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Epilogue

Brexit and the Union: Past, Present, Future

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Introduction

While a distinguished British hero had strongly commended the 'United States of Europe' in 1946,[1] when it came to joining the 1951 European Coal and Steel Community, the view of the (then) British government was that 'the Durham miners simply won't wear it'.[2] The reasons for this early rejection of European integration were economic and political in nature. Not only did the British economy produce as much coal as the rest of Europe combined,[3] politically, irritations especially arose from the French insistence on 'supranationalism'—a 'foreign' idea that ran counter to the British ideal of parliamentary sovereignty.[4]

When it came, a few years later, to choosing between the 1957 European Economic Community (EEC) and the British Commonwealth, the British government again unconditionally favoured the latter.[5] Once more, economic reasons came to complement geopolitical ones. For not only was the 'common market' incompatible with the (then) imperial preference system guaranteeing cheap agricultural goods, British foreign policy still followed its 'three circles' logic in which Europe simply ranked last.[6]

To nonetheless contain the consequences of its choice against Europe, the British government, however, quickly proposed a rival organization to the EEC: the 1960 European Free Trade Association (EFTA). The creation of EFTA thereby followed a dual political aim. Positively, it created a free trade area that would allow Britain to trade with six other European States, while at the same time keeping its imperial preference system.[7] Negatively, on the other hand, it was hoped that EFTA would dissolve the (supranational) common market in an (intergovernmental) free trade area 'like a lump of sugar in an English cup of tea'.[8] This second aim, however,

[1] This had been done by none other than Sir Winston Churchill in 1946, see A. G. Harryvan and J. van der Harst (eds), *Documents on European Union* (Macmillan, 1997), 38.

[2] This was the view of the Labour government of the time (see K. Morgan, *Labour in Power: 1945–1951* (Oxford University Press, 1985), 420).

[3] M. Camps, *Britain and the European Community, 1955–1963* (Oxford University Press, 1964), 3.

[4] Ibid., 4: 'Co-operation with Europe was desirable; integration with Europe was not.'

[5] For the classic analysis here, see G. St J. Barclay, *Commonwealth or Europe* (University of Queensland Press, 1970).

[6] In Churchill's famous words (as quoted in Harryvan and van der Harst, *Documents on European Union* (n. 1), 16): 'I feel the existence of three great circles . . . The first circle for us is naturally the British Commonwealth and Empire, with all that that comprises. Then there is also the English-speaking world in which we, Canada and the other British Dominions and the United States play so important a part. And finally there is United Europe.'

[7] Unlike a 'common market', a 'free trade area' allows each Member State to retain its own commercial policy towards third countries. On this distinction, see Chapter 19, Section 4b.

[8] I am grateful to Anne Deighton for having pointed me to this wonderful 'British' treasure. For the historical context of the phrase, see J. Ellison, *Threatening Europe: Britain and the Creation of the European Community, 1955–58* (Palgrave, 2000), 2.

turned out to be wishful thinking, and in an extraordinary act of pragmatic reorientation, membership in the European common market suddenly became a British priority in the early 1960s. Yet Britain's first application to join the Union, made in 1961, was rejected by France. In a famous 1963 press conference General de Gaulle—then President of France—gave the following reasons for France's veto:

> Great Britain applied for membership of the Common Market. It did so after refusing earlier to participate in the community that was being built, and after then having created a free trade area with six other states, and finally . . . after having put some pressure on the Six in order to prevent the [putting into effect] of the Common Market from really getting started. Britain thus in its turn requested membership, but on its own conditions. This undoubtedly raises for each of the six States and for England problems of a very great dimension. England is, in effect, insular, maritime, linked through its trade, markets, and food supply to very diverse and often very distant countries. Its activities are essentially industrial and commercial, and only slightly agricultural. It has, throughout its [history], very marked and original customs and traditions. In short, the nature, structure, and economic context of England differ profoundly from those of the other States of the Continent.[9]

This rejection came as a shock. And it was a shock to be repeated when de Gaulle vetoed a second British application in 1967. Only a third membership application would succeed—and only once the French General had left the political stage. It led to the signing of the Accession Treaty on 22 January 1972; and on 1 January 1973, Britain joined the European Union (together with Ireland). Ever since, however, Britain has never been the happiest of Member States. Doubts about European integration persisted; and especially the idea of an accompanying 'political union' continued to be resolutely rejected. This rejection reached its climax in 2016, when a referendum on British EU membership yielded a popular majority for 'Brexit'—the British exit from the European Union.

This—separate—chapter aims to explore the past, present, and future of Brexit. Section 1 offers a historical overview of British membership in the Union. With its commitment to European integration often selective, the United Kingdom had come to be seen as an 'awkward partner' within the European Union.[10] Section 2 explores the process of withdrawal in some detail and here, in particular, the nature and content of Article 50 TEU—the provision that regulates the process. Section 3 subsequently analyses the post-Brexit Withdrawal Agreement that governs the relationship between the European Union and the United Kingdom today. Section 4 tries to look into the future and discusses the prospective partnership options that

[9] Harryvan and van der Harst, *Documents on European Union* (n. 1), 132 at 134.

[10] S. George, *An Awkward Partner: Britain in the European Community* (Oxford University Press, 1996).

have been on the diplomatic table for the post-2020 economic relations between the European Union and the United Kingdom. Would the United Kingdom ever join the EFTA States (again); or will it favour a 'Canada plus' deal? And what is a 'soft' as opposed to a 'hard' Brexit here?

Let us look at all of these questions in turn.

1. Britain in the European Union: An 'Awkward Partner'?

a. 'Second Thoughts': The 1975 Membership Referendum

Having joined the 'common market' in 1973, 'second thoughts' about EU membership soon emerged. For once a new Labour government had entered Downing Street in 1974, it instantly tried to renegotiate the 'Tory Terms' of EU membership.[11] Under pressure from its left wing, Harold Wilson—then prime minister and leader of the Labour Party—had been forced to promise a 'fundamental renegotiation' of the British membership of the Union.[12] The 1974 Labour Party Manifesto therefore read as follows:

> Britain is a European nation, and a Labour Britain would always seek a wider co-operation between the European peoples. But a profound political mistake made by the [Conservative] Government was to accept the terms of entry to the Common Market, and to take us in without the consent of the British people. This has involved the imposition of food taxes on top of rising world prices, crippling fresh burdens on our balance of payments, and a draconian curtailment of the power of the British Parliament to settle questions affecting vital British interests. This is why a Labour Government will immediately seek a fundamental renegotiation of the terms of entry . . . In preparing to re-negotiate the entry terms, our main objectives are these:
>
> – Major changes in the Common Agricultural Policy, so that it ceases to be a threat to world trade in food products, and so that low-cost producers outside Europe can continue to have access to the British food market.
> – New and fairer methods of financing the Community Budget . . .
> – As stated earlier, we would reject any kind of international agreement which compelled us to accept increased unemployment for the sake of maintaining a fixed parity, as is required by current proposals for a European Economic and Monetary Union . . .
> – The retention by Parliament of those powers over the British economy needed to pursue effective regional, industrial and fiscal policies[.][13]

[11] On this point, see specifically D. Gowland and A. Turner, *Reluctant Europeans: Britain and European Integration 1945–1998* (Longman, 2000), ch. 13: 'Renegotiating "Tory Terms"'.

[12] Ibid., 213: 'One of Wilson's main reasons for holding the referendum had been to prevent an irreparable split in the Labour ranks.'

[13] 1974 Labour Party Manifesto: 'Let us work together—Labour's way out of the crisis', available at www.labour-party.org.uk/manifestos/1974/Feb/1974-feb-labour-manifesto.shtml.

These four points represent four political cleavages that became fundamental fault lines in all future British–Union relations. Especially the budget issue became an intractable bone of contention. In the view of the British political establishment, the standard formula for membership contributions severely disadvantaged the United Kingdom; and the latter was therefore entitled to a 'rebate' so as to reduce its net contributions to the Union budget.

All these demands for a 'fundamental renegotiation' might have simply been rejected by the other EU Member States on the grounds that the ink of the 1972 Accession Treaty had barely dried; yet faced with a conflict in the 'honeymoon' period of British membership, the 1975 Dublin European Council found a compromise that offered some minor-yet-not-insignificant changes to please the British. The Labour prime minister therefore recommended continued membership in the Union; and the subsequent vote in the British Parliament supported the government's position—a result that was nevertheless overwhelmingly due to 'conservative' votes.[14] The Labour government had, however, also promised a referendum on Union membership and the Referendum Act 1975 therefore determined that the people themselves could, on 5 June 1975, decide whether the United Kingdom should remain or leave the European Union.[15] Two-thirds of the votes cast favoured continued Union membership; and this—almost enthusiastic—support provided strong democratic legitimacy to the British decision to join (and remain) in the Union.

b. A Market Without a State: The Thatcher Vision

Did the 1975 referendum ease the 'awkward' relationship between Britain and the Union? With the coming into power of the Conservative Party in 1979, high hopes existed.[16] They were soon dashed. The rebate issue quickly returned to the fore and was henceforth pursued with unbending zealousness: Britain wanted its 'own money back'![17] And, in order to achieve this aim, Britain adopted a strategy of (un)civil disobedience by deliberately obstructing the Council in 1982—a

[14] The majority of British Labour MPs rejected, against the wishes of their own government, the renegotiated terms as insufficient (137 votes in favour and 145 against). Without the overwhelming Conservative support (249 votes in favour and 8 against), the United Kingdom would have left the European Union in 1975.

[15] The 1975 referendum question was: 'Do you think that the United Kingdom should stay in the European Community (Common Market)?' And again, while the Labour government had recommended a positive vote, the official Labour Party line was negative.

[16] During the 1970s and 1980s, the Conservative Party was seen as the 'party of Europe'. During much of the 1980s, the Labour Party's official policy was committed to a withdrawal from the Union (see A. Geddes, *Britain and the European Union* (Palgrave 2013), 224).

