

# Negotiating and Mediating Brexit

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## *Abstract*

*The United Kingdom will leave the European Union. Brexit will involve many complex negotiations. This article analyses the negotiation position of the parties (UK, EU, Member States) based on a set of four key negotiation factors: agreement options, nonagreement alternatives, interests, and perceptions (“Negotiation Analysis”). A special focus here is on the effect of triggering the formal withdrawal process under the Treaty on European Union’s Article 50 on the non-agreement alternatives of the parties. The article considers the likely negotiation strategy of the UK against this background (“UK Negotiation Strategy”). It further discusses strategic negotiation moves already made by the parties and moves likely to be made in the future (“Negotiation Dynamic”). So far, the parties appear to approach these immensely complex negotiations intuitively, as a zero-sum or even a negative-sum game, engaging only in value-claiming tactics. No neutral process manager is involved so far. Against this background, this article proposes an international, tailor-made mediation process as a means to efficiently steer the withdrawal negotiations and help the parties agree on a value-preserving “withdrawal agreement” (“Brexit Mediation”).*

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## I. INTRODUCTION

On June 23, 2016, the United Kingdom (UK) citizens voted, by a slim majority, to leave the European Union (EU). After a relatively short period of uncertainty, the new British government led by Prime Minister May confirmed the decision: she promised to make Brexit a success<sup>1</sup> and to issue the withdrawal notice under Article 50 of the Treaty on European Union (Article 50) before the end of March 2017.<sup>2</sup> Evidently, the UK seems to be on an unequivocal Brexit course—remaining in the EU is a very unlikely scenario.

However, leaving the EU will require the UK to conduct many very complex negotiations. Not only will the UK be required to negotiate a withdrawal agreement with the EU according to Article 50, but the UK will also need to conclude hundreds of other new treaties with third parties, international organisations, and potentially the EU itself. For all parties, much is at stake: Brexit involves nothing less than the political and

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1. See George Parker, Kate Allen, & Jim Pickard, *May Promises to Make Brexit “a Success,”* FIN. TIMES (July 11, 2016), <https://www.ft.com/content/7939901e-4756-11e6-8d68-72e9211e86ab>.

2. See Elizabeth Piper & Guy Faulconbridge, *May Says to Trigger EU Divorce by End of March, Sterling Falls,* REUTERS (Oct. 3, 2016), <http://www.reuters.com/article/us-britain-eu-may-article-idUSKCN12208C>.

economic future of the Union and its Member States, including the UK. In 2014, Europe was the world's most important trading area with a 23.8% share of world-wide GDP, followed by the United States (US) (22.2%) and China (13.4%).<sup>3</sup> How the European economy will compare to the US, China, and other markets post-Brexit is now a very open question.

This article considers the fate of these important Brexit negotiations. Namely, I begin by dealing briefly with the withdrawal notice under Article 50 and its legal consequences.<sup>4</sup> I then proceed to analyze the ensuing Brexit negotiations and the negotiation position of the parties involved on the basis of four key negotiation factors: agreement options, nonagreement alternatives, interests, and perceptions.<sup>5</sup> A particular focus of this analysis is the effect triggering the formal withdrawal process under Article 50 will have on the nonagreement alternatives of the parties. I then consider the likely negotiation strategy of the UK against this background.<sup>6</sup> Next, I discuss the Brexit negotiation dynamic by considering strategic negotiation moves already made by the parties, and the strategic moves likely to be made in the future.<sup>7</sup> As will be seen, the ensuing Brexit negotiations will be very complex, as they involve many participants and issues. Drawing on historical examples, I ultimately propose an international, conflict-specific mediation process as an instrument to efficiently manage these negotiations.<sup>8</sup> I conclude by summarizing the article's main results and providing an outlook for the future.<sup>9</sup>

## II. LEGAL FRAMEWORK

Since the Lisbon Treaty,<sup>10</sup> EU law formally recognizes the possibility of a Member State withdrawing from the Union. The relevant provision is

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3. See *The EU in the World—Economy and Finance*, EUROSTAT, [http://ec.europa.eu/eurostat/statistics-explained/index.php/The\\_EU\\_in\\_the\\_world\\_-\\_economy\\_and\\_finance](http://ec.europa.eu/eurostat/statistics-explained/index.php/The_EU_in_the_world_-_economy_and_finance) (last visited Jan. 11, 2017).

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Part V.

8. See *infra* Part VI.

9. See *infra* Part VII.

10. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Lisbon Treaty changed the name of the Treaty Establishing the European Community (EC Treaty) to the Treaty on the Functioning of the European Union.

Article 50. It reads as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.<sup>11</sup>

As noted above, Prime Minister May has announced that the UK will issue the notification according to Article 50 before the end of March 2017. By this announcement, she complied, albeit with delay, with a request by EU officials and other Member States who were already pushing for a quick

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11. Consolidated Version of the Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 16 [hereinafter TEU].

withdrawal shortly after the referendum.<sup>12</sup> However, this plan may be delayed or disrupted due to UK “constitutional requirements”<sup>13</sup>—specifically, on November 3, 2016, the High Court held that “the Secretary of State does not have power under the Crown’s prerogative to give notice pursuant to Article 50 for the United Kingdom to withdraw from the European Union.”<sup>14</sup> On appeals, on January 24, 2017, the Supreme Court upheld the High Court’s decision.<sup>15</sup> Hence, Parliament must authorize such notice.<sup>16</sup> Swiftly, on January 26, 2017, the British government introduced a bill comprising a mere 130 words, authorizing the Prime Minister to give notice under Article 50(2) TEU.<sup>17</sup> It remains to be seen whether and, if so, what kind of amendments to the bill will be tabled in the legislative process, possibly delaying Parliament’s authorization.<sup>18</sup> The British government has already conceded to Parliament that it will publish its negotiating plans before invoking Article 50.<sup>19</sup>

12. See Horst Eidenmüller, *Brexit Negotiation Games*, OXFORD BUS. L. BLOG (June 27, 2016), <https://www.law.ox.ac.uk/business-law-blog/blog/2016/06/brexit-negotiation-games>.

13. See TEU, *supra* note 11, at art. 50(1).

14. R (Miller) v. Sec’y of State for Exiting the European Union, [2016] EWHC (Admin) 2768, at [111], <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/r-miller-v-secretary-of-state-for-exiting-eu-amended-20161122.pdf>.

15. R (Miller) v. Sec’y of State for Exiting the European Union, [2017] UKSC 5, <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

16. See R (Miller) v. Sec’y of State for Exiting the European Union, [2017] UKSC 5, at [122] (“The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament.”).

17. See Robb Merrick, *Brexit Bill: Theresa May Publishes Article 50 Legislation in Preparation for MPs’ Vote*, FIN. TIMES (Jan. 26, 2017), <http://independent.co.uk/news/uk/politics/brexit-bill-theresa-may-publishes-article-50-legislation-parliament-vote-commons-mps-eu-european-a7547111.html>.

18. See Kate Allen, Jane Croft, & George Parker, *Theresa May to Fast-track Brexit Bill Following Court Defeat*, FIN. TIMES (Jan. 24, 2017), <https://www.ft.com/content/0267a864-e246-11e6-8405-9e5580d6e5fb>.

