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CENTRE FOR BREXIT
POLICY

THE 'AUSTRALIAN DEAL'

Another Impossible Dream

OCTOBER 2020





CENTRE FOR BREXIT
POLICY

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THE CENTRE FOR BREXIT POLICY

The Centre for Brexit Policy (CBP) is a new think tank backed by cross-party politicians who support the UK leaving the EU. It has been formed to propose the critical policy changes enabled by Brexit that will boost national prosperity and well-being in years to come, as well as help ensure that Britain fully 'takes back control' when it leaves the European Union.

The CBP aspires to trigger a deep and wide debate about what Brexit should mean for the UK over the next decade or two. By providing a focus for the development of post-Brexit public policy, the CBP hopes to help formulate an overarching framework for the UK that maximises the opportunities Brexit affords. This will be promoted to Government, Parliamentarians, and the public welcoming contributions from those who want to see Brexit open a new and fruitful chapter in our country's life.

The CBP has three core objectives:

- **Identify the benefits and opportunities of Brexit across the full spectrum of economic, trade, social, foreign, defence and security policy areas proposing new policies for the Government's agenda**
- **Continue to make the intellectual, evidence-based case for a 'real' Brexit and provide the Government with clear and constructive advice on how to deal with ongoing negotiation and implementation issues. A 'real' Brexit means regaining full control over our laws, borders, seas, trade, and courts**
- **Check any attempts to dilute a real Brexit, as well as serving as a catalyst and rallying point for positive news stories that, over time, will be able to persuade and demonstrate the many substantial advantages of Brexit**

Delivery of these objectives is based on professional, substantive fact-based research by experts in their fields leading to authoritative reports, short papers, OpEds, events, and briefing meetings - both within and without Government.

The CBP is supported by a cadre of expert CBP Fellows drawn from multiple disciplines to provide additional expertise and experience in developing an agenda for policy change that will ensure the British people benefit from Brexit. Additional support is provided by a CBP Business Forum to bring a business perspective to shaping CBP's agenda, provide input to policy proposals, and deliver a pro-Brexit business voice.

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EXECUTIVE SUMMARY

- In our previous paper, *The EU Deal Unmasked: Twelve Reasons Why the UK Will Fail to Get a Canada-Style Deal*, we pointed out that the Government's long-standing and wholly reasonable ambition to agree a 'Canada-style deal' with the EU will be impossible to achieve as long as the existing Withdrawal Agreement (WA) and its associated Northern Ireland Protocol (NIP) remain in place. We listed twelve reasons why this would be the case.
- The Prime Minister has made clear his willingness to leave the TP on 31 December "without a deal". There is much speculation about the consequences of the UK leaving the TP on 31 December 'without a deal' under WTO terms - or, what the Prime Minister terms as an 'Australian deal'.
- Many observers labour under the misunderstanding that, under such an exit, the UK would then be free from the jurisdiction of the European Court of Justice (ECJ) and other EU controls on our laws and sovereignty. However, unless specific steps are taken to disapply the WA/NIP, they will continue to apply to the UK for the long term with debilitating effects on our laws, freedom of action, and sovereignty.
- This means - if there is no agreement with the EU - reverting to an 'Australian Deal' will not be a satisfactory option and the Government's only viable option will be to reject the WA/NIP, if it wishes to deliver its Manifesto Brexit commitments.
 - In the absence of an agreement between the UK and the EU, an ongoing presence of the WA/NIP would make it impossible for the Government to deliver its Manifesto Brexit commitments
 - The same factors preventing delivery of the Government's Brexit Manifesto also would undermine a potential 'Australian Deal'
 - Given the conclusions of this paper, the Government is left with only a single viable option - rejecting the WA/NIP before 31 December.
- **Attempting to reject the WA/NIP after 31 December will be highly problematical if the Government has already agreed some form of limited deal with the EU**

INTRODUCTION

In our previous paper, *The EU Deal Unmasked: Twelve Reasons Why the UK Will Fail to Get a Canada-Style Deal*¹, we pointed out that the Government's long-standing and wholly reasonable ambition to agree a 'Canada-style deal' with the EU will be impossible to achieve as long as the existing Withdrawal Agreement (WA) and its associated Northern Ireland Protocol (NIP) remain in place. We listed twelve reasons why this would be the case.

