

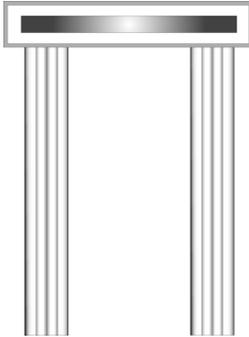


Martin Howe
Richard Aikens
T. D. Grant

Avoiding the Trap
How to Move on from the
Withdrawal Agreement

Briefings for Brexit
POLITEIA

A FORUM FOR SOCIAL AND ECONOMIC THINKING



POLITEIA

A Forum for Social and Economic Thinking

Politeia commissions and publishes discussions by specialists about social and economic ideas and policies. It aims to encourage public discussion on the relationship between the state and the people. Its aim is not to influence people to support any given political party, candidates for election, or position in a referendum, but to inform public discussion of policy.

The forum is independently funded, and the publications do not express a corporate opinion, but the views of their individual authors.

www.politeia.co.uk

Avoiding the Trap
How to Move on from the Withdrawal
Agreement

Martin Howe
Richard Aikens
T. D. Grant

Briefings for Brexit
POLITEIA

2019

First published in 2019
by
Politeia
14a Eccleston Street
London
SW1W 9LT
Tel: 0207 799 5034

Email: secretary@politeia.co.uk
Website: www.politeia.co.uk

© Politeia 2019

ISBN 978-1-9993662-4-7

Cover design by John Marenbon

Politeia gratefully acknowledges support for this publication from
The Foundation for Social and Economic Thinking (FSET)
Briefings for Brexit

Printed in Great Britain by:
Plan – IT Reprographics
Atlas House
Cambridge Place
Hills Road, CB2 1NS

THE AUTHOR

Martin Howe QC is a barrister in the fields of intellectual property and EU law at 8 New Square and chairman of Lawyers for Britain. He was called to the bar in 1978 and became a QC in 1996. His recent publications include *The Cost of Transition: Few Gains, Much Pain?* (2017) and *How to leave the EU: Legal and Trade Priorities for the New Britain* (2016).

Sir Richard Aikens PC is an arbitrator and Visiting Professor at King's College London and Queen Mary University of London. He specializes in shipping, insurance, banking, international trade and arbitration. He joined what is now Brick Court Chambers in 1974 and became a Queen's Counsel in 1986 and in 1999 he was appointed to the High Court of Justice and assigned to the Queen's Bench Division. He became a Lord Justice of Appeal in 2008 (a post he held until 2015) and was appointed to the Privy Council in the same year.

Thomas Grant is an international lawyer and Fellow of the Lauterpracht Centre for International Law in Cambridge and Senior Research Fellow at Wolfson College. Dr Grant's books include *Aggression against Ukraine: Territory, Responsibility, and International Law* (2015) and *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009).

Contents

Executive Summary. After Theresa May. After her deal - the new path forward	1
I Introduction – A Withdrawal Treaty Like No Other	7
II The Withdrawal Agreement - A Legally Binding Death Trap for Brexit	9
III The Political Declaration and its Significance – For Worse, not Better	16
IV Renegotiating the Withdrawal Agreement - Is it an option?	21
V Our future relations with the EU - By-passing the WA	26
VI Conclusion	36

After Theresa May. After Her Deal

The New Path Forward

Executive Summary

1. As Mrs May departs, the Conservative Party is selecting a new leader who will become Prime Minister. That person's principal task will be to achieve Brexit and deliver the results demanded by the 17.4m people who voted to leave the EU in 2016.

2. This task requires a new start. It should not involve an attempt to renegotiate the Withdrawal Agreement ('WA') which resulted from Theresa May's disastrous negotiations with the EU. Such an attempt would be futile, since the EU has set its face against any 'reopening' of the WA. It extracted a formal commitment from Mrs May not to try to reopen it as a condition of the European Council decision to grant an extension of the Article 50 'two year negotiating period' to 31 October 2019.

3. The WA (of which the Northern Ireland backstop Protocol is 'an integral part') would become legally binding in international law if ratified by the UK and the EU Parliaments. The WA contains a series of remarkable features which are detrimental to the UK and which would make 'Brexit' illusory:

(1) It would perpetuate the doctrines of 'direct effect' and supremacy of EU law over UK law (including new EU laws on which the UK would have no voice or vote), under which the UK courts are required to strike down Acts of Parliament if found to be inconsistent with EU law or even vaguely drafted treaty provisions. The doctrines apply to the provisions of the WA itself and also any long term relationship agreement with the EU that would replace it.

(2) The WA would perpetuate the jurisdiction of the ECJ either directly, or via a backdoor mechanism modelled on the EU's agreement with Ukraine, under which the supposedly neutral arbitral tribunal set up under the WA would be bound on matters of EU law by decisions of the ECJ. Meanwhile

the ECJ itself would have become an entirely foreign court with no post-Brexit British judge.

(3) The WA has uniquely stringent mechanisms for breaches by the UK, which would make the UK subject to financial penalties or even to discriminatory trade sanctions. Any attempted recourse by the UK to WTO disputes procedures would be prohibited.

(4) The WA requires the UK to use ‘best endeavours in good faith’ to negotiate terms for a long term future agreement in line with the principles set out in the Political Declaration (PD). The absence of an exit clause from the backstop Protocol would trap the future PM into having to negotiate against the genuine and formidable threat of the UK falling into the backstop if it did not agree to the EU’s terms. The scope for negotiation on any future long term deal is severely reduced by the concessions that have been made by the UK in the terms of the PD.

(5) The WA has no exit clause from the backstop Protocol except with the agreement of the EU, a fact unique amongst international treaties.

(6) Even in the wholly unlikely event that the EU were to agree to remove the whole backstop Protocol from the WA, the rest of the WA would still contain serious constraints on the UK and little or nothing of value. For example: (a) Its ‘long tail’ jurisdiction would lead to UK companies being subjected to State aid or competition proceedings for many years after the UK had left the EU and after the transition period; (b) It contains an obscure clause on ‘geographical indications’ which would severely disrupt future trade negotiations with other countries.

4. If the WA were to come into force, even if the UK would be nominally leaving the EU it would still be subject to all EU laws (including new ones), the jurisdiction of the ECJ, the decisions of EU institutions such as the Commission and EU Parliament and the UK would not be entitled to submit ‘proposals, initiatives or requests for information to the (EU) institutions’: WA Art 128(5)(b).

5. Because Article 184 of the WA requires the UK (and EU) to use best endeavours to negotiate a long term agreement which conforms to the principles set out in the Political Declaration (PD), the UK cannot attempt to negotiate for any future agreement that departs from those principles. A failure to agree a long term relationship in accordance with those principles will mean that the UK is locked into the backstop Protocol terms with no way out and no legal means of complaint. This constraint does not appear to have been appreciated by either Mrs May, her advisors or any of the current Conservative party leadership candidates.

6. There is no requirement that a Withdrawal Agreement has to be concluded in order for a member state to withdraw from the EU under Article 50 and given the position we are in, the current attempt to conclude a Withdrawal Agreement should be stopped. The EU will not agree any changes and the current version will not be agreed by the UK Parliament.

Instead, the future PM should concentrate on addressing the longer term relationship between the UK and the EU.

7. A ‘no deal’ exit from the EU means no Withdrawal Agreement under Article 50; it does not mean leaving the EU with no deals of any kind unless the EU refused to enter negotiations, despite the UK’s willingness to do so.

8. In the absence of a trade agreement between the UK and the EU, WTO rules require that the EU must charge its Common External Tariff (CET) on goods imported from the UK and the UK must charge its standard external tariffs (those charged on imports from the rest of the world) on goods imported from the EU. Contrary to common belief, the UK is not obliged to continue to charge tariffs at EU levels - it will be free to reduce them or remove them on sectors of goods where they are not warranted. The UK government envisaged doing so pre 29 March 2019.

