

BRIEF CRITICAL APPROACH TO THE NEW EU-UK RELATIONSHIP AGREEMENT THROUGH INTERNATIONAL LAW

By Diego Sánchez Borjas⁹

Abstract

On January 30th, 2020, Brexit materialised in the formal withdrawal of the UK from the European Communities and started the second countdown for the new relationship agreement governing future UK-EU relationships until December 30th, 2020. On one hand, the Withdrawal Agreement established a regime of rights and obligations which still considers the UK as a Member State in the transition period. On the other hand, given the duty to consider the steps for negotiations, the Declaration, a non-contractually binding text, reunited both parties' goals' in key areas (i.e. defence, foreign policy, and international development). The changes in the UK negotiation stance reveal the usefulness of the conduct of the parties in analysing legal effects to conclude whether a previous intention remains invocable. Following the doctrine of *estoppel*, the non-legally binding nature of the Political Declaration is argued and found that permits the EU to call the UK to adopt a coherent and clear stance on the new relationship agreement, even through dispute settlement procedures set forth in the Agreement.



⁹ 3rd Year Law student focusing on International and European Law, Universitat Abat Oliba CEU (Barcelona). Editor of the Institute for a Greater Europe.

Introduction

On June 23rd, 2016, the result of the referendum on the United Kingdom (UK) membership to the European Union (EU) in favour of exiting the EU embarked the country upon an ocean of legal uncertainty (The Electoral Commission 2020). With no precedent whatsoever in the EU's history, both the EU and the UK assumed the challenge of achieving an orderly transition. In that light, after four years of intense negotiations and continuous deadline extensions, both the UK Government, through the favourable vote in Parliament, and the Council of the EU, after the support in the EU Parliament, signed on January, 24th 2020 the Withdrawal Agreement -the Agreement-, and entered into force on February, 1st 2020, accompanied by the Political Declaration -the Declaration- (Notice concerning the entry into force of the Agreement 2020).

Whereas the Agreement brings a framework ensuring the applicability and enforcement of EU law even after withdrawal, the Declaration lays down the intention towards future negotiations. The 178-pages complex legal document outlining the subjects both the EU and the UK are bound to duly respect during the transition period, the time frame on which both parties undertake to implement it fully, in addition to reaching a new relationship agreement as two separate parties (Withdrawal Agreement, Arts. 126 and 184). On the other hand, the 141-paragraph Declaration seeks to create a symbiosis between a free trade agreement and several separate cooperation agreements in areas where both parties shared competences (Political Declaration, para 3). To sum up, whilst the Declaration can only serve its purpose if an agreement is reached, the Agreement will continue to do so even after the transition period.

Furthermore, concerns arise towards the likeliness of agreeing on the final text of the new relationship treaty given the divergence of the UK from the Declaration. In short, the British Government published their proposed versions of the new agreement excluding key areas as covered in the Political Declaration (i.e. foreign policy, international development and defence), a stance to which the EU expressed their regret based on the content of the joint declaration. Despite all efforts to ensure the agreement enters into force after December 31st, 2020, both Parties have expressed no interest in extending the term to agree on the treaty regulating their new relationship. In that sense, the present paper analyses the following question: **To what extent does the Political Declaration create any legally binding obligation for both Parties on the terms of the new relationship agreement?**

The subsequent paragraphs, considering the research question above, discuss the nature of the Withdrawal Agreement and its legal effects on the content of the Political Declaration. Thereupon, the analysis will rely on the discussion findings to determine whether, based on international law treaty-based formulas and authoritative opinions, an obligation arises or not from the Declaration. To that end, the comparative reasoning will depart from relevant factual findings of the ongoing negotiation process to apply the most adequate formula to answer the research question.

The Withdrawal dilemma: perspectives on the new agreement

Following Article 50(1) TEU -Treaty on the European Union-, the moment in which the Withdrawal Agreement enters into force suspends the application of EU law and provisions on the UK (Judgement of 19 September 2018, *Minister of Justice and Equality v RO*, C-327/18 PPU, para 45). Reasoning from which the primacy of EU law and the direct effect it possesses over UK domestic law ceases to operate in that specific moment (Judgement of 10 December 2018, *Wightman and others v Secretary of State for Exiting the EU*, C-621/18, paras 44, 45, 54). In other words, the power by which a Member State self-obliged to comply with the Treaties, shall be recalled withdrawing the initial consent from which all rights and obligations were born (Lord Bridge

of Harwich opinion, *Regina v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] UKHL 13, para 3). Hence, the repeal of the European Communities Act 1972, the legal text constitutionally acknowledging the primacy of EU law over UK law, only produces legal effects, of formally withdrawing, if Article 50 TEU procedure is observed (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 60).

