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Culture, Tourism, Europe and External Relations Committee

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CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE
20th Meeting 2017, Session 5

CONVENER

*Joan McAlpine (South Scotland) (SNP)

DEPUTY CONVENER

*Lewis Macdonald (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Jackson Carlaw (Eastwood) (Con)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Ross Greer (West Scotland) (Green)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Richard Lochhead (Moray) (SNP)
Stuart McMillan (Greenock and Inverclyde) (SNP)
*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
Laura Dunlop QC (Faculty of Advocates)
Professor Sir David Edward
Peter Sellar (Faculty of Advocates)

CLERK TO THE COMMITTEE

Katy Orr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Culture, Tourism, Europe and External Relations Committee

Thursday 14 September 2017

[The Convener opened the meeting at 10:00]

Withdrawal from the European Union (Negotiations)

The Convener (Joan McAlpine): Good morning and welcome to the 20th meeting in 2017 of the Culture, Tourism, Europe and External Relations Committee. I remind members and the public to turn off mobile phones, and I ask any members using electronic devices to access the committee papers during the meeting to ensure that the devices are switched to silent. Apologies have been received from Stuart McMillan.

Members may have noticed that we have a large official delegation of visitors from Swedish local authorities with us today. I welcome them to the Scottish Parliament.

Our first item of business is an evidence session on the article 50 withdrawal negotiations and the role of the European Court of Justice and options for dispute resolution post-Brexit. I welcome our witnesses: Professor Sir David Edward; Michael Clancy, the director of law reform at the Law Society of Scotland; and from the Faculty of Advocates, Laura Dunlop QC and Peter Sellar. Thank you for attending today. I invite Sir David Edward to make some opening remarks.

Professor Sir David Edward: I have just a few points to make. The first is that the basic position paper on dispute resolution is not perhaps as revealing as an earlier one, "Providing a cross-border civil judicial cooperation framework", because that contains what I think are two very important phrases. It says:

"The following principles should ensure orderly completion of ongoing cooperation, so that:

- citizens, consumers, families and businesses involved in a dispute continue to have a clear, predictable, legal framework for the resolution of that dispute;
- legal certainty is maximised to the benefit of citizens and business by ensuring that their properly negotiated arrangements are respected".

That seems to be an absolutely admirable statement of what we should be trying to achieve.

My second point is that, in dealing with the other countries, you have to remember, for example, that article 19 of the German basic law states:

"Should any person's rights be violated by public authority, he may have recourse to the courts."

As far as the Germans are concerned, any dispute would need to be capable of judicial recourse.

My third point is that the paper entitled "Enforcement and dispute resolution" appears to envisage that we are talking about disputes between the United Kingdom on the one hand and the European Union on the other hand, but in fact EU law is not really about that at all and, certainly, the jurisdiction of the ECJ is not about that. Let me give you one simple example from my experience when I was a judge. A lady of Spanish nationality came to Britain and studied picture conservation at Newcastle. She got a job at the Louvre in Paris and she then sought to be appointed to a position in the Prado in Madrid. She was refused consideration for that position because she did not have a picture conservation qualification in Spain. Why did that qualification apply? Because the agreement between the Prado authorities and the Prado staff committee provided that you must have a Spanish qualification. That was an agreement between the museum authorities and the staff association about the qualifications needed to have a job in the Prado.

There you have a situation in which a Spanish national wants to be appointed to a job in Spain and has been refused it not because of a Spanish law but because of an agreement between a state entity and its staff association. A great many of the cases that come before the ECJ from the national courts concern comparable situations. One has to bear it in mind that more than 50 per cent of the case load of the Court of Justice is concerned with cases arising in the national courts of the member states about the rights of individuals, and that is not going to go away in the event of Brexit.

For example, British companies will still want to send their employees to other European countries as directors, managers, sales representatives or technical staff. Those employees will want to live in the country to which they are sent with their families, to send their children to school and to have healthcare. Some will find themselves on the wrong side of local bureaucracy and some will separate; they will need to know which courts will grant a divorce and which will decide on the financial settlement, the custody of children and problems of cross-frontier access. Such issues are what the jurisdiction of the ECJ is designed to solve, for ordinary people in ordinary, day-to-day situations. It is not just about trade disputes. That is the most important point to understand in the whole of this discussion.