9. A Civitas study demonstrates that the total value of tariffs charged on UK goods imported into the EU, and subject to the CET would be approximately 4.5% on average. This does not amount to a swingeing increase in the price

of UK exported goods to the EU. It is less than half the *net* contributions that the UK makes to the EU budget each year.

10. The future PM should propose the continuation of zero tariffs on goods between the UK and the EU. The mechanism would be a simple temporary Free Trade Agreement, to apply until a fuller long term FTA can be negotiated and ratified. A draft (complying with GATT rules) has already been prepared by Dr Lorand Bartels of Cambridge University.

11. Such a bridging arrangement would be preferable to the elaborate and highly constricting ‘transition period’ envisaged by the WA, under which the UK would be subject to all EU laws (including new laws on which it would have no vote) and could not implement any trade agreements with third countries. By contrast, this bridging arrangement would be compatible with the immediate negotiation and implementation of trade agreements with third countries such as the USA.

12. As for the suggestion that there would have to be a closed land border in Ireland to deal with tariffs, it must be recalled that both the Channel ports and the Irish land border are already fiscal borders for the imposition of VAT and Excise Duties on goods imported into the UK. VAT is currently satisfactorily collected by businesses filing electronic returns with periodic inspection to ensure compliance. The same process can be applied to any collection of trade tariffs (if there are any).

As for regulatory barriers post-Brexit, under the terms of the 2018 Withdrawal Act, the UK’s post Brexit regulations relating to goods will be the same as the EU’s, unless and until divergence occurs in particular areas. Moreover, UK law (the 2018 Withdrawal Act) lays down the default rule of continuing to recognise EU goods as conforming to British standards. There will be no legal barrier against the continued importation into the UK of goods made and certified under EU standards and rules. Stories of ‘shortages’ of food and medicine are wrong.

13. Arrangements on regulatory recognition are normal between trading countries whether or not they are in any existing special trade agreement.

They are mandated by the World Trade Organisation's (WTO's) TBT and SPS agreements. Thus the EU will be under both legal and practical pressure to enter into arrangements to continue to recognise UK goods as conforming with EU standards.

14. As for services, the UK is a net services exporter. There are no current plans to change the rules and standards of UK based services providers, so that the EU has no rational basis on which to refuse recognition. In the financial sector, EU industries' access to the City is important, if not vital. Under the Withdrawal Act 2018 the default position is that EU-based service providers would continue to be recognised and able to provide services to UK customers unless and until UK rules are positively changed.

15. A zero tariff FTA is hugely beneficial to the EU having regard to the size of the UK's deficit in goods trade and the way in which EU goods exports to the UK are concentrated in high tariff sectors. It would be entirely reasonable for the UK to ask in return for interim access for goods and services into the EU market for as long as relevant rules remain aligned.

The paper concludes:

‘What we have proposed is a better way forward than the WA from all angles. Nobody can guarantee how the EU will choose to react, but if they have any sense and if these proposals are pushed by a determined UK Prime Minister then they present the best chance of an optimal exit from the EU’.

I

Introduction

A Withdrawal Treaty Like No Other

Theresa May's tearful announcement that she is standing down as Conservative Leader and Prime Minister should not divert us from understanding how she got herself - and her Party and her country - into this unsustainable position. She lost support because of her repeated and increasingly desperate attempts to ram through the deal she had negotiated with the EU, using false and discredited claims that voting for her deal would 'deliver Brexit', when the truth is that it would have delivered permanent vassalage.

Her false claims were repeated in a disgraceful leaflet pushed out by the Conservative Party for the European Parliament election - about its only effort in the whole campaign and now appear to be infiltrating the 'programme' of some would-be successors. The claim tries to pillory those principled MPs who have consistently opposed her disastrous deal, as 'playing politics' and 'voting against Brexit'. But the collapse of the Conservative vote and the huge swing of support behind the Brexit Party, which opposes her deal, demonstrates that voters are not stupid; the voters just did not accept her claims.

If a new Conservative leader were to renew support for her deal, it would spell political oblivion for the Conservative Party.

It has to be said that the disastrous deal was the result of grotesque and sustained incompetence on the part of the Prime Minister. At the outset of the negotiations, she over-ruled her Brexit Secretary David Davis and accepted the EU's sequencing, under which the UK would have to give the EU what it wanted on money, citizens' rights, and the NI backstop before even being allowed to discuss our future trade relationship with the EU.

Again and again, she made panic-stricken and humiliating capitulations to the EU's demands. The last and most disastrous of these was to agree that the backstop Protocol should have no exit clause, making it unique in international relations for trade treaties. It is not that she fell into any

concealed traps: she repeatedly hurled herself headlong and impaled herself - and her country - on the upright spikes at the bottom of pits clearly visible along the road.

But the disastrous deal she agreed with the EU is not explained by mere incompetence. Her peculiar vision of Brexit (if it can even be called that) distorted her conduct of negotiations. In the Irish backstop, she appears actively to have sought to create binding obligations against the UK in order to force the country into the rule-taking non-voting relationship with the EU which was so strongly opposed both inside and outside her Cabinet.

The methods she used to pursue her agenda were to cook up policies directly with civil servants in secret in order to by-pass the responsible ministers, to ambush the Cabinet, and repeatedly to give direct orders on the conduct of negotiations which just ignored and over-rode the views of ministers. She became a rogue Prime Minister trampling over the normal constitutional checks and balances on her role.

Mrs May is entirely responsible for her political demise and no tears should be wasted on her. Of more concern is how to recover from the appalling situation in which she has left her country.

II

The Withdrawal Agreement

A Legally Binding Death Trap for Brexit

There seems to be a widespread belief among the political class that once Theresa May has stepped down as Prime Minister, it would be possible for the next PM to ratify the deal and then change or at least mitigate the worst aspects of it.

We joined the EEC in 1973, but it took most of the political class about 20 years before they understood one of the most basic features of the EEC legal order: that Community law (now EU law) is supreme over UK law. Thus, even Acts of Parliament would be legally ineffective and be struck down in UK courts where they conflicted with Community law as interpreted by the European Court of Justice (now Court of Justice of the European Union, but 'ECJ' for short). This fundamental fact was made clear to politicians and lawyers by the well-known Factortame case, where an attempt to protect UK fishing interests through the Merchant Shipping Act 1988 was struck down by the House of Lords after it referred the case to the ECJ.

Our grave concern is that many politicians do not understand the legal consequences which will follow if the UK were now to ratify the Withdrawal Agreement. In particular they wrongly discount the effect of the binding obligations to which the UK will be subject if we ratify this treaty. They do not seem to understand the mechanics of the UK's post-ratification relations with the EU, and how the terms of the treaty will undermine or destroy the UK's ability to resist the imposition of gravely damaging terms under which we will become non-voting rule takers over wide areas of policy.

The Withdrawal Agreement: An unusual, remarkable and unique international treaty

The Withdrawal Agreement ('WA') is an international treaty between the EU and the UK. Its status is that the text has been negotiated, but - like an agreement under English law that is 'subject to contract' - it has no legal force yet, because it only comes into force when ratified by the authority of

the UK Parliament on one side and of the European Parliament on the other. It will never have any legal force if Parliament does not approve it and pass implementing legislation. But if it is ratified, it will become legally binding in international law. The so-called ‘backstop’ Protocol relating to the Irish border (containing rules which will apply to the whole of the UK as well as Northern Ireland) accounts for 173 pages of the text and is, by virtue of Art.182 WA, an ‘integral part’ of the treaty text. Accordingly, it is as legally binding as the rest of the text if the WA comes into force.

