(Re)Solving the governance puzzle for the future UK-EU relationship

Brexit is a plan in the making. A positive and durable relationship is essential. We need a multilateral solution that works for the UK, the EFTA States including Switzerland, and the EU, writes ***Michael-James Clifton****.*

On 28 September 2020, the President of the European Council, Charles Michel stated that "an arc of instability has emerged around us" and referred to Russia, Ukraine, Belarus, Libya, Syria, Turkey, Africa. He continued: "To the west, Brexit. In the wake of the referendum, the European Union was shaken by the result. It was a choice in favour of national sovereignty that felt like a failure in the construction of Europe. Where do things stand today? The United Kingdom has had to come to terms with our quiet strength. The truth of the matter is that the British are faced with a dilemma. What type of society do they want? … The answer to that question will determine what level of access we can grant to our internal market."

In my view, President Michel's view is based on a number of misunderstandings. As the last few years have shown, Brexit is a plan in the making. Indeed, the consequences flowing from the Brexit referendum, and the present government's actions in particular, are also disorienting domestically. The policy choices give expression to different perspectives and different currents of feeling and are not necessarily consistent nor coherent. There was some strength to the idea that the UK should be addressed in a special manner as a 'former EU Member State', as Prof. Kalypso Nicolaides proposed. However, there has been an insistence that the UK be treated as a standard 'third country', which factually it is not.

It would appear almost trite to observe that Brexit refers to the United Kingdom's withdrawal from the EU on the basis of Article 50 TEU. But, as Theresa May stated 'Brexit means Brexit.' It is self-defined and self-defining. Consequently, Brexit has been understood to also mean the 'separation', rather than withdrawal, from the European Economic Area ("EEA"). Nevertheless, the understanding of 'separation' as 'withdrawal' has been accepted by the EEA's Contracting Parties. On 30 January 2020, two days after the EEA EFTA Separation Agreement was signed, the EEA/EFTA States amended the Surveillance and Court Agreement to this effect. This understanding was affirmed on 25 May 2020 by the 'joint statement of the members of the EEA Council', (i.e. both EU and EFTA/EEA members) meeting informally.

Clearly, the UK and the EU will have a future relationship, of one sort or another. But the future relationship negotiations are beset, I would suggest, by actions unlikely to build a positive rapport. On the EU-side, examples include the blocking of UK accession to the Lugano Convention, Channel Tunnel jurisdiction, and the lack of onward movement for UK nationals (having exercised their existing free movement rights).

Date originally posted: 2020-10-13

Permalink: https://blogs.lse.ac.uk/brexit/2020/10/13/uks-future-relationship-with-the-eu-should-be-multilateral-including-efta-states/

Blog homepage: https://blogs.lse.ac.uk/brexit/

Vera Kratochvil (publicdomainpictures.net)

The Lugano Convention regulates jurisdiction and the recognition and enforcement of judgments between the EU, Denmark, Iceland, Norway and Switzerland. On 8 April 2020, the UK deposited an application to accede to the Lugano Convention. The Financial Times reported on 27 April 2020 that the "European Commission had advised the bloc's member states earlier this month that a quick decision was 'not in the EU's interest'." It is notable in that regard that the UK's accession to the Lugano Convention has been publically supported by Iceland, Norway, and Switzerland. Dr Louise Merrett and Prof. Catherine Barnard have contended that "This is not an area where there can be any level playing field argument."

Concerning the Channel Tunnel, the Treaty of Canterbury 1986 provides for disputes to be resolved by consultation and then arbitration. An arbitration has been conducted on the basis of Article 19 of the Treaty of Canterbury with a partial award issued in January 2007. Despite this, following a proposal by the Commission, COREPER agreed a mandate on 9 September 2020 to empower France to negotiate an amendment to the Canterbury Treaty, which would "apply the same set of rules over the whole infrastructure, including in its section under UK jurisdiction" requiring an "amend[ment of] the Statute of the European Court of Justice in a manner that respects the Court's prerogatives…"

Date originally posted: 2020-10-13

Permalink: https://blogs.lse.ac.uk/brexit/2020/10/13/uks-future-relationship-with-the-eu-should-be-multilateral-including-efta-states/

Blog homepage: https://blogs.lse.ac.uk/brexit/

On the UK side, Clauses 44, 45 and 47 of the UK Internal Market Bill, as it currently stands (as introduced into the House of Lords on 30 September 2020) are intentionally drafted to breach the Withdrawal Agreement and to "have effect notwithstanding inconsistency or incompatibility with international or other domestic law." The Bill puts a question mark over the durability of the Withdrawal Agreement. These clauses are unwise tactically, and mar the UK's reputation both internally, not least vis-à-vis the devolved administrations, and abroad. As Ewan Smith put it, "[i]t is a limited brand of despotism, sheltered by law officers who ought to know better."

The UK does have a decision to make as to its future relationship with the EU, as President Michel states — but, in my view, this is rather whether it should be bilateral or multilateral. The EFTA States are the only major Western European countries to be outside the EU. In considering the UK-EU negotiations, their experiences provide valuable guidance. Three of the four EFTA States, Iceland, Liechtenstein and Norway, share a multilateral approach with the EU through the EEA, while Switzerland and the EU have a bilateral relationship.

The UK's current approach to its future relationship with the EU is bilateral. This may well change in the future as Brexit continues to evolve. Against all backgrounds, what should be sought is a positive and durable relationship. This should be based on an agreement which is balanced in terms of substance and methods for resolving disputes.

The present EU-UK negotiations may or may not reach an agreement. However, even if they do, they are likely to result in a rather thin or "skinny" arrangement. Assuming that an agreement is reached: how durable is it likely to be? How long before the parties wish to supplement or supersede it? And critically, will there be mutual motivation to do so?

