

Brexit and the European Court of Justice

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This paper considers the prospective United Kingdom (UK) departure from the European Union (EU), and what might follow, from the particular perspective of the European Court of Justice (ECJ) (or, Court of Justice of the European Union, CJEU) and its function as an adjudicatory body. The subject is of substantial importance in its own right. Moreover, to appreciate it fully is to comprehend some of the most significant features of the 'leave' project as a whole. Expert commentaries on this subject have tended to approach it from a rational perspective, discussing the concessions the UK might make to achieve a more satisfactory outcome. However, the present work emphasises that UK attitudes towards the ECJ (as towards the EU generally) are founded in questionable assumptions that in turn create the premise on which the programme of departure from the EU rests. Within this context, to analyse the UK approach to negotiations through a lens of rationality is a potentially flawed approach. This paper, therefore, considers Eurosceptic perceptions of the Court, interrogating their validity, but also accepting that, whatever their merits, they are nonetheless the basis for the current UK posture.

It begins by considering the views taken of the ECJ by those hostile to UK participation in European integration; and critically assesses their analyses. The paper then discusses the UK position regarding the ECJ in negotiations taking place under Article 50 of the Treaty on European Union (TEU), and the implications of the UK stance in this area. It asks what the alternative to the ECJ might be. The paper considers the weakening of the position that to leave without a deal in place is a reasonable – or even desirable – option; and the consequences of this change of discourse for attitudes towards post-EU arbitration arrangements.

Euroscepticism and the ECJ

A central feature of the EU, and a key strength of the organisation, is the Single Market. This entity is sustained and advanced through the active development of rules intended to ensure regulatory harmonisation across member states. They reduce non-tariff barriers to trade, complementing the elimination of duties entailed by the Customs Union. The ECJ is responsible for the interpretation of this body of European law, which takes priority over all other legislation applying within the Union. This system of rules, upheld by the Court, is intrinsic to the European integration project. Some leading advocates of UK departure from the EU reject the EU approach to regulation. Their primary interest is in the avoidance of tariffs, not the prevention of regulatory protectionism. They favour a minimalist framework, whereby the UK relationship with the EU is determined by the default mechanism of World Trade Organisation (WTO) rules, with no other arrangement in place. The credibility of this approach has diminished under public scrutiny in recent months, as is discussed below. However, among Eurosceptics, including within the UK government, unease about the ECJ continues.

Aside from the fundamental philosophical difference described above, there are a number of strands to the Eurosceptic criticism of the ECJ. One involves the number of cases that the UK has lost before it, when UK policy has been found to be in violation of European law and accordingly been required to alter its position. In the lead-up to the referendum of 23 June 2016, 'Leave' campaigners made much of data showing that over the period of UK membership commencing in 1973, the UK

had been defeated in 101 out of 131 instances, a loss rate of 77.1 per cent.¹ Furthermore, advocates of exit held, the balance was worsening, reaching 80 per cent in the period since 2010, with the UK losing 16 of 20 cases.

However, such uses of these data lacked proper context. The ECJ is not an instrument dedicated to legalistic persecution of the UK. It hears cases against all member states. The UK has not been an outlier in its loss rate. Moreover, the bulk of the cases lost by the UK were brought by the European Commission, and the Commission only takes such legal action if it thinks it has a high chance of victory. Furthermore, quantitative evidence of this sort does not reveal how important was each individual case; and the outcome of particular judgements, whether the UK won or lost, might anyway be judged desirable or otherwise according to the particular perspective taken.² In enforcing European law across the EU, the ECJ benefits all participants in the EU, through strengthening the Single Market and reinforcing other aspects of its work, and through protecting individual rights. To recognise this proposition, of course, is to acknowledge the value of the EU project as a whole, and is therefore not compatible with a Eurosceptic agenda.