[17] For the famous Thatcher speech, see Harryvan and van der Harst, *Documents on European Union* (n. 1), 244–5.

strategy inspired by France's empty chair policy 20 years earlier.[18] This policy of obstructionism irritated France so much that it openly suggested that the UK should search for an alternative status to full Union membership—a suggestion that was instantly rejected. Progress on the British Budgetary Question, colloquially termed the 'Bloody British Question',[19] was finally made in 1984 when the 'Fontainebleau' European Council reached an agreement on EU membership contributions that applied until 2020 (see Figure 20.1).[20]

Did the end of the rebate 'war' inaugurate a period of European 'peace'? A short peace indeed followed; yet short it was. In 1985, an 'ideological' alliance between Thatcher's Britain and the European Union had suddenly emerged in the form of the Commission's White Paper 'Completing the Internal Market'. The paper had a British 'father': Lord Cockfield—a close collaborator of Thatcher—who had become EU Commissioner for the Internal Market in 1985; and the 'British' idea was seized upon by (then) Commission President Jacques Delors. However, whereas for Britain 'the single market was an end in itself that could raise to a European stage the liberalizing and deregulatory elements of the Thatcherite project', for the European Commission and most continental European States it was 'a means to an end, that end being deeper economic and political integration'.[21]

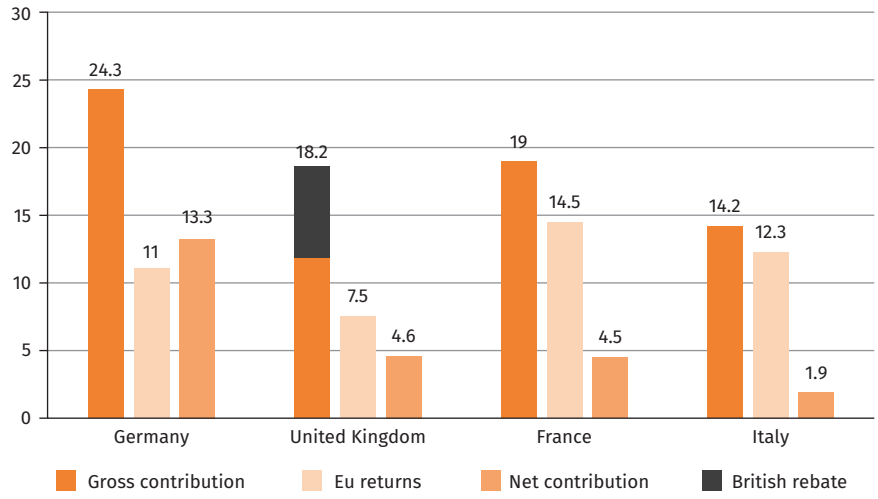

Figure 20.1 EU membership contributions (2014–20)

[18] For a discussion of the empty chair crisis, see Chapter 1, Section 2b. However, unlike France, Britain lost this battle as, surprisingly, the Council called for a majority vote to break the deadlock—a move that signalled the beginning of the end of the Luxembourg Compromise. A similar episode of British obstructionism would recur in 1996 in response to the ban on British beef following the BSE crisis.

[19] R. Jenkins, *A Life at the Centre* (Pan Books, 1991), ch. 27.

[20] For the original mechanism, see Council Decision 85/257 on the Community's System of own Resources [1985] OJ L128/15.

[21] Geddes, *Britain and the European Union* (n. 16), 70.

To that effect, in 1985 the European Council called for a major institutional reform of the Union: the 1986 Single European Act (SEA). The SEA was a decisive if small step towards political integration.[22] Yet the very idea that Europe could re-regulate markets and offer social rights to workers was anathema to the (then) British government. Furious to discover that the single market project was more that an exercise in deregulation, Thatcher set out her (Conservative) vision in 1988 in a famous speech at the College of Europe in Bruges:

> We have not successfully rolled back the frontiers of the state in Britain only to see them reimposed at a European level, with a European superstate exercising a new dominance from Brussels . . . [T]he Treaty of Rome itself was intended as a Charter for Economic Liberty . . . By getting rid of barriers, by making it possible for companies to operate on a Europe-wide scale, we can best compete with the United States, Japan and the other new economic powers emerging in Asia and elsewhere. It means action to *free* markets, to *widen* choice and to produce greater economic convergence through *reduced* government intervention. Our aim should not be more and more detailed regulation from the centre: it should be to deregulate, to remove the constraints on trade and to open up[.][23]

This speech became a prelude and source of accepted Euroscepticism within the Conservative Party;[24] and henceforth a section within that party would hold the 'Thatcherite' line—especially after the 1992 Treaty on European Union.

c. From Maastricht to Lisbon: 'A Europe of Bits and Pieces'

The 1992 Treaty on European Union represented 'a new stage in the process of European integration'.[25] Not only would it lay the foundations for 'Economic and Monetary Union' (EMU), a significant push towards political union had been made—especially by means of reducing the national veto in the Council.[26] Yet the 1992 TEU was also a constitutional compromise. Politically sensitive areas, like foreign

[22] Far from being a surrender to continental views, British interests had predominantly found their way into the SEA (see George, *Awkward Partner* (n. 10) 184: '[T]he British achieved real progress in areas that mattered to them. Majority voting was extended only in limited areas . . . [and] [s]pecifically excluded from the rules on majority voting were the areas of taxation, free movement of persons, health controls, and employees' rights . . . The other clear victory for the British view was that no major increase was proposed in the powers of the European Parliament').

[23] Harryvan and van der Harst, *Documents on European Union* (n. 1), 244–5 (emphasis added).

[24] Geddes, *Britain and the European Union* (n. 16), 229. The Bruges Speech led to the creation of one of the best-known Eurosceptic think tanks: the Bruges Group. For a self-presentation of the group, see www.brugesgroup.com.

[25] Preamble to the TEU.

[26] For a brief history, see Chapter 1, Section 3.

and security policy and justice and home affairs, had remained intergovernmental; and even within the supranational parts of the European Union, the Maastricht Treaty had created 'a Europe of bits and pieces'.[27] With regard to EMU, for example, Britain had secured an opt-out;[28] and, having vehemently opposed further integration on social matters, it had also received a second 'opt-out' here which meant that the envisaged social chapter within the EU Treaties had to be abandoned in favour of an 'Agreement on Social Policy concluded between the Member States of the European Community *with the exception of the United Kingdom of Great Britain and Northern Ireland*'.[29]

This second opt-out would eventually be dropped when a British Labour government returned to power in 1997; yet the British ambivalence towards 'full' membership obligations remained. When it thus came to the 1997 Treaty of Amsterdam, Britain (and Ireland) not only decided to opt out of the incorporation of the Schengen Agreement,[30] it also extrapolated itself from the Treaty title on 'Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons'.[31] The same strategy of differential membership surfaced with the 2007 Lisbon Treaty, where the United Kingdom obtained a partial opt-out from the EU Charter of Fundamental Rights;[32] and even more remarkably, Britain was allowed a complete opt-out of the already existing (!) Union law on police and judicial cooperation in criminal matters.[33] This was cherry-picking at its best or worst—depending on one's point of view.

d. After Lisbon: The Path to Withdrawal from the Union

aa. From Lisbon to the Referendum: The Rise of Euroscepticism

By 2009, the United Kingdom was two-thirds in and one-third out of the European Union. While remaining a 'full' member in form, its various opt-outs had exempted it from core EU obligations and placed it at the margins of Europe. This strategy of semi-detachedness took a decidedly more Eurosceptic turn with the return to

[27] The famous phrase comes from D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CML Rev.* 17.

[28] See Protocol On certain Provisions relating to the United Kingdom of Great Britain and Northern Ireland [1992] OJ C191/87, esp. preamble 1: 'Recognizing that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament'.

[29] Protocol On Social Policy [1992] OJ C191/90 (emphasis added).

[30] See Protocol On the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland [1997] OJ C340/97.

[31] See Protocol On the Position of the United Kingdom and Ireland [1997] OJ C340/99.

[32] See Protocol No. 30 On the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2016] OJ C202/312.

[33] See Protocol No. 36 On Transitional Provisions [2008] OJ C115/322, esp. Art. 10.

power of the Conservative Party in 2010. Fearing to lose out to the United Kingdom Independence Party (UKIP)—founded in 1993 as a response to the Maastricht Treaty—the Conservatives had become an essentially Eurosceptic party.[34] And, although forced to work within a coalition, the Coalition Programme heralded a 'nationalist' move away from closer European integration:

> The Government believes that Britain should play a leading role in an enlarged European Union, but that no further powers should be transferred to Brussels without a referendum. This approach strikes the right balance between constructive engagement with the EU to deal with the issues that affect us all, and protecting our national sovereignty . . .
>
> – We will ensure that there is no further transfer of sovereignty or powers over the course of the next Parliament. We will examine the balance of the EU's existing competences and will, in particular, work to limit the application of the Working Time Directive in the United Kingdom.
> – We will amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty—a 'referendum lock'. We will amend the 1972 European Communities Act so that the use of any *passerelle* would require primary legislation.
> – We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.[35]

The European and national outcomes of these commitments are well known. The most significant European expression is the completely senseless—though highly symbolic—veto of the EU Fiscal Compact by the British government so as to fulfil its first promise.[36] A response to the second and third—national—commitments was the European Union Act 2011. The Act provided for a 'referendum lock' for future amendment treaties transferring new competences to the Union,[37] while it also reconfirmed 'national' parliamentary sovereignty as the core principle of the British Constitution.

But there would be more: in an attempt to win over Eurosceptic voters (and to please its own right wing), the Conservative Party finally promised—just as the

[34] D. Baker et al., 'Sovereign Nations and Global Markets: Modern British Conservatism and Hyperglobalisation' (2002) 4 *British Journal of Politics and International Relations* 399 at 404.

[35] For a copy of the Coalition Programme, see www.gov.uk/government/publications/the-coalition-documentation.

[36] See *Financial Times* (9 December 2011): 'Britain's Cold Shoulder for Europe'. The 'senselessness' of the decision stemmed from the fact that—in substance—these were reforms favoured by the Conservative government; and all that Cameron achieved was to remove Britain from the negotiating table when the eurozone decided to go ahead anyway.

[37] For an analysis of the Act, see M. Gordon and M. Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"' (2012) 37 *EL Rev.* 3.

Labour Party had done in 1975—a 'fundamental renegotiation' of the British terms of EU membership and an 'in–out' referendum.[38] Winning the 2015 national election, the Conservative government almost immediately set out its renegotiation demands in a letter to the European Union,[39] and a European Union Referendum Act 2015 was duly adopted. Following intense negotiations in early 2016, the European Council and the other Member States offered the United Kingdom an olive branch in the form of the—pompously styled—'New Settlement for the United Kingdom within the European Union'.[40] Based on these not-insignificant concessions, a referendum was called for 23 June 2016 to let the British voters decide on them and their continued membership in the Union as such. Yet to the dismay of the (then) government, a (slight) majority of voters within the United Kingdom here expressed their wish to leave the European Union.[41]

The referendum result was accepted by all main parties as politically binding, and the United Kingdom henceforth began to prepare its withdrawal from the European Union.

bb. Triggering the Withdrawal Process: The Miller *Judgment*

Under British constitutional law, referenda do not have any binding legal force. It was therefore clear that the British Parliament would need to 'ratify' the popular vote by means of parliamentary legislation. What was unclear, however, was whether this parliamentary 'ratification' would need to happen at the beginning or the end of the withdrawal process. Would Parliament need to be involved in 'triggering' the withdrawal process—laid down in Article 50 TEU (discussed in the next section)?

In order to exit the European Union, a Member State must notify its intention to the Union 'in accordance with its own constitutional requirements';[42] and within

[38] An informal promise was first made by David Cameron on 23 January 2013 in his 'Bloomberg Speech'; and a formal promise was then made in the 2014 Tory manifesto, which committed the party to holding a referendum by the end of 2017. For the bellicose language of the manifesto, see (ibid., 18): 'If you want more EU red tape, more interference from Brussels, a bigger EU budget and no referendum—vote Labour. They are the ones who signed away power after power to the EU and refused to give the British people a vote, and they are the ones who opened the door for uncontrolled migration.'

[39] For a copy of the letter, see www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk.

