

## Written evidence submitted by Dr. Holger Hestermeyer (FRE0008)

### A) Introduction

1. I am the Shell Reader in International Dispute Resolution at King's College London and a Senior Research Affiliate of the Max-Planck-Institute for Comparative Public and International Law in Heidelberg. In the past, I have served as specialist adviser to the House of Lords EU Committee and the EU External Affairs Sub-Committee. My expertise is in the areas of public international law including international trade, EU law and comparative public law. I have given oral testimony in two related inquiries, namely on the Draft Withdrawal Agreement to the House of Commons Exiting the European Union Committee on 21 November 2018 and on the level playing field to the House of Lords EU Internal Market Sub-Committee on 27 February 2020.
2. This testimony reflects the view of the author alone and neither can nor should be attributed to any of the institutions he is or has been affiliated with.
3. This written testimony is submitted in response to a request from the Committee on the Future Relationship with the European Union addressed to the author and dated 24 April 2020. The letter contained a number of questions. As suggested by the letter rather than answering these questions, the testimony will try to assist the Committee by addressing a number of overarching issues, which have not been sufficiently considered.
4. Specifically, this testimony will address the difficulty of finding the right framework or narrative for the current negotiations that have led the partners to severely underestimate the difficulties of successfully concluding them. These difficulties have not been overcome to this day.

### B) Conceptualising the negotiations on the future relationship

5. Even though – or quite possibly because – the negotiations on the future relationship have been such a dominant topic in public discourse, they continue to be poorly understood. A proper conceptualisation of the talks is not of mere academic interest. The missing framework has led to concrete missteps that have harmed the prospects for both sides of finding common ground. I will address three issues in particular, namely the statement of the Chief Negotiator of Task Force Europe, David Frost, that the UK and the EU have to build a relationship of sovereign equals (I), the statements that a UK-EU FTA would be easy to reach (II) the use of other trade agreements as models (III).

## I) A negotiation between sovereign equals

6. David Frost has repeatedly referred to the future relationship between the UK and the EU as one between sovereign equals and accordingly to the negotiations as taking place between sovereign equals.<sup>1</sup>
7. Legally, this statement reflects the fact that the UK and the EU negotiate with each other as subjects of international law. The UK possesses this quality as a sovereign state, the EU has been endowed with international legal personality by its member states in Art. 47 of the TEU.
8. However, the statement glosses over three substantial differences between the UK and the EU: The EU does, on the one hand, not possess the same type of sovereignty as the UK. On the other hand the EU is a union of 27 sovereign equals of the UK. What seems to be legal nitpicking has effects on the negotiating strategy of the UK, which needs to be readjusted to take account of these two factors. Finally, factually, the UK and the EU differ in their economic position, which has effects in the world of negotiating trade agreements in terms of leverage.
9. The principle of sovereign equality of nations was first proposed by the Japanese delegation in the drafting of the Covenant of the League of Nations, but not included in the Covenant at the time.<sup>2</sup> The United Nations turned the principle into a cornerstone of today's international order. Art. 2(1) of the UN Charter reads "The Organization is based on the principle of the sovereign equality of all its Members." Membership is open to to "all ... peace-loving states".<sup>3</sup> The EU, however, is not a state, nor does it claim to be one.<sup>4</sup> Accordingly, it does not possess the same type of sovereignty as the UK.
10. The EU is, in fact, a supranational organisation of 27 member states. Each of these states is a member state of the UN and, under Art. 2(1) of the UN Charter, the UK's sovereign equal.
11. The peculiar construct of the EU might seem a matter of theory at first, but has real-life consequences. While EU Member States have endowed the EU with the exclusive power to negotiate trade agreements,<sup>5</sup> - and indubitably member states respect and have to respect the Commission's exclusive power in that regard – no such agreement can be reached without member states' consent, which is

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<sup>1</sup> E.g. in his speech delivered at ULB Brussels on 17 February 2020. <sup>2</sup>

Walters, A History of the League of Nations (OUP 1952).

<sup>3</sup> Art. 4(1) of the UN Charter.

<sup>4</sup> CJEU, Opinion 2/13, ECLI:EU:C:2014:2454, paras 155 ff. *Hestermeyer*, *Eigenständigkeit und Homogenität in föderalen Systemen* (Mohr Siebeck 2019), 131 ff.

