

Of the State of the (European) Union and of Trade Deals

IEL Annual Lecture,
6th February 2017

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Introduction

Working at a court, you see a cross-section of the conflicts that are preoccupying society. That is probably true of any court. It is certainly true of a court like the Court of Justice of the European Union (which I shall refer to by its standard English acronym, ‘the ECJ’). Courts (perhaps this is a boring admission) are composed of a bunch of lawyers. Courts do not go out crusading for cases to decide. They deal with the cases that are in their docket, interpreting the legal texts that the legislator has adopted. The cases on which you spend your professional life as a member of a court therefore do not represent what you have ‘chosen’ to deal with. If they did, and if one were to believe the tabloid press, the ECJ would concentrate exclusively on cases chosen with the express, malign intention of advancing the wicked European project. As it is, however, the cases that we decide simply reflect the ‘hot issues’ of the day. So, when fixing on the subject for this lecture, I took a look at what I had been writing about over the last year or so. In the first part of my lecture I want, on that basis, to look at the ‘state of the (European) Union’ as perceived by those on the ‘European’ side of the Channel. In the second part, I shall move across to offer some comments on trade deals prompted by the work that I have been doing over the last 6 months on the EU-Singapore Free Trade Agreement (‘EUSFTA’).

Perhaps I should begin by spelling out very clearly ‘where I am coming from’. Although I was nominated to the job that I do by the United Kingdom, I was appointed by all the Member States acting together. That means that I do not work for the UK government. I serve the rule of law in the European Union – nothing more, nothing less. My job at the ECJ (as an Advocate General, not a judge) requires me to write opinions – so, to be ‘opinionated’.

¹ – Advocate General, Court of Justice of the European Union. The author writes in an extra-judicial capacity and the comments made do not necessarily reflect the views of, still less bind, the court in which she serves. She would like to thank Sir David Edward, Judge Ian Forrester and present and former colleagues at the ECJ (David Guild, Doyin Lawunmi, Peter Gjørtler, Matthew Radley, Ariel Wagner and Isabella Wimmer) for their helpful comments on earlier drafts of this lecture. The author is of course responsible for any remaining imperfections.

Opinions are not binding judgments. They are thoughtful, reasoned analyses of difficult sets of circumstances whose purpose is to suggest to the actual decision-makers (in my world, the judges) which course of action to take and which to avoid. It is in that spirit that this lecture is offered. The court in which I serve is not the ‘Strasbourg Court’ (the human rights court, charged with interpreting the ECHR) but the ‘Luxembourg Court’ (located some 200 km to the north-west), which is responsible for giving authoritative rulings on EU law so as to ensure (as required by Article 19(1) TEU) that ‘in the interpretation and application of the Treaties the law is observed’.

My work also means that I am in daily contact with colleagues from other Member States. They, in turn, are in touch with sentiments and currents of opinion back home in their respective countries. Some of what I shall be saying today, when I relay what is being said by others in relation to the ‘state of the (European) Union’ (which necessarily now includes the ‘Brexit process’), is in the form of reported speech – what we used to call, when I was trying to write Latin proses at school to get admitted as an undergraduate at Cambridge University, ‘oratio obliqua’. It is what others are saying. What I shall narrate is therefore by definition incomplete. It does not pretend to be a scientific survey of all possible shades of opinion. But it does provide a ‘litmus paper test’ of what those others think really matters in the European Union of 2017. And, to the extent that some of those ‘others’ – or their compatriots who think like them – will be sitting down on the opposite side of the negotiating table from the UK Brexit team, it may plausibly be relevant to a central topic of debate on the UK side of the Channel.

I should also like to make it crystal clear what this lecture is not about. It is not about whether UK voters, by a majority of 52% to 48% of those voting, were right or wrong to have voted to leave the EU. Nor is it about whether the political class should take that vote as a binding mandate for Brexit in general and for one version of Brexit in particular; or about how to accommodate different sentiments in the various different parts of the UK about the desirability (or otherwise) of some form of Brexit; or about whether Brexit will lead triumphantly to the promised sunlit uplands of a leading world role for a new global Britain, unhampered by tedious EU regulation, or whether the great experiment will end in economic and / or social tears, or whether (as is so often the case in real life) the final outcome will be somewhere between the two. As an ordinary citizen, I have views on all those topics but I am not about to share them with you. This lecture is about some of the real-world parameters within which the Brexit negotiation will take place. That is all.

The state of the (European) Union

So what of the state of the European Union? What is to the fore in the collective consciousness of committed, thoughtful European citizens and therefore also on the minds of those charged with moving the European Union forward? And what are ‘the others’ saying (and perhaps thinking) about Brexit in that context?