On the contrary, the Agreement draws a different scenario. Despite having fulfilled the conditions set forth on the TEU to materialise the withdrawal, and the legal consequences thereof, Article 127(1) of the Agreement determines that EU law still binds the UK except in certain matters¹⁰. As a result, Article 4(1) states that the principles of primacy and direct effect will continue to operate in favour of individuals when challenging a UK domestic law provision or decision incompatible to the terms of the Agreement or of the EU law specific provision made applicable by the Agreement. The Court of Justice of the EU (CJEU) will exercise jurisdiction to hear the challenges and can deliver enforceable judgement in claims submitted either before or after the end of the transition period, in case of failure to fulfil obligations under the EU treaties or the Agreement. Consequently, EU law, unless specifically provided on the Agreement (Preamble paras 7 and 8; Arts. 86, 87 and 89), is still applicable in the UK, as noted in s.1A(3)(f) of the *European Union (Withdrawal Agreement) Act 2020*, to ensure an orderly withdrawal.

Equally important, the Agreement transmits a clear expectation on the negotiation upon the future relationship agreement. The decision of both the UK, before losing its status as a Member State, and the EU, as a subject of international law whose legal personality and powers originate from the TEU and the TFEU -Treaty on the Functioning of the EU- (*Reparations for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p. 179; Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62.), to abide by the Agreement, a legal document founded on EU primary law, relies on the principle of *pacta sunt servanda*, whereby the parties to a treaty commit to use their best endeavours to attain its content (*Convention on the Law of the Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts. 2(1)(b), 20 and 26). It thus enshrines the question of good faith as the main basis binding both parties, to fulfil the commitments therein and particularly as a safeguard on the future relationship negotiations to reach an agreement before the transition period ends (Withdrawal Agreement, Arts. 5 and 184). Accordingly, reference to the Declaration in the Agreement covers the discussion during negotiations of aspects set forth in the joint declaration on the new relationship.

Furthermore, to understand the legal effects of the Agreement in the Declaration implies the interpretation of the main legal basis for withdrawal. Hence, Article 50(2) TEU develops an ambiguous mechanism concerning the future relationship agreement:

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union **shall** negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, **taking account of the framework for its future relationship with the Union**.¹¹

Following the general rule of treaty interpretation, based on the natural meaning of the words used therein (*Convention on the Law of the Treaties*, art. 31(1); *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgement) [1994]

¹⁰ Protocol to the TFEU concerning the status of the UK, the Schengen acquis, the enhanced cooperation and political rights regarding the election of Members of the EU Parliament and popular initiative.

¹¹ Emphasis added in bold.

ICJ Rep 6, para 41), the duty bestowed upon the EU under the verb “shall” consists of two actions: to *negotiate* and *conclude* an agreement. Owing to the latter, the TEU imposes a duty to the EU concerning the content of the Withdrawal Agreement to be valid: it cannot avoid any reference to the steps to be taken in the negotiations on the new relationship. Consequently, the legal basis of the Agreements sets forth a duty to envision the areas subject to agreement in the negotiations between the Union and the withdrawing State (the UK).



Nonetheless, the paragraph acknowledges one special feature and two separate conditions: firstly, the obligation only concerns the Union and not the withdrawing State as it refers solely to “the Union shall”; secondly, that the agreement negotiated and concluded by the Union with the withdrawing State must set out the steps to be followed in the exiting process; thirdly, that the Union, in the exercise of the duty imposed by the TEU, shall consider, following the meaning of “take account of”, how will the future relationship with the withdrawing State be.

Notwithstanding it, the Political Declaration goes beyond the mere consideration of what the new relationship will be. Rather than expressing a general formula subject to any modification, both the EU and the UK adopted a commitment concerning the mechanisms of the new relationship. Paragraph 135 of the Declaration provides that:

In setting out the **framework of the future relationship** between the Union and the United Kingdom, this declaration **confirms**, as *set out in the Withdrawal Agreement*, that it is the **clear intent** of *both Parties* to **develop in good faith agreements giving effect to this relationship** and **to begin the formal process of negotiations** as soon as possible after the United Kingdom’s withdrawal from the Union, such that they can come into force by the end of 2020¹².

An analysis on the content of the paragraph demonstrates that the relationship to be given legal form after successful negotiations is no other than the one referred to in the Declaration. The text softly excludes any other possible form of relationship when it uses “this” rather than “the” to refer to what relationship will affect the EU and the UK as it relates to the most recent idea used with that noun. In other words, it is the relationship, in its parameters and principles, as conceived in paragraph 128 of the Declaration, given the use of the verb “confirms”, the only one contemplated as to form the relationship between both parties. In that light, paragraphs 2 to 4 of the Declaration materialises the basis of the future relationship into the form of a partnership covering cooperation in trade, under a Free Trade Agreement, including security and foreign policy under a set of principles namely, the balance of rights and obligations, and common values and interests.

