

# Blog: Sir Ivan Rogers' speech text in full

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Sir Ivan Rogers delivered a lecture on 'The real post-Brexit options' at the University of Glasgow on 23 May 2018. He joins Lord Kerr, David McAllister MEP, Michael Russell MSP and David Martin MEP in taking part in the Policy Scotland Brexit series of lectures. In October 2017 Sir Ivan delivered a lecture on 'The History and Origins of Brexit'.

The full text of Sir Ivan's speech is reproduced below.

## The real post-Brexit options

Thanks very much for inviting me back.

Today, I want to look forward, both to the immediate crisis I believe we face and to the options I think realistically exist to find a post Brexit settlement which can stick. But briefly, to look back first...

In last year's lecture here, I attempted to cover the deep origins of Brexit and to explain that the revolution which we saw in 2016 had been a very long time in gestation, and was not – or certainly should not have been – that much of a surprise.

I tried, in a lecture in Oxford in November to amplify that, with a particular focus on the Cameron years. For those of you who are suckers for punishment or insomniacs, that lecture is available on the Prospect, Politico and Hertford College websites.

I start with the history, both of the immediate past and of the long gestation of Brexit, because it is really important, if we want to understand where we are now and why, where others on the other side of the table are and why, and where things can conceivably go from here.

What I aim to explore today are the real choices that confront us now, which, as I have argued here and elsewhere, have rather rarely been discussed honestly over the years of our membership of the EU. These choices have been at the heart of decisions taken by Governments of all hues over the entire period, but they barely got a look in in the referendum campaign, which, for good or ill, was primarily about issues which were much more immediate and pressing to the public.

These real choices facing us are what I want to try and cover today.

One of the most bizarre things in the current UK debate – which has more than a few bizarre things – is the apparent absence, or perhaps auto-deletion, of much memory for the events of the last 25 years or more.

But memories are much stronger on the other side of the table. Which is why so many propositions currently on the table from both the ex-Remainer and the ex-Leaver camps, to put it bluntly, delusional.

I would characterise the Cameron renegotiation as the last of multiple attempts, dating back at least 25 years, to carve out and entrench a British exceptionalism within the EU.

We already had – as I got endlessly reminded by EU colleagues – an entirely unique status within the EU. A unique opt-out from monetary union, an opt-out from Schengen, an ability largely to pick and choose which areas of judicial integration to join and which not, and so on.

Cameron sought further to entrench that exceptional status. He wanted a Europe of separate tiers, not multiple speeds. We were not on a slow train to the same destination to which others might be heading by Express. We were heading for – or at – a different final destination, and a flexible, effective EU should, in his view, have been able to accommodate radically different destinations with only certain core elements, legal rulebooks and mechanisms in common.

He had, unlike say, Tony Blair, for whom I also worked, no desire whatever to put Britain at the heart of all the European project. Had he inherited office before the ratification of the Lisbon Treaty, he would have had a referendum on that, and advocated voting against it. People seem now to forget that too. Had we had a vote in Lisbon and voted against, which we would have done, who knows what course we would now be on?

Cameron wanted permanently to insulate the UK from being sucked into monetary, fiscal and political integration which it did not want, whilst benefitting from greater cross-border integration in goods and services markets to create a vastly larger “home” market, and the ability to break down the behind the border barriers to trade that the Single Market was created to deliver – largely by Lord Cockfield, Margaret Thatcher’s Conservative appointee to the European Commission, and probably the biggest producer of supranational legislation in human history.

Whatever one’s views about what the February 2016 package delivered on this – in my view, quite a bit – or on whether or why the campaign failed to make any very convincing argument about the basis on which it was best to stay in, the fact is that the public was not persuaded, and chose to leave altogether. I still do not find that surprising, and think the result would be the same now.

I get asked quite often whether Cameron ought to have threatened that he would himself campaign to leave unless he got substantially more on the free movement issue – notably on the quantitative controls, even if temporary ones, he ideally wanted – given that, under Blair, the UK had failed to take advantage of the opportunity to restrict numbers in the several years after the accession of the A8 countries. Could he not just have forced the type of settlement that would have enabled him to win the referendum?

There are two answers to that. First, there was zero preparedness in key capitals, West and East as well as in the Institutions, to amend the Treaties to permit such quantitative controls. Like it or not, others universally believe in the indivisibility of the four freedoms – of goods, capital services and people – for all EU members.

And anyone suggesting that, if we reran the negotiation now, with the benefit of hindsight about the June 2016 result, the negotiation would have a different outcome on that, is kidding themselves. Tweaks to the operation of free movement and serious latitude on its

implementation at national level: fine. Serious changes to free movement to take it back to nearer a pre-1992 world to which many Cameron advisers wanted to return: not fine, and not gettable, then or now, staying inside the EU. There is no point in basing UK policy on fantasising about the EU agreeing something it won't: whether on free movement, or on plenty else.

Second, if the central issue for Cameron and Osborne on the sustainability or otherwise of UK membership was the satisfactory resolution of the potential problems over Single Market non-Euro countries' interests being systematically subordinated to those of Eurozone players, against London's – and indeed Edinburgh's – interests on financial sector regulation, in particular, then why would any EU leader believe that the UK would ever think those problems better resolved by leaving the EU altogether?

As a negotiator, I am actually a great believer that the threat of leaving the negotiating table and going another route has to be there, whenever you can credibly deploy it. But the key word there is “credibly”.

There was, for the EU side of the table, no credibility at all to the idea that the UK could better secure its fundamental interests on the financial markets issues in the time zone by leaving the EU, thus guaranteeing it would have no vote in the Council or Parliament on the future regulatory regime changes.

For one simple reason. It is not true. As we are in the process of finding out.

Just as, in the Article 50 negotiation since the referendum, there has been no credibility in the threat to walk out to “no deal”, as it has been self-evident to the other side of the table from 2016 that a “no deal” outcome post exit, without any sort of preferential access deal for British goods and services in key sectors, is vastly worse for the UK than even a bog standard Canada Dry style FTA of the sort with which we are confronted post a transition standstill, should UK red lines not evolve.