[40] European Council, A New Settlement for the United Kingdom within the European Union [2016] OJ C69/1. This cannot be the place to fully analyse the Union concessions in any detail but the most important concession was probably a safeguard mechanism for 'situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time, *including as a result of past policies following previous enlargements*' (ibid., 9, emphasis added).

[41] With a turnout of 72 per cent of the electorate, 52 per cent decided to leave, while 48 per cent voted to remain.

[42] Art. 50(1) TEU.

the United Kingdom, the question of which branch of the British State would be entitled to notify the referendum result soon gave rise to a constitutional battle between the British government (executive) and the British Parliament (legislature). Relying on the ancient powers of the royal prerogative, the former claimed that it alone was entitled to the trigger the withdrawal from the Union. This view was challenged in *R (Miller) v Secretary of State for Exiting the European Union* on the grounds that a notification to the European Union required the *prior* consent of the British Parliament.[43]

In its *Miller* judgment, the United Kingdom Supreme Court was faced with two contradictory features of the—unwritten—British Constitution. According to a first principle, 'ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament'; whereas, in accordance with a second principle, 'ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law' unless authorized by a parliamentary statute.[44] These two principles can only be harmoniously combined in a classic dualist legal order, as any changes introduced by international treaties 'outside' the United Kingdom will—theoretically—have no automatic effects 'inside' the domestic legal order; and the Supreme Court consequently started out as follows:

> There is little case law on the power to terminate or withdraw from treaties, but, as a matter of both logic and practical necessity, it must be part of the treaty-making prerogative . . . Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts . . . This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state . . . The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.[45]

But did this dualist reasoning apply to European Union law? In a judgment full of internal contradictions and intellectual gaps, the Supreme Court struggled to find a convincing answer that cut the Gordian knot created by the traditional–dualist British legal order and the modern–monist Union legal order.

[43] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[44] Ibid., para. 5. [45] Ibid., paras 54–5.

When discussing the effect of Union law in the United Kingdom, this is what the Supreme Court had to say:

> In one sense, of course, it can be said that the 1972 [European Community Accession] Act is the source of EU law, in that, without that Act, EU law would have no domestic status. *But in a more fundamental sense and, we consider, a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law. The legislative institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution* . . . In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is . . . the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute *EU law an independent and overriding source of domestic law* . . . The 1972 Act effectively operates as a partial transfer of law-making powers, or an assignment of legislative competences, by Parliament to the EU law-making institutions (so long as Parliament wills it)[.][46]

The 1972 Act was here portrayed as a 'conduit pipe' or 'bridge' that allowed directly applicable (!) EU law into the British legal order without the need for a *specific* act of transposition into British law. On the basis of this monist position,[47] Union law was—for the first time—expressly recognized as an 'independent' source of 'British' law and expressly placed above 'ordinary' parliamentary legislation. And it was this—monist—view that allowed the court to argue that a withdrawal from the European Union would constitute 'a fundamental change which justifies the conclusion that *prerogative powers cannot be invoked to withdraw from the EU Treaties*'.[48] The Supreme Court consequently held that the British Parliament had to specifically empower the government before a formal notification to the European Union could take place. Parliament duly passed the European Union (Notification of Withdrawal) Act 2017 in which it authorized the British Prime Minister to trigger Article 50 TEU and to thereby begin the official Brexit process.[49]

[46] Ibid., paras 61, 65, and 68 (emphasis added).

[47] To repeat, under a classic dualist doctrine, there cannot be any 'directly applicable' European rights; and a withdrawal from the Union could therefore *never* change any British (!) rights, as all British rights are a result of British law—not European law. That this view was rejected by the UK Supreme Court for European Union law is confirmed in para. 90 when the Court admitted that '[i]n 1972, for the first time in the history of the United Kingdom, a dynamic, international [!] source of law was grafted onto, and above, the well-established existing sources of domestic law: parliament and the courts'. After over 40 years of denial, this was a remarkable statement. Alas, the owl of Minerva only spreads its wings with the fall of dusk!

[48] Ibid., para. 83 (emphasis added).

[49] s. 1(1) of the Act states: 'The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.'

2. Withdrawing from the Union: Article 50 TEU

The European Union is not a sovereign State. It is a Union of States that allows its Member States to withdraw or 'secede' from the Union. With the 2007 Lisbon Treaty, this right to withdraw has been expressly codified in Article 50 TEU. The provision states:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period . . .

What is the history and nature of the provision? While Article 50(1) TEU confirms the sovereign right of each Member State to withdraw from the Union, this choice must be formally notified to the European Union according to Article 50(2). For the United Kingdom, this happened in March 2017, when the (then) British prime minister sent a letter to the President of the European Council. This letter started the two-year negotiation period envisaged in Article 50(3)[50] which would, in fact, have to be extended twice to allow the parties to finally reach the agreement that will be analysed in Section 3. This section, however, explores the legal principles governing the very process of withdrawal itself. This process is only outlined in the most skeletal manner by Article 50; the provision indeed seems to leave the negotiation process to the negotiating parties themselves. How, then, was the British withdrawal from the Union negotiated? Let us look at this question in a second step after having taken a closer look at Article 50 itself.

[50] Can the notification to withdraw itself be withdrawn during the two-year negotiation period? The question has been hotly debated. For arguments in favour, see A. Sari, 'Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind?' (2017) 42 *EL Rev.* 451. The Court of Justice has indeed confirmed a departing Member States' unilateral right to revoke its notification in Case 621/18, *Wightman and Others v Secretary of State for Exiting the European Union*, EU:C:2018:999, esp. paras 58ff.

a. Article 50: Constitutional History and Nature

Most sovereign States categorically prohibit secessions from their territory;[51] while most international organizations implicitly permit withdrawals of their Member States.[52] Within the European Union, a sovereign 'right' to withdraw has always been implicit in the Union legal order.[53] The Lisbon Treaty has made this implicit right explicit; yet what are the exact contours of this right? The history of Article 50 may here offer some preliminary insights.

aa. Drafting History During the European Convention

Article 50 was conceived during the European Convention leading up to the (failed) 2004 Constitutional Treaty.[54] Whose brainchild Article 50 has been eagerly contested by two putative 'fathers'.[55] Yet it seems that the idea of a withdrawal clause first emerged from a third source—a British member of the Convention, who drew on the 'Cambridge Draft Treaty' edited by Professor Alan Dashwood.[56] This Cambridge draft advocated a unilateral and automatic right to withdraw from the Union; and, in doing so, it did not even envisage a withdrawal agreement. All that was needed was a formal notification from the withdrawing Member State; while the Union was, in its turn, entitled to unilaterally adjust its institutional structure after the withdrawal.[57]

[51] Some federal States appear to be more tolerant with regard to secessionist claims by their constituent units. For the Canadian constitutional order, see *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[52] On the 'sovereign' right of withdrawal, see T. Christakis, 'Article 56: Denunciation of or Withdrawal from a Treaty Containing No Provision regarding Termination, Denunciation or Withdrawal' in O. Corten and V. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Vol. II (Oxford University Press, 2011), 1251. This is not uncontested: see N. Feinberg, 'Unilateral Withdrawal from an International Organisation' (1963) 39 *BYIL* 189.

[53] For the same view, see J. H. H. Weiler, 'Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community' (1985) 20 *Israel Law Review* 282. It is, however, unclear how that conclusion is reached. For while Weiler generally holds 'that orthodox *legal* analysis would confirm, in the context of the EEC, Feinberg's general conclusion against the automatic right of unilateral withdrawal' (ibid., 287 (emphasis added)), he nonetheless finds that, *politically*, and in the absence of techniques for avoiding all obligations arising under European law '[i]f a Member State cannot accept these obligations, better it be allowed to withdraw, even unilaterally' (ibid., 298).

[54] For a brief discussion of the European Convention, see Chapter 1, Section 4a.

[55] The two auto-proclaimed 'fathers' are the Italian Giuliano Amato, then a Vice-President of the European Convention, and the British diplomat, Lord Kerr.

[56] See European Convention, Contribution by Mr P. Hain: Constitutional Treaty of the European Union, CONV 345/1/02 (Brussels, 16 October 2002).

[57] Ibid., Art. 27: '1. Any Member State may withdraw from the European Union. It shall address to the Council its notice of intention to withdraw. 2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity, shall determine, after consulting the Commission and the European Parliament, the institutional adjustments to this Treaty that such withdrawal entails. 3. For the purpose of this Article, the Council, sitting in the composition of Heads of State or Government, and the Commission shall act without taking into account the vote of the nationals of the withdrawing Member State. The European Parliament shall act without taking into account the position of the Members of Parliament elected in that State.'

This 'State-centred' version was heavily criticized by the more 'integrationist' Convention members;[58] and it contrasts strikingly with the counter-proposal made by the European Commission. In its 'Penelope Project',[59] the Commission had indeed suggested a much more 'Union-centred' withdrawal provision. It read:

> 1. Where a revision to the Constitution has entered into force and a Member State has not been able to adopt it in accordance with its constitutional requirements, such State may, after a period of two years after the entry into force of that revision, apply to withdraw from the Union. In that case the Union shall commence negotiations with the Member State concerned in order to conclude an agreement governing their future relations . . .
> 3. If the agreement governing future relations between the Union and the requesting Member State is not concluded within a period of six months following the opening of negotiations, the Member State shall cease to be a member of the Union on 1 January of the year following the expiry of that period. In that case, the respective rights and obligations of the Union and the Member State leaving it shall, for no more than two years, continue to be governed by the law applicable on the day when the requesting State left the Union . . .
> 4. The Member State leaving the Union may continue to be a contracting party to the Agreement on the European Economic Area.[60]

The Commission draft here offered a *conditional* and *limited* right of withdrawal in only one situation: where a Member State had been outvoted in the (newly suggested) majoritarian revision procedure,[61] it would not be forced to stay within the Union but could leave after two years of unsuccessful ratification. The provision thereby also evoked the idea of a future-relations agreement; yet where no such agreement had been reached within six months, the State would (almost) immediately cease to be a Union Member. In this case, the departing State would nonetheless still be subject to a transitional arrangement that applied the unrevised (!) EU Treaties for another two years (maximum); and—mysteriously—the withdrawing State would also remain a party to the Agreement on the EEA.[62]

[58] For an overview of the various amendment proposal here, see European Convention, Scheda di analisi delle proposte di emendamento riguardanti l'appartenenza all'Unione: Progetto di articoli relativi al titolo X della Parte I (articoli da 43 a 46), CONV 672/03 (Brussels, 14 April 2003).

[59] http://ec.europa.eu/archives/emu_history/documents/treaties/Penelope%20pdf_en.pdf.

[60] Ibid., Art. 103.

[61] According to Art. 101 of the Commission Draft Treaty, future Treaty revisions were no longer subject to unanimous agreement by all the Member States but henceforth allowed for a qualified majority of five-sixths or three-quarters of the Member States (depending on which part of the Constitutional Treaty would be amended).

[62] The EEA Agreement was discussed in Chapter 19, Section 4b/bb. It constitutes an association agreement that binds the EFTA States to the Union.