The Convener: Thank you, Sir David. The UK Government has indicated that the ECJ is a red-line issue for it. On the particular point that you

raise, how will such disputes be resolved if the UK is not subject to the ECJ?

Professor Sir David Edward: Somebody will have to resolve such disputes. The suggestion is that they would be solved by the British courts, but the British courts have to know the law that they will apply. That is why there is a reference procedure to the Court of Justice. The Court of Justice says, "This is how you interpret the law."

It is true that under the European Free Trade Association procedures, the EFTA court would decide issues arising in the EFTA countries, but you have to remember that the European Economic Area agreement includes within it a huge part of EU law. It is not the same as a situation where the UK leaves the single market and customs union, which is the hypothesis that we have to imagine, and then somehow the British courts will decide on situations arising in Britain.

Correspondingly, if we are talking about a British person who is working in Germany, what is the law that the German courts will apply? Will they go to the European court to have a ruling on what the law is or will there be some other authority that will tell them? Those are questions of extreme complication that are simply not properly addressed at all in the UK position paper.

The Convener: My next question is for the other members of the panel. The ECJ is said to be a red-line issue for the UK. However, among the general public, the complexities of the matter are little understood. Is it possible to explain in plain language, to any non-lawyers who may be listening, what the relationship is between the ECJ and the single market and why the two are inextricably linked?

Laura Dunlop QC (Faculty of Advocates): I will have a go at answering that question, then others can join in.

One overarching principle is that there should be consistency. The function of the ECJ is to ensure, by giving opinions, that the position that Sir David Edward has sketched as an example would be resolved in the same way in different member states, so that there is not a huge diversity of solutions to people encountering, in essence, the same difficulties.

Other panel members may have other views.

Peter Sellar (Faculty of Advocates): Roughly speaking, I agree with that. The principal role of the Court of Justice of the European Union is to ensure uniform application, across the 28 member states, of all the laws and regulations that are adopted by the institutions in order to further the four freedoms and so on. It is the guardian of that principle.

Michael Clancy (Law Society of Scotland): It is the interpretation and application of that law that is important. Many courts throughout the 28 member states might have different interpretations of the same point of law, so the ECJ is there to provide certainty—and certainty is one of the things that we are all seeking in this process. Sir David Edward mentioned that as one of the things that people would want to get out of the withdrawal process, and it is something that the Law Society has highlighted since we began commenting on the referendum. When we put forward our proposals to the UK Government for inclusion in the negotiation, we said that there should be certainty and stability and that the rights of citizens should be respected.

The Convener: Sir David Edward referred to the UK Government's position paper on dispute resolution and suggested that many questions are not being answered. Would you care to comment on the UK Government's position papers on these matters?

Michael Clancy: I will start, and others might want to join in.

I think that the purpose of the UK position paper is to provide not answers but options. It offers a suite of potential choices that could be arrived at, but the "could be arrived at" bit is where the legal issues translate into political issues. If one looks at the latest edition of the joint technical note that summarises the UK and EU positions at the end of the third round, one sees that there is significant difficulty. The red, yellow and green colour scheme is quite instructive. Green signifies the use of EU law concepts but, when it comes to whether the Commission should monitor compliance or whether the UK should be prepared to consider the establishment of an independent monitoring arrangement, that is a red spot. In mysterious phraseology, we are told that the role of the CJEU is

"for discussion in the governance group".

Similarly, we are told that, for future CJEU case law to be taken into account, there must be

"discussion in the governance group".

A veil of lack of transparency—of obscurity—falls on those two points. I do not underestimate how difficult the process is for the negotiating parties.

10:15

Professor Sir David Edward: In 2016, 25 references were made to the European Court of Justice by UK courts. Those are cases arising in the UK courts that, in one way or another, raise an issue of EU law. It also has to be recognised that you do not always realise that there is an underlying question of EU law when a case starts,

and that is going to be one of the problems with the cut-off period. It has been suggested that the ECJ will have jurisdiction only in cases that have already got there, but there are many cases in the womb of litigation that may eventually be seen to raise a question of EU law about an existing situation before Brexit occurs, and that is a serious problem. If I currently have a dispute with my employer about the application of equality law—on gender equality, racial equality or transfer of undertakings and so on—it may not actually get to court until very nearly March 2019. Is that dispute somehow to descend into limbo because it has not got to the European Court in time?