Despite the Prime Minister bringing new vigour and determination to the negotiations, since the publication of our paper, the negotiations made little progress - perhaps even retrogressed - so that formal talks were suspended. Consequently, the Prime Minister warned Britain to prepare to leave the Brexit Transition Period (TP) without a trade deal unless there was a "*fundamental change of approach*" from Brussels. Speaking after the recent European Council meeting, he said "*I have concluded that we should get ready for January 1 with arrangements that are more like Australia's, based on simple principles of global free trade.*"

While the on-off negotiations with the EU have now resumed with new urgency, the Prime Minister has made clear his willingness to leave the TP on 31 December "*without a deal*". Thus, the chances of achieving a 'future relationship agreement' (FRA) with the EU remain problematic. Speculation continues about the consequences of the UK leaving the TP on 31 December 'without a deal' under WTO terms - or, what the Prime Minister terms as an 'Australian deal'.

Unfortunately, too many labour under the misunderstanding that, under such an exit, the UK would then be free from the jurisdiction of the European Court of Justice (ECJ) and other EU controls on our laws and sovereignty. However, this decidedly is not the case because we would not be leaving 'without a deal', but rather with the baggage of the already ratified WA and its associated NIP.

Unless specific steps are taken to disapply the WA/NIP, they will continue to apply to the UK for the long term with debilitating effects on our laws, freedom of action, and sovereignty. This means - if there is no agreement with the EU - reverting to an 'Australian Deal' will not be a satisfactory option.

The purpose of this paper is to explain why we have reached this conclusion - ie, why the ongoing harmful effects of the WA/NIP prevent the UK from 'breaking free' if the UK exits the TP without an agreement with the EU. We also draw out some implications of this for the current negotiations. An instructive way of gauging the harmful effects of the WA/NIP is to show the destructive impact they would have on Government achieving its Brexit objectives, as set out in the Conservative 2019 Election Manifesto; for example, "*We will keep the UK out of the single market, out of any form of customs union, and end the role of the European Court of Justice.*"

This paper concludes that

- The impact of the WA/NIP on the UK's laws, freedom of action, and sovereignty is ongoing, fundamentally harmful, and dominant
- In the event no agreement is reached with the EU, a successful 'Australian Deal' will not be achievable and the Government's only viable option will be to replace or reject the WA/NIP, if it wishes to deliver its Manifesto Brexit commitments. Attempting to reject the WA/NIP after 31 December will be highly problematical if the Government has already agreed some form of limited deal with the EU.

Our conclusion with regard to the 'Australian Deal' mirrors that of our previous paper in which we concluded that an ongoing WA/NIP would prevent achieving a successful 'Canadian-style deal'. Thus, as long as the WA/NIP remains in place, the Government has no attractive options.

The remainder of this paper explains these conclusions in depth.

¹ <https://centreforbrexitpolicy.org.uk/wp-content/uploads/2020/10/THE-EU-DEAL-UNMASKED-Twelve-Reasons-Why-the-UK-Will-Fail-to-Get-a-Canada-Style-Deal.pdf>

WA/NIP IMPACT IS ONGOING, FUNDAMENTALLY HARMFUL, AND DOMINANT

As the likelihood has grown that the UK and the EU might fail to agree an FRA, there has been increasing talk of the UK leaving the TP on WTO terms, or with an 'Australian Deal' as the Prime Minister likes to call it. If the UK had not already signed the WA (and its integral NIP), this would, indeed, represent a satisfactory outcome, particularly as unresolved trade issues are likely to be easier to resolve once the UK is truly 'out' of the EU as a sovereign third country and the unpleasant implications of a no trade deal scenario begin to bite on EU member-states.

However, as things currently stand, we are saddled with the baggage of the WA/NIP, which will remain in force whether or not an FRA is agreed. The purpose of this section of the paper is to explain the harmful effects of the WA/NIP. It is evident that these harmful effects will be ongoing for the foreseeable future, will have a fundamentally harmful impact on the UK, and these fundamental effects will dominate the UK's laws and sovereignty.

The following two sections summarise the separate effects of the WA and the NIP.

EFFECTS OF THE WITHDRAWAL AGREEMENT

The WA is a legally binding international treaty with the following effects on the laws and judicial system of the UK.