19. See George Parker & Kate Allen, *Theresa May Wins Brexit Vote After Agreeing to Publish Plan*, FIN. TIMES (Dec. 7, 2016), <https://www.ft.com/content/379f9dee-bc6b-11e6-8b45-b8b81dd5d080>. Another question is whether any negotiated withdrawal agreement is subject to parliamentary approval. There seems to be little doubt that it is. See Vaughne Miller, Arabella Lang, & Jack Simpson Card, *Briefing Paper: Brexit: How Does the Article 50 Process Work?*, HOUSE COMMONS, no. 7551, (June 30, 2016), <http://researchbriefings.files.parliament.uk/documents/CBP-7551/CBP-7551.pdf>. In a speech on January 17, 2017, Prime Minister Theresa May conceded that much. See Theresa May, *Speech by Theresa May, Lancaster House, 17 January 2017*, TELEGRAPH (Jan. 17, 2017), <http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/> (“I can confirm today that the Government will put the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament, before it comes into force.”).

After the withdrawal notice is given, Article 50(2)–(3) contemplates a two-year negotiation period for a withdrawal agreement. This agreement shall take account of the framework for the withdrawing Member State’s future relationship with the Union. Of further, crucial importance are the Union’s majority requirements for concluding the withdrawal agreement with the UK. Apart from the consent of the European Parliament—where a simple majority decision suffices—a qualified majority in the Council is necessary for a binding withdrawal agreement. Article 238(3)(b) of the Treaty on the Functioning of the European Union (TFEU) defines “qualified majority” as at least 72% of the Council’s members representing at least 65% of the Union’s citizens.<sup>20</sup> This means that 19 out of 27 Member States—28 minus the UK—must sanction the agreement. In respect to the citizen requirement, noteworthy Member State population shares—again, the UK not included—are the following: Germany 18.30%, France 14.97%, Italy 13.70%, Spain 10.47% and Poland 8.57%.<sup>21</sup> Thus, many different blocking coalitions are conceivable. Germany and France, for example, can veto any withdrawal agreement if they form a coalition with any one of the three other Member States mentioned. To put it differently: to conclude a withdrawal agreement, the UK will need a broad consensus amongst the remaining large Member States. If no deal can be reached within the two-year period, assuming the period is not extended, then the UK will exit the EU according to Article 50(3) without a deal—Brexit “pure and simple” so to speak.<sup>22</sup>

This implication is also important with respect to the legal issue of whether a withdrawal notice, once given, may be subsequently revoked—an issue open to significant debate.<sup>23</sup> If the withdrawing state could unilaterally revoke the notice, it could frustrate the automatic exit mechanism stipulated

20. Consolidated Version of the Treaty on the Functioning of the European Union art. 238(3)(b), Oct. 26, 2012, 2012 O.J. (C 326) 50 [hereinafter TFEU].

21. Cf. *Population on 1 January*, EUROSTAT, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1> (last visited Jan. 12, 2017).

22. OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST*, Act I, Pt. 2 (1895) (“*Jack*: That, my dear *Algy*, is the whole truth pure and simple. *Algernon*: The truth is rarely pure and never simple.”).

23. See Vaughne Miller, Arabella Lang, & Jack Simpson Card, *Briefing Paper: Brexit: Article 50 TEU and the EU Court*, HOUSE COMMONS, no. 7763, at 9 (Nov. 14, 2016), <http://researchbriefings.files.parliament.uk/documents/CBP-7763/CBP-7763.pdf> (summarizing the arguments). In the *Miller* case, irrevocability was common ground between the parties. See *R (Miller) v. Sec’y of State for Exiting the European Union* [2016] EWHC (Admin) 2768, at [10]; *R (Miller) v. Sec’y of State for Exiting the European Union*, [2017] UKSC 5, at [26].

in Article 50(3). It would effectively mean that a state could test the process risk-free and see what kind of deal can be negotiated, only to reverse course once it emerges that no favourable exit agreement can be concluded. Indeed, this would undermine the purpose of Article 50(3). Hence, if the notice can be withdrawn, it seems that it may only be through taking due regard of the legitimate interests of the other Member States, possibly by analogy to the qualified majority requirement in the Council stipulated in Article 50(2).

In the scholarly literature on Article 50, there is a controversial discussion about whether the provision can also be invoked to partially withdraw from the Union or to modify current membership status.<sup>24</sup> Article 50(2) foresees that the withdrawal agreement takes “account of the framework for [the withdrawing Member State’s] future relationship with the Union.”<sup>25</sup> Hence, the provision foresees that a Member State might leave the EU and that its withdrawal agreement might prospectively set out the fundamentals of its future relationship with the Union. Thus, on its plain language, Article 50 is not the right instrument to effect a partial withdrawal or to obtain a modified membership status. These goals are more appropriately achieved by a treaty change according to the TEU’s Article 48.<sup>26</sup> Be that as it may, it is at least clear that every withdrawal agreement that, as a matter of its regulations, amounts to or implies such a treaty change must be ratified by *all* Member States according to Article 48.

### III. NEGOTIATION ANALYSIS

The negotiation situation concerning the withdrawal agreement can be helpfully analysed using four key negotiation factors: agreement options, nonagreement alternatives, interests, and perceptions.<sup>27</sup> Utilizing this

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24. See Eva-Maria Poptcheva, *Briefing: Article 50 TEU: Withdrawal of a Member State from the EU*, EUROPEAN PARLIAMENTARY RES. SERV. 6 (February 2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS\\_BRI\(2016\)577971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (summarizing the discussion).

25. See TEU, *supra* note 11, at art. 50(2).

26. See TEU, *supra* note 11, at art. 48.

27. See CHRISTIAN BÜHRING-UHLE, HORST EIDENMÜLLER, & ANDREAS NELLE, *VERHANDLUNGSMANAGEMENT*, ch. II (2<sup>nd</sup> ed. 2017). For an application to Brexit, see *Brexit Negotiation Games*, *supra* note 12; Horst Eidenmüller & Andreas Hacke, *Im Brexit-Poker hat die EU die besseren Karten*, FRANKFURTER ALLGEMEINE ZEITUNG 6 (July 21, 2016), <http://www.faz.net/aktuell/politik/staat-und-recht/im-poker-um-brexit-referendum-hat-eu-die-besseren-karten-14349624.html>; see also Hans-Bernd Schäfer & Arkadiusz Radwan, *Brexit-Poker—Wer hat die*

framework, why and how giving notice under Article 50 fundamentally changes the negotiation position of the parties becomes clear.

#### A. *Four Key Negotiation Factors*

If parties act rationally, negotiations will only lead to an agreement if *agreement options* can be found that are better than each parties' best *non-agreement alternative*, also known as a Best Alternative to a Negotiated Agreement (BATNA).<sup>28</sup> Hence, the respective BATNAs of the parties limit the space of potentially acceptable agreement options, or Zone of Possible Agreement (ZOPA). Likewise, *interests* are the most important measuring rod that parties use to evaluate their nonagreement alternatives and discussed agreement options. Finally, negotiations take place in our heads—agreement options, nonagreement alternatives, and interests are all *perceived* subjectively. Accordingly, distortions of perceptions and systematic cognitive biases also enter the negotiation calculus.<sup>29</sup>

#### B. *Interests and BATNAs of the Parties*

If one analyzes the UK's negotiation position under this framework, several conclusions regarding its interests and BATNA emerge. First, it is apparent that the UK primarily wants to regain political sovereignty. Of central importance in this respect is full control over immigration. However, the Brexit referendum has also been interpreted by Prime Minister May as a vote against certain aspects of globalisation and a Europe for elites.<sup>30</sup> The new British government aims to rectify perceived imbalances and injustices in the fabric of the social system. In other words, it aims to create "a country that works for everyone."<sup>31</sup> Finally, the UK also has an interest in

*besseren Karten in den Austrittsverhandlungen nach Art. 50 EUV?*, SSRN (September 22, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842253](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842253).

