

Brexit, A Drama: The Interregnum

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Introduction

In an earlier article I charted the legal and political events from David Cameron's Bloomberg speech in 2013 until the outcome of the referendum, including the beginning of the legal challenge to the way in which Article 50 TEU could be triggered.¹ This article continues the story, covering the period after the referendum to the present. The approach in the earlier article is preserved, employing the metaphor of an unfolding drama, with Shakespearian quotations appropriately chosen for each Act or Scene. This article therefore begins with Act 7, following on from Act 6 of the previous piece.

Act 7 is entitled 'In Search of a Negotiating Strategy', and is divided into three scenes. It introduces the leading political 'players' in the UK, the EU and the capitals of prominent EU Member States that shaped political developments over this period, and will continue to do so during the Brexit negotiations. The analysis then shifts to evolution of the 'plan', connoting choice between a hard or soft Brexit strategy, how this unfolded over the Autumn of 2016 and was clarified in the Spring of 2017. The final scene of this Act focuses on the fact that the Brexit plan as it evolved in Westminster was intended to be a 'plan for the UK', in which the devolved parliaments and assemblies would have voice. There was, however, a significant

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¹ P Craig, 'Brexit: A Drama in Six Acts' (2016) 41 ELRev 447.

mismatch between Westminster rhetoric and political reality, and the views of the devolved assemblies were largely ignored both substantively and procedurally.

Act 8 is entitled 'In Search of the Exit Trigger'. At the same time as the UK government was deliberating on its Brexit negotiating strategy, it was fighting a legal battle of its own making to ascertain the constitutional legal requirements for triggering Article 50 TEU. The government contended that this could be done through recourse to the prerogative, without seeking authority from Parliament. The claimants contested this assumption. The claimants won and the government lost, both in the Divisional Court and in the Supreme Court. The first scene of this Act, 'the legal', provides an overview of the central legal and constitutional arguments in the case. The second scene, 'the political', stands back and looks at the broader picture, arguing that this was a legal fight that the government was always likely to lose and never had to fight. The discussion concludes with reflection as to why the House of Commons was quiescent when afforded the opportunity for voice by the courts.

Act 9 continues the motif of search, being entitled 'In Search of an Agreement'. The story picks up after the formal triggering of Article 50, beginning with the first scene, 'reaction', connoting the response of the EU to the Prime Minister's letter triggering Article 50. The ink was barely dry on this letter, when she lost the first round of the negotiations. The UK had argued strenuously that discussion concerning withdrawal and future trade should proceed in parallel. This was rejected by the European Council, and prominent EU leaders. The negotiations were instead to be phased, such that discourse concerning trade would not begin until sufficient progress had been made on withdrawal. The negotiations did not in fact begin until 19 June 2017, because of the intervening UK general election. It is the subject of the second scene, 'temptation', which explains why the Prime Minister could not resist calling a snap election, even though she had asseverated that she would not do so. The rest, as they say, is history, with the prospects of Prime Ministerial electoral triumph dashed on the rocks of

shifting voter affiliation within but a few weeks. The scene ends with discussion of the electoral impact on the unfolding Brexit negotiations. The final scene, ‘negotiation’, charts the way in which discussions concerning the key issues of the withdrawal agreement, people, money, and borders have unfolded thus far, including the fault lines concerning future trade relations between the UK and the EU.

Act 7: In Search of a Negotiating Strategy

Scene 1: The Characters

‘What players are they?’, *Hamlet*

‘Now name the rest of the players’, *Midsummer Night’s Dream*

‘The players cannot keep counsel; they’ll tell all’, *Hamlet*

The collective memory can be short, individual recollection fragile. It is all too easy to reason with the benefit of hindsight, and to assume that the Prime Ministerial asseveration in the Lancaster House speech² that the UK was heading for hard Brexit was preordained. The speech will be examined in due course, but this outcome was not viewed as inevitable in the autumn of 2016. We should therefore begin at the beginning, in the aftermath of the referendum, with the newly anointed Prime Minister.

Theresa May placed three prominent leave campaigners in the key positions for the upcoming Brexit negotiations: Boris Johnson as Foreign Secretary, Liam Fox as Secretary of

² Prime Minister Theresa May sets out the Plan for Britain, including the 12 priorities that the UK government will use to negotiate Brexit, January 17 2017, 5 (hereafter referred to as the Lancaster House speech), <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> : Hansard 7 Feb 2017, Vol. [621] Col. [272].

State for International Trade and David Davis, who became Secretary of State for Exiting the European Union. The news media, not surprisingly, dubbed them the three Brexiteers,³ although more surprisingly they did not ascribe names to each that corresponded to their better known Musketeer forbears. There is little doubt that Boris Johnson would qualify as Porthos, but it is more difficult to assign the names of Athos and Aramis to the other two Brexiteers, who in truth did not really fit either appellation.

The insider view from the Civil Service is that the Prime Minister placed the three Brexiteers in position so that they would bear the blame if events unfolded badly, as judged by the outcome of the negotiations. There is truth in this, although the reality was more interesting, since the appointments reflected the conjunction of political necessity and political expediency. Political necessity demanded that prominent Brexiteers be placed in pole position for the UK exit from the EU, since if it were otherwise the Prime Minister, who had been a quiescent remainer, would risk the wrath of her back-bench Brexiteers. They would complain that she had jeopardized the exit deal by placing it in the hands of those who were not committed to the task. Political expediency meant that if a good deal were secured for the UK the Prime Minister could bask in the glow of managerial glory, having placed the right people in the job to secure a good outcome, whereas if the deal went sour she had time to distance herself from the negative result.

There were early skirmishes between the three Brexiteers, in particular between Fox and Johnson, with the former as the principal protagonist.⁴ It was Fox in July 2016 who presumed on his good relationship with the Prime Minister to ask that the Foreign Office should

³ <http://www.newstatesman.com/politics/uk/2016/09/meet-three-brexiteers-men-who-could-change-how-we-exit-eu> .

⁴ <http://www.independent.co.uk/voices/editorials/not-so-much-all-for-one-and-one-for-all-the-three-brexiteers-are-out-for-themselves-a7190136.html> .

lose its role in trading relationships. This was in addition to his claims voiced on a US radio show that he would be taking over a wing of the Foreign Office, as well as all aspects of UK Trade and Investment from the Business Department, and export finance from the Treasury. The Prime Minister was not amused by what became known as a ‘turf war’ between two of the Brexiteers. Her anger was explicable in part, as Simon Heffer noted, ‘by her sense that a public which voted for Brexit would expect her ministers to be getting on with it, not jockeying for position and making the political class even more despised than it already was’.⁵ Fox was duly slapped down by the Prime Minister, although Johnson did have to second some officials to Fox’s department. It remained for Jacob Rees-Mogg to exemplify his mastery of the sardonic turn of phrase, when he dismissed talk of turf wars with the quip that there was in reality nothing more serious than a little grass cutting.

In the Brexit world move begets counter move. The EU duly nominated people charged with its side of the negotiations. The Commission and European Parliament picked seasoned and trusted long term EU insiders for the job, these being Michel Barnier⁶ and Guy Verhofstadt.⁷ Barnier is a tough negotiator on behalf of the Commission, and Verhofstadt will wish to ensure that the European Parliament’s concerns as to the content and shape of the emerging deal are properly respected, even if it is not present at the negotiating table.

The dramatis personae that would shape the Brexit talks also perforce included the leaders of other EU countries. There was pronounced uncertainty in this respect in the latter part of 2016, since elections were imminent in a number of EU countries. Matters did not get

⁵ <http://www.newstatesman.com/politics/uk/2016/09/meet-three-brexiteers-men-who-could-change-how-we-exit-eu> .

⁶ https://ec.europa.eu/info/persons/director-head-service-michel-barnier_en .

⁷ [http://www.europarl.europa.eu/meps/en/97058/GUY VERHOFSTADT_home.html](http://www.europarl.europa.eu/meps/en/97058/GUY_VERHOFSTADT_home.html); <https://www.theguardian.com/profile/guy-verhofstadt> .

off to an auspicious start. While an election was not formally due in Italy until 2018, Renzi, the pro-EU prime minister, placed considerable emphasis on a referendum on constitutional reform that he had scheduled for November 2016.⁸ He duly lost and, like David Cameron before him, came to rue the day when he decided to call the referendum; Renzi resigned and Italy was only saved from an immediate election by the actions of its President.

The most pressing concern on the continent in the Autumn of 2016 was to prevent contagion from the populist dimension of Brexit, which meant praying that Geert Wilders did not succeed in the Netherlands and that Marine Le Pen did not become French President. The Dutch were the first to go to the polls in 2017, with fears that the populist Geert Wilders would gain a significant share of the vote, or even become the dominant party. It did not happen, in part because sufficient Dutch people recoiled from Wilders' extremist rhetoric, and in part because the other Dutch parties closed ranks, vowing not to enter a coalition with his party.⁹

The fact that France and Germany were to have elections in the late Spring and Autumn of 2017 was even more significant, given that the outcome was unclear. The chance that Hollande would survive in the Spring of 2017 were slim in the Autumn of 2016, although no one guessed then as to the convulsion in French politics that was to unfold six months later, with the election of Macron as President, coupled with his triumph in the parliamentary elections.

It was also not certain that Angela Merkel would survive in the Autumn of 2017. She had been the dominant leader of the dominant economy in the EU, but her fortunes waned with the unpopularity of her migration policies, which saw electoral gains for far-right parties in

⁸ <http://www.bbc.com/news/world-europe-38204189> ; <http://www.independent.co.uk/news/world/europe/italian-pm-matteo-renzi-resigns-after-crushing-defeat-in-constitutional-referendum-a7455726.html> .

⁹ <https://www.theguardian.com/world/live/2017/mar/15/dutch-election-voters-go-to-the-polls-in-the-netherlands-live> ; <https://www.ft.com/dutch-election> .

German regional elections. She was placed under further pressure by Martin Schultz who returned to the domestic political fray, having stood down as President of the European Parliament.¹⁰

The uncertainty as to the electoral map in Europe cast a shadow over preparations for the triggering of Article 50 TEU. There were concerns that whenever the Article 50 process was initiated nothing meaningful would happen until after the German elections in the autumn of 2017. This would in turn mean that the two-year clock built into Article 50 would begin to tick all-the faster if in the initial months post-triggering by the UK relatively little were to be done.

There was, as might be expected, considerable ‘diplomatic exchange’ in and around the Brexit process. Boris Johnson as foreign secretary was a central player in this respect. He treated all with pristine equality, manifest in equal disdain for his foreign counterparts. For the Germans it was Johnson’s diplomatic triumph to pronounce that he was not a Berliner, while standing next to the German foreign minister in the said city.¹¹ For the Italians, it was the jibe that they would perforce be eager to accept a good trade deal for the UK, since otherwise their precious sales of Prosecco to the UK might suffer.¹² For the EU, it was deployment of the unconventional diplomatic gambit, to the effect that the Union could ‘go whistle’ for what he alleged were extortionate payments as part of the withdrawal process,¹³ prompting the swift response from Michel Barnier that he could hear nothing, except the sound of the clock ticking as the two-year time limit ran down.¹⁴

¹⁰ <https://martinschulz.de/> .

¹¹ <http://www.politico.eu/article/boris-johnson-ich-bin-nicht-ein-berliner-anglo-german-brexit/> .

¹² <http://www.bbc.co.uk/news/uk-37995606> .

¹³ <http://www.bbc.co.uk/news/uk-politics-40571123> .

¹⁴ <http://news.sky.com/story/michel-barniers-jab-at-boris-johnsons-go-whistle-remark-10945670> .

Scene 2: The Plan

‘I like not fair terms and a villain’s mind’, *Merchant of Venice*

‘I am the master of my speeches, and would undergo what’s spoken, I swear’, *Cymbeline*

‘Twere good she were spoken with; for she may strew
Dangerous conjectures in ill-breeding minds’, *Hamlet*

The period between the referendum and the Prime Minister’s Lancaster House speech in January 2017 was characterized by uncertainty as to the direction of the UK Brexit strategy. The principal contestation within the Conservative Party was whether to pursue hard or soft Brexit, and this was so notwithstanding protestation from therein that these labels did not do justice to the range of available options. The reality was to the contrary, the appellation hard and soft Brexit accurately captured the rival positions.

