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BRITAIN AND THE EU: IN OR OUT – ONE YEAR ON

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One year ago, Britain seemed firmly in the European Union, David Cameron was Prime Minister, and the Conservatives had an effective overall majority of 17. A great deal has happened in the past year, confirming, if confirmation were needed, of the toxic nature of the European issue for British politics.

And perhaps the most prescient remark ever made about Britain and Europe was made nearly 70 years ago, in 1950, by the Labour Foreign Secretary, Ernest Bevin, when it was proposed that Britain joined the European Coal and Steel Community, precursor of the European Union.

Bevin said - If you open that Pandora's Box, you never know what Trojan horses will jump out.

The box was first opened by Harold Macmillan in 1961 when Britain applied to join the European Community, as the EU then was. But the British application was vetoed in 1963, and that veto was perhaps one of the factors which led to the Conservative defeat in the 1964 general election.

The box was to be opened again by Edward Heath and Britain entered the European Community in 1973 after a bitter parliamentary battle to ratify the treaty of accession. But, in February 1974, Heath was narrowly defeated in the general election. When a government is narrowly defeated, any of a host of issues can be held responsible for that defeat, but it seems plausible to suggest that hostility to Europe was one of them. The anti-European cause was led by Enoch Powell, a former Conservative minister. He now advocated a Labour vote, since Labour was proposing a referendum on our continued membership, and that offered anti-Europeans the chance of reversing the verdict of Parliament in ratifying the treaty. The referendum duly occurred in 1975 but it led to a 2 to 1 majority for staying in Europe.

In the 1980s, however, the anti-Europeans gained strength in the Labour Party to the extent that in its 1983 manifesto, Labour proposed leaving the European Union without a referendum, so closing the box. Labour was heavily defeated in that election but Europe was one of the issues which had helped to split the party in 1981 and had led to the formation of the new Social Democratic Party which eventually merged with the Liberals to form the Liberal Democrats.

The box was opened even further in October 1990 when Britain joined the Exchange Rate Mechanism of the European Monetary System, precursor to the euro. This was against the wishes of the Prime Minister, Margaret Thatcher, and prefigured the end of her premiership one month later following the resignation of her Deputy, Sir Geoffrey Howe, on a European issue.

But the problems of Europe were by no means over. Under Margaret Thatcher's successor, John Major, Britain left the Exchange Rate Mechanism in 1992 under humiliating circumstances so legitimising euroscepticism in the Conservative party. Major then faced a problem in persuading his party to agree to ratification of the Maastricht treaty – even though he had achieved opt-outs for Britain, including an opt-out from joining the euro. By 1997, the Conservative were hopelessly split on Europe and that was one cause of the Labour landslide.



In October 2011, a petition for a referendum on the EU had attracted over 1m signatures and was debated in Parliament. 81 Conservative MPs defied a three line whip to vote for the motion.

In January 2013, in his Bloomberg speech, David Cameron proposed a referendum which he hoped would legitimise British membership of the EU.

In June last year, the referendum was held and yielded a 52/48 vote for leaving the EU; and in 2017, Theresa May called an election in part to confirm the outcome of the referendum.

SO – Europe has had seismic effects on British politics – dividing parties and destroying Prime Ministers. That of course is because it raises basic concerns of sovereignty and nationhood, and undermines our fundamental constitutional concept of parliamentary sovereignty, a concept which has no counterpart in any other member state of the EU.

The movement towards European unity requires us to answer a fundamental question – are we or are we not politically part of the Continent of Europe. We have had to deal with this question for almost the whole of the postwar period, and perhaps we have still not fundamentally decided on what our answer should be.

At a recent seminar on Brexit held at King's College, London, the Professor of European Law, Takis Tridimas, declared that the referendum on 23rd June 2016 on Britain's continued membership of the European Union, was the most significant constitutional event in Britain since the Restoration in 1660. That was because the referendum showed, or perhaps confirmed, that on the issue of Europe, the sovereignty of the people trumped the sovereignty of Parliament – since, in the referendum, Britain voted, against the wishes of Parliament and government, to leave the European Union.

The referendum was, admittedly, only advisory. But the government had agreed in advance that it would be bound by the result. Parliament could not be bound by it, but, as the then Leader of the House of Commons, Edward Short, had told the House of Commons in relation to the previous referendum on Europe in 1975, 'one would not expect honourable members to go against the wishes of the people'.ⁱ

Brexit, therefore, is coming about – not because government or Parliament want it, but because the people want it. For the first time in its history government and Parliament are being required to do something that they do not wish to do. There is a conflict between a supposedly sovereign Parliament and a sovereign people. That is a situation without precedent in our long constitutional history.