The WA has a number of features which are unusual, remarkable, or even unique in international treaties. These are:

1. Direct effect and supremacy: The WA explicitly requires that its provisions and the provisions of EU law which it makes applicable to the UK shall have ‘direct effect’, and that UK courts shall be required “*to disapply inconsistent or incompatible domestic provisions*” (Art.4 WA). This means that even Acts of Parliament must be struck down by UK courts where they are deemed to contradict the WA or EU law, so continuing the *Factortame* case doctrine after we have left the EU. Other international treaties to which the UK is party do not involve such rules of direct effect and supremacy, which are unique to the EU treaties. In the absence of Art.4 WA, these doctrines would cease to apply to the UK on the day we leave the EU.

2. Binding adjudication by a foreign court: The WA departs from near-universal treaty practice, which is that one sovereign will never submit to binding rulings by the courts of the other treaty party but will only submit to rulings by strictly neutral international bodies. By contrast, the WA makes the UK subject to binding rulings by the ECJ across wide areas, both directly via references from UK courts to Luxembourg or Commission enforcement actions against the UK (Art.89 WA), and by an indirect mechanism modelled on Ukraine’s treaty with the EU under which an international arbitral panel must refer all issues of EU law to the ECJ and that panel would be bound to give judgment in line with the ECJ’s rulings (Art.174 WA).

Contrary to the impression Theresa May and her advisers repeatedly sought to give, this ECJ jurisdiction will not cease at the end of the transition period. It will continue permanently both for the parts of the WA which continue after the transition period (principally citizens' rights and the 'backstop' Protocol), and under the long term relationship agreement with the EU; since the UK has pre-committed itself to extending those same arrangements under para.124 of the Political Declaration ('PD'). For reasons we explain below, the UK will have no ability to escape from the commitments it has made in the PD when it negotiates a future relationship agreement.

3. Uniquely stringent international remedies for treaty breaches: The WA goes far beyond almost all international treaties in the remedies it provides for treaty breaches. Many treaties contain arbitration clauses for the resolution of disputes, coupled with a (standard) obligation on the parties to respect the judgments of the arbitrators. The WA goes far beyond standard international practice, in providing for (A) penalty payments which can be imposed by the ECJ or the arbitration panel (Art.178(1) WA), and (B) 'self-help' remedies allowing the EU to suspend its own treaty obligations if there is a non-compliance with an arbitration ruling (Art.178(2) WA), subject to review by the panel for 'proportionality'.

Under these 'self-help' remedies, the EU could impose what amount to discriminatory trade sanctions against the UK, and the UK would have no recourse to the normal protections against discriminatory trade measures under the WTO Agreements, because Art.168 WA prohibits recourse to the WTO disputes mechanism, or indeed to any dispute mechanism other than the ECJ or the unusual arbitral panel set up under the WA. Most international arbitral panels are *functus officio* (defunct) after they render their final award on a dispute; the WA arbitral panel would have an on-going life of its own, including practically unprecedented enforcement powers.

4. No exit clause: Finally and most importantly, the WA has no exit clause from the backstop Protocol (and certain other long-term provisions) except with the agreement of the EU. This makes it, as far as we are aware, unique

among international treaties which regulate trade, which routinely contain notice clauses entitling the parties to terminate the treaty. As the Attorney General has advised twice, the legal effect is that the UK cannot legally prevent the backstop Protocol coming into force at the end of the transition period, and will thereafter be trapped with the EU on a long term replacement agreement.

This last feature - the lack of an exit clause - should be viewed in conjunction with the other remarkable features of the WA which we have noted above. Not only can we be trapped in an international treaty indefinitely against the will of the people of the UK and of a future UK Parliament, but that treaty will have direct effect in UK courts and will have supremacy over existing and future Acts of Parliament. It will have binding adjudication by the ECJ (which will become a wholly foreign court after exit), and ferocious remedies for breach which would be deployed if a future government or parliament were to try to escape from the WA's clutches. And this last feature (no exit) is what threatens irreversible consequences for the UK if we were to ratify the WA, which consequences will last for the country well beyond the careers of current politicians.

Ratifying the WA? Consequences and Constraints for the UK and next Prime Minister

If the deal in the current WA is ratified and comes into force, the next day we will not have left the EU in anything but name. Until at least December 2020 - potentially extendable to December 2022 - we will be in the so-called 'transition' or 'implementation' period. During the transition period, the whole of EU law will continue to apply to the UK, subject only to some limited exceptions (Art.127 WA). We will have to continue to obey the EU's laws and rules, and be subject to the full panoply of Commission and ECJ enforcement processes as we are now.

The big difference is that we will no longer have a vote or voice in any of the EU institutions. So, we will have no vote or veto against EU law changes

which damage the City, or against the Commission's use of State aid controls to suppress our competitiveness.

Moreover, the UK Parliament “*shall not be considered to be a national parliament of a Member State*” (Art.128(2) WA), nor shall the UK be entitled to submit “*proposals, initiatives or requests for information to the institutions*” (Art.128(3) WA). Our representatives or experts will only be able to attend meetings of EU bodies or expert groups where action is being taken against individual persons or companies in the UK, or where “*the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of Union law during the transition period*” (Art.128(5)(b) WA) - i.e. the UK, a supposedly sovereign state, will be summoned to meetings in order to be told what to do.

The original purpose of the so-called ‘transition’ or ‘implementation’ period was to allow the orderly detailed implementation of a future relationship which had been agreed in outline. But that is not how it will work out. The Political Declaration contains important - and often damaging - provisions about our future relationship with the EU but leaves many important questions unresolved. This means that the period will be an ‘implementation’ period only in name: in truth, it will be an extended negotiation period. But any ‘negotiation’ during that period will be under radically different legal rules from the present, weighted entirely in favour of the EU.

So, the Brexit process will not be ‘over’, or ‘done and dusted’ if the deal is ratified. After a short pause while the new Commission takes office, the turmoil will resume, with continuing negotiations with the EU about our future relationship. The EU’s advantages in those negotiations will be far greater than they are now. Most importantly, we will then be negotiating against a genuine and formidable ‘cliff edge’ at the end of the transition period rather than the largely overblown Project Fear ‘cliff edge’ we are said to face if we leave now without a deal.

This cliff edge will be real and formidable because, if we do not submit to the detailed terms offered by the EU for our long-term relationship, we will

then *automatically* fall over it into the backstop Protocol. That will divide the United Kingdom with directly effective EU single market rules applying in Northern Ireland, and plunge the whole of the UK into a no-say customs union with the EU subject to so-called ‘level playing field’ controls on the UK economy. The threat of this happening will put huge negotiating power - blackmail power - into the EU's hands, since the backstop locks us out of having an independent trade policy and threatens the Union of the United Kingdom.

And even if under the threat of the backstop we manage to make a long-term relationship agreement with the EU, why would anyone expect that agreement to contain a normal notice clause? That would provide to the UK an escape route from the Irish backstop which would be blindingly obvious to the EU. So instead of a normal notice clause, they will insist on a clause which reinstates the backstop Protocol if the UK ever drops out of the long-term agreement. The EU will argue that this is necessary to protect the Northern Ireland peace process, etc, etc, etc, if the UK ever decides to leave or renegotiate its trade relations with the EU.

If we agree the deal, there does not seem to be any legal way of preventing the EU from insisting on this. The UK's negotiating position will be particularly weak, because if it does not agree to the terms the EU insists on for the future relationship agreement, then the UK will drop automatically into the backstop Protocol and stay there indefinitely. So the backstop Protocol or its threat of re-imposition would act as a permanent dog-leash with which the EU can restrain the UK's international trade policy and competitiveness.

Some people say the present negotiations with the EU are like a game of football where we have done badly in the first half. They hope maybe we can do better in the second half under a new captain. But these negotiations are more like a game of chess: the UK's now retiring leadership has sacrificed all the UK's major pieces and left the remaining pieces in positions where check-mate by the EU is inevitable in a few moves. Even the most

competent and Brexit-committed future Prime Minister could not magically get us out of that situation.