28. This concept was developed by WILLIAM L. URY, ROGER FISHER, & BRUCE M. PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97 (2d ed. 1991).

29. On this *see especially* DANIEL KAHNEMAN, *THINKING, FAST AND SLOW*, ch. II–IV (2011). For the effect of these biases on contracting and contract negotiations, *see* HORST EIDENMÜLLER, *Der homo oeconomicus und das Schuldrecht: Herausforderungen durch Behavioral Law and Economics*, JURISTENZEITUNG 216 (2015).

30. *See, e.g.*, George Parker, *Theresa May Takes a Swipe at Capitalist Elite: PM Pledges to Make Britain Fairer and Says Brexit Was a Cry for a New Start*, FIN. TIMES (Oct. 5, 2016), <https://www.ft.com/content/d38287f4-8afb-11e6-8cb7-e7ada1d123b1>.

31. This was the motto of the convention of the Conservative Party from October 2–5, 2016, in

maintaining full access to the common market at the lowest costs possible.<sup>32</sup> Indeed, 44% of all British exports go to the EU,<sup>33</sup> which amounts to approximately 12% of the country's GDP.<sup>34</sup> Conversely, EU exports to the UK make up only 3% of Europe's GDP.<sup>35</sup> Furthermore, losing access to the common market would have especially grave consequences for London's finance industry.<sup>36</sup> If stripped of the European passport, which gives London's finance industry the right to operate and provide services in other Member States based on the regulations in the country of origin, severe negative economic consequences are expected. It has been estimated that up to 35,000 jobs might be lost, along with revenues in the order of £18–20 billion per year and taxes in the order of £3–5 billion per year.<sup>37</sup>

However, the volume of bilateral trade between the UK and the EU only tells half the story with respect to the two parties' interests and alternatives. What also matters is the specific assets being traded.<sup>38</sup> To put it differently:

Birmingham, as seen in the convention speech by Prime Minister May on October 5th. *See Theresa May: Speech to Conservative Party*, YOUTUBE (Oct 5, 2016), <https://www.youtube.com/watch?v=08JN73K1JDC>.

32. Brexit Minister David Davis signalled that the UK might be prepared to pay for single market access. He is quoted as having said that "the major criteria here is that we get the best possible access for goods and services to the European market." John Murray Brown, *UK Could Make EU Budget Contributions After Brexit—David Davis*, FIN. TIMES (Dec. 1, 2016), <https://www.ft.com/content/b4c1c7d1-87d1-3764-9113-f8c98c44d4b9>.

33. *See Mind Your Step*, ECONOMIST (Oct. 8, 2016), <http://www.economist.com/news/britain/21708264-theresa-may-fires-starting-gun-what-looks-likely-be-hard-brex-it-taking-britain-out>.

34. *See generally United Kingdom GDP: 1960–2017*, TRADING ECON., <http://www.tradingeconomics.com/united-kingdom/indicators> (last visited Jan. 11, 2016).

35. *See generally id.*

36. Of course, it would not only be the finance industry that would suffer. London has become a premier provider for dispute resolution services, supported by the Brussels Ia Regulation. London is a leading international restructuring venue, supported by the European Insolvency Regulation. UK company law benefits from the "incorporation theory" that Member States had to adopt under the Court of Justice of the European Union (CJEU) jurisprudence on freedom of establishment for companies. One could go on and on. London's legal industry would suffer alongside its finance industry if Brexit occurred with no adequate replacement for the existing laws and regulations.

37. *See The Impact of the UK's Exit from the EU on the UK-Based Financial Services Sector*, OLIVER WYMAN 2 (2016), [http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2016/oct/Brexit\\_POV.PDF](http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2016/oct/Brexit_POV.PDF) (last visited Dec. 6, 2016). Meanwhile, Japanese financial institutions threaten to move "some functions from London within six months unless they receive clarity on the UK's future relationship with the EU." Katie Martin, Laura Noonan, & Martin Arnold, *Japanese Banks Warn of Leaving London Without Brexit Clarity*, FIN. TIMES 1 (Dec. 15, 2016), <https://www.ft.com/content/cc085d38-c349-11e6-9bca-2b93a6856354>. For an analysis of the various policy options, *see also* John Armour, *Brexit and Financial Services*, SSRN (January 2, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2892679](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892679).

38. I am indebted to Dan Awrey for having raised this point in a private discussion.

whether the UK can source European deliveries easily from a third-party country is important, as is whether its European partners can easily sell their goods and services to third party countries. If, for example, a European trading partner delivers highly specialised technical equipment that the UK cannot obtain easily from another source, the UK has a problem. Likewise, if its European trading partner has no other market for this equipment, it too has a problem. Both parties are in a bilateral monopoly situation.<sup>39</sup> Thus, figuring out exactly how the UK and EU trading relationship affects the bargaining position of both sides requires an in-depth analysis of the goods and services traded.

The UK's BATNA depends on whether the Article 50 withdrawal notice is given or not. If it were possible for the UK to negotiate a withdrawal agreement in the shadow of a non-declared exit, its BATNA would be the status quo: a continuing full membership in the EU. However, such "shadow" negotiations were categorically ruled out shortly after the referendum by leading EU representatives and the governments of other Member States.<sup>40</sup> Once a withdrawal notice has been given, the two-year negotiation period described above runs. If no agreement can be reached within this timeframe, the UK will leave the EU and would, *vis-à-vis* the EU, resort to a third country status. This outcome would satisfy crucial UK political interests but not its economic interests.

Turning to the EU, its primary interest is clearly to prevent a Brexit that weakens the Union politically or economically. Ideally, the Union would want to reinvent itself after Brexit and emerge stronger than it was before.<sup>41</sup> One aspect of this interest requires preventing a "Europe à la carte" or cherry-picking by individual Member States.<sup>42</sup> If cherry-picking were possible for the UK, other Member States might be tempted to follow suit and try to negotiate a similar special status for themselves—with clearly

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39. On bargaining in such a situation, see HORST EIDENMÜLLER, *EFFIZIENZ ALS RECHTSPRINZIP* 84 (4th ed. 2015).

40. See *Brexit Negotiation Games*, *supra* note 12. In terms of negotiation tactics, this was a binding self-commitment. See BÜHRING-UHLE et al., *supra* note 27, at Chapter III; see also *infra* Section V.

41. This might mean that the EU takes the principle of subsidiarity seriously and fundamentally reconsiders which policy fields it can work on with real value added, compared to uncoordinated action by the Member States. Commerce, defence, and security—including fighting terrorism—might be such policy fields. See Eidenmüller & Hacke, *supra* note 27.

42. Such cherry-picking was ruled out by leading EU representatives and the governments of other Member States shortly after the referendum. See *Brexit Negotiation Games*, *supra* note 12.

detrimental long-term consequences for the Union as a whole. Further, the EU and its officials clearly have an interest in maintaining positions, competences, and influence.<sup>43</sup>

The EU's BATNA is a mirror image of the UK's BATNA. Before giving Article 50 notice, should its "shadow" negotiations fail, the UK would remain a full Member State.<sup>44</sup> However, after giving notice, should the two-year period lapse without a withdrawal agreement in place, the UK would revert to third country status. This prospect is not a rosy one for the EU either: it would lose a Member State that makes significant contributions to its budget.<sup>45</sup> More importantly, it would lose a stabilising political force with regards to the power dynamic between Germany and France.