Whereas Article 184 of the Agreement, where both the EU and the UK self-obliged to its terms, acknowledges a duty to negotiate considering the content of the Declaration, it is not clear whether it transmits a legally binding nature to the Declaration itself. Despite not establishing a duty to agree on the exact content of the Declaration, the Declaration conceives the roadmap to discuss on how to develop the cooperation areas

¹² Emphasis added in bold

(economic, foreign policy, security, common values). An argument sustained in the language of each part of the Declaration in the areas of interest where words namely “should” are used to express the guidelines both the EU and the UK committed to consider when negotiating on the final agreement¹³. Yet, the official UK Government proposed texts do not substantially comply with following the guidelines above as it excludes the covered areas of foreign policy, defence, and international development (European Commission 2020a; Whitman 2020). Conversely, these proposed documents include, as updated on May 27th, a paragraph reconsidering whether to include these areas in different negotiated treaties or agreements (HM Government 2020, para 8).

The Declaration seeks to consolidate all areas in the outcome of the new relationship negotiations, but the UK Government modified its stance, differing from the content of the joint Declaration, to discuss certain areas in the near future. Nevertheless, while the UK Government modified its original stance, it does not necessarily mean it self-obliged in the first place to act accordingly and fulfil the Declaration. Given the use of a non-compulsory register, based on the use of “should”, in the Declaration, and the lack of signature, ratification or any form to demonstrate one or both of the Parties expressed their consent to the terms of the Declaration, it does not legally bound them (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Judgement) [2018] ICJ Rep 507, para 126). Therefore, according to international law, no tacit or express agreement that contractually binds both Parties can be inferred from the text of the Declaration.

Although no legal binding force emanates from the Declaration, international jurisprudence recognizes the legal effects produced by the conduct of the parties. In international law, official texts or documents reflect the will of one State whilst forming its will before making any decision, thus, may demonstrate its conduct in international relations. Due to the latter, the doctrine of *estoppel* declares the existence of a preclusion opposed to the conduct of one party, to which another party relies on, and causes on the latter a change of position or any prejudice (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgement) [1969] ICJ Rep 3, para 30). The main effect is to declare as legally void any later act contrary to the original act on which the counterpart relied on and changed its position or suffered a prejudice as a result. Whereas no legal obligation emanates from the Political Declaration itself, if proven with a factual analysis that the EU changed its position due to its reliance on an act from the UK, then a legal obligation to not follow the effects of the later act will enter into force.

Noting the aforementioned, the Political Declaration was modified because of political assurances to ensure the ratification of the Withdrawal Agreement. After the threefold failure from Theresa May’s government to adopt the Agreement in the House of Commons, Boris Johnson’s government made a request to the EU to change the content of the Declaration seeking to satisfy Parliament and approve the orderly withdrawal (Khan and Brunsden 2019). Taking into consideration the proximity to the final deadline of the extension to conclude the Agreement, the EU, advocating to prevent a no-deal scenario and to ensure an adequate transition to the new relationship, accepted the request for the sake of an ordered and certain transition (European Commission 2020b, p. 3). Subsequently, the House of Commons voted favourably, and the Withdrawal Agreement was ratified, text to which the revised Political Declaration was also included. Owing to the request made by the British Government in a context urging its approval, the EU changed the content of the Declaration, and both Governments later concluded the Withdrawal Agreement.

¹³ See Parts I to IV of the Political Declaration.

In the light of the factual analysis, the doctrine of *estoppel* is applicable inasmuch the EU decision to modify the original content of the Declaration relied on the conduct of the UK Government. The British Government request to the EU constitutes the conduct as it is an act made by an official organ of the State, whereas the EU decision to modify the Declaration refers to a change of the original position on the roadmap for negotiations due to assurances made to obtain the ordered withdrawal, an element justifying EU reliance on UK request (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgement) [2007] ICJ Rep 43, para 385). As a result, any act by the UK Government contrary to the essence of the first act where it expressed its purpose of covering certain areas in the negotiation for the future relationship will not legally oblige the EU.