The purpose of the recent general election was to resolve that conflict – to replace the House of Commons elected in 2015 which had ceased to represent the people on the issue of Europe, with a more representative House, one committed to carrying through the verdict of the people in the referendum. Had that been achieved, it is possible that the European issue would have been settled, that the box would have been closed. But that purpose was not achieved. Indeed, the new House of Commons probably holds a larger percentage of MPs opposed to Brexit than the old. And, in the Cabinet, 16 out of the 23 members voted for Remain. The box remains open, and indeed in my view the outcome of the election reopens the whole European question.

Nevertheless, the process of leaving the EU was begun in March of this year when Theresa May activated Article 50 of the EU treaty, by giving notification to Brussels that Britain intends to withdraw from the EU. The clock is ticking, and, under the provisions of Article 50, Britain will leave the EU two years after the activation of Article 50, that is in March 2019, unless the deadline is extended. To extend the deadline, there must be unanimous agreement amongst the other 27 member states.

In a recent case which came to the Supreme Court - the Miller case - both sides argued that the Article 50 process, once triggered, was irrevocable. I do not share that view – nor, more importantly, does Lord Kerr, who, as the diplomat Sir John Kerr, helped negotiate Article 50 in the 2008 Lisbon Treaty.



In my view, invoking Article 50 initiates a negotiation, and a member state can, at any point, decide that it does not wish to continue with the negotiation.

Suppose that there were a clear indication, as for example through a second referendum, that the British people had changed their mind. The Article itself has nothing to say on what happens in these circumstances. But, if a state were not able to revoke its notification when it had changed its mind, the consequence would be that it would have to complete the withdrawal process, sign a withdrawal agreement, and then re-apply to join under the provisions of Article 49. That seems to me contrary to the spirit of Article 50. For Article 50 is intended to provide for a negotiation, not for the expulsion of a member state that wishes to remain in the EU.

It may be that the withdrawing state has no RIGHT to revoke Article 50, but surely, at the very least, the other member states have discretion to allow it to do so, and would no doubt exercise that discretion were the withdrawing state be seen, in good faith, to have changed its mind.

Article 50, however, deals with the process by which a member state withdraws. The actual act of withdrawal is not, in my view, the invoking of Article 50, but repeal of the European Communities Act of 1972. That was the Act which ratified the Treaty of Accession and made Britain subject to the law of the European Union. The Prime Minister has indicated that the government will propose to Parliament that the European Communities Act be repealed through what has been called a Great Repeal Bill. But, if we simply repealed every single European law, that would leave a legal vacuum since many areas which we would all like to see regulated, would remain unregulated. What Parliament will do, therefore, is incorporate the whole of European law into our domestic law and then decide what, of the huge corpus of European Union legislation – directives and newly incorporated regulations - which has been passed during over 40 years of membership, is to be retained, what is to be modified and what repealed. That is similar to what India, and perhaps other ex-colonies did when attaining independence. When she became independent in 1947, India incorporated the whole corpus of British legislation affecting her, and her parliament then decided which of these laws she wished to keep, which she wished to modify and which she wished to repeal. So the Great Repeal bill might equally be called a Great Incorporation bill.

Strictly speaking, Article 50 inaugurates a withdrawal process, not an agreement on Britain's future relationship with the EU. Withdrawal involves negotiating essentially technical issues, though important ones, such as the rights of British citizens in the European Union, the rights of European Union citizens in the UK and the amount of money which Britain owes to the European Union. But Article 50 also provides, in somewhat ambiguous language, that the negotiations take 'account of the framework' for a country's 'future relationship with the Union'. The EU has insisted that negotiations on the terms of withdrawal and the amount that the UK needs to pay to the EU on leaving make sufficient progress BEFORE negotiations on the future relationship. The British government hoped that the negotiations on the future relationship could take place in parallel with negotiations on the future relationship, but has had to give way on this point to the EU – an indication perhaps of the fact that Britain does not enjoy a particularly strong negotiating position.

Indeed, it may be that the government's view of the possibilities of negotiation are somewhat over-optimistic. It seems to me – though I hope that I am wrong – that the UK's position in these negotiations is not a very powerful one. This is so for four reasons.