Moreover, the individual interests of the remaining Member States are quite diverse. For instance, export-oriented countries, such as Germany, surely have an interest in maintaining trade with the UK on the smoothest possible terms.<sup>46</sup> Member States from southern Europe, including France, may want to see EU budgets and spending rise, and see fiscal control over the Member States relaxed.<sup>47</sup> Further, for the Visegrád-States, curtailing illegal immigration is as important as it is for the UK.<sup>48</sup>

Prima facie, these very different interests of the remaining Member States should enhance the UK's bargaining leverage. One thinks of the Roman tactic of *divide et impera*.<sup>49</sup> However, one must not forget that any

43. This creates a conflict of interests in the EU's relationship with the Member States—a principle agent conflict—as the Member States interests require taking the principle of subsidiarity seriously.

44. See TEU, *supra* note 11, at art. 50.

45. In 2015, Germany contributed 21.36% to the EU budget, France 15.72% and the UK 12.57%. See *Share of Total Contributions to the European Union Budget in 2015, by Member State*, STATISTA, <https://www.statista.com/statistics/316691/european-union-eu-budget-share-of-contributions/> (last visited Dec. 6, 2016).

46. That does not imply, of course, that Member States such as Germany will continue to accept London's current position as the leading European financial center. The interests at stake with respect to free movement of goods, on the one hand, and freedom to provide services and the free movement of capital, on the other, are quite different.

47. See Michael Sheridan, *EU 'Club Med' Tells Merkel to End Austerity*, TIMES (Sept. 11, 2016), <http://www.thetimes.co.uk/article/eu-club-med-tells-merkel-to-end-austerity-ljhbmh7gt>.

48. See generally Bart Bachman, *Diminishing Solidarity: Polish Attitudes Toward the European Migration and Refugee Crisis*, MIGRATION POL'Y (June 16, 2016), <http://www.migrationpolicy.org/article/diminishing-solidarity-polish-attitudes-toward-european-migration-and-refugee-crisis>.

49. "*Divide et impera*" refers to the concept of "split[ing] the opposition so that it ceases to threaten your own power." *Divide et Impera*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/divide%20et%20impera> (last visited Jan. 16, 2017).

withdrawal agreement requires a qualified majority in the Council and hence a broad consensus amongst the remaining Member States. In the case of a treaty change, even unanimity is required.<sup>50</sup> Hence, pre-withdrawal, disagreement amongst the remaining Member States strengthens, rather than weakens, the EU's bargaining position.

#### IV. UK NEGOTIATION STRATEGY

For more than three months after the referendum, it was completely unclear which strategy the UK would use to approach the Brexit negotiations. In the immediate aftermath of the referendum it was even unclear whether and, if so, when the Article 50 withdrawal notice would be given. Since then, at least the contours of the British exit plan have become discernible, largely due to the speeches delivered by Prime Minister May in October at the Conservative Party convention<sup>51</sup> and even more importantly on January 17, 2017, at Lancaster House.<sup>52</sup>

As already mentioned, it now seems clear that Brexit, as such, will happen and that a withdrawal notice will be given before the end of March 2017. This despite the facts that (1) under the analysis of interests and BATNAs undertaken in the previous section, the "Brexit Negotiation Game" may be a negative sum game with net losses for all sides,<sup>53</sup> and (2) given the firmly announced position of the EU and leading Member States, it seems cherry-picking retained fundamental freedoms—like the freedom to move goods, services, and capital or not to move persons across borders—will be difficult at best. At the same time, it appears that the new British government considers political sovereignty and a more just society to be more important than the interests of the financial industry.<sup>54</sup>

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50. See TFEU, *supra* note 20, at art. 48.

51. See *Theresa May: Speech to Conservative Party*, *supra* note 31.

52. See *May*, *supra* note 19.

53. See also *Brexit Negotiation Games*, *supra* note 12.

54. The political calculus motivating this stance is not difficult to decipher. The UK voting system is majority rule in the constituencies ("first past the post") and Greater London represents only a relatively few constituencies. If Prime Minister May calls early elections in 2017, the Conservative Party can expect to secure a broad majority of seats in parliament if it can credibly signal to lower-income voters—those who feel most disenfranchised by globalization—that the new British government will look after them primarily. However, because the available data suggests that inflation will rise, the lower-income members of society—who typically spend a higher portion of their income on consumer goods—will suffer more than others. See *Some Britons Will Suffer from a Weak Pound More than Others*, *ECONOMIST* (Oct. 18, 2016), <http://www.>

Nevertheless, the British government will probably try to do at least some cherry-picking and thereby achieve the best of both worlds: political sovereignty and the economic benefits of full access to the single market. On December 1, 2016, Brexit Minister David Davis apparently signalled that the UK might even be prepared to pay for single market access when he said that “[t]he major criteria here is that we get the best possible access for goods and services to the European market.”<sup>55</sup> Basically, this amounts to suggesting that Britain pay the EU for permission to cherry-pick.

In her speech on January 17, 2017, Prime Minister Theresa May reinforced and elaborated on this approach. While formally accepting the EU’s negotiating position that the four freedoms of goods, capital, services, and people are indivisible,<sup>56</sup> she made it perfectly clear that the UK will

seek the greatest possible access to [the Single Market] through a new, comprehensive, bold and ambitious Free Trade Agreement. That Agreement may take in elements of current Single Market arrangements in certain areas—on the export of cars and lorries for example, or the freedom to provide financial services across national borders—as it makes no sense to start again from scratch when Britain and the remaining Member States have adhered to the same rules for so many years.<sup>57</sup>

In essence, this comes down to obtaining the benefits of the free movement of goods, capital, and services without, at the same time, accepting the free movement of persons; in other words, cherry-picking certain “elements of current Single Market arrangements.”<sup>58</sup>

The UK is probably well-advised to test this strategy but not to push too

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economist.com/news/britain/21708904-effect-sterling-inflation-some-britons-will-suffer-weak-pound-more-others?cid1=cust/ddnew/n/n/n/20161018n/owned/n/n/nwl/n/n/EU/7898930/email&etear=dailydispatch. Of course, the government can potentially counterbalance these negative effects by raising state debt and social security benefits for a couple of years. However, this will reduce the government’s room for political manoeuvring and strategic spending in the long run. Thus, even if such measures are implemented, everyone will feel the welfare reduction, eventually. However, this distant sort of loss does not count in an opportunistic political calculus.

55. See Brown, *supra* note 32. Note, however, that he made no mention of the free movement of capital. That said, he may have been speaking more generally. In any event, the free movement of capital is the only of the EU’s fundamental freedoms that can apply to non-EU states. See TFEU, *supra* note 20, at art. 63.

56. See May, *supra* note 19.

57. See *id.*

58. *Id.*

hard or too long for two reasons. First, as already emphasized, the “official” negotiating position of the EU is that there will be no cherry-picking.<sup>59</sup> Given that any withdrawal agreement needs to be backed by a broad consensus amongst the remaining Member States,<sup>60</sup> the UK will not want to antagonize anyone by insisting on such a controversial proposition.<sup>61</sup> Second, the UK will want to reduce the legal, political, and economic uncertainty associated with Brexit. The longer the process takes to complete, the worse the impact on British investment and growth will be.<sup>62</sup>

Hence, the simpler, more realistic, and probably faster exit strategy for the UK is what can be called “Hard Brexit,” wherein Britain completely leaves the EU and its rules and regulations, both primary and secondary. Such a move would imply that the UK does not aim to obtain a European Economic Area (EEA) status the way Norway, Iceland, and Liechtenstein have—at least not in the long run.<sup>63</sup> The move would also imply that the UK intends to relinquish its attempt to cherry-pick “elements of current Single Market arrangements.”<sup>64</sup> Instead, the UK may contemplate concluding a nexus of bilateral treaties, similar in kind to those Switzerland has executed. However, the rules and regulations accepted by Switzerland, at least with respect to free movement of persons, could hardly serve as a model for the UK, especially given its strong interest in fully controlling immigration.

