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# DISCUSSION PAPER

## Brexit: Half In, Half Out or Right Out?

*Andrew Duff*

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Ever since the British people misspoke in that famous referendum in June 2016, the British establishment has been scrabbling around to find a compromise between Remain and Leave. This presents a legal, political and intellectual challenge for both British and European leaders. Can a country be both half in and half out of the European Union? There is no formal category of associate or second-class membership of the EU. If a state is not a member of the Union it is a third country in terms of EU and international law. If it applies to join the EU, as any European state may, there are tight hoops to crawl through before being accorded candidate status (think Bosnia), and after that, if lucky, accession status (think Serbia). Laborious negotiations then proceed for several years before admission to the status of member state (Croatia the latest, in 2013).

Three states – Norway, Iceland and Switzerland – got stuck during the accession process because, once the ramifications of full EU membership became clearer, they changed their mind about joining. The first two have forged (with tiny Liechtenstein) a European Economic Area agreement with the EU through which they enjoy most of the privileges of full membership without any of the rights of full membership. Switzerland, understandably, balked at that option and now finds itself in a litigious swamp of bilateral agreements with the EU and its member states. None of these four European countries are members of the EU customs union. That privilege belongs for a third country to Turkey (with the exception of agriculture), which has to accept the common external tariff of the EU but is not part of the common commercial policy.<sup>1</sup> None of those countries enjoy 'frictionless' trade with the EU. Customs checks are needed to levy the right level of VAT and excise duties, to certify rules of origin and to apply the EU's health and safety norms. Being on the outside is complicated – and far more so than most British politicians think.

Jeremy Corbyn, Labour leader, who as an MP has never missed a chance to vote against the EU, made a speech on 26 February in which he announced his conversion to continued UK membership of the customs union.<sup>2</sup> In a variation on the theme, however, as prime minister he would also demand full access to the single market subject to the UK's ability to "negotiate protections, clarifications or exemptions" where it wants them, for example on labour mobility, state aids and competition policy. Furthermore, unlike Turkey, Labour would also want its own trade policy while playing a part (unspecified) in the EU's commercial policy. Unlike Norway, the UK under a Labour government would not be content simply to take every rule sent its way by Brussels. Labour declines to accept the famous level playing field on offer from the EU. The most that can be said about Mr Corbyn is that he is at least ambitious for Brexit. And what he says is important because he might very well become prime minister.

## The benefit of hindsight

Former prime ministers John Major (1990-97) and Tony Blair (1997-2007) disagree with Jeremy Corbyn. They want to stop Brexit in its tracks. They hope that the House of Commons, however emasculated it is by the referendum, will vote against the Article 50 withdrawal agreement in October. Their stance is predicated on two bold presumptions: first, that the EU would be happy to have the British back as full members without imposing tough political conditions; and second, that the British electorate would change its mind about Brexit if offered the chance to do so in a second referendum.

John Major and Tony Blair lack evidence to back up either of their assumptions. The more likely outcome of a defeat of the Article 50 treaty would be a constitutional crisis out of which Jeremy Corbyn would emerge as prime minister. And Mr Corbyn is pro-Brexit. He would not get a second crack at the Article 50 negotiations even if he asked for it: the fact is that the secession treaty is a fairly technical affair that will do the job of relieving the EU of its obligations to the UK and vice versa in an orderly manner.

The two ex-leaders should be listened to with care, however, when they speak alarmingly of the dangers of Brexit. They have form. Under their leadership the decline of Britain's influence in Europe accelerated. It was their willingness to diverge increasingly from the European mainstream that led inexorably to Cameron's glib decision to hold an In/Out referendum. Where Thatcher, Major, Blair and Brown sowed, Cameron reaped.

So, on 1 March we heard Mr Blair's speech to the European Policy Centre in Brussels with more than usual interest.<sup>3</sup> He was as lucid as he was unpersuasive. He believes the British people will change their mind about Brexit if only the EU could solve the problem of immigration (which he sees as the main impulse behind the referendum result).

"Europe knows it needs reform. Reform in Europe is key to getting Britain to change its mind."