Politics mixed uneasily with the economics that divided the two camps. The majority of Conservative MPs had voted to remain in the EU and were therefore more naturally inclined to a softer Brexit. The smaller group of MPs who favoured exit were more cohesive and organized, operating in the mould of a praetorian guard with a mission to ensure exit from all aspects of the Lisbon Treaty. The Prime Minister’s statement that ‘Brexit means Brexit’ had a certain aphorismic ring to it, albeit one that palled with its oft-repeated iteration. It served to cloak substantive uncertainty as to what the government’s negotiating strategy would be, while allowing the Prime Minister to vaunt her credentials as being committed to exiting the EU, notwithstanding that she had been on the remain side, although largely quiescent, prior to the referendum.

Hard Brexiteers believed from the outset that a deal whereby the UK could secure access to the single market without having to accept free movement was very unlikely to be secured. Control over immigration was central to their demands, and they were not willing for

this to be sacrificed or qualified to gain access to the single market. They were, moreover, unwilling to accept single market access, since that would almost inevitably entail subjection to the jurisdiction of the CJEU, and would result in the UK being a rule-taker, as opposed to a rule-maker, since it would be bound by EU rules that it had no voice or vote in. The sovereigntist aspect of the hard Brexiteer argument found this to be doubly distasteful.

They sought a quick divorce, without expending time on trying to get a deal that combined access to the single market without having to accept free movement, since they thought that this would not be forthcoming. The quick divorce would mean a thin withdrawal agreement, with the details of the relationship between the UK and the EU to be worked out in some detail thereafter. There was general talk of this being some kind of free trade deal, along with the many other free trade deals that we are told the UK would secure with countries including China, Australia, USA and Russia.

This vision was combined with talk from some hard Brexiteers, such as John Redwood, that the UK could and should leave the EU without going through the process laid down in Article 50 TEU. The UK should, on this view, simply repeal the European Communities Act 1972, thereby removing the juridical basis for the application of EU law in the UK.¹⁵ It should, moreover, refuse to pay any sum by way of divorce settlement, with Redwood asserting that the UK should not waste more than ten minutes on the divorce proceedings, and that it should send the firm message that there would be no divorce settlement.¹⁶

The defining feature of the soft Brexit option was the desire to secure continued access to the internal market, and the customs union, driven by concern as to the possible disruptive economic impact to trade in goods and services if this access was closed. The concerns in this respect were especially prevalent in relation to banking and financial services, given that this

¹⁵ <https://www.ft.com/content/7badcbe2-3a0b-11e6-9a05-82a9b15a8ee7> .

¹⁶ <http://www.express.co.uk/news/politics/778146/John-Redwood-no-EU-divorce-settlement-billion-payment> .

sector was especially dependent on the ‘passporting’ rights allowing trade in such services across the EU, which would be lost if the UK exited from the single market. This was more especially so, since if there was a loss of single market access and no trade agreement negotiated between the UK and the EU, then UK-EU trade relations would default to World Trade Organization rules, which are weak in relation to services.¹⁷

A route to securing access to the single market would be through the European Economic Area.¹⁸ The EEA Treaty allows access to the single market, but there are, however, obligations in relation to the other freedoms that constitute the economic core of the EU, including free movement of workers.¹⁹ Some of those who favoured the soft Brexit option desired limits to free movement over and beyond those currently allowed by the EEA. It was therefore not fortuitous that the talk was of a custom-made agreement that would suit the needs of the UK, facilitating access to the single market, while at the same time legitimating limits to free movement over and beyond those in the EEA. This is because the provisions within the EEA schema that allow for temporary limits to free movement are narrowly defined.

Article 112(1) EEA stipulates the substantive criteria and provides that a contracting party can take unilateral measures if ‘serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising’. The exceptional nature of such limits is reinforced by Article 112(2), which states that ‘such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation’. There are, in addition procedural constraints in Article 113 EEA, which imposes an obligation on the contracting party that is considering taking safeguard measures to notify,

¹⁷ M Matsushita, T Schoenbaum, P Mavroidis and M Hahn, *The World Trade Organization, Law, Practice, and Policy* (Oxford University Press, 3rd edn, 2017).

¹⁸ <http://www.efta.int/eea>.

¹⁹ Arts 28-30 EEA.

without delay, the other contracting parties through the EEA Joint Committee, and provide all relevant information; the contracting parties then enter into consultations in the EEA Joint Committee with a view to finding a commonly acceptable solution; and the contracting party cannot, subject to limited exceptions, take safeguard measures until one month has elapsed after the date of notification. Any safeguard measures that are adopted must then be subject to review every three months with a view to their abolition. Article 114 EEA provides furthermore for a quid pro quo, such that if a safeguard measure taken by a contracting party creates an imbalance between the rights and obligations under the EEA Agreement, then any other contracting party can take ‘such proportionate rebalancing measures as are strictly necessary to remedy the imbalance’.

Uncertainty as to whether the government would pursue hard or soft Brexit continued throughout Autumn 2016. Political speeches were subject to forensic examination with a rigour normally reserved for biblical exegesis. It was, therefore, unsurprising that the Prime Minister’s speech to the Conservative Party conference in October 2016 should be subject to such close scrutiny.²⁰ While not unequivocal, it revealed that Theresa May was leaning towards hard Brexit. The people’s voice should, said the Prime Minister, be respected. Article 50 TEU was to be triggered no later than the end of March 2017. There would be a Great Repeal Bill ‘to get rid of’ the European Communities Act 1972; laws would be made not in Brussels, but in Westminster, subject to adjudication by UK courts, not the CJEU; and the authority of EU law in the UK would be ‘ended forever’. The government would seek an agreement that involved ‘free trade, in goods and services’, such that British companies would have the maximum freedom to trade with and operate within the single market.

But let’s state one thing loud and clear: we are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice. That’s not going to happen. We are leaving to become, once more, a fully sovereign and independent country – and the deal is going to have to work for Britain.

²⁰ <http://www.mirror.co.uk/news/uk-news/theresa-mays-speech-conservative-party-8983265>.

The speech left some room for doubt as to the Prime Minister's intent, given the reference to continued trade within the single market. Commentators nonetheless noted the strength of the views expressed concerning immigration and the CJEU, and rightly concluded that these were not compatible with access to the single market through membership of the EEA. The Prime Minister was repeatedly pressed in the ensuing two months to state more clearly the approach that she would pursue in the exit negotiations pursuant to Article 50 TEU. Theresa May resisted this pressure until January 2017, when she duly clarified her position, and that of the government, and came out unreservedly for a hard Brexit approach.

The Lancaster House speech was, unsurprisingly, a blend of rhetoric and substance, both being designed to appeal to the multiple constituencies that were addressees of the message.²¹ There was much talk of the fact that the UK did not wish to be isolated from the EU in a post-Brexit world, and that we should all remain the best of friends. This was combined with explanation as to why the UK was, by way of temperament and tradition, ill-suited for membership of this supranational organization. The rhetoric diminished as we moved towards the business end of the speech, in which the Prime Minister set out the twelve priorities that would shape the UK's negotiating strategy. The present analysis focuses on the priorities that truly shaped the UK's stance concerning its future relationship with the EU.

Control over our own laws was accorded prominence within the priorities in the Lancaster House speech, thereby affirming the importance placed on this issue in the Prime Minister's speech at the Conservative Party conference a few months earlier, as reflected by the close similarity in wording. The UK would 'take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain'; leaving 'the European Union

²¹ Lancaster House speech (n 2).

will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast’, and those laws will be interpreted by judges not in Luxembourg, but in courts across this country’.²²

Control over immigration was equally central in the priorities articulated by the Prime Minister. Thus while there was much rhetoric concerning the UK attracting and remaining open to the best and brightest from the EU, this was immediately tempered by the statement that the ‘process must be managed properly so that our immigration system serves the national interest’.²³ It was, therefore, vital that the UK was able to control the number of people coming to Britain from the EU, and ‘as home secretary for 6 years, I know that you cannot control immigration overall when there is free movement to Britain from Europe’.²⁴ This sensitivity to immigration as ingrained by the Prime Minister’s previous time as Home Secretary, was then reinforced by reference to the wishes of the people, who had, said the Prime Minister made clear during the referendum campaign that Brexit must mean control of the number of people who came to Britain from Europe, and ‘that is what we will deliver’.²⁵

The positioning within the speech of control over law and migration spoke volumes as to the overall direction of the UK negotiating position as between hard and soft Brexit, and this was confirmed when the Prime Minister finally set out the UK’s bargaining strategy in relation to trade, which only appeared two-thirds through the list of priorities. The UK would, said the Prime Minister, ‘pursue a bold and ambitious free trade agreement with the European Union’, which should ‘allow for the freest possible trade in goods and services between Britain and the EU’s member states’.²⁶ However, Theresa May made it abundantly clear that what she was

²² Ibid 5.

²³ Ibid 6.

²⁴ Ibid 7.

²⁵ Ibid 7.

²⁶ Ibid 8.

proposing could not mean membership of the single market, since this would mean accepting the four freedoms of goods, capital, services and people. She also ruled out the possibility of being out of the EU, but a member of the single market, since this ‘would mean complying with the EU’s rules and regulations that implement those freedoms, without having a vote on what those rules and regulations are’,²⁷ and would mean accepting that the CJEU still had direct legal authority over matters in the UK. This would ‘to all intents and purposes mean not leaving the EU at all’.²⁸ The UK would not therefore seek membership of the single market, but rather the ‘greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement’.²⁹

The Prime Minister further clarified her preference for hard Brexit when she made clear that not only would the UK not be seeking membership of the single market, but that it would also not seek to remain within the EU customs union. This became apparent in the discussion of another priority, which was pursuit of free trade agreements with other countries. The UK wished to ‘get out into the wider world, to trade and do business all around the globe’,³⁰ with countries such as China, Brazil, the USA, Australia, New Zealand and India. The Prime Minister acknowledged that full membership of the EU Customs Union would legally prevent the UK from negotiating separate free trade deals with such countries, since the EU had exclusive competence over such matters. She was not willing to accept this constraint, and therefore stated that the UK would not seek full membership of the Customs Union, while affirming that the UK wished trade with the EU to be as frictionless as possible and that this might be achieved through some form of associate membership.

²⁷ Ibid 8.

²⁸ Ibid 8.

²⁹ Ibid 8.

³⁰ Ibid 9.

There was much else of importance in the Lancaster House speech, including commitments to making proper provision for the rights of EU citizens working in the UK, and vice versa; resolving the difficult issue of the border between the Republic of Ireland and Northern Ireland in a post-Brexit world; and ensuring continued cooperation between the UK and the EU on matters relating to security and counter-terrorism. There was also much assurance that the government at Westminster would negotiate a deal that was good for the entire UK, based on full deliberations with the devolved institutions. These are highly important issues, which will be examined in greater detail below. They do not, however, alter the core message that emerged from the Lancaster House speech, which was that the UK would negotiate towards hard Brexit. It was crucial to this vision that it would be possible for the UK to agree the comprehensive trade agreement within the two-year period laid down in Article 50 for the conclusion of the withdrawal agreement. Thus the Prime Minister stated that ‘I want us to have reached an agreement about our future partnership by the time the 2-year Article 50 process has concluded’,³¹ such that all that would be required thereafter was a period for implementation. This assumption is highly implausible, an issue to which we shall return below. Suffice it to say that complex free trade agreements normally take in the region of 5-6 years to negotiate.

The substantive and procedural package that emerged from the Lancaster House speech set the frame for subsequent UK deliberations concerning exit from the EU. Everything thereafter, prior to the 2017 general election, was predicated substantively on hard Brexit, and procedurally on the assumption that it was plausible for a trade deal to be concluded within the two-year time frame. This is readily apparent from the Government White Paper on Brexit, and

³¹ Ibid 10.

from the Prime Minister's formal letter triggering the beginning of the exit process under Article 50.

The Government's White Paper on Exit from the EU³² was, in effect, the Lancaster House speech fleshed out with more facts and figures. This is readily apparent from the fact that it contains the same 12 priorities as in the earlier speech, listed in the same order. The substantive message remained the same, as did the procedural assumption that the hard Brexit combined with the comprehensive free trade agreement could be achieved within the two-year time frame. The extra detail did, however, provide interesting indications of the government's thinking as to key aspects of its negotiating strategy.

Thus the reaffirmation of the centrality of taking back control over our own laws, and ending the jurisdiction of the CJEU, was complemented by new thinking as to the dispute resolution mechanisms that would prevail thereafter between the UK and the EU. The government acknowledged that 'ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution',³³ and that such dispute resolution mechanisms ensured 'that all parties share a single understanding of an agreement, both in terms of interpretation and application'.³⁴ The White Paper drew on examples of dispute resolution mechanisms in EU-Third Country agreements, such as the new EU-Canada Comprehensive Economic and Trade Agreement (CETA), which established a 'CETA Joint Committee' to supervise the implementation and application of the agreement. There were further references to such mechanisms in the North American Free Trade Agreement (NAFTA), and the World Trade Organisation (WTO). The UK would seek to draw on these examples when thinking about future relations with the EU. The principal objective was to

³² The United Kingdom's Exit from and New Partnership with the European Union, Cm 9417 (2017).

