Verdict of the "Star Chamber" under Sir William Cash MP on the UK-EU Political Agreement

Rebus sic stantibus and public international law:

Assessment of the Attorney-General's Proposed Argument for Termination of the Protocol *via* Article 62 of the Vienna Convention on the Law of Treaties

- **The notion Art. 62 VCLT gives the UK a "clear and undoubted" basis for terminating the Withdrawal Agreement is badly misconceived.**
- **Art. 62 VCLT, given the high burden that a State must meet to use it, and given the extreme reluctance of international courts and tribunals to accept it, supplies no assurance whatsoever that the UK could terminate the Withdrawal Agreement in a lawful manner.**
- **The ECJ's Advocate-General himself has said that a matter of EU law "cannot depend on... the application of a controversial point of international law such as *rebus sic stantibus*", a conclusion affirmed repeatedly by the ECJ.**

1. We have been asked to consider supplemental advice from the Attorney General relating to the ability of the UK to exit the Protocol to the draft Withdrawal Agreement under Article 20 of the Protocol, or to terminate elements of the Agreement as a whole under the doctrine of *rebus sic stantibus*.

2. First, the Attorney General addresses the possibility that the UK could, after the transitional period, exit the Protocol "[i]f the [UK] took the reasonable view on clear evidence that the objectives of the Protocol were no longer being proportionately served by its provisions because, for example, it was not any longer "protecting the 1998 Agreement in all its dimensions". The UK (the Attorney General continues) could "seek agreement to end those provisions that would be, for obvious reasons "no longer necessary" to achieve the Protocol's objectives. If the EU were to decline to consent to its termination, the issue could be referred to the arbitration tribunal on the basis of evidence that the Protocol was having the opposite effect of its whole purpose."

3. Whilst it is correct that the UK could make such an argument under Article 20 of the Protocol, that argument needs in the first instance to be agreed to by the EU. Article 20 provides for a process of consideration of any such proposition by the Joint Committee, once notified to it, and then a joint decision by the UK and EU within the Joint Committee as to whether the argument is to be accepted. If the EU were not to agree with the UK's position, the UK could, it is correct, refer the matter to the arbitration panel established under Part Six, Title III of the Withdrawal Agreement. However, the issue at hand, for determination by the arbitration panel, would not be whether the EU was wrong in its assessment of the UK's argument that the Protocol no longer achieved its objectives with respect to protecting all dimensions of the 1998 Agreement. The EU is under the Agreement perfectly entitled to form its own view of such a point and to disagree with the UK if it wishes. The arbitration panel would not even be in a position to determine whether the EU was acting unreasonably in its view that the Protocol was no longer necessary. Instead, it could only intervene if it determined the EU had not acted in good faith in forming its view.

4. Under Article 5 of the Withdrawal Agreement the parties agree to assist each other in carrying out the tasks which flow from the Agreement "in good faith". It is difficult to conceive of circumstances which would enable the UK to form the reasonable view envisaged, and which then allowed the arbitration panel then to determine that the EU could not in good faith disagree with the UK. We earlier addressed the extreme unlikelihood that an arbitration panel would decide that the EU had acted other than in good faith. International jurisprudence is clear that judges and arbitrators will not say that a party has acted in bad faith, even when the party has taken extreme, even outlandish, positions (for example, Japan's position in *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervening*), ICJ Rep 2014 p. 226 that hunting whales and selling the meat on the Tokyo fish market was "scientific research").

5. Second, the Attorney General says there could be respectable argument for exiting the relevant portions of the Withdrawal Agreement, "if the facts clearly warranted it," on the basis "that there had been an unforeseen and fundamental change of circumstances affecting the essential basis of the treaty on which the [UK's] consent had been given." The Attorney General goes on to say: "[t]hose facts might, for example, be that the prolonged operation of the Backstop was having a socially destabilising effect in Northern Ireland, contrary to its objectives. Article 62 of the Vienna Convention on the Law of Treaties, which is reflective of the customary international law doctrine *rebus sic stantibus*, permits the termination of a treaty in such circumstances. It is in my view clear and undoubted in those exceptional circumstances that international law provides the [UK] with the right to terminate the Withdrawal Agreement. If that were to happen, the [UK] would no doubt offer to continue to observe the unexhausted obligations in connection, for example, with citizens' rights."[*]

6. The Secretary of State for the Department for Exiting the European Union made statements in Parliament yesterday, outlining the Attorney General's advice: 12 March 2019, Hansard vol. 656, column 288-289.

7. In our opinion, the Attorney General's understanding of *rebus sic stantibus* and the circumstances in which it could be successfully invoked are clearly erroneous.

