Professor John Finnis | 2 November 2016

Terminating Treaty-based UK Rights: A Supplementary Note

Judicial Power Project

Executive Summary

1. Double tax treaties provides a clear parallel for the process whereby the Government gives notification under TEU art. 50 of the UK's intent to leave the EU.

2. This notification will be substantially identical to the notification that can be given by virtue of, for example, art. 29 of the UK-Russia double tax treaty, which would result in the termination of the treaty and thereby the elimination of rights that many UK citizens and others enjoy under UK statutory provisions dependent (for their effect) on the treaty.

3. No one doubts that notification under art. 29 of the UK-Russia double tax treaty can be given without any Parliamentary approval, let alone a statute. So no one should doubt that notification under art. 50 TEU can likewise.

4. The European Parliamentary Elections Act 2002 discloses no positive intention that there be elections in the UK to the European Parliament. Rather, it provides that if and when under EU law there arises an obligation to conduct elections to the European Parliament, then such elections shall be conducted in the UK in the manner specified in the 2002 Act. The 2002 Act's operation was always intended to be wholly contingent on arrangements made on the international plane. These arrangements are well understood to be terminable for all purposes by prerogative actions on that plane, with no requirement of parliamentary let alone statutory intervention.

Terminating Treaty-based UK Rights:

A Supplementary Note

In a Judicial Power Project paper of 26 October, *Terminating Treaty-based UK Rights*, I argued that UK law and constitutional practice about double tax treaties provides a clear and uncontroversial parallel for the process whereby the Government, in the exercise of its prerogative (non-statutory) power in foreign affairs, will give notification under TEU art. 50 of the UK's intent to leave the EU. This notification will be substantially identical to the notification that can be given by virtue of, say, art. 29 of the UK-Russia double tax treaty, which would result (after the time specified in the article) in the termination of the treaty and thereby the elimination of rights (quite numerous) that many UK citizens and others enjoy under UK statutory provisions dependent (for their effect) on the treaty. No one doubts that notification under art. 29 can be given without any Parliamentary approval, let alone a statute. So no one should doubt that notification under art. 50 TEU can likewise.

Since the Government failed, in Court in the *Brexit* litigation, to point out and describe this parallel and precedent with the precision needed, the paper of 26 October sought to do so.[1] A few readers have doubted that the Government could have really have failed on this pivotal matter, or that the Court needed guidance on it. So this Supplementary Note sets out in more detail the logic, intent and legal effect of the slightly complex and unusual structure of interlocking parliamentary statutes, executive orders, and international agreements and notifications.

[1] This Note presupposes and supplements, without amending or (subject to the next footnote) qualifying, my Judicial Power Project paper of 26 October, *Terminating Treaty-based UK Rights*.

Oral Argument

In tracing this structure, it may be helpful to begin by noting very clearly just where and how oral argument[2] about it went astray.

On Day 2 (Monday 17 October) at p. 145 line 22 of the transcript, James Eadie QC was asked by the Master of the Rolls:

> [2: 145. 22] Can you give me an example in practice of how a double taxation treaty negotiation, withdrawing a benefit under it without legislation, could be applied by analogy here? Can you give me, rather than taking the general principle, can you give me an exact example of such a situation?...
>
> [146. 4] Because…if you have a double taxation agreement, it might be something along the lines…of saying that you can make a deduction for British taxes in relation to something that occurs elsewhere…
>
> [146. 16] There, let's assume that the Crown negotiates something which involves a curtailment of that right. *It would still need Parliamentary intervention to remove the right, by way of some Finance Bill,* from a person in this country to make that deduction. *That would be necessary*. … [Here and throughout emphasis has been added.]

Mr Eadie: [147. 1] *Yes*. … the double taxation treaties do indeed involve… [147. 6] a bespoke process by which you do have to go back to Parliament, but afterwards. Much of this is therefore a sequencing involved. What happens in terms of sequencing is that the double taxation treaty is renegotiated or different provisions are arrived at. Then, as my Lord says, there is interposition into domestic law and Parliament reacts. …. [147. 25] It [the renegotiation and new agreement] doesn't preclude Parliament from then saying: well, actually, we don't much like the look of it; *nor does it necessarily preclude – maybe my Lord is right in terms of that specific context – Parliament having potentially*

[2] The paper of 26 October may go too far in saying that the Government's Skeleton argument, paras. 36-37, stated the essential points. In dealing with double tax agreements, para. 36 tends to merge termination with renegotiation and replacement – which is of course the usual case, perhaps even, *hitherto*, the only case.

necessarily to alter the domestic scheme to take account of that new arrangement.