I think it would be fair to say that there is a real awareness that we live in difficult times. The liberal, tolerant, democratic values that many took for granted are under threat. We are seeing vicious assaults on our Western way of life by terrorist bodies such as Islamic State. There is also a different kind of ‘assault’ – by the populist press and politicians with their post-truth narratives, alternative facts, fake news and ‘politics-by-Tweet’. The phenomenon is to be found not only in the United Kingdom but also in other Member States (France, Germany, the Netherlands to name but those with upcoming elections) and, of course, in the USA. And then there are those who feel that, in a world of relentless globalization, they have simply been left behind. There seems to be less need and less reward for the labour that they are able to offer than in the ‘good old days’. The prosperity that the globalization process was meant to bring has not trickled down to them as individuals. The massive profits have gone to large, multinational corporations and to banks; and these disgruntled voters cannot afford the wonderful consumer goods from all over the world that fill our shops and TV screens. And the EU has always been a convenient scapegoat for the populist press, and indeed for national politicians wishing to distract attention from their own wrong-headed policies and actions.

Nevertheless, many people within the European Union are still looking to the EU to be a positive force in helping them to keep them safe – to regain prosperity, even – whilst enabling them to continue to enjoy the open border, free travel environment to which they have happily become accustomed. Along the way, they would like the EU to promote policies that enrich further education for their children and help these to find good jobs at the end of the education process; to ensure decent and safe working conditions; to look after the environment (and so on, and so on). The EU and its predecessors have, after all, successfully delivered on all these aspirations (along with peace and relatively high levels of prosperity) over the sixty-five years since the European Coal and Steel Community (the ‘ECSC’) came into being five years before the EEC and its founding fathers proclaimed that

‘world peace may be safeguarded only by creative efforts equal to the dangers which menace it’; that

‘Europe can be built only by concrete actions which create a real solidarity and by the establishment of common bases for economic development’; that they were

‘[d]esirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace’; and that they were

‘[r]esolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny’.

Over the sixty-five years since the preamble to the ECSC Treaty was penned, there have been reminders (for those who choose to see them) that peace and stability are not achieved

without effort and cannot simply be taken for granted. The break-up of the former Yugoslavia led to bloody conflicts uncomfortably close to the EU's own borders.² The present unrest in the Ukraine, coming after the Russian incursion into the Crimea, should also jolt us out of our comfortable complacency.

So what does the state of the European Union look like as seen through the prism of the ECJ's case load? The biggest and arguably the most difficult cases that I have been handling over the last year or so have – predictably – involved a number of awkward issues centering on the refugee crisis. The Grand Chamber wrestled, in *Ghezelbash*³ and in *Karim*,⁴ with the thorny question of how much access to the courts should be available to asylum-seekers under the Dublin III Regulation⁵ to challenge the competent authority's decision as to which Member State should deal with their claim. (Dublin III lays down an elaborate set of criteria and Member States are very keen to pass on potential refugees, thereby reducing the number of claims that they have to process and decide.) Right now, I have not one but two cases – references from national courts in Austria⁶ and Germany,⁷ both Member States with enormous numbers of pending asylum applications – that question the application of those criteria. Both cases are being treated under the expedited procedure⁸ and are likewise headed for the Grand Chamber. This time last year, there was the 'urgent preliminary ruling procedure' (the 'PPU') in Case C-601/15 PPU N,⁹ concerning detention of an asylum seeker on grounds of public policy.

² – For a quick overview, see <http://www.hr/croatia/history/homeland-war> or https://en.wikipedia.org/wiki/Croatian_War_of_Independence. Tourists visiting the beautiful coastal city of Dubrovnik in Croatia often do not realise that Dubrovnik was heavily shelled from Serbian positions on the heights above it during the 'Homeland War' of 1991 – 1995. Since then Dubrovnik has been restored; and Croatia has rebuilt its economy and joined the EU in 2014 as the 28th Member State.

³ – My Opinion in Case C-63/15, ECLI:EU:C:2016:186; judgment: ECLI:EU:C:2016:409.

⁴ – My Opinion in Case C-155/15, ECLI:EU:C:2016:189; judgment: ECLI:EU:C:2016:410.

⁵ – Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31).

⁶ – Case C-646/16 Jafari (pending).

⁷ – Case C-670/16 Mengesteab (pending).

⁸ – The 'expedited' procedure under Article 105 of the ECJ's Rules of Procedure ('RP') is used very sparingly by the Court. It reduces (drastically) the length of time required to treat a reference for a preliminary ruling. The expedited procedure is a little slower than the Court's fastest procedure (the 'urgent preliminary ruling procedure' (in French, 'procédure préjudicielle d'urgence', hence the universal abbreviation 'PPU') under Article 107 RP), which is used when (for example) someone is in detention or a child has been abducted. However, the accelerated procedure is significantly faster than giving a case informal priority within the Court.

⁹ – My Opinion: ECLI:EU:C:2016:85; judgement: ECLI:EU:C:2016:84.