So the nominal achievement of Brexit will turn to ashes in the mouths of those who have supported the deal. Leave supporters, even if they momentarily welcome leaving the EU in name, will soon come to realise that they have been very badly let down by those whom they looked upon to deliver the result of the referendum for them. Remain supporters will realise that the UK is in a position of having no say in the future of the EU, or the UK's relations with it, whilst having to obey its rules.

III

The Political Declaration and its Significance

For Worse, not Better

Theresa May's deal with the EU contains two parts. The legally binding treaty part consists of the Withdrawal Agreement itself and the Northern Ireland backstop Protocol which is attached to it and forms an 'integral part' of that treaty. The other part of the deal is the Political Declaration, which sets out in broad terms the framework for the future relationship agreement between the UK and the EU.

It is widely believed that because the Political Declaration ('PD') is 'not legally binding', therefore it does not really matter what it says. But this belief is utterly wrong.

The PD is linked to the WA, the binding treaty, by Art.184 of the WA, which imposes an obligation on both the UK as well as the EU to use "*best endeavours in good faith*" to negotiate an agreement which conforms to the PD.

The PD is vague in many areas, but where it is prescriptive, the EU will be legally entitled to insist on the UK seeking an agreement which complies with it. If the UK asks for something different, the EU will be fully entitled to say that the UK has not met the "*best endeavours in good faith*" requirement in Art.184 and, thus, will be able to withhold agreement of the terms that we propose for the future UK-EU relationship. The EU will say that negotiations have failed through no fault of its own. The consequence will be that the UK will automatically enter the backstop Protocol and stay there indefinitely. This will legally prevent a future Prime Minister, however pro-Brexit and determined, from negotiating an agreement which departs from the PD.

If the UK were to ask for something in the future agreements that contradicts the PD, the EU could legitimately say that we are not complying with our obligation to negotiate what is in the PD; and that the EU has no obligation in turn to give us an agreement which departs from the PD. Result: we are locked into the backstop with no way out, and no legal means to complain.

Any attempt, by an Act of Parliament, to try and negate or soften the effect of the WA and PD would be met with a ruling from the ECJ or the WA arbitral tribunal that such an Act is inconsistent with the WA, and so must be disappplied. UK Courts, under the terms of the WA and of the implementing legislation which Art.4 of the WA requires the UK to pass, would have no choice in the matter; such a ruling would bind them.

From the vague to the prescriptive Although much of the PD consists of mere outlines, it does contain important prescriptive provisions which are contrary to UK interests. The most damaging is probably paragraph 23 on tariffs. This is simply not compatible with us negotiating the Canada-style FTA with the EU which is favoured by most Brexit supporters. Instead, it requires “*ambitious customs arrangements ... that build and improve on the single customs territory*” which is in the backstop Protocol. Dominic Raab resigned over the inclusion of this wording in the PD.

Para 124 of the PD also pre-commits the UK to carry forward the unequal disputes procedures of the WA. The ECJ will maintain jurisdiction via a backdoor but nonetheless effective mechanism under which the ECJ's rulings on EU law issues will bind the supposedly neutral arbitration panel. As already noted, this extraordinary mechanism is totally contrary to the international treaty practice of the UK. The UK, like practically all other sovereign states, does not submit itself to the courts of the other treaty party. The only places so far where the EU has been able to impose this dictatorial solution has been on the desperate former Soviet republics of Ukraine, Moldova and Georgia. The EU is seeking to impose a similar mechanism on Switzerland, but so far the Swiss Federal Council has had the good sense to resist.

Para 75 of the PD states that: “*Within the context of the overall economic partnership the Parties should establish a new fisheries agreement on, inter alia, access to waters and quota shares*”. This does not contain detail but is a concession in principle by the UK on there being fishery quota sharing as part of the economic partnership with the EU. Para 75 is not a repetition of existing obligations under the UN Convention on the Law of the Sea

regarding quota-fixing. It calls for a new agreement - and, most importantly, it binds the negotiation of such an agreement into the whole raft of future UK-EU rules. The EU will undoubtedly take advantage of this concession to demand continued access to UK fishing waters for EU vessels and the UK will be in a very weak negotiating position to resist the EU's demands. The weakness of the UK's position is compounded by the fact that each individual EU Member State will have a veto over the conclusion of an agreement which allows the UK to exit from the backstop Protocol.

It would be astonishing if one or more EU Member States with strong fishing interests did not exploit this fact by threatening to de-rail an overall deal unless their demands for preferential access to UK waters are met. The obligation on the EU to negotiate in good faith does not prevent them from vigorously advancing their own interests in the way in which a paragraph of the PD is fleshed out, and we cannot see that the UK would have any credible legal redress in this situation.

Mrs May trumpeted the end of free movement of persons as her great achievement. But the ending of free movement on exit is the automatic consequence of leaving the EU under the operation of Art.50, and could only be put at risk if the UK were positively to enter into an agreement which curtails it. Para 4 of the PD reflects this underlying treaty reality by acknowledging that the free movement of people between the EU and the UK under the present treaty rules will end.

But paras 50 to 59 of the PD then commit the parties to establish "*mobility arrangements*" to replace free movement, and "*to consider addressing social security coordination in the light of future movement of persons*". The entitlement of low-paid EU workers to non-contributory access to the UK's generous in-work tax credits and other social security benefits has been a powerful 'pull factor' that has brought large numbers of EU workers into low-paid low-skill jobs in the UK. This part of the PD hands a powerful lever to the EU to insist on continuation of the present rules against discrimination in social security benefits. These rules have prevented the UK

from stopping distortions such as the payment of child benefit to the children who are back in the home countries of EU citizens working in the UK.

The precise content of the ‘mobility arrangements’ that will be negotiated is not spelt out, but in view of its weak negotiating position up against the backstop, the UK would be hard pressed to resist pressure to expand these arrangements. As with so much else in the deal, an ‘end to free movement’ risks turning out to be more nominal than real. The title might change from ‘free movement’ to ‘mobility arrangements’, but the EU will have all the leverage to make a mockery of the Prime Minister’s claim that we are taking back control of our borders.

‘Naked into the Conference Chamber’ It can be seen that the combination of the legally binding nature of the backstop Protocol, and the pre-commitments made by the UK in the PD linked to Art.184 of the WA, will fatally undermine the negotiating position of a future Prime Minister.

The UK’s strongest card in trade negotiations with the EU is that we buy far more goods from them than they sell to us - a trade in goods deficit of £95bn in 2017. So tariff-free and regulatory barrier-free access for their goods exports into the UK market is a huge benefit to EU exporters. If the UK is to give this benefit to the EU, it should insist in return on continued free access for UK services exporters into the EU market. But the PD’s provisions for access for services are very weak. Thus, for example, para 37 on financial services records that the parties will “*make equivalence decisions in their own interests*”. This is what the EU does at the moment with regard to non-member countries, so represents no benefit to the UK.

But by ratifying the WA, we will already have given the EU what it wants; namely a legally binding commitment to allow continued unfettered access for goods into the UK market. The backstop Protocol commits us to give tariff-free access for EU goods into the UK under a customs union, which also has the additional and (damaging for the UK) effect of preventing us from letting in goods from third countries at lower or zero tariffs which would compete with EU goods for the benefit of our consumers. With access

for EU goods into the UK market guaranteed in this way before negotiations even begin, the EU will have a free hand to refuse any concession on services that the UK would otherwise have had the leverage to secure.