The 'British' and the 'Union' drafts of what was to become Article 50 thus offered two—extreme—versions, neither of which would be adopted by the European Convention. The Presidium indeed offered a compromise. Although heavily based on the State-centred view that acknowledged a unilateral and unconditional right to withdrawal, it insisted on the obligation that 'the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'.[63] The Presidium, however, quickly clarified that 'such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance';[64] and after a two-year period without reaching a withdrawal agreement, the membership obligations of the withdrawing State would therefore automatically cease.[65]

It is, with minor amendments, this compromise version that can today be found in Article 50 TEU.

bb. The Nature and Character of Article 50

What is the nature and character of Article 50? The provision represents a compromise between the 'State-centred' and the 'Union-centred' versions tabled during the European Convention. This compromise solution is, however, much closer to the former than the latter. For like the Cambridge draft, the right to withdraw from the Union is unconditional and unilateral:

> Article 50(1) TEU provides that any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. It follows that the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice.[66]

However unlike the Cambridge draft, this right is no longer automatic, since Article 50 imposes a procedural obligation to try to reach a mutual understanding in the form of a 'withdrawal agreement'. The wording of Art. 50 TEU thereby seems to only impose the obligation to negotiate such an agreement on the Union; yet

[63] European Convention, Presidium, Title X: Union Membership, CONV 648/03 (Brussels, 2 April 2003), esp. Art. 46(2).

[64] Ibid., p. 9.

[65] Ibid., Art. 46(3) (emphasis added): 'This Constitution shall cease to apply to the State in question as from the date of entry into force of the withdrawal agreement *or, failing that, two years after the notification* referred to in paragraph 2.'

[66] Case C-621/18, *Wightman* (n. 50), para. 50.

such a duty equally exists and extends to the departing Member State.[67] Indeed, this is the first and single most important characteristic of Article 50 TEU.

Second, and unlike the Commission's Penelope draft, the final text of Article 50 concentrates exclusively on the withdrawal agreement. The latter is designed to settle past commitments and must be categorically distinguished from a future-relations agreement to be concluded *after* withdrawal. Article 50 nonetheless states that the withdrawal agreement should already 'tak[e] account of the framework for [the withdrawing State's] future relationship with the Union', yet—again—the withdrawal agreement is not to settle this relationship.

Third, the withdrawal agreement cannot itself deal with the necessary constitutional amendments required to adjust the Union legal order following the withdrawal. The withdrawal agreement was specifically designed as an ordinary international agreement between the Union (!) and the departing Member State. Unlike an accession treaty or a formal treaty amendment under Article 48 TEU, the withdrawal agreement will thus not constitute primary law of the Union and therefore cannot amend the EU Treaties. Any textual adjustments to the EU Treaties will here have to be done in the future. In the meantime, the Union is likely to treat all express references to the United Kingdom as materially defunct.

Fourth, the final version of Article 50 makes no mention of a transition period; nor does it refer to continued EEA 'membership' of the departing State. These matters were rightly dropped, because the former could be dealt with in the withdrawal agreement itself, while the latter must be achieved by a future-relations agreement.

b. Negotiating Brexit: Institutional and Procedural Aspects

There is no obligation to *conclude* a withdrawal agreement under Article 50; yet, as was argued in the previous section, there is an obligation to *negotiate* on the Union and the departing Member State. Who is to negotiate the withdrawal agreement, and according to which procedure(s)? For the departing Member State, this is of course a question of national constitutional law. For the European Union, by contrast, the text of Article 50 offers some basic answers,[68] which have—through Brexit—been further concretized.

[67] This duty, while not directly based on Art. 50 TEU, derives from the departing State's (continued) status as a Member State of the Union and the duty of loyal cooperation under Art. 4(3) TEU. For the opposite view, insisting on a purely unilateral obligation on the Union, see C. Hillion, 'Accession and Withdrawal in the Law of the European Union' in A. Arnull and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015), 126; A. Łazowski, 'Inside But Out? The UK and the EU' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), 493.

[68] For the text of Article 50, see again page 919.

On the European Union side, Article 50 directly calls on the European Council to draw up 'guidelines'.[69] Inspired by the reference to Article 218(3) TFEU,[70] the Commission and the Council are also entitled to be involved and to especially nominate the Union negotiator. For Brexit, the Commission was chosen as the Union negotiator; and it here set up an independent unit dealing specifically with Brexit: the Article 50 Task Force.[71] Led by the EU Chief Negotiator, Michel Barnier (Figure 20.2), it consisted of a small team of experts on issues ranging from the internal market to international trade. The Commission had, however, also been asked to integrate representatives from the Council as well as the European Council into its negotiation processes; and the Union negotiator was obliged to 'systematically report' to the European Council, the Council, and the Parliament. The controlling influence of the European Council over the negotiations indeed became quickly apparent: it remained 'permanently seized of the Article 50 TEU situation'.[72]

How were the negotiations structured? The European Union insisted from the very beginning on a 'phased approach' to the negotiations that would concentrate

Figure 20.2 EU chief negotiator: Michel Barnier

Source: https://ec.europa.eu/info/persons/director-head-service-michel-barnier_en, © European Union 2020.

[69] For the European Council Brexit Guidelines, see www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/.

[70] The provision states: 'The Commission . . . shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominate the Union negotiator or the head of the Union's negotiating team.'

[71] For an overview, see https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en.

[72] M. Dougan, 'So Long, Farewell, Auf Wiedersehen, Goodbye: The UK's Withdrawal Package' (2020) 57 *CML Rev*. 631 at 635.

exclusively on the 'withdrawal agreement'.[73] A first phase was here to deal with issues directly resulting from withdrawal; and only if sufficient progress had been made, could a second phase eventually turn to the future 'framework' of cooperation between the United Kingdom and the Union. Importantly, during this second phase the Union would not yet negotiate any future association or trade agreement with the departing State, as this could—according to Union constitutional law—only be done with a 'third State' that had already left the Union fold.[74] In the words of the European Council:

> While an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country, Article 50 TEU requires to take account of the framework for its future relationship with the Union in the arrangements for withdrawal. To this end, an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU[.][75]

The second phase of the negotiations was thus to end with a bridge from membership to partnership; yet again, this bridge was not the future (trade) agreement itself.

Finally, what about the Union's core objectives for the negotiations? The European Council Guidelines here listed five fundamental Union objectives. The Union's first priority was the establishment of 'reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union'.[76] Second, in view of the Union, the negotiations would need to 'seek to prevent a legal vacuum once the Treaties cease to apply to the United Kingdom'.[77] Third, a financial settlement between the parties would need to be found.[78] Fourth, and significantly, the European Council insisted that '[i]n view of the unique circumstances on the

[73] The opposite approach had been favoured by the British negotiation team, which had hoped to tie the United Kingdom's exit directly to a new partnership agreement. This was, however, impossible both from a practical and a theoretical point of view. The argument has even been made that the negotiation procedure for the withdrawal agreement is, in any case, a Union matter (see A. Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *EL Rev.* 523 at 527: 'The TEU leaves the decision on withdrawal to the domestic constitutional laws, while at the same time providing an EU procedural framework for departure').

[74] All Union treaty-making competences, discussed in Chapter 8, require that the Union would negotiate with a 'third country', while Art. 50 TEU itself provides no external competence for a future relations agreement.

[75] European Council Brexit Guidelines (First Phase), para. 5.

[76] Ibid., para. 8 [77] Ibid., para. 9. [78] Ibid., para. 10.

island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order'.[79] Fifth, and jumping over some less fundamental objectives, the European Council claimed that the withdrawal agreement 'should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement'.[80]

c. Conclusion and Ratification: The European Union

What about the ratification of the withdrawal agreement? For the Union, Article 50 TEU states that the agreement 'shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'; and the provision also clarifies that the member of the Council 'representing the withdrawing Member State shall not participate in the discussions' in the Council, where a super-qualified majority, as defined in Article 238(3)(b) TFEU, is to apply.[81]

Let us unpack these requirements one by one.

First, both branches of the EU legislator need to give their respective consent. For the Council, a special majority applies: 'the qualified majority shall be defined as at least 72 per cent of the members of the Council representing the participating Member States, comprising at least 65 per cent of the population of these States'.[82] This 72 per cent of the 27 Member States equates to 20 Member States; and in a Union without the United Kingdom, a blocking minority of 35 per cent of the Union population translates into about 155 million people. Importantly, unlike the general rule in Article 16(4) TEU, a blocking minority of only three—not four—States would seem to be sufficient.[83]

With regard to the European Parliament, Article 50 specifies that it must give its consent; and consent here means the 'majority of the votes cast'.[84] Would these votes include the withdrawing Member State's MEPs? Article 50 does not contain an express exclusion rule, and the argument has therefore been made that all MEPs—including the British MEPs—should be entitled to vote on the withdrawal

[79] Ibid., para. 11. [80] Ibid., para. 17.

[81] Art. 50(2) and (4) TEU. [82] Art. 238(3)(b) TFEU.

[83] Alas, if Germany and France agreed to reject the agreement, they would only need another Member State with a population of 10 million to block the agreement.

[84] Rule 82 of the European Parliament's Rules of Procedure is entitled 'Withdrawal from the Union' and states: 'If a Member State decides, pursuant to Article 50 of the Treaty on European Union, to withdraw from the Union, the matter shall be referred to the committee responsible. Rule 81 shall apply *mutatis mutandis*. Parliament shall decide whether to give its consent to an agreement on the withdrawal by a majority of the votes cast.'

agreement.[85] Teleological reasons strengthen this argument: MEPs do not represent their Member State but directly represent the European citizens as a collectivity.[86] The point is not, however, uncontested; and others have argued that the exclusion rule within Article 50 with regard to the (European) Council should also apply, analogously, to the European Parliament.[87] Constitutional practice, however, now points the other way.

What about the European Court of Justice? It has been contended that 'the jurisdiction of the Court over the withdrawal agreement does not seem to be restricted'; and that, in particular, 'the *renvoi* in Article 50 TEU to Article 218 TFEU opens the possibility of the European Court of Justice intervening . . . by way of an advisory opinion based on Article 218(11) TFEU'.[88] Textually, this is not, however, clear: for Article 50 TEU refers only to the third paragraph of Article 218 TFEU, which exclusively deals with the negotiation stage. This could, contrariwise, be taken to mean that all the other stages in the life of the withdrawal agreement are exclusively governed by Article 50; and since the provision is silent on the jurisdiction of the Court, it could be maintained that the *ex ante* jurisdiction of the Court under Article 218(11) is unavailable. This point, like some others, has remained untested and unresolved during the United Kingdom's withdrawal from the Union.

Be that as it may, on 30 January 2020, the Union concluded the 'Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community';[89] and a day later, the United Kingdom formally exited the Union.

3. The Withdrawal Agreement: Content and Effect

On 31 January 2020, the United Kingdom left the European Union; and, the next day, the Withdrawal Agreement entered into force.

What are the fundamental choices behind the Withdrawal Agreement? The first important choice of the Withdrawal Agreement was the introduction of a 'transition'

[85] In favour of this view, see D. Harvey, 'What Role for the European Parliament under Article 50 TEU?' (2017) 42 *EL Rev.* 585 at 600: '[U]ntil the day on which the withdrawal agreement enters into force, UK MEPs will continue to participate in the workings of the European Parliament and, as a consequence, vote on any withdrawal agreement.'