The continued ‘listing’ and asset-freezing of persons and organisations suspected of supporting terrorism has brought its fair share of awkward questions – for example, the various ‘Tamil Tigers’ cases,¹⁰ the procedural challenge brought by Hamas against the renewal of its listing¹¹ and the Iranian Banks cases (asset freezing enforcing sanctions to impede nuclear proliferation).¹² Measures to prevent the financial system being used to support terrorism (or to channel the proceeds of money laundering) have also been scrutinized.¹³

Straddling the boundary between ‘the other’ and ourselves (and reflecting possible tensions within the multi-cultural, multi-faith society of today’s EU) are two references concerning employees who were wearing ‘hijabs’ (Islamic headscarves – not, please note, full veils) and who were dismissed from their jobs: Case C-157/15 Achbita and Case C-188/15 Bougnaoui. These poisoned gifts came to us, respectively, from the Belgian and the French supreme courts of cassation. The ECJ’s only two female Advocates General out of eleven, Juliane Kokott and myself (we happen also to be the two longest-serving Advocates General), delivered Opinions that went in diametrically opposed directions.¹⁴ The Grand Chamber is about to tell us how to square the circle.¹⁵

Perhaps I should reassure you that the ECJ (as seen through the recent work of this particular Advocate General) is still handling some business to do with mainstream ‘economic law’. We still have a lot of VAT cases.¹⁶ The straitened financial times of the last few years have given

¹⁰ – See Case C-158/14 A, B, C and D, my Opinion: ECLI:EU:C:2016:734; judgment: pending, and Case C-599/14 P LTTE, my Opinion: ECLI:EU:C:2016:723; judgment: pending.

¹¹ – See Case C-79/15 P Hamas, my Opinion: ECLI:EU:C:2016:722; judgment: pending.

¹² – See Case C-176/13 P Council v Bank Mellat, my Opinion: ECLI:EU:C:2015:130; judgment: ECLI:EU:C:2016:96, and Case C-200/13 P Council v Bank Saderat, my Opinion: ECLI:EU:C:2015:134; judgment: ECLI:EU:C:2016:284.

¹³ – See Case C-235/14 Safe Interenvios, my Opinion: ECLI:EU:C:2015:530; judgment: ECLI:EU:C:2016:154.

¹⁴ – See Opinion of Advocate General Kokott in Case C-157/15 G4S Secure Solutions (‘Achbita’) of 31 May 2016, ECLI:EU:C:2016:382, judgment pending; and my Opinion in Case C-188/15 Micropole (‘Bougnaoui’) of 13 July 2016, ECLI:EU:C:2016:553; judgment pending.

¹⁵ – Judgment in both cases is listed for 14 March 2017.

¹⁶ – See, for example, Case C-543/14 Ordre des barreaux francophones et germanophone (introduction of VAT on lawyers’ services in Belgium), my Opinion: ECLI:EU:C:2016:157; judgment: ECLI:EU:C:2016:605; and Case C-546/14 Degano Transport (arrangement with creditors – partial payment of VAT debts), my Opinion: ECLI:EU:C:2016:13; judgment: ECLI:EU:C:2016:206.

rise to a spate of consumer credit cases.¹⁷ Public procurement¹⁸ is a hardy perennial. The Common Agricultural Policy ('CAP') always generates business: in my case, the complicated rules governing support for the market in sugar,¹⁹ the export regime for frozen chickens²⁰ and the vexed question of extra fishing quotas to provide safety tonnage for the fishing fleet.²¹ The rules governing the registration of substances under the chemicals regulation (REACH)²² are a growth market for litigation. Quotas for greenhouse gas emissions recently gave rise to a spate of references.²³ Closer still to our 'traditional' competences as an economic court, we are still called upon to hand down rulings about conformity assessments for products (such as in vitro medical measurement devices) that are in free circulation within the internal market²⁴ and about social security for migrant workers following EU enlargement.²⁵ We continue to grapple with sticky issues such as the labelling rules

¹⁷ – See, for example, Case C-42/15 Home Credit Slovakia, my Opinion: ECLI:EU:C:2016:431; judgment: ECLI:EU:C:2016:842, Case C-127/15 Verein für Konsumenteninformation v INKO, Inkasso GmbH, my Opinion: ECLI:EU:C:2016:584; judgment: ECLI:EU:C:2016:934, and Case C-377/14 Radlinger and Radlingerová, my Opinion: ECLI:EU:C:2015:769; judgment: ECLI:EU:C:2016:283.

¹⁸ – See, for example, Case C-406/14 Wroclaw – Miasto na prawach powiatu (public procurement and limitations on sub-contracting), my Opinion: ECLI:EU:C:2015:761; judgment: ECLI:EU:C:2016:562, Case C-439/14 Star Storage and Others (public procurement – access to review procedure), my Opinion: ECLI:EU:C:2016:307; judgment: ECLI:EU:C:2016:688, and Case C-292/15 Hörmann Reisen (public procurement: public passenger services by bus), my Opinion: ECLI:EU:C:2016:480; judgment: ECLI:EU:C:2016:817.

¹⁹ – See Case C-96/15 Saint Louis Sucre, my Opinion: ECLI:EU:C:2016:64; judgment: ECLI:EU:C:2016:450.