³³ Ibid [2.4].

³⁴ Ibid [2.5].

avoid the CJEU from being the dispute settlement body in any future relationship between the UK and the EU. There was, nonetheless, a sleight of hand, whether intended or not. The discourse concerning methods of dispute resolution was conducted principally against the factual backdrop of future trade relations with the EU, to be embodied in a comprehensive free trade agreement. The White Paper glossed over dispute settlement pursuant to the withdrawal agreement that embodied the terms of the divorce, which will be separate from, and prior to, any future trade deal. It will be far more difficult, legally and politically, to exclude the CJEU from the withdrawal agreement, more especially if it contains transitional provisions that prolong key articles of the Lisbon Treaty.

There was, by way of contrast, nothing substantively new in the White Paper discussion concerning control over migration, as compared to the Lancaster House speech. The chapter reads as if the brief given to the drafter was to add five hundred words to what had been said earlier, so as to make it look more authoritative in accord with the demands of a White Paper, while at the same time saying giving nothing away as to the modality for securing immigration controls, or the stringency thereof. Thus we are told that the UK will remain an open and tolerant country, which recognises the valuable contribution made by migrants to our society,³⁵ but that the ‘record levels of long term net migration’³⁶ has given rise to public concern about pressure on public services and jobs, necessitating controls over migration of a kind that cannot be done within the confines of the EU, because of the principle of free movement. The government would duly consider the options for controlling migration from the EU in a post-Brexit world.³⁷

³⁵ Ibid [5.2].

³⁶ Ibid [5.3].

³⁷ Ibid [5.9].

The trade dimension of the White Paper reinforced the position taken in the Lancaster House speech, viz that the government would ‘prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU’.³⁸ It would not, however, not seek membership of the single market, but would ‘pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement’.³⁹ Frictionless was clearly regarded as the ‘go to’ word when drafting the White Paper, as attested to by its usage but a paragraph later, when the White Paper reaffirmed that the government would not seek to remain in the EU Customs Union, but would rather seek a ‘new customs agreement with the EU, which will help to support our aim of trade with the EU that is as frictionless as possible’.⁴⁰ It is rare for White Papers to be purely about facts, and the White Paper on Exit was no exception in this respect. Presentation, unlike possession, is not nine-tenths of the game, but it is an irreducible element thereof. It comes, therefore, as no surprise that the section on trade was strongly imbued with the message that the ‘comprehensive, bold and ambitious free trade agreement’⁴¹ was a natural development for two systems that had adhered to the ‘same rules for so many years’,⁴² and that it was moreover natural that it should incorporate elements from the current single market arrangements, since it would make ‘no sense to start again from scratch’,⁴³ when the UK and the remaining Member States had adhered to the same rules for so many years. The remainder of the White Paper chapter on trade was designed to show through a plethora of charts, facts and figures the

³⁸ Ibid [8.0].

³⁹ Ibid [8.0].

⁴⁰ Ibid [8.1]. See also [8.43]-[8.50].

⁴¹ Ibid [8.2].

⁴² Ibid [8.3].

⁴³ Ibid [8.3].

interconnectedness of the UK and EU trade systems, deploying this factual premise to sustain the policy conclusion that everyone must agree that the comprehensive, bold and ambitious free trade agreement was an ideal that was readily attainable, to which all should readily subscribe. All of which is fine, subject to the caveat that the facts do not speak for themselves, and that the policy conclusion drawn therefrom is highly contestable.

The procedural dimension that played out so strongly in the Lancaster House speech was continued in the White Paper. This was the belief that Brexit could be smooth and orderly, since the withdrawal agreement and the agreement on future trade could be concluded within the two-year time frame, thereby avoiding cliff-edges and providing a smooth transition to the new world order consisting of multiple free trade agreements, including that concluded with the EU. Thus the White Paper stated that it is in ‘no one’s interests for there to be a cliff-edge for business or a threat to stability, as we change from our existing relationship to a new partnership with the EU’, and that ‘we want to have reached an agreement about our future partnership by the time the two-year Article 50 process has concluded’.⁴⁴ A note of self-doubt was, however, evident but a paragraph later, when the White Paper stated that while the government was confident that the UK and EU could reach a positive deal on future partnership, as this would be to the mutual benefit of both parties, ‘no deal is better than a bad deal for the UK’.⁴⁵ This became, like the phrase Brexit means Brexit, one of the talismanic aphorisms repeatedly iterated by the Prime Minister. The problem was that while Brexit means Brexit might grate by reason of its very ambiguity, the no deal is better than a bad deal contained substantive assumptions that were simply unquantified. It is therefore unsurprising that the ‘no deal’ scenario was strongly criticized by the select committee on Exiting the European Union. It took the view that this would be bad for the UK and the EU, and it was

⁴⁴ Ibid [12.2].

⁴⁵ Ibid [12.3].

critical of the government because it had not explained what terms would be demonstrably worse for the UK than ‘no deal’. It was therefore incumbent on the Government to ‘conduct a thorough assessment of the economic, legal and other implications of leaving the EU at the end of the Article 50 period with “no deal” in place’.⁴⁶

It was but a short time between the White Paper and the 29 March 2017 when the Prime Minister triggered the exit process under Article 50, through a formal letter sent to the President of the European Council, Donald Tusk.⁴⁷ The withdrawal letter encapsulated the same substantive agenda as previously set out in the Lancaster House speech and the White Paper: sovereign authority over our own laws, control over migration, and no membership of the single market; issues concerning the rights of EU citizens in the UK and vice-versa would be resolved, so too would the border between the Republic of Ireland and Northern Ireland, and outstanding financial liabilities; and future trade relations would be governed by a comprehensive, bold, free trade agreement between the UK and the EU. The procedural aspect of the agenda, the relationship between the withdrawal agreement and that on future trade relations, was however accorded greater prominence in the withdrawal letter than it had been hitherto. The Prime Minister stated in the notification of withdrawal letter that ‘it is necessary to agree the terms of our future partnership alongside those our withdrawal from the European Union’.⁴⁸ The importance attached to parallelism in the negotiations on withdrawal and trade is reflected in the fact that it was repeated on three further occasions in the letter.⁴⁹

⁴⁶ Select Committee on Exiting the European Union, The Government’s negotiating objectives: The White Paper (HC 1125, 2017) [293].

⁴⁷ Formal Notification of Withdrawal, 29 March 2017, <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>

⁴⁸ Ibid 2.

⁴⁹ Ibid 4, 5, 6.

Scene 3: A Plan for the 'UK'

'Stands Scotland where it did?', *Macbeth*

Come, deal justly with me', *Hamlet*

'Look, what is done cannot now be amended:
Men shall deal unadvisedly sometimes,
Which after hours gives leisure to repent', *Richard III*

The EU reaction to the UK plan came swiftly. It will be considered in due course. Before doing so, it is important to be mindful of the fact that the plan was presented for the UK as a whole. This was, in a formal sense, a statement of the obvious, since it is the UK that is a member of the EU, and the Westminster Parliament retains competence over foreign policy. The UK entered the EU, and Brexit is destined to take the UK out. The flip side to this conception of indivisibility was that the plan was meant to be beneficial to all parts of the UK, including Scotland, Wales and Northern Ireland; and they were to be accorded voice in its shaping.

These twin themes were affirmed and reiterated in the governmental papers prior to the triggering of withdrawal. By October 2016, an EU Negotiations configuration of the Joint Ministerial Committee had been established, chaired by David Davis, with the object of facilitating discourse on the 'UK approach' to Brexit. In the Lancaster House speech the Prime Minister stated that the 'devolved administrations should be fully engaged in this process';⁵⁰ this would occur through the Joint Ministerial Committee on EU Negotiations, 'so ministers from each of the UK's devolved administrations can contribute to the process of planning for our departure from the European Union';⁵¹ and the net result would be a Brexit that works for

⁵⁰ Lancaster House speech (n 2) 5.

⁵¹ Ibid 6.

the whole of the United Kingdom. Strengthening the Union was accorded a separate chapter in the White Paper, where we were once again assured that the aim was to deliver an outcome that ‘works for the whole of the UK’, and that the devolved administrations were ‘fully engaged in our preparations to leave the EU’,⁵² this picture being reinforced through a neat box inserted in the White Paper tabulating the work the Joint Ministerial Committee on EU Negotiations had done thus far.

There was, however, a gap between this rhetoric and reality. Truth to tell the substantive fault lines between Westminster and the devolved assemblies were significant, and the procedural engagement a good deal less than the reader would divine from reading the official Westminster documentation, with the consequence that while the devolved bodies exercised voice its impact at Westminster was muted.

The *substantive fault lines* were marked, with the Scots and the Welsh favouring soft rather than hard Brexit. The Scots voted by a significant margin, 62% to 38%, to remain in the EU, which prompted the immediate response from Nicola Sturgeon, the leader of the Scottish National Party, that this was a game changer, which furnished the requisite justification for a second referendum on Scottish independence if and when the Scots were minded to call it. The fact that this has not occurred is because she does not have the poll numbers to support independence.

The post-referendum politics were nonetheless fascinating, as Nicola Sturgeon and Theresa May jockeyed for position. They had a meeting shortly after Theresa May became PM.⁵³ Not surprisingly their respective scripts were different. For the PM the meeting was designed to show respect for Scotland, while emphasizing that the referendum was a vote taken

⁵² White Paper (n 32) [3.1].

⁵³ ‘Brexit: PM is ‘willing to listen to options’ on Scotland’, BBS News 15 July 2016, <http://www.bbc.com/news/uk-scotland-scotland-politics-36800536> .

by the UK as a whole, that she saw no particular warrant for giving the Scottish people a second shot at independence, and that the Brexit negotiations would be run from and by Westminster. For the leader of the SNP the meeting was designed to emphasize the distinctiveness of the Scottish vote, emphasizing by way of corollary the need for a Scottish voice to be taken fully into account during the Brexit negotiations.

The details became clearer in Sturgeon's subsequent press conferences,⁵⁴ and were readily predictable, showing a very strong inclination towards the soft Brexit option. Thus on September 27 August 2016 Nicola Sturgeon emphasized the importance of remaining in the single market and the customs union, stating that this was vital to protect Scotland's economy.⁵⁵ The Scottish Government website is unequivocal, stating that Scotland's role in the EU is essential to the Scottish Government's efforts 'to help attract business, investment and tourism, and to further Scotland's wider interests'.⁵⁶

The Scottish Government recognised 'the vital role our EU membership plays in securing the future prosperity of Scotland, and the impact the EU has upon our work to deliver sustainable growth and address long-standing inequalities in Scotland and in the wider world'.⁵⁷ This soft Brexit vision was central to the paper *Scotland's Place in Europe*,⁵⁸ where the Scottish government argued that if Scotland did not become an independent state with EU membership in its own right, then membership of the single market and customs union was the best outcome for Scotland, and should be secured even if the remainder of the UK opted for hard Brexit.

⁵⁴ <http://www.gov.scot/Topics/International/Europe>

⁵⁵ <https://firstminister.gov.scot/fm-highlights-importance-of-single-market/> .

⁵⁶ <http://www.gov.scot/Topics/International/Europe/eu-referendum>.

⁵⁷ <http://www.gov.scot/Topics/International/Europe/Action-Plan> .

⁵⁸ Scotland's Place in Europe, December 2016, <http://www.gov.scot/Resource/0051/00512073.pdf> .

Wales had voted to leave the EU, but the Welsh Government did not interpret this to mean a commitment to hard Brexit. Carwyn Jones, the Welsh First Minister, writing a foreword to the Welsh government's paper entitled *Securing Wales' Future*, stated that 'continued full and unfettered access to the Single Market is fundamental to our future'.⁵⁹ This paper was written jointly by the Welsh Government and Plaid Cymru, whose leader, Leanne Wood, reiterated the same theme, stating that 'in promoting the Welsh national interest, this White Paper solidifies the view of the involved parties that Wales should be able to benefit from continued participation in the European Single Market', and that the party supported free movement of persons from the EU.⁶⁰ The White Paper forcefully endorsed the soft Brexit option, stating that analysis showed that any significant reduction in access to the single market would be damaging, and the greater the reduction, the worse the consequences would be in terms of reduced or negative growth, with the consequence that 'full and unfettered access to the Single Market for goods, services and capital – including our key agricultural and food products – is vital for the forward interests of Wales and the UK as a whole'.⁶¹

The *procedural fault lines* were equally marked. Nicola Sturgeon reminded the reader that the Prime Minister had depicted a UK in which Scotland, Wales, Northern Ireland and England continued to flourish side by side as equal partners, drawing on this to stress the importance of voice for all parts of the UK when the negotiating strategy was being drawn up: 'the way in which the Westminster Government responds to proposals put forward by the devolved administrations will tell us much about whether or not the UK is indeed a partnership

⁵⁹ *Securing Wales' Future*, Transition from the European Union to a New Relationship with Europe, January 2017, https://beta.gov.wales/sites/default/files/2017-02/31139%20Securing%20Wales%20Future_Version%20_WEB.pdf.