A second line of criticism involves the discretion possessed by the Court. In reaching decisions, so the argument runs, the ECJ is able fundamentally to alter the rules of the system. Consequently, deals arrived at between politicians can subsequently be undone by the Court. A further complaint arises in Eurosceptic narratives connected to the potential of the ECJ for autonomous action. There have been claims of a tendency for the Court to expand its reach and by extension that of the European integration project generally, continuing the federalising tendencies of the EU. Those who perceive the ECJ as in possession of excessive power find it more objectionable still because of a supposed lack of democratic accountability for the aggrandising activities of the Court.

Such complaints about the role of a court are not unique to the EU and the ECJ. Across various different types of jurisdiction in different parts of the world claims are often made about the idea of supposedly undemocratic expansionism by the judiciary. This criticism has been voiced with regard to UK courts when dealing with matters not related to European law. In recent decades, domestic judicial review has become an increasingly important part of the UK legal system. Courts are able to scrutinise – and if appropriate negate – the actions of ministers and public authorities generally. Such proceedings can consider whether a particular action was within existing powers; whether it was reasonable, and whether it was exercised in accordance with proper procedures. These forms of judicial intervention will continue in any possible

post-EU environment and could – for reasons discussed below – intensify in their prominence. In this sense, in as far as exit from the EU is seen as a means of preventing judicial engagement in decision-making by politicians through severance from the ECJ, it will not succeed, since domestic courts as well as the ECJ perform such a role. Indeed, under the common law system sometimes held to be under threat from the EU and ECJ, courts have a greater scope to develop their own approaches and expand the reach of their jurisdiction on their own initiative.

Another form of domestic judicial review in the UK that would remain unaffected by Brexit involves assessing compliance with the European Convention of Human Rights (ECHR), to which the UK has been a signatory since the 1950s and which was incorporated directly into the internal UK legal order through the Human Rights Act 1998. Human rights review of this type has generated probably more controversy than any other form of judicial review. There seems, moreover, to be a significant degree of confusion, among public and political protagonists, about which manifestation of ‘Europe’ – whether the EU or the Council of Europe and ECHR – is giving offense at any given point (there has also been a genuine interleaving of the two systems, though this more subtle process does not receive substantial recognition beyond specialist circles). Whether willful or founded in honest ignorance, crude conflation of the two ‘Europes’ is another reason that departure from the EU and from the remit of the ECJ will not deliver all that is hoped for by some supporters of this course of action. Exit from the EU will not bring about repeal of the Human Rights Act, or remove the UK from the jurisdiction of the European Court of Human Rights, responsible for the ECHR, a Council of Europe treaty. Indeed, commitment to continued enforcement of the Convention could conceivably form an important part of an exit deal with the EU.

Complaints about the ECJ as interfering with political processes, changing the rules on its own initiative, and lacking in democratic legitimacy, are also manifestations of a more general controversy, found within all democracies. The role of courts is to interpret the law, including as it applies to government. This area of overlap naturally involves tensions. The desire to avoid frustration of an elected or democratically accountable administration is legitimate. But so too is support for the rule of law, without which democracy cannot function properly. To subordinate the courts wholly to the will of those who claim popular mandates would be disastrous. The rule of law requires that governments and governed alike should be subject to legal rules and limitations, which in turn necessitates an independent judiciary. Courts must have discretion to apply their own interpretations of the law. At times, it must be acknowledged, they can

¹ https://gallery.mailchimp.com/1026e6b00f73284a7e46eb046/files/ECJ_failure.01.pdf

² <https://infacts.org/mythbusts/uks-ecj-loss-rate-doesnt-show-injustice/>

reach decisions that substantially alter previously existing understandings. They might, for instance, reinterpret the concept of individual rights to keep pace with changing social attitudes. Some might question their democratic authority unilaterally to alter the law in this way.

