The EEA Agreement: the key to a simplified Brexit process?

The UK is currently a member of the European Economic area and is likely to be able to continue membership if it wishes. Its treaty rights under the EEA afford the UK a considerable degree of control over the post-Brexit outcome. Continued membership can be viewed as an 'interim measure' that would, in one step, meet most of the Leave agenda, whilst allowing time for reflection on longer-term issues.

The UK is currently a contracting party to the EEA Agreement (EEAA), a multilateral international treaty that has a succinct, well-defined, economic aim that could have come straight from the pages of Adam Smith: to promote trade by developing a market (markets being economic institutions whose primary function is to facilitate trade).

The UK signed and ratified the Agreement in the early 1990s as one of the original contracting parties. The EEAA is what the EU calls a mixed agreement. For such agreements it is reasonably clear that, even under EU law (before getting to international law), EU Member States are contracting parties "in their own right", not simply as adjuncts to the EU.

There is nothing in the text of either the EEAA or the Treaty of Lisbon that states or clearly implies that withdrawal from one treaty entails withdrawal from the other. The EU negotiators have not asserted that there is. Neither the EU nor the other contracting parties to the EEAA have sought to call the international conference required by the EEAA in the event of an impending withdrawal of one of one of its parties.

By way of background, it is important to note that the rules on the termination and suspension of the operation of treaties are set out in the Vienna Convention on the Law of Treaties ("VCLT") at Articles 42-45 and 54-64. As a general rule, a treaty remains in force unless it is terminated on the basis of the application of either its own specific provisions on termination or the VCLT (see Article 42(2)). Save in the case of the conclusion of a later treaty designed to replace an earlier one (Article 59), there is no basis in the Vienna Convention (or the EEAA) for withdrawal/termination *by implication*.

It is possible for other parties to seek to terminate the participation of one of their number, for example by alleging that a party is in material breach. Under Article 60(2)(a)(i) of the VCLT, however, in the case of multilateral treaties like the EEAA, the material breach of one party requires the "*unanimous agreement*" of all other parties to suspend or terminate the treaty between themselves and the defaulting party. So the EU27 and the 3 EFTA States, as well as the EU itself, would all need to agree that the UK has committed a material breach of the EEA Agreement by its decision to the leave the EU, and formally invoke termination on the grounds of material breach against it. There is no indication that the 30 States concerned are giving serious consideration to this possibility.

Another ground for terminating a treaty is fundamental change of circumstances. Although it is not clear whether it would be necessary for all parties to the EEAA to agree that the UK leaving the EU constitutes a fundamental change of circumstances, this route too presents formidable difficulties. First of all, Article 62 of the VCLT does not operate automatically and parties to the treaty intending to invoke ~~it~~ Article 62 would need to notify the others. Absent such a notification, the EEAA would remain in force.

Furthermore, international law sets the bar for the operation of Article 62 very high. Those wishing to terminate a treaty on this basis have to show that: a) the circumstances that have now changed constituted an essential basis for the consent of the parties; and b) the effect of the "fundamental change" is radically to transform the extent of the obligations owed to ~~it~~ the relevant contracting party or by it still to be performed under the treaty.

In one of the leading cases on treaty law, *Gabcikovo-Nagymaros* (Hungary v Slovakia), the International Court of Justice emphasized that the stability of treaty relations requires Article 62 to be applied only in exceptional cases. The Court *rejected* the argument that profound political changes (the transition from communism to a market economy), diminished economic viability of the project, and wide-ranging changes in both environmental law and scientific knowledge about the environment amounted to a fundamental change of circumstances in terms of Article 62, VCLT.

To gain some insight into where the Article 62 bar might be set, it is interesting to look at the case concerning the termination of the Cooperation Agreement treaty between the (then) European Community and Yugoslavia. The relevant circumstances were clearly much more extreme than the UK's decision to leave the European Union: ~~i.e.~~ they involved the dissolution of Yugoslavia and the civil war that followed. The European Court of Justice endorsed the Council's decision to terminate the agreement but on the basis that "*the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and its Protocols … were concluded*".

In a nutshell then, in the EEA context, and in light of the general principles of treaty law, forced termination seems a remote possibility to begin with and it is certainly not something that could easily be achieved.