It is a much more complex situation than the British Government appears to recognise in its position paper. As I have said, the position paper seems to imply that all the disputes will be between the UK as a state and the EU, and they will not.

Laura Dunlop: My comment about pending cases is particularly directed towards the position paper to which you have referred, convener. It is a huge generalisation, but there is what I would call the "Mastermind" principle of, "I've started so I'll finish." You do not change the way in which a case is going to be dealt with midway through.

To take a much more local example, after the financial jurisdiction as between the sheriff court and the Court of Session was changed in the Courts Reform (Scotland) Act 2014, the provision was, as practising lawyers would expect: new cases to be governed by the new rules. However, what seems to be being canvassed in the position paper, particularly in paragraph 11, is something much more like a fudge—certainly, something that raises the possibility of a discretion. It says:

> "where considerable time and resources have been invested in CJEU proceedings, it may well be right that such cases continue to a CJEU decision."

Practising lawyers would expect any case that is in a court to finish in that court. That would be the norm, so introducing what the paper appears to be suggesting—a set of criteria according to which a decision is made as to whether the case is to be allowed to continue in the same court—is a very complicated exercise. That is certainly something that struck me.

Sir David Edward is making a further point, which is that there will be disputes that have not yet become cases, and there is a good argument for saying that those disputes should fall to be dealt with according to the law that everyone understood to be the governing law at the time when the dispute developed. The EU, in its position paper, is bidding for those cases to continue to go through the CJEU as well, and I think that we, as practising lawyers, understand why that is so. However, there is a considerable gap between the two positions, with the UK saying, "Well, we will define what will fall to be treated as a pending case"—an awful lot of definition will be required in that respect—and the European Union saying that disputes in which the facts have arisen under a particular regime should still go through the Court of Justice.

Peter Sellar: This is not just a theoretical but a practical issue. At the moment, I am involved in three Francovich damages cases that are in various phases; a couple are sisted or stayed, but if by the point at which exit day is designated for us—we can assume that it will be in March 2019, although it could be sooner—we have not seized the court of the idea of sending a preliminary reference question to the Court of Justice and we alight on it only after the fact, that remedy or option could be taken away from us. That is a realistic scenario.

I also want to pick up a small point about the positions of the UK and the EU on the red line of the CJEU. One needs to make a distinction between where the rights of citizens will be adjudicated and where trade disputes and other issues that arise under the withdrawal agreement will be adjudicated. The European Union has, I think, set out quite a clear and simple position, although it has its political tensions; however, we have yet to get any clarity from the UK side, other than what it has said about the red line.

The Convener: Thank you very much. I will take supplementaries from Richard Lochhead and Mairi Gougeon.

Richard Lochhead (Moray) (SNP): Good morning. Although the issue is obviously quite complex, my question is a relatively simple one. On the one hand, Theresa May has said that exiting the European Union will mean that the European Court of Justice will have no jurisdiction over the UK; on the other, negotiations and a debate are being had around the post-Brexit relationship with regard to the single market, with some arguing for membership of it and others arguing for access to it. Is it possible or even likely that the UK Government will be able to negotiate access to the single market—which is what it wants; we would prefer membership—when at the same time the European Court of Justice will have no jurisdiction over the UK?

Secondly, is the UK likely—

The Convener: A supplementary is normally one question, Mr Lochhead.

Richard Lochhead: Related to my first question, then, is the EU likely to insist that the ECJ has on-going jurisdiction?

Professor Sir David Edward: First of all, it is entirely wrong to think that the CJEU has

jurisdiction in the United Kingdom; it simply has jurisdiction over answering questions put to it by UK courts. It might then be said that existing UK law has to be changed, but that is quite different from saying that it has jurisdiction in the UK in the same way that the Supreme Court of the United Kingdom has jurisdiction in Scotland.

Secondly, on the single market, what we are talking about is, in layman's language, the level playing field. If we want to play on the same playing field as the other 27 states in the single market, they can legitimately say, "We want to play by the same rules, and we want a single referee who is going to tell us what those rules are." It is a bizarre kind of dream-wish that we can play on this playing field on equal terms but still have our own referee. It is just absurd.

Mairi Gougeon (Angus North and Mearns) (SNP): I had an idea that the situation was very complex when I was preparing for the meeting, but I think that, after hearing some of your examples and the points that you have raised, we are realising just how much more complex the situation is.