[86] On this point, see Chapter 3, Section 2.

[87] Łazowski, 'Withdrawal from the European Union' (n. 73), 528: 'It has to be emphasised that a departing country will be treated as a third country during such negotiations, and therefore will not participate in consensus-building in the European Council and the Council or in the voting, should that prove necessary. Although Art. 50 TEU is silent on this, it seems reasonable to expect that the same rule will apply to the elected members of the European Parliament from the departing country.'

[88] Hillion, 'Accession and Withdrawal' (n. 67), 141–2.

[89] Council Decision 2020/135 [2020] OJ L29/1.

or 'implementation' period. Proposed by the British government itself, this period was meant to offer extra time for an *orderly* withdrawal and was set to expire on 31 December 2020.[90] Up to this point, the United Kingdom remained under the obligation to apply (almost) all EU law—even if it could no longer actively participate in the Union institutions.[91] This period of 'passive' membership, while not ideal in theoretical terms, was designed to offer legal certainty during a time in which the future trade relationship between the United Kingdom and the Union was discussed. The transition period was thus conceived as a 'bridge' between (past) 'membership' and (future) partnership; and it was primarily meant to avoid the legal challenges that would be created by a 'hard' Brexit (to be discussed later).

Since the end of the transition period, the United Kingdom is 'fully' outside the scope of European Union law. Its rights and obligations vis-à-vis the Union are henceforth exclusively determined by the 2019 Withdrawal Agreement and—if agreed—the future partnership agreement. While complementing each other, the aims of both agreements are very different. The Withdrawal Agreement essentially deals with the legal issues that stem from Britain's past membership, whereas an eventual partnership agreement concerns the future relationship between the United Kingdom and the European Union. This section only explores the Withdrawal Agreement and the post-Brexit status of European law in the British legal order.

a. Withdrawal Agreement I: Structure and Content

The Withdrawal Agreement is designed to settle past commitments (even if it already contains a *political* declaration for a future relationship with the Union).[92] Its material content is thus limited to issues that arise from Brexit and its structure can be seen in Table 20.1.

From the very beginning, the three main substantive problems caused by Brexit were: (1) the situation of European citizens (and businesses) that had exercised their free movement rights in the past, (2) a financial settlement between the United Kingdom and the European Union had to be found; and, finally, there was (3) the 'Irish question'.

The first issue appeared to be relatively straightforward. For while Brexit is to end the free movement of persons in the future, both sides agreed that the rights of EU citizens in the UK and of those British citizens in the EU-27 must be guaranteed so as to protect past life choices. This means, in particular, that those persons having legitimately exercised their free movement rights in the past will *in principle*

[90] The Withdrawal Agreement envisaged the possibility of an extension for up to two years (see Art. 132); yet the British side insisted that it would not use this possibility.

[91] Withdrawal Agreement, Art. 127(1).

[92] Importantly, this is a *political* declaration, which is not as such part of the *legal* agreement.

Table 20.1 Withdrawal Agreement: structure

2019 British Withdrawal Agreement
Part One: Common Provisions (Arts 1–8)
Part Two: Citizens' Rights (Arts 9–39)
Part Three: Separation Provisions (Arts 40–125)
Part Four: Transition (Arts 126–32)
Part Five: Financial Provisions (Arts 133–57)
Part Six: Institutional and Final Provisions (Arts 158–85)
Protocol on Ireland/Northern Ireland
Protocol on Sovereign Base Areas in Cyprus
Protocol on Gibraltar
Annexes I–IX

continue to enjoy those rights under Part II of the Withdrawal Agreement.[93] And this protected status should last for the rest of their lives.[94]

The second issue also turned out to be easier than expected. For the Union had originally adopted a 'divorce model' and approached the outstanding financial commitments 'on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union'.[95] This view sharply contrasted with a British opinion advocating a 'club model' and according to which 'Article 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget or other financial instruments'.[96] Yet again, a detailed compromise was reached that can today be found in Part V of the Withdrawal Agreement.

The third problem—the Irish border question—proved to be the hardest. The problem stems from the complex legal arrangements governing (British) Northern Ireland and the Republic of Ireland. For after years of paramilitary conflict between the two sides (known as 'the Troubles'), the 1998 'Good Friday Agreement' had finally brought peace. Yet that agreement guarantees an open border between the northern and the southern island; and with Britain leaving the European Union, this

[93] This includes the right to residence (Withdrawal Agreement, e.g. Art. 13) and the right to non-discrimination (ibid., e.g. Art. 23). For an early analysis of the potential limitations of the citizens' right part, see S. Smismans, 'EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU is Not Enough' (2018) 14 *European Constitutional Law Review* 443; and E. Spaventa, 'The Rights of Citizens under the Withdrawal Agreement: A Critical Analysis' (2020) 45 *EL Rev*. 193.

[94] Withdrawal Agreement, Art. 39 establishes the principle of 'life-long protection'.

[95] Council, Directives for the negotiation of an agreement with the United Kingdom, available at https://ec.europa.eu/commission/publications/negotiating-directives-article-50-negotiations_en, para.25.

[96] House of Lords, European Union Committee, 'Brexit and the EU Budget', available at https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/125/125.pdf, para. 133.

open border was suddenly placed in jeopardy. Because once the United Kingdom left the European Union, the border between the Republic of Ireland and Northern Ireland became an *external* border of the European Union and that border might require border checks for goods entering the EU internal market.

The only—principled—solution here seemed for the United Kingdom to remain within the single market and the customs union; but what would happen in the absence of a future trade agreement to this effect? In order to prevent a 'hard' border from arising, a pragmatic 'fudge' had to be devised. A first solution here invented the so-called 'Irish backstop'. Accordingly, all of the United Kingdom—including Northern Ireland—would have remained within the EU customs union *until a future trade agreement had solved the Irish border problem*. This semi-permanent solution, however, proved ultimately unacceptable to the United Kingdom and the 2019 Withdrawal Agreement has consequently selected another option instead. This option formally takes the United Kingdom out of the EU customs union (and the single market); and this includes Northern Ireland.[97] Yet a closer look reveals that Northern Ireland has *de facto* remained within the EU customs union (and elements of the single market).

The core provisions here are Articles 5–7 of the Protocol on Northern Ireland, dealing with customs duties and the free movement of goods. The legal principles established by these provisions are so deeply buried under technical complexities that it takes some analytical effort to excavate them.[98] Their essential meaning could be this. First, the normal EU principles on the free movement of goods will apply between the Union and Northern Ireland.[99] This, in particular, requires Northern Ireland to apply much of the Union's internal market legislation; and Northern Ireland thus remains, *de facto* and to a great extent, regulatorily aligned to the EU internal market.[100] Second, as regards goods *not* produced in Northern Ireland, the British authorities will have to impose customs duties and customs checks on all third-country goods (including British

[97] Withdrawal Agreement, Irish Protocol, Art. 4: 'Northern Ireland is part of the customs territory of the United Kingdom. Accordingly, nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol.'

[98] For an early analysis of the 'devilishly complicated' Irish Protocol, see S. Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 *EL Rev*. 222.

[99] Withdrawal Agreement, Irish Protocol, Art. 5(5): 'Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland. Quantitative restrictions on exports and imports shall be prohibited between the Union and Northern Ireland.'

[100] Ibid., Art. 5(4): 'The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland.' Annex 2 lists nearly 300 Union acts that will need to be applied in Northern Ireland. Importantly, these acts are not fixed to their 2020 text, but will need to be dynamically adjusted in the light of future Union amendments, see ibid., Art. 13(3): '[W]here this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.'

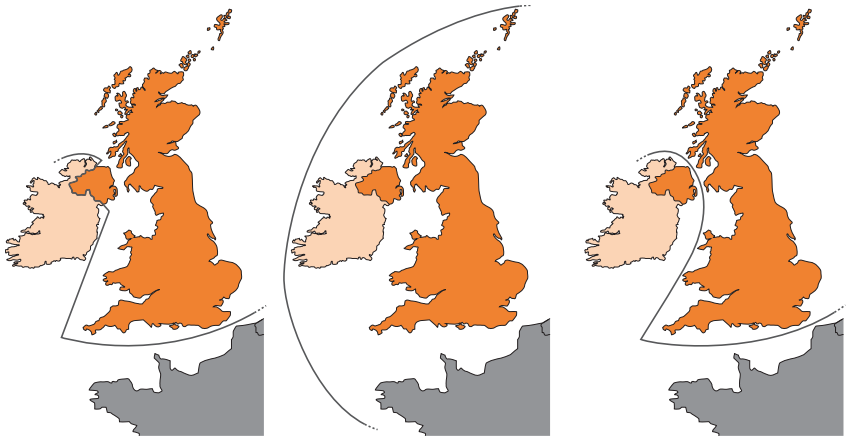

Figure 20.3 Irish border: alternative suggestions

goods) that are 'at risk of subsequently being moved into the Union'.[101] The relevant customs duties and procedures are those of the Union.[102] Third, as regards product standards, British goods from outside Northern Ireland can be placed on that regional market; yet these goods must ultimately comply with EU regulatory standards.[103]

In conclusion, then, the Irish Protocol avoids a hard and visible border between the Irish Republic and Northern Ireland,[104] yet it creates an informal and invisible border in the Irish sea (Figure 20.3).

b. Withdrawal Agreement II: Implementation and Governance

How is the Withdrawal Agreement to be implemented and by whom? The institutional provisions can be found in Part VI of the agreement. They distinguish between a special implementation regime with regard to Part II on 'Citizens' Rights', and a general implementation regime applying to all of the rest of the Agreement.

[101] Ibid., Art. 5(1) and (2). The Union's permission to having a third country—the United Kingdom—administer and police its customs border is remarkable; and it constitutes a second major concession to the unique situation of the island of Ireland.

[102] Ibid., Art. 5(3).

[103] In the words of M. Dougan, 'So Long, Farewell, Auf Wiedersehen, Goodbye' (n. 72), 686: '[F]uture EU–UK regulatory divergence may well mean (for example) that toys manufactured in England and Scotland, even with no ambition for export beyond the UK, nevertheless still need to be adapted specifically for the Irish market.'

[104] Importantly, the Irish Protocol only deals with some barriers to free movement, namely as regards goods; and, as regards natural persons, it defers to the 'Common Travel Area' (ibid., Art. 3: 'The United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories'). However, apart from goods and (natural) Persons, the protocol does not deal with the other fundamental freedoms.

At the heart of the general implementation regime lies the newly created 'Joined Committee'.[105] The latter comprises representatives of the United Kingdom and the European Union.[106] The committee can adopt binding decisions on the basis of the 'mutual consent' of the two parties;[107] and, importantly, these decisions will 'have the same legal effect as this Agreement'.[108] The Committee is thus, notably, entitled to 'adopt amendments to this Agreement' where this is so provided.[109]

In its task to enforce the agreement, the Joint Committee is assisted by six 'specialized committees' each of which dedicated to one core matter.[110] These specialized committees work under the direction of the Joined Committee (Figure 20.4), and only the latter is in fact empowered to adopt legally binding decisions.[111] The Joint Committee can decide in secrecy.[112] There is no parliamentary organ to oversee and control its work, nor is there any direct access to the European Court of Justice to control the exercise of its powers.