⁶⁰ Ibid 5.

⁶¹ Ibid 6.

of equals'.⁶² Leanne Wood, speaking on behalf of Plaid Cymru, made the same point, stating that 'Wales has a democratic right to shape the kind of EU withdrawal that takes place' and that 'Wales' role should be to influence any negotiations which take place, rather than simply accepting that EU withdrawal can be carried out without regard to the interests of Wales, Scotland and Northern Ireland'.⁶³ The idea that Scotland, Wales and Northern Ireland would have voice and that the negotiating strategy would be the product of discourse undertaken in the JMC was, as we have seen, central to the UK government's documentation.⁶⁴

The procedural reality proved to be very different. The tensions were evident when the Prime Minister gave her Lancaster House speech, in which she opted for hard Brexit, two days before a JMC meeting, without having discussed Scotland's policy document released a month earlier. It prompted an angry response from Michael Russell, the Scottish Minister responsible for JMC discussions, who stated that Scotland 'must not be treated with contempt but as an equal partner in the negotiating process'; that 'Scotland overwhelmingly rejected a hard Brexit'; and that it was 'extremely disappointing that the Prime Minister chose to disregard the process and make a significant announcement about her position two days before the JMC even considered our paper'.⁶⁵

The tensions resurfaced in an exchange between David Davis and Michael Russell in March-April 2017.⁶⁶ The letter from David Davis indicated that the JMC process was working as intended, and that there was very considerable agreement between Westminster and the

⁶² Scotland's Place in Europe (n 58) v.

⁶³ Securing Wales' Future (n 59) 4.

⁶⁴ See above (ns 50-52).

⁶⁵ <https://news.gov.scot/news/jmc-meeting-on-brexit>

⁶⁶

http://www.parliament.scot/S5_European/General%20Documents/CTEER_Minister_M.Russell_2017.04.27.pdf

governments of the devolved regions, notwithstanding the fact that the UK government had rejected membership of the single market and customs union that was central to plans advanced by the devolved governments. Michael Russell's view was starkly different. He re-emphasized the importance that Scotland attached to membership of the single market, distinguishing this from some form of limited access to which the Prime Minister aspired, and denied that substantial agreement had been reached on the majority of issues. Russell was, moreover, sharply critical of the way in which the JMC process had operated. Choosing his words carefully, Russell accepted that points raised in *Scotland's Place in Europe* 'could have been addressed'⁶⁷ in the JMC discussions over the preceding months. There must, said Russell, be adherence to the principles underlying the JMC process, such that the devolved administrations should have a meaningful opportunity to contribute to the framing of the negotiation process. He expressed disappointment that 'the substance of those meetings has not enabled proper discussion or engagement on strategic choices that we face', such that the 'result is a negotiating position reached solely by the UK government rather than what was set out in the terms of reference, namely to agree a UK approach'.⁶⁸

Russell's scepticism is borne out by academic commentary. Sionadh Douglas-Scott noted that reaction to JMC (EN) meetings by the devolved administrations has been one of 'frustration that their views were not being taken into account'.⁶⁹ The Westminster government's treatment of the devolved administrations was further in evidence in the withdrawal letter which, while acknowledging Northern Ireland as a special case, made no

⁶⁷ Ibid 5.

⁶⁸ Ibid 5-6.

⁶⁹ S Douglas-Scott, 'Brexit and the Scottish Question', in F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press, 2017) Chap. 6.

mention of special arrangements for Scotland and Wales.⁷⁰ Douglas-Scott expressed concern as to the extent to which the consultative process has been taken seriously.⁷¹

All in all, there are reasons to be anxious about Scotland's place in the Brexit negotiations. The Article 50 letter stresses that, 'we will negotiate as one United Kingdom, taking due account of the specific interests of every nation and region of the UK as we do so.' However, it is unclear, to say the least, that the UK Government has given any meaningful consideration to the Scottish Government's proposals for a differentiated solution for Scotland, as published in its paper *Scotland's Place in Europe*. It is also unclear what negotiating as 'one United Kingdom' means in any case. Does this mean that devolved interests could be ignored if this benefited the UK population (of which England makes up over 84%) overall? UK interests could be determined in a variety of ways, some of which would be more equitable to devolved needs than others.

Act 8: In Search of the Exit Trigger

Scene 1: The Legal

'Insisting on the old prerogative
And power i' the truth o' the cause', *Coriolanus*

'Faith I have been a truant in the law,
And never yet could frame my will to it;
And therefore frame the law unto my will', *Henry VI, Part I*

'Why what need we
Commune with you of this, but rather follow
Our forceful instigation? Our prerogative
Calls not your counsels, but our natural goodness
Imparts this; ...
We need no more of your advice: the matter,
The loss, the gain the ordering on't is all
Properly ours', *Winter's Tale*

Governance is quintessentially about multi-tasking. Thus was it so that, while the powers that be in Westminster were deciding on the negotiating plan for Brexit, Autumn 2016 also saw the

⁷⁰ Notification of Withdrawal (n 47).

⁷¹ Douglas-Scott (n 69).

government engaged in legal battles as to the mode of triggering exit. Article 50(1) TEU stipulated that a state could withdraw in accord with its constitutional requirements. The issue was whether, as a matter of UK constitutional law, this could be done by the executive acting through the royal prerogative, or whether approval had to be forthcoming from Parliament via a statute authorizing the start of the Brexit process. The question was simple and sharply defined. The answer proved to be more contentious. The litigation process was attended by countless blogs, the case became the most discussed prior to the court's ruling, and the hearing before the Supreme Court was televised. The ensuing analysis is a bare summation of the contending views of the majority and the dissent in *Miller*. The contrasting arguments were considerably more complex. Resolution of these intricate arguments is equally difficult, and cannot be undertaken here. I regard the majority decision as correct and my views can be found in detail elsewhere.⁷²

The Supreme Court in *Miller*⁷³ upheld the Divisional Court,⁷⁴ and decided that the government could not trigger Article 50 TEU to begin withdrawing from the EU without statutory authorization from Parliament. The case concerned structural constitutional review, in which the Supreme Court demarcated the ambit of legislative and executive power, the latter being exercised through the prerogative.

Courts and commentators alike were forced to confront ambiguities in the well-known constitutional precepts through which limits to prerogative power are commonly expressed: the prerogative cannot be used to alter the law of land or affect rights, and that it cannot be deployed so as to circumvent statute that covers the same ground. It was contestation as to the meaning

⁷² P Craig, 'Miller, Structural Constitutional Review and the Limits of Prerogative Power' [2017] PL forthcoming.

⁷³ *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁷⁴ *R. (on the application of Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

of these precepts that divided the majority and the dissent in *Miller*, and disagreement in this regard also underpinned academic discourse.

There are three dimensions to legal control over the prerogative: the first is as to whether it exists; the second is as to its extent; the third concerns the manner of exercise. *Miller* turned on contestation as to the second of these issues. The word ‘extent’ in this context captures the limits or constraints placed on an admitted prerogative. It is a matter for the courts to decide, and the decision is normative in nature. The courts will determine the types of constraint they believe should, as a matter of principle, be placed on prerogative power. Thus the courts have fashioned constraints that the prerogative cannot alter the law of the land or effect rights, and that it cannot be used where it would place statute law in abeyance or frustrate statutory rules. The precise meaning of these constraints can be contestable, so too can their application in a particular case. There are, therefore, always two related, but distinct, issues when we consider the extent of the prerogative: what types of constraint should, as a matter of principle, be placed on prerogative power; and how does a constraint apply to the facts of a particular case.

The first limit to prerogative power is that it cannot alter the law of the land, a proposition derived from the *Case of Proclamations*. It concerned the legality of two proclamations made by the King: one prohibited new buildings in London, the other the making of starch from wheat. The court held that the King cannot by his proclamation change ‘any part of the common law, or statute law or customs of the realm’.⁷⁵ Nor could the King create any new offence by way of proclamation, for that would be to change the law. It was for the courts to determine the existence and extent of prerogative powers. The principal beneficiary was Parliament, since the case concerned the extent of monarchical regulatory power independent

⁷⁵ (1611) 12 Co. Rep. 74 at 75.

from the legislature. The denial of such power meant that if the King wished to attain these ends he must do so through statute.

The principles embodied in the *Case of Proclamations* were reinforced by the Bill of Rights 1688, which provided that ‘the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall’⁷⁶ and that ‘the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall’.⁷⁷

The application of the principle from *Proclamations* in *Miller* raised difficult issues concerning the meaning of ‘the law’ that could not be changed through the prerogative, and the nature of the rights that could not be affected by use of the prerogative. The majority of the Supreme Court regarded EU law as a novel source of law within the UK legal order.⁷⁸ It, and the rights emanating from it, was therefore part of the law of the land that could not be altered through recourse to the prerogative. The majority acknowledged that the EU rights brought into UK law through the ECA 1972 could vary from time to time, and that this would cease when the UK withdrew from the EU. This did not, however, mean that withdrawal, with the consequential impact on rights, could be done through the prerogative without Parliamentary authorization. There was, said the majority, no indication that Parliament intended this. There was a vital difference between changes in domestic law resulting from variations in EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the EU.⁷⁹

⁷⁶ Bill of Rights 1688, 1 Will. and Mar. Sess.2, c. 2, Article 1.

⁷⁷ Bill of Rights 1688, 1 Will. and Mar. Sess.2, c. 2, Article 2; Sir Stephen Sedley, ‘The Judges’ Verdicts’, <https://www.lrb.co.uk/2017/01/30/stephen-sedley/the-judges-verdicts>.

⁷⁸ *Miller* (n 73) [65].

⁷⁹ *Ibid* [76]-[78], [83].

The principal dissent was by Lord Reed, who held that the prerogative over the making and unmaking of treaties was a fundamental part of the UK constitutional order, which could only be curtailed expressly or by necessary implication. The ECA 1972 contained no express limitation on the Crown's prerogative power, nor were there any words through which to infer that this was the necessary implication of the statute.⁸⁰ Lord Reed denied that triggering Article 50 TEU would impact on rights. Parliament had, he said, recognized in the ECA 1972, section 2(1), that rights given effect under the ECA could be altered or revoked from time to time without the need for a statute, and he rejected the distinction drawn by the majority between such changes in rights and that resulting from withdrawal from the EU.

The second constraint on prerogative power is that it cannot be exercised if statute covers the same area. The seminal case was *Attorney General v De Keyser's Royal Hotel*,⁸¹ which arose out of the Crown's decision, acting under the Defence of the Realm Regulations, to take possession of a hotel to accommodate personnel of the Royal Flying Corps. The Crown contended that the hotel owners had no legal right to compensation. The Defence Act 1842 gave broad powers to the Crown to take possession of land, subject to compensation. The Crown maintained that the taking was, however, justified by the prerogative, which was said to warrant temporary seizure of property in time of emergency, without any legal right to compensation.

Their Lordships were unpersuaded by the argument. Lord Atkinson held that it would be absurd to construe a statute so as to enable the executive to disregard limits contained therein by reliance on the prerogative. Lord Parmoor was equally clear in this respect: when executive

⁸⁰ Ibid [160], [177], [194], [197].

⁸¹ *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

power had been directly regulated by statute, the executive could no longer use the prerogative, but had to observe the restrictions which Parliament imposed in favour of the subject.⁸²

The decision in *Miller* did not turn on application of the *De Keyser* principle as such, but the Supreme Court nonetheless said some important things about it. The majority accepted the principle from *De Keyser*, and its application in subsequent cases. It held, moreover, that it was highly improbable that Parliament had the intention that ministers could subsequently take the UK out of the EU without the approval of the constitutionally senior partner, which was Parliament.⁸³ If that had been the intent it was, in accord with the principle of legality, incumbent on Parliament to have made this clear, and thus pay the political cost of the choice. There was, said the majority, no evidence that the ECA 1972 was intended to clothe the executive with that far-reaching choice.⁸⁴

Lord Reed also accepted the principle in *De Keyser*, but did not believe that it was applicable to this case. It was central to *De Keyser* that Parliament had regulated the area in relation to which the executive sought to exercise the prerogative. This was not so here. The 1972 Act did not regulate withdrawal from the EU. It merely recognized the existence of Article 50 TEU, but said nothing as to who should take the decision to invoke Article 50.⁸⁵

It is important not to lose sight of the value that underpins the twin constraints on prerogative power in *Proclamations* and *De Keyser*, which is the sovereignty of Parliament. It is Parliament that is the legitimate legislator within the UK and the limits on prerogative power protect that authority from being undermined. If the executive could change the law of its own volition, it could thereby bypass legislation without the need for amendment and repeal, hence

⁸² Ibid 575.