8. As an initial point, it is important to understand how extreme the circumstances would have to be for a valid invocation of *rebus sic stantibus*. In the 1990s, Hungary tried to escape a 1977 Treaty between itself and Czechoslovakia by invoking *rebus sic stantibus*—the doctrine of "fundamental change of circumstances" that the DeXEU Secretary referred to on 12 March 2019. The Treaty that Hungary desired to get out of had to do with certain dam works on the Danube River. The change was the fall of the Soviet Union; the disappearance of the Warsaw Pact; and the dissolution of the other original treaty party, Czecholovakia.

9. The International Court of Justice (ICJ) however would have none of it. The Court emphasised the actual language of Art.62. For a fundamental change of circumstances to supply grounds for withdrawal or termination of a treaty, the change must have been "not foreseen". The Court did not think that even these changes - which constituted a veritable earthquake in world politics - got Hungary over the bar. The Court rejected Hungary's Art.62 position entirely. The Court added that this whole branch of treaty law is "negative and conditional":

[*] The VCLT is probably, as a strictly formal matter, inapplicable to the WA which is an agreement between the UK and the EU, a non-State entity. However, the VCLT is generally regarded as codifying pre-existing customary international law and hence the same result is likely whether or not the VCLT as such applies.

the "stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases." *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 65 (para. 104).

10. The Secretary of State for DeXEU said that the changes that he envisages would be "exceptional". He used the word twice. But saying they are "exceptional" does not make them so in the eyes of international law. Hungary undoubtedly thought there was something "exceptional" about the collapse of Soviet tyranny and the liquidation of the other State Party with which Hungary had concluded the treaty in question. But that was not enough.

11. And the Secretary's remarks bring to light another point: the exceptional circumstance, in addition to constituting a "fundamental" change, must be an *unforeseen* change. The Secretary of State therefore practically nullifies his own argument by the very fact of making it: he says that a crisis under the 1998 Agreement would be an exceptional problem. No doubt it would be a problem, and a very big one. But in saying that, the Secretary has already made it clear that he recognises the possibility that it might happen. It would lie ill in the mouth of the United Kingdom to say, later, that we had not foreseen it. A change that you foresee is not a change that you may invoke under Art. 62. The UK must expect that, if it tried to fall back on Art. 62 in a court or arbitral proceeding, the other side would read back to it the very words of UK Ministers regarding the foreseeability of problems under the Withdrawal Agreement/Protocol. In our opinion, the foreseeability of the postulated change of cirucmstances itself would be enough to defeat resoundingly any *rebus sic stantibus* plea.

12. It is crucial here that the UK keep sight of the procedural setting in which such a plea would be made. In a purely diplomatic setting, it is acceptable to ventilate a range of views of varying levels of plausibility. There is nothing illegal or, for that matter unethical, to press a point between diplomats that would almost inevitably fail in a court of law. But, under the WA/Protocol, any UK claim to unilaterally terminate the instrument or part of it is subject not merely to diplomatic exchanges. The UK claim will be subject to compulsory and binding procedures, arbitral (the Arts. 170 & ff. Arbitration Panel) and/or judicial (the ECJ).

13. The ECJ has not been much more enthusiastic about attempts to use Art. 62 to escape treaties than have judges and arbitrators applying public international law. In *A. Racke GmbH & Co.* v. *Hauptzollamt Mainz*, Case C-162/96 , 16 June 1998, ECR 1998, pp I-3655, the Court was sceptical about the doctrine. The most help the ECJ in *Racke* gives the AG today is to say that "it does not appear that... the Council made a manifest error of assessment" when it suspended certain trade concessions that had been made earlier by the EC to the Socialist Federal Republic of Yugoslavia and referred to a "radical change in the conditions under which the... Agreement... and its Protocols... were concluded..." (id. para. 56). But even this is of practically no use in respect of the Withdrawal Agreement and Backstop (Protocol), because it addressed a situation simply too disimilar to the UK's:

--the ECJ here was addressing a Council decision affecting internal EU/EC rules, not an international declaration renouncing the treaty and made to the other treaty party;

--the Council decision was made in circumstances not only of the disappearance of the treaty party (such as with Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case) but, moreover, one where the remnants of the disappeared treaty party had collapsed into a civil war on a scale that Europe had not seen since 1945; and

--the Court was lukewarm at best on Art. 62, because all it said was that, as concerns internal EC action in respect of a major war, there *probably* was not a blatant misapplication of the law when the Council mentioned Art. 62 ("does not appear that" there was "manifest error of assessment"). In judging whether a State has violated international law by terminating a treaty, it is inconceivable that an international arbitrator or judge, applying public international law, would apply such a favourable standard ("manifest error" standard) to the terminating State.