In addition, the backstop Protocol requires us to follow EU single market rules for goods in Northern Ireland. Although in theory it does not compel the adoption of the same rules in Great Britain, in practice we would be obliged to permit continued importation of goods which follow EU regulations into Great Britain, because excluding Northern Ireland goods through regulatory controls in the Irish Sea would be a betrayal which would violate the fundamental principles of the Union.

Since the EU can get continued tariff and regulation-free access for their huge surplus trade in goods into the UK market by letting the backstop come into force, what incentive do they have to give anything extra to the UK in return for such access as part of the future trade relationship? The answer is - none whatsoever.

In 1957, Aneurin Bevan famously warned against sending a British Foreign Secretary *'naked into the conference chamber'* if the country were unilaterally to give up its nuclear weapons. Ratifying the Withdrawal Agreement would mean sending a future British Prime Minister naked into the conference chamber with the EU. With our negotiating position fatally undermined in advance by the legally binding concessions in the WA, it would be not simply difficult, but impossible, to secure an agreement with the EU which would allow the country and its people to reap the benefits of Brexit.

IV

Renegotiating the Withdrawal Agreement - Is it an option?

The EU has repeatedly insisted that now that the Withdrawal Agreement has been negotiated, it ‘cannot be reopened’. One view is that this is simply a negotiating posture and what one would expect them to say; and that if the EU were to be presented with a determined British Prime Minister who said that the WA must be changed or it is ‘no deal’, the EU could buckle.

Before coming back to that question, we need to ask what changes to the WA would be needed in order to make it desirable - or even acceptable - to the UK.

The Northern Ireland Protocol The so-called ‘Brady amendment’ passed by the House of Commons on 29 January 2019 indicated the House’s view that the WA would be acceptable if the backstop Protocol were to be replaced with ‘alternative arrangements’ for the management of the Northern Ireland border. No attempt was made by Theresa May to ask the EU to remove the Protocol from the WA, and as a result the WA was defeated for the second time in the House of Commons on 13 March 2019 following the Attorney-General’s advice that certain non-legally binding assurances given by the EU did not materially alter the legal lock-in effect of the Protocol.

If the Protocol were to be removed in its entirety from the WA, and replaced with provisions on alternative border arrangements which were acceptable to the UK, then the single most objectionable feature of the WA - the prospect of indefinite lock-in to the highly damaging Northern Ireland Protocol - would be removed. However, the rest of the WA would still contain a series of provisions highly detrimental to the UK.

Other negative points To recall some of the key negative points:

- obligations to pay large sums to the EU greatly in excess of the UK’s international law obligations, conventionally described as ‘£39bn’ but likely to turn out to be a significantly higher sum. In a departure from international

treaty practice, the UK's liability to pay these sums would be decided by the ECJ instead of by a neutral international body.

- continuing direct effect and supremacy over UK law of the WA itself (including rules of EU law which it continues to apply to the UK) and, which, because of the commitment in the PD, will be carried forward into the future relationship agreement.

- extensive post-Brexit ECJ jurisdiction as described above, both for the WA itself and (via the commitment in the PD) for the future relationship agreement.

For example, direct effect, supremacy over UK law and ECJ jurisdiction would combine together to make the provisions on citizens' rights operate in a way which could be gravely damaging to the UK and would prevail literally for generations. Even assuming that the substantive terms in the WA for citizens' rights are acceptable (and bearing in mind that the same rights are enjoyed by UK citizens in the EU as EU citizens in the UK), the effect of the ECJ jurisdiction clauses is that these sometimes vaguely drawn rights could be effectively re-written and expanded in consequence of their scope being 'reinterpreted' by the ECJ. This is writing a treaty which is tantamount to a blank cheque which can be filled in by an organ of the other treaty party. The consequences for the UK are both unknown and would be out of the UK's control.

The ECJ would retain direct jurisdiction to reinterpret the scope of citizens' rights via direct preliminary references from UK courts in litigation begun within 8 years after the end of the transition period (Art.158 WA), but thereafter would retain jurisdiction indefinitely to reinterpret such rights on references made by the WA arbitral tribunal under the indirect Ukraine-style clause (Art. 174 WA).

- general 'long tail' jurisdiction for the EU Commission and the ECJ to pursue the UK for infractions if a case is brought at any time up to 4 years after the end of the transition period (Art.87 WA). In the event of 'no deal',

this jurisdiction will just disappear on the day we leave the EU, so the effect of this clause in the WA is hugely to expand the exposure of the UK to long running Commission infraction actions which could run for many years after we have left the EU. The threat of such actions would linger not only over the UK government, but over UK companies as well, for example those accused by the Commission of having been in receipt of ‘State aid’, or in breach of competition law. EU competition law and State aid cases are notoriously long-running, so this long-tail jurisdiction risks subjecting companies in the UK to uncertainty over repaying funds deemed to be State aid, or over competition penalties, for many years after exit.

- the legal obligation to “*use best endeavours in good faith*” in Art.184 WA to negotiate an agreement in line with the Political Declaration. As we have explained above, the PD is very gravely flawed and to be acceptable would itself require very extensive renegotiation.

- there are other provisions of the WA which are less obvious but still important and damaging to the UK. An extraordinary clause is buried within the transitional arrangements for the protection of intellectual property in Art.54(2) WA. This would impose a binding obligation on the UK to retain the EU’s rules on the protection of “*geographical indications of origin*” (words like ‘champagne’ etc) “*unless and until an agreement as referred to in Article 184 that supersedes this paragraph enters into force or becomes applicable*”. Like the NI Protocol, this Article is binding indefinitely and has no exit clause.

No doubt the UK will wish to retain a system for the protection of geographical indications in order to protect our own producers here and abroad. But the EU system has highly restrictive and protectionist aspects which cause serious concern to other countries around the world, notably the USA. For the UK to undertake an obligation to freeze its PDI rules unless and until the EU agrees to let us modify them could seriously interfere with our negotiations for trade agreements with international partners. The problems created by this commitment are explained in more detail by Shanker Singham and Peter Allgeier in their analysis of the prospective US-

UK trade talks at:

<https://brexitcentral.com/what-do-the-american-negotiating-objectives-mean-for-a-future-us-uk-trade-deal/>

The acceptance by UK negotiators of such a bizarre and extraordinary non-time limited commitment in the WA to shadow EU PDI rules demonstrates gross negligence (or worse) on their part.

The other side of the equation is to ask ‘what is there in the WA which the UK needs or wants?’ The answer is that, with the highly debatable exception of the transition period, there is nothing in the WA which the UK particularly needs or even wants. While the protection of the rights of UK citizens within the EU is of concern, this can in practice be dealt with by unilateral commitments by the UK and by EU member states to respect the rights of each others’ citizens, which in due course can be regularised into bilateral agreements such as the UK-Spain agreement.

So, to turn the WA with its attached PD into something the UK actually wants would require a huge renegotiation of many or most of the terms of the WA and of the PD, extending far beyond removal of the backstop Protocol.

The UK, The EU and the Withdrawal Agreement: No Turning Back

Anyone who has attempted to negotiate an agreement knows that it is a foolish negotiating tactic to start with a bad text and then try to amend it to make it more even handed. Every clause becomes a hard-fought battle, just to get back from a bad text to a neutral text. The difficulties of attempting to renegotiate the WA and the backstop Protocol are compounded by the fact that the EU has publicly dug itself in to not allowing negotiations on the WA to be reopened, and by the fact that Ireland would claim that abandonment of the Protocol would be a political betrayal by both the EU and the UK.

The EU’s public commitment to the non-negotiability of the WA has been formally reiterated in the strongest terms. The European Council on 13 December 2018 in response to Theresa May’s request for ‘assurances’ about

the backstop formally resolved that the WA “*is not open for renegotiation*” (Council Conclusions, para 1).