Laura Dunlop talked about there being quite a big gap—will it be possible to bridge the gap between the two positions in the time that there is for the negotiations?

Laura Dunlop: On that particular point, I was, I admit, slightly dismayed by the suggestion in the UK Government paper that there will be a lot of definition going on. If you start trying to agree complex definitions of what is or is not a pending case and putting in factors that you have to take into account, such as how much time and expense has already been spent on the case, that will take up a great deal of time.

My suspicion—others may disagree—is that the compromise position as far as pending cases are concerned will be something along the lines of cases that are already with the registrar in Luxembourg being allowed to proceed. That would be a clear rule. A casualty of that would be the type of disputes that we were discussing earlier, where the dispute is there but the litigation is not. Those would be clear rules, but the consequence would be that you would be denying the people involved in those disputes a resolution according to the legal framework that ordinarily would govern that dispute.

To answer your question, I think that it depends—that is probably the answer to every question. However, if we get sidetracked into a very convoluted drafting exercise of trying to define criteria for things that practising lawyers can all recognise, such as pending cases, I do not think that there is enough time.

Michael Clancy: I think that the average case time in the ECJ is 15 months or thereabouts. It was probably less when you were in charge, David.

Professor Sir David Edward: Not necessarily.

Michael Clancy: At the moment, we have just over 18 months before the possible exit day. If there was a reference today from a court, the case might be able to be determined prior to the exit day as we imagine it, but we do not even know yet what the exit day will be, and the bill could provide different exit days for different purposes. Therefore, it may be the case that there will be a sliding scale in some form of transitional arrangement, which could take us beyond 29 March 2019, to deal with cases that are commenced with the understanding of there being a certain set of legal parameters.

The issue of pending cases is such that we have to remember that, under the Human Rights Act 1998, there is no right to an effective remedy, because article 13 of the European convention on human rights is disapplied by the 1998 act. Therefore, even though you may have a good case in terms of EU law, you cannot effectively claim that the 1998 act could be prayed in aid there. However, let us say that your case in EU law relates to some aspect of property, such as intellectual property. If you are then deprived of your right of property because the Government has chosen a particular date for exit—at which point, CJEU access is denied—that puts the Government in a difficult position, which can be taken in the national courts.

The Convener: That is interesting.

Tavish Scott (Shetland Islands) (LD): If the Prime Minister does not announce a transition in her Florence speech next week, I think that everything that Michael Clancy has said is right. However, what most people expect is that there will be a UK application for a transition period. Therefore, is it not the case that all the pending cases that you are describing today will flow into that transition period?

We do not know how long that period will be but, in the evidence that the chancellor gave to the Treasury Select Committee this week, he argued quite clearly for a longer transition period. In those circumstances, Michael Clancy's point about the 15 months goes on and on and on, so is it not more of an argument about how many more cases are initiated that could go to the ECJ over the next 18 months before we formally leave on 29 March 2019? Is that not the issue—and then how long the transition period is?

Professor Sir David Edward: It depends on what your transition agreement is, does it not?

Tavish Scott: I am assuming that it has to include the ECJ continuing to have jurisdiction in the way that you just described.

10:30

Professor Sir David Edward: Yes. Does the ECJ have a British judge? Are British lawyers entitled to appear before the court? Is the United Kingdom what is called a "privileged applicant", enabled to appear in any case before the ECJ to argue the UK position? Those things will have to be worked out. When people use a vague expression such as "transitional period", what they are really talking about is a kind of continued standstill. What are we leaving, if this standstill is in place? What does the expression, "We are leaving the EU in March 2019," actually mean? One of the greatest difficulties about this discussion is the use of vague phraseology, which needs to be tied down in very precise legal terms. That takes a long time to negotiate.

Also remember that March 2019 is the last point, but we still have to get round the Parliaments of 27 member states and the European Parliament before we even enter upon this.

Michael Clancy: The other issue is what examples of long transitional periods when a country leaves the jurisdiction of a court can be brought to the table. In the paper that we sent to both the UK Government and the European Commission's task force on article 50 negotiations with the United Kingdom, we explained the situation with New Zealand, which gave up having its cases go to the Judicial Council of the Privy Council in 2003. When I spoke to the previous registrar of the Supreme Court a couple of years ago, she estimated that, at that point, there were still as many as 40 cases sculling around in New Zealand that might end up at the JCPC in London.