The Withdrawal Agreement does, however, envisage a dispute settlement mechanism. The latter is to come into play in case of a disagreement between the United Kingdom and the European Union, which could not be resolved by the Joined Committee.[113] The Withdrawal Agreement here exclusively relies on classic international arbitration.[114] It, nonetheless, in a surprising supranational turn, obliges all arbitration panels to refer 'a question of interpretation of a concept of Union law' or 'a question of interpretation of a provision of Union law referred to in this Agreement' to the European Court of Justice; and the European Court's ruling 'shall be binding on the arbitration panel'.[115] Any ruling of the arbitration panel will be 'binding on the Union and the United Kingdom';[116] and in the case of non-compliance, the arbitration panel

[105] Withdrawal Agreement, Art. 164. The rules of procedure of the committee are set out in Annex VIII to the Agreement.

[106] The Union will be represented by the Commission, see Art. 1 of Council Decision 2020/135 (n. 89): 'The Commission shall represent the Union within the Joint Committee[.]' However, Member States can request to add their own representative(s) to the Commission delegation 'in case particular matters to be addressed at that meeting are of a specific interest to that or those Member States'.

[107] Withdrawal Agreement, Art. 166(3).

[108] Ibid., Art. 166(2).

[109] Ibid., Art. 164(4)(f). According to Art. 164(5)(d), the Joint Committee may also, within the first four years after the end of the transitional period, and with certain exceptions, amend the Withdrawal Agreement 'provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when this Agreement was signed'. These amendments must not, however, amend essential elements of the agreement.

[110] Ibid., Art. 165. These committees are, like the Joined Committee, composed of representatives from the Commission and the United Kingdom. Council Decision 2020/135 (n. 89) here expressly refers to Ireland, Cyprus, and Spain as State representatives entitled to join the special committee dealing, respectively, with Ireland/Northern Ireland, Cyprus, and Gibraltar (ibid., Art. 2).

[111] These committees are deprived of the power to adopt legally binding decisions, see ibid., Art. 164(5)(a).

[112] Ibid., Annex VIII, Art. 10.

[113] Ibid., Arts 169–70.

[114] Ibid., Arts 168 and 171.

[115] Ibid., Art. 174.

[116] Ibid., Art. 175.

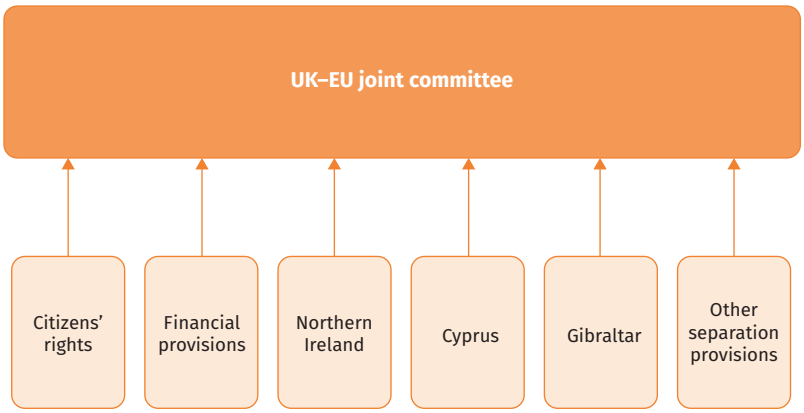

Figure 20.4 Withdrawal Agreement: implementing committees

Source:

can impose a lump sum or penalty payment.[117] If the non-compliance persists, the complainant will, finally, be able to punitively suspend the application of any provision within the Withdrawal Agreement (except for those in Part Two) or parts of any other agreement between the Union and the United Kingdom.[118]

With regard to 'Citizens' Rights' under Part Two, this general implementation regime is significantly strengthened. With regard to the monitoring and implementation of this part, the Withdrawal Agreement specifically calls on the United Kingdom to establish 'an independent authority' that 'shall have powers equivalent to those of the European Commission' in policing breaches of citizens' rights; and to enforce these rights through legal actions before the British courts 'in an appropriate judicial procedure with a view to seeking an adequate remedy'.[119] But, more importantly, for a period of eight years following the transitional period (that is, until 31 December 2028), the European Court of Justice is entitled to receive and give preliminary rulings to British courts;[120] and the legal effects of such preliminary rulings 'shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States'.[121] This eight-year period is the result of a compromise with the Union having originally asked for permanent jurisdiction and the United Kingdom having asked for no jurisdiction of the Court.

Will the jurisdiction of the Court fully stop after eight years? Remarkably, this is not the case for some specific parts of the Agreement,[122] and especially in relation to the

[117] Ibid., Art. 178(1). [118] Ibid., Art. 178(2).

[119] Ibid., Art. 159(1). According to Art. 159(3), the Joint Committee may decide, eight years after the end of the transitional period, that the United Kingdom may abolish the independent authority.

[120] Ibid., Art. 158.

[121] Ibid., Art. 158(3). Art. 161(2) further states that Art. 267 TFEU will apply *mutatis mutandis*.

[122] Ibid., Art. 160.

Irish border question.[123] The governance arrangements with regard to the Irish question are, nonetheless, more fragile and complex. For the status of Northern Ireland under the Withdrawal Agreement must be regularly confirmed by the consent of a majority of its people. Four years after the end of the transitional period—and regularly thereafter—the Northern Irish Legislative Assembly must thus positively approve the status quo; and if the status quo were to be rejected, the 'Irish solution' would cease to apply two years later.[124] The result would be a hard border cutting through the island—endangering the fragile peace that has existed for the past 20 years.

c. Withdrawal Agreement III: Enforcement in the Domestic Legal Orders

The Withdrawal Agreement is an international agreement; and, as such, its internal effects in the European Union and the United Kingdom depend on their respective 'domestic' constitutional law.

For the *monistic* Union legal order, this means that the Withdrawal Agreement will be automatically enforceable in the European and national courts wherever it has direct effect;[125] and, as an EU international agreement, it will enjoy a rank above ordinary Union legislation,[126] and also enjoy primacy over all national law.[127] By contrast, for the dualistic British legal order, the Withdrawal Agreement cannot, as such, have domestic effects; and it was therefore necessary to 'incorporate' the agreement into domestic law by an act of the Westminster Parliament. This happened by means of the European Union (Withdrawal Agreement) Act 2020. Yet in the light of the British constitutional doctrine of parliamentary sovereignty, the Act cannot, at least not theoretically, enjoy a hierarchical status above ordinary British legislation; and this raises the potential danger of a deficient implementation of the Agreement, if a future British Parliament ever decided that it no longer wished to adhere to the terms of the Agreement.

This potential unevenness in the judicial enforceability of the Withdrawal Agreement was clearly seen by the Agreement itself. Its Article 4 indeed tries to protect against it. It states:

> 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom *the*

[123] Ibid., Irish Protocol, Art. 12(4) states: '[T]he Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.'

[124] Ibid., Art. 18.

[125] On the status and effect of international agreements in the Union legal order, see Chapter 5, Section 4.

[126] Within the Union legal order, international agreements rank above Union legislation, see Case C-61/94, *Commission v Germany* (*IDA*) [1996] ECR I-3989, para. 52: 'primacy of international agreements concluded by the [Union] over provisions of secondary [Union] legislation'.

[127] On the primacy of Union law over national law, see Chapter 6.

> *same legal effects as those which they produce within the Union and its Member States*. Accordingly, legal or natural persons shall *in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law*.
> 2. The United Kingdom shall ensure compliance with paragraph 1, *including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation*.[128]

This provision is remarkable in that it formally obliges the United Kingdom to give the Withdrawal Agreement the same effect in its domestic legal order *as Union law in the Union legal order*. And this expressly includes not just the doctrines of direct effect (para. 1) and primacy (para. 2); the latter doctrine, in particularly, unequivocally commits the United Kingdom to give British courts the judicial power to disapply British post-Brexit legislation.

How has the European Union (Withdrawal Agreement) Act 2020 incorporated this treaty commitment? It has done so by adding an amendment to the European Union (Withdrawal) Act 2018—to be discussed later. Cast in the typical—and often barely comprehensible—style of Westminster drafting, the relevant provision here states:

> (1) Subsection (2) applies to—
> (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and
> (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement,
> *as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom*.
> (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—
> (a) recognised and available in domestic law, and
> (b) enforced, allowed and followed accordingly.
> (3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).[129]

If ever there was an elliptic law, here we have it! The provision seems to use the 'conduit pipe' technique of the original European Communities Act 1972 for the

[128] Emphasis added. Art. 4(3)–(5) of the Agreement subsequently deals with the interpretation of the agreement in the light with EU law, and especially the jurisprudence of the European Court of Justice.

[129] European Union (Withdrawal Agreement) Act 2020, s. 5.

Withdrawal Agreement.[130] According to subsection 2, the Withdrawal Agreement will thus have direct effect in the British legal order; and according to subsection 3, the Agreement will prevail over any parliamentary act—unless, the latter expressly overrules it.[131] This appears to replicate the—complex—pre-Brexit position on the primacy of European law over British law;[132] and just like the former situation, it will depend on what the national judiciary, and especially the Supreme Court, is willing to make of it.

d. Excursus: The Status of EU Law in Post-Brexit Britain

What has happened to the rest of European Union law in the United Kingdom? Has Brexit invalidated all European rights and obligations overnight; or have they been retained, albeit in new legal bottles? The answers to these questions can be found in the European Union (Withdrawal) Act 2018. The latter starts with a bang and ends in some whimpers. For while section 1 unambiguously states: 'The European Communities Act 1972 is repealed on exit day', the rest of the Act mitigates that result dramatically. Indeed, far from being the 'Great Repeal Act', the Act should be known as the 'Great Retain Act'.

How is European law retained in the post-Brexit United Kingdom? For the purposes of legal certainty and continuity, the European Union (Withdrawal) Act 2018 'saves' all European law that existed on Brexit day by transforming it into British national law. This is done in three clauses corresponding to three types of European law. According to section 2, all 'EU-derived domestic legislation'—like national law adopted to implement EU directives—'continues to have effect in domestic law on and after exit day'.[133] According to section 3, 'direct EU legislation', operating before exit day, will also be incorporated as a 'part of domestic law'. But since the latter clause primarily covers EU secondary or tertiary law, adopted as EU regulations or decisions, section 4 subsequently expands the incorporation to any rights or obligations that have in the past arisen under EU primary law, and especially the EU Treaties.[134]

[130] Ibid., Explanatory Notes, paras 31–2.

[131] This is confirmed by s. 38 of the Act, which confirms the British constitutional principle of parliamentary sovereignty and, in particular, that 'nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom' (ibid., para. 3).

[132] For an excellent treatment, see P. Craig, 'Britain in the European Union' in J. Jowell et al. (eds), *The Changing Constitution* (Oxford University Press, 2015), ch. 4.

[133] This clarification was deemed necessary as, under British constitutional law, secondary legislation normally lapses with the primary legislation—here the European Communities Act 1972—on which it is based.