- i) First, Britain is outnumbered by the 27 member states who have mandated the negotiators. The process has been compared to a divorce from 27 ex-wives!
- ii) The final deal has to be ratified by the European Parliament, which tends to be more integrationist than the member states. The deal may also, as I shall explain, have to be ratified also by national parliaments and even by some regional parliaments.
- iii) The stringent time limit. There is, apparently, a Japanese saying – the shorter your time scale the deeper your wallet needs to be.
- iv) We seem to me to have very little leverage. People complain that David Cameron did not secure enough in his re-negotiation. Perhaps he had perhaps little leverage – but he could at least say – if I don't get a good deal – the UK might vote to leave the EU. What can Theresa May say – if I don't



get a good deal, we will stay in the EU. Clearly not! Britain used to argue – give us a special deal or we will leave the European Union. One cannot continue to argue that when one has already agreed to leave.

Britain is in the position of a supplicant – a position that de Gaulle always said one should try to avoid. Just 50 years ago, British Prime Minister, Harold Wilson, and his somewhat volatile Foreign Secretary, George Brown, visited de Gaulle to try to overcome his veto. Brown did not start off well by calling de Gaulle ‘Charley’! Brown said that the two countries should deal with the problem of Europe. De Gaulle replied that he did not understand. France was in the European Community, as the European Union then was, and had no problem. Britain was outside and wanted to get in and that was her problem!

Some British politicians suffer from an Imperial reflex. Britain for them is at the centre of the world and other countries are under an obligation to meet British needs. That is ironic. Last year, some of the Brexiteers argued that the EU was composed of ill-intentioned foreigners determined to do Britain down. Now these foreigners have been transformed into charitable institutions which will help UK out of her difficulties. That is somewhat implausible!

What then is the future relationship likely to be? The European Union comprises three elements – first, a free trade area, secondly, a customs union – that is an area with a common trade policy and a common external tariff – and thirdly, a single market – that is a market in which non-tariff barriers to trade – regulations, standards and the like – are harmonised. Article 50 leaves open the question of whether Britain seeks to continue to remain part of any or all of these elements.

Were Britain to seek to remain in the internal market, it would be natural for her to seek to emulate Norway and join the European Economic Area – EEA. The EEA comprises the member states of the European Union together with Norway, Liechtenstein and Iceland. EEA members are not subject to the Common Agricultural Policy nor the Common Fisheries Policy. The European Economic Area is not a customs union and so membership would leave Britain free to conclude trade deals with third countries. But they are subject to the EU’s common external tariff and so Norwegian fish exports to the EU, for example, are subject to a tariff.

The EEA extends the European Union internal market, together with the free movement of goods, services, people and capital into non-member states. So, if Britain were to become part of the EEA, she would have to continue to accept freedom of movement. She could not limit immigration from Europe.

There is, admittedly, an emergency brake mechanism allowing for restrictions on immigration on the part of EEA members. Art 112 of the EEA Agreement allows such restrictions in exceptional situations. Some have suggested that this could be used by Britain to limit immigration. But I do not believe this to be the case. Article 112 says that a country can limit immigration if it faces ‘serious economic, societal or environmental difficulties of a sectorial or regional nature’ that are ‘liable to persist’. They must be ‘restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation’. These criteria seem to me very specific and limited and they cannot, in my view, be used to secure exemption from the free movement principle as a matter of policy. So far, indeed, the European Union has not granted membership of the internal market to any country which has not accepted the principle of freedom of movement. Indeed, Norway in recent years has taken more European Union immigrants per head of population than Britain. ⁱⁱ

Although members of the EEA are not part of the legal order of the European Union, they are nevertheless required in practice to adopt EU legislation on employment, environmental policy, social policy and competition. They are under an obligation to adopt not only current European Union legislation, but also all future EU legislation, into their own domestic law. Member states of the EEA are also subject to judicial review by a European court – not the European Court of Justice but the Court of the European Free Trade Area. That court, however, follows the case law of the Court of Justice. Indeed it cannot contradict the case of the law of the European Court. EEA members are also required to contribute to the EU budget. Norway currently pays



around 83% per head of the British contribution, although that includes a contribution to the Schengen area to which Britain does not and would not belong.

These requirements could cause difficulties for a British government. For one important motivation, perhaps the most important motivation, behind the referendum vote was to restrict immigration from the European Union. Since many of those who voted for Brexit also sought to end the supremacy of European law and supervision by a European court as well as contributions to the EU budget, the option of EEA membership would hardly satisfy them.

In fact, EEA membership mimics European Union membership. It would require Britain to comply with much of the so-called *acquis* – that is the laws and regulations - of the European Union - in exchange for access to the single market; but Britain would be unable to influence that *acquis*. Britain, then, would be subject to European Union regulation without representation. We would have to rely on other countries, such as France or Germany, to protect our interests, to act, as it were, as trustees for our interests. The Norwegian option is perhaps more suitable for a small country prepared to accept rules made by others than a large country such as Britain more accustomed to be a rule maker. It would mean for Britain a kind of colonial status, in which she would be dependent on others to look after her interests, as children depend on adults to look after their interest, a form of virtual representation of the type to which the American colonists so objected in the 18th century.