With judgements involving types of law that are not European in origin, the UK Parliament can, if it objects sufficiently to a particular judgement, alter or clarify the law to reverse the outcome of a case. However, with European law as interpreted by the Court, the same option is not available. Yet this position arises from the intrinsic nature of the EU as a sovereignty-sharing arrangement. To remove the UK from the jurisdiction of the Court is to leave the arrangement – but also to break with the benefits it brings. The extent to which the UK can continue to enjoy those advantages from outside the EU will depend in part upon the arbitration mechanisms it is willing to agree to, and the extent to which the ECJ is involved in them.

Though Eurosceptics deploy the term ‘federal’ – whether applied to the ECJ or other aspects of European integration – as a term of abuse, in introducing this concept they unwittingly provide a useful tool of analysis. It is unfortunate that many advocates of UK membership of the EU have acquiesced in the rhetorical premise of their opponents. Rather than challenging the stigmatisation of federalism, they have implicitly (or explicitly) accepted that it is an undesirable concept in the European context, but have held that the EU is not inherently federal in its structures, or that any federalising tendencies it presents can be contained. In fact, the federal concept can usefully be applied to the EU, conveying its key strength. While in most federal polities it is responsibility for external policy that is centralised, European federalism is an inversion of the usual pattern. Foreign affairs are handled on a largely intergovernmental basis, with the role of the European External Action Service and High Representative for Foreign Affairs and Security Policy limited. But the Single Market, on the other hand, has the character of a central initiative within a federal system, with harmonised standards applied across the EU. As the EU adopts more legislation, and as more cases are brought before the Court, the ECJ advances the federalisation of Europe, expanding the scope of the Single Market. It is this Single Market, the largest of its kind in the world, to which the UK government hopes to maximise continued access. To suppose that it can do so while excluding itself from the remit of the ECJ is to contradict the federal rationale that many Eurosceptics rightly recognise as underpinning the EU.

The federal perspective is also instructive regarding the democratic legitimacy of the ECJ. European law –

in other words, the law that the Court applies – is the product of processes that are akin to those of democratic federations. The European Parliament is directly elected; and the Council of Ministers comprises governments that are democratically accountable in accordance with the procedures in place in the respective member states. It is true that the EU could be more fully democratic, if judged using criteria that applied to national systems. But such a development would involve at minimum establishing a clearer link between the make-up of the Commission and European-wide elections. This shift in an increasingly federal direction has been fiercely opposed by the same Eurosceptics who have denounced the EU and by extension the ECJ for a lack of democratic legitimacy.

Third, there are complaints about the Court from sovereignty perspectives. In this sense, objections to the ECJ arise not only from it being a court, but also being European, or – as some perceive it – foreign. The idea of an institution based in Luxembourg making decisions with direct legal force in the UK is, for some, unacceptable. They dislike the idea that the Court is composed mainly of non-UK judges, from non-UK legal traditions, and that it is – in their view – of inferior quality to a UK court. Critics might also object to the principle of the ECJ overruling UK courts, perhaps over matters of fundamental legal principle. They also baulk at the incorporation of the jurisprudence of the Court into UK law.

Often also raised in the debate on national sovereignty is the matter of parliamentary sovereignty, an important doctrine in traditional interpretations of the UK constitution. This concept entails an Act of the Westminster Parliament being the ultimate source of legal authority in the UK. There is no UK written constitution to which an Act of Parliament can be made subject. No court, so this theory holds, can strike down an Act. Some observers have found membership of the EU difficult to reconcile with the idea of parliamentary sovereignty, since it involves the existence of rival law-making institutions, the product of which, European law, takes precedence even over Acts of Parliament (though admittedly this incorporation of European law into the UK domestic system takes place via an Act of the Westminster Parliament, the European Communities Act 1972). As a key organ of the European legal order, the ECJ is both symbol and instrument of this perceived compromising of parliamentary sovereignty. The restoration or preservation of parliamentary sovereignty has been a longstanding and crucial component of the Eurosceptic agenda, providing another motive for seeking a complete severance from the jurisdiction of the ECJ.