It is not just the British side of the table which has done its homework on the implications, sector by sector, of all post exit scenarios. Both sides know the legal position in the event of a “no deal” and they also know the contingency plans of major tracts of industries located in the UK if it happened. It sometimes feels as though it is only large chunks of the Westminster village who are blissfully unaware, or wish to write it all off as fear-mongering from those notorious anti-capitalists who run large businesses.

Which is why the threats to walk out have stopped and the repetitions of “no deal is better than a bad deal” have ceased. (There are of course people who want to crash out without a deal. They just do not include the PM or a good 90% of the Commons.)

So, as I say, Cameron's core judgment, after many years in office being faced with the daily reality of EU negotiations, was that the optimal place for the country was inside the outer perimeter fence of both Single Market and Customs Union. This was not passionate Europhilia: far from it. But a cold calculation – Angela Merkel once accused him of making no other sort about EU issues – of economic self interest.

The more he looked at the issues on how, from outside the EU, the UK would be able to secure its vital interests, the more obvious the conclusion that being even “just outside” was radically different from being “just inside” the fence.

And that brings me to today...

I want to try and stand back a bit from the immediate frenzy over the Customs Union issue, though I shall come back to that. And to try and cut through the fog.

The UK debate is still characterised by extraordinary misconceptions – most inadvertent, some I fear entirely deliberate – of what post Brexit options there are. Every day, one gets bombarded with confident assertions on issues like what the Customs Union is, and what it does or does not prevent you from doing; what EEA membership would mean, and how the Norwegian “model” in it works; what happens at the Swiss/EU border, the Norwegian/Swedish one, or the Canada/US one; what “mutual recognition” is or could be from outside the EU; how “equivalence” in financial services works and / or might be improved; whether an Association Agreement is a viable option for an exiting state, and so on.

I have talked with old Swiss and Norwegian counterparts and negotiators who despair at the mischaracterisation of their models and of how their democracies, both of which are rather vibrant by any international standard, function, and of the difficult compromises over the trade off between sovereignty and maximising market access they have made.

I talk to lots of people in EU capitals who despair that the UK political class, whose forbears they think made the strongest case for tackling the real, pernicious behind the border barriers to trade across borders in both goods and services, and who remember that in a world where we rely purely on national rules, national Courts and national enforcement mechanisms to strike down those trade barriers against foreign goods, services and companies, we are always waiting for Godot. And who hear people professing themselves free traders who have only a hazy understanding about multilateral, regional and bilateral free trade deals, have never negotiated one – but know it’s straightforward, once one has left the EU.

At the moment, it sometimes feels, from the noise levels, that there are only three schools:

- Those Remainers, who are in fact Reversers, who, whether genuinely or not, see no viable version of Brexit and want to put the issue back to the people as and when there is a final version of the Framework Agreement this year, presumably with the intended choice between that and the status quo ante the referendum, but minus the Cameron renegotiation package;
- Those Leavers who view anything except the clearest complete rupture with the EU as an unacceptable betrayal of the “will of the people” and an act of sabotage of the “true path” Brexit – a path which will later have to be resumed if any of this perfidy were to succeed short term;
- A third way school, which attempts to satisfy both the extremes by asserting that, from outside the EU, we can resume total control of our laws, borders and money and exercise full sovereignty, without intrusion by a foreign Court, but still retain virtually all the benefits of current trading arrangements with our former partners, whilst diverging from them to taste, wherever we derive advantage domestically or with other partners, from so doing. Plus of course still have a major role in setting the key policies of the bloc we have left.

I speak solely as one unaccountable individual, not elected to anything by anyone and with no aspiration ever to be. So my views are merely those of someone with, I hope, a bit of expertise, and a passionate interest in the future of my country.

But my view on each of these schools of thought is that all are wrong and are basically fantasist propositions.

One of the most powerful charges made against the UK political elite by those advocating Brexit has always been that it deliberately mis-sold the nature and direction of the European project to the British people. That is for another lecture – though I covered in the last one here some issues on which I believed that to be a reasonable accusation.

But if we are to avoid miss-selling the British people on our post Brexit options, we need a far more honest debate based on clear, accurate, realistic accounts of the pros and cons of each of the options. Not on fantasies, or incoherent and muddled thinking.

The last of the three positions I described, which is essentially the revealed position of the UK Government, if one reads its speeches and documents on everything from financial services to customs procedures and from data to internal security, is really a very thinly disguised attempt to achieve from outside the EU the vast bulk of what Cameron was seeking to achieve from just inside the perimeter fence.

I dislike all the endless cake and cherries metaphors. They do not help clarify what is desirable or doable.

But the Luxembourg PM, Xavier Bettel's pithy description is a pretty good one: "Before they (the British) were in with a lot of opt-outs; now they are out and want a lot of opt-ins".

Michel Barnier has likewise expressed surprise that so many of the UK documents read like ones from a state aspiring to accede to the EU, not one intending to leave it. I confess I slightly share the puzzlement. So many of the positions in these documents read a good deal more enthusiastic about the case for remaining closely aligned to EU policy than most of the instructions I ever received from Departments when negotiating over years on their behalf in Brussels!

But... you may say: this is fine. We were semi-detached when we were in. We can be semi-detached, or semi-attached, when we are out. What's wrong with that: it best embodies the equivocal British sentiment about our role on and beyond the European Continent?

The problem is that, in dealing with the EU, the states of being just inside the perimeter fence and supposedly just outside it, are very radically different. On leaving, we become, in EU parlance, a "third country".

There is no legal status of "being a third country which used to be a member and therefore can be treated radically better than other third countries". There is no legal "half way in, half way out" option for either the Single Market or the Customs Union. There is therefore an asymmetry. If you are in, you can, within constraints, negotiate bespoke arrangements, carve outs, opt-outs, opt back-ins, and so forth. But once you are out of the legal architecture of the EU, the scope for bespoke arrangements is massively diminished.

This is not a popular message with much of the British political class. They view EU law as a branch of theology, and think that "common sense" must dictate that if all just "will" large elements of continuity after Brexit, it must come to pass. "Be pragmatic, be creative, be flexible" are the pleas. "Drop your pointless theological fixations, just for us. You know it makes sense. And if you don't, your car makers do, and they'll soon talk sense into you".