Prof. Anand Menon contends that "a deal would at least allow the two sides to keep talking". If one supposes that such continuing (and continuous) negotiations would intend to create a number of side agreements, then the UK would be a similar position to Switzerland. The author is somewhat sceptical, particularly as to the level of motivation in the EU. The EU has been very clear that it does not consider its relationship with Switzerland as a 'model'. Indeed, the EU's Task Force 50 put it this way "The situation as regards Switzerland: Shortcomings of the existing framework i.e., not a model".

The EU has wanted an institutional framework with Switzerland for more than a decade. The evolution of this policy is interesting. At first, the EU proposed 'docking' – that Switzerland maintains its bilateral agreements with the EU, but that its agreements, as they apply in Switzerland, be subject to the EFTA Surveillance Authority and the EFTA Court, with an added Swiss Member and Judge respectively. Switzerland then proposed that the Swiss Federal Supreme Court be competent, in parallel to the ECJ. After this, Switzerland proposed that the ECJ have 'direct' jurisdiction, which would issue binding, but not final, decisions. The current proposal is the draft EU-Switzerland institutional framework agreement 2018. This provides for an 'arbitral tribunal' which would be obliged to seize the ECJ if EU law or treaty law based on EU law is 'implied'. This is based on the EU's association agreements/deep and comprehensive free trade agreements with Ukraine, Moldova, and Georgia. The institutional framework agreement also contains a chapter on State aid, and provisions enabling the mutual monitoring of either party's application of the bilateral agreements.

As I have previously written, as a consequence of the ECJ's judgment being binding on the 'Ukraine-style' arbitral tribunal such an arbitral tribunal is more closely bound to the ECJ than an EU Member State's supreme court would be, due to the lack of any equivalent to the doctrine of *acte clair*. Simply put, it would require the UK or Switzerland to submit itself to the court of the other side. It is not readily apparent why such a mechanism would fulfil the needs or desires of either the UK or Switzerland, and it has been heavily criticised, in particular by Prof. Carl Baudenbacher, the former President of the EFTA Court in his legal opinion for the Economic Affairs and Taxation Committee of the Swiss National Council.

Date originally posted: 2020-10-13

Permalink: https://blogs.lse.ac.uk/brexit/2020/10/13/uks-future-relationship-with-the-eu-should-be-multilateral-including-efta-states/

Blog homepage: https://blogs.lse.ac.uk/brexit/

Lord Frost emphasised in February 2020 that the UK wants to run its own affairs. Yet, a 'Ukraine-style' arbitral tribunal is provided for in Articles 170-181 of the UK-EU Withdrawal Agreement, and paragraphs 130 to 132 of the Political Declaration. In the meantime, the Swiss draft institutional framework agreement remains unsigned. The EU sought to use a stick rather than a carrot. While Switzerland sought clarifications, the EU ruled out any renegotiation, and Switzerland's stock exchange was denied equivalency. On 20 September 2020, former Swiss Federal Councillor Johann Schneider-Ammann stated that the framework agreement with the EU jeopardizes Switzerland's sovereignty. On 29 September 2020, Gerhard Pfister, head of the Swiss Christian Democrats, one of the parties in government, called the role of the ECJ in the institutional framework agreement 'toxic'. Two weeks ago the social partners came out against the entire agreement describing it as 'clinically dead'.

If Brexit is a plan in the making, we are in search of a solution. Such a solution must work for all: the UK, the EFTA States including Switzerland, and the EU. There must be a mechanism for resolving disputes which is compatible 'autonomy of the EU legal order' as understood by the ECJ, but which equally is compatible with the sovereignty of the other parties.

Michel Barnier, the EU's Brexit negotiator, has raised the concept of the UK docking to the EFTA institutions. The EU also proposed it to Switzerland. It must be presumed therefore that it is acceptable to the EU. Docking has long been advocated by Prof. Carl Baudenbacher. Dr Elizabeth Howell has argued that docking to the EFTA institutions would respect the UK's Brexit stance as regards the supremacy of the ECJ.

The docking of countries would essentially entail the UK or Switzerland making use of the EFTA Surveillance Authority and the EFTA Court, to monitor compliance with their own trade agreements with the EU, and to act as a judicial forum for disputes arising from their agreements. It would involve docked countries nominating an ESA College Member and EFTA Court Judges. Some benefits of docking to the EFTA institutions for these countries would be that it would provide them with an efficient, effective and impartial mechanism to resolve disputes. It would avoid the sovereignty pitfalls of a 'Ukraine-style' arbitral tribunal.

Suella Braverman MP, then Parliamentary Under-Secretary of State at DExEU, stated in March 2018 that "the UK Government are not in favour of docking with the EFTA Court, to put it simply and directly." Perhaps though, this multilateral solution may be adopted as the plan for Brexit continues to be developed. Such a solution would recognise what has worked for the EEA/EFTA States for the past 25 years.

This article gives the views of the author, and not the position of LSE Brexit, nor of the London School of Economics. The views contained in the contribution are presented in the context of academic debate, are strictly personal to the author, and do not represent those of the EFTA Court. This blog post is based on the author's speech to the Benelux Parliament, given in a personal capacity, on 2 October 2020 as part of the Parliament's "Topical debate on the consequences of Brexit for the Benelux countries". Any errors are attributable to the author's alone.

Date originally posted: 2020-10-13

Permalink: https://blogs.lse.ac.uk/brexit/2020/10/13/uks-future-relationship-with-the-eu-should-be-multilateral-including-efta-states/

Blog homepage: https://blogs.lse.ac.uk/brexit/