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# Post-Brexit realism and international law: Renegotiating a bad Withdrawal Agreement

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# Post-Brexit Realism and international law: renegotiating a bad Withdrawal Agreement

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# Post-Brexit Realism and international law: renegotiating a bad Withdrawal Agreement

Patrick Minford (Cardiff University)

**Abstract:** Some pro-Brexit MPs will not vote for the government's proposed Withdrawal Agreement because of its fine print: they think it will be written in indelible tablets of law that we can never change. But they forget that sovereign states will not indefinitely stay in treaties that do not suit them, if no one can force them to, as in general no one can, unlike in national law where the state can force us. That is just the plain economics of national self-interest, as deployed in game theory studies of international treaties. Our Agreement with the EU if we sign it will not last for long if it stops us from pursuing our interests in trade and regulation: no one, certainly not the EU, can force us to stay with it. It has been negotiated like a hostile divorce because the EU wanted to prove it does not pay to leave. But once the divorce has happened, it will be a new situation where, as with ex-partners in a divorce, they will want to live harmoniously with us in the long term. There will be sensible diplomacy so that we can accommodate each other's interests, in a process of adaptation. After leaving, we can push ahead with good policies on trade, regulation and migration that the government we vote for will pursue; the EU will cooperate as it will not wish us to move to default WTO rules.

In the latest discussions on the Brexit Withdrawal Agreement and Political Declaration, the WAPD for short, two views have emerged about the UK's future choices. One, which I will call the lawyer view, is that once signed, the WAPD binds the UK indefinitely; this view is held by many of my friends and Brexit allies who are largely lawyers and as such tend to believe that the letter of the law will prevail. The other, which I will call the realist view, is that it can be 'evolved', to use a word popular with some politicians, in line with the mutually evolving interests of the two sovereign parties, the EU and the UK. The latter view is the one generally adopted in the economic analysis of international treaties, as the following quotation from a recent paper in a leading economic journal makes very clear.

'At the national level, such conflicts [over payment for /usage of public goods] between individual and collective rationality can be resolved by the intervention of the government ( Demsetz, 1967 ). At the international scale, however, there is no supranational authority that could coerce states into adopting efficient policies if they run counter to national interests. Filling the void are international agreements. Under the terms of the Vienna Convention on the Law of Treaties, a state that ratifies a multilateral treaty chooses partially to surrender its sovereignty and to subject its policies in a specific domain to the rules and prescriptions of the treaty. In so doing, sovereign states agree to coordinate their policies in mutually beneficial ways. By the very nature of sovereignty, however, the agreement is fundamentally non-binding and states can always withdraw from it. Therefore, the fact that public good provision is implemented through an international agreement should not change a country's incentives to contribute per se—unless the treaty alters the country's incentives to cooperate in other ways. (Wagner, 2016)

The point of economic analysis of treaties therefore is that a sovereign state only continues as a party to any treaty if it remains in its interests to do so. Therefore one must analyse treaty development over time with reference to how these sovereign interests evolve; and how at any time the sovereigns reach an accommodation based on their mutual interests. The basic reason, as explained in the quotation, is that there is no supranational power that enforces treaties in the way that a national state, with a monopoly of force, enforces domestic law.

The Realist View is therefore asserting that once the UK is out of the EU, how it deals with the WAPD is a matter of subsequent choice and negotiation with the EU, which also has freedom of the same sort. Anyone supporting the Lawyer View must therefore demonstrate that the WAPD remains an agreement that it is in the interests of both sides to maintain in the same form. It is not sufficient to say that because it has been signed it is indefinitely binding; this would only be sufficient if there was a supranational power that could enforce this, and I shall assume it as obvious that indeed there is no such power. In a recent posting on Lawyers for Britain (2019) my old friend and longtime Brexit ally, Martin Howe, argues that the Treaty of Utrecht binding Spain into Gibraltar's status, illustrates that treaties bind longterm. However, in fact this well illustrates the point about self-interest. Spain, like the UK, has had a strong interest in Gibraltar not accidentally becoming a casus belli, much as the Falklands, with a population similarly determined to remain British, became, at great expense to both the UK and Argentina. Ceaseless ongoing diplomacy on both sides to accommodate mutual complaints has found the Treaty a useful figleaf.

In the rest of this piece I will discuss what the interests of the UK and EU are and how if at all they might evolve, and with them the UK/EU future Treaty relationship. This type of analysis is a branch of game theory, which can involve highly complicated mathematics, as in the paper cited, but fortunately not in this case here.