We have the rather odd sight of politicians who, as is their perfect right, made a case for Brexit on the basis of national sovereignty, autonomy and control, and not primarily on

economic grounds, objecting to being confronted with sovereigntist arguments from the EU27. Nothing seems to rile UK politicians more than French and German ones, or EU Commissioners, talking about the “sovereign autonomy of the EU legal order” and of EU decision-making, when ruling out UK participation in decision-making fora of the Union after Brexit. But that the Union, and before it, and before we even joined it, the EEC, IS an autonomous legal order – a unique legal system – is not news. That’s been there from the start.

By all means object to that, and indeed cite it as one reason to want to exit the EU. But do not feign surprise or outrage when this autonomous legal order, which is not a State, federal or confederal, but a unique supranational construction in nature, duly operates in precisely the way any expert can tell you it will – and has to.

Just at this point, briefly to cite what the German Constitutional Court, often now quite beloved on the sceptic side of UK politics, said, in its first ever ruling on the then European Economic Community: “The Community is not a state, not even a federal state. Rather, it is a community of a special nature in the process of ever closer integration... A new public authority has thereby been created which is autonomous and independent vis-a-vis the public authorities of each Member State. Consequently its acts do not require approval or ratification by the Member States, and cannot be annulled by them.”

That’s from more than 50 years ago... It’s not breaking news.

Those of us who would argue that sovereignty in the 21<sup>st</sup> century is, in the bulk of fields, an inevitably qualified concept – where it’s not as simple as saying “we have lost/surrendered it and we need to get it back” are, I feel, much better placed than the pure sovereigntists to argue against an EU doctrine of sovereign autonomy being deployed against us as a newly minted “third country”.

You simply cannot, with any honesty or coherence, make an argument for taking back control and full autonomy of decision-making on the UK side of the Channel, *and* simultaneously argue for the EU27 to restrict to a certain extent its *own* autonomous decision-making precisely in order to give you, a non-member of the club, a real say in the direction of its policy.

Yet, candidly, this is what key UK speeches and papers over the last 18 months do, time and again.

Unsurprisingly, those then elicit the reaction in the 27 that this is an unacceptable “have your cake and eat” posture from a UK which avows that it cannot accept the obligations of members – respect of supranational laws, adjudication and enforcement, the indivisibility of the four freedoms underpinning the Single Market, and budgetary contributions – but still wants all the benefits of club membership and a say in making the club’s rules.

A few examples. But there are legions more I could give.

On data protection and privacy, which is now absolutely critical to modern cross border trade flows – a connection largely ignored by those loudly proclaiming themselves free traders – we are currently enacting legislation to give effect to the General Data Protection Regulation, a huge piece of EU legislation to which we contributed heavily. (I personally endured many years of painful Ambassador-level discussions on it.) Once outside the EU, our ability to contribute from within to any development of the EU policy framework will disappear. But we will be obliged to implement changes agreed by the 27, or at least to keep substantially in line, or the UK regime will not be declared “adequate” – essentially equivalent – by the EU.

That would have huge repercussions for corporate Britain. And there is no reason to believe the EU would behave any more emolliently to us on the issue than they did in analogous negotiations with the US, a far far bigger world player in data. When I was working on the GDPR, several senior UK Ministers vehemently objected to facets of the legislation, for reasons I well understood, wanted to vote against it, and talked bravely about the different UK regime, based on different cultural principles, we would construct post Brexit.

But since the referendum, the penny has seemingly dropped in Government that autonomy/sovereignty in this domain is, to put it mildly, highly constrained. The reality – not one I welcome, but businesses have to deal with the world as it is, not build castles in the air – is that three discrepant data realms are developing in data protection and privacy – a US one, a Chinese one and an EU one. There is no very effective global governance, whether via the WTO or other global forum, which prevents those players going their own ways, or radically constrains their room for manoeuvre. The result is that the UK, recognising that it has no practical choice in its own commercial interest but to deliver long term convergence with one of these three regimes, is formally indicating that it intends to stay aligned with the EU model.

Understandably, from outside, it is concerned that it has become voiceless in the data realm on the global stage by becoming voiceless on the European one. And its paper therefore makes a case for why we should still be somehow involved in setting policy for the bloc.

But why exactly should the EU permit an exiting member of the club to co-decide the rules of the club? And indeed, how can it, when the UK will not be in the Council or the European Parliament when future legislation is decided?

Second example. Financial services and regulation. I alluded earlier to the centrality of these issues for Cameron, both early on in his term, as the *casus belli* over the quid pro quo for agreeing the Fiscal Compact Treaty, and in the renegotiation itself. This was *not*, contrary to much EU belief, about protecting the City from tough regulation. The UK regulatory reaction to the financial crisis was both tougher and I think, more coherent, than the EU norm.

But it was facing the reality that UK interests in the biggest developed market on the planet and the one in our time zone, and in the sector in which, above all, we had a major surplus with the EU, could increasingly be imperilled by being outvoted by Eurozone players acting as a block, given that they would have the qualified majority to outvote us.

These issues have not gone away through the mere act of leaving. They have merely got more acute. And we know that in the development of future financial regulation within the EU, we shall not be in the room. We know that passporting, on which the Single Market in this domain was built, has inevitably gone.

So here, the UK is again advancing a proposition – snappily entitled bespoke dynamic mutual recognition – which has considerable substantive merits on how issues might be best ordered across international boundaries between regulators and supervisors on either side of the Channel, but is inevitably going to be rejected – indeed, already has been unequivocally rejected – as legally unviable. One cannot take oneself outside the jurisdiction of the ECJ, and leave the Single Market, and simultaneously demand a role that no non-member has in the shaping of EU regulation.

Why, again, should members, who have painfully agreed an extremely detailed constraining single rule book, allow a non-member greater latitude than they have themselves to achieve so-called comparable regulatory outcomes – and agree a non-ECJ unique resolution

mechanism to decide whether they are comparable? This is not going to happen in a month of Sundays.