And more recently the ECJ has resiled even further from the doctrine, rejecting pleas by Austria and Sweden to escape treaties after those States had invoked fundamental change. See Case C-205/06 *Commission* v *Austria* [2009] ECR I0000 (paras. 38-40); and Case C-249/06 *Commission* v *Sweden* [2009] ECR I0000 (paras. 39-41). As the Advocate-General had said in that connection, a matter of EU law "cannot depend on... the application of *a controversial point of international law* such as *rebus sic stantibus*" (Case C-205/06, Advocate General Poiares Maduro's Opinion, 10 July 2008 at para. 61) (emphasis added).

14. Moreover, in our opinion, the AG fails to appreciate the full weight of the burden on a State that invokes *rebus sic stantibus*. We already have noted the magnitude of the fundamental change needed to satisfy the rule. Adding to that weight, the State invoking *rebus sic stantibus* must show that the putative change is such that it "radically… transform[s] the extent of obligations still to be performed under the treaty." (Art. 62(1)(b)). Here, the difficulty for the UK would be not only showing that the change was of the requisite magnitude. It would also be to show that the change has made the obligations of the Agreement materially different from what they were at the outset. The change, to be available as a ground for terminating the Agreement, must, in essence, have transformed what particular acts the UK is obliged to do in order to fulfil the obligations contained in the Agreement. In the words of the International Court of Justice, "The change must have increased the burden of the obligations to be executed *to the extent of rendering the performance something essentially different from that originally undertaken*". *Fisheries Jurisdiction* (*Federal Republic of Germany* v. *Iceland*), Judgment, ICJ Rep 1973 at p 63 (para 36) (emphasis added). If the day came when the UK invoked *rebus sic stantibus*, the EU would say that the Protocol and the other obligations under the Withdrawal Agreement are fulfilled today the same way as they were fulfilled at the start; their performance is not at all different from what it was when those obligations were originally undertaken, certainly not "essentially different." In view of the nature of the obligations under the Agreement and its Protocol, this would be an extremely difficult challenge for the UK to satisfy.

15. For example, if social conditions changed in Northern Ireland, as the Attorney General ominously suggests they might, the EU would reply to an invocation of Art. 62 by saying that, at most, the new conditions make fulfilling the Protocol more difficult (perhaps even a lot more difficult), but they do not turn the performance of the UK's obligations into anything essentially different from what the UK originally promised to do. The jurisprudence is quite clear that a State does not have recourse to Art. 62 just because it has become harder to perform the obligations that the treaty created. The standard is vastly more difficult to meet than that: the change of circumstances must be such that the original obligation is now, for all practical purposes, a different obligation due to the change. The UK itself, in the drafting work on the VCLT, "doubted whether a subjective change of policy... can ever be regarded as a fundamental change of circumstances" and sounded a cautionary tone as to the doctrine overall

(ILC Yearbook 1966 Vol. II pp. 344-45). The tenor of States almost universally has shared that tone, with some going so far as to equate "fundamental change of circumstances" to total impossibility of performance.

16. Finally, there is the distinct objection that the EU would conceivably raise in respect of the nature of the obligations that the Written Agreement would create. We have already noted this: it is the objection that Art.62(2)(a) VCLT excludes *rebus sic stantibus* when it comes to boundary treaties. The Withdrawal Agreement and Protocol set down obligations pertaining to the boundary between the United Kingdom and the Republic of Ireland, and related to those obligations is that the UK continue to treat the external boundary of the EU as the customs boundary.

17. We therefore conclude, on the basis of the above considerations, that the AG's view of Art.62 VCLT is badly misconceived. Art.62 VCLT gives the UK no assurance (much less a "clear and undoubted" assurance as the AG postulates) that the EU has implicitly accepted, or that general international law implies, any right for the UK unilaterally to terminate the Withdrawal Agreement. Art.62 VCLT, given the high burden that a State must meet to use it, and given the extreme reluctance of international courts and tribunals to accept it, supplies no assurance whatsoever that the UK could unilaterally terminate the Withdrawal Agreement in a lawful manner. Parliament would do better to recall the assessment made by Sir Hersch Lauterpacht, British judge of the International Court of Justice (1955-60), over a half a century ago. *Rebus sic stantibus*, Judge Lauterpacht admonished, "is not a talisman for revising treaties." (Sir H. Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Grotius, originally 1958; reprinted edn 1982) p 86).

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