Even though Hard Brexit appears to be a relatively simple exit strategy,

59. This was affirmed recently in a statement following an informal meeting of the Heads or Governments of twenty-seven Member States, as well as the Presidents of the European Council and the European Commission on December 15, 2016, in Brussels: “[A]ny agreement . . . will have to be based on a balance of rights and obligations. Access to the single market requires acceptance of all four freedoms.” *Brexit: EU Says No Compromise on Freedom of Movement*, BBC (June 29, 2016), <http://www.bbc.com/news/world-europe-36659900>.

60. See *supra* Section III.2.

61. See Laurence Norman & Valentina Pop, *EU’s Brexit Negotiator Michel Barnier Puts Tight Timeframe on U.K. Leaving the Bloc*, WALL STREET J. (Dec. 6, 2016), [www.wsj.com/articles/brexit-negotiations-should-be-completed-by-march-2019-says-eu-1481025122](http://www.wsj.com/articles/brexit-negotiations-should-be-completed-by-march-2019-says-eu-1481025122) (discussing statements of Michel Barnier on the Brexit schedule). “On Tuesday, Mr. Barnier reiterated that the bloc’s so-called four freedoms, which include the right to work anywhere in the EU, must be respected for the U.K. to retain access to the single market.” *Id.*

62. The signs are visible already. To give just one example, new office construction in London has fallen by 42% between late 2015 and late 2016. See Judith Evans, *Sharp Fall in New London Office Building, Survey Shows*, FIN. TIMES (Nov. 14, 2016), <https://www.ft.com/content/ea4c65d2-aa7b-11e6-9cb3-bb8207902122>.

63. In the EEA, the four fundamental freedoms apply as does secondary European Union law. The latter would be important for the British finance industry because of the “passporting rules.” See *supra* Section III.2.

64. See May, *supra* note 19.

this does not mean that it will be easy to implement—quite to the contrary. Assuming that the UK indeed wishes to move forward with this plan, it will need to conclude many treaties or agreements with the EU, other supra-national institutions, and third party countries in the years or even decades to come. This lengthy process is likely to proceed in phases. The first priority would certainly be the withdrawal agreement with the EU. In a Hard Brexit scenario, the scope of this agreement will probably be limited to regulating the conditions for and mode of an “orderly exit,” including the financial consequences for both sides.<sup>65</sup> Second, either simultaneously or a couple of years later, the UK will probably need to conclude one or a number of trade and cooperation deals with the EU. These agreements will cover crucial issues relating to free movement of goods, services, and capital; the status of EU citizens living in the UK and vice versa; and aspects of internal and external security. If these agreements explicitly or implicitly alter the TEU, they must be ratified by all Member States. And if these arrangements, *in essence*, amount to cherry-picking “elements of current Single Market arrangements,”<sup>66</sup> they would probably be rejected as politically unpalatable at the EU or Member States’ level. Third, the UK might want to secure a temporary EEA membership or another transitional agreement to cover the interim period between when the withdrawal agreement takes effect and the UK’s conclusion of new cooperation and trade deals with the EU.<sup>67</sup> Such a transitional agreement could, for example, involve staying in a customs union with the EU, at least temporarily. “Turkey, Andorra, Monaco and San Marino [for example] are outside the EEA but in a customs union with the EU.”<sup>68</sup> Alternatively, the withdrawal agreement’s entry into force could be

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65. The Financial Times has computed that the UK might be confronted with a “divorce bill” in the order of £20 billion. See Alex Barker & George Parker, *UK Faces Brexit Divorce Bill of Up to £20bn*, FIN. TIMES (Oct. 12, 2016), <https://www.ft.com/content/3c1eb988-9081-11e6-a72e-b428cb934b78>. The European Commission puts the sum at closer to €60 billion. *The EU’s Brexit Negotiators Prepare for Disaster*, ECONOMIST (Dec. 17, 2016), <http://www.economist.com/news/europe/21711886-still-its-sexiest-job-brussels-eus-brexit-negotiators-prepare-disaster>.

66. See May, *supra* note 19.

67. See Norman & Pop, *supra* note 61 (discussing statements of Michel Barnier on the Brexit schedule). “Mr. Barnier said, meanwhile, it could be useful to have a transitional agreement in place to help both sides adjust. Mrs. May has also suggested she favors a transitional agreement for the period after Britain leaves the bloc.” *Id.*

68. See *There Is a Case for Staying in the Customs Union*, ECONOMIST (Dec. 3, 2016), <http://www.economist.com/news/britain/21711053-even-if-not-permanent-home-transitional-deal-remain-customs-union-may-make>. The clear disadvantages of such an arrangement for the UK would be that the Turkish model covers industrial goods only, not services. *Id.* It also “means applying the EU’s common external tariffs without having any say in them, and it precludes free-

postponed to the latter point in time.<sup>69</sup> Fourth, the UK might have to negotiate renewed, full membership status with the World Trade Organization (WTO). Its current membership status is arguably tied to that of the EU.<sup>70</sup> Renewed, full membership with the WTO would require unanimous consent.<sup>71</sup> Finally, the UK will have to negotiate and conclude hundreds of new trade agreements with third-party countries such as the US, Canada, and China.

## V. NEGOTIATION DYNAMIC

Analyzing a negotiation situation based on four key negotiation factors<sup>72</sup> can provide a static picture of the negotiation, like an X-ray. However, negotiations are an inherently dynamic enterprise because parties constantly make moves to create and to claim value.<sup>73</sup> Unfortunately, there is a tendency for claiming tactics to dominate value creation moves because claiming value seems to be the better idea no matter what your opponent does. Either your opponent moves to create value, and you exploit them to claim that value, or your opponent moves to claim value and you claim value to guard against being exploited yourself. That said, if this strategy is implemented universally, the final outcome may be worse for all sides than the outcome that would have resulted had all parties acted more cooperatively and focused on creating value. This paradox is commonly referred to as the “Negotiators’ Dilemma.”<sup>74</sup>

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trade deals with third countries.” *Id.*

69. See TEU, *supra* note 11, at art. 50. This approach seems to be favored by Theresa May. See May, *supra* note 19 (“Instead, I want us to have reached an agreement about our future partnership by the time the two-year Article Fifty process has concluded. From that point onwards, we believe a phased process of implementation, in which both Britain and the EU institutions and member states prepare for the new arrangements that will exist between us will be in our mutual self-interest. This will give businesses enough time to plan and prepare for those new arrangements.”).

70. This is disputed, however. The UK was one of the founding signatory states of the General Agreement on Tariffs and Trade, 1948, TIAS 1700 (GATT), and there is an argument that its WTO membership follows from that and not from membership in the EU. See generally *The 128 Countries that Had Signed GATT by 1994*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](https://www.wto.org/english/thewto_e/gattmem_e.htm) (last visited Dec. 7, 2016).

71. See TFEU, *supra* note 20, at art. 48 (unanimity requirement).

72. See *supra* Section III.

73. These two dynamics are at the centre of almost all real-life negotiations. See BÜHRING-UHLE et al., *supra* note 27, at Ch. III.

74. See LAX AND SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 38, 154 (1986); BÜHRING-UHLE et al., *supra* note 27, at Ch. III.