Predictably, the EU response has been to say that the existing equivalence regimes which operate in numerous directives might be revised and improved. But that they – the 27 alone – would remain the sovereign arbiters of whether we or other third countries had achieved equivalence. Will that approach by the EU to the UK on financial services, in which it remains the paramount player in the time zone, deliver what the EU says it wants on an “orderly withdrawal” with “minimum disruption”? I suspect it might not.

But it is not an economic assessment of how to minimise financial sector disruption which drives the EU’s position. And we are already seeing moves by EU players to force the relocation of substantial real economic activity in the financial sector into their jurisdictions and out of ours. Again: is that economically wise for an EU with many perils in its banking system, to go its many unresolved issues of Eurozone governance? In my view, not.

But when you deliberately leave a regulatory union because you cannot live with the supranational law and enforcement, it is scarcely surprising that those who can and do live with both, want to “take back control” strands of activity where they see their interests or financial stability threatened by decisions taken and adjudicated wholly outside their legal order.

This is obvious.

Thirdly, more broadly on mutual recognition, beyond the financial services sector, the UK seems to seek – via what the Prime Minister called in her Mansion House speech “ a comprehensive system of mutual recognition” – something which goes even beyond what the EU 27 expect of, and deliver to, each other. At best, within the EU thanks to, or perhaps notwithstanding, UK efforts over decades, we have a system of conditional and managed mutual recognition. That goes right back to the famous Cassis de Dijon judgment – for it was the dreaded ECJ which first elaborated the whole concept of mutual recognition – of which UK Prime Ministers of both major parties became so enamoured, as it was a means of avoiding extensive regulatory harmonisation but of really tackling the pernicious behind the border barriers to internal trade which the UK was, as a free trade nation, the keenest to dismantle.

But neither the Court nor the Treaty on the Functioning of the EU imposes an unconditional rule of freed cross border trade, any more than it does on free movement of people. If the UK believes that the EU will agree to admit UK goods and services into the Single Market simply because they comply with UK law and that law aligned is aligned with EU law, so we might get treated as if we were still close to being a member state, rather than in one of several different categories of third country, this is simply wishful thinking, driven by people who have not even half understood how mutual recognition works and what it depends on. Can one, like the Canadians, in the CETA deal, get to much thinner agreements in multiple sectors delivering mutual recognition of conformity assessments? Yes. But that is not remotely the same trade arrangements as we have today.

If one is talking about “ambitious managed divergence”, and deliberately taking oneself outside the jurisdiction of the ECJ, because one cannot live with uniform enforcement of the rules by a foreign Court, that is fine. But one cannot then also talk about delivering the benefits of a mutual recognition regime which inevitably has to build on huge foundations of trust between home and host states, coupled with a strong institutional and juridical framework. The whole point of mutual recognition regimes within the EU across a whole



plethora of sectors, was actually to permit quite radical, if constrained, regulatory divergence between countries to build their mutual confidence in each other's institutions to regulate markets competently and fairly.

One cannot really object if, when one votes to leave the club partially because one wants greater capacity to diverge and because one cannot accept any supranational law and enforcement, that the remaining members of the club then tend to trust one less, rather than more. Deep trade liberalisation tackling behind the border barriers comes with powerful institutions which constrain one's sovereignty. If you don't want those institutions, that's fine. But then you don't get the full trade liberalisation.

That is less free trade, not freer trade.

Fourthly, numerous justice and home affairs issues, on which, as I say, when within the EU, we had considerable, if not quite complete, latitude to decide which instruments to join and which to shun. Again, the UK Government desire to keep vast tracts of the current settlement essentially intact is clear.

To pick a few examples, the Brussels Regulations have created uniformity across the bloc for litigating parties and have greatly enhanced the UK's attractiveness as a place to litigate. Which is now imperilled: we cannot and will not achieve the same results from outside.

We want to retain all the advantages that the European Arrest Warrant, for all its defects, has delivered, recognising that if we have to return to predecessor regimes, they are vastly less efficient and hence pose safety risks to the public – and that, in any case, Member States have no competence, in either sense of the word, to negotiate upgrades with us. But again, the substantive benefits come from the regime to which the role of a supranational Court is completely fundamental. On Europol, we started by wanting, post Brexit, a superior relationship to the one the Danes, whose people had rejected Europol membership in a referendum, had negotiated from within the EU. But again, this is just fanciful. The reality will at best, be Icelandic or Norwegian levels of access, no British leadership of operational projects and demonstrably less British impact on the direction of work.

Fifthly, major projects like the Galileo space programme – though the same types of issues which have cropped up recently there will reappear in multiple other areas. Here again, the toxicity of the exchanges in recent weeks and the mutual accusations of bad faith conceal an obvious truth. The UK genuinely wants to remain a major player in the project, with privileged ongoing access from outside the EU, and views its capabilities and contribution to date as giving it the right to that ticket. For the EU, the decision to leave inevitably entails relegation to a different role and status in the project, and, let's be candid, offers scope for EU located firms to take contractual business away from UK ones.

For those of us who worked on the intensive debate over the creation of Galileo about 18 years ago, and recall a previous generation of UK politicians instructing one to find ways to ensure it did not get off the ground – I failed – listening to a much more Eurosceptic set of politicians complain bitterly that, post Brexit, the field might be somehow tilted more against the depth of participation we now are enthusiasts for, brings me back to my collective amnesia point.

Other systems have long memories of British scepticism – both good and bad, I might add: British scepticism was always quite valuable in preventing some lunacy. But to be told that it's absolutely imperative that things do not change for the worse for us when we leave, and that it would be punitive behaviour on their part if they did, can feel a bit rich coming from

people who opposed setting projects up in the first place, but now think they do rather well out of them.

We risk the same syndrome on European defence co-operation, whose purpose and added value, when within, we did more than all others put together to question. Our papers now sound more enthusiastic about participating at the top policy-definition tier than we usually did when a member state.

Similarly, on enlargement, I must say I do not recall the enthusiasm for EU enlargement into the Balkans in the referendum campaign. No doubt, we now have some fine ideas about how free movement from the potential new accession states into the current 27, but not to the UK, can be best managed after they join...