**Current UK and EU interests and the WA**:

Based on economic analysis within a rather standard World Trade model and other models described in Minford et (2015) I suggest the following broad interests of the EU and the UK:

EU: for the EU the status Quo is optimal. The UK contributes 10% of the EU budget. Its food and manufacturing industries sell to UK consumers at 20% above world prices because the customs union places trade barriers of this tariff-equivalent value against products from the rest of the world. EU regulations prevent UK practices that would reduce UK costs and so undercut EU competition, driving down margins. Unskilled EU workers can be exported to the UK labour market where their wage is supplemented by the UK taxpayer by about 20%.

UK: for the UK the optimal policy is abolition of protection against the non-EU; this ' free trade' policy eliminates the 20% premium paid to EU producers of food and manufactures and it also lowers consumer prices, pushing up productivity via trade competition. At the same time the UK would want to sign a free trade agreement with the EU that keeps the current free access with zero tariffs between them; nevertheless it turns out that any tariffs or equivalent that are imposed will benefit the UK and be paid by EU traders, because UK prices of both imports and exports are set by world prices, so UK tariffs must be absorbed by EU exporters while EU tariffs must similarly be absorbed by EU importers. It follows that though the UK would be willing on the 'good neighbour' principle to sign an EU-UK FTA, it would strictly speaking be better off under WTO rules with no deal.

These descriptions of economic interests take no account of current political pressures. A natural question is: given its interests why on earth did the UK sign up to the WAPD? This effectively makes the status quo the most achievable agreement, given that the backstop endows the EU with effective veto power over anything it dislikes; under the backstop the UK effectively stays in the EU as now until the EU deems there to be an agreement.

The only way to account for this is in terms of the votes in Parliament. With a part of the Tory party led by Philip Hammond having a Remainer view of UK interests- that is wanting protection for reasons of preserving **current** jobs (notice not gaining the most jobs in the long term as would occur under free trade etc), following vested interests like the CBI- the government of Mrs. May seems to have assumed that only the 'soft Brexit' WAPD could get through Parliament. Similarly, it assumed that Parliament would not support No Deal, because this too would sacrifice some current jobs to a free trade strategy under WTO Rules; as a result the government did not prepare for No Deal and so lost its only bargaining counter with the EU so that the WAPD failed to favour UK interests. As a result the WAPD too cannot get through Parliament because the ERG Conservatives and DUP votes oppose it. Now Mrs May is trying to get Labour votes to push through some even 'softer' WA, with a PD promising EU customs union in some shape or form. Hence the EU have not had any difficulty achieving a WAPD that favours its interests, because of Parliamentary politics. Add to this that the EU was in any case determined- due to its own politics- to show that exiting countries get a bad deal, to discourage others. It is clear that the politics of the divorce situation was bound to produce a bad deal from the UK viewpoint. One does not need to go further and accuse Mrs May of being a closet Remainer, which she may well be, to account for what has been agreed.

**The Economic Analysis puzzle**

How those Remainer ideas took hold in the face of strong economic arguments to the opposite effect, as set out above, for the long run gains of Brexit, is rather baffling. As I explained in a recent paper in World Economy, Minford (2019), Remainers and their economist allies (eg Breinlich et al, 2016) used 'gravity theory' to argue that leaving the EU would be damaging to the UK and that gains from free trade with the rest of the world would be small. However, the 'gravity models' they used did not obey the canons of good general equilibrium modelling, in which all causal factors are simultaneously analysed for the effect of a major policy change like Brexit. All the gravity models were 'partial equilibrium relationships' in which trade, GDP, FDI and productivity were separately related without any overall inter-linking. This approach was originally -in 2016- also adopted by the Treasury (HM Treasury, 2016); but at the end of 2017 the Treasury for this reason finally abandoned it, in favour of a full general equilibrium model, the GTAP model, bought in from the Purdue University Trade Modelling Project. This was used to reevaluate Brexit in the Cross-Whitehall Civil Service Report (Civil Service, 2018) of that time. Given the strong Whitehall bias against Brexit the new model was given assumptions that produced similar negative results to the previous ones. These consisted of a) few and limited FTAs with the non-EU world b) large border barriers, even with an EU FTA, between the UK and the EU. However, plausible alternative assumptions reverse the Brexit effect on GDP under WTO No Deal for example from highly negative (-7%) to firmly positive (+3%).These assumptions are that the UK uses FTAS with the non-EU to eliminate all trade barriers on goods against them while also gaining wide market access; and that it signs an FTA with the EU that prevents any new barriers, or if it goes to WTO Rules then only tariffs spring up at the border, other interferences being illegal under WTO obligations.