The Master of the Rolls: All I am saying is that all that shows (that particular example) is that a Parliamentary intervention – in order to give effect to what has been negotiated by the Crown and its prerogative power, in order to give effect to it, *Parliamentary intervention is necessary and it is substantive.* …

Mr Eadie: [148: 16] My Lord, yes. I don't mind that…. For the purposes of my argument, I don't mind that because in that context, whether it intervenes substantively or not to alter things, the fact of the matter is that the prerogative has been exercised in that way. Now, *that isn't an example of, as it were, having a direct and immediate impact on to domestic law*; it's an example of the Crown exercising its power on the international plane to enter into an agreement which it then, as it were, presents to Parliament to say yes or no. …

Thus the opportunity was missed – the opportunity to give Etherton MR and the Court a clear account of the operation of double tax treaties/agreements in UK law, and to correct the misapprehension that taxpayers' statutory rights to a deduction or tax credit would be unaffected by termination of the relevant treaty unless and until "some Parliamentary intervention… some Finance [Act]" had changed those rights.

In doing so, the golden opportunity was missed, of supplying what Lord Thomas CJ had been asking for, a few minutes earlier,[3] namely, some authority for the proposition that though treaty making cannot affect rights under UK law without a statute, "in the case of *withdrawal from* a treaty you can actually thereby affect rights that have been enacted in law".[4] Counsel at first denied that he was relying on that distinction, that asymmetry between making and terminating. Then, when reminded by Lord Thomas CJ that it was at the heart of the case,[5] and pressed to answer the question[6] whether "the Crown has the prerogative power to withdraw from a treaty even if that affects the rights that are accrued under domestic law", counsel inevitably answered Yes – but with no explanation, authority or example. (Any other answer would have brought a precipitate end to argument and fairly summary judgment for the claimants.)

[3] 2: 119. 3-4
[4] 2: 118. 13-15
[5] 2: 118. 19-20
[6] 2: 118. 24 – 119. 1

So Etherton MR's questions, minutes later, about double tax presented counsel with the opportunity to recover ground by giving some substance to his bare "Yes" – the opportunity to point to a fully practical, even homely example of the needed distinction between the domestic legal effects of *making* and the domestic legal effects of *terminating* a treaty – not simply renegotiating it (a different matter, on which both Court and counsel unfortunately focused). We see the opportunity being missed, above at 147.1 and 148.16. The propositions of law embedded in Etherton MR's question at 146.16-21 are mistaken. Identifying the mistake provides the example that counsel needed to supply. Here's the slow motion identification.

Making and Terminating Treaty-based Statutory Rights

Statutory rights to a tax credit (or other deduction) reducing liability to UK tax, as rights "under the arrangements" made in a double tax agreement, stand on two legs (have two distinct necessary conditions): (A) the making of those arrangements by the bringing into effect of the relevant agreement between the UK and, say, Russia; (B) one or more of the scores of provisions in Part 2 (ss. 18 to 134) of the Taxation (International and Other Provisions) 2010 [TIOA] that create statutory rights to tax credit, rights having the content and extent specified in those treaty-based arrangements, and additional legal machinery and effect supplied by those TIOA provisions.[7]

The First Leg: Bringing into effect the relevant tax treaty

The arrangements made in the double tax agreement have effect on, again, three distinct bases (three distinct necessary conditions):

(a) the terms of the treaty,

[7] TIOPA Part 2 is entitled "Double taxation relief", and most though not all its provisions (ss. 2 to 134) concern relief under double tax arrangements. Part 3 (ss. 135 to 145) concerns "Double taxation relief for special withholding tax". Examples of provisions that give direct statutory effect to double tax agreements' arrangements as such include ss. 18, 20, 21, 25, 31, 32 to 34…and so on. In all these cases, at least, termination of a treaty (without replacement) would simply eliminate the statutory right that a taxpayer would otherwise have enjoyed.

(b) an Order in Council (made only after the House of Commons has seen the draft of it and resolved to ask that it be made) declaring that the specified treaty makes arrangements for affording relief from double taxation and that "it is expedient that those arrangements should have effect", and

(c) TIOPA s. 2 which on the making of such an Order in Council gives effect to the arrangements in that treaty, and does so "despite anything in any enactment" (s. 6(1)).[8]

As to **basis (a)**, notice that UK double tax agreements contain specific provisions about their coming into effect: the 1994 UK-Russia treaty (Convention), for example, provides by art. 28 ("Entry into force") that:

> Each of the Contracting States shall notify to the other in writing through the diplomatic channel *the completion of the internal procedures required by the law applied in that Contracting State* for the bringing into force of this Convention. This Convention shall enter into force on the date of the later of these notifications and shall thereupon have effect: (a) in the United Kingdom: (i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6th April in the calendar year next following that in which the Convention enters into force…

and so forth. The "internal procedures" referred to in the passage here italicized are of course the laying of the draft Order in Council before the Commons, the Commons resolution, and the making of the Order.