In considering these sovereignty issues, it should be recalled that the existence of an EU-level Court responsible

for upholding European law is an inescapable necessity of a Single Market. At its core, the Single Market is a set of universal rules that, to be consistent in their application, must be interpreted by a single body, the Court. Full participation in the Single Market, therefore, necessitates complete acceptance of the jurisdiction of the Court; and the extent to which a state outside the EU can obtain access to the Single Market is dependent in part upon how far it is willing to adhere to European law. The idea that the Court and the Single Market can be detached from one another, that has been promoted by some advocates of leaving, is misleading. Yet it is now increasingly recognised that the UK must be willing to submit itself to arbitration mechanisms of some kind if it is to avoid the most disruptive of exits.

Some apparently believe that it is not appropriate to subject a multinational polity with divergent legal systems to the same court. If this supposition is true, then the UK Supreme Court, the ultimate court of appeal in civil cases for England, Wales, Scotland and Northern Ireland, representing between them three distinct legal systems, is an inherently flawed entity. Yet the present government intends to create specific central powers within the UK to ensure the preservation of a single market in the post-EU UK. This policy suggests an awareness of the need for a single legal system to ensure an integrated market. Why, then, should UK policy-makers expect the EU to take a different attitude with regard to its own internal market? If the UK excludes itself from the jurisdiction of the ECJ, doing so must come at a price in terms of restricted access to the European Single Market. Under any plausible model for a post-EU legal order for the UK, it will not in any case be possible fully to exclude the jurisprudence of the EU. Case law that has accumulated since 1973 cannot simply be expunged. It is likely that UK courts will have regard not only to pre-exit EU judgements, but also in some way to decisions made after the point of departure.

The Eurosceptic claim that rejecting the EU and ECJ is necessary to a preservation or restoration of parliamentary sovereignty has come to appear particularly ironic in the period since the 2016 referendum. The UK government had to be forced by the UK Supreme Court to respect the authority of Parliament as the source of legal authority to activate Article 50 of the Treaty on European Union. Moreover, Parliament has often appeared embarrassed by its own supposed sovereignty and reluctant to assert it with respect to a referendum the result of which has no legal force. Parliamentary sovereignty has long been a contested concept, with longstanding arguments over both its conceptual coherence and desirability. An important part of this debate has involved whether, in providing for membership of the then-European Economic Community through the European Communities Act 1972, Parliament

abrogated its own sovereignty. One view is that, since Parliament retained the power to repeal the 1972 Act (as the European Union [Withdrawal] Bill will do if it becomes law), EU membership did not compromise its sovereignty. Indeed, this is the view that the current government presented in its white paper of February 2017, through the formulation that '[w]hilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.' (See appendix).

Moreover, the EU and ECJ have not been the only potential judicial threats to the doctrine of parliamentary sovereignty. The development of a concept of 'common law constitutionalism' suggested in remarks by UK judges and the work of certain legal scholars has advanced the idea that there might be certain fundamental principles that are immune to interference, even through an Act of Parliament. Nonetheless, the concept of a legislature unlimited in its law-making power, not subject to a 'written' constitution (which the UK lacks), remains a preeminent feature of the UK constitution. Indeed, this aspect of our system of government creates difficulties for the UK in making guarantees about the upholding of certain principles – such as citizenship rights – post exit. Within the concept of parliamentary sovereignty, the entrenchment of legal rules is problematic, and any law introduced can as easily be repealed, without the need to adhere to heightened constitutional amendment procedures, and no special judicial protection available. Insistence on this internationally exceptional constitutional approach surely does not help engender trust in any pledges about the future rights of EU citizens in the UK if they are denied recourse to the ECJ.

On the present trajectory exit from the EU will see an expansion in the powers of the executive rather than Parliament. The government is committed to preserving legal continuity at the point of exit. It intends to achieve this objective through the EU Withdrawal Bill. This proposed legislation is already proving hugely controversial owing to the extent of the powers it would delegate to UK ministers. In this scenario it is the domestic courts – filling the void left by the ECJ – that will take on the role of acting as check on the executive, with Parliament more a bystander. Decisions in areas such as the allocation of powers between different tiers of government and which precedents to follow in areas of retained European law may, depending on the model arrived at, afford substantial discretion to the courts.