The difficulties were well summed up by one political leader last year, six weeks before the ref. who said.

‘The reality is that we do not know on what terms we would win access to the single market. We do know that in a negotiation we would have to make concessions in order to access it; these concessions could well be about accepting EU regulations over which we would have no say, making financial contributions just as we do now, accepting free movement rules just as we do now or quite possibly all three combined.

It is not clear why other member states would give Britain a better deal than they themselves enjoy’.

That speaker was Theresa May.

Some have suggested that Britain could secure a similar arrangement to that of Switzerland. The Swiss arrangement is based on some 120 bilateral agreements with the European Union, which it took Switzerland some 20 years to negotiate.

These agreements need continual re-negotiation to take account of changing economic circumstances, a cumbersome and unwieldy arrangement. Broadly, the agreements provide for free trade in industrial goods but not in agriculture. Swiss financial institutions enjoy only limited access to the European Union, but they do not enjoy so-called passporting rights. That is why a number of branches of Swiss banks are located in European Union member states, primarily in London, in order to sell services to European Union customers. The Swiss contribute to the European Union around 40% per head of the British contribution. But, as with Norway, Swiss goods being exported to the European Union face tariffs and border costs in terms of rules of origin requirements, so as to prevent third countries from using these countries as back doors to avoid the European Union’s common external tariff.

Switzerland, like Norway, seemed to have been required to accept the free movement of peoples. But, in February 2014, in a referendum, the Swiss voted in a referendum to establish quantitative limits on all immigration, including European Union immigration. This breached a bilateral agreement with the European Union. The European Parliament has said it puts at risk the whole series of bilateral treaties with EU, since Switzerland should not be able to reject free movement while benefiting from all of its other agreements with the EU.

The European Union indeed has threatened that, unless the Swiss reconsider, it will withdraw access to the single market. Switzerland is currently seeking a compromise solution. But the European Union is in any case



trying to alter its relationship with Switzerland. The immigration issue confirmed the EU in its belief that bilateral agreements are not a good idea since it seems to give non-member states the right to cherry-pick, benefiting from the agreements it likes, while trying to find ways round agreements it does not like. The European Union is now seeking a tighter relationship with Switzerland involving greater supervision by the Commission and control by a European Court, and more rapid adoption by the Swiss parliament of European Union legislation in the relevant areas. The Council of the European Union declared on 16 December 2014 that 'A precondition for further developing a bilateral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU's internal market, in order to ensure homogeneity and legal certainty in the internal market'. It declared that 'an ambitious and comprehensive restructuring of the existing system of sectoral agreements would be beneficial to both the European Union and Switzerland'.

The Swiss model in fact may well be breaking down. The EU prefers a multilateral not a bilateral approach – it would like the Swiss model to converge towards the Norwegian model which in turn it hopes would lead to actual membership of the EU. So it is highly unlikely that the EU would agree to replicate the Swiss model for Britain. A former British Ambassador to Switzerland once said to me that the Swiss model, with its large number of bilateral agreements requiring continuous adaptation and re-negotiation was not even good for Switzerland, let alone Britain.

Both the Norwegian and the Swiss models require broad equivalence of laws with the EU. They seem to preserve the autonomy of Norway and Switzerland, to give them control, but in practice they do not do so. In practical terms, Norway and Switzerland lose sovereignty but without the compensating benefit open to members of the EU of helping to determine EU legislation.

In 2013, the Foreign Affairs Committee of the House of Lords concluded - paragraph 164 – that

'current arrangements for relations with the EU that are maintained by Norway or Switzerland are not appropriate for the UK if it were to leave the EU. In both cases the non-EU country is obliged to adopt some or all of the body of single market law without the ability to shape it. If it is in the interests of the UK to remain in the single market, the UK should remain in the EU, or launch an effort for radical institutional change in Europe to give decision-making rights in the single market to all its participating states'.

Norway and Switzerland therefore seem less EXAMPLES than WARNINGS on how, even though de jure sovereignty is preserved, de facto autonomy is lost.