- **Direct Effect and Supremacy.** The WA (including the NI Protocol) will have "direct effect" and supremacy in UK courts over UK domestic law, including over Acts of Parliament: Art 4.
- **EU Citizens' Rights.** The WA provides for settlement rights for EU citizens resident in UK at the end of the TP - including wide-ranging and permanent rights not to be discriminated against in employment and in all economic activities within the scope of the EU Treaties
 - Citizens' rights treaty articles will have direct effect and supremacy in UK courts over UK law indefinitely: Art.4
 - Rights are to be 'interpreted' by references from UK courts to ECJ in actions started up to 8 years after transition: Art.158(1).
 - Thereafter, EU citizens' rights are to be interpreted (for their lifetimes) by the ECJ under 'Ukraine' arbitration clause (see below)
- **Continuing ECJ Jurisdiction**
 - Full direct jurisdiction for resident EU citizens' rights in actions begun up to 8 years after end of transition (also direct jurisdiction in Northern Ireland under NIP (see below)
 - 'Long tail' jurisdiction to rule against UK in pending proceedings and in actions begun by Commission up to 4 years after end of transition: Art.87(1)
 - 'Ukraine' arbitration clause to apply for everything under WA and NIP not covered by direct jurisdiction: neutral arbitration panel required to refer all questions of EU law to ECJ and be bound by ECJ ruling (Art 174)

EFFECTS OF THE NORTHERN IRELAND PROTOCOL

The NIP is an “integral part” of the WA; consequently, it also is a legally binding international treaty with the following impact on NI, NI-GB goods trade, State-aid in both NI and GB, and prospects for future FTAs with non-EU countries.

- The NIP comes into force automatically at the end of the TP unless replaced by a separate long term UK/EU agreement
- The NIP then endures for at least 6 years. If the Northern Ireland Assembly votes by simple majority to consent to the Protocol continuing, it will be extended by further 4 year periods.
- NI must apply internally all EU single market laws on goods as they now stand and as they are changed by the EU in future; all laws will be under the direct jurisdiction of the EU Commission and ECJ
- There are consequent requirements for EU mandated regulatory controls on goods imported into NI from GB to ensure conformity with EU single market rules, even where the goods are not at risk of moving on into EU
- NI theoretically is part of UK customs territory BUT
 - NI will be subject to EU tariffs on goods from GB if the goods are not proved to be “not at risk” of going on into the EU
 - NI will be subject to EU tariffs on goods from GB if ‘processed’ within NI with claim back where not incorporated into goods going into EU, diluting benefits of lower UK tariffs to NI businesses
 - There will be no customs controls at all between NI and the ROI or elsewhere in the EU, leading to competitive advantage for EU businesses over GB suppliers
 - NI will be subject to EU customs control procedures and to EU VAT rules
- NI will be subject to direct EU State aid control by the EU Commission; aid to businesses in the whole of the UK subject to State aid control if aid might theoretically affect trade between NI and EU; no protection for NI businesses against State aids to competitors in EU countries - normal WTO countervailing duties not possible
- Indirectly, the NIP could harm UK chances of signing FTAs with third states as NIP
 - Complications would be unattractive to potential treaty partners like the US
 - Could frustrate CPTPP accession if one of the CPTPP members was dissatisfied with part of the UK effectively being carved off
 - Would require big reservations in the UK’s schedules for goods that might be at risk of entering the EU to bear EU level tariffs
 - Art 54 on keeping EU geographical indicators could upset future treaty partners

THE WA UNDERMINES AN 'AUSTRALIAN DEAL' - REJECTION IS THE ONLY VIABLE OPTION

Following the previous section's overview of the ongoing, fundamentally harmful and dominant effects of the WA/NIP, this section of the paper explains how these effects make it impossible for the Conservative Manifesto Brexit commitments to be delivered via an 'Australian Deal' if no FRA is achieved. This leaves the Government with only a single viable option - rejecting the WA/NIP before 31 December.

There are three reasons for this conclusion:

1. In the absence of an agreement between the UK and the EU, an ongoing presence of the WA/NIP would make it impossible for the Government to deliver its Manifesto Brexit commitments.

Annex A reproduces page 5 of the Conservative Party's 2019 Election Manifesto that describes the commitments the Government undertook with regard to Brexit. These can be summarised as:

Boris Johnson's new deal...

- Takes the whole country out of the EU as one United Kingdom

- Takes us out of the customs union allowing us to

 - Set our own tariffs

 - Do our own trade deals

- Will be a new relationship based on free trade and friendly cooperation, not on the EU's treaties or EU law

There will be no political alignment with the EU

We will...