<sup>5</sup> Art. 207, 217, 218 TFEU.

ensured through the institutional role of the Council. This is true not just for so-called “mixed agreements” that include matters within the competence of member states and requiring their ratification of the treaty as well, but even for “EU-only agreements”, agreements concluded by the EU alone, as the Council also has to agree to those treaties. In practice, this means that the EU is less flexible in trade negotiations than many states and that consensus-building is a necessary component of such negotiations with the EU. While the complexity of EU trade negotiations has – not without reason – long been criticised in the UK, a similar complex process of consensus-building is not unknown in other political entities either. One only has to think of the consensus-building exercises required in trade talks with the USA.<sup>6</sup>

12. The UK is currently not taking sufficient account of the need for consensus-building, reducing the likelihood of successfully reaching a negotiated outcome by the end of the year. The UK has made textual proposals to the EU, but – according to press reports – denied the commission the permission to share these texts with national capitals.<sup>7</sup> This not only makes it difficult for the commission to effectively consult with member states to reach consensus. It also hampers the otherwise extraordinarily effective machinery of the UK’s FCO in their discussions with EU member states to build that consensus.
13. Finally, while both the UK and the EU27 economies are deeply intertwined, the economic situation of the two partners differs. Unsurprisingly given the size of its population, the EU27 is a significantly larger economy: in 2016 the UK represented 16% of the EU28’s GDP.<sup>8</sup> While the EU27 accounted for 48% of UK goods exports in 2017, the UK took 18% of the EU27 exports (excluding intra-EU trade, with intra-EU trade it would be 6.2%).<sup>9</sup> For both partners the share and significance of the other partner is falling. However, the significance of this trend should not be exaggerated: It is the current relative importance of each other’s market, not the falling trend, that is decisive in the negotiations. In a traditional free trade agreement negotiation this would normally imply a greater leverage of the EU side. We will turn to the question to what extent we find ourselves in such a tradition setting now.

## **II. The easiest trade agreement in history**

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<sup>6</sup> See e.g. the account of the negotiations between Canada and the US in Ritchie, *Wrestling with the Elephant* (Macfarlane Walter & Ross 1997).

<sup>7</sup> See e.g. Jennifer Rankin, *EU and UK government to resume post-Brexit talks next week* (Guardian, 15 April 2020).

<sup>8</sup> Valentina Romei, *What will the EU look like after Brexit?* (FT, 22 January 2018).

<sup>9</sup> Andrew Walker, *Does the EU need us more than we need them* (BBC, 23 December 2018).

14. At times, the agreement on the future relationship between the UK and the EU has been referred to as the “easiest trade agreement in history”. While this statement certainly has to be understood at least partly as normal political hyperbole, experts have at times agreed that this trade agreement should be easier to reach than others. That assessment results from an analysis of the negotiating situation through the lense of ordinary negotiations of trade agreements. However, as this section will point out, the future relationship agreement negotiations differ significantly from such a traditional setting. These differences make it appear unlikely that a negotiated outcome can be reached by the end of the unextended transition period.
15. The negotiations of a free trade agreement normally involve two nations agreeing to simplify trade with each other by reducing trade barriers towards each other. Relevant offensive interests (asking for improved market access) and defensive interests (protective barriers for one’s own market one wishes to maintain) are identified in discussions with stake-holders, including industry, business, unions and civil society. Impact assessments determine the value and effect of certain commitments. The outcome of the negotiations is an international agreement. Such an agreement binds both partners. The more the parties want to liberalise trade through such a classic trade agreement, the more they have to submit to binding commitments in the agreement. As the House of Lords EU Committee put it: “There is always an inherent trade-off between liberalising trade and the exercise of sovereignty.”<sup>10</sup> The main challenge of the negotiations lies in overcoming protective interests – both on one’s own side and on the opposing side. It is from this perspective that experts could allege that the negotiation of a future trade agreement would be easy. As the future relationship negotiations do not have to dismantle any existing barriers to trade, there are no defensive interests to overcome. Full liberalisation to an extent that does not exist in a free trade agreement is the current state of affairs and hence nobody lobbies for maintaining existing barriers in place.
16. While the negotiating objectives are, to some extent, drafted from this perspective, the perspective of a classic trade negotiation does not seem to adequately reflect the reality and incentives of the negotiations on the future relationship. The negotiations of the future relationship cannot be divorced entirely from Brexit. This is not only reflected in the different baselines – the future relationship negotiations do not dismantle existing trade barriers, but decide about where trade barriers are put in place. It is also reflected in the linkage between the two processes. The parties have politically committed themselves to an outline of the future relationship in the political declaration that was negotiated by Boris Johnson’s government alongside the withdrawal

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<sup>10</sup> House of Lords EU Committee, Brexit: the options for trade (13 December 2016), 3.

agreement. The negotiations are thus indubitably closely linked to Brexit itself. This linkage changes the incentive structure of both parties to the negotiation.