Voluntary withdrawal from the EEAA is explicitly provided for by its Article 127 which specifies a twelve-month notice period. The very existence (fifteen years before the appearance of Article 50 in the Treaty of Lisbon) and relative permissiveness of the exit mechanism are not accidental. Given that the EEAA was concluded in the immediate aftermath of the fall of the Berlin Wall, with Europe in a state of flux, Article 127 was 'tailor made' for countries that might soon wish to transition *into* the EU. It is also a good fit for a country that wishes to transition *away from* the EU.

The UK Government has chosen not to give Article 127 notice and, in the absence of other actions, the UK will remain a party to the EEAA following Brexit. It therefore makes perfect sense for the UK to fully reserve its rights under the EEAA given that there is no 'automatic' ending of the obligations and rights acquired on signing (in Porto on 2nd May 1992) and ratifying the Agreement. "*Pacta sunt servanda*" (Art. 26, VCLT).

Given that the UK has not given notice of withdrawal from the EEAA and the fact that a forced termination of the UK's membership of the EEAA is very unlikely for both legal and political reasons, the UK's position of strength should be recognised. Put bluntly, the UK *currently* enjoys a considerable

degree of control over the post-Brexit outcome stemming from its *current* Treaty rights under the EEAA. If it chooses to remain a party to the EEAA, committed to its Article 1(1) aim – to promote trade and better *economic* relations between the contracting parties – and consistently acts in good faith, it should expect to be able achieve that (proximate) objective.

Recognition of these points has major implications for the UK Government's negotiating strategy. First of all, the UK/EU divergences consequential on Brexit will necessarily occur over a period of many years and continuing EEA membership appears much the most expedient and effective way of handling the earlier stages of the process. It can be viewed as an 'interim measure' that would, in one step, meet most of the Leave agenda, whilst allowing time for reflection on longer-term issues.

Secondly, the UK's current Treaty rights under the EEAA would greatly reduce the risk of chaos in the event of failure to conclude a withdrawal agreement. This stems from the fact (which does not appear to be widely appreciated), that the EEAA is an extant Free Trade and Economic Cooperation Agreement, made 'deep' by its establishment of a harmonised (though not uniform) system of regulations that serves to reduce non-tariff barriers to trade. This system would be retained in the immediate, post-Brexit period.

Thirdly, EEA membership would also remove the prospective 'cliff edge' at the end of the transition period (likely to prove problematic in light of the difficulties in getting a major new UK/EU agreement up and running by the 1st January 2021, now only 28 months away); and it would resolve the greater part of the Irish Border issues, which are more to do with regulatory harmonisation than with customs. Since the fact of membership of the EEAA constitutes a "status quo" position, continued membership of the EEAA would not need an affirmative vote by a parliamentary majority, which might be a very handy feature for a Government that finds majorities hard to achieve.

There would be one major, outstanding issue to resolve. The EEAA as it stands requires the UK to participate in one or other of its two governance pillars, either the EU pillar or the EFTA pillar, which establish parallel institutions and mechanisms for monitoring compliance with the Agreement.

In the EU pillar the UK would continue to cede sovereignty to the EU (the 'vassal State' characterisation is not inapt); in the EFTA pillar there would be an immediate return of UK sovereignty over the relevant, trade-related matters. The latter is clearly much preferable although it would require UK accession to the *Surveillance and Court Agreement* between Iceland, Liechtenstein and Norway, subject to the consent of those three States.

Just as Article 127 contemplates "necessary modifications" to the Agreement in the event of the withdrawal of one of the parties, so the change in the EU-status of the UK will call for certain adjustments to the text. The most basic one is that the UK's name be added to the list of non-EU contracting parties at Article 2(b).

There are good reasons for believing that the other parties to the EEAA would consent to the amendments required to ensure the effective continued participation of the UK. The EU, consistent with its own EEAA commitments, has itself suggested the EEA as a Brexit option. For non-EU members of the EEA the minor inconveniences of adjusting the existing surveillance and court arrangements to accommodate the UK would likely weigh lightly by comparison with the prospect of the loss of an enhanced Free Trade Agreement with the UK, which for them is a very major trading partner.

However, in the event of any major obstacles the UK should make it clear that it will reserve its rights under the EEAA and seek international dispute resolution if necessary. That need not delay things: as an emergency measure to sustain the continued operability of the EEAA , the UK could offer to quickly set up its own surveillance body and, for judgments, rely on the domestic courts, which have a high international reputation for impartiality.

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