- Keep the UK out of...

 - The Single Market

 - Any form of customs union

- End the role of the European Court of Justice

This future relationship will be one that allows us to:

- Take back control of our...

 - Laws

 - Money

- Control our own trade policy

- Ensure we are in full control of our fishing waters

Annex B analyses the impact the WA/NIP would have on each of the above Manifesto Brexit commitments. The analysis demonstrates that not a single one of these commitments would be deliverable as long as the WA/NIP remains in place.

2. The same factors preventing delivery of the Government's Brexit Manifesto also would undermine a potential 'Australian Deal'. An Australian-style free trade agreement means trading on WTO non-preferential terms. In fact, Australia could be substituted for any country with which the EU does not have an FTA - the US would be another good example. Under WTO terms, the UK would be entitled to Most Favoured Nation (MFN) treatment with respect to tariffs and non-tariff barriers on goods and services, the latter bearing more restrictions with regards to sectors and additional requirements such as professional qualifications. The EU's average MFN WTO tariffs on manufactured goods are fairly low (around 4%) although they are somewhat higher on agricultural products and on some composite goods, such as automobiles.

The WTO prohibits unreasonable restrictions on trade in the form of testing and certification procedures as well as subsidies that distort trade. All of this is enforceable under the WTO's neutral dispute settlement system. Similar provisions are not included in the WA/NIP. It needs to be said that Australia does have a number of smaller agreements with the EU on specific issues (in fact, is has over 80 mini-agreements with the EU) but these cover matters such as human rights and aviation that normally are not included in FTAs.

With the WA and NIP in place, it would be impossible to have a normal WTO relationship with the EU, such as Australia enjoys, because the WA/NIP imposes EU state aid rules (which supersede WTO subsidies rules) and also imposes special customs/tariff procedures on one of the UK's territories (NI), which the WTO arrangement does not do. The WA also expressly excludes WTO dispute settlement procedures for these issues.

3. Given the conclusions of this paper, the Government is left with only a single viable option - rejecting the WA/NIP before 31 December. This paper has shown - in the event of failure to agree an acceptable FRA with the EU - that the Government's mooted strategy of reverting to an 'Australian Deal' will not work unless the WA/NIP is first rejected. With the WA/NIP remaining in place, the Government will not be able to deliver its Manifesto commitments. For the same reasons, the potential benefits of an 'Australian deal' will not be forthcoming. Moreover, as explained in our previous paper, the WA/NIP also prevents achieving a 'Canada-style deal'.

Thus, the Government is 'boxed in' with no viable attractive options, as long as the WA/NIP remains in force. In addition to leaving the UK in a colonial-type relationship with the EU and being unable to realise many of the economic benefits afforded by a true Brexit, the Government could likely experience a strong backlash in the next election from those who provided its current 80 seat majority.

To avoid these outcomes, the Government must either

- **Agree a 'Canadian-style' FTA that simultaneously replaces the WA/NIP**
- **Leave the TP on WTO terms simultaneously rejecting the WA/NIP** on the grounds that the EU has breached its WA commitments. This could deliver a true 'Australian Deal', as well as the Government's Manifesto commitments.

These actions need to be taken before 31 December. Time is now very short to achieve the first of these. Therefore, the latter option is the likely practical course available to the Government.

What must be avoided at all cost is to agree a flawed, limited deal with the EU in hope of disentangling the UK from the WA/NIP after 31 December. Attempting to reject the WA/NIP after 31 December will be highly problematical if the Government has already agreed some form of limited deal with the EU. Its appeal to the court of world opinion will have been lost by the action of signing the new agreement.

The Government's only likely practical option is to reject the WA/NIP before 31 December in conjunction with leaving the TP on WTO terms.

ANNEX A - 2019 CONSERVATIVE MANIFESTO BREXIT COMMITMENTS

Get Brexit Done

When the new Government entered Downing Street, the Prime Minister made a simple promise: to get Brexit done. Many said it would be impossible. But he swiftly negotiated a great new deal – despite Parliament’s best efforts to block his progress.

And then, when he put it to MPs, they insisted on yet more delay.

We must move on. No more renegotiations. No more referendums. Every week is costing us. Investment is waiting to come into the country. Families and businesses cannot make vital decisions. The public services cannot get the attention they deserve.