Some say that Britain could seek to remain a member of the EU customs union after she has left the European Union. That is the view that has been put forward by Sir Keir Starmer, Labour's Shadow Brexit Secretary, and it is thought to be the view held by the Chancellor of the Exchequer, Philip Hammond. But the argument is often made rather loosely. MEMBERSHIP of the customs union is, however, by definition not possible since by definition the EU customs union comprises only EU members. But the UK could, as Turkey has done, negotiate a customs union WITH the EU. This option is open to the obvious objection that it would prevent Britain from having an independent trade policy of her own. She would not be able to seek trade agreements with other countries, which was one of the hopes of many of those who supported Brexit. The EU could not allow such an independent policy since if, for example, Britain had a free trade agreement with India, then a flood of goods could arrive from India via Britain that would have avoided EU tariffs and EU regulations even though India is of course outside the EU customs union.

But supporters of the customs union option say that there is in any case only limited scope for such trade deals with other countries. So that objection, they claim, is not a very powerful one. They argue that a customs union with the EU would also have the advantage of avoiding a hard border between Northern Ireland and the Republic of Ireland, that is a tariff barrier between the two parts of the island of Ireland.



But there would be two disadvantages to a customs union with the EU. First, Britain would be committed to the European Union's common trade policy without any means of influencing that policy. Britain would have to continue to accept European Union legislation relating to trade policy. Britain would also have to accept the decisions of the European Court or some other judicial body on matters to do with the customs union where it was alleged that there had been breaches of the rules.

Second, EU trade agreements do not include countries outside the EU with whom they have a customs agreement. They do not, for example, include Turkey. So Turkish markets are opened up to third countries with whom the EU has a trade agreement, but the markets of these countries are not opened up to Turkey. In other words, a country which has a customs union with the EU is involved in an asymmetric relationship. This means that Turkey, like Norway and Switzerland, cedes a part of its sovereignty without being represented in the EU and with little influence on its decision-making process. In the case of Britain, continued membership of the customs union from outside the EU would mean that, when the European Union signed a trade agreement with a third country, for example, Japan, then Japan would enjoy free access to British markets, but Britain would have no access to the markets of Japan, and would not be allowed to enter into a separate trade agreement with Japan.

Some ministers have suggested that Britain would seek a 'bespoke' agreement, one that is tailored to Britain's specific needs. Theresa May as Home Secretary achieved such an agreement with Justice and Home Affairs. She opted out of much of it, but then opted in to those areas which suited British interests. The Labour election manifesto proposed retaining the benefits of single market and customs union, while also restricting immigration. This, however, assumes that Britain could secure the benefits she wished from the European Union such as membership of the single market, without being bound by its obligations, such as free movement and judicial supervision. It is not clear that it would be in the interests of the European Union to agree to something of this sort. Many of the governments of other member states face Eurosceptic movements of their own. Were Britain able to secure the benefits of membership without the obligations, these Eurosceptic movements would argue that their own countries also would benefit from leaving the European Union and it would be in danger of breaking up. If one decided to leave a tennis club, because one found the subscription and the membership obligations onerous, one would be unlikely to be allowed to play tennis on the same basis as those who remained members.

I recently heard an official of the European Parliament, which must ratify any agreement with the UK, complain that while in the EU Britain continually wanted exceptions and opt-outs. Now Britain is leaving the EU but still wants exceptions and opt-outs. I rather doubt that the EU will allow Britain to cherry-pick.

It seems to me, therefore, questionable whether there is any such animal as a so-called 'soft' Brexit. This form of Brexit seems to me to mimic EU membership, to give Britain many of the disadvantages of membership without the ability to influence EU legislation. They would turn Britain into a satellite or colony of the EU. Theresa May has been criticised for saying that Brexit means Brexit. But that is not a mere meaningless mantra. She has said that we are not staying in the internal market or the customs union. Perhaps she has merely drawn out the logic of Brexit. Perhaps the only real alternatives are the so-called hard Brexit and remaining in the EU. If Britain does not seek continued membership of the internal market or the customs union, there are only two alternatives left.

The first is an association agreement with the European Union, under Article 217 of the treaty, on the lines of agreements which the Union has negotiated with the Ukraine, Georgia and Moldova, providing for free trade and also political cooperation. An association agreement leaves a non-European Union state free to make its own trade agreements with third countries. Furthermore, the agreements with the Ukraine, Georgia and Moldova do not require free movement, since the European Union is not anxious to encourage further mass immigration from those countries. The agreement with the Ukraine goes further than most free trade agreements in that it also provides for the freedom of establishment in service and non-service sectors. This, however, was made dependent upon the Ukraine being prepared to accept the *acquis* of the European Union. An association agreement might therefore, like the other options, limit the autonomy of Westminster, and might therefore limit the extent to which Britain were able, in the slogan of the Brexiteers to 'take back control'. But



there is a historical precedent for Britain which, in December 1954, negotiated an association agreement with the European Coal and Steel Community, providing for Britain to enjoy access to the integrated coal and steel market of the Community. This Agreement lasted until Britain joined the European Community in 1973.