And the EU should reform itself in a British direction. Mr Blair certainly gets marks for consistency: this was also his policy when in office. Today, however, he badly underestimates the degree of latent hostility in the EU towards Britain and he grossly overestimates the EU's own capacity for reform. The areas he singles out for reform are fiscal policy (for the Eurozone), energy supply and immigration policy – none of which the EU will be able to tackle without a formal shift of competence up from the member states to the EU level (which he as prime minister never countenanced). If anyone were in any doubt about how resistant the EU is to political reform, behold Mark Rutte's speech in Berlin (2 March).<sup>4</sup> See also the almost entirely negative results of the European Council's institutional discussions on 23 February.<sup>5</sup>

## Secession treaty

If proof were needed that the Article 50 withdrawal agreement is mainly a technical exercise, we had it on 28 February when the Commission published its draft text.<sup>6</sup> This is what the House of Commons will have to vote on in the autumn. It is a clear and well-structured draft which succeeds in the main in translating the political agreement of the Joint Report of December 2017 into legal language.<sup>7</sup> For the first time we see how the terms of the secession treaty are to be applied. The arrangements for governance are robust and comprehensive. They include the establishment of a new independent authority in Britain to oversee the rights of EU citizens staying on, and the setting up of a new institution in Brussels dubbed the Joint Committee.

The Commission proposes a wide remit for the Joint Committee, co-chaired by the UK and EU, to implement, apply and interpret the agreement (Article 157). The Committee, and five or more specialised committees, will seek to resolve problems technically and politically before they escalate into litigation. Decisions of the Joint Committee will be made by consensus and will have binding effect. Disputes must be brought to the Joint Committee, which may, at any point, refer the matter to the European Court of Justice for a ruling that will be binding on both parties. The UK will retain full access to (though not membership of) the European

Court for the duration of the transition period. The Court may impose penalties. In extremis, either the UK or the EU may suspend all or part of the agreement (with the exception of the chapter on citizens' rights), and the EU may restrict Britain's participation in the internal market in a proportionate and relevant way.

The UK government needs to apply itself particularly to two aspects of the draft secession treaty. The first concerns the rights of British nationals resident in EU states, where the draft does not envisage an EU regulation to ensure the continued access of British ex-pats to free movement across the Union (Article 32), since it would leave the matter up to the discretion of individual states.

The second issue concerns the timetable, where the draft simply foresees the closure of the transition period on 31 December 2020 (Article 121). This may be convenient for the EU's bean counters because it coincides with the end of the Union's current multiannual financial plan, but such a deadline is too abrupt for the reaching of an agreement on the final relationship. It is vital, therefore, that there is a provision for the extension of the transition period, including a specified decision-making procedure for such an extension and the stipulation that it should only be deployed to link the end of the transition period with the coming into force of the final UK-EU treaty. This second stage of the transition could even be called an implementation period. Anything less would oblige everyone to change their regulations twice – once to leave the EU and fall back on WTO rules, and once again to recuperate from the shock.

## **The Irish Protocol**

The British media has paid no attention to these critical governance matters because it is scandalised by the fact that the Commission's draft text includes a protocol on the Irish border which both Theresa May and Jeremy Corbyn felt impelled immediately to declare unacceptable. It must be recalled, however, that the Joint Report of December 2017 outlined three options for Ireland. The first is the best scenario, namely a deep and comprehensive free trade agreement between the EU and UK that would avoid a hard border and protect North-South cooperation as well as commerce between the whole island of Ireland and Great Britain. The second would be a package of smart customs and border control arrangements to be proposed by the UK government.

It is the third option, involving a joint commitment by the UK government and the EU to establishing full regulatory alignment between Northern Ireland and Ireland, should the first two options not materialise, which is the stuff of the Commission's controversial draft protocol.<sup>8</sup> Brussels defends its decision to publish the document on the grounds that it has heard nothing concrete from London about either of the first two options. The Commission also points out that the "common regulatory area" which is proposed in the draft protocol does not affect the whole of the *acquis* but is limited only to trade in goods that is subject in all normal cases to customs controls at international borders. Further, Article 15 makes it clear that the protocol will not be applicable if the future UK- EU trade negotiations reach an agreement which avoids a hard border and protects the Good Friday Agreement.

The over-reaction in London to the appearance of the draft protocol suggests, first, that the UK has not properly digested the nature of the political commitment it made in December and, second, that the UK establishment has never realised the degree to which the 1998 Good Friday Agreement pooled sovereignty between Britain and Ireland with respect to the future of Northern Ireland. Not a happy omen.

## **Association agreements**

All of which leads us once again to reflect on the future relationship. The Union has developed a plethora of alternative forms of international agreements with third countries, most of which merely involve trade (think Canada or Japan).