This tendency is already visible in the Brexit Negotiation Games. So far, neither the EU nor the UK seem to have a clear game plan, let alone a sophisticated strategy. In a speech made on January 17, 2017, Prime Minister Theresa May at least stated the main goals the UK hopes to achieve in the ensuing Brexit negotiations.<sup>75</sup> Yet, certain negotiation moves have already been made and *all* such moves have aimed at claiming value. To be more specific, a majority of the moves have, in one way or another, involved firmly committing to negotiation positions or drawing “red lines” that will not be crossed.<sup>76</sup>

In a negotiation, it is not always an advantage to be totally flexible or to adopt a position that allows for flexible reactions to your opponent’s moves. Indeed, sometimes having no flexibility at all, through a binding commitment to a certain position, is the key to achieving an extraordinarily advantageous result. For example, if two lorry-drivers approach each other at high speed on a highway that is only broad enough for one, the driver who tears out his or her steering wheel and visibly throws it out of the window wins. The other driver must back down and give way or accept mutual destruction.<sup>77</sup>

However, actions are typically needed to achieve a binding commitment; talk is cheap. Yet words become less cheap when statements are backed by the reputation of the person making them. This is particularly true regarding politicians’ public statements: no politician wants to be called a liar or a weak negotiator because they backed down from a publicly averred “red line” or “minimum goal” during a negotiation. Hence, public statements made by leading EU or Member States’ representatives in the Brexit negotiations add at least some binding weight to these commitments.

Important in this respect is the position—formulated almost immediately after the referendum by leading EU representatives and the heads of many Member States—that, firstly, there will be no negotiations

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75. See May, *supra* note 19.

76. See, e.g., Michael Gasiorek et al., *UK–EU Trade Relations Post Brexit: Too Many Red Lines*, UK TRADE POL’Y OBSERVATORY (Nov. 2016), <https://www.sussex.ac.uk/webteam/gateway/file.php?name=uktpo-briefing-paper-5.pdf&site=18>. For an example, see also May, *supra* note 19 (“But I do *want* us to have a customs agreement with the EU. . . . I *want* to remove as many barriers to trade as possible. And I *want* Britain to be free to establish our own tariff schedules at the World Trade Organisation.”) (emphasis added).

77. This analysis of self-commitment as a claiming tactic was pioneered by Tom Schelling. See Thomas C. Schelling, *An Essay on Bargaining*, 47 AM. ECON. REV. 46, 281, 293 (1956); see also AVINASH K. DIXIT & BARRY J. NALEBUFF, *THE ART OF STRATEGY* 175–76 (2010).

before the UK gives notice under Article 50; and secondly, there will be no cherry-picking.<sup>78</sup> The first move was aimed at worsening the UK's BATNA by forcing it to trigger Article 50, ensuring that Brexit "pure and simple"—and not the status quo—would be the outcome if no deal can be reached within the two-year negotiation period. The second move was calibrated to exclude one of the many conceivable agreement options in the Brexit negotiations, namely a "Europe à la carte" for the UK—excellent for Britain but potentially disastrous for Europe.

The UK was less swift making its moves in the Brexit negotiation game. The first weeks immediately following the referendum will probably go down in history as a time when British politics imploded, with one leading figure of the political establishment after another throwing in the towel—a situation resembling a Hollywood soap opera more than a Shakespearean drama.<sup>79</sup> Then came Prime Minister May's "Brexit means Brexit."<sup>80</sup> As a political statement, it was probably meant to confirm that the new government is not going to try to reverse the referendum result but implement it faithfully.<sup>81</sup>

The effectiveness of this move as a negotiation tactic can be questioned. Arguably, Brexit-at-all-costs is not in the best interests of the UK. But this is now what Prime Minister May has promised the British people. The UK's negotiation partners in Europe may find themselves empowered by a commitment to the UK's exit no matter what kind of withdrawal proposals they put on the table. Hence, Brexit means Brexit is a rather self-destructive commitment for the UK to have made. The one good thing about it is that it

78. See *supra* Section III.2. This position was formulated again—expressly—in a statement following an informal meeting of the heads of twenty-seven Member States, as well as the presidents of the European Council and the European Commission. See *Statement Following the Informal Meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission*, EUROPA.EU (December 15, 2016), [http://europa.eu/rapid/press-release\\_MEX-16-4444\\_en.htm](http://europa.eu/rapid/press-release_MEX-16-4444_en.htm).

79. See, e.g., Heather Stewart et al., *David Cameron Resigns After UK Vote to Leave European Union*, GUARDIAN (June 24, 2016, 05:44 EDT), <https://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union>; Steven Castle & Steven Erlanger, *Nigel Farage, Who Spurred the 'Brexit' Resigns as Head of U.K. Independence Party*, N.Y. TIMES (July 4, 2016), [https://www.nytimes.com/2016/07/05/world/europe/nigel-farage-ukip-brexit.html?\\_r=0](https://www.nytimes.com/2016/07/05/world/europe/nigel-farage-ukip-brexit.html?_r=0).

80. See Ashley Cowburn, *Theresa May Says "Brexit Means Brexit" and There Will Be No Attempt to Remain Inside EU*, INDEP. (July 11, 2016), <http://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html>.

81. *Id.* ("There will be no attempts to remain inside the EU").

clarifies the direction of travel. In an extremely complicated and complex negotiation setting, simplifying moves are helpful to control and manage the process. Unfortunately, in the present case, the opportunity costs of this move are potentially very high for the UK.

Conversely, since the referendum, the UK has tried to better its bargaining position by threatening a “tax war” with Europe: if no satisfactory access to the single market can be achieved, then corporate tax rates might be cut to a historic low of 10%, according to a “secret plan to slash corporation tax by half.”<sup>82</sup> But this announcement may not be enough to lure many businesses and investments to the UK. Even if the UK undertook deeds to bolster these tough words, the crucial question for investors would be the UK’s credible commitment to these tax levels in the long run—and a stable tax policy more generally. On this point, the UK has little to offer. As one commentator observed:

[T]he post-referendum uncertainty relates not only to the future of UK/EU relationships, but also to the stability and trustworthiness of British political institutions. That uncertainty may not be enough to erode the competitive advantages for firms that are already established in the UK . . . but it makes any attempt to attract new businesses or to rebrand the UK as a tax or regulatory haven at the border of the EU highly unlikely to succeed.<sup>83</sup>

Apart from commitment tactics and threats, we have also already seen the EU creating and applying time pressures as a tactical move. On June 28, 2016—immediately after the referendum—Mr. Schulz, then President of the European Parliament, called upon the then Prime Minister of the UK, Mr. Cameron, to come forward with the withdrawal notice within days.<sup>84</sup> As we

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82. See Tim Shipman et al., *Threat of UK Tax Cut Staves off Hostile EU*, SUNDAY TIMES (Oct. 23, 2016), <http://www.thetimes.co.uk/article/threat-of-uk-tax-cut-staves-off-hostile-eu-w102bzs8r>. This threat was repeated by Prime Minister Theresa May in her speech on January 17, 2017. See May, *supra* note 19 (“And we would have the freedom to set the competitive tax rates and embrace the policies that would attract the world’s best companies and biggest investors to Britain. And—if we were excluded from accessing the Single Market—we would be free to change the basis of Britain’s economic model.”).

83. Luca Enriques, *Why the UK Has Currently Little Chance to Become a Successful Tax or Regulatory Haven*, OXFORD BUS. L. BLOG (July 7, 2016), <http://www.law.ox.ac.uk/business-law-blog/blog/2016/07/why-uk-has-currently-little-chance-become-successful-tax-or>.