²⁰ – See Case C-141/15 Doux, my Opinion: ECLI:EU:C:2016:676; judgment: listed for 9 March 2017.

²¹ – See Case C-361/14 P McBride and Others, my Opinion: ECLI:EU:C:2016:25; judgment: ECLI:EU:C:2016:434.

²² – See Case C-472/14 Canadian Oil Company Sweden and Rantén, my Opinion: ECLI:EU:C:2015:809; judgment: ECLI:EU:C:2016:171.

²³ – See Case C-460/15 Schaefer Kalk, my Opinion: ECLI:EU:C:2016:852; judgment: ECLI:EU:C:2017:29.

²⁴ – See Case C-277/15 Servoprax (recognition of conformity assessment for in vitro diagnostic medical device for free circulation within the internal market), my Opinion: ECLI:EU:C:2016:457; judgment: ECLI:EU:C:2016:770.

²⁵ – See Case C-465/14 Wieland and Rothwangl, my Opinion: ECLI:EU:C:2016:77; judgment: ECLI:EU:C:2016:820.

governing individual portions of honey.²⁶ And yes, we also try to look after travel grants for students.²⁷

To summarise on the ‘state of the European Union’ as seen from both inside and outside the CJ: the EU is living through a period of serious geopolitical challenge. Those charged with its governance are fully aware that, as well as keeping the economic market running smoothly, they need to find new ways to regulate the flow of migrants to Europe, to tighten up security on the EU’s external borders, to fight youth unemployment and, more generally, to renew trust and confidence in the European project.²⁸ The Eurozone crises has abated but has not necessarily gone away for good. Many accept that some reforms are needed within the EU – to structures, to priorities – so as to keep the right balance between the EU centre and its component sovereign Member States (a perennial issue since the EEC was founded). There has been some discussion of whether it might be good to create two concentric circles (to replace the ‘variable geometry’ from which the UK has so greatly benefitted as a Member State): a looser outer circle of Associate Members with some rights and privileges and an inner circle of Full Members, committed to a more federal ideal for the EU, who accept fuller obligations in return for fuller rights and privileges.

In that context, some do indeed speak of the scheduled UK Presidency of the European Council in the second half of 2017 – a presidency that the UK inevitably had to relinquish following the Brexit referendum – as a sad missed opportunity to start fixing what needs fixing to take the European project smoothly forward. On the EU side of the equation, British officials within the EU institutions have consistently impressed colleagues with their professionalism and integrity; and the high standard of EU-related work within the UK civil service has meant that the UK has tended to make a thoughtful and significant contribution to presidency discussions. Above all, British pragmatic creativity has been a quality much valued within the EU in the last 43 years.

On the whole, however, talk of possible significant internal reform has, for the moment, been put on the back burner ‘while we deal with Brexit on top of all the other pressing problems’. Many (including, incidentally, Lord Hague, the former Conservative Party leader, in a recent speech in Luxembourg) regard finding a coherent and humane way of addressing potential mass migration triggered by the predicted population explosion in Africa and the Middle East

²⁶ – See Case C-113/15 Breitsamer und Ulrich, my Opinion: ECLI:EU:C:2016:200; judgment: ECLI:EU:C:2016:718.

²⁷ – See Case C-233/14 Commission v Netherlands, my Opinion: ECLI:EU:C:2016:50; judgment: ECLI:EU:C:2016:396.

²⁸ – See <http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/>. See also <http://www.consilium.europa.eu/en/press/press-releases/2017/01/31-tusk-letter-future-europe/>.

as the biggest challenge to Europe. That geographical unit – Europe – of course includes the UK.

From this perspective and against that background, Brexit is not centre-stage. It is an immense, time consuming distraction. It sucks time and energy and resources away from other things that are more important. (Yes: from an EU perspective there are other current issues that are more important than Brexit.) And because Brexit, as viewed from that EU perspective, is a messy sideshow, not the main act on the playbill, the process of Brexit is one that of itself erodes part of the UK's political capital and stock of political goodwill amongst its EU partners.

That brings me to what 'the others' are saying (and, perhaps, thinking) about Brexit itself.

Initially, that could best be summarized as shock, surprise, regret, coupled with a feeling that, if the UK does want to leave, then we should all get on with making that happen quickly. Please, therefore, trigger Article 50 TEU as soon as possible. As the months passed and Article 50 TEU was not triggered, the feeling of impatience ('why aren't the Brits getting on with it, then?') gave way to the incredulous, dawning realization that actually there was no plan: that the UK had apparently decided to leave the EU without the slightest idea of what, precisely, it wished to put in place in its stead. European observers – well-wishers as well as sceptics – tried to 'read' the various messages emanating from London (for example, the new Prime Minister's speech at the Conservative Party Conference). Those pronouncements may have been intended primarily for domestic ears; but since English is a very accessible language, they were read, deconstructed and mulled over in every capital in the EU. That the statements made were deliberately ambiguous or not entirely clear merely added to the confusion and sense of frustration ('but what DO they want, then?'). Everyone understands that, before a negotiation, one keeps certain cards close to one's chest – but that cannot plausibly (as seen through EU eyes) extend to cover very basic questions about what kind of deal the UK is likely to be looking for.