The Union's most ambitious and far-reaching rules-based trade and investment partnership with a neighbouring European country was reached with Ukraine in 2014. It creates a deep and comprehensive

free trade area (DCFTA) with the steady elimination of tariffs and tariff quotas and a wide harmonisation of norms that align key sectors of the Ukrainian economy with that of the EU's internal market. WTO rules on non-tariff barriers are incorporated in the DCFTA. It is designed to achieve a level of approximation with the *acquis* that will allow the EU and Ukraine to sign an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA). Sanitary and phytosanitary measures are assured. Customs facilitation and cooperation arrangements are provided for, alongside measures to combat fraud. Unlike normal FTAs (think Canada), there is the right of establishment in both the services and non-services sectors. Eventually, investors will enjoy the same regulatory environment in Ukraine as in the EU. Reciprocal arrangements will apply in the area of public procurement, and Ukraine commits to aligning itself with EU state aids and competition policy. There are chapters on free movement of capital, intellectual property, energy supply, transparency and sustainable development.

The agreement offers Ukraine an unprecedented level of access for a third country to the EU internal market, including associate membership of various EU agencies where access to the internal market is relevant or where the deepening of future economic relations is mutually desired. There are also important chapters on collaboration in the fight against crime and terrorism and on foreign, security and defence policy – all of which it would be vital to replicate and build on for the UK.

The governance arrangements of this new-style association agreement are necessarily elaborate. There are permanent joint institutions established at ministerial, parliamentary and technical levels, a platform for civil society and a tripartite tribunal for the arbitration of disputes (EU, Ukraine and a neutral mediator). The Association Council tries to solve disputes technically and politically, only leading to litigation in the last resort. Unlike the static European Economic Area arrangements with Norway and Iceland, or its problematic relations with Switzerland and Turkey, the EU has embarked on a more dynamic relationship with Ukraine, Georgia and Moldova. There are, naturally, several common features between these modern association agreements with emergent neighbours, on the one hand, and the old-style agreements forged out of necessity with frustrated candidate countries, on the other. But it is clear which model better suits the EU's interests as it tries to craft a future, dynamic relationship with its retiring, former member state.

The EU-Ukraine agreement took seven years to complete, but Georgia and Moldova, which used the Ukrainian template as the basis for their own negotiation of similar deals, took only three years.<sup>9</sup> Usefully, provision was made for these association agreements to enter into force provisionally before all member states had ratified them.

## **Mansion House**

Theresa May gave her third set-piece speech on Brexit at Mansion House in London on 2 March.<sup>10</sup> Of the three it was her best. She faced up to truths she had previously sought to avoid. She confirmed that she accepts the basis of the EU's case, set out in its original guidelines of April 2017, that a country seceding from the EU leaves the customs union and internal market, and that, accordingly, present levels of trade will be diminished after Brexit. She was clear that divergence from the European *acquis* will have adverse trade consequences for the UK. She effectively rebuffed the Brexiteers who claim that regulatory equivalence is neither desirable nor necessary in order to trade with the EU. She wants to maintain high regulatory standards – thereby sinking the Singapore option beloved of her gung-ho nationalists. There will be no British race to the bottom.

Mrs May laid down some challenges to the EU side, too. Drawing explicitly on the Ukraine example, she observed that it was possible to align with the EU in some areas but not in others. She rebuffed Mr Barnier's argument that Britain faces an invidious binary choice between Norway on the one hand and Canada on the other. Under its Association Agreement, Ukraine has different levels of market access depending on the degree of regulatory harmonisation, sector by sector. This is what she wants for Britain.

Her overall intention is that UK and EU standards "will remain substantially similar". She hopes to negotiate a comprehensive rules-based system of mutual recognition. She finds it "hard to see how it would be in the

EU's interests for the UK's regulatory standards to be as different as Canada's". She continued:

"What is clear is that for us both to meet our objectives we need to look beyond the precedents, and find a new balance. As on security, what I am seeking is a relationship that goes beyond the transactional to one where we support each other's interests. So I want the broadest and deepest possible partnership – covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today."

Mrs May's speech was received initially with predictable scorn from her political opponents in Britain and from those in the EU who have not been paying attention to Brexit. Indubitably she can be criticised for not delivering the same speech very much earlier. Certainly there are still ambiguities in what she says – notably on the rules-based character of the trade deal she hopes to strike – which will only be clarified in the detailed negotiation process. Surely she could have said more about the critical issue of governance of the association agreement. And she was silent on the question of labour mobility. But May's Mansion House speech was a constructive step forward. She sounded more self-confident. And her basic objective of a large and complex treaty covering trade, investment and political collaboration is now quite clear.