84. See Martin Schulz, *Prolonged Uncertainty Concerning Brexit Would Be in No-one’s Interest*, EUR. PARLIAMENT NEWS (June 28, 2016), <http://www.europarl.europa.eu/news/en/news->

all know, this did not happen. More recently, the designated lead negotiator for the European Commission, Michel Barnier, “signalled an uncompromising stance on talks, laying out a tight timetable for the U.K.’s exit from the bloc.”<sup>85</sup>

Usually, time pressure is considered to be disadvantageous in negotiations because a negotiator who is keen on getting a result quickly will be inclined to make more concessions than his or her opponent. Or, put technically, negotiators who discount future benefits at a higher rate than their opponents are at a disadvantage.<sup>86</sup> However, in the Brexit negotiation, the situation is anomalous. Assuming that to exit without a deal or with a clearly suboptimal deal is much worse for the UK than for the EU, arbitrarily limiting negotiation time works to the EU’s advantage.

So, what negotiation moves should we expect next? What we have read, heard, and seen so far does not inspire confidence that the leading officials on either side have the skills and the knowledge to manage the process proactively and constructively. While value-claiming moves may not be all we see down the road, we will likely see more moves to claim value: some planned, some intuitive, and some self-defeating. So far, no one who appears to sense the potential of and need for sophisticated process design and management has yet stepped onto the stage. Here lies an opportunity for mediation.

## VI. BREXIT MEDIATION

Mediation is an old process. In recent decades, it has increasingly been used to resolve civil claims, and it has become part of the dispute resolution culture of many states around the world. However, mediation has also long been used to resolve international conflicts relating to international business or political matters. That said, designing and implementing a tailor-made mediation process to resolve a complex international dispute can be a formidable challenge. The case of Brexit will almost certainly confirm this.

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room/20160627STO33934/schulz-prolonged-uncertainty-concerning-brexit-would-be-in-no-one%E2%80%99s-interest.

85. Norman & Pop, *supra* note 61.

86. See BÜHRING-UHLE et al., *supra* note 27, at ch. III (citing other references).

A. *The Potential of Mediating Brexit*

Mediation is negotiation assisted by a neutral third party who has no decision-making authority.<sup>87</sup> Further, there is no such thing as “a” or “the” mediation—it is an extremely diverse and fluid concept. Mediation can be primarily interest-based but also rights-based.<sup>88</sup> It can be conducted in phases or plenary sessions but also in private sessions, sometimes referred to as “caucus mediations.”<sup>89</sup> Mediation can aim at a comprehensive conflict resolution but it can also be restricted to certain aspects of a conflict. It can aim at binding solutions or agreements or focus solely on self-reflection and transformation.<sup>90</sup> The goal is to privately and purposefully design a mediation process that, given the specific conflict and the interests of the parties, promises to offer the best form of conflict resolution possible; that “[fits] the forum to the fuss.”<sup>91</sup>

It should be clear from the discussion in the preceding sections that Brexit will necessitate and be implemented through multiple, very complex negotiations. Many parties are involved and their interests are very different. At the same time, these parties themselves are not monolithic but largely consist of multiple stakeholders, sometimes with extremely heterogeneous interests. For examples, one need only consider the EU or the WTO. It is obvious that this complexity poses enormous challenges with respect to the management of the negotiation processes. These challenges should prompt negotiation professionals to consider third-party assistance.

This is true even if one just focuses on the negotiations between the UK and the EU.<sup>92</sup> Both the withdrawal agreement and a new cooperation and trade agreement will involve *literally thousands* of issues. None of the parties involved in the negotiations is neutral or independent—every party and its stakeholders have interests to pursue. Thus, the potential inherent in negotiation management by a *neutral third party* is obvious.

87. See, e.g., CHRISTIAN DUVE et al., *MEDIATION IN DER WIRTSCHAFT* 63 (2d ed. 2011).

88. See Leonard L. Riskin, Commentary, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COSTS OF LITIG. 111–14 (1994).

89. On caucus mediation, see, e.g., Horst Eidenmüller, *Caucus-Mediation und Mediationsgesetz*, 22 BEILAGE ZU ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 18 (2016).

90. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, pt. II (1<sup>st</sup> ed. 1994) (dealing with the transformative approach to mediation).

91. See Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

92. See *supra* Sections IV.1–3.

This is all the more true because, as discussed, the first moves in the Brexit Negotiation Game<sup>93</sup> have already demonstrated that most of the actors involved are insensitive, first, to the benefits of a careful and transparent process design; and, second, to how dominant value-claiming moves have already become and will probably remain without third-party assistance.<sup>94</sup> The potential for value destruction in these Brexit negotiations is huge, but the potential to preserve or even create value through an efficient process assisted by neutral and professional process managers is equally huge.

The design of a Brexit Mediation could build on and draw from the many historical examples of international economic or political conflict resolution in which some form of neutral third-party negotiation assistance was successfully employed. In Europe, for example, there was the first Eurotunnel restructuring in 1996 and 1997. That process involved 225 commercial banks.<sup>95</sup> There, the mediators, Lord Wakeham and Robert Badinter, established a process wherein twenty-five of the 225 banks became members of a steering committee and the final and decisive negotiations, assisted by the mediators, took place amongst a group of six core banks.

Possibly even more widely remembered—despite forty intervening years—is then US President Jimmy Carter’s engagement as a mediator in the 1978 Camp David peace treaty negotiations between Israel and Egypt.<sup>96</sup> Among other tools, this mediation successfully used an important mediation technique known as the “one text” procedure.<sup>97</sup> Finally, mediation techniques were also used in the negotiations that led to the UN Law of the Sea (1973–1982).<sup>98</sup>

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93. See *supra* Sections IV.1–3.

94. Presenting a classic Negotiators’ Dilemma.

95. See HORST EIDENMÜLLER, *UNTERNEHMENSANIERUNG ZWISCHEN MARKT UND GESETZ* 529 (Cologne, Otto Schmidt, 1999).

96. See, e.g., CARLTON L. DAY, *PRESIDENT CARTER’S LEADERSHIP AT CAMP DAVID: MEDIATION AS AN EXERCISE IN STRATEGIC THINKING*, USAWC STRATEGY RESEARCH PROJECT (2011).

97. See FISHER et al., *supra* note 28, at 116; see also DUVE et al., *supra* note 87, at 261; see also Paula Young, *One-Text Mediation Process: Clinton’s Christmas 2000 Proposal to the Israelis and Palestinians*, *MEDIATE.COM* (Feb. 2001), <http://www.mediate.com/articles/young1.cfm> (contrasting the “one text process” to the “concession-hunting” process).

98. See JAMES K. SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* (1984).

*B. Mediation Design and Obstacles to Mediation*

Against this background, it seems that installing an institution or a group as a neutral process manager might be a good first step towards establishing a potential mediation framework for a Brexit Mediation. Soliciting the support of a professional mediation institution, such as JAMS in the US,<sup>99</sup> would be helpful to the parties in this regard. The team of mediators selected (“Brexit Mediators”) should be composed of seasoned specialist mediators from different countries. A group of three—one from the UK, one from Europe, and one from a third country, such as the US—is one plausible option.<sup>100</sup> Clearly, the mediation team would need to establish some form of organizational support structure and authorization to solicit the assistance of further experts on relevant subject matter. The ability to recruit additional mediation support to assist with the large and diverse number of negotiation issues to be addressed seems reasonable, as well. The ultimate size of the mediation team would depend on the goal the parties set for the mediation process. Of course, this goal needs to be discussed and agreed upon by the parties.