Our priority as Conservatives is to get Brexit done – so that we can unleash the potential of this great country. So that we can push past the obstacles that other parties have put in our country’s way. So that we can deliver on the people’s decision in 2016 and use our new post-Brexit freedoms to transform the UK for the better by focusing on your priorities.

If we elect a majority of Conservative MPs to Parliament, **we will start putting our deal through Parliament before Christmas and we will leave the European Union in January.**

Boris Johnson’s new deal takes the whole country out of the EU as one United Kingdom. It takes us out of the customs union, allowing us to set our own tariffs and do our own trade deals. It allows us to pass our own laws and ensures that it is our courts that enforce them.

Our deal is the only one on the table. It is signed, sealed and ready. It puts the whole country on a path to a new free trade agreement with the EU. This will be a new relationship based on free trade and friendly cooperation, not on the EU’s treaties or EU law. There will be no political alignment with the EU. **We will keep the UK out of the single market, out of any form of customs union, and end the role of the European Court of Justice.**

This future relationship will be one that allows us to:

- ▶ Take back control of our laws.
- ▶ Take back control of our money.
- ▶ Control our own trade policy.
- ▶ Introduce an Australian-style points-based immigration system.
- ▶ Raise standards in areas like workers’ rights, animal welfare, agriculture and the environment.
- ▶ Ensure we are in full control of our fishing waters.

We will negotiate a trade agreement next year – one that will strengthen our Union – and **we will not extend the implementation period beyond December 2020.** In parallel, we will legislate to ensure high standards of workers’ rights, environmental protection and consumer rights.

The only way to deliver Brexit is with a Conservative majority in Parliament. A vote for any other party or candidate is a vote for Jeremy Corbyn – and a vote for more chaos.

ANNEX B - WA/NIP IMPACT ON THE CONSERVATIVE 2019 ELECTION MANIFESTO

BREXIT-RELATED COMMITMENTS FROM THE CONSERVATIVE 2019 ELECTION MANIFESTO

IMPACT OF THE WITHDRAWAL AGREEMENT AND NORTHERN IRELAND PROTOCOL

Boris Johnson's new deal...

Takes the whole country out of the EU as one United Kingdom

✘

Bifurcates Great Britain (GB) and Northern Ireland (NI) with regard to goods trade, State aid, and VAT

Takes us out of the customs union allowing us to

Set our own tariffs

✘

NI subject to EU tariffs on goods 'at risk' of going into EU or if processed within NI

Do our own trade deals

✘

Regulatory controls on goods from third countries into NI and EU tariffs on 'at risk' goods likely to complicate FTAs with non-EU countries and CPTPP accession

Allows us to pass our own laws and ensures that it is our courts that enforce them

✘

WA/NIP have 'direct effect' and supremacy in UK courts over UK law, including Acts of Parliament with long-term ECJ jurisdiction (including resident EU citizens rights)

Will be a new relationship based on free trade and friendly cooperation, not on the EU's treaties or EU law

✘

UK-EU relationship governed by WA, an EU treaty based on EU law

There will be no political alignment with the EU

✘

NI subject to direct EU State aid control by EU Commission; aid to businesses in whole of UK subject to State aid control if aid might theoretically affect trade between NI and EU; no protection for NI businesses against State aids to competitors in EU countries - normal WTO countervailing duties not possible

We will...

Keep the UK out of...

The single market

✘

NI must apply internally all EU single market laws on goods as they now stand and as they are changed by the EU in future; all laws under direct jurisdiction of EU Commission and ECJ

Any form of customs union

✘

NI subject de facto to aspects of EU customs union with EU customs control procedures and tariffs on 'at risk' goods from GB

End the role of the European Court of Justice

✘

Ongoing full direct ECJ jurisdiction in NI and for resident EU citizens, 'long-tail' ECJ jurisdiction for pending proceedings and EU actions begun up to 4 years after TP exit, and 'Ukraine' arbitration clause

This future relationship will be one that allows us to:

Take back control of our...

Laws

✘

UK-EU relationship governed by WA, an EU treaty based on EU law

Money

✘

UK exposed to unbounded liabilities from the EIB and InvestEU, as well as the unbounded notional £39 billion 'divorce payment'

Control our own trade policy

✘

NI subject to EU tariffs on goods 'at risk' of going into EU or if processed within NI and FTAs with non-EU countries and CPTPP accession likely to inhibited

Ensure we are in full control of our fishing waters

✘

No direct impact by WA/NIP but vulnerable to being conceded as part of negotiations



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