⁸³ *Miller* (n 73) [85]-[90].

⁸⁴ Ibid [87]-[88].

⁸⁵ Ibid [233].

the principle in *Proclamations*. If the executive could use the prerogative where Parliament had already addressed the issue in a statute it could then avoid the legislation crafted by Parliament, hence the principle in *De Keyser*, and its extension to cases where the prerogative would frustrate the legislation. *Proclamations* protects Parliamentary sovereignty directly, by preventing recourse to the prerogative where it would change the law; *De Keyser* protects sovereignty indirectly, by precluding use of the prerogative where the formal law is left intact, but the executive seeks to circumvent it by use of the prerogative.

The value underlying recognition of a prerogative power to manage international relations, including the making and unmaking of treaties was identified by William Blackstone.⁸⁶

This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.

For Lord Reed, ‘the value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th’,⁸⁷ and Timothy Endicott voiced strong views to the same effect.⁸⁸ It can be readily acknowledged that unanimity, strength and dispatch are important values in the conduct of international relations. It is accepted that the executive has primary responsibility for negotiation of treaties, which cannot be done in a collective.

⁸⁶ Sir W Blackstone, *Commentaries on the Laws of England* (1765-1769), Book I, Chapter 7, ‘Of the King’s Prerogative’.

⁸⁷ *Miller* (n 73) [160].

⁸⁸ T Endicott, “This Ancient, Secretive Royal Prerogative”, UK Const. L. Blog, 11 Nov 2016, <https://ukconstitutionallaw.org/>.

The reality was, however, that the rationale for according the executive prerogative power over treaty making had scant if any relevance to the issue in *Miller*, which was whether Parliament should have to give statutory approval before triggering Article 50 TEU. It is not self-evident that unanimity, strength or dispatch should be regarded as the principal values in this determination; it is not self-evident that the executive has advantages in making this decision over Parliament; and it is not self-evident that the executive values would be placed in jeopardy by requiring a vote in Parliament. Consider these issues in turn.

The decision to trigger Article 50 and leave the EU ranks among the most significant peace time treaty determinations ever made by the UK. It is an issue on which the country was fiercely divided, notwithstanding the referendum. The UK constitutional tradition is one of parliamentary as opposed to popular sovereignty, which is why the referendum was not legally binding, although it was clearly important in political terms. The values that matter here are those that are fundamental to a parliamentary democracy, viz that major decisions are not made without approval by Parliament.

It is not self-evident that the executive would have any advantages over Parliament when making this determination. The executive may claim epistemic advantages and experience in relation to some aspects of foreign policy. The reality is that such advantages were not relevant to the current determination, or to analogous decisions of this nature. MPs knew the issues concerning EU membership as well as the executive.

Nor is it self-evident that requiring a vote in Parliament placed the executive's strategy for triggering Article 50 TEU in jeopardy. To the contrary, the date chosen by the executive, the end of March, had no especial magic; it was not jeopardized by the parliamentary vote, which was accomplished in a matter of weeks; and if the government had not contested the issue in litigation parliamentary approval would have been secured earlier.

Scene 2: The Political

‘God speed the Parliament! Who shall be the speaker?’, *Henry VI, Part I*

‘I have thought on it, it shall be so. Away, burn all the records of the realm: my mouth shall be the parliament of England’, *Henry VI, Part II*

‘We must not rend our subjects from our laws,
And stick them in our will’, *Henry VIII*

The previous scene began with the observation that governance quintessentially entails multi-tasking. That trite observation is true, but does not serve to explain why the government chose to embark on any particular strategy, nor does it cloak any such strategy with the veneer of rationality, howsoever defined. The salient issue for present purposes is why the government fought the action, not why Ms Miller initiated it. There are various possible answers, but none is terribly satisfactory. It might be contended that the government truly believed that it should be able to trigger Article 50 TEU, through recourse to the prerogative. It might alternatively have felt worried by the prospect of backbench revolt if a Bill to authorize withdrawal were to be placed before Parliament.

The former rationale is, however, unconvincing, since the government lawyers would have told the Prime Minister that this was assuredly not going to be an open and shut case. This was more especially so because they had to fight the case with one hand tied behind their backs, since they could not, for political reasons, argue that Article 50 was revocable and thus could not easily rebut the claimant’s argument that triggering of Article 50 would terminate rights derived from EU law. The government lawyers would, moreover, have known, and duly advised the Prime Minister, that you simply do not know what will happen when you get into court. The only thing that you know is that the matter is now no longer in your control. All of which was borne out by the litigation, since not only did the government lose, but the judgment

elaborated constraints on the prerogative relating to constitutional statutes that had not been articulated hitherto.

The latter rationale is also weak, given that the government did not encounter any real difficulty in securing passage of the legislation authorizing the triggering of Article 50. Barely a day after the *Miller* judgment the European Union (Notification of Withdrawal) Bill 2017 was introduced, which had undoubtedly been drafted considerably earlier. The House of Commons duly passed the Bill by a large majority. There were attempts to impose substantive and procedural constraints on how the government conducts the negotiations, but they were not successful, and the Bill secured its majority without any amendment. There were some rocky moments in the House of Lords, but there was never any likelihood that it would block the legislation, which was duly enacted as the European Union (Notification of Withdrawal) Act 2017.

We return then to the inquiry posed above, as to why Theresa May chose to fight the case. It might be contended that she did not wish to show weakness in her early days in the job. Yet the reality is that she could have secured her aims without doing so, and without resort to litigation. It would have been perfectly possible for the Prime Minister to have said in October 2016 that while she did not accept that she had, as a matter of law, to secure parliamentary authorization before triggering Article 50, she would nonetheless place the appropriate Bill before Parliament. The statute would have been duly enacted well before Christmas without litigation, thereby avoiding the costs and avoiding also being told what to do by the courts.

The very fact that the House of Commons imposed no substantive or procedural amendments to the exiguous Bill authorizing the triggering of Article 50 TEU is indeed telling from a constitutional and political perspective. We should be wary of a story whereby lawyers are seen, and perhaps see themselves, as the saviour of the Constitution, riding valiantly to the rescue of the stricken maiden, Parliament, thereby saving it from the clutches of the wicked

dragon, viz the all-powerful executive. There is a real danger of constitutional solecism here. Sovereignty resides with Parliament, and has done so for circa 400 years. It does not reside with the executive. It is therefore unarguable that Parliament could, at any time since June 23rd 2016, have enacted a statute requiring the government to seek its approval before triggering Article 50. If it had done so it would have been game over. The specific statute would have trumped the prerogative. Parliament did not therefore need to await rescue by the bold legal prince on its white charger.

This begs the question as to why Parliament was quiescent in this respect, to which the answer is eclectic. Some MPs might genuinely have felt that the issue should, for reasons of principle, be left to the executive; others, particularly, hard Brexiteers, were committed functionally to the prerogative, since they were concerned in the aftermath of the referendum at attempts to undo their victory on the floor of the House. The principal explanation as to why most MPs were not clamouring for voice through enactment of a statute was in reality rather different. They were fearful of backlash from their constituents who had voted to leave, who would be angered if they felt that their victory was in danger of being undermined by demands for such a statute, a fear made all the more real by the fact that it would be whipped up by certain sections of the media. Much easier for MPs to remain largely silent on this, such that demands for Parliamentary voice rarely rose to susurrations let alone clamour, and rely instead on the courts through the instrumentality of the *Miller* judgment to give Parliament voice without the attendant political dangers of actively seeking it.

Act 9: In Search of an Agreement

Scene 1: Reaction

‘This weighty business will not brook delay’, *Henry VI Part II*

‘tis not well that you and I should meet upon such terms as now we meet’, *Henry IV, Pt I*

‘A time, methinks, too short to make a world-without-end bargain in’, *Love’s Labour’s Lost*

Article 50(2) TEU provides for negotiation of a withdrawal agreement, ‘taking account of the framework for its future relationship with the Union’. It is for the European Council to provide the guidelines for negotiation, which frame discussions leading to the withdrawal agreement. It is then the Commission, as affirmed by Article 218(3) TFEU, that conducts the detailed negotiation. The European Parliament has no formal role, but since it has a veto on the withdrawal agreement, its views will perforce be taken into account during the negotiation. It is the Council acting by qualified majority that concludes the agreement, after obtaining the consent of the European Parliament.

The ink was barely dry on the Prime Minister’s withdrawal letter when the first reaction was forthcoming from the EU. A central tenet of the UK government’s approach to the negotiations was, as we have seen, that there should be parallel discussion on withdrawal and trade. The response from President Tusk to the Prime Minister’s letter was succinct in its rejection of parallelism. He outlined the fundamental principles that would inform the negotiations, which were: minimization of disruption caused by UK withdrawal; securing agreement on the rights of EU citizens living in the UK; ensuring that the UK honoured its financial commitments; and avoiding a hard border between Northern Ireland and Ireland. He then continued in the following vein.⁸⁹

These four issues are all part of the first phase of our negotiations. Once, and only once we have achieved sufficient progress on the withdrawal, can we discuss the framework for our future relationship. Starting parallel talks on all issues at the same time, as suggested by some in the UK, will not happen.

⁸⁹ Remarks by President Donald Tusk on the next steps following the UK notification, http://dsms.consilium.europa.eu/952/Actions/Newsletter.aspx?messageid=11790&customerid=16061&password=enc_3936444345424338_enc

President Tusk reiterated this position before the European Council meeting in April 2017, stating that ‘before discussing our future, we must first sort out our past’.⁹⁰ The German Chancellor, Angela Merkel, reaffirmed this position,⁹¹ as did the European Parliament.⁹² The European Council formally endorsed the negotiation guidelines on 29 April 2017⁹³ and adopted the phased approach. The first phase would be concerned with the withdrawal agreement, the ‘disentanglement of the United Kingdom from the European Union’.⁹⁴ The second phase concerned future trade relations, which could only be finalized after the UK had left the EU; an overall understanding of the framework of this relationship might be agreed during the second phase, but ‘preliminary and preparatory discussions to this end’⁹⁵ could only occur when the European Council decided that sufficient progress had been made towards ‘reaching a satisfactory agreement on the arrangements for an orderly withdrawal’.⁹⁶

⁹⁰ Invitation letter by President Donald Tusk to the members of the European Council, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/28-tusk-invitation-letter-euco-art50/>

⁹¹ BBC News, 27 April 2017, <http://www.bbc.co.uk/news/world-europe-39730326>

⁹² Red Lines on Brexit Negotiations, <http://www.europarl.europa.eu/news/en/news-room/20170329IPR69054/red-lines-on-brex-it-negotiations>

⁹³ European Council, Brussels, 29 April 2017, EUCO XT 20004/17.

⁹⁴ Ibid [4].

⁹⁵ Ibid [5].

⁹⁶ Ibid [5].

The guidelines were reaffirmed and rendered more specific in the Council's negotiating directives,⁹⁷ which were adopted based on Commission recommendations.⁹⁸ The Council negotiating directives set March 29 2019 as the date by which a withdrawal agreement had to be concluded as demanded by the two-year time limit set out in Article 50(3) TEU, unless there was unanimous agreement to extend that period. The phased approach established by the European Council guidelines was reaffirmed,⁹⁹ and the Council directives then provided greater detail on what would be covered by the withdrawal agreement, which will be explicated below. Before doing so it is necessary to factor in the impact of the 2017 UK general election, which is the subject of scene 2.

Scene 2: Temptation

‘Sell when you can, you are not for all markets’, *As You Like It*

‘Withhold thine indignation, mighty heaven,
And tempt us not to bear above our power’, *King John*

‘But something may be done that we will not:
And sometimes we are devils to ourselves,
When we will tempt the frailty of our powers,
Presuming on their changeful potency’, *Troilus and Cressida*

The triggering of Article 50 TEU was a defining moment for the UK and for its Prime Minister. Theresa May had steered the ship of government to her desired destination. She had failed in

⁹⁷ Council Decision EU/Euratom 2017/? of authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, Annex, BXT 24, Brussels, 22 May 2017.