And finally, we have the whole issue of the very large tracts of the UK economy in which regulatory agencies at the EU level either administer EU law or supply expert advice to underpin policy – in other words, supply key government functions which we no longer have at the national level. Post Brexit, we either have to take back full control and re-learn how to conduct those functions or we have to find a way to remain part of or affiliated to these agencies, but, inevitably, with less of a voice than we had within on policy direction.

There is a plethora of these bodies, managing critical issues from aviation safety to chemicals, from food safety to the energy internal market, from medicines to trademarks, from telecommunications and broadcasting to fisheries. They cover, in other words, large tracts of the most successful business sectors the UK has.

I do not want to be unfair about the UK papers and speeches here – and there will be a vast volume of work going on in each area to examine what can and should be done and at what speed. No single post Brexit model will work for all. But if we want, in areas, genuinely to go it alone – or have to, because we cannot accept the jurisdictional and dispute resolution implications of staying in agencies run at the EU level in which our voice is lessened – then we have to be going full tilt in developing that regulatory capability at huge speed, rather than assuming the EU is bound to give us both associate membership and a serious role from outside in policy setting, when the only way that can happen is if we shift our red line on jurisdiction questions.

That was promulgated as a red line when no serious thought at all had been given to these questions.

The fact that, in so many areas, we are obviously NOT doing that, and both regulators and industries are making it clear that they have no intention of replicating, at great cost, regulatory capability which already exists, is yet another reason why the EU side has long since concluded that the UK would not walk out.

Because it could not.

No amount of “be careful: we could still walk out, you know” sabre rattling makes the slightest odds when the other side knows that the day after doing so, we would be back pleading for continuity and for the ongoing delivery of, and access to, functions the British State has no capability to provide.

I make all these points not to disparage the idea of close and deep co-operation on a huge number of fronts with our former EU partners. That is self-evidently in both sides’ interests. All sides need to recognise what is at stake here.

But to make the point that Brexit does indeed mean Brexit. And that the Eurosceptic contention, with which personally I agree, that the EU had developed hugely beyond a free trading bloc – where I differ is just that I think that was always extremely clearly the intention stated on the tin – needed to be accompanied by the recognition that leaving such an extraordinarily complex and deep legal order for a new, much looser, but hopefully co-operative deal, was bound to be a very lengthy tortuous process.

And was bound therefore to require serious time because in every one of these economic areas, as well as in internal and external security, there will need to be new legal agreements negotiated, often of great detail, specifying the new relationship, which will not be at all the same – cannot be the same – as the one pre-exit.

No number of repetitions of the line that “we start convergent, so doing a trade and security deal with us is the work of weeks” makes it true.

Because if we are leaving it is because we want to diverge and differentiate in substantial areas. For the other side, continuity on Day 1 is the reddest of red herrings. They want to know where we intend to end up on Day 2, day 200 and day 2000.

And they assume that must be really rather radically different, or we would not be Brexiting. What a strange thing for them to believe...!

It is pretty obvious what objectives you bring to the table if you are the 27 when that is the position.

My view is that if we are to avoid the public thinking that, yet again, they have been mis-sold by their leaders, and misled as to what Brexit could and could not solve, it is far better to be honest about the sheer complexity of the exit process, and to be honest about the trade-offs and choices ahead in deciding our post Brexit destination.

Because, it will be obvious from what I have said, that, in some areas, taking back control at national level *does* have real meaning, and will result in decision-making being in the UK, but that in others, the resumption of sovereignty and autonomy would be purely notional. And that the development of a national regime for the sake of it would be actively damaging to the national interest, and would deliver the simulacrum of sovereignty, but in reality less British control over things that hugely matter to British society and to our economic fortunes.

The correct way to think of the EU in economic terms is as a “regulatory union”, with the appetite and ability to extend its rules extraterritorially: the so-called Brussels effect. The EU is a superpower in *no* other respect. But in this critical one, it is. And the idea that, on its own, the UK, can compete with massive regional trading blocs – the EU, the US, China – as a standard setter, on industrial goods to data, is an illusion. And leaving a regulatory union, including a Customs Union is really much more difficult than leaving a free trade area.

This brings me to the question of the Customs Union, which I have managed to avoid, deliberately, for the bulk of this lecture. Not because it is not important. But because it is simply absurd the extent to which the debate about whether to stay in some form of Customs Union with the EU after Brexit has now become, with the Irish border issue, the *only* apparent subject for discussion. We spent several decades in *the* Customs Union, with the political class evidently largely failing to understand what it was, how it worked, and what the linkage was to the Single Market. Now, suddenly, on leaving all manner of people who have never previously had a thought about it, opine as if experts on what the consequences of staying in a Customs Union are.

So, first, some brief pedagogy. Contrary to what you often still read, the Customs Union itself did *not* abolish internal borders to trade within the old EEC. It dates from the late 60s and some of us still recall our long border queues at Western European borders in the 70s and 80s.

The Customs Union was radically deepened by the Single Market Project, in which, as I say, Lord Cockfield was a driving force, to establish a common area for the free circulation of goods covering all the Member States, backed up by the Common External Tariff, a Single Customs Code, common IT systems, and common judicial oversight and enforcement: the dreaded supranationalism again.

That gave the Member States the confidence that they could rely on each other to police the external border effectively, and hence eliminate customs checks at internal borders between them.

One can like this or loathe it as a political, integrationist project, but that is the reality of why there is now friction-free goods trade within the EU.

Key UK economic sectors – cars, aerospace, chemicals, medicines, many others – benefitted hugely from that. One cannot seriously argue, for example, that the renaissance of the UK car industry – largely under foreign ownership, which viewed the UK as the most attractive platform location within the Single Market and Customs Union – could have happened without this deepened Customs Union.

When Margaret Thatcher visited the Japan of the Nakasone era, her whole pitch to Japanese car firms and other multinationals was to view the UK as *the* platform into the Single Market. They took her at her word, and an amazingly high proportion of Japanese inward investment into the European Continent has come our way in the last 30 years. For precisely the reason that we are inside the Single Market and Customs Union.