On 11 April 2019 the European Council agreed under Article 50 to extend the UK’s EU membership until 31 October 2019. Recital (12) of its decision stated that:

“(12) This extension excludes any re-opening of the Withdrawal Agreement. Any unilateral commitment, statement or other act by the United Kingdom should be compatible with the letter and the spirit of the Withdrawal Agreement, and must not hamper its implementation. Such an extension cannot be used to start negotiations on the future relationship”.

The European Council’s decision was taken with the agreement of the UK Prime Minister. The EU will argue not only that it has repeatedly made clear that it will not allow the renegotiation of the WA, but also that Theresa May in agreeing to the extension has committed the UK not even to ask.

The above demonstrates that attempting to renegotiate the WA (including the backstop Protocol) is likely to be an exercise in futility. In order to achieve a useful result, such an exercise would have to involve wholesale renegotiation of its terms, rather than mere tinkering. Even removal of the backstop Protocol would leave it a damaging and detrimental agreement for the UK. Any such renegotiation would involve the EU in huge loss of face given the political position they have emphatically taken (and to which Theresa May formally succumbed on 11 April).

It does not follow that the UK should not seek to negotiate with the EU and its Member States about our future relationship. The way to do it is to bypass the WA, not to seek to change it in a head-on assault which is likely to fail.

Our Future Relations with the EU - By-passing the WA

There is no requirement under Article 50 TEU for a Withdrawal Agreement to be concluded when a Member State withdraws from the EU, nor, under Article 50, is the conclusion of such an agreement a precondition for the EU to enter into trade or other agreements with the withdrawn Member State after exit.

In practice, as became clear when we approached 29 March 2019, if there had been a so-called ‘no deal’ exit, then numerous formal agreements and informal bilateral arrangements would have been implemented to preserve the flow of trade, such as customs procedures at the Channel ports, landings rights for aircraft, driving permits for hauliers, etc, etc. ‘No deal’ does not mean no agreement of any kind - it just means no comprehensive Withdrawal Agreement under Art.50 TEU.

It is imperative that the new UK government take advantage of the time created by the unwanted extension of EU membership to 31 October 2019. The UK must prepare further for a ‘no WA’ exit. But it is still possible to propose a wider trade relationship with the EU to come into force from or shortly after exit.

The EU has claimed that it is incapable of entering into an agreement with the UK under the clauses of the EU treaties authorising agreements with non-Member States until after the UK has actually left. This is questionable in view of the past use of those powers to enter into ‘external’ agreements with Denmark on matters falling within Denmark’s justice and home affairs opt-out protocol. But even assuming it is right, appropriate external agreements of a simple nature could be negotiated in advance of 31 October and then formally passed and brought into force shortly afterwards, in order to bridge the gap until a fuller and more formal FTA can be negotiated.

Tariffs on UK-EU trade

In the absence of a trade agreement between the UK and the EU, WTO rules will require, under the so-called ‘Most Favoured Nation’ (MFN) principle, that the EU must charge its Common External Tariff (‘CET’) on goods imported from the UK, and the UK must charge its standard external tariffs

(i.e. the tariffs we charge on imports from the rest of the world) on goods imported from the EU.

Contrary to a widespread misapprehension, there will be no requirement that the UK must set its own external tariffs at the same level as the CET level tariffs which the UK is currently obliged to impose on non-EU goods as an EU member state. The UK has ‘copied and pasted’ the EU tariff schedules as its own tariff schedules at the WTO, but these merely set the ‘bound’ or upper limit rates, and the UK is entitled to charge lower rates or zero rates, provided it does this equally on imports from all countries with which the UK has no special trade agreement. (There are also rules allowing tariff concessions to imports from less developed countries).

The government’s intended ‘no deal’ tariff rates, which were revealed shortly before the failed attempt to leave the EU on 29 March 2019, display a pragmatic attempt to remove or reduce tariffs on goods where this would not damage UK domestic industry. With more time available, this approach can be refined, and the UK can adopt tariff schedules which benefit UK consumers. Even if tariffs in some sectors are imposed on goods imports from the EU27 where at present there are no tariffs, the reduction or elimination of tariffs on goods imports from the rest of the world should result in downward pressure on prices of goods in the UK. The overall impact on prices will depend on the interaction of tariffs and import volumes particularly for foodstuffs. Tariffs on imports from the EU will raise prices but also reduce volumes. The reduction or removal of tariffs from non-EU countries will have the opposite effect.

While the UK can control and therefore reduce the level of tariffs on imports from the EU27, it cannot prevent the EU from charging its standard tariffs on goods flowing in the opposite direction. However, these MFN tariffs on UK exports to the EU under the EU’s Common External Tariff (CET) have been calculated in a study by Civitas (https://www.civitas.org.uk/reports_articles/potential-post-brexit-tariff-costs-for-eu-uk-trade/) by Justin Prots in October 2016, and they would amount to about £5.2bn per year. That figure is based on 2015 trade volumes but the overall pattern will not be greatly different by 2019. Assuming an unchanged

composition of trade, a figure for 2019 updated for inflation and rising export volumes would be £6.7 billion. This cost would be borne partly by UK exporters and partly by consumers in the countries of importation, depending on competitive forces in the markets concerned.

This figure is in fact remarkably low, reflecting the fact that the UK's exports into the EU27 are mainly in low tariff areas which receive comparatively little protection against imports from the rest of the world, by contrast with the EU27's goods exports into the UK which are more concentrated in higher tariff sectors including cars and food.

To put that figure in perspective, it is a little over half the current net contribution which the UK pays into the EU budget each year. So if the UK leaves without any form of special trade agreement with the EU, ongoing EU budget contributions will no longer be payable, nor will the very high post-exit payments mandated by the WA. (Although the UK may ultimately be liable for some sums under international law, these are likely to be far lower than the sums payable under the WA, and the UK will have offsetting claims such as for the value of the UK's shareholding in the European Investment Bank).

The effect of this will be to release money which could be used to reduce the impact of those EU tariffs on particularly affected industries. It is against WTO rules to pay money directly to exporters to cover tariffs or other export costs, but the money could be used for wider ranging tax cuts or other help for industries adversely affected, since we will no longer be inside the EU State aid regime.

By contrast, the same Civitas study calculated that EU goods exports to the UK would bear £12.9bn tariffs on the assumption that the UK would impose the same tariffs post Brexit as the CET. The reason why the projected tariffs payable by EU exporters are so much higher than the tariffs in the opposite direction is twofold. First, the volume of goods exports from the EU to the UK in 2015 at £220.5bn was higher than UK goods exports in the opposite direction at £117.2bn (2015 figures). The ONS figures for 2017 were that the UK exported £164bn of goods to the EU27 and imported £259bn, giving a

deficit of £95bn in goods (ONS Pink Book 2018, section 9, table 9.4). Secondly, the EU's goods exports were more heavily concentrated in high-tariff sectors: agriculture, vehicles and clothing and footwear being a very important component of EU exports to the UK.

Given the UK's intention not to impose tariffs at the full CET rates after exit, the notional £12.9bn figure above would be too high. However, the impact of tariffs on EU exports to the UK, were the UK to impose them, would still be likely to be more negative for the EU27 than the impact of tariffs on UK exports in the opposite direction. It should be borne in mind that not only would EU27 exports to the UK bear tariffs, but in addition UK tariffs to the rest of the world would be reduced, causing competitive pressure from rest of the world imports against imports from the EU27.

This means that the EU27 would have a strong economic incentive to enter into a zero tariff Free Trade Agreement (FTA) with the UK as soon as possible. It is conceivable that the politics of wishing to punish the UK for its heresy in choosing to leave the EU would win out against rational economic self-interest and preserving the jobs for example of Bavarian motor workers, but it is certainly worth the UK proposing a temporary zero-tariff regime pending the negotiation of a fuller long term FTA.