The ECJ and exit negotiations

Regardless of the internal consistency or general rationality of the Eurosceptic attitude towards the ECJ,

it is now a core part of UK policy for departure from the European Union (see appendices). The white paper of February 2017, *The United Kingdom's exit from and new partnership with the European Union* stated simply that: 'We will bring an end to the jurisdiction of the CJEU in the UK.' (paragraph 2.1). It then went on to describe a range of possible options for dispute resolution mechanisms that might form part of the envisaged EU-UK Free Trade Agreement. The arrangement the UK government sought, it insisted, would 'respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens.' But are these goals reconcilable with one another? An insistence on 'UK sovereignty' and protection for the place of UK 'courts' is already a source of considerable 'uncertainty' regarding the future position in law.

In public statements regarding exit from the EU, the UK government seeks to focus all attention on the FTA it hopes to secure with the EU (and further FTAs with parties other than the EU). However, Article 50 negotiations have not yet progressed to a point where the EU is willing to allow consideration of an FTA in tandem with discussion of exit arrangements. A key blockage involves the unwillingness of the UK to countenance a role for the ECJ in guaranteeing the rights of EU citizens within the UK after it has left the EU. It is conceivable that, partly because of this particular obstruction, talks will fail to pass beyond this first phase and the UK will leave the EU in March 2019 with no deal in place.

Will this threat, becoming a more imminent prospect, force a different attitude on matters including the role of the Court? The government appears still to hold to its broad formulation that 'no deal is better than a bad deal'. In her Florence speech of 22 September, the Prime Minister referred to the continuation of 'our preparations for our life outside the European Union – with or without what I hope will be a successful deal.' (See appendix). However, as the full implications of the lack of a 'successful deal' have become more apparent, the balance of opinion among ministers and subscribers to the 'no deal is better than a bad deal' maxim has shifted. Conceptions of what comprises a 'good' or 'successful' outcome have broadened to take in an increasing acceptance of some kind of role for the Court, for instance in the upholding of the rights of EU citizens in the UK. But there is not yet a complete comprehension of the binary nature of the choice, between, on the one hand, EU membership with full jurisdiction for the Court; or, on the other hand, a place outside the EU. For the EU, any third outcome risks compromising the essential nature of the Union and membership within it. Even in the implausible circumstance that such a hybrid outcome were agreed

in negotiations, it would, ironically, be vulnerable to being struck down by the European Court itself.

Whatever shifts in outlook may be taking place in the UK, the delay that has occurred has placed beyond any doubt – even for the most optimistic supporters of departure from the EU – that, even if talks about an FTA commence, they cannot be completed within the two-year period allowed for under Article 50 (experts had in fact already cautioned, before Article 50 was triggered, that even if the two years were used in full, they would not be sufficient). The UK government now recognises that it needs an extension. It uses the face-saving but misleading term 'implementation period'. In fact, by March 2019 there surely will not be an agreement ready for 'implementation'. Rather, it seems more likely that the UK will need to preserve existing arrangements for sufficient time to achieve a basic outline agreement with the EU, whereupon 'implementation' will become a more plausible proposition. Article 50 allows – by unanimity – for an extension of the exit deadline beyond two years. However, assuming the EU were agreeable to an extension on these terms, the UK would need to be willing to accept continued full membership of the EU, including the jurisdiction of the ECJ. At present, this scenario is still seemingly regarded as politically unacceptable by the UK government.