But frictionless borders also mean that there is, in practice, now just no such thing as a British car or a British plane. A Mini, for example, is assembled in Oxford, supporting 4000+ jobs around that city alone, from thousands of components, many of which are from elsewhere in the EU, and arrive at the plant on a just in time basis, thanks to frictionless internal borders. And virtually every component has its own cross border supply chain.

Any disruption or delay to any of these components can bring the production line to a halt, costing millions a day. For industries which operate on very tight margins and rely entirely on the frictionless internal trade and pan-EU rules of origin, a small number of those disruptions changes the decision as to where it is optimal to assemble the car or plane. A thousand or so trucks of car components cross our border every day.

No developed country has chosen to leave a Customs Union before.

It *can* be done, though. But anyone suggesting it is easily done needs their head examined.

What clearly cannot be done though is to replicate the effect of removing all internal borders via customs facilitation, whether you call that “maximum” facilitation or not. And that is not because of EU obstinacy or obstructionism.

It is because those internal barriers are only removed by participation in the Single Market as well as the Customs Union. And it is because World Customs Organisation rules require certain processes, such as the declaration of goods crossing borders, which cannot legally be eliminated.

This means, for example, that even zero-rated goods have to be declared, to prove they should be subject to a zero tariff. A zero tariff is *not* no tariff. It is therefore *not* a means of eliminating customs requirements. Nor do things like trusted trader schemes work for any but a small minority of companies: only about 100 or so companies benefit from such schemes on the US-Canada border.

Yet again, the fantasies of what will supposedly be possible when we are sovereign are just that. Because our sovereignty is heavily constrained, and not solely at EU level.

When I said, on resigning, that free trade in the 21<sup>st</sup> century only ever happens via legal agreements – which can be global, regional, bilateral, or internal to a bloc, this is what I meant. The statement of course outraged people: how can he be saying that all free trade comes only under heavily managed, negotiated agreements? Because it's the reality... And leaving the EU does not alter that reality one jot. It just inevitably creates friction in what was formerly internal trade, and which has become external trade with a third country.

It is, let's face it, the growing revolt against the implications of that from very substantial industrial sectors of the UK economy and from key foreign investors that has put the Customs Union issue back in play. Plus of course, the intractability of the Irish border question, to which I shall come back.

It is obviously easier and more entertaining to write these issues up about whether the Prime Minister is “boiling the Brexiteer frog” by bringing temporary or permanent membership of a Customs Union back into play, or whether it is the EU27 boiling the May frog, by making clear that a better deal than a bog standard FTA is only on offer for the UK if it shifts its stance on the Customs Union question.

But these are, in the end, massive questions about the future direction of the UK once we have left the EU, and they deserve to be treated as such.

The case against creating a new Customs Union with the EU – it is, to be clear, legally not possible to stay in *the* Customs Union after exit – stems from its linkage to the Common Commercial Policy and the need to apply the same external tariffs as the EU. The thesis runs that this would hobble the UK's new sovereign, autonomous trade policy from the outset because we could only make significant advances in our bilateral trade deals if we can vary our tariff rates away from EU ones.

People note, with justice, that neither Norway nor Switzerland took the Customs Union route. Though they say much less – or indeed nothing – about why the Norwegians took an EEA route – which as I say, they think the British political debate grossly distorts – or why the Swiss took the route of voluntary complete regulatory alignment across the full range of industrial goods: thus forfeiting sovereignty completely in that – huge – area, as one senior Swiss negotiator put it to me, when I was examining the Swiss option.

Ruling out these options before truly understanding what either meant, or whether variants on them might be viable, was, in my view, simply an act of folly.

The same applies to an Association Agreement, which, though clearly originally designed for a non-member seeking to converge and integrate further with the EU from without, has dispute resolution governance which might be applicable to the UK's situation, and could provide the kind of framework which would permit the type of mutual recognition agreements the UK economy needs, and much else besides.

If you take this anti Customs Union view, though, but also take the view that there will be severe downsides, above all for the sectors I mentioned, if you lose the advantages of Customs Union membership, resulting in major relocations of manufacturing businesses away from the UK, you then contort yourselves trying to find ways we can have *both* a fully sovereign trade policy in which we can vary our tariff rates to outcompete the EU and other competition in third country markets.

*And* guarantee the free circulation of goods within the area comprising the EU and the UK – by developing technological solutions which enable you to track the final destinations of goods in circulation, so that you can operate a scheme which rebates businesses for any differences in tariffs and guarantees the EU that you will police their former external border in such a way as to guarantee that the duties owed to them will reach them in full.

Even saying that is a mouthful.

So is it necessary? And if it is, can this hybrid Customs Partnership idea be made to work and sold to others?

The view that for the UK to have a genuinely autonomous trade policy, it must have full latitude to vary tariffs seems to me to be relatively thin – except in agricultural tariffs, where it is strong. Again, some brief history, given the complete amnesia in the debate. The WTO, and the GATT before it, has been, on the whole, very successful since the War in negotiating multilateral tariff reductions. But, inevitably, vastly less successful at tackling non-tariff barriers multilaterally or plurilaterally.

The last successfully completed World Trade Round, the Uruguay Round, was completed with another UK Conservative politician, Leon Brittan, at the helm on the EU side, in days when overwhelmingly it was the US and the EU who mattered in concluding these Rounds.

But the inability of the WTO system to conclude any major global Round now in a quarter century since, having completed numerous rounds in the previous 50 years, makes my point.

The world trade system has sought to move beyond tariffs, for two reasons: because, by and large, in industrial sectors, most of the tariff cutting has been done and the major developed country blocs, including both EU and US actually have very low average common external tariffs; and because the real, and growing, impediments to free trade in the 21<sup>st</sup> century are behind the border barriers in issues like services, government procurement, intellectual property, and cultural/social/environmental norms masking barriers to foreign entry into markets.

By definition, those barriers are much harder to eliminate multilaterally. Which is why, as the Doha Round repeatedly failed, the world moved further towards regionalism and bilateralism, and negotiations between and within mega trade blocs. Basically to be oblivious to that trend, and to talk blithely about a world leading role for the UK in the WTO just at the time the US, which largely created the Bretton Woods Institutions, including the GATT, is posing serious threats to their foundations, and is deliberately hobbling the WTO, is one of the bigger ironies – and solipsisms – of the current UK debate.