As this debate has unfolded between our critique and the Treasury, academic economists espousing the previous gravity methods have stayed strangely quiet while the Treasury dropped their

methodology. Meanwhile we published another paper (Minford and Xu, 2018) in which we tested a full 'Computable general equilibrium' (CGE) model with gravity mechanisms against a plain Classical CGE trade model without them, to see how well each matched the UK trade facts. Using an elaborate and thorough Indirect Inference test we found that the gravity version was strongly rejected while the Classical one fitted the facts. Furthermore when we did the Brexit policies on the Gravity version the effects were much the same as with the Classical, our main tool; this was because Brexit gives gains with the rest of the world while not much disturbing our relations with the EU and so stirring up the negative gravity effects. Therefore it is clear that the anti-Brexit claims based on the gravity approach are invalid.

Unfortunately in the present fevered atmosphere calm academic debate cannot take place; it is reminiscent of wars of religion where each entrenched side only wants to hear confirmation of its prejudices. One of the side benefits of Brexit occurring is that people may move on to normal technical discussions about optimal UK policies.

**The way forward in Parliament**

There are now three main Parliamentary scenarios. In two of them one or another WAPD, Mrs May's or some even softer one agreed with Labour, gets through Parliament. The UK then leaves the EU in these two scenarios, initially for the transition period, as soon as either gets through.

In the third, there is no WAPD agreed and the possibility strengthens of a second referendum with Remain on the ballot paper, leading to either No Brexit or a renewed demand for Brexit. This third scenario is one in which Brexit uncertainty continues for a year or more, with unknown political consequences, given that the Leave voters in the first referendum would feel betrayed. This third scenario will only be welcomed by Remainers determined to reverse the democratic referendum decision. From a Brexit viewpoint, the only hopeful outcome would be a new Conservative leader and government determined to change the WAPD and get it through Parliament before exit. But how could this be achieved without an election to change Parliament's composition? Also, what would be the odds on the Conservatives winning such an election, given the fury of the populace with the Conservatives for failing to deliver Brexit? Such hopes look forlorn.

**Scenarios 1 and 2, if Brexit occurs: What of UK and EU interests post-Brexit?**

In this section I ask what, given we have a WAPD as described, opposed widely by Brexiters, is likely to occur if, as seems probable, Mrs. May steps down and is succeeded by a Brexiter Conservative leader? Such a leader is likely to agree with my account above of UK interests. If so, what can such a leader do, if saddled with the WAPD?

Under the realist view espoused by economic analysis, this leader's government moves to reopen bargaining with the EU. This would be done via normal diplomatic processes, in which the EU would face a possible general lack of UK political cooperation in a wide array of areas, including key ones like security and military matters; also the WTO option would be reactivated as a 'walk away' trade strategy, should the EU be unwilling to move away from its status quo aims. The UK having left the EU after resolving basic administrative issues such as citizen rights, aviation/transport/visa agreements, there would probably be little appetite to revisit these issues; and the focus should be on the trade relationship quite narrowly. Nevertheless were it to be widened, the new government would make active preparations for a breakdown in these areas.

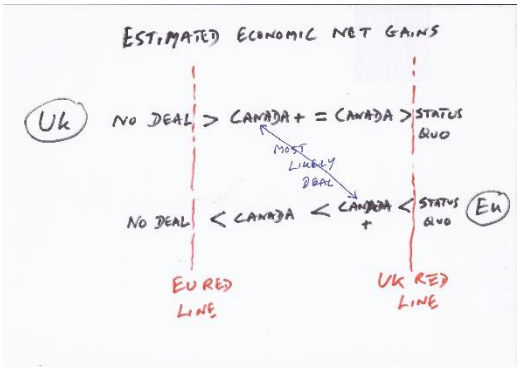
At the same time the UK would proceed to negotiate FTAs with non-EU countries, informing them of their aims on EU relations. These would be widely welcomed, as we already know.

How would the EU /UK bargaining go from here? We can think of the 'game' now as a series of proposals and counter proposals. Start from the opening WAPD 'proposal' for the status quo. This violates UK interests radically, breaching its basic 'red lines'. The UK counter-proposal is to walk away to WTO Rules and no deal. This UK counter proposal damages EU interests radically, as we have seen: they face world prices in the UK market and tariffs in both directions are paid by EU traders. In order to counter this the EU now offers an FTA: Canada+ which consists not just of zero barriers on goods (Canada) but also the + of mutual recognition in services where EU interests are served by free trade, given a wide reliance on UK service industries. The UK wants either Canada or Canada+ more or less indifferently as its service industries are all highly competitive around the world. As noted earlier, while No Deal gives strictly better gains, the UK is likely to agree to this proposal for the sake of neighbourly relations.