17. From a UK perspective, one of the major goals of Brexit was regaining control over the UK's regulation.<sup>11</sup> Traditional economic studies showed that this would hurt rather than benefit the UK economy,<sup>12</sup> but this economic argument did not prevail with a majority of the voting population – for some because of a belief that the EU was moving in the wrong regulatory direction, for others because they considered the economic price worth paying. The incentive structure that flows from this complicates traditional trade negotiations. The future relationship negotiations are, for the UK, in significant measure about gaining in sovereignty rather than economic goals. In fact, David Frost personally emphasised the significance of the concept and the ability to set one's own rules as highly significant for Brexit.<sup>13</sup> The traditional singposts guiding the negotiations of a free trade agreement – industry interests and economic studies showing the benefit of liberalising trade at the cost of binding legal commitments – are from this perspective aligned against the main benefit of Brexit. While the government arguably tried to change the dynamics of the negotiations after the EU had left the European Union by adopting the goal of a classic free trade agreement, the change did not imply a return to the traditional incentive structure of free trade agreements. Instead, the incentive structure defined by Brexit continues to prevail, as can be seen from the lesser impact of industry interests, which continue to have a hard time to be heard, and the absence of impact assessments (unlike with regard to the UK-US negotiations). The changed ambition also did not change the baseline from which the parties negotiate: the agreement will still lead to more rather than less trade barriers and continues to resemble trade agreement negotiations “in reverse”. And while the model of what the government wants to achieve is now to some extent defined, reaching agreement on a free trade agreement implies detailed negotiations, during which every future commitment will be scrutinised for its impact on retaining sovereign control at a level of rhetoric that is uncommon for free trade agreements and makes their success less likely.
18. For the EU the negotiations on the future relationship are not normal free trade negotiations, either. Much like for the UK they are trade negotiations “in reverse” with an outcome that will leave the trading situation worse than before – but with no compensating perceived gain in sovereignty. They are also negotiations with a member state that has left the EU. While it has always been incorrect to state that the EU wants to punish the UK for leaving, there are nevertheless

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<sup>11</sup> Lord Ashcroft, How the United Kingdom voted on Thursday... and why (Friday 24 June 2016).

<sup>12</sup> Tetlow & Stojanovic, Understanding the economic impact of Brexit (Institute for Government, November 2018).

<sup>13</sup> Speech delivered at ULB Brussels on 17 February 2020.

negative incentives for the negotiations flowing from this fact. While before Brexit the UK was one member state of 28, post Brexit it faces the EU27 combined as one entity. There is a risk that where before the UK was equal to all 27 others, it now becomes the equal of the 27 combined, certainly an outcome that none of the member states can contemplate as acceptable.

### **III. Models in the negotiation of trade agreements**

19. From the very beginning of the negotiations, precedent has played an enormous role in the debate about Brexit. The newspapers were full of conversation of the “Norway option”, the “Swiss approach” or the “CETA model”. The EU’s chief negotiator Michel Barnier presented a slide with various “options” to the Council and the UK government has made it clear that it regards CETA and EU-Japan as viable models for free trade agreements.
20. I fear the value of precedent is overstated.
21. Bilateral free trade agreements are freely negotiated between two partners. Only multilateral agreements can boast a significant part (though not all) of the wording to be “off the shelf” and pre-fixed.
22. In bilateral negotiations negotiators commonly turn to models and it is not uncommon that a party starts its considerations on the basis of what might be called a model treaty. Models have the benefit of being tried and tested. Some wording in existing treaties has withstood legal challenges and accordingly offers legal security absent from new wording. However, models change with the circumstances and over time.
23. Equally, negotiation partners can and regularly do point to the opposing side’s own existing agreements to show that proposed language should be acceptable. They might also emphasise that rejecting what has been offered to country A in negotiations with country B is unfair. Fairness is not irrelevant, as both parties can only expect a sustainable outcome if both sides feel they have been treated fairly. However, nothing prevents a party from nevertheless insisting on different terms. This might be due to different circumstances of the negotiations (the party itself considers different terms as fair), a change in perception or negotiating approach over time or simply constraints with regard to a party’s own stakeholders. At times, the negotiators might themselves be unhappy with what they can offer, but they cannot depart from their mandate.
24. This becomes relevant in particular for the discussion on the level playing field.
25. One might find the EU’s insistence on stronger level playing field obligations than in trade negotiations with Japan and Canada irritating or unfair. However, this is not an objective standard. Importantly as a starting point both parties have already agreed to a level playing field in principle in the Joint Declaration.
26. Additionally, stakeholder pressure might be limiting the commission’s scope for action. Some commentators on the continent have found the level playing field provisions contained in Prime Minister May’s Withdrawal Agreement in the context of the Northern Irish backstop “insufficiently strong” as became clear at a hearing in

the German Bundestag. France and the Netherlands are proposing a change in the EU's general approach towards trade and sustainable development chapters in free trade agreements, namely including sanctions.<sup>14</sup>