[134] The main exception here is the Charter of Fundamental Rights (s. 5(4)).

What is the status of 'retained' European Union law in post-Brexit Britain? Section 5 here offers the following rules:

> (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
> (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day . . .

The provision clarifies that 'retained' Union law will continue to enjoy 'supremacy' over British law adopted *prior* to Brexit; whereas any British legislation adopted *after* Brexit will henceforth be able to repeal 'retained' European Union law. For the British courts, section 6 underlines this temporal aspect of the supremacy question. For as regards retained EU law, the provision states that its meaning will continue to be determined by 'retained case law'; that is, the *past* jurisprudence of the European Court of Justice. The only two courts that are today not bound by past judicial precedents of the European Court are the UK Supreme Court and the highest Scottish criminal court—both of which will be allowed to (re)assert their position at the top of the judicial hierarchy within the United Kingdom.[135]

What about the Union's international agreements—have they also been retained?[136] The answer to this final question is a clear 'no' as regards agreements concluded 'purely' by the European Union. Today, these Union agreements have simply stopped applying to the United Kingdom. The situation is slightly more complex with regard to mixed agreements; that is, agreements to which both the Union and the Member States are joint parties.[137] Technically, the United Kingdom is here an independent signatory State; and it could therefore—theoretically—retain all the rights and obligations under international law after Brexit. Yet this reading has been put into question by EU external relations specialists, who have—rightly—pointed out that this logic will not hold for so-called 'bilateral' mixed agreements.[138] These are international agreements to which EU Member States are only a party *qua* membership of the Union.

[135] The European Union (Withdrawal Agreement) Act 2020 has made significant modifications on whether lower courts will be bound by past EU jurisprudence. This cannot be the place to discuss them.

[136] According to the *Financial Times*, the question concerns over 750 international treaties concluded by the EU (*Financial Times*, 30 May 2017: 'After Brexit: the UK will need to renegotiate at least 759 treaties').

[137] On the idea of mixed agreements, see Chapter 8, Section 4a.

[138] See especially M. Cremona, 'The Withdrawal Agreement and the EU's international Agreements' (2020) 45 *EL Rev*. 237.

A good illustration here is the EEA Agreement. The Agreement is a mixed agreement, which defines its two 'contracting parties' as, on the one hand, the 'EFTA States' and, on the other hand, the '[Union] and the [EU] Member States'.[139] The United Kingdom, while listed as a Member State of the European Union, was here never an 'independent' signatory party but only a contracting party *qua* membership of the Union and, once its Union membership ended, the EEA Agreement materially ceased to apply to the United Kingdom.

For both 'pure' EU agreements and 'bilateral' mixed agreements, the United Kingdom will need to renegotiate them if it wants to retain them.[140] With regard to 'multilateral' mixed agreements, on the other hand, matters are different. Whenever the United Kingdom is an 'original' contracting party in its own right, all treaty obligations incurred under a mixed agreement will be retained after Brexit. This is—with some minor exceptions—the case for the WTO Agreement.[141] The United Kingdom indeed remains a member of the WTO after its withdrawal; and in the absence of an alternative partnership agreement with the Union, its relationship with the Union would fall back to be governed by WTO terms.

4. Frameworks for the Future: Hard and Soft Brexits

What will the future relationship between the United Kingdom and the European Union look like?* While the United Kingdom will, of course, try to get a 'bespoke' agreement that works best for itself, what models has the EU so far developed for third States wishing to be closely associated with the Union? Three such models have been much discussed in the past five years. They are: the EEA model ('Norway model'), the Customs Union model ('Turkey model'), and the Free Trade Agreement model ('Canada model').

In terms of economic association with the single market, each of these models offers less than EU membership but more than WTO membership, with the 'Norway model' offering the 'softest' possible Brexit and the 'Canada model' offering the least 'soft' Brexit in this context (see Figure 20.5). By contrast, a 'hard' Brexit will occur if no form of economic partnership between the United Kingdom and the European Union is found. This 'WTO model' shall be discussed first.

[139] Agreement on the European Economic Area ('EEA Agreement') [1994] OJ L1/3, Art. 2(b) and (c).

[140] On these so-called 'continuity agreements', see J. Larik, 'Brexit, the EU–UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) 114 *AJIL* 443.

[141] Under Art. XI(1) WTO Agreement, 'original membership' is defined as the contracting parties of the GATT 1947 as well as the European Union; and since the UK was an original member of the GATT, it will remain an independent member of the WTO.

*This Chapter was completed prior to the conclusion of the "EU-UK Trade and Cooperation Agreement" on 24 December 2020.

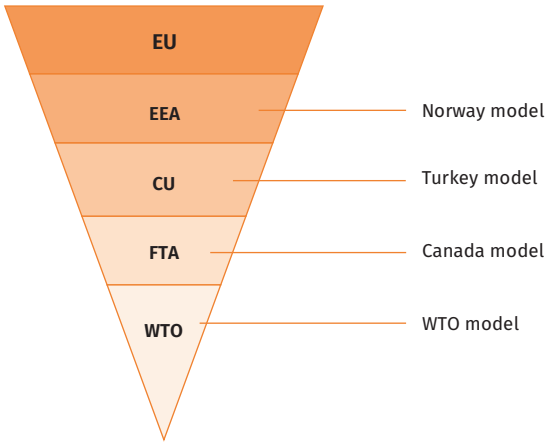

Figure 20.5 Declining levels of economic integration

a. A 'Hard' Brexit Without a Trade Agreement: The 'WTO Model'

What will happen if no special trade agreement is concluded between the United Kingdom and the European Union by the end of the transition period?[142] In that case, a 'hard' Brexit occurs in which the United Kingdom will fall back into the World Trade Organization and onto WTO terms. 'WTO terms' are the 'standard terms' of international trade to which more than 160 States have today signed up. The WTO Agreement thereby follows a complex structure that we have looked at in Chapter 19, Section 1c/aa. Its historical core lies in the 1947 GATT, which deals with the free movement of goods; but the WTO Agreement also lightly covers trade in services (as well as other matters). Following Brexit, the United Kingdom would, without much change,[143] automatically resume its independent membership in the World Trade Organization.

What are the fundamental trade principles under the 'WTO Model'? The GATT makes a fundamental distinction between tariff barriers and non-tariff barriers with only the former being a legitimate instrument of protectionism. A State wishing to limit its international trade with the outside world can, in principle, no longer employ quantitative restrictions or discriminatory national laws but must

[142] We saw in Section 3 that the transitional period ends on 31 December 2020. During that time, the United Kingdom remained part of the EU internal market and its customs union.

[143] The exact nature of the UK's rights and duties as a WTO member are still being worked out today. For a discussion of this point, see F. Baetens, 'No Deal is Better than a Bad Deal'? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net' (2018) 55 *CML Rev*. 133. See now also Regulation 2019/216 on the apportionment of tariff quotas in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union [2019] OJ L38/1.

channel its 'protectionist' ambitions into tariffs. Behind the special status of tariffs as the sole legitimate instrument of economic boundary control, lie historical as well as pragmatic reasons.[144]

By contrast to the EU Treaties, the GATT therefore expressly allows for customs duties and customs checks as legitimate barriers to international trade. They are, however, subject to a famous WTO principle: the 'most-favoured-nation' (MFN) principle. According to the MFN principle, any customs advantage granted by one State to another must automatically be accorded to *any third State* trading in a like product.[145] The sole exception to this MFN principle recognized within the GATT can be found in its Article XXIV, which states:

> The [WTO Members] recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements . . . Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area[.][146]

What does the MFN principle mean for trade between the United Kingdom and the European Union? It means that in the absence of a specific free trade agreement, neither the United Kingdom nor the European Union can unilaterally decide to favour each other by not imposing any customs duties vis-à-vis the other. If the UK thus wanted to lower tariffs for goods coming from Europe, it would also have to do this for the rest of the world; and in the case of the European Union, such a move will be out of the question. In the event of a 'hard Brexit', the European Union will consequently have to extend its 'normal' tariffs to the United Kingdom; and a selection of the most important tariff rates under its 'Common Customs Tariff' can be found in Figure 20.6.[147]

[144] K. W. Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press, 1970), 25ff.

[145] See Art. I(1) GATT: 'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.'

[146] Art. XXIV (4) and (5) GATT.

[147] These figures are taken from House of Lords, European Union Committee, 'Brexit: trade in goods', available at https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/129/129.pdf.

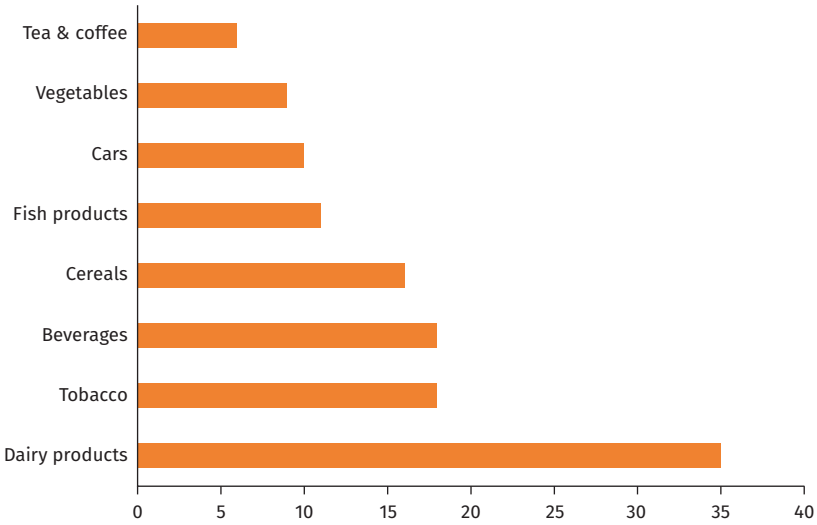

Figure 20.6 Average EU-bound tariff rates (selection)

b. Towards a Future Partnership: Of Hard Choices and Red Lines

What are the British wishes for a future partnership agreement and what are the British 'red lines' here? Her Majesty's Government, early on, spelled out a number of principles in its White Paper 'The United Kingdom's Exit from and New Partnership with the European Union'. The most important principles here were: 'taking [back] control of our own laws', 'maintaining the Common Travel Area' with Ireland, 'controlling immigration', 'ensuring free trade with European markets', and 'securing new trade agreements with other countries'.[148]

When measured against the three existing economic partnership models, mentioned earlier, which model comes closest to the British position? Each of the three models will formally give back full 'sovereignty' to the United Kingdom; yet, from a substantive point of view, participation in the EEA would still amount to following three-quarters of European Union legislation.[149] With regard to the ability to fully control immigration, the EEA option would also not work, as 'the free movement of persons is a key element of the EEA Agreement'.[150] A customs union or a free trade agreement would, consequently,

[148] White Paper, 'United Kingdom's Exit from and New Partnership with the European Union', available at www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper. Among the 12 principles mentioned, these are principles two, four, five, eight, and nine.

[149] This is the estimate offered by the Norwegian government, EEA Review Committee, 'Outside and Inside: Norway's Agreement with the European Union'), available at www.europarl.europa.eu/meetdocs/2009_2014/documents/deea/dv/0226_13_/0226_13_en.pdf.