The attitude of UK ministers towards the ECJ, then, is making discussion of an FTA difficult; and is likely, if such negotiations begin, to create problems for securing sufficient time for them to take place. Furthermore, continued reluctance towards accepting the jurisdiction of the Court is also likely to create barriers to the agreement of an FTA with the EU that meets the objectives that the UK government purports to have set for it: that is, the maximisation of free trade between the two parties. At present, the UK, as a member of the EU, sits within the Customs Union and Single Market. As such, it has the same external tariff as other member states, no internal tariffs, and shares in common measures to prohibit internal non-tariff barriers (the enforcement of which is a crucial function of the ECJ). Leaving the Customs Union, Single Market and the jurisdiction of the Court – all of which the UK is seemingly still set upon doing – inevitably entails a reduction in the extent to which trading relations between the EU and UK are 'free', even though they may be governed by what is labelled a 'Free Trade Agreement'.

At present, the Court is responsible for applying the rules of the EU. The UK intends that, in its future deal with the EU, a new arbitration mechanism of some kind will take on this role, albeit one which the Court could potentially feed in to (see appendix). It will presumably have responsibility for rules on tariffs and regulations. What

seems to be crucial to the UK is that it will have equal representation on such a body and that, unlike the ECJ, the conclusion it reaches will not be binding in UK law. The UK has cited various international models that might be drawn upon in designing a customised mechanism for an EU-UK FTA. However, two important and connected points must be noted. First, all of the international examples the UK refers to support trade agreements that are less integrated than the EU, the most fully incorporated supranational economic bloc in the world. The participating countries in these non-EU agreements established these dispute resolution systems to facilitate transition from a position of less to greater harmonisation. The UK is choosing to move in the opposite direction in its relationship within the EU: from inside to outside. Whatever arbitration mechanism is formed will be an important part of this shift away from free trade. Second, given that this is the general path that the UK is following, the only question facing it is how far it wishes to travel along it. Different FTAs – all representing less integration than EU membership – offer varying levels of harmonisation. The particular type of arbitration mechanism the UK is willing to tolerate will have an important influence on the final outcome that is reached, and how integrated it continues to be with the EU. But, from a free trade perspective, any model is necessarily inferior to EU membership. Insistence by the UK that descriptions of other systems are only examples, and that there will be a special bespoke mechanism for an EU-UK FTA certainly serves to confuse negotiations further, but will not evade this fundamental reality.

Conclusion

Dislike of the Court was an important motive for many opponents of UK membership of the EU; and objections to its role figured prominently in their publicity, both in the long term and during the referendum campaign of 2016. Yet some of the claims they made were potentially misleading; and the general premise on which debate about the ECJ rested was problematic. In the period following the 'leave' victory of 23 June 2016, the insistence of the UK government on complete extrication from the purview of the Court has generated many complications. It has been one of the sources of difficulties within Cabinet in forming an agreed, coherent policy towards exit. Reluctance to make concessions the ECJ has been a key reason that negotiations with the EU have struggled to advance beyond their initial stage and begin to encompass the post-exit EU-UK relationship (or even discussion of the 'implementation period' that the UK government presents almost as an entitlement, rather than another benefit which must be secured through guarantees or concessions elsewhere). Even if progress is made to matters including a FTA between the two parties, the issue of the Court could prove to be an inhibiting influence on the conclusion

of a satisfactory arrangement. The increased reluctance to countenance a 'no deal' outcome may have led to a general softening of attitudes on the UK side regarding the future influence of the court. But the fundamental issue that membership of the Single Market and jurisdiction of the Court are a single package cannot be overcome. The implications of this reality have not yet fully been faced by many within the UK.

The UK stance over the Court has been a major source of the plausibility of a scenario in which exit negotiations collapse and the UK finds itself outside the EU in 2019 with no substitute deal (beyond the default international minimums) in place. The fact that, in such circumstances, the UK will suffer far more than the remaining EU is beginning to attain the wide recognition in the UK that should have existed from the outset. Some of those who have reached such a realisation have begun to reason that it would be appropriate for the UK to become more flexible over the ECJ, diluting its position in return for guarantees of some degree of post-EU security. In a narrow sense this approach could appear rational. However, it is logically flawed from at least two standpoints.