There is, however, a political difficulty of negotiating a satisfactory association or trade agreement since the European Union will not want it to be so favourable to Britain that it becomes attractive to those member states in which secessionist feeling is strong. There would also have to be a method of dispute agreement which did not subject Britain to judicial review by a European court.

In addition, European Union procedures for ratifying association agreements and most trade agreements are far more stringent than those for ratifying a withdrawal agreement. The withdrawal agreement under the Article 50 procedure requires a qualified majority in the European Council and a majority in the European Parliament. But an association agreement or a so-called 'mixed trade agreement' – that is, one which includes areas that fall within the shared competences of the Union and the member states, such as the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice and common safety measures in public health - also needs to be ratified separately by each of the member states, together with some regional parliaments, including, for example, those of Flanders and Wallonia – a total of 38 legislatures, each of which has a veto. The trade agreement between the EU and Canada was held up for some time by the Belgian regional parliament of Wallonia.

In addition, no trade or association agreement can be signed until Britain has actually left the European Union. The Union cannot conclude such an agreement with another country until that country ceases to be a member state. It is in any case highly unlikely that the detailed outlines of such an agreement will have been decided within two years. When, in 1985, Greenland, whose one staple industry is fishing, withdrew, it took three years to negotiate an agreement. The trade agreement between the European Union and Canada took seven years to negotiate.

Were no association agreement or trade agreement to be in place by 2019, then, unless there were unanimous agreement to extend the two year deadline, there would need to be a transitional agreement. That might well involve Britain remaining in some sort of relationship with the EU until agreement was reached. The price of such continued involvement might be continued acceptance of EU laws, judicial supervision by the European Court of Justice and a continuation of free movement. It is not clear whether such a transitional agreement would be acceptable to large sections of the Conservative Party or to the British people who voted in 2016 to leave the EU and perhaps assumed that our departure would take place within a fairly short period of time. But, whatever the merits of the EU, speed in negotiating trade agreements is not one of them; and the requirements needed to secure agreement are very stringent indeed.

In the absence of a trade or association agreement, Britain would, following Brexit, be subject to World Trade Organisation rules. This would leave Britain free to negotiate her own trade deals with the European Union and other World Trade Organisation members. Britain's Most Favoured Nation tariff schedules could not, under the principle of rectification, be vetoed by other World Trade Organisation members, provided that they did not yield a greater degree of protection than at present; and, since Britain is a member of the World Trade Organisation, the European Union could not discriminate by raising its common external tariff against her.

World Trade Organisation rules do not, however, apply to most non-tariff barriers, which, in the modern world, have become far more important than tariffs. The European Union has removed many such non-tariff barriers with the development of the internal market, and more are in the process of being removed. It is these non-tariff barriers rather than tariffs which would probably constitute the main difficulty for Britain after Brexit since services are such an important part of the British economy.

Some Brexiteers have argued that one does not need a trade agreement to trade successfully. Japan and the United States have, after all, traded perfectly happily and successfully with the European Union for many years without such an agreement. If one has goods and services that other countries wish to buy, they will trade. A



country adopting a policy of free trade gains an immediate economic benefit. If other countries impose tariffs against her goods, it is the standard of living of these other countries which falls, not the standard of living of the country that has adopted free trade. Indeed, there is no doubt that one advantage of leaving the EU is that one moves from a protected market in agriculture and in some other goods to an unprotected market. Being free of the common external tariff, Britain can import cheap food from beyond the European Union, e.g. from Australia, Canada and New Zealand. So the price of food might fall; and she can import, for example, cars from the United States without any longer paying the common external tariff of 10% on cars. To leave a protected market for an unprotected one must lead to economic gains.

Perhaps the logic of a post-Brexit Britain is that she should reduce tariffs and move towards unilateral free trade. That was the policy adopted by New Zealand in 1984 by a Labour government to compensate for the fact that she had lost British markets when Britain joined the EU. Some Brexiteers cite Singapore or Hong Kong as global trade hubs that have benefited from free trade and the philosophy of econ liberalism.

But this involves a huge paradox. For the referendum vote was in essence a cry of rage by the victims of globalisation, the revenge of the betrayed. They sought protection against the excesses of globalisation, against market forces which, so they believed, were costing them their jobs and holding down their wages. They wanted, above all, restrictions on immigration from the EU. Immigration, so they believed, seemed primarily to have benefited the elite who were able to hire efficient Polish builders and Lithuanian au pairs. The benefits seemed less obvious for the left behind on low wages who believed that an unlimited supply of immigrant labour kept wages low. In addition, the left behind found it difficult to cope with the **social** effects of immigration, the transformation of their communities which had occurred without their consent.