That gives an idea of how long a tail this could have—2003 to the present day is 14 years. If that becomes the case, it will test the political will of Michel Barnier, of Theresa May, of their successors and of their successors.

Lewis Macdonald (North East Scotland) (Lab): One of the possibilities that have been put to this committee and others is a transitional period that involves us, as Sir David Edward described, remaining within the jurisdiction of the European courts, the single market and the customs union for a transitional period that is to be defined. What would be the implications of that in terms of case law and of the management of case law?

Also, if the United Kingdom were to withdraw from the political institutions of the European Union in March 2019 but to remain within the single market for a further two or three years, would that require the establishment of a new form of arbitration? Would it permit the jurisdiction of the EFTA court or something like it, or would it require the status quo—as I think Sir David described it—of not leaving that jurisdiction during such a transitional period?

Professor Sir David Edward: To remain within the single market means playing according to the rules of that market as they are at the time. Does it mean remaining in the single market on the basis of the rules as they exist at the moment when the supposed exit occurs at the beginning of the transitional period, or are the rules to be those that are developed in the course of the transitional period? Is the United Kingdom to have any say in the formulation of rules that emerge during that period? Is it to be part of the legislative procedure? Is the European Court of Justice to have jurisdiction, and what will happen with cases that arise in the course of the transitional period? Those are not hypothetical questions. If we are to go down that road, we need to be very precise. Part of the difficulty is that the UK is presenting a wish list but is entirely forgetting that the others might have their own wish lists or objections. For example, as I said, the Germans will object to any situation in which an individual does not have the right of recourse to a court.

Michael Clancy: What are the known knowns? It is a known known that clause 1 of the European Union (Withdrawal) Bill says that the European Communities Act 1972 will be repealed on exit day, and section 3 of that act subordinates national courts to the CJEU. If there is no national legal order in all that, it becomes intensely difficult to muse about what might be, or what might have been, if we were sitting at some time in the future.

Clause 6 of the bill tells us that a court or tribunal—that is not defined in the bill, so that is another amendment that we will need—is not bound by any of the principles that are laid down by the European court, and cannot refer any matter to it, on or after exit day.

What is the negotiation and what is the agenda for the negotiation? Do we look at the bill as being some kind of statement by the UK Government that says, "This is our set of cards on the table," or is it the rather more ill-defined proposals in the proposal papers, when we know that there is, currently, a great gulf between the positions of the UK Government and the EU?

Laura Dunlop: It is initially attractive to see a transitional period as a very big part of the solution to some of those difficulties. It is psychologically appealing to imagine a gradual slope so that, for example, the influence of the European Court of Justice will decline slowly and gradually, and we will all be able to adjust.

However, without using emotive language about cliff edges, it is probably not possible to do even the part about dealing with the jurisdiction of the European Court of Justice without some step changes. There will have to be some situations where there is something that you could do yesterday but you cannot do today, and there will have to be dates such as that. The jurisdiction issue is a very small part of the many negotiations that have to take place and the many arrangements that have to be made.

Peter Sellar: To me, "transitional deal" means that the deal that we will have to have negotiated by this time next year will have a period over which we transition. If that is the scenario, I have nothing else to add. On the other hand, if it basically means that we want a lot more time to get through the nitty-gritty details, we will need the unanimous consent of all the other member states, as article 50 requires. Those are two different beasts.

As far as I understand "transitional deal", we have to have negotiated everything in that two-year timeframe to allow the European Parliament and, perhaps, national Parliaments to have their say, then have some sort of transition. Again, that is perhaps a little bit of a vague concept that is on someone's wish list, because I do not understand what it is.

Lewis Macdonald: One possibility is that 30 March 2019 will mark a political point of departure—as Laura Dunlop described it, a clear date on which we will cease to be a member of the European Union. However, it is conceivable that, if the will existed and the bill that is currently before the House of Commons was amended in the right way, the separation could be confined to a political one at that point and the other processes of separation could follow over a two or three-year period. That might be relevant to the point that you have just made.

Peter Sellar: Yes, and that would be a political negotiation or settlement. Of course, if the UK stayed in the single market and the customs union and if the CJEU published a decision on the reclassification of a product that was flown in from the United States and landed in London before it came to Paris, would we be beholden to that decision in that transitional period? In my opinion, we would have to be, but we would not have any political say over it. That goes back to the question of whether the CJEU would have a British judge.