First, though there is now discussion of some role for the Court post exit, ending the full jurisdiction of the ECJ is a core objective of the 'leave' programme. Moreover, it is interwoven with an even more fundamental part of the platform, namely the desire in some way to restore or protect parliamentary 'sovereignty'. To abandon this position on the Court, therefore, would be seriously to compromise the agenda of those who advocated this departure in the period leading up to 23 June 2016, and have maintained pressure thereafter. Though the interpretations and argumentation in which such attitudes to the Court and the doctrine of parliamentary sovereignty rest are open to challenge, they are central to the course to which the UK is presently committed.

The overall premise of leaving the EU provides a second perspective from which a less rigid approach to the Court might seem incoherent. Any countenancing of acceptance, even if only to some extent, of continued ECJ jurisdiction, is motivated by a desire to secure a less disruptive and economically harmful removal from the EU, principally through achieving some degree of continuity beyond the current departure date and a comprehensive Free Trade Agreement in the longer term. The obvious inference to be drawn from this approach is that exit from the EU is a source of harm the impact of which should be diminished as far as possible. Framed in these terms, negotiations are a damage-limitation exercise and a second best outcome to remaining inside. It is true that they might lessen some of the harsher potential consequences of removal from the EU. Yet nonetheless they seem to point to a reduction in the extent of free

trade between the EU and the UK; and moreover to the UK being within the scope of a legal order which it no longer has a direct role in determining. Supporters of exit who are sceptical regarding transition phases and more flexible negotiating stances are correct to depict these approaches as appealing mainly to those who supported "Remain" but are reluctant forcefully to make the case for continued membership. The main source of this diffidence is an aversion to being denounced as disrespecting the referendum result and therefore "the popular will." In Parliament, including within the preeminent Chamber at Westminster, the House of Commons, these silent Remainers seemingly comprise a majority. It remains within their power to force a change of government policy, though to do so would probably involve removing the existing administration and possibly a reconfiguration of the party system. At present these opponents of exit confine themselves to resisting specific manifestations of the policy of departure, not the policy itself. Until they can overcome their reluctance expressly to oppose leaving the EU and fully to deploy their authority as parliamentary representatives, the UK faces choices only between different varieties and degrees of irrationality and self-inflicted damage.

Appendix:

Excerpts from White paper: *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, February 2017

2. Taking control of our own laws

We will take control of our own affairs, as those who voted in their millions to leave the EU demanded we must, and bring an end to the jurisdiction in the UK of the Court of Justice of the European Union (CJEU).

Parliamentary sovereignty

2.1 The sovereignty of Parliament is a fundamental principle of the UK constitution. Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.

...

Ending the jurisdiction of the Court of Justice of the European Union in the UK

2.3

...

We will bring an end to the jurisdiction of the CJEU in the UK. We will of course continue to honour our international commitments and follow international law.

Dispute resolution mechanisms

....

2.5 Dispute resolution mechanisms ensure that all parties share a single understanding of an agreement, both in terms of interpretation and application. These mechanisms can also ensure uniform and fair enforcement of agreements.

2.6 Such mechanisms are common in EU-Third Country agreements. For example, the new EU-Canada Comprehensive Economic and Trade Agreement (CETA) established a 'CETA Joint Committee' to supervise the implementation and application of the agreement. Parties can refer disputes to an ad hoc arbitration panel if necessary. The Joint Committee can decide on interpretations that are binding on the interpretation panels. Similarly, the EU's free trade agreement with South Korea also provides for an arbitration system where disputes arise.