The sore thumb on tariffs – and, incidentally, the same applies to the US and Japan as does to the EU – is agriculture. But outside agriculture, it is simply not credible to suggest that the UK can vary its tariffs on industrial goods so far below already very low EU levels as to create great leverage to open up other countries' markets in services, procurement and so on.

And, beyond tariffs as we have seen, the overwhelming bulk of industrial sectors with any export market interest, want, on standards, to remain convergent on EU ones, and within the EU's regulatory orbit. Indeed, outside both the EU and EEA, they are alarmed at the prospect of being excluded from the key private sector standard setting bodies, which sit outside the EU structures, but only have national members from within the EU and EEA.

This is, quite simply, a loss of control and sovereignty, not a gain. The company CEOs to whom I talk on post Brexit options sometimes wonder which planet Westminster inhabits, as it obsesses about theoretical sovereignty and abandons real sovereignty.

Agriculture *is* different. And there, it would be a scandal if, having left the CAP, which, incidentally, one can do in a whole number of post Brexit models, we failed not only to change our domestic subsidies regime, but also to go for serious tariff reductions over time. The consumer interest here demands it, and the CAP's costs are not just imposed on domestic taxpayers and consumers, but on the developing world. Here the UK can and should be different.

But again, a candid debate on free trade – in which I am a fervent believer – demands real honesty about the distributional impacts between sectors and geographically within the UK and beyond it.

We can certainly, for example, have cheaper bananas if we want Chiquita and Dole to monopolise the UK market at the expense of African and Caribbean – UK Commonwealth – producers whom we have protected since we joined the EU – indeed, as in cane sugar, via our own Accession Treaty – and for whom the European Trade Commissioner, a British Tory, for whom I was working, fought a pretty brutal trade war against the Clinton White House 20 years ago. I much look forward to watching that debate in the Commons. Perhaps it's only the White Commonwealth – CANZUK as it is sometimes called – whose future matters to some professed Commonwealth trade enthusiasts?

We *can* have cheaper beef and lamb from Australia, New Zealand, Argentina and the US, but there will be impacts, which will hit some regions and nations much harder than others, if we do.

We will *never* succeed in doing a trade deal with the US without changes to our sanitary and phytosanitary standards which will pose real problems for our trade relationship with the EU – which is a vastly bigger export market for our food and drink industry.

We *can* do a free trade deal with China, but there will be deals as part of it on the treatment of steel, aluminium and much else, where, in order to land the deal, we may have to permit substantially greater penetration of our market than the EU or our less than free trading US friends will. One cannot slip such deals through by executive action and avoid serious Commons debate, and Scottish Parliament debate, on what we want. Nor should one try to.

My provisional view is therefore that an industrial goods Customs Union with the EU, if one could carve out agriculture – and I honestly do not know how easy that would be – would impose rather little restriction on what the UK would want to put on the table by way of propositions.

But the Establishment should not, with free trade deals with large, fast growing, developing markets make the mistake it essentially did on enlargement: of telling them that this is all in everyone's best interests, and that any distributional effects will come out in the wash. The evidence suggests that those areas where Chinese competition had already had the biggest impact on indigenous industries, voted more heavily for Brexit than others.

As an avowed free trader who thinks free traders are doing a pretty dreadful job selling the benefits of free trade, I am a believer that we need a real debate on our trade policy which now goes beyond the vacuous soundbites. If we are seeking aggressively to open third country markets for UK services via making offers on other issues, the losers from this will be in very different constituencies from the gainers. Inevitably, it seems to me that it will be what David Goodhart calls the Anywhere classes who stand to gain, and the Somewhere classes who are likeliest to lose. Have we not just seen the lesson of that on free movement of people?

So in a post Brexit UK trade policy debate, we need to think hard, rigorously and honestly about this, and not produce buccaneering blather.

And no trade policy with third countries, however successfully aggressive, will deliver very quick results, or ones, which on any serious analysis will transform the UK's productivity performance and economic prospects. 65+% of all UK exports are, after all, to the EU, or to countries with whom we already have a preferential deal via EU membership.

The next several years are, in trade policy, mostly about running rather hard to stand still before we can move forward. Every insider I talk to on both sides of the Channel, as well as in the US and Asia, knows that. It barely gets a mention in our public debate.

I have not wanted to spend too long on the Customs Union debate now running, as it would require a lecture in its own right to do it justice and is, as I say, dominating a debate of which it is only a part to a quite ridiculous degree. But the Irish border issue is the potential showstopper in the coming months, and we know that without an agreed legal backstop in the Withdrawal Treaty, there will be no such Treaty. Dublin will not move off that, given that the December Agreement with the Prime Minister promised it. And all the other Member States will back Dublin on this.

There will therefore be a backstop, and, to the extent that London is unhappy with the draft backstop the European Commission produced on February 28<sup>th</sup>, it will need to produce its own alternative proposition and negotiate to a conclusion.

Clearly, the Prime Minister still wants to demonstrate that even when there is an agreed legal backstop, it will be temporary and self-abolishing when something better is available to remove the need for it.

Hence the debate about the two options – the so-called maximum facilitation and the so-called Hybrid New Customs Partnership, the complexity of which I outlined earlier.

We seem now to be discussing here which of these might be ready to be introduced in about 2023, and what sort of transition – and now whether for the UK as a whole, rather than just Northern Ireland – might be needed, and on what, beyond the agreed end of the standstill period, on December 31, 2020. It's a debate which, candidly, bears very little relation to any debate the other side of the Channel, but be that as it may.

The purpose of this lecture is to try and clarify options not to forecast events. But a few points are clear.

The so-called maximum facilitation model will never be accepted by the 27 side of the table. Not now. Not in five years. Not in 105 years. Because, consistent with what I said earlier about what the Customs Union actually is, no technological solution, current or future, ever solves the problem. You can have the most facilitated border in the world, but it's still a



facilitated border. And, as an external border of the EU, rather than the internal border we have now, it cannot look the same.