Professor Sir David Edward: Let us assume that, even before we got to that stage, something like the BSE scare arose during the transitional period and regulations had to be made for the confinement and traffic of animals—or something of that nature. The regulations would have to be made tomorrow. Would the UK be there? Would the UK experts be part of the committee that decided those regulations? What place would the UK have not just in the judicial evolution of the single market but in its political and administrative evolution? If we say that we are out politically but in legally, what about such situations, which can blow up quite quickly?

Lewis Macdonald: That is why the second part of my initial question referred to the EFTA court. The countries in the European Economic Area, such as Norway, are not members of the European Union but have to apply the law as defined in the European Union. However, the supervision of that is in the hands of the EFTA court rather than the ECJ and those countries are not political members and have no political say in those decisions.

Professor Sir David Edward: There is extensive political involvement in the evolution of EU law in the background, and those countries are then obliged to transpose that into domestic law. They are represented on many committees and have a political input into the creation of EU law that they are going to have to apply themselves.

Lewis Macdonald: That is the essence of my question. Is that, in any sense, a model that the United Kingdom could apply?

Professor Sir David Edward: I would say that it certainly is, but we would have to know what the model contained. If people are saying that they do not want to be ruled by Brussels any more, are they saying that we are outside the EU altogether or in what way are we going to participate? Remember that the EEA agreement is thought, particularly in Norway, to be a rather unsatisfactory agreement and there are considerable difficulties in the process of transposing EU law into Norwegian law. That is an attractive example, but it applies to Norway, Iceland and Liechtenstein, of which only Norway is, in any sense, a major player.

The Convener: I am afraid that we have to move on in order to get other members' questions in. Jackson Carlaw is next.

Jackson Carlaw (Eastwood) (Con): My points have been covered, thank you.

10:45

Ross Greer (West Scotland) (Green): I have a question about the trade agreement with Canada, but I have another question that I would like to ask first. Leaving aside the serious economic consequences and so on, what would be the implications for disputes if we left on Brexit day with no deal to be ratified?

Michael Clancy: I will begin, and anybody who wants to chip in can do so. In the situation that you

describe, the supranational relationship that we have with Europe would cease to apply, because article 50 says that, if there is no agreement at the end of the two years, the treaties cease to apply.

Instead of having the supranational relationship that we currently enjoy, we would be subject to public international law. Am I right in saying that?

Laura Dunlop: Yes.

Michael Clancy: That involves a cascade of various arrangements, all of which would have to be dealt with in a scurry and a hurry. Those arrangements involve things such as the World Trade Organization arbitration arrangements and issues around the law of the sea—essentially, all the types of arrangement that you can imagine—as well as the trade elements, which involve setting up bilateral agreements and multilateral agreements with EU member states. Other agreements would cover ways of dealing with family matters and so on, and one clear issue that would have to be dealt with is that of signing up to the Lugano convention.

All of that takes time and there would be some difficult and sleepless nights. However, as Sir David Edward pointed out has happened in the past, if the heads of Government manage to get around the table and reach an agreement—even if it is not a formally agreed treaty—they can register it with the UN and try to hold to it. That approach was employed after Maastricht in 1992 and in relation to—

Professor Sir David Edward: Denmark.

Michael Clancy: Yes, in relation to the agreement with Denmark. David Cameron did the same thing in a suspensive way when he negotiated the attempt to modify the treaties and their application to the UK before the referendum.

Professor Sir David Edward: It is important to understand what the WTO does and does not do. Under the WTO agreement, there are certain rules. A more favourable tariff cannot be applied to one country over others, but the exception involves a customs union. If we assume that we will go over the cliff edge, we will no longer be in the customs union so, formally speaking, the EU will have to apply to the United Kingdom the same rules as it applies to anybody else with regard to tariffs.

Customs procedures are important not for the general trade in goods but most particularly for the passage of components across the frontier, which happens several times in the case of building motor cars, for example. Complicated rules of origin that apply are eliminated by the EU customs union.