Certain colleagues see particular issues in even sharper focus. Unsurprisingly, Irish colleagues are extremely concerned about the implications of Brexit for the island of Ireland. Many recall that the Good Friday Agreement, which brought peace after decades of 'the Troubles', was constructed on the premise that both the UK and the Republic of Ireland are EU Member States. Replacing extradition (politically, virtually unthinkable in Dublin) by the European Arrest Warrant (low-key judicial co-operation) has vastly improved that element of the Anglo-Irish story.²⁹ The economy of Northern Ireland is interlinked with that of the

²⁹ – See Case C-237/15 PPU Lanigan, Advocate General Cruz Villalón's Opinion: ECLI:EU:C:2015:509; judgment: ECLI:EU:C:2015:474.

Republic (tankers trundle along collecting milk from farms on both sides of the border every day for processing at dairies in the Republic). Having a ‘hard border’ (EU to third country) between the North and the South seems to such colleagues retrograde, indeed practically inconceivable; yet how would a ‘soft’ border work out in practice and who would pay for what, where? (I add that a completely ‘soft’ border seems to me to be a non-starter.)³⁰

Other colleagues who come from Member States with federal structures or devolved regions are bewildered by the whole Scottish story. They have looked at the voting figures from the Brexit referendum and they realize that two out of the four component parts of the UK voted to remain in the EU. They recall – many colleagues within the EU follow big political events in other Member States assiduously – that a major element in the Scots referendum in 2014 was the concern that Scotland might drop out of the EU if it departed the United Kingdom. Why, then, the apparently cavalier approach towards, and disregard for, Scottish unwillingness to be forced out of both the EU and the single market?³¹

After Theresa May’s speech on 17 January 2017, reactions in the UK press were triumphalist. The front page of *The Times* the following day read, ‘May to EU: give us fair deal or you’ll be crushed’.³² The speech got a less enthusiastic reaction from those on the other side of the Channel. EU ambassadors who attended the speech in Lancaster House spoke of ‘unnecessary and unhelpful threats’.³³ ‘Where is the give for all the take?’ asked the Czech Republic’s secretary of state for EU affairs, Tomas Prouza, on Twitter. EU Council President Donald Tusk lamented what he called a ‘sad process, surrealistic times’.³⁴ There is a persistent perception amongst the EU audience that the avowed ‘clarity’ of the Prime Minister’s ‘twelve principles’ is not really clarity, but just cherry-picking by another name – coupled with reminders (gentle and not so gentle) that the deal, at least as perceived by the EU, cannot be about cherry-picking.

³⁰ – For example: suppose that the UK signed a Free Trade Agreement with the USA which allowed hormone-treated beef into the UK from the USA. The EU would, I suspect, feel that there simply had to be a way of preventing that (banned) product from entering the 27 Member States via Ireland.

³¹ – Of course, constitutional concerns of other Member States (for example, Spain in relation to possible Catalan independence) only complicate the situation.

³² – *The Times*, 18 January 2017: <http://www.thetimes.co.uk/article/may-to-eu-give-us-fair-deal-or-youll-be-crushed-07m2p8bfd> (full article available only on subscription).

³³ – *The Times*, 18 January 2017: <http://www.thetimes.co.uk/article/diplomats-dismiss-mays-bluff-rlsm265g9>.

³⁴ – See <http://www.reuters.com/article/us-britain-eu-may-priorities-iduskbn1502h2>.

In an article in the Guardian on 18 January 2017,³⁵ Guy Verhofstadt, the European Parliament's Brexit negotiator, offered a clear and frank summary of what the expected Brexit negotiations look like from an EU perspective:

'The EU will work in a frank and open manner to help deliver a Brexit that is least harmful for all concerned, but we must be honest with each other too: the days of UK cherry-picking and a Europe à la carte are over. (...) [N]o one in Europe wants to "punish" either Britain or the British. I have never heard any MEP or European leader call for this, in private or public. But it is an illusion to suggest the UK will be permitted to leave the EU but then be free to opt back into the best parts of the European project, for example by asking for zero tariffs from the single market without accepting the obligations that come with it. I hope that British people will see from the perspective of an EU taxpayer how unreasonable this would be.'