As to **basis (b)**, notice that the Order in Council is declaratory. In our example: the Double Taxation Relief (Taxes on Income) (Russian Federation) Order 1994, SI 1994/3213 made on 14 December 1994 declares ("It is hereby declared") by its art. 2 that the arrangements specified in the treaty (identified as the Convention set out in part I of the Schedule to the Order and the Exchange of Notes set out in part II of that Schedule) "have been made with the Government of the Russian Federation with a view to affording relief from double taxation…", and that "it is expedient that those arrangements should have effect". The Order does not purport to enact those arrangements, nor even to *bring* them into effect, though it is accurate to say – once

[8] Subject only to this Part of TIOPA and Part 18 of the Income and Corporation Taxes Act 1988 [ICTA].

they have come into effect by virtue of international actions under art. 28 – that they have been "given effect in UK law" by the Order in Council made under TIOPA s. 2.[9] They *came into* effect on the international plane (and thus also in the UK) by virtue of the treaty's art. 28 (above), on the date of the later of the respective UK and Russian notifications of conclusion of internal procedures. Since the Russian notification was given years after our Order in Council, the treaty did not come into force until 18 April 1997, and its statutory effect in the UK was therefore (as defined by art. 28) only as from 6 April 1998 in respect of income or capital gains taxes. That statutory effect has as its direct statutory basis the third of the three bases: TIOPA s.2 (or more precisely, s. 2's substantially identical predecessor, s. 788(1) Income and Corporation Taxes Act 1988), an analogue of s. 2(1) of the European Communities Act 1972 [ECA].

As to **basis (c)**, TIOPA s. 2(1) provides:

Giving effect to arrangements made in relation to other territories

(1) If Her Majesty by Order in Council declares—

(a) that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to taxes within subsection (3), and

(b) that it is expedient that those arrangements should have effect,

those arrangements have effect.

Notice that the "arrangements specified in the Order" are not simply arrangements made "in relation to" Russia but are, more importantly, arrangements (as the Order specifies) "made *with the Government of the Russian Federation*" and contained in a

[9] That is the phrasing of Lord Reed for the Supreme Court in *Anson v HMRC* [2015] UKSC 44 at [26], and it is preferable to the slightly unnuanced *obiter* characterisation of double tax arrangements as "enacted by" Orders in Council, by Lord Radcliffe for the majority in *Ostime v AMP* [1960] AC 459 at 476; Lord Radcliffe's alternative phrasing is a bit better, "the agreement became municipal law of this country by virtue of an Order in Council made…under the authority of [the then predecessor of TIOPA s. 2(1)]"; but Lord Reed's seems the best. Incidentally, Lord Radcliffe remarks at 476, 480 that such double tax agreements and arrangements first came into UK practice in 1946, under the Finance (No. 2) Act 1945 s. 51(1).

treaty that makes provision for its own effect and termination. Notice also that s. 2 TIOPA does not purport to give effect to the Order in Council, but rather to the arrangements, arrangements which (as we seen) are those in the treaty, the terms of which are, for identification, scheduled to the Order. Thus it could and did happen that the UK statutory effect began only, after an unpredictable lapse of time, years after the making of the Order in Council.

The Second Leg: Statutory provisions making the treaty-based rights effective in tax assessment

Statutory rights to tax credits under those double-tax treaty arrangements (in the hypothetical raised by Etherton MR) stand on a second leg: any one or more of the provisions of ss. 18 to 134 of TIOPA. In each case, the provision will be applicable because the section creates a statutory right the content and extent of which is defined by what credit is "allowed" or "proper" "under double taxation arrangements" that "have effect under" s. 2(1) TIOPA.[10]

This whole jigsaw of legs and bases – of necessary conditions – for the enjoyment of statutory rights embodies and makes clear the "distinction" that Lord Thomas CJ put to counsel for the Secretary of State, the asymmetry between the bringing into effect of the double tax treaty and its termination. Like the ECA, the TIOPA itself makes no provision for the termination of any of the treaties to which it gives UK legal effect. In relation to TIOPA, those are the treaties given UK legal effect by s. 2(1) TIOPA because specified in Orders in Council to which s. 2(1) TIOPA applies. In relation to the ECA, they are the treaties specified in s. 1 ECA and given UK legal effect by s. 2 ECA. Just as termination of those EU treaties in relation to the UK is provided for in art. 50 TEU (given Parliament's statutory approval by s. 2 European Union (Amendment) Act 2008), so termination of the UK-Russia double tax agreement in provided for in art. 29 of that treaty (given Parliament's statutory approval by s. 2 TIOPA with SI 1994/3213):

> 29. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice in writing of termination at least six months before the end of any calendar year beginning after the expiry of five years from the date of

[10] See e.g. TIOPA s. 18 and/or s. 134, read with s. 2(4) and 2(1); and n. 7 above.