However, that applies only to goods and not to services, which constitute the most important element in the UK economy. There is little in the WTO agreements that is relevant to that. There is a thing called the agreement on trade-related aspects of intellectual property rights and a thing called the general agreement on trade in services—TRIPS and GATS, respectively—which are about trade in services, but they are limited, so there would suddenly be a situation in which there were no rules, except perhaps in a limited area. That is the most important thing to realise about the cliff-edge scenario.

Peter Sellar: What can a company or person do under WTO rules if, when trying to sell their goods, they get stopped X number of times between Dover and Calais at a cost of a lot of money? Not very much, other than lobby their Government as much as they can, raise that as a political point and hope that the matter will be taken through the dispute settlement process, although an individual is on the outside of that. If the fallback is the WTO rules, individuals have no ability to assert their rights in court.

That is the trade stuff. As for what happens to citizens' rights afterwards, from what I understand of the repeal bill in its current form, all the regulations, decisions and directives that are in place for EU citizens' rights here and UK citizens' rights in the EU will be grandfathered through. In other words, those rights will be in play and could be asserted in court—but just here, and not before the European Court of Justice. Whether they would change is a different matter.

Ross Greer: On a somewhat more positive note than falling off the cliff edge, how comparable are the mechanisms in the comprehensive economic and trade agreement with Canada to what the UK Government seems to seek? Some aspects of the UK Government's rhetoric and position papers suggest that the mechanisms in CETA are comparable to what it is aiming for. Is that the case?

Professor Sir David Edward: That is true as far as trade is concerned, but that approach says nothing about citizens' rights, workers' rights or the situation of, say, poor Mrs de Bobadilla, who qualified in picture restoration in Britain and wanted to do it at the Prado. It says nothing about that, and that is what the vast majority of the case law of the Court of Justice is about.

The Convener: It might be helpful to get on record the various alternative arbitration mechanisms that there is talk of falling back on. There is not just the agreement with Canada; I believe that the association agreement between the EU and Ukraine has also been mentioned. I do not think that those mechanisms are widely understood. Will someone explain them for the benefit of the non-lawyers?

Professor Sir David Edward: I have some experience—not a great deal—of international investment arbitration, which is extremely time consuming and, in general, extremely slow. There are many complaints about it, and some countries have withdrawn from the International Centre for Settlement of Investment Disputes system. If I were talking to an individual citizen, I would not recommend it as a means of settling their disputes. First, you have to choose your arbitrators, and they must have back-up. In fact, many arbitrators in investment arbitration have their own offices and assistants—I do not, but they do.

Let us think about the 25 cases that went from the UK courts to the Court of Justice. It is not a matter of convening an ad hoc arbitration tribunal; there must be back-up and staff. The EFTA court has three full-time judges and a permanent staff of 20, not including translators. The president's principal assistant in the EFTA court said that, if the UK were to join, the court would have to increase its permanent staff to 50. To me, that is fanciful.

Laura Dunlop: I hope that I am not going to live to regret this, but we are wondering whether we could have a shot at producing a list for the committee of the bespoke mechanisms. If I am right, we are talking largely about trade disputes under trading agreements. We could do a bit of research on that and try to produce a summary of the mechanisms that we have been able to identify, if that would assist.

The Convener: I am sure that members would find that helpful. Before moving on to the next member, I have a question. I understand that many of the arbitration panels of judges convene behind closed doors, so there is a lot less transparency than is the case for matters that go to a properly constituted court, such as the ECJ. Is that correct?

Professor Sir David Edward: In investment arbitrations, the parties, which are usually a corporation and a Government, say whether they want any part of the matter to be revealed, but the proceedings before the award are in private and can be kept confidential.

Mairi Gougeon: We could spend a lot more time on that issue, too. I have questions about the European Union (Withdrawal) Bill but, before I get to them, I will mention the UK Government's position papers, some of which we have talked about. The committee has brought up the issue that some of the positions relate to matters that are devolved to the Scottish Parliament. If the negotiations are based on those position papers, what will happen should an agreement eventually be reached? What would that mean for Scotland? It would be interesting to get a legal perspective on that.

Michael Clancy: I see that I am being nominated to answer. You pose an interesting question. As you know, international agreements, including those with the EU, are reserved to the United Kingdom under paragraph 7 of schedule 5 to the Scotland Act 1998. Therefore, formally, it is outwith the competence of the Scottish Parliament and the Scottish Government to be part of the discussion about the agreement that is to be reached.