The lawyers – and there are, unsurprisingly, many lawyers from other Member States amongst my daily contacts – are, above all, bemused by the process. As they understood the referendum campaign, a key theme of those urging a 'Leave' vote was the wish to restore sovereignty to Parliament at Westminster. The judges and advocates-general at the ECJ have followed with keen interest the Miller case as it progressed through the Divisional Court (christened in-house as 'Brexit No 1') and the Supreme Court ('Brexit No 2'). They eagerly read the entire Supreme Court judgment, the day it was delivered. And then a steady stream of colleagues came to ask me: surely this meant (given the apparent absence of any agreed pre-referendum strategy) that there would now be a detailed, thoughtful and informed debate in the Mother of Parliaments about the obvious key issue that a representative democracy would debate: what kind of Brexit should UK negotiators be aiming for? Many of them know that the legislative process within the EU took a major turn for the better when Lord Cockfield introduced British civil service procedures into the Directorate General of the Commission assigned to him and instructed his startled officials to prepare the first-ever EEC White Paper on 'Completing the Internal Market' in 1985³⁶ (a truly pivotal moment in the history of EU constitutional process and a fine example of an important British contribution to the European Union). A five-line draft bill, a hastily written white paper not incorporating the mandatory economic impact assessment that appeared part-way through the Parliamentary debate on that bill rather than before draft legislation was presented to the House and three line Conservative and Labour whips to support the government and endorse triggering Article 50 TEU are not easy to put across to Continental colleagues – particularly if (as is the case) you have to start by explaining that the imagery of the whips systems

³⁵ – https://www.theguardian.com/commentisfree/2017/jan/18/not-punish-britain-shed-illusions-eu-fair-deal?utm_source=esp&utm_medium=Email&utm_campaign=Brexit+briefing+2016&utm_term=209927&subid=20042825&CMP=ema-3239.

³⁶ – Commission of the European Communities, White Paper from the Commission to the European Council (Milan, 28-29 June 1985), Brussels, 14 June 1985, COM (85) 310 final.

derives from the glorious old English tradition of fox-hunting. Steady repetition of the twin mantras ‘Brexit means Brexit’ and ‘Do not dare to thwart the will of the people’ is, I fear, proving less than convincing on the side of the Channel where I live and work. Colleagues point out to me that in any mature representative democracy, after the campaigning and the associated slogans have had their day, the elected representatives ‘thwart’ the (raw) will of the people on a regular basis by holding grown-up debates on complex issues involving difficult choices before committing their country to a particular course of action. In some Member States, there are still uncomfortable memories about the historical consequences of plebiscites.

Trade deals

The ECJ does not just spend its time dealing with infringement proceedings against Member States, appeals from the General Court and references from national courts on the interpretation and validity of provisions of EU law. An important part of the ECJ’s functions is to subject the proposed exercise of competences by the EU institutions to rigorous scrutiny. Sometimes, that involves patrolling the boundary between the respective powers of the Commission and the Council.³⁷ At other times, it requires the ECJ to examine whether a particular competence belongs to the EU or to its constituent Member States.

Over the last six months and more, I have been immersed in thinking and writing about trade deals. To be more specific: with the dedicated help of not one but two of my *référéndaires*, Stanislas Adam and Isabelle Van Damme – both very experienced EU international relations and trade lawyers – I have been examining very closely one particular such deal: the EUSFTA. The European Commission asked the ECJ to give its ‘Opinion’ pursuant to Article 218(11) TFEU as to whether that trade agreement fell within the exclusive competence of the EU (so that it could be concluded by the EU acting on its own) or whether some parts of the deal fell within shared competence (or indeed Member State exclusive competence), so that each Member State would also have to conclude the agreement in accordance with its own constitutional requirements. In my Opinion,³⁸ I concluded that the EU did not have exclusive competence to conclude the EUSFTA as drafted. In the process of working on that Opinion, I

³⁷ – See, for example, Joined Cases C-103/12 and C-165/12 European Parliament and European Commission v Council of the European Union (Venezuelan fisheries), my Opinion: ECLI:EU:C:2014:334; judgment: ECLI:EU:C:2014:2400, Case C-73/14 Council of the European Union v European Commission (submission of written statement to ITLOS), my Opinion: ECLI:EU:C:2015:490; judgment: ECLI:EU:C:2015:663, and Case C-660/13 Council of the European Union v European Commission (Swiss MOU), my Opinion: ECLI:EU:C:2015:787; judgment: ECLI:EU:C:2016:616.

³⁸ – See my Opinion in Opinion Procedure 2/15, ECLI:EU:C:2016:992, Opinion of the Court: pending. For an interesting development since my Opinion in that procedure was delivered, see <http://www.trading-together-declaration.org/>.

have – of necessity – reverted in part to the economist that I used to be before I became a lawyer.

Let us therefore look together at some very basic economic realities that are reflected in the way that modern trade deals are written.

Classical economic analysis divides the factors of production into capital and labour.