Whatever tariffs we decide to set must be charged equally to everyone, with the exception of countries with which we have customs union or free trade agreements, for which Art.XXIV of GATT permits exceptions to the MFN principle.

A temporary zero-tariff regime could be achieved consistently with GATT through the UK and EU entering into a simple all-goods zero tariff Free Trade Agreement. This would lawfully permit zero tariffs to be maintained under WTO rules until a fuller and more formal agreement were negotiated and ratified. A simple one-page 'bare bones' FTA of this kind has been drafted by Dr Lorand Bartels of Cambridge University. https://twitter.com/lorand_bartels/status/1088767673083797504?lang=en

Dr Bartels' draft complies with the definition of a permissible FTA under Article XXIV(8) of GATT, according to which zero tariffs must be charged on substantially all trade in goods. (It should be noted that there is no requirement for a so-called 'interim' agreement under Art.XXIV GATT. This has been proposed by various parties for reasons that are baffling to us. Such 'interim' agreements are normally used when 'phasing' of tariff reductions towards zero is undertaken, which means there will be a transitional phase when the agreement will not comply with the definition of an FTA under Art.XXIV. There is no such requirement in a UK-EU FTA since we are starting from a base of zero tariffs on all goods).

As regards the EU's internal constitutional requirements, such an FTA could be concluded by the EU under Art.207 TFEU on the common commercial policy. Such an agreement does not fall within any of the unanimity requirements of the treaty and so can be passed by qualified majority voting ('QMV'), nor is it a mixed agreement which would require the individual EU member states to sign and ratify it.

The Northern Ireland border and 'alternative arrangements'

If the WA is rejected, there are two possible scenarios post Brexit on tariffs. One scenario is where there is no trade agreement, in which case tariffs would be leviable on goods crossing from the EU to the UK and vice versa. In this scenario, both the Channel ports and the Irish land border would be fiscal borders at which taxation liabilities would arise for tariff purposes. However, it is important to recall that the Channel ports and the Irish land border are already fiscal borders for the imposition of VAT and Excise duties.

The average level of tariffs is substantially lower than the VAT rate, so it is puzzling why one kind of tax (VAT) can be satisfactorily collected by requiring businesses to file returns with periodic inspections to ensure compliance, while trade tariffs apparently need physical inspection of goods at the border. Given that customs declarations made by businesses are now almost universally filed online, the 'behind the border' collection of trade tariffs seems eminently practical. The Alternative Arrangements

Commission under the joint chairmanship of the Rt Hon Greg Hands MP and the Rt Hon Nicky Morgan MP is due to report on 24 June 2019 on ‘comprehensive customs cooperation arrangements, facilitative arrangements and technologies’ for achieving this objective.

The problem with the WA and the backstop Protocol as they stand is that they would give the EU a power of veto over any such ‘behind the border’ arrangements. The EU27 have a very strong economic self-interest in forcing the UK to maintain tariff and non-tariff barriers against imports of goods from third countries which compete with their own goods exports into the UK market. Accordingly there is a very serious danger that the EU, if given this legal right of veto, would strain to find fault with ‘behind the border’ arrangements proposed by the UK, in order to force the UK into continued alignment of its external tariffs with those of the EU under the backstop Protocol.

The PD at para 27 indicates that alternative arrangements in place of the regulatory and tariff alignment under the backstop will be ‘considered’, but places no obligation on the EU to agree to any such alternative arrangements. If the WA is ratified, the EU would be perfectly entitled to ‘consider’ such alternative arrangements and find them wanting. In view of the complexities involved, it would be virtually impossible to prove the EU were acting in bad faith.

However, outside the constraints of the WA and the Protocol, the UK can negotiate practical arrangements for the Irish land border (and indeed facilitation of customs processes on UK/EU trade at the Channel ports and at airports) in a more sensible and balanced way.

If a UK/EU temporary zero tariff FTA of the kind we suggest above were to be negotiated, this would significantly reduce but not eliminate the need to collect tariffs on goods crossing the EU-UK border, whether in Ireland or elsewhere. Tariffs would still be leviable on ‘non-originating’ goods: that is goods which have passed into the EU market or the UK market from third countries. Such ‘rules of origin’ controls are an absolutely essential part of an FTA, since they allow each FTA partner to operate its own tariff and

trade agreement policy with third countries independently of each other. These residual tariffs on non-originating goods could be collected by the same 'behind the border' mechanisms of online filings by the importing businesses as we discuss above.

Regulatory barriers on UK-EU trade

The next question is what to do about regulatory barriers on trade between the UK and the EU in the immediate post-Brexit period.

The European Union (Withdrawal) Act 2018 'repatriates' into UK law the corpus of existing EU laws. This includes laws which provide for example that it is lawful to import into and sell in the UK medicines made in a factory in Germany under the supervision of the German authorities. So, there will be no legal barrier against the continued importation into the UK after 31 October 2019 of goods made and certified under EU standards and rules.

Much of the hysteria about 'shortages' of goods such as food and medicine seems to be based on the idea that the UK would impose non-tariff barriers against the importation of goods from the EU27. But it would require additional positive action by the government and/or Parliament to create such regulatory barriers, none of which is envisaged in current legislation. Hence, claims that there will be shortages arising from regulatory restrictions against the import of goods into the UK are completely baseless.

But obviously, the rules which the EU applies to imports from the UK are not under the UK's control in the same way as the rules governing imports from the EU27 into the UK. This has led to suggestions that the EU27 will simply refuse to recognise any UK goods as conforming with their required product standards despite the fact that unless and until the UK chooses to change its rules and standards, goods made in the UK will in fact continue to comply with EU rules.

This suggestion disregards two constraints on the EU. The first is the WTO Agreements, principally the WTO's Technical Barriers to Trade (TBT), and Sanitary and Phytosanitary (SPS), Agreements. These require WTO

members to recognise that goods and agricultural products from other WTO members are compliant with the standards which they impose on domestic goods, unless there is an objective reason for refusing them entry or for not recognising something, e.g. testing certificates issued in another state. (The fact that testing is carried out in the country of origin rather than in the country of importation, in this case the EU, cannot as such be a lawful reason to exclude those goods under WTO rules).

Where the UK continues to follow EU rules on standards after exit, no such objective reason will exist, unless and until the UK decides to change those rules in particular sectors. The EU would therefore be on to a hiding to nothing in the WTO disputes procedure if it were arbitrarily to restrict imports of goods from the UK after Brexit.

The second reason relates to the EU's own legal order, under which international agreements concluded by the EU, including the WTO Agreements, form an integral part of the EU's legal order. While the ECJ has been resistant to the concept that the WTO Agreements as such have direct effect in EU law, the WTO Agreements are relevant to the interpretation of provisions of EU law which are intended to give effect to WTO obligations.

In almost all areas, the EU has existing powers to recognise both the standards and the 'competent authorities' (relevant regulatory authorities) of non-Member countries as complying with the standards necessary for importation of the goods concerned into the EU. These have been adopted into EU law in order that the EU can comply with its obligations under the SPS and TBT Agreements.

In general, such powers of recognition are delegated to the EU Commission, which can enact the necessary regulations itself without the need for legislation to go through the Council of Ministers or the European Parliament. One of many examples of how this system works can be seen in Commission Regulation (EC) No 798/2008 of 8 August 2008 "*laying down a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the Community and the veterinary certification requirements*".

This is typical of the many hundreds or thousands of instances in which the Commission has been granted and has exercised delegated powers to make formal regulations which recognise imported goods as satisfying EU standards. Not only does the Commission possess the necessary powers to recognise UK goods as conforming to EU standards after Brexit, but it would lay itself open to legal challenge by companies whose business would be adversely affected if it were to fail to do so without objective reason, such as a relevant change in UK law.