It's good that the truck drivers are now explaining this to British Ministers. The Freight Trade Association said this week:

“A haulier could lift a full trailer in Birmingham but it could contain 40 different consignments from 40 different producers. Then it comes to Northern Ireland and is broken down with mixed loads on different trucks going to different places, so a tracking device telling you the original truck had crossed the border does not tell you anything... Customs is only the tip of the iceberg and the biggest problem is sanitary and phytosanitary checks on agrifood. Twenty per cent of meat has to be checked and 50 per cent of chicken.”

I could go into much more detail on this. But the central point is that once the UK leaves and what used to be an internal border becomes an external border, the full EU regime will apply automatically as to all other external borders, and that necessitates a hard border. Unless the UK accepts the special status for Northern Ireland – which is politically impossible.

One can, for the reasons I gave earlier – international legal obligations on the UK beyond the EU – forget all the endless repetition of “on the EU and Dublin's head be it: we won't erect a hard border; it would be their choice”.

Firstly, that's simply legally untrue, at WTO and WCO level. Secondly, the EU simply won't agree a max fac deal as solving the problem. It was dead well before arrival.

Options one sees touted, like the whole of the UK staying in a Customs Union, but Northern Ireland alone remaining in the Single Market for goods, also do not fly. That is just another way of ending with a GB/Northern Ireland internal border.

That leaves two interesting questions.

First, could the 27, in principle, ever agree to the Hybrid Customs Partnership Model, under which the UK polices the existing external frontier of the EU, collects the right duties, rebates importers for the differences, as they emerge, between UK and EU duty rates by developing a hugely complex mechanism with as yet unproven technology to track the end destination of goods passing through our borders?

I remain personally as sceptical as I was when the proposal was first mooted after the referendum. The UK's first paper on this, last summer, was met with something between deep scepticism and derision in the capitals I have visited, and 9 months later, the 27 await any detailed response to the several – obvious – killer questions they asked both how it would be operable and how, legally, the UK could act as an agent for EU Customs collection, why they should believe it would not be a recipe for fraud and evasion – and loss of receipts to their Budget, not ours – why it would not fatally damage the EU anti-dumping regime, how it would deal with rules of origin issues, whether they would have to mirror what will be an exceptionally expensive poor value for money UK regime at EU ports. And so on.

One can never know from the outside whether these are insuperable problems, but if a UK Accounting Officer/Permanent Secretary were confronted with such a model the other way round, I feel reasonably confident in predicting his/her answer. Quite why the Commission, the European Parliament, the European Court of Auditors and the European Anti Fraud Office should take a benign view of an unprecedented scheme to hand a foreign power the business of collecting revenues at great cost and at clear risk to their revenues, I am not sure.

Come what may, one can guarantee that the EU side will assuredly not agree *now* to a date certain for the end of the Irish backstop and whatever transitional arrangement inside a Customs Union there might be, and it will ensure that, if, unilaterally, the UK were simply then to decide – given that it might be a different PM or Government deciding – to exit the transitional arrangement, we would, in so doing, pull down much of whatever trade edifice we were building.

The EU did that very effectively to the Swiss. It worked. And clearly, they will constrain unilateralism by greatly raising the price of it.

But the other question or challenge is more for the EU side now. If the reality is that no option which dissolves the need for a backstop guarantee is in sight even in five years, and the political reality is that no solution which demarcates Northern Ireland radically from the rest of Great Britain is viable, then the entire UK staying in a Customs Union – which, as I have said, may differ from the current Customs Union – becomes perhaps the only way through. Of course, as I have explained, a Customs Union alone does not solve either the Irish issue or the regulated goods sectors issues for the UK. Its only ongoing deep regulatory alignment which solves that.

Which brings the question of the Single Market *acquis*, and indeed of ongoing budget contributions back in play. Both the Swiss and Norwegians, albeit in different ways, after all pay heavy fees for deep regulatory alignment and market access. Both kept out of the Customs Union, but found different routes to deliver the best market access deal they could get whilst surrendering sovereign control over regulation. These are, as they and others have found, questions you cannot, in the end, duck by just asserting that you will have it all ways...

If the option now exists of the UK aligning itself more permanently regulatorily on goods, and staying in both a Customs Union and having quasi Single Market membership, paying something for it, living under ECJ jurisprudence and jurisdiction in goods, but disapplying the fourth fundamental freedom, free movement of people, the EU faces the decision as to whether this is an unacceptable option sundering indivisible freedoms and offering something too close to membership advantages to a non member. Or whether it's rather a good deal for the EU with a major strategic partner. With the added advantage of providing far more continuity in the sectors in which you have a surplus with the UK than those in which you have a deficit – notably key services sectors.

The doctrine in parts of Brussels is of course that one cannot use the negotiation over Ireland for the Withdrawal Treaty to pre-empt and prenegotiate the outline of the future relationship. And that nor can the solution which might work for the special case of Northern Ireland be the template for a broader post Brexit resolution. To be clear, in my view, that was a genuine attempt to treat this issue as a special case. It was not about the Berlaymont seeking to annex Northern Ireland, before it rolled on to Scotland and broke up the UK...

But we are now at a point where reality starts to bite on all sides. And it's time soon to decide what are feasible outlines of solutions even if it then takes years, as it will, to fill in all the substance.

Domestically, we can have a 21<sup>st</sup> century thirty years war in which true path Leavers resume the campaign for the hardest possible clean break Brexit and reject any economic deal the EU could ever conceivably sign; and the hard Remainers say that everything bar remaining or reapplying for full membership is an unacceptable loss from the status quo. We can have two different “stab in the back” legends running concurrently. Given that, as the Swiss always

correctly observe, no negotiation with the EU ever ends, and there is no permanent, completely stable end state, we could indeed actually have this sterile debate for ever...

But the sooner we realise there are no perfect choices, that there are serious trade-offs between sovereignty and market access interests and that we are best off if we make stone cold sober judgments of where sovereignty at the national level can be real and effective, and where it is purely notional and actually a material loss of control, the better for the UK.