2.7 Dispute resolution mechanisms are also common in other international agreements. Under the main dispute settlement procedure in the North American Free Trade Agreement (NAFTA), the governments concerned aim to resolve any potential disputes amicably, but if that is not possible, there are expeditious and effective panel procedures. Similarly, under the treaties establishing Mercosur, disputes are in the first instance resolved politically, but otherwise the parties can submit the dispute to an ad hoc arbitration tribunal. Decisions of the tribunal may be appealed on a point of law to a Permanent Review Tribunal Under the New Zealand-Korea Free Trade Agreement, where the focus is also on cooperation and consultation to reach a mutually satisfactory outcome. The agreement sets out a process for the establishment of an arbitration panel. The parties must comply with its findings and rulings, otherwise compensation may be payable or the benefits of the FTA may be suspended. Within the World Trade Organisation (WTO), the Dispute Settlement Body (made up of all the members of the WTO) decides on disputes between members relating to WTO agreements.⁴ Recommendations are made by dispute settlement panels or by an Appellate Body which can uphold, modify or reverse the decisions reached by the panel. Such mechanisms are essential to ensuring fair interpretation and application of international agreements.

2.8 The UK already has a number of dispute resolution mechanisms in its international arrangements. The same is true for the EU. Unlike decisions made by the CJEU, dispute resolution in these agreements does not have direct effect in UK law.

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2.10

...

The actual form of dispute resolution in a future relationship with the EU will be a matter for negotiations between the UK and the EU, and we should not be constrained by precedent. Different dispute resolution mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured. Any arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens.

Excerpts from *Enforcement and dispute resolution: a future partnership paper* (H.M. Government, 2017)

Enforcement of the agreements

22. The UK's position is that where the Withdrawal Agreement or future relationship

agreements between the UK and the EU are intended to give rise to rights or obligations for individuals and businesses operating within the UK then, where appropriate, these will be given effect in UK law. Those rights or obligations will be enforced by the UK courts and ultimately by the UK Supreme Court. UK individuals and businesses operating within the EU should similarly be provided with means to enforce their rights and obligations within the EU's legal order and through the courts of the remaining 27 Member States.

23. This means, in both the UK and the EU, individuals and businesses will be able to enforce rights and obligations within the internal legal orders of the UK and the EU respectively, including through access to the highest courts within those legal orders. This would be the case in respect of both the Withdrawal Agreement, including an agreement on citizens' rights, and the future partnership.

...

28. Dispute resolution mechanisms are common within international agreements. The form these mechanisms take varies considerably across the spectrum of agreements,

given the different areas of international cooperation, and consequently the varied nature of potential disputes that could arise. The appropriate dispute resolution mechanism is dependent on the substance and context of each agreement.

29. However, one common feature of most international agreements, including all

agreements between the EU and a third country, is that the courts of one party are not

given direct jurisdiction over the other in order to resolve disputes between them. Such an arrangement would be incompatible with the principle of having a fair and neutral means of resolving disputes, as well as with the principle of mutual respect for the sovereignty and legal autonomy of the parties to the agreement. When entering into international agreements, no state has submitted to the direct jurisdiction of a court in which it does not have representation.

...

Excerpts from PM's Florence speech: *a new era of cooperation and partnership between the UK and the EU*, 22 September 2017

...

I know there are concerns that over time the rights of EU citizens in the UK and UK citizens overseas will diverge. I want to incorporate our agreement fully into UK law and make sure the UK courts can refer directly to it.

Where there is uncertainty around underlying EU law, I want the UK courts to be able to take into account the judgments of the European Court of Justice with a view to ensuring consistent interpretation.

...

It is, of course, vital that any agreement reached – its specific terms and the principles on which it is based – are interpreted in the same way by the European Union and the United Kingdom and we want to discuss how we do that.

This could not mean the European Court of Justice – or indeed UK courts – being the arbiter of disputes about the implementation of the agreement between the UK and the EU however.

It wouldn't be right for one party's court to have jurisdiction over the other. But I am confident we can find an appropriate mechanism for resolving disputes.

So this new economic partnership, would be comprehensive and ambitious. It would be underpinned by high standards, and a practical approach to regulation that enables us to continue to work together in bringing shared prosperity to our peoples for generations to come.

...