### **New guidelines**

The prime minister has given enough for the European Council, at its meeting on 22-23 March, to deliver new guidelines to the Commission to get cracking on drafting the political declaration to be attached to the Article 50 treaty that will define the framework for Britain's future relationship with the EU.

The Mansion House speech must also be followed through by rapid action on the UK side. Chancellor of the Exchequer Philip Hammond must take the initiative on financial services. Justice minister David Lidington needs to flesh out the scale, scope and intensity of the future institutional relationship, not least with regard to the juridical tribunals that will be needed to police such a complicated and unprecedented package deal. The UK should invite the EU to consider the establishment of a joint EU-UK court in which, to reflect the balance of advantage, judges from the European Court of Justice in Luxembourg maintain a majority. And the British government needs to be more honest about its preparedness to respect the jurisprudence of the EU Court even where it escapes its direct jurisdiction.

More work is needed on concrete proposals for practical customs arrangements, including anti-smuggling measures in Northern Ireland. The UK must accelerate its putting in place new regulatory authorities in Britain, independent of the political ministries, on which the Commission, and the EU agencies to which the UK eventually prescribes, can rely on to authenticate regulatory equivalence.

### **Grunts and squeals**

The Council and Commission must now use the leverage they have to extract from London a clearer commitment to the objective of a comprehensive association agreement. When the European Council pronounces its first official words on the future association with Britain, we can be sure of the usual grunts and squeals from the BBC's Today programme. For some in London and Belfast it will be a shock to discover the obligations that come with privileged partnership. But as Mrs May well knows there are more important things at stake than short-term British politics. The world is watching Europe's ability to ride out the British crisis. The test for the Union is to live up to its treaty commitment to develop a special relationship with post-Brexit Britain based on a new balance of rights and obligations. There are only weeks left to find the key to that new neighbourly regime of enduring partnership.

In his Brussels speech, Tony Blair was correct to warn of the danger to the EU of dealing Britain a really bad hand.

"Britain out of Europe will ultimately be a focal point for disunity ... a competitive pole to that of Europe, economically and politically to the detriment of both".

It is absolutely in Europe's interest to hug Britain as close as possible. In its present unreformed condition, poised uneasily as it is between the confederal and federal, the Union would not be insulated from damage wrought by a belligerent, nationalistic Britain sulking 40 kilometres off Calais. The EU's immediate interest lies in keeping the British within its regulatory orbit. The EU's long-term strategy must be to return with more confidence to its historic mission of promoting the ever closer union of the peoples of Europe – not excluding the British peoples. For everyone's sake, the United Kingdom is better half in than right out of Europe.

***Andrew Duff was a member of the constitutional Convention and one of Parliament's representatives at the drafting of the Treaty of Lisbon. He is President of the Spinelli Group and a Visiting Fellow at the European Policy Centre. His latest book, 'On Governing Europe: a federal experiment', is just published.***

*The views expressed in this Discussion Paper are the sole responsibility of the author.*

## Endnotes

- 1 Andorra and San Marino are also part of the EU customs union, as is Monaco by virtue of its customs union with France.
- 2 <https://blogs.spectator.co.uk/2018/02/full-text-jeremy-corbyns-brexit-speech-2/>
- 3 <https://institute.global/news/tony-blairs-speech-european-policy-centre>
- 4 <https://www.government.nl/documents/speeches/2018/03/02/speech-by-the-prime-minister-of-the-netherlands-mark-rutte-at-the-bertelsmann-stiftung-berlin>
- 5 <https://verfassungsblog.de/eu-leaders-agenda-whos-afraid-of-reforms/>
- 6 [https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf)
- 7 [https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union\\_en](https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en)
- 8 Based on paragraph 49 of the Joint Report.
- 9 The legal basis for an Association Agreement is Article 217 TFEU, negotiated under the procedures of Article 218. The strategic goal is spelled out in Article 8 TEU.
- 10 <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>

**European Policy Centre**  
**14-16 rue du Trône, 1000 Brussels, Belgium**  
**Tel: +32 (0)2 231 03 40 - Fax: +32 (0)2 231 07 04**  
**email: [info@epc.eu](mailto:info@epc.eu) - twitter: [@epc\\_eu](https://twitter.com/epc_eu)**

**[www.epc.eu](http://www.epc.eu)**



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