[150] V. Reding, 'Free Movement of People and the European Economic Area' in EFTA Court, *The EEA and the EFTA Court: Decentred Integration* (Hart, 2014), 193. However, this does not (!) mean that there are no control or better safeguard mechanisms to limit the inflow of workers from other EEA States.

present better options when it comes to the British principles of 'taking back' control and 'controlling immigration'. However, the idea of a customs union between the United Kingdom and the European Union has also been ruled out because it would not allow the United Kingdom to conclude its own international trade agreements with the rest of the world. The only model that thus remains would be the Canada model.

The European Union has, in principle, accepted this choice in favour of a comprehensive free trade agreement with the United Kingdom. Yet it has also insisted on a number of EU 'red lines'. They have been expressed, early on, by the European Council as follows:

> A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. The European Council recalls that the four freedoms are indivisible and that there can be no 'cherry picking' through participation in the Single Market based on a sector-by-sector approach, which would undermine the integrity and proper functioning of the Single Market. . . . As regards the core of the economic relationship, the European Council confirms its readiness to initiate work towards a balanced, ambitious and wide-ranging free trade agreement (FTA) insofar as there are sufficient guarantees for a level playing field.[151]

The starting point for the Union here is that no form of economic association with Britain can ever grant it full access to the single market. Full 'membership' of the single market can only be achieved through full membership of the Union; and all non-membership arrangements will consequently only offer *partial* access to the single market. In the past, the 'golden rule' of Union association has thereby always been this: the degree to which a third State is willing to accept *positive* integration via Union legislation will directly determine the degree to which it is entitled to enjoy the benefits of *negative* integration via access to the single market. But more than that, whatever form of economic association is chosen, the Union will insist on a 'level playing field' that guarantees a balance of rights and obligations. Both of these 'red lines' are not at all meant to 'punish' the United Kingdom; they exist to preserve the integrity and survival of the Union and its internal market.[152]

[151] European Council, Guidelines (23 March 2018), paras 7–8; available at www.consilium.europa.eu/en/meetings/european-council/2018/03/23/art50/.

[152] Let me make one personal comment on the 'indivisibility' of the four fundamental freedoms here. This Union red line is not based on the claim that the four freedoms cannot be legally separated. It is rather based on the idea that the four fundamental freedoms are a social compromise; and to unravel that compromise runs the danger of inviting other States to reduce the European Union to an essentially economic project without a 'human face'. For the European 'Single Market' is meant to offer 'big' businesses as well as 'little' workers a stake in the European project. To reduce or take away the freedom of persons from that 'package deal' would fundamentally undermine one of the values most associated with the benefits of European integration and further perilously undermine the social legitimacy problems of the European Union. For the opposite view, C. Barnard, 'Brexit and the Internal Market' in F. Fabbrini (ed.), *The Law & Politics of Brexit* (Oxford University Press, 2017), 201.

Have the two visions from the United Kingdom and the European Union found some common ground? Both parties have indeed committed to a joint 'Political Declaration setting out the Framework for the Future Relationship'.[153] The latter states:

> [T]he Parties agree to develop an ambitious, wide-ranging and balanced economic partnership. This partnership will be comprehensive, encompassing a Free Trade Agreement, as well as wider sectoral cooperation where it is in the mutual interest of both Parties. It will be underpinned by provisions ensuring a level playing field for open and fair competition . . . It should facilitate trade and investment between the Parties to the extent possible, while respecting the integrity of the Union's Single Market and the Customs Union as well as the United Kingdom's internal market, and recognising the development of an independent trade policy by the United Kingdom.[154]

This formulation offered a good starting compromise at the beginning of the EU–UK trade negotiations. Yet already by May 2020, dark clouds and significant disagreements had occurred.[155] They primarily related to the Union's insistence on a 'level playing field'. The central idea here is this:

> Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. . . . These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters.[156]

Can this Union 'red line' be negotiated away? At the time of writing, the United Kingdom government still hopes this can be done. What relative bargaining power will it realistically have to achieve a tailor-made British deal? Its absolute and relative trading power vis-à-vis the Union can be gleaned from Table 20.2. Constituting the fifth largest national economy in the world, the United Kingdom is certainly in a stronger negotiating position than Norway, Turkey, or Canada; yet, in relative

[153] The 'Political Declaration' was attached to the Withdrawal Agreement, and can be found at [2019] OJ C384 I/178.

[154] Ibid., para.17.

[155] Consider the loud and bitter 'complaint letter' sent by the British negotiators to the Union's chief negotiator on 19 May 2020.

[156] Political Declaration (n. 153), para. 77.

Table 20.2 Absolute and relative trading power

Economic size (GDP, $bn)	EU trading partners (% EU trade)
United States (18,569)	United States (17.5)
European Union (16,398)	China (14.8)
China (11,199)	Switzerland (7.2)
Japan (4,939)	Russia (6)
Germany (3,467)	Turkey (4)
United Kingdom (2,619)	Norway (3.5)
France (2,465)	Canada (1.8)

terms, it still only represents one-fifth of the economic size of the European Union (minus the UK). And the trade relations with the Union reflect that economic imbalance: for whereas the EU is by far the largest trading partner for the United Kingdom with approximately 50 per cent (!) of all external trade, British trade will only represent between 15 and 20 per cent of all trade conducted by the Union. So, even if the United Kingdom will be one of the most important trading partners of the EU after its withdrawal, its relative bargaining power is decidedly smaller than that of the EU.

This economic imbalance is joined by a 'legal' imbalance. Legally, the Union is simply not an 'easy' negotiating partner when compared to the unitary United Kingdom. The Union is composed of various and diverse Member States that will need to find a compromise among themselves; and, in the best-case scenario, this means a qualified majority in the Council under the Union's Common Commercial Policy.[157] However, as the Canada Agreement shows, the Union may be forced, by its Member States, to choose a mixed agreement and, in such a situation, the 'bespoke' British agreement would have to safely pass 27+1 parliamentary veto points. This makes the Union much less flexible in its negotiations; and this degree of 'inflexibility' is further increased by the very fact that the Union has a written constitution, whereas the United Kingdom has not. The Union negotiator as well as the Union's own legislature are always bound by the fundamental principles of the Union legal order—a legal limitation that has, at times, perplexed a country that has come to reify the supremacy of parliamentary politics over the supremacy of constitutional principles.

[157] For a discussion of the scope and nature of the EU's Common Commercial Policy, see Chapter 19, Section 1.

Conclusion

From the very start, Britain's feelings towards European integration were complex. An imperial and global power at the end of the Second World War, its economic and ideological commitments often differed fundamentally from those in 'Europe'. It therefore should have come as no surprise that the original invitation to join the Schuman Plan was rejected. Britain's decision to join the 'common market' in the 1970s was predominantly of an economic nature; and its profound doubts about any 'federal' or 'political' union were a constant theme throughout its membership.

Britain's critical attitude towards transfers of legislative powers to the European Union did find numerous expressions in a wide range of 'opt-outs'. They had given the United Kingdom a unique place within the Union: 'No other country has the same special status in the EU.'[158] And yet, even this half-way house 'inside' and 'outside' the European Union could not prevent a British withdrawal from the Union. Triggering the 'withdrawal' procedure in Article 50 TEU, the reasons quoted for leaving were the wish of the British people to restore 'national self-determination' and to become again a fully sovereign State in the international sphere.[159]

This chapter has tried to explore some of the—innumerable—legal issues created by Brexit. Section 2 started by giving a quick overview of the drafting history of Article 50 so as to better understand its nature and content. The provision grants, as we saw earlier, an unconditional and unlimited right of withdrawal to any Member State. The only condition mentioned is the—procedural—obligation to negotiate a withdrawal agreement so as to guarantee a smooth exit. Such a Withdrawal Agreement has now been concluded by the United Kingdom and the European Union and Section 3 explored the nature and content of that Agreement. Many issues, however, remain intractable and here, most importantly of all, the Irish border question. Much, then, depends on what the 'future-relations' agreement between the United Kingdom and the Union will look like. Section 4 here tried to look into the future by analysing the various options on offer (see Figure 20.7).

Affiliation with the European Economic Area would undoubtedly represent the 'softest' Brexit. Yet it would mean that the United Kingdom principally accepts the free movement of persons while also committing itself to shadowing a significant proportion of EU legislation. These consequences could to some extent be avoided

[158] HM Government, 'Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union', at www.gov.uk/government/publications/alternatives-to-membership-possible-models-for-the-united-kingdom-outside-the-european-union, para. 2.10.

[159] The official Art. 50 letter can be found at www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50.

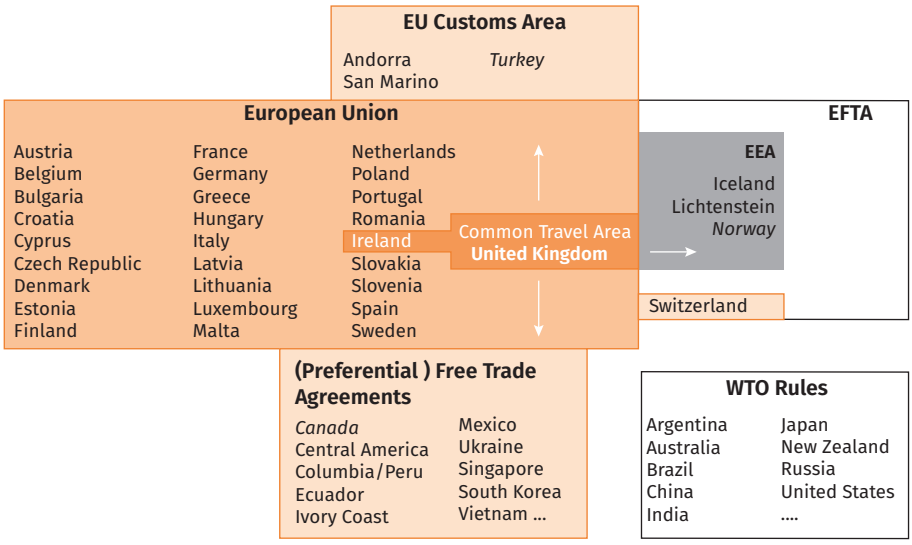

Figure 20.7 *Quo vadis* United Kingdom?

if the United Kingdom joined a customs union arrangement. It would here retain control over immigration, yet it would not gain access to the EU internal market in services; and this arrangement would also significantly limit its capacity to conclude future international trade agreements with third States. What about a comprehensive free trade agreement? The latter option seems today the sole option left in the light of the joint 'Political Declaration' attached to the EU–UK Withdrawal Agreement.

But no one knows the future; and we must wait and see what the next months and years hold in store for the United Kingdom–European Union relationship. From the European Union's side, the door to membership always remains open;[160] and, who can tell, perhaps after its divorce the United Kingdom's next marriage will be one of political love instead of economic convenience.

Further Reading

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[160] Art. 50(5) TEU: 'If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.' For a brief discussion of the accession process under Art. 49 TEU, see Chapter 19, Section 4d.

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S. Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 *EL Rev*. 222