The vote for Brexit, then, was a popular protest against globalisation. That was the main motivation of UKIP and many other Brexiteers. But some of the leaders of the Brexit campaign from the Conservative Party were economic liberals who, while agreeing that EU immigration should be restricted, had an entirely different agenda. They sought Brexit for basically Thatcherite reasons, to ensure a more effective operation of the market economy, freed from the restrictions and regulations of Jacques Delors's social Europe. They believed that a Britain free of EU regulations and restrictions could be a powerful global trading hub, like Hong Kong or Singapore. They opposed not globalisation but social protection and regulation.

It is this economically liberal view of some of the Brexit leaders rather than the populist view of most of the Brexit voters which seems to me more likely to prevail after Brexit. Indeed, it seems to me the view which must prevail if Britain is to survive economically after Brexit. For Brexit makes no sense unless Britain decides to chart a new course towards economic liberalism. Survival outside the European Union entails that Britain must become more competitive, opening up markets and embracing free trade. It means encouraging enterprise by lowering corporation tax and perhaps personal taxation as well. These reductions in taxation can be financed only by reducing public expenditure. That will put further pressure on social and welfare expenditure, already under strain after seven years of austerity. It will mean a radical shrinking of the state, which is likely to disadvantage the very voters who believed that Brexit would protect them from the excesses of globalisation. Far from gaining shelter from world economic forces, they will find themselves even more exposed to them. They will have to sink or swim in the harsher economic climate in which post-Brexit Britain will find herself. Brexit, therefore, could lead to a Britain more, not less exposed, to the forces of globalisation. It could prove the revenge of Margaret Thatcher from beyond the grave.

Such an economically liberal stance also conflicts also with Theresa May's idea of a more socially responsible and interventionist private enterprise system. In the Conservative manifesto, it was said that the Conservatives rejected equally the ideologies of the untrammelled free market and of socialism. There is a conflict between Theresa May's middle way and the more competitive policies needed if Brexit is to be a success.

Is there an appetite for a solution based along these lines of economic liberalism – Margaret Thatcher's fourth term – as it were - on the part of the British people. If not, then it seems to me that we have either to remain in the EU or to become a satellite of it. So there are no easy choices.



BUT – now we have had the general election. Theresa May called it to resolve the European question. Had she gained the landslide she was hoping for, that might have happened. She could then have argued that the referendum result had been confirmed and she could have pressed ahead with Brexit negotiations confident that the whole nation was behind her. But the opposite has happened. The election has been called the revenge of the Remainers. It reopens the whole issue of Brexit. That is so for four reasons.

The first is that there is no Commons majority for Theresa May's version of Brexit. Indeed, as I said at the beginning of this lecture, there is probably a stronger representation of Remain MPs in this Parliament than in the last. Perhaps there is no majority for any of the forms of Brexit on offer. We do not know.

The second reason is that the election intensifies the division within the Conservative Party. It is now perfectly possible that a deal secured by the government would be voted down in the Commons, while the DUP, on whom the Conservatives depend for their majority, might not support a deal which worsens the economic position of Northern Ireland by cutting her off from her natural market in the Republic. Even more important, if a deal is seen as too 'hard', Conservative Remainers may join with the opposition parties to defeat it. On the other hand, a deal which seems to Tory eurosceptics not hard enough could lead to it being rejected within the Conservative Party, and opposed by Conservatives in the country.

The third reason is that the House of Lords, which probably has an even higher proportion of Remainers in it than the House of Commons, will now feel emboldened to press its own views. Had Theresa May won a landslide, her position on Brexit would have been seen to enjoy electoral legitimacy; and, in terms of the Salisbury Convention, the Lords would have had to let it prevail. Now, with the government lacking a majority in the Lords, and with the pro-Remain Liberal Democrats and the cross-benchers holding the balance of power, the upper house will feel under no such constraint.

The fourth reason is that the success of the Labour Party raises the question of whether the British people do still want to leave the EU. In the great increase in the Labour vote – the largest increase in a vote for a party since Attlee in 1945 – there may be an element of buyer's remorse. Now the Labour Party was not, as the LibDems were, a Remain party. The Labour manifesto declared that the party accepted the outcome of the referendum, that a Labour government would leave the EU, that it would institute a policy of 'managed immigration' in place of free movement, and that it would seek to retain the benefits of the single market and the customs union. How it could achieve these aims while at the same time controlling EU immigration and adopting a separate trade policy was not made clear.