In another note, how can the EU make the *estoppel* applicable and realign the course of negotiations? As the conflict arises in the light of the implementation of Article 184 of the Withdrawal Agreement regarding the duty to negotiate the future relationship referred to in the Declaration, the EU and the UK should initiate consultations which, if unsuccessful, may lead to an arbitration (Arts. 167-170). The Agreement sets a time frame of 3 months after notifying the Joint Committee of consultations to overcome the impasse (Art. 171), and stipulates the procedure following notification (Art. 172). Whereas it may seem lengthy, the Agreement provides the possibility of an urgent request to reach an award within 15 days of submitting the request, including the legal obligation to comply with the ruling of the panel and procedure to notify an act contrary to it (Arts. 173, 175 and 176). To await the ruling of the arbitration panel ensures legal certainty to the EU and the UK in the clarification of the areas to be covered in the outcome of the negotiation process. In addition, it is beneficial for both Parties in their respect of international law as recurring to dispute settlement materialises the good faith they originally abided by.

To conclude, the future relationship agreement should not diverge from the areas covered in the Declaration given the *estoppel* of the UK request to modify its original content. It does not affect the ability of the EU to demand satisfaction through the dispute settlement provided in the Agreement ensuring it is not bound by the latest decision of the UK.

Conclusions

After almost five decades as a Member State of the Union, the UK now awaits to form a new relationship as equals. Through a cloudy, dense mist of ambiguity and delays, the new agreement seems in danger to be finally agreed upon on time. With modifications announced during negotiations, the uncertainty envisaged to be over with the Withdrawal Agreement and the Political Declaration has returned.

Given the potential impact the new relationship reveals, the present essay unfolded the legal implications for the UK to diverge from the initial commitment made in the Declaration. Whilst the Declaration is not legally binding in principle, the arguments above demonstrated the application of the *estoppel* principle that proves the possibility of the EU to prevent the UK from going against its original position. A situation which, for the sake of not undermining trust in both international law and the UK, constitutes a new step in achieving an orderly withdrawal through coherence and consistency.

Bibliography

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("Withdrawal Agreement"), OJ C 384I, 12.11.2019, p. 1–177. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29> [Accessed 28 Mar. 2020]

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, I.C.J. Reports 2007, p. 43.

Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgement, I.C.J. Reports 1985, p. 13.

Convention on the Law of the Treaties, signed on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

European Commission, (2020a). *Statement by Michel Barnier following Round 4 of negotiations for a new partnership between the European Union and the United Kingdom*. [online] Available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_739 [Accessed 10 May 2020]

European Commission, (2020b). *Communication to the Commission on the endorsement by the Commission of the revised Protocol on Ireland/Northern Ireland included in the Withdrawal Agreement and of the revised Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, as agreed at negotiators' level, as well as on their transmission to the European Council*, C(2019) 8000 final. [online] Available at : https://ec.europa.eu/commission/sites/beta-political/files/c_2019_8000_european_commission_recommendation_0.pdf [Accessed 5 May. 2020]

European Union (Withdrawal Agreement) Act 2020, c. 1,
<http://www.legislation.gov.uk/ukpga/2020/1/contents> [Accessed 5 Apr. 2020]

HM Government, (2020). *The Future Relationship with the EU. The UK's Approach to Negotiations. February 2020*, London: HM Stationery Office, pp. 1-30. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf

Judgement of 10 December 2018, *Wightman and others v Secretary of State for Exiting the EU*, C-621/18.

Judgement of 19 September 2018, *Minister of Justice and Equality v RO*, C-327/18 PPU.

Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62.

Khan, M. and Brunsden, J. (2019). Boris Johnson demanded the EU allow UK to diverge from standards. *Financial Times*, [online]. Available at: <https://www.ft.com/content/227f7270-ce8f-11e9-99a4-b5ded7a7fe3f> [Accessed 18 Mar. 2020]

North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J. Reports 1969, p. 3.

Notice concerning the entry into force of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 189. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XG0131\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XG0131(01)) [Accessed 30 Mar. 2020]

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgement, I.C.J. Reports 2018, p. 507.

Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ C 34, 31.1.2020, pp. 1–16. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.034.01.0001.01.ENG [Accessed 12 Apr. 2020]

Regina v. Secretary of State for Transport, ex parte: Factortame Ltd and others [1990] UKHL 13.

Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174

Results and turnout at the EU referendum, (2020). [online] *The Electoral Commission*. Available at: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum> [Accessed 30 Mar. 2020]

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgement, I.C.J. Reports 1994, p. 6.

Treaty on the European Union (TEU), OJ C 326, 26.10.2012, pp. 13–390. Available at: http://data.europa.eu/eli/treaty/teu_2012/oj [Accessed 4 Apr. 2020]

Whitman, R. (2020). *Why the UK Has Taken Foreign Policy Out of Brexit Negotiations*. [online] Chatham House. Available at: <https://www.chathamhouse.org/expert/comment/why-uk-has-taken-foreign-policy-out-brexit-negotiations> [Accessed 5 Jun. 2020]