If the JTT sits in panels with an odd number of members, this implies that one or two members will be drawn from the EU and UK lists respectively but leaves the question of who shall be the additional member who will chair the panel and have a deciding vote in the event that the UK and EU members disagree. This is a well-rehearsed issue in international arbitral panels or courts and there are several possible solutions. One solution is to draw the chairman from a list of distinguished international jurists who are associated neither with the EU nor the UK. Another is to draw the chairman either alternately or by lot from either the EU list or the UK list in each case.

Wider remit of the UK International Treaty Court

We have shown in some detail how our proposed International Treaty Court would operate and would fit into the mutual adjudication of rights of UK and EU citizens under the withdrawal agreement. But the Court could and should be given a wider remit.

First, the British government has paralleled its proposals regarding the rights of EU citizens in the UK with similar proposals about the rights of citizens of the three EEA States (Norway, Iceland and Liechtenstein) and of Switzerland, who currently enjoy free movement rights in the

UK. Although much smaller in number, the rights of these citizens too need to be interpreted and applied within the UK.

Secondly, the government is seeking to negotiate a wide-ranging free trade agreement with the EU. This is likely to contain terms restricting e.g. unjustified or discriminatory restrictions on imports. Parliament will need to pass legislation giving effect in UK law to these provisions, and it is highly desirable that these treaty-based provisions should be interpreted by the same specialist Court.

It should be noted that in the context of trade related international agreements, there is a viable alternative at the international level for the resolution of inter-State disputes to the ad hoc joint arbitral tribunal which we propose for this role. That alternative is to use the existing machinery for WTO disputes settlement. This is a two-tier system involving an initial decision on a dispute by a an international WTO Panel, but with the possibility of an appeal to a WTO Appellate Body. The EU-Canada CETA agreement preserves the ability of either party to invoke the WTO disputes procedure in relation to matters falling within its jurisdiction, although it contains mechanisms to prevent a party from submitting the same dispute both to a WTO panel and to an ad hoc panel under the treaty - it must choose one or other.

An EU-UK agreement relating to post-Brexit citizenship rights would be outside the scope of WTO panels and therefore only the ad hoc joint treaty tribunal which we propose would have jurisdiction. However, a wider EU-UK free trade agreement would potentially be subject to overlapping jurisdiction of the ad hoc panel under the agreement and

the WTO disputes settlement procedure. We would recommend the adoption of similar rules to those in the EU-Canada CETA agreement in order to regulate the interaction of these two jurisdictions in the event of disputes on the international plane.

Regarding the WTO, once we leave the EU, it will be the duty of the UK government to propose to Parliament the necessary legislation to ensure that the UK complies with its international obligations under the WTO Agreements. Many of these obligations are at present effectively covered by EU law but will need to be replaced with UK legislation. Once this is done, it is sensible that the task of interpreting WTO-derived UK legislation internally within the UK should be entrusted to the Internal Treaty Court as well. Our international obligations under the WTO Agreements will be within the scope of the WTO panel system and so no special mechanisms need to be provided at international level.

Fourthly, the government is intending to conclude free trade agreements with a number of non-EU countries in the foreseeable future. Such agreements will need to be provided for in domestic law, and it is likely that similar rules against discrimination or unjustified restrictions on international trade in goods or services will form part of those agreements. Again, the International Treaty Court would be best placed to interpret them internally within the UK. We envisage that arrangements for resolution of disputes at the international level will be similar to those in the EU-Canada agreement, i.e. an *ad hoc* panel with alternative resort to WTO panels on matters falling within their jurisdiction.

Conclusions

The new relationship between the judiciaries of the UK and the EU must be governed by mutual respect and independence. Our proposal for a Joint EU-UK Treaty Tribunal accords the ECJ the role it was designed for: as the final arbiter of EU law within its member states, not the arbiter of disputes between the EU and countries outside it. In a relationship of equality between treaty partners, the body which ultimately resolves such disputes approaches its task with neutrality: neutral between the EU and the UK and between their respective interpretive traditions.

But the success of this new relationship will be measured not just by the quality of the joint tribunal's judgments, but by how rare are the disputes requiring it to sit at all. So we must ensure our jurisdictions can meet the demand of internal litigation inevitably arising under the withdrawal agreement and future treaties. Our proposed International Treaty Court would create a new resource for courts and tribunals across the spectrum of the UK judicial system. In time, it will develop a body of case law and experience that will command the respect of courts within EU member states and the ECJ, reducing the call for international arbitration. An efficient and effective judicial system within the UK is essential for a close, productive and mutually beneficial relationship between Britain and the EU; and it is for the sake of this relationship that the judicial framework must be fair, must be respected and must be built to last.