⁹⁸ Recommendation for a Council Decision authorizing the Commission to open negotiations with the UK setting out the arrangements for its withdrawal from the EU, COM(2017) 218 final.

⁹⁹ Ibid Annex [9]-[10].

her bid to trigger Article 50 through use of the prerogative, but the House of Commons proved duly pliant and passed the legislation to authorize Brexit with no amendment. There were those in the preceding months who had encouraged the Prime Minister to hold an early election. She had steadfastly declined to do so, and repeatedly proclaimed that she was the right person to steady the ship of state, being clear and steady in her chosen policies.

Then came temptation, and it proved too great to resist. It would indeed have been politically irrational to do so, when viewed within the temporal frame. Consider the political circumstance. The Prime Minister was in control of her party, and the cabinet. She had a lead in excess of 20 points over the opposition. She had an approval rating in the mid-60s. The Labour Party was riven by discord, as manifest by rebellion of the majority of its MPs against the leader Jeremy Corbyn, whom the general media regarded as unelectable. The Labour Party could not attempt to stop a snap election called by the Prime Minister without appearing weak, and fearful of electoral battle. The Prime Minister was expected to return with a majority in excess of 100, and inflict a crushing defeat on the Labour Party. It would thereby give the Prime Minister the electoral legitimacy that she lacked hitherto and endorse her vision for hard Brexit. It would, moreover, cement her hold on the party, rendering the prospects of something akin to an 'imperial' Prime Minister within her grasp. The projected increased majority, replete with those grateful to the PM for their newly won seats, would diminish the power of existing factions in the Tory party.

Nothing could possibly go wrong, until it did. The poll numbers began to get closer. The Conservative manifesto was adjudged a failure. Days during the election battle were taken up with damage control, to combat the fall-out from ill thought-out Conservative policy on the funding of social care for the elderly. The election that was intended to be the opportunity for the Prime Minister to sell her vision of hard Brexit was conspicuous by the lack of time devoted to the issue. It was, moreover, an intensely personal election. Theresa May and Jeremy Corbyn

dominated the electoral arena, with little by way of contribution from their respective supporting cast. This too was deliberate. It was felt that Theresa May, with her approval rating in the mid-60s, would naturally win out over her opposite number. This too proved a miscalculation. The Prime Minister was simply not a natural on the electoral trail, too often appearing to be wooden, and falling back on stock phrases that wore thin with their very repetition. Jeremy Corbyn, by way of contrast, was much more naturally inclined to the cut and thrust of relatively unscripted meetings with ‘the people’. Theresa May compounded her problems by refusing to appear on the only televised electoral debate. Opinion polls were increasingly distrusted, for good reason, given their inaccuracy in relation to the referendum and the previous election. It was, therefore, unsurprising that the opinion poll that pointed to a hung Parliament shortly before the election was treated with some scepticism, bordering on disdain. This particular poll nonetheless proved prescient.

The Conservative party ‘won’ the election, and secured the most seats. There was, however, no concealing the fact that it was in reality a ‘loss’ for the Conservatives, and more especially for the Prime Minister, who bore responsibility for the electoral failure.¹⁰⁰ The offering up of her two closest Downing Street advisers for ritual post-electoral sacrifice, was but a short-term palliative to assuage anger within her party. She had taken a parliamentary majority of 12 into the election, and turned it into a deficit, such that she could only form a government with support from the Democratic Unionist Party from Northern Ireland, DUP. The fall-out from the general election was dramatic, with the Conservative party having to ditch many of its election policies, either because support from the DUP could not be assured, or because it was simply too risky trying to secure their passage in a hung Parliament. How long the Prime Minister survives remains to be seen.

¹⁰⁰ <http://www.independent.co.uk/topic/general-election-2017>

There was much discussion in the immediate aftermath of the election of its effect on government Brexit policy. Some contended that it would lead to a dramatic shift from hard to soft Brexit, underpinned by electoral rejection of hard Brexit in the election. Truth to tell this was always unlikely to happen. The 2017 election certainly did not endorse the hard Brexit approach set out in the Lancaster House speech and the White Paper, but it would be difficult to claim a major surge for the softer option, since the issue did not feature greatly in the election debates. The weakened Prime Minister was, moreover, mindful of the fact that a volte-face towards soft Brexit would bring the Praetorian Guard of hard Brexiteers down on her, with a challenge to her leadership more quickly than might be imagined.

It would, however, be wrong to regard the 2017 election as having no impact on UK Brexit policy. It emboldened soft Brexiteers in the cabinet, such as the Chancellor, Philip Hammond, who spoke loudly and repeatedly in favour of Brexit that would safeguard business and jobs by securing optimal access to the single market. To the same end, there has been much talk of longer transition or implementation periods. Pragmatism is heard all the more frequently, engendered in part by experience from the early stages of the negotiations, and in part by the increased freedom felt by players to voice views post the 2017 election that diverge from hard-line Brexit ideology. Business became more vocal, stressing that no deal was definitely worse than a bad deal, and that impending cliff-edges would see companies voting with their shareholders' feet, and moving their operations to venues within the EU. How this plays out over the next 18 months remains to be seen. Much depends on the detail of the negotiations, to which we now turn.

Scene 3: Negotiation

‘Let every eye negotiate for itself and trust no agent’, *Much Ado about Nothing*

‘Your hand, a covenant: we will have these things set down by lawful counsel, and straight away for Britain, lest the bargain should catch cold and starve: I will fetch my gold and have our two wagers recorded’, *Cymbeline*

‘Come, there's no more tribute to be paid: our kingdom is stronger than it was at that time’, *Cymbeline*

The UK elections delayed the beginning of the negotiations between the UK and the EU, eating further into the two-year clock that had begun to tick down from the date of delivery of the Prime Minister’s letter triggering withdrawal. David Davis said that disagreement as between parallelism and the phased approach would be the ‘battle of the summer’, expressing confidence that the UK would be able to secure its preference for parallelism. Matters turned out rather differently. The UK had to accept the phased approach, and rather than it being the battle of the summer, it rapidly became a *fait accompli*. There was, in truth, little that the UK could do in this respect, since the EU held the important legal and political cards. Article 50 TEU stipulated clearly that it was for the European Council to lay down the principles to guide the negotiations, and it followed the lead of President Tusk, who pushed forcefully for the phased approach, as did Angela Merkel and the European Parliament. This was unsurprising, since that choice has significant impact on the political dynamics underlying the negotiations. The phased approach means that trade negotiations do not begin until the European Council deems that there has been ‘sufficient progress’ on the terms of the withdrawal deal. This puts pressure on the UK, more especially because the longer the clock ticks down without any significant progress on future trade relations, then the more nervous will business in the UK become, and the more keenly will firms eye movement to an EU country in order to secure continued access to the single market.

The initial negotiations are therefore concerned solely with withdrawal. The topics to be covered by the withdrawal agreement were specified in the European Council guidelines for

negotiation,¹⁰¹ made pursuant to Article 50(2) TEU, and the Council negotiating directives made thereafter.¹⁰² The withdrawal agreement will deal with the minimum for a divorce, people, money and borders; the treatment of issues pending at the time of withdrawal; and dispute settlement.

(i) People

The position of EU citizens living in the UK, and UK citizens living in the EU, is regarded as central to the withdrawal agreement by both sides. It featured prominently in UK documentation, as exemplified by the statement in the White Paper on Exit that ‘securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of this Government’s early priorities for the forthcoming negotiations’.¹⁰³ In similar vein President Tusk emphasized the need to think of people first, and to settle ‘their status and situations after the withdrawal with reciprocal, enforceable and non-discriminatory guarantees’.¹⁰⁴ The European Parliament was of like mind.¹⁰⁵

It is, however, often easier to agree on general propositions than their detailed meaning. This is more especially so when there are political pressures to contend with, as there are in the UK, given that control over immigration was the most significant factor driving the leave vote. It was therefore never going to be easy to secure consensus on the more particular rights to be accorded to EU citizens in the UK and vice-versa.

¹⁰¹ European Council (n 93) [8]-[21] .

¹⁰² Council Decision (n 97).

¹⁰³ White Paper (n 32) [6.3].

¹⁰⁴ Remarks by President Donald Tusk (n 89).

¹⁰⁵ Red Lines (n 92).

The EU, from the outset, took a broad view of the rights that such people should be afforded. This is readily apparent from the European Council guidelines, which stressed that guarantees for EU citizens in the UK ‘must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence’.¹⁰⁶

The list of rights was specified in greater detail in the Council negotiating directives,¹⁰⁷ which also stipulated that enforcement of these rights would be for the CJEU.¹⁰⁸ The agreement should safeguard the status and rights derived from EU law at the withdrawal date for EU citizens in the UK, and UK citizens living in a Member State. It should cover both EU27 citizens residing, or having resided, and/or working, or having worked, in the UK, and vice-versa. It should include rights the enjoyment of which occurred later, such as rights related to old age pensions, and rights that were in the process of being obtained, including the possibility of acquiring them under current conditions after the withdrawal date, such as the right of permanent residence after a continuous period of five years of legal residence that started before the withdrawal date. These should be protected as directly enforceable vested rights for the life time of those concerned.¹⁰⁹

The Council negotiating directives provided considerable detail as to the scope of the protection to be afforded in a post-Brexit world. The personal scope¹¹⁰ should be the same as

¹⁰⁶ European Council (n 93) [8].

¹⁰⁷ Council Decision (n 97) Annex [20]-[22]. The material in the Annex was based on the earlier Commission recommendation COM(2017) 218 (n 98), and the material therein concerning citizens’ rights was in turn based on ‘Essential Principles on Citizens’ Rights’, Commission Taskforce for the Preparation and Conduct of the Negotiations with the UK under Article 50, 12 June 2017, TF50.

¹⁰⁸ Council Decision (n 97) Annex [41]-[42].

¹⁰⁹ Ibid [20].

¹¹⁰ Council Decision (n 97) Annex [21(a)]

Directive 2004/38,¹¹¹ thereby including those who were economically active, such as workers and self-employed, as well as students and other economically inactive persons, who resided in the UK or the EU27 before the withdrawal date. It should also include family members who accompanied or joined them at any time before or after the withdrawal date. The personal scope should, in addition, include those covered by Regulation 883/2004,¹¹² such as frontier workers and family members irrespective of their place of residence.

The Council negotiating directives were similarly specific as to the substantive scope of the rights to be protected. This should include ‘at least’¹¹³ residence rights and rights of free movement derived from Articles 18, 21, 45 and 49 TFEU, as further embellished by Directive 2004/38. Formal documentation to evidence such rights should be of a declaratory nature, and should be readily available under easily accessible procedures. The rights in Regulation 883/2004 and related regulations concerning the coordination of social security systems, which covered matters such as rights to aggregation, and export of benefits, should continue to be available. So too should the rights in Regulation 492/2011,¹¹⁴ designed to ensure that EU workers enjoyed the same social and tax advantages, training, housing, and collective rights as nationals of the host state; and protected rights of workers' family members in relation to matters such as access to education and the like. In similar vein, recognised professional

¹¹¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

¹¹² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1.

¹¹³ Council Decision (n 97) Annex [21(b)].

¹¹⁴ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance [2011] OJ L141/1.

qualifications obtained in a Member States before withdrawal should continue to be so in a post-Brexit world.¹¹⁵

The EU's detailed specification of citizens' rights made uncomfortable reading for the UK negotiating team. It prompted David Davis to complain that the EU was setting 'ridiculously high' demands on this issue.¹¹⁶ The UK set out its position in relation to citizen rights in late June 2017.¹¹⁷ The principal fault lines as between the EU and the UK approach were as follows.¹¹⁸

First, the EU approach was predicated on continuation of EU rights to free movement, residence and the like as derived from EU law continuing thereafter. The UK approach was markedly different in this respect. In the post-Brexit world there would be 'new rights in UK law for qualifying EU citizens resident here before our exit'.¹¹⁹ Qualifying individuals would be granted 'settled status' in UK law, which would allow them to reside, undertake any lawful activity, access public services and apply for British citizenship. To qualify, the EU citizen must have been resident in the UK before a specified date and must have completed five years' continuous residence in the UK before they apply for settled status, at which point they must

¹¹⁵ Council Decision (n 97) Annex [22].

¹¹⁶ <http://www.independent.co.uk/news/uk/home-news/brexit-negotiations-latest-david-davis-eu-demands-citizens-rights-ridiculously-high-european-union-a7762986.html>

¹¹⁷ The UK's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU, Cm 9464 (2017).