The bargaining round which may well take a few years to play out is therefore likely to be resolved by Canada+. We can essentially rule out any other resolution because all other alternatives leave one side unacceptably badly off- beyond its red lines- or can be improved on by one side without making the other worse off

What I mean by unacceptably is literally that it will not accept it in the long run, when by walking away or cooperating it can avoid it. The EU can avoid No Deal by cooperating. The UK can avoid the status quo by walking away.

All this is illustrated in the following diagram: the top line shows how the UK ranks all options, with No Deal the best; the second line shows the EU rankings, with the status quo the best. Each side's red lines of unacceptability are marked out on each side. Any resolution must be inside these. Canada + within these is better than Canada for the EU and an equals with it for the UK. So Canada+ gets chosen.




Notice that all this diplomacy is carried out between 'consenting sovereigns'. Neither will bring in outsiders because no outside power has jurisdiction or indeed wants it. In so far as third parties have preferences, they tend to favour the UK as they typically want to agree FTAs with the UK. As for the WTO, it allows states to negotiate FTAs freely; and in general favours all agreements that in net terms reduce trade barriers, just as will occur under the EU-UK renegotiation.

**The need for a new Conservative leader and government**

In order for this new diplomacy based on the UK's true economic interests, not sandbagged by Remainers within the tent like Hammond and co, there plainly needs to be a new Conservative leader and government, fully seized of the Brexit case for free trade and so on. The current leadership/government has proved that it has neither the understanding nor the will to pursue the UK's true interests. Without it changing no progress along the lines discussed here is possible.

It is now very likely that the Conservative party will change its leadership, if only for reasons of pure survival. With the agreed extension, the Conservatives face carnage in the local elections and if the European elections take place, annihilation in those. This will inform the party of how unpopular its failure to deliver Brexit has made it. Its best hope then is for Mrs. May to go and for a new leader to chart a new direction, while making it clear that the new government rejects and regrets the old government's failed Brexit agenda.

**What are the implications of the Realist View for Parliamentary votes?**

MPs now have some time for reflection during their Easter holiday. They need to ponder the effects of their votes.

Any MP that wants to avoid the chance of that third scenario of possibly No Brexit needs to consider voting for one or other WAPD. With either of them Brexit occurs and the renegotiation can be launched under a new Prime Minister.

An ERG Brexiter will prefer Mrs May's original WAPD since it does not contain extra 'soft' commitments put in to satisfy Labour. These become yet another element to be renegotiated. In principle that too will be jettisoned; but it adds complication.

A DUP Brexiter will remain nervous about the backstop in Mrs May's WAPD; and could be less nervous with a softer one including a customs union because with that the backstop does not come into play. Nevertheless a DUP MP should reflect that none of these will survive renegotiation and should not therefore be unduly concerned. What it really needs from Mrs May and her potential successors is a guarantee that whatever is renegotiated it will never include differential treatment for Northern Ireland, or indeed any other devolved part of the Union. But they should feel confident on this: the Conservatives have been robustly and consistently a unionist party.

It should be noted by both these groups that in opposing any WAPD they are playing the role of 'useful idiots' to Remainers who want no Brexit, leading to a second referendum.

When one turns to Labour MPs and Mrs May, both involved in negotiations over a softer WAPD, they should reflect that their new WAPD causes both sides difficulties- Mrs May because it infuriates most Conservatives, Labour because it will infuriate the substantial Labour group that wants a second referendum rather than any sort of Brexit; but at the same time achieves no extra longterm softness in the outcome, as the added-on soft elements will simply be the first to go in the inevitable renegotiation.

Reflection on all sides should therefore have the effect of terminating the May-Labour negotiation while logically inducing ERG and DUP Brexiters to push the May WAPD over the line.

**Conclusions**

The Realist view of post-Brexit affairs clearly implies that the UK, once it is out of the EU will behave like any other sovereign power and see that its foreign relationships evolve to suit its interests. So far these have been stitched up in talks with the EU due to a Remainer group of Tories who have opposed the government's Brexit policies in favour of industrial vested interests, in alliance with Labour opponents, and undermined its bargaining position vis-à-vis the EU which was in any case politically determined not to agree a good trade deal. No sovereign state could put up with this sort of stitch-up in the long term. This piece has described how a new government, fully seized of the UK interest in free trade and domestically set regulation, besides control of borders and the ending of budget transfers to the EU, will have both the incentive and the scope to achieve a logical renegotiation that reaches an EU agreement tolerable to both sides.

Under this view the key aim for Brexiters should be to get the WAPD in some form- it does not much matter what form- over the line, so that Brexit definitely happens as demanded in the referendum. Policy in the future will then evolve to meet UK interests.

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