It is not realistic to negotiate and actually conclude a detailed withdrawal agreement and a new cooperation and trade agreement in a mediation framework. A more sensible and realistic goal could be some form of “High-Level Agreement” about key elements and principles. The Brexit Mediators would be tasked with identifying the general form of the future relationship of the UK with the EU<sup>101</sup> and the key elements necessary to a successful deal. The key elements identified would then be fleshed out in detail sufficient to provide a usable framework for future, more focussed and comprehensive negotiations. Hence, the goal of the mediation would be more abstract and political than concrete and legal.

Designing a process that would be most conducive to achieving this goal poses a significant challenge. One crucial element of the process design would be to determine the negotiation participants and committees. The EU

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99. JAMS, <https://www.jamsadr.com/> (last visited Dec. 7, 2016).

100. Appointing three co-mediators with different backgrounds seems a plausible way to do justice to the enormous complexity of the case, the many international and cross-cultural issues raised, and the need to have a balanced panel that represents a range of views. At the same time, should the Brexit mediation team encounter contentious process moves, a group of three would allow for majority decisions.

101. Examples of possible forms include an Associated Membership, Temporary EEA Status, a Hard Brexit, and Swiss Status.

has already designated lead negotiators to represent the European Commission, the European Council, and the European Parliament; three EU institutions with prominent roles in the Brexit process.<sup>102</sup> Hence, it seems sensible that the UK likewise nominate three lead negotiators, one to negotiate opposite each of the EU's chosen three.<sup>103</sup>

The process could start immediately after the UK gives its formal withdrawal notice under Article 50. To leave enough time for negotiating the legal details of the withdrawal agreement, a new cooperation and trade agreement, and/or a transition agreement, it would be important to reach a High-Level Agreement within a year or so. The mediation process could consist of a series of monthly high-level meetings, each lasting a couple of days. Between the meetings, work could be done in various committees and meetings could be held with other stakeholders—both to communicate intermediate results and to enhance the process's legitimacy. An internet platform, supported by software tools that facilitate specific tasks like variable communication and scenario analysis, could be designated to manage the process. Likewise, key meetings could be streamed over the internet, live from Brussels.<sup>104</sup> Maximum transparency *vis-à-vis* the general public is probably crucially important,<sup>105</sup> as the recent Transatlantic Trade and Investment Partnership negotiations between the EU and the US have demonstrated.

These Brexit mediation process design considerations are clearly both tentative and rough. They highlight only some of the possible elements an appropriate process design might incorporate. A more precise mediation

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102. The three lead negotiators for these three institutions are: Michel Barnier (France) for the European Commission, Didier Seeuws (Belgium) for the European Council, and Guy Verhofstadt (Belgium) for the European Parliament. See *Brexit Talks Role for Belgian EU Veteran Guy Verhofstadt*, BBC (Sept. 8, 2016), <http://www.bbc.com/news/world-europe-37307203>.

103. These representatives could be exchanged depending on the subject matter being negotiated and the specific tasks at hand. On the UK's side, Prime Minister May, Brexit Minister David Davis, and Foreign Minister Boris Johnson would probably play important roles.

104. Brexit negotiations will take place in Brussels. See *The EU's Brexit Negotiators Prepare for Disaster*, *ECONOMIST* (Dec. 17, 2016), <http://www.economist.com/news/europe/21711886-still-its-sexiest-job-brussels-eus-brexit-negotiators-prepare-disaster>.

105. There is a potential tension between maximum transparency and the incentive to compromise. Parties might be more reluctant to concede points when meetings are streamed live. However, in some circumstances, compromise may also be easier after an open debate and exchange of views. Further, the potential to effectively manage an extremely complicated process is another rationale for mediation, one that is not negatively affected by maximum transparency. Indeed, the more efficiently managed the process, the more transparent proceedings will appear. The same potential enhancement applies to value-creating moves in a mediation.

design would itself have to be negotiated in the first “Brexit Mediation Meeting,” which would ideally involve as many affected stakeholders as reasonably possible, including at least one representative from each European Member State.

As with mediations in the private sphere, the most difficult Brexit Mediation challenge could be motivating the parties to agree to mediation in the first place because there are many potential barriers to mediation. Experience tells us that parties to a conflict usually underestimate the value of professional process management or overestimate their own capabilities in this regard.<sup>106</sup> High-ranking civil servants, diplomats or politicians affirm this experience. At the same time, the potential of mediation as an instrument of efficient process management is often underestimated—especially when parties lack personal experience with this instrument of consensual conflict resolution. Finally, some parties may consider mediation to involve a loss of control—both with respect to the process, certainly, but also possibly with respect to its results.

Each of these obstacles can be overcome: overoptimism by citing the many failed complex negotiations unassisted by mediators and pointing out those successful negotiations in which mediators helped steer the process; lack of familiarity with mediation by the dissemination of information about the mediation process and mediation success stories in similar contexts; and fear of loss of control by stressing that mediation—in stark contrast to litigation or arbitration—is a paradigm process that leaves parties in full control of both the process itself and the results. Undertaking this kind of information and education is time and energy consuming. At the same time, the Brexit stakes are very high for the UK, Europe, and, indeed, the world. There should be ample motivation to live up to the challenge.

## VII. SUMMARY AND OUTLOOK

The Brexit referendum in the UK has thrown the European Union into a crisis. Crises hold the potential for disaster but also for creative new beginnings. Much will depend on whether the exit process can be steered constructively, keeping a close eye on the interests of the many affected parties. There is a nontrivial probability that Brexit is a negative-sum

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106. On “overoptimism” as a rationality trap, *see, e.g.*, BÜHRING-UHLE et al., *supra* note 27, at Ch. II.

game.<sup>107</sup>

The ensuing Brexit negotiations are many and very complex. In this article I have analyzed the negotiation position of all parties on the basis of four key negotiation factors. I have shown that giving notice under Article 50 changes the bargaining power in the Brexit Negotiation Games to the UK's disadvantage. I have also explored the UK's current negotiation strategy and concluded that it will try to cherry-pick first and go for a Hard Brexit with some form of transition arrangement later if its desired outcome proves unattainable.

So far, the negotiation moves by the parties are geared almost exclusively towards claiming value. Moreover, the EU has taken more sophisticated steps by ruling out shadow negotiations before the UK gives notice under Article 50 and by ruling out any form of cherry-picking or Europe *à la carte*. If the parties continue as they have begun, we can expect to see more value-claiming tactics, as in all real-live negotiations.<sup>108</sup> Yet despite the individual gains attainable through value-claiming, this scenario seems to resemble the classic Negotiators' Dilemma, one in which all parties might achieve better outcomes if they cooperate. Herein lies the potential for Brexit Mediation, the opportunity to save value and possibly even help the parties identify options for mutual gain.

Another independent motive for Brexit Mediation is process management. The ensuing negotiations are extremely complex. So, without a professional and neutral third party, it will prove extremely difficult—if not impossible—to manage them constructively and efficiently.

I have sketched out one potential “Brexit Mediation Model.” It would involve mediated “High-Level Talks” geared first towards defining the principles underlying the new relationship between the EU and the UK; and second towards identifying and agreeing to the key elements of a withdrawal agreement, a new cooperation and trade agreement, or a transition agreement between the EU and the UK. The potential for mediation to help preserve value in this very complex multi-party dispute is enormous. In the interest of the future of Europe, and indeed, the world as a whole, we are all called upon to remove any obstacles that lie in its way.

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107. *See supra* Part IV.

108. *See supra* Section III.2.