¹¹⁸ See the Department for Exiting the European Union, Comparison between EU/UK Positions on Citizens' Rights, 19 July 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/631038/Joint_technical_note_on_the_comparison_of_EU-UK_positions_on_citizens_rights.pdf

¹¹⁹ Safeguarding the Position of EU Citizens (n 117) [6].

still be resident.¹²⁰ There are, moreover, differences as to the benefits that attach to citizens under the EU proposals, as compared to those of the UK.¹²¹

Secondly, there were real differences concerning the rights of family dependants. The EU position was, as we have seen, to guarantee such family members the same rights post-exit as they enjoyed prior thereto. The UK accepted that family dependants who joined a qualifying EU citizen in the UK before exit would be able to apply for settled status after five years, including where that date occurred after exit. However, those joining after Brexit would be subject to the same rules as those joining British citizens, or alternatively to the post-exit immigration arrangements for EU citizens who arrive after the specified date.

Thirdly, the EU regime entailed the CJEU policing the rights accorded to citizens in a post-Brexit world, and these rights would continue to be directly effective. The UK position was starkly different: the definition of the rights would be for the UK to determine; they would be enforceable in the UK legal system; and the CJEU would have no jurisdiction.

Fourthly, there is the issue of the cut-off date beyond which citizens no longer take the benefit of EU rights. The EU position in this respect has been clear from the outset: the rules that they proposed should apply to those lawfully in the UK at the date of exit, since EU rights pertain until that time. The UK paper was equivocal on this issue: the cut-off date would be no earlier than March 29 2017, the date when withdrawal was triggered, and no later than the date of exit. The rationale for the equivocation is not hard to divine, this being concern that there

¹²⁰ There were also provisions enabling EU citizens who became resident before the specified date, but who had not accrued five years' continuous residence at the time of the UK's exit to be able to apply for temporary status in order to remain resident in the UK until they accumulated five years, after which they would be eligible to apply for settled status.

¹²¹ E-M Poptcheva and E Tilindyte, EU and UK Positions on Citizens' Rights, First Phase of Brexit Negotiations, European Parliament Research Service, PE 608.643, July 2017.

will be a wave of inward EU migration from those seeking to benefit from EU rules in the period between now and exit.¹²²

(ii) Money

The resolution of financial commitments is a second key issue in the withdrawal negotiations. The factors that affect the calculation from the EU perspective were set out in the Council negotiating directives.¹²³ The single financial settlement should ensure that the EU and the UK ‘respect the obligations resulting from the whole period of the United Kingdom membership in the Union’.¹²⁴ This financial settlement should include matters related to the EU budget; termination of the UK’s membership of all EU, including the European Investment Bank, and the European Central Bank; and the UK’s participation in funds related to EU policies, such as the European Development Fund. The settlement must cover ‘obligations resulting from the MFFs,¹²⁵ liabilities including pensions and contingent liabilities and any other obligations deriving from a basic act within the meaning of Article 54 of the Financial Regulation’.¹²⁶ It would moreover be for the UK to ‘fully cover the specific costs related to the withdrawal

¹²² <http://www.dailymail.co.uk/wires/pa/article-4629116/Brexit-negotiations-citizens-rights-started-constructively--May.html>

¹²³ The position in the Council negotiating directives was based on the earlier Commission recommendation COM(2017) 218 (n 98), and the material therein was in turn based on ‘Essential Principles of Financial Settlement’, produced by the Commission Taskforce for the Preparation and Conduct of the Negotiations with the UK under Article 50, 24 May 2017, https://ec.europa.eu/commission/sites/beta-political/files/financial-settlement-essential-principles-draft-position-paper_en.pdf

¹²⁴ Council Decision (n 97) Annex [23].

¹²⁵ Multiannual Financial Frameworks, http://ec.europa.eu/budget/mff/introduction/index_en.cfm

¹²⁶ Council Decision (n 97) Annex [26].

process such as the relocation of the agencies or other Union bodies'.¹²⁷ There will, moreover, be detailed supervision over payment of these liabilities by EU bodies, including the Commission and the CJEU.¹²⁸ The upper estimates of the bill have commonly been put in terms of 60 billion euros, although higher figures have been mooted. The UK countered with a figure in terms of 36 billion euros. There will doubtless be much hard bargaining before a final figure is reached, but it is unlikely to be less than 45 billion euros.

The calculation of the UK's liabilities when leaving the EU is complex¹²⁹ and contestable. The ultimate bill will be determined as much by politics as by accountancy, since both sides will be playing to their respective political constituencies. Contestation as to the size of the bill, and legal liability to pay, is evident from the House of Lords' Report on *Brexit and the EU Budget*.¹³⁰ In terms of the size of the bill, the Committee concluded, in the light of evidence that it heard, that the absolute sum of any posited settlement was highly speculative, and that almost every element was subject to interpretation.¹³¹ By way of contrast, the Committee came to more definitive conclusions concerning legal liability to pay in the event that no withdrawal agreement was reached, concluding that in such an eventuality there would be no enforceable legal obligation. There was division of opinion between those who gave legal advice on this issue, and the Committee's conclusions followed closely the views of its legal

¹²⁷ Ibid [26].

¹²⁸ Ibid [30].

¹²⁹ M Tutty, The Potential €60 Billion Cost to the UK of Exiting the EU, Institute of International and European Affairs, www.iea.com, contains a short and useful guide. The House of Lords, European Union Committee, *Brexit and the EU Budget* (HL 125, 2017) provides a valuable, more detailed guide.

¹³⁰ *Brexit and the EU Budget* (n 129).

¹³¹ Ibid [33]. See also, [40]-[41], [60]-[62], [69], .

adviser.¹³² This conclusion was informed by the wording of Article 70 VCLT,¹³³ which states that,

Consequences of termination of a Treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
 - (a) Releases the parties from any obligation further to perform the treaty;
 - (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

The Committee's reasoning was as follows.¹³⁴ Article 50 TEU should be interpreted in the light of Article 70 VCLT. The rule in Article 70(1)(b) VCLT only applied to withdrawal from a treaty which did not have its own withdrawal procedure, as signified by the wording 'unless the treaty otherwise provides'. Article 50 TEU embodied a withdrawal procedure, with the consequence that it took precedence over Article 70(1)(b) VCLT. If there was an agreement pursuant to Article 50 it would then provide for settlement of outstanding financial liabilities. If there was no withdrawal agreement, Article 50 stipulated that the EU 'Treaties shall cease to apply to the State in question' two years after the withdrawal notice was given. There was no provision 'for ensuring that EU legal obligations on the withdrawing State persist after the Treaties cease to apply'.¹³⁵ The Committee said that the meaning of the phrase the 'Treaties shall cease to apply to the State in question' was clear: the legal basis for application of all EU law in the UK came to an end, including any current and future legal obligations of a financial nature. The CJEU's jurisdiction over the UK would terminate and therefore it would not be possible to enforce outstanding payments in this manner. It followed that 'under EU law,

¹³² Ibid Appendix 3.

¹³³ Vienna Convention on the Law of Treaties.

¹³⁴ Brexit and the EU Budget (n 129) [133].

¹³⁵ Ibid [133].

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, unless a withdrawal agreement is concluded which resolves this issue'.¹³⁶ Any recourse against the UK would have to be by EU Member States, seeking to use an international court.

There are, however, considerable difficulties with this argument.¹³⁷ The legal meaning of Article 50 is for the CJEU. That is unarguable. The key legal issue is the meaning of the phrase 'the Treaties shall cease to apply to the State in question' two years after the notice of withdrawal. It is important to disaggregate two legal issues that are elided in the Committee's reasoning: whether there is an obligation and how it is to be enforced.

It can be accepted that there might well be room for contestation as to what the precise legal obligations are, this being reflective of disagreement as to the constituent elements of the overall exit bill, but this does not affect the argument of principle set out here. The preceding phrase, concerning cessation of application of the Treaties, carries no implication that legal obligations incurred prior to cessation should be unenforceable. That is not the natural meaning of the words as adjudged either by linguistic text, or normative policy. In textual terms, the phrase clearly speaks to the future, it says nothing as to the discontinuation of obligations already incurred in the past. In normative terms, there is no basis for assuming that future cessation should mean that obligations already imposed, including those that might last beyond exit, should be dispensed with. This does not cohere with the text, nor does it cohere with any purposive interpretation of the wording. Nor does it accord with the European Union (Withdrawal) Bill 2017. The Bill, which will apply even if there is no withdrawal agreement, is predicated on the assumption that EU law is applicable to liabilities incurred prior to

¹³⁶ Ibid [133].

¹³⁷ For related arguments to those set out below, see *ibid* [128]-[131].

Brexit.¹³⁸ Nor, moreover, does it fit with more general principles of legal interpretation. If a contract is terminated for some reason, the standard assumption is that obligations incurred prior to termination would continue to exist, subject to the caveat that the rationale for the termination did not legally undermine the particular contractual obligation. Contractual obligations do not persist only if there is some specific statement to this effect in the contract, which is the interpretation given to Article 50 by the House of Lords' Committee.

It can be accepted that there may be difficult issues concerning enforcement, although they may not be as intractable as the Committee stated. The Committee discussion was premised on the assumption that enforcement would have to be via the CJEU, or an international court. If, however, in accord with the preceding argument, there is a valid legal obligation incurred prior to exit, which subsists notwithstanding departure, there is no obvious reason why this should not be enforceable in UK courts. The Treaties cease to apply from the date of exit. They could not, therefore, be relied on in UK courts to enforce EU law in a post-Brexit world. There is, however, no indication in Article 50 that termination of membership has retrospective impact, enabling the UK to avoid obligations already incurred while the Treaty was validly in force. UK courts would merely be reasoning through the implications of obligations incurred when the UK was bound by the Lisbon Treaty. It is noteworthy that the UK government, while denying that the CJEU has jurisdiction to rule on cases on which it has not been seized on the date of withdrawal, even where the facts occurred before that date, has accepted that such cases would be determined by UK courts in accord with the law that existed

¹³⁸ European Union (Withdrawal) Bill 2017, sections 5-6.

at the time the facts arose, including EU law.¹³⁹ The EU acquis and CJEU case law are to this end included in the European Union (Withdrawal) Bill 2017.¹⁴⁰

The preceding legal issue will only arise if the UK exits without a withdrawal agreement. Lest anyone should be tempted by this idea, on the assumption that the UK might thereby avoid the exit bill, assuming that the House of Lords' Committee is correct, it is worth remembering that no deal means no withdrawal agreement and no trade agreement, given that the former is a condition precedent to the latter. There would, in addition, be the very negative impact on relations between the UK and the EU27. The financial costs of all this would dwarf any saving from not having to pay the Brexit bill.¹⁴¹

“[N]o deal” doesn’t mean the country would come to a stop. But even under relatively benign conditions and with time to prepare, the impacts would be widespread, damaging and pervasive. It is not possible *ex ante* to quantify the economic impacts, but it is reasonably clear that they will be comparable to some of worst-case scenarios presented before the referendum. This time, Project Fear would not be scaremongering.

(iii) Borders

Borders constitute the third principal topic in the withdrawal agreement, with the focus on the need to avoid a hard border between Northern Ireland and Ireland. This was a constant feature in communications from the UK.¹⁴² It was echoed by President Tusk who spoke of the need to ‘seek flexible and creative solutions aiming at avoiding a hard border between Northern

¹³⁹ Ongoing Union Judicial and Administrative Proceedings, Position Paper by the UK Government, 13 July 2017, [13]-14], <https://www.gov.uk/government/publications/ongoing-union-judicial-and-administrative-proceedings-position-paper>

¹⁴⁰ European Union (Withdrawal) Bill 2017, sections, 4-6.

¹⁴¹ The UK in a Changing Europe, The Cost of No Deal, <http://ukandeu.ac.uk/wp-content/uploads/2017/07/UKIN-Cost-of-No-Deal-A4-v3.pdf>, 23.

¹⁴² White Paper (n 32) [4.1]-[4.10]; Notification of Withdrawal (n 47) 5.

Ireland and Ireland’,¹⁴³ and the European Parliament.¹⁴⁴ The Commission negotiating mandate affirmed the need for flexible solutions to the situation in Ireland, stating that ‘negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order’.¹⁴⁵ The practical difficulties of achieving this commonly desired solution are however considerable.¹⁴⁶

(iv) Transitional Issues

There is, therefore, much to resolve concerning money, people and borders. There are, in addition, further issues, such as cases pending before the CJEU at the date of withdrawal, and administrative issues pending before the Commission. The Council negotiating directives are predicated on continuity for matters that are already in the system. Thus the CJEU should remain competent to adjudicate in cases lodged before the withdrawal date and its rulings must be binding on the UK; the same is true for administrative procedures that are ongoing at the date of withdrawal; and it should be possible to begin administrative and judicial proceedings after withdrawal for facts that occurred prior thereto.¹⁴⁷ The Prime Minister has made much about ending the authority of the CJEU,¹⁴⁸ and UK documentation shows a keen interest in

¹⁴³ Remarks by President Donald Tusk (n 89).