Capital these days is intimately associated with investment – with likely return on investment, with stability and with having (relative) confidence, as an investor, that one stands a reasonable chance of predicting what the future may hold. A multitude of factors lie behind the decision to locate a factory in country X rather than country Y. Economists love to take the example of a factory producing ‘widgets’, so that is what I shall do here. However, unlike the output of Adam Smith’s famous pin factory, the modern-day widget is not a simple object. There is often an extended chain of production, involving components sourced from different countries. Sub-assembly work takes place; and half-assembled sub-assemblies may move across frontiers several times before the completed widget rolls off the final production line. You do not want the assembly line to be brought to a halt because a crucial component is held up in customs. (Let me give a historical example here. When Volkswagen set up its first big manufacturing plant in South America, in Brazil, it told its major existing component suppliers such as Lucas that, if they wanted to go on being VW suppliers *anywhere*, they were going to set up their own factories in Brazil next door to VW. At the time, my father worked for Lucas; and that is why I spent four years of my childhood in São Paulo. The economic logic was brutal and straightforward.) Transposing that to 21st century Europe, it seems likely that for individual companies economic logic will sooner or later cut across political reassurances. And whilst a fall in the value of one currency against another (for example, sterling against the euro) indubitably makes exports from the UK to the Eurozone more competitive and promotes inward movement of tourists into the UK to take advantage of attractive offers, thus boosting the receipts of the UK service economy, it simultaneously increases the costs to UK industry of any components that have to be sourced abroad.

You also need stability of access to the market(s) in which you intend to sell the factory’s products. In order to derive sensible economies of scale, you want to be producing widgets that will be saleable in all your destination markets. Obviously you do not want to be kept out of that other market by the type of crude trade protectionism that goes by the name of quotas and / or tariffs. But it is also no good getting your widgets tariff- and quota-free across the frontier only to have them languish in a warehouse. You need your widgets to be recognized as fully compliant with local regulations and standards in order to be able to put them on the market. So, if you choose not to manufacture your widgets to standards ‘imposed’ by a particular trading partner (say, the EU) and subject to judicial control by that trading partner’s highest court (for the EU, the ECJ), you have to get your trading partner to agree that your standards and its standards are interchangeable and mutually acceptable so that you can sell

your widgets, manufactured to your standards, in its market. This is all deeply technical and boring and unsexy. It does not convert into a good sound-bite. But it is what international trade is about. In exiting the EU, the UK will withdraw from the jurisdiction of the ECJ but will not thereby escape its jurisprudence.³⁹

Labour is the other classic component of production. Replace the word ‘labour’ by ‘immigration’ and hackles rise. In the current UK tabloid narrative, migrants are stealing UK jobs, or alternatively are too lazy to work so they sponge off UK social security. The Grand Chamber of the ECJ handed down two very clear, very Member State friendly rulings in Case C-333/13 Dano (2014)⁴⁰ and Case C-67/14 Alimanovic (2015),⁴¹ indicating that free movement of citizens of the Union is not about benefit tourism. Unfortunately, those two judgments do not seem to have received much publicity in the UK, at least not in the popular press. And, unlike widgets, workers often do have families and children who need to go to school. That said, it should also be remembered that workers who are part of the regular workforce pay taxes and social security contributions and thus help to fund social provision in the host Member State.⁴²

From an EU perspective, free movement of workers (together with freedom of establishment and freedom to provide services) is a non-negotiable pillar of the single market. If everyone is playing a game of association football by the rules of soccer, one player cannot be authorized to pick up the ball and run with it in his hands as if he were playing rugby. But to judge by the EUSFTA, even without access to the EU single market, some free movement of labour necessarily also finds its way into a sophisticated, modern-day trade deal. Thus, Section D of Chapter 8 of the EUSFTA is entitled ‘Temporary presence of Natural Persons for Business Purposes’ and provides the necessary free movement rights to make business happen in the context of that Free Trade Agreement.

Trade deals are very detailed and very complicated and take a long time to put together. That is an unpalatable truth. The core period for negotiating the EUSFTA (excluding the earlier attempt to negotiate a regional, ASEAN agreement and the period subsequently spent cleaning up the text: so, just the negotiating period) took from March 2010 to October 2014:

³⁹ – A comment made on a number of occasions by Sir David Edward, the former British judge at the ECJ, during discussions on Brexit in Scotland.

⁴⁰ – Judgment: ECLI:EU:C:2014:2358; Opinion of Advocate General Wathelet: ECLI:EU:C:2014:341.

⁴¹ – Judgment: ECLI:EU:C:2015:597; Opinion of Advocate General Wathelet: ECLI:EU:C:2015:210.