> entry into force of the Convention. In such event, the Convention shall cease to have effect: (a) in the United Kingdom: (i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6th April in the calendar year next following that in which the notice is given….

No Parliamentary approval of any kind is required for the Crown to give notice of termination of the UK-Russia double tax Convention 1994.[11] Thus UK and/or Russian persons and companies can find that they have been lawfully and constitutionally stripped of the extremely valuable UK rights that Parliament has conferred on them in, for example, TIOPA s. 134. These "statutory rights" will have been destroyed by sheer executive action, a simple notification made under the 1994 Convention art. 29 and the prerogative of foreign affairs, without the slightest approval by Parliament – nor even by a national referendum organized by Parliament for the purpose of approving or disapproving it.

As the paper of 26 October seeks to explain, the term "statutory rights" is systematically ambiguous. The just mentioned "destruction" of "statutory rights" thus involves no defiance of Parliament's intentions, but rather compliance with Parliament's at least permissory intentions embodied in art. 50 TEU and in art. 29 of the UK-Russia treaty as envisaged by TIOPA s. 2(1) and approved by the House of Commons. Moreover, the "destruction" leaves the statutory provisions establishing those rights entirely undisturbed. For these are not provisions that *by themselves* define and confer rights. Instead they are provisions that give UK statutory legal effect *contingently* to such rights as arise on the international (EU or double tax treaty) plane, and that track those rights as they come into existence and go out of existence by actions on the international plane. In some cases, Parliament itself sees and approves the rights as they come into UK legal effect. In some cases, only one House sees and approves them. In none of the matters we have been considering does Parliament require that it or either of its Houses approve any termination of the rights that is the possible or actual or inevitable intended result of the actions of foreign governments or entities or of Her Majesty's ministers' in their conduct of the UK's international relations.

[11] It would, I suggest, be fanciful to say that a notice under art. 29 of the 1994 treaty would be irrevocable and could not be withdrawn (at least by agreement) within its six month period. But suppose we indulge the fancy and treat notice as a bullet that necessarily and inexorably hits its target, as *mutatis mutandis* the parties to the Brexit litigation curiously agree. Nothing in the analysis changes.

A Further Parallel: European Parliamentary Elections Act 2002

The paper of 26 October said nothing about the complaint of Brexit case claimants about loss of their rights arising, they say, under the European Parliamentary Elections Act 2002, or arising under the law of or in other EU member states by virtue of EU citizenship. This is not the place for extended analysis or discussion of those claims. But in considering them, it may be helpful to recall that the valuable legal rights which would be destroyed by UK (or Russian) executive termination of the double tax treaty include not only the UK statutory rights exemplified by TIOPA ss. 18 to 134, but also the valuable legal rights enjoyed by UK citizens and residents (as well as Russian citizens and residents) *under Russian law* by virtue of the efficacy in Russian law of the 1994 UK-Russian double tax treaty while that treaty is in force and effect.

Just as the 2002 Act adds something specific to the effect of ECA s. 2(1) upon the Treaties listed in ECA s. 1, so too TIOPA ss. 18 to 134 add something specific – what I called above "additional machinery and effect" – to the primary operation of TIOPA s. 2(1), of making the treaties (scheduled to Orders in Council under it) part of UK law. Thus: just as the Commons, by giving approval to art. 29 of the 1994 treaty, contemplated the possible destruction by sheer prerogative action of some or all statutory rights under TIOPA ss. 18 to 134, so too Parliament itself, by giving statutory approval[12] to TEU art. 50, contemplated the possible destruction by sheer prerogative action of statutory rights including those in the 2002 Act.

Moreover, the 2002 Act discloses no positive intention that there be elections in the UK to the European Parliament, but rather the intention that if and when under EU law there arises an obligation or opportunity for Member states to conduct elections to that Parliament, then such elections shall be conducted in the UK in the manner specified in the 2002 Act. Like TIOPA ss. 18 to 134, its operation and the machinery it provides were always intended to be wholly contingent on arrangements made on the international plane, arrangements well understood to be terminable for all purposes by prerogative actions (or the actions of foreign parties) on that plane, with no requirement of parliamentary let alone statutory intervention.

[12] That is, as mentioned above, by the 2008 Act adding the TEU (Lisbon Treaty of European Union) to the ECA s.1 list of Treaties given force in UK law by ECA s. 2(1).

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