This is where we may reflect on the parts of the bill that talk about matters that are outwith the Scottish Parliament's competence—in particular, what happens under clause 11. I do not know whether we want to get into that thicket today, because the issue is, at the very least, problematic. We have submitted a number of options—I hope that you have seen our memorandum of comments on the bill—that apply to the provisions in clause 11(1)(b), which would insert new subsections (4A), (4B) and (4C) into section 29 of the Scotland Act 1998.

In the final analysis, politics comes into play, and the role of intergovernmental relationships is key. Through participation in the joint ministerial committee, the Scottish Government can make its points most cogently. The question is how we can encourage the JMC to be a body that everyone can stand back from and say is functioning. Following the upcoming JMC meeting, it will be for the UK and Scottish ministers to express their satisfaction with the process.

Professor Sir David Edward: One thing that needs to be thought about is the position of the Scottish legal system, the Scottish judicial system and the Scottish prosecution system in the mechanism of what is called justice and home affairs—Europol, Eurojust, the European arrest warrant, the enormous number of cross-border information systems and the various conventions and regulations about recognition and enforcement of judgments. That is directly Scottish competence, and Scotland has an absolute right to know what is going on and to have its say on that.

11:00

Mairi Gougeon: You raised the issue of Europol and cross-border matters. Does the bill as it stands give Scotland sufficient protection in terms of continuing to tackle cross-border crime?

Professor Sir David Edward: No.

The Convener: Do you see that as an attack on the Scottish legal system?

Professor Sir David Edward: No—it is the situation because this has been put together by people who do not know that such problems exist. Somebody has described the paper as an undergraduate essay that would have failed.

The Convener: Are you referring to the UK position paper?

Professor Sir David Edward: Yes—I am referring to the paper on enforcement and dispute resolution.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): There is a lot of flesh to be put on the bones of the position papers. Is that deliberate, because of the negotiating position that the UK Government is in, as neither side wants to give too much away?

Professor Sir David Edward: From what I hear, part of the difficulty is that the people who are writing the position papers and the people who are negotiating do not want to hear from the experts. I know of a number of people who have offered help that has been refused.

Laura Dunlop: There are position papers and partnership papers. Some of the partnership papers are an attempt to disrupt the sequencing plan and take the current negotiations beyond the three issues with which they are supposed to be exclusively concerned. They try to head in the direction of what the position is to be on trade, for example. I have seen some arguments that it is necessary to do that and that resolving Northern Ireland's position would be assisted by knowing some of the answers on questions about the single market and the customs union. Attempts are being made to persuade the EU negotiators to enter into discussion on issues that more properly belong in the next phase of negotiations, once the three primary issues have been resolved.

One thing that is striking when reading a lot of the material is that questions of dispute resolution really belong with the ultimate solution for trade. Once we know what is to happen with trade and the provision of services, addressing dispute resolution may become easier. There is an element of putting the cart before the horse in trying to deal with that at the moment, as the partnership paper does.

The Convener: We have come to the end of the evidence session. The meeting has been fascinating and we could probably cover much more ground. I end by asking Mr Clancy whether there are any points that we have not covered.

Michael Clancy: We have discussed a lot about the CJEU as we classically understand it—in its dealing with references, citizens' issues and trade matters—but I will draw attention to two specific points. One is the CJEU's role in the European Atomic Energy Community. The fact that the Euratom treaty requires adherence to the CJEU is in effect the reason why we are withdrawing from Euratom. Doing that is problematic for a number of reasons, which include not only strategic issues of civil nuclear usage but difficulties that will be created in relation to nuclear medicine and health if we do not have a single market for the import and export of such things as radioisotopes.

The second point is about the agreement among the EU member states for there to be a unified patent court. The UK is to have a chamber of that court, which will be situated in London. The UK Parliament will be asked to ratify the agreement, and there may indeed be an order sculling around for its ratification, although I believe that the process is in difficulties in Germany. The unified patent court will not be a court or tribunal under clause 6 of the bill; it will be a separate international body, but the CJEU's role in it means that it is in effect daubed with a sign that says, "We don't want this either."

We, and the UK Government, have to be careful about simply identifying the initials CJEU and saying that that is something that we do not want in any circumstances. We have to be much more circumspect.

The Convener: I thank our witnesses for coming.

11:07

Meeting continued in private until 11:32.

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