Quite apart from these legal constraints, the EU has a strong self-interest in permitting the continued importation of objectively compliant UK goods into the EU. For example, if the EU were suddenly to refuse to recognise medicines manufactured in the UK as compatible with EU law it could lead to serious consequences and even the death of patients who need the medicines.

Although this is an extreme example, consumers and industry within the EU would be damaged if the Commission were to fail to exercise its powers to recognise UK goods as conforming to EU standards.

For these reasons, Armageddon type predictions that the EU would freeze out UK goods by refusing to recognise them as complying with EU standards in breach of WTO rules and in a worse way than it treats any other non-EU country do not take account of the EU's legal obligations or the practicalities. Those predictions are simply not realistic.

Given this background, there would be a strong mutual interest in a temporary regulatory recognition agreement (a companion to the temporary EU-UK FTA mentioned above) which would provide for the continued recognition of UK goods and UK testing and certification processes as complying with EU law, and vice versa, so long as the regulatory standards in each sector under EU or UK law were not amended. This would avoid the need for large numbers of sector by sector delegated Commission decisions on recognition and would provide a breathing space for the negotiation of a permanent FTA incorporating processes for mutual regulatory recognition.

Mutual recognition and services exports

The WTO Agreements (notably the TBT and SPS Agreements mentioned above) provide greater protection for goods exports than for services exports. The UK is a big net importer of goods from the EU but a services exporter. So, the UK has a very strong interest in pushing for continued recognition of UK based service providers as complying with EU rules so long as relevant UK or EU rules and standards are not amended in such a way as to cause divergence.

As already mentioned, the default position under the 2018 Withdrawal Act is that EU-based service providers would continue to be recognised and able to provide services to UK customers, unless and until the rules are positively changed.

So, a third element of a temporary arrangement with the EU while a more permanent FTA is negotiated should be a general continuation of the rights of EU-based and UK-based service providers to export cross border, unless and until rules in the relevant sector are changed by either party.

Such an agreement would be in the mutual interests of the UK and the EU and of industries on both sides of the Channel. The EU has an interest in unhindered services exports to the UK market and in unhindered access to UK services, particularly in the financial sector where access to the City is important for many EU industries.

As noted above, a zero tariff FTA is hugely beneficial to the EU having regard to the size of the UK's deficit in goods trade and the way in which EU goods exports to the UK are concentrated in high tariff sectors. It would be entirely reasonable for the UK to ask in return for interim access for goods and services into the EU market for as long as relevant rules remain aligned.

VI Conclusion

Attempting to amend the Withdrawal Agreement is likely to be at best an exercise in futility. At worst it might lead to a scenario where the UK was pressured to agree to the WA and backstop Protocol with only minimal or cosmetic changes, with the disastrous consequences for the UK's future freedom of action we have outlined above. But if the UK indicates that it is not prepared to enter into an agreement under Art.50 TEU then that is the end of the WA, legally speaking. Some EU spokesmen have made noises claiming that the EU would not enter into any future trade agreement with the UK unless and until the UK has accepted the WA and the backstop Protocol.

However, for the EU to maintain such a posture for any length of time would amount to self-harm. The EU's willingness to do so should be tested by a determined British Prime Minister offering a sensible and balanced post-exit trade relationship which refuses to make concessions of a kind which are not replicated in the EU's trade agreement with other countries around the world: such as ECJ jurisdiction, 'level playing field' clauses or fishing rights.

Regarding the EU's financial claims, the UK could offer to submit to binding international arbitration - before a neutral body rather than the ECJ - on the extent of the UK's post-exit financial obligations and its claims to EU assets such as the European Investment Bank.

The temporary agreements on zero tariffs and on regulatory recognition which we propose are far simpler and much less wide ranging than the all-embracing 'transition period' in the WA but would achieve much the same effect. Apart from the problems we have identified above of the UK becoming a vassal state during the transition period, subject to laws over which it has no control, the transition period would require the UK to maintain the EU's external tariffs and prevent the UK from implementing any FTAs with third countries until it has ended.

What we have proposed is a better way forward than the WA from all angles. Nobody can guarantee how the EU will choose to react, but if they have any sense and if these proposals are pushed by a determined UK Prime Minister then they present the best chance of an optimal exit from the EU.

Brexit: Options for the Irish Border
Ray Bassett

The Brexit Settlement and UK Taxes
David B. Smith

Commercial Law After Brexit: Next Steps for the UK
Thomas Sharpe QC

Hard Choices: Britain's Foreign Policy for a Dangerous World
John Baron

Triggering Article 50, Courts, Government and Parliament
D. Abulafia, J. Clark, P. Crisp, D. Howarth, S. Lawlor & R. Tombs

The EU: An idea whose time has passed
Roger Bootle

Joining the World: Britain Outside the EU
Nigel Lawson

Banking on Recovery: Towards an accountable, stable financial sector
*J. McFall, S. Kamall, G. Lyons, R. Roberts, F. Capie, G. Wood, K. Matthews,
D. B. Smith, M. Powell, E. Michaels & S. Lawlor*

Dumbing Down the Law: The SRA's Proposals for Legal Training
Anthony Bradney

The British Bill of Rights: Protecting Freedom Under the Law
Jonathan Fisher QC

Paying for the Future: Working Systems for Pensions and Healthcare
L. Schuknecht, M. Dauns & W. Erbert

What's the Point of the Human Rights Act? The Common Law, the
Convention, and the English Constitution
Dinah Rose QC

Subscribe to Politeia's Publications!

For £35 a year you will receive an electronic copy of each of our publications, plus hard copies of two new publications on request, and, if you wish, free hard copies of your choice from our back catalogue. You will also receive advance notice and invitations to Politeia's conferences and flagship events, with guest speakers from the UK and overseas.

More information can be found on our website: www.politeia.co.uk. Or, write to the Secretary, Politeia, 14a Eccleston Street, London SW1W 9LT, or at secretary@politeia.co.uk

A Selection of Recent and Related Publications

The EU, The UK and Global Trade - A New Roadmap
(with New Direction)
David Collins

The Withdrawal Agreement, State Aid & UK Industry: How to Protect UK
Competitiveness
Barnabas Reynolds & James Webber

How to Take Back Control: Trading Globally Through the WTO
John Redwood

Intangible Assets: Funding Research in the Arts and Humanities
John Marenbon

The Court of Justice of the EU - Imperial, Not Impartial
Gunnar Beck

Deal, No Deal? The Battle for Britain's Democracy
Sheila Lawlor

Free Trade in UK-EU Financial Services
How Best to Structure a Brexit Trade Deal
Barnabas Reynolds

The long overdue departure of Mrs May leaves behind the Withdrawal Agreement treaty (“WA”) which she so disastrously negotiated. The next Prime Minister will need to make a new start on how to leave the EU, and should not revisit the WA or try to renegotiate it - an exercise in futility.

In Avoiding the Trap: How to Move on from the Withdrawal Agreement, Martin Howe QC, Sir Richard Aikens and Dr Thomas Grant explain why, and propose what the new course should be.

In addition to the disastrous Northern Ireland backstop Protocol, the WA contains remarkable and unusual clauses highly damaging to the UK, and nothing of any real value. Direct effect and supremacy over UK law in our own courts, financial penalties and trade sanctions for breaches, ECJ jurisdiction for the indefinite future and ‘long-tail’ Commission enforcement action, and vast financial payments to the EU, are all obligations in the WA which would not apply to the UK if it leaves with a clean break. The WA also legally constrains the negotiation of the UK’s future EU relationship with a flawed Political Declaration.

Article 50 does not require there to be a Withdrawal Agreement in order for a member state to leave. The new PM should bypass the WA and proceed directly to negotiate the UK’s future relationship and propose bridging arrangements (including a temporary zero-tariff all-goods FTA) while negotiations take place.

Briefings for Brexit
POLITEIA

£8.00