27. Rather than insisting on the language used in other trade agreements as models, the UK might benefit from using this opportunity to define level playing field obligations that protect UK interests and that could resolve wider issues in trade. The government has repeatedly stated that it does not want to lower UK standards. Accordingly, committing to this would not seem to be problematic. In the area of state aid, the most contested of the level playing field obligations, the world trade order is in a process of reconsideration. One of the reasons for US discontent with the WTO lies in a perceived slanted playing field – namely in the perception that China can unfairly subsidise its industry and outcompete the American industry. It is likely that changes will be made in this area. Within the EU, the UK has traditionally resorted to state aid at lower levels than many EU member states. The UK's economic interest accordingly would lie in disciplining state aid to ensure a level playing field. It might be time to consider level playing field conditions that will help protect UK interests and consider changes the world-trade system is currently undergoing. Unfortunately this does not, at the moment, seem to be the approach chosen.

**May 2020**

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<sup>14</sup> Alan Beattie, Franco-Dutch alliance could be harbinger of things to come in EU trade deals, FT Trade Secrets, 7 May 2020.



# Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

Email: [freucom@parliament.uk](mailto:freucom@parliament.uk) Website: [www.parliament.uk/freucom](http://www.parliament.uk/freucom)

24 April 2020

Dr. Holger Hestermeyer  
Reader in International Dispute  
Resolution,  
King's College London

Dear Dr Hestermeyer,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our [call for evidence](#), which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Such submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

- What impact has the COVID-19 pandemic had on the negotiations? Have the UK and EU been affected differently? What further consequences might the pandemic have on the progress of the negotiations and the nature of any future relationship?
- How would you characterise the approach the UK and EU are taking to the future relationship negotiations? In which ways, if any, do these approaches differ from the withdrawal negotiations? What new challenges might both parties face?
- What is your assessment of the likelihood of an agreement given both sides' negotiating mandates? Has this assessment changed since the talks began? If so, why?
- What progress would you expect to have been made by the end of June? How do you think talks might progress over the coming year? How long would you expect the UK and EU's respective ratification processes to take?
- Given the time constraint imposed by the Transition Period, what sort of agreement do you believe is possible between the UK and the EU? What issues should each side be prioritising? To what extent do the priorities set out in each side's negotiating mandates match your assessment of what they should be seeking? On which areas does each side have the most negotiating leverage?
- What would be the main differences between a UK/EU relationship as roughly set out by both sides' mandates and a no-deal scenario? If only a limited deal is agreed what are the possible consequences for areas that are not covered? What scope is there for temporary or transitional measures either agreed between the two parties or put in place unilaterally.
- Our previous witnesses have outlined four key areas of initial disagreement:
  - Governance;
  - Level Playing Field;
  - Fish; and
  - Co-operation in Criminal Matters.

Have there been any recent developments in these areas? Could you sketch out possible compromises? Which other issues do you foresee emerging as sources of disagreement as the negotiations progress?

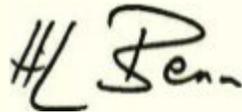
- Why does the EU want a single agreement and why does the UK want several separate agreements? How would these different governance arrangements affect how any future relationship between the UK and the EU would operate? What are the standard forms of dispute resolution contained in

FTAs? To what extent do these differ based on the scope of an FTA? What form of dispute resolution procedures are both parties seeking in this agreement? How do these differ from those set out in the Withdrawal Agreement?

- Are precedents such as CETA and the EU-Japan FTA useful as templates for an agreement between the UK and EU? Based on both sides' mandates, how would an UK-EU FTA differ from those precedents? What would be the possible implications of those differences with respect to, for example, level playing field provisions?
- Is it normal for only one side of a negotiation to publish draft legal texts? Are there any benefits or drawbacks, for either side, from doing so? What are the UK's main areas of contention going to be in the draft EU legal text? What proportion of the contents do you believe are acceptable to both sides and where will attention be focused? Because draft legal texts have been published at this stage, is an agreement more likely by the end of 2020?
- How likely is a transition period extension? Does an extension request from one party place any obligations on the other side? What steps would the UK and EU need to take for an extension to be agreed? What practical matters would need to be decided? What role would the UK Parliament and EU institutions play in this process? How might an extension affect the dynamics of the negotiations and the scope of any future agreement?
- What actions does the UK Government believe it is legally required to take by 31 December 2020 to fulfil its obligations under the Withdrawal Agreement? Would a failure to implement the Withdrawal Agreement by either side prevent agreement on a future relationship from being reached? What areas of implementation are likely to prove most controversial? How might they be resolved?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at [freu@parliament.uk](mailto:freu@parliament.uk).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hilary Benn'.

**Hilary Benn**  
Chair of the Committee