¹⁴⁴ Red Lines on Brexit Negotiations (n 92).

¹⁴⁵ Council Decision (n 97) Annex 1, [14].

¹⁴⁶ M Dougan, ‘The “Brexit” Threat to the Northern Ireland Border: Clarifying the Constitutional Framework’, in M Dougan (ed), *The UK after Brexit, Legal and Policy Challenges* (Intersentia, 2017), Chap.3.

¹⁴⁷ Council Decision (n 97) Annex 1, [34]-[38]; Ongoing Judicial and Administrative Procedures, Commission Taskforce for the Preparation and Conduct of the Negotiations with the UK under Article 50, 12 July 2017, TF50 (2107) 5.

¹⁴⁸ White Paper (n 32) [2.3].

exploring other dispute resolution mechanisms.¹⁴⁹ It will therefore be interesting to see how such proposals are treated by the UK negotiating team. The indications from the government documentation¹⁵⁰ is that there some gap between the EU position in this respect and that of the UK government.

This is equally true of issues relating to resolution of disputes flowing from the withdrawal agreement. The European Council guidelines state that the choice of the relevant mechanism should be made ‘bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union’.¹⁵¹ This is reinforced by the Council negotiating directives, which state that the CJEU must have jurisdiction in relation to the terms of the withdrawal agreement that concern EU law, including citizens’ rights and financial liabilities, and that an alternative adjudicative mechanism would only be acceptable for disputes on other matters if it offered equivalent guarantees of independence and impartiality.¹⁵²

(v) Future Trade

The withdrawal agreement is but one part of the overall Brexit package, and insofar as the medium and long term are concerned a future trade agreement is more important in economic terms. There may indeed be no trade agreement at the end of the two-year period, either if the talks on the withdrawal agreement fail because of irreconcilable differences between the two sides, or because there is insufficient progress on the withdrawal agreement until very late in

¹⁴⁹ Ibid [2.4]-[2.10].

¹⁵⁰ Ongoing Union Judicial and Administrative Proceedings (n 139).

¹⁵¹ European Council (n 93) [17].

¹⁵² Council Decision (n 97) Annex 1, [42].

the day, such that the European Council is unwilling to signal that discussion can begin on trade before close to the end of the two-year period, and there is no unanimity as required to extend that time frame. If there is no deal, then the UK will default to WTO rules.¹⁵³ The nature of any trade deal is therefore a matter of conjecture at present, and may be so for a number of years hereafter. It will be the subject of detailed consideration in a subsequent paper, that sees the drama that is Brexit approach its denouement. The existing discussion will therefore be confined to some key points that will shape trade matters over the coming 18 months and thereafter.

First, it is important to clarify what the two sides seek. The UK does not want membership of the single market, since this requires acceptance of free movement of people; nor does it want a formal customs union deal, since this would unduly circumscribe the UK's ability to enter trading arrangements with other parties.¹⁵⁴ Its aim is for a far-reaching and comprehensive trade agreement, covering matters such as intellectual property and services, which embodies 'a deep and special partnership between the UK and the EU, taking in both economic and security cooperation'.¹⁵⁵ The EU also favours a trade deal, but the parameters for such a deal are closely circumscribed: it cannot amount to participation in the single market; it precludes participation in the single market on a sector-by-sector approach; it is predicated on the assumption that 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

¹⁵³ G Messenger, 'Membership of the World Trade Organisation', in Dougan (n 146) Chap. 11; M Cremona, 'UK Trade Policy', in Dougan (n 146) Chap. 12; P Craig, 'Brexit and Relations between the EU and the UK', in Dougan (n 146) 315-20.

¹⁵⁴ Lancaster House speech (n 2) 8.

¹⁵⁵ Ibid 5.

member’;¹⁵⁶ there must be a level playing field in terms of competition and state aid; and there must also be safeguards ‘against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices’.¹⁵⁷

Secondly, we should be realistic about the time scale for concluding such an agreement, because of the inherent complexity of the negotiations. Free trade deals do not come in only one size. The core of a free trade agreement is the abolition of tariffs and quotas on goods. There will normally be provisions dealing with technical barriers to trade, phytosanitary matters, rules of origin, investment, safeguards, cross-border trade, the environment, customs administration and the like. More ambitious trade agreements aim for liberalization in areas such as services and investment, cover intellectual property rights and competition, and include provisions on labour and environmental standards.¹⁵⁸ The US-Australia agreement is 264 pages long, which is about average. This is dwarfed by the EU-Canada Comprehensive Economic and Trade Agreement, CETA, which took seven years to negotiate. It is in excess of 1500 pages, and this is so even though its coverage of services is limited.¹⁵⁹

Thirdly, if such a comprehensive trade agreement is a mixed agreement,¹⁶⁰ because the subject matter goes beyond the EU’s exclusive external competence, it would therefore require ratification by the twenty-seven Member States, plus the regions of some states, as well as the EU. This is less likely following the CJEU’s decision concerning the FTA between Singapore

¹⁵⁶ European Council (n 93) [1], [21].

¹⁵⁷ Ibid [21].

¹⁵⁸ <http://www.trade.gov/fta/> ; <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta>

¹⁵⁹ <http://ec.europa.eu/trade/policy/in-focus/ceta/>

¹⁶⁰ P Koutrakos and C Hillion, *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart, 2010).

and the EU, since it took a broad view of the scope of the common commercial policy and the sphere of the EU's exclusive competence.¹⁶¹

Fourthly, we should note a tension or paradox underlying Brexit insofar as it relates to the balance between the economic and the social in our political ordering. Part of the rationale for the leave vote was a reaction to the perceived negative effect of globalization on certain communities. The balance between the economic and the social within the EU was, moreover, felt to be too heavily weighted towards the former. There is little doubt that some communities have suffered, or failed to reap the rewards, from more open markets. There is also no doubt that the balance between the economic and the political within the EU has been contestable from the outset. This does not diminish the sense of paradox that inheres in the current trade discourse. The reason is readily apparent. If and insofar as the concern is globalization, then it is assuredly not alleviated by promise of multiple free trade agreements, which is globalization writ large. If and insofar as the concern is the balance between the economic and the social, then it is assuredly not met through multiple free trade agreements, given that the EU provides better protection for labour and social rights than do FTAs.

(vi) Trade Relations: Transition

There is, as noted above, increased acceptance that some form of transitional agreement may be necessary after the end of the two-year period. The language of transition and implementation is used interchangeably in government discourse, notwithstanding that the words have very different connotations. The European Council, for its part, spoke of a

¹⁶¹ Opinion 2/15, *Conclusion of the Free Trade Agreement between the European Union and Singapore*, 16 May 2017.

transition agreement, to the extent to which it was necessary and legally possible.¹⁶² The legality of such an agreement is uncertain. It might assume three different forms.

The first might be termed '*transition and change*'. On this view a transitional agreement might be directed to the future, providing a bridge between the status quo and the future agreement, the details of which may not be fully concluded within two years. This is the assumption in the Council negotiating directives.¹⁶³ It might be conceived as part of the withdrawal agreement, or as independent thereof. There are, however, difficulties in both respects.

There are issues as to how far transitional provisions concerning future trade could be appended to the withdrawal agreement. Article 50(2) TEU states that the withdrawal agreement can take account of the state's future relationship with the EU, which undoubtedly contains interpretive leeway, but if transitional provisions are to be of practical use they will have to be detailed. There are also issues as to whether detailed transitional provisions smoothing future trade relations would fall within the EU's exclusive competence. If they did not, then ratification by all Member States as well as the EU would be required. This could lead to considerable delay, hence undermining the rationale for transitional provisions.

The second conception can be termed '*transition and continuity*'. On this view there would be continuation of some EU treaty provisions, pending conclusion of a future trade agreement. If there is no meaningful trade agreement sketched out within the two-year period, then the concept of transition could not connote a bridge between the old and the new, since by definition the content of the new order would not be known. The existing EU rules would provide a framework thereby obviating the dangers of the cliff-edge. Such a transitional

¹⁶² European Council (n 93) [6].

¹⁶³ Council Negotiating Directives (n 97) Annex [19].

agreement might be part of the withdrawal agreement, or independent thereof, but there are legal difficulties.

There are substantive issues as to compatibility with the EU legal order.¹⁶⁴ It would have to be decided whether continuation of some EU provisions was compatible with the EU Treaty, and its underlying principles, which would be determined by the CJEU. The CJEU would, moreover, have jurisdiction over the transitional provisions. Denial of its interpretive authority over Treaty provisions during a transitional period would be regarded as infringing the autonomy of the EU legal order.¹⁶⁵ In the words of the European Council, prolongation of the EU acquis ‘would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply’.¹⁶⁶

There are, moreover, procedural problems if the transitional provisions are appended to the withdrawal agreement. Article 50(3) provides that the Treaties cease to apply to the Member State from the date when the withdrawal agreement enters into force. This creates a Catch 22. The agreement must be legally in force for the transitional provisions to apply. However, when the agreement enters into force Article 50 stipulates that the Treaties cease to apply. There is no provision allowing some of the Treaty articles to continue pending completion of a trade agreement at an unspecified future date.

¹⁶⁴ See, e.g., Opinion 1/92, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, EU:C:1992:189, [32], [41]; Opinion 2/13, *Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, [201].

¹⁶⁵ Opinion 2/13 (n 164) [205].

¹⁶⁶ European Council (n 93) [6].

It is, moreover, questionable whether a withdrawal agreement could perpetuate some provisions of membership beyond two years, given that the voting rules for the withdrawal agreement only require a qualified majority, whereas unanimity is the criterion for extension of the time to secure a withdrawal agreement over and beyond two years. A withdrawal agreement concluded by qualified majority that did not terminate all the withdrawing state's rights and obligations on the date when the agreement took effect could be regarded as circumventing the unanimity requirement in Article 50(3) for an extension beyond the two-year period.

The third possibility is that a transitional agreement is '*in part continuation of the past, in part a window to the future*'. This is likely, given that the first option is predicated on the assumption that the future trade relationship has been worked out to some degree. There may, however, be scant by way of agreement on future trade relations within the two-year period, or the terms may be exiguous in the extreme, such that the transition would perforce be directed in part towards continuation with the EU status quo, and in part to smoothing the path towards whatever might have been concluded on trade relations. The legal concerns associated with transition and change, and those associated with transition and continuity, would both be relevant.

Conclusion

Predicting the political future in any circumstance is a high risk strategy, more especially so in the context of the ongoing discussions concerning Brexit. There are complex issues to be resolved in the withdrawal negotiations, as attested to by the government's paper on relations

between Northern Ireland and Ireland post-Brexit.¹⁶⁷ The political landscape will perforce be affected by the economic climate, and the UK government knows full well that the longer withdrawal negotiations proceed without any start on discourse concerning future trade, then the more nervous will markets become. How far this shapes the contours of the withdrawal agreement remains to be seen, but even if trade discussions begin relatively soon, it is unlikely that they will be concluded within the two-year time frame, thereby requiring some form of transition agreement of the kind considered above. The complexity of the impending trade dimension to the negotiations is exemplified by the recent paper on post-Brexit customs arrangements between the UK and the EU, and the difficulties in this respect are exacerbated by the fact that the government seeks some special interim customs arrangements while remaining free to negotiate free trade agreements with other countries during this time.¹⁶⁸

The political landscape will also be influenced by the legal, as well as the economic. The *Miller* litigation may be over, but there are likely to be new legal battles before Brexit is concluded, including legal argumentation as to whether Parliament should have to signal its consent to a withdrawal agreement before it takes effect, or before the government seeks to exit the EU without an agreement.¹⁶⁹ There is, moreover, litigation pending as to whether the agreement concluded between the Conservative Party and the DUP, whereby the latter agreed to give support to the former on confidence motions and supply, with the quid pro quo being a further billion pounds in spending for Northern Ireland, is lawful. The future is therefore unknowable, save for the fact that there will be an Act 10 to this drama.

¹⁶⁷ Northern Ireland and Ireland, Position Paper, 16 August 2017, <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu> .

¹⁶⁸ Future Customs Arrangements, A Future Partnership Paper, 15 August 2017, <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu> .

¹⁶⁹ The Three Knights' Opinion, In the Matter of Article 50 of the Treaty on European Union.