⁴² – For example, Luxembourg has a very great number of trans-border workers (‘frontaliers’) from Belgium, France and Germany who make a significant contribution to its (excellent) social security system (3rd trimester 2016: 177 225 trans-border workers in all – 43 502 from Belgium; 43 262 from Germany; and 90 461 from France; see statistics on <http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx>).

four and a half years. The resulting agreement consists of a preamble, 17 chapters, a protocol and five ‘understandings’. It is a very long, very technical, read. An analysis by the Peterson Institute for International Economics of the past 20 free trade agreements made by the US shows that the average time from talks being launched to the deal being implemented was 45 months.⁴³ There are indications from the US that US businesses may not see a US-UK trade deal as a priority and warnings that ‘a quick US-UK trade deal would be far less comprehensive and far less meaningful than one that takes a few years’.⁴⁴ I merely add that President Trump has made it crystal clear that his presidency is going to be about ‘America First’. That alone might incline one to think that it would be wise to approach striking a deal with him on a Free Trade Agreement – which can only legally be done after the UK ceases to be an EU Member State⁴⁵ – on the basis of clear objectives, with the aid of experienced negotiators and with one’s eyes wide open.⁴⁶

Finally – and I do apologise for stressing something that is surely blindingly obvious – a negotiating table has two groups of negotiators sitting on opposite sides of it. How long a trade deal takes to do, and what ends up being included, certainly reflects the complexity of the issues that need to be discussed (and the EUSFTA shows that services are a particularly complex and sensitive component of any trade deal).⁴⁷ The deal that is finally struck is affected by what each side can put on the table (what they have to offer) and by their relative bargaining power (the stronger party usually gets the best of the bargain). But the smoothness – or otherwise – of the process is also affected by how good relations are between the potential trading partners. It seems to be common ground that the UK wishes at least to explore negotiating some future deal with the EU. My perception – based on what colleagues and EU diplomats are saying to me day in, day out – is that the result of the process so far – the consequence of what has, and has not, happened between the referendum vote and now –

⁴³ – The Times, 24 January 2017: <http://www.thetimes.co.uk/article/quick-trade-deal-is-not-high-priority-for-us-companies-g33tkwj5w>.

⁴⁴ – The Times, 24 January 2017: <http://www.thetimes.co.uk/article/quick-trade-deal-is-not-high-priority-for-us-companies-g33tkwj5w>.

⁴⁵ – Article 3(1)(e) TFEU confers exclusive competence for the common commercial policy on the European Union. Detailed rules for the application of that policy are to be found in Title II of Part Five of the TFEU. The UK is currently a Member State and will remain a Member State unless / until Brexit becomes effective. As a Member State, the UK is therefore bound both by these specific provisions and by the duty of sincere cooperation in Article 4(3) TEU, which requires it (in particular) to ensure fulfilment of the obligations arising out of the Treaties.

⁴⁶ – Here, keeping one’s eyes open might also include needing to be watchful about proposed blanket bans on migrants that might also catch British citizens who are dual nationals. Sir Mo Farah is, it seems, now safe from being stopped at the US border; but how President Trump’s travel ban will eventually work out is far from clear at the time of writing.

⁴⁷ – Chapter Eight (‘Services, establishment and electronic commerce’ occupies pp. 176-437 of volume 1 of the EUSFTA.

is that the UK is losing political goodwill and losing friends before the negotiations even start.

Conclusion

I have not attempted, in this lecture, to come up with a recipe for ‘Brexit-success’. I have merely highlighted some of the parameters within which the Brexit process will be played out. What I have put before you are sober facts which, like the laws of gravity, are rather hard to avoid in practice. It is for those whose duties and mandates are political to decide whether or not to pay attention to those facts. Politicians on campaign can and do put out sound-bites to catch the public mood and win votes. However, there should – I respectfully suggest – come a point when the campaigning stops and the business of government begins. Politicians who hold public office and bear political responsibility are charged with governing in the interest of the whole country, not just those who voted for them. Statesmen – a much rarer if not endangered or, frankly, extinct breed – do better than that. They manage to see the bigger picture and, where necessary, are prepared to lead and shape public opinion rather than reacting to it.

I have truly no idea what the actual outcome of the next two years will be. My final word – and it is really a plea – is this. We (the UK and the EU) may end up with a hard Brexit or a soft Brexit; a bespoke Brexit or a Brexit that borrows from a successful model of some other relationship between a third country and the EU; a ‘red, white and blue Brexit’ or a Brexit that comes rather closer to being blue with golden stars. What seems to me to be essential, however, is that we should try very hard NOT to end up with a disorderly Brexit. A disorderly Brexit will be one in which, during the process of negotiation, irreconcilable fictions and fools’ gold collide with reality. A disorderly Brexit will generate economic uncertainty and cause economic, political and social damage. It will harm millions of individual human beings – EU citizens who are nationals of the 27 other Member States who live and work in the UK and play an important role in many sectors of the British economy; and British EU citizens who live and work elsewhere in the EU.⁴⁸ A disorderly Brexit will create sourness, resentment and the hardening of hearts and minds on both sides of the Channel. And it will poison the relationship between the UK and the EU for at least a generation.

A famous headline in The Times, just before the First World War, read, ‘Fog in Channel – Continent cut off’. It was (unintentionally) amusing, because it betrayed an interesting perspective on who was cut off from what. I suggest that it is vitally important to clear away some of the post-referendum fog that right now seems to be obscuring the view of the Continent from the UK.

⁴⁸ – See, e.g., House of Lords European Union Committee, 10th Report of Session 2016-17, ‘Brexit: Acquired Rights’ (HL Paper 82).