But that did not matter. Remainers perhaps came to the conclusion that a vote for the LibDems was a wasted vote and that the best way to reverse or at least mitigate the outcome of the referendum was to vote Labour. In constituencies where over 60% voted Leave, there was a small swing of around 0.8% to Cons. But in seats where the Remain vote was over 55%, there was a 5% swing to Labour.

I said earlier that perhaps there is no such thing as a soft Brexit, that perhaps there were only two real alternatives – Remain or Theresa May's Brexit leaving Britain outside the internal market and the customs union, since a so-called soft Brexit meant becoming a satellite or colony of the EU with little means of influencing its policy – perhaps the worst of all words.

It may be that, faced with this choice – of Brexit means Brexit – or Remain – the British public come to have second thoughts. It may be that MPs, to overcome party divisions, do what Harold Wilson did in 1974 and David Cameron did in 2013, call for a referendum. That referendum would be on the deal, when finalised, asking the British public whether they still want to leave the EU. There is therefore a slim possibility that Britain might not, after all, leave the EU. That possibility may appear remote now. But two years ago, it appeared a very remote possibility that Britain would leave the EU. Opinion on Europe can alter very rapidly.

Labour in the 2017 election attracted Remain voters while not greatly alienating Leave voters. It produced a Leave manifesto but used the language of the Remainers, or at least of the so-called soft Brexiters. The parties that have been most successful since the European issue came to dominate British politics have been those that



were able to finesse it as Labour did in 2017. In 1974, Harold Wilson finessed it by promising a referendum which meant that both pro-Europeans and Eurosceptics could vote for him with a clear conscience. David Cameron, whose achievement now looks rather more impressive than it did a few weeks ago, did the same in 2015 so that both pro-Europeans and Eurosceptics were able to vote for him. Theresa May, however, enjoyed no such luxury. She had to accept the outcome of the referendum, in which, after all, around 58% of Conservatives seem to have voted for Brexit. But Jeremy Corbyn was able to finesse the issue.

It is a paradox that Remainers looked primarily to Jeremy Corbyn to rescue them from Brexit since Corbyn was, with his Bennite allies, a lifelong Eurosceptic who had voted No in the 1975 referendum, and had voted against the ratification of both the Maastricht and Lisbon treaties. It is equally a paradox that Leavers look to Theresa May who had supported Remain in the referendum.

The general election was just the latest attempt to purge Europe as an issue from the body politic. The first was the referendum in 1975 which yielded a two to one majority for remaining in the UK. After that referendum, Harold Wilson, Prime Minister at the time, said ‘The verdict has been given by a bigger vote, by a bigger majority than has been received by any government in any general election. Nobody in Britain or the wider world should have any doubt about its meaning. ----- It means that fourteen years of national argument are over. It means that all those who have had reservations about Britain’s commitment should now join wholeheartedly with our partners in Europe and our friends everywhere to meet the challenge, confronting the whole nation.’

Tony Benn, who had wanted Britain to leave the European Community, said ‘I have just been in receipt of a very big message from the British people. I read it loud and clear. By an overwhelming majority the British people have voted to stay in and I’m sure everybody would want to accept that. That had been the principle of all of us who advocated the referendum’.

But by 1983, Labour was proposing leaving the European Community without a further referendum. Since then Prime Ministers have sought in vain to exorcise Europe, to control Ernest Bevin’s Trojan horses. In 2006, in his first Conference speech as Tory leader, David Cameron said that the Conservatives had alienated voters by – and I quote - ‘banging on about Europe’.

In 2013 he promised a referendum which he hoped would exorcise the issue. At first it seemed that the 2016 referendum had settled it. But the 2017 general election, the revenge of the Remainers, has reopened it. For Brexit depends, in form upon the continuing consent of a sovereign Parliament, but in practice upon the continuing consent of a sovereign people.

Disraeli once said there is no such thing as finality in politics. How right he was!

The story has not therefore come to an end. Have we reached the beginning of the end – or perhaps only the end of the beginning. Who can tell - and, having wrongly predicted the outcome of the GE, I will make no further predictions!

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ⁱ House of Commons Debates, vol. 888, col. 293. 11 March 1975.

ⁱⁱ Liechtenstein, a member of the EEA, has been given the right to impose quantitative limits on immigration from the European Union. But it is a state of only 37,000 people, and a tax haven. Therefore, the European Union has an interest in limiting immigration into Liechtenstein. It is doubtful if the arrangement for Liechtenstein can be regarded as a relevant precedent for Britain.