COMMENT

David Owen

Norway's snow crab can lead us to a smooth Brexit that preserves national sovereignty

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Why should we be forced to choose between a disguised sell-out and a fear-laden pullout from the European Union? Neither is in the national interest. Neither is likely to have the support of a sufficient number of MPs. All those who believe the voters' decision to leave the EU should be respected, irrespective of party politics or personal preferences, must be ready to compromise to reach an agreed exit strategy.

Whether we like it or not, we are stuck with the article 50 treaty process on negotiating our withdrawal from the EU, but that should be influenced by the emphasis on developing "good neighbourliness" with fellow countries referred to in article 8, so far in short supply from Brussels.

Yet to tear up the associated draft withdrawal agreement on Brexit would mean abandoning much good work. We would be wise to keep as much of the text as we can. What is unacceptable is continuing with the Chequers document with EU rejections of passages of text that imply significant differences compared with existing EU arrangements – but with the retention of passages that don't imply such differences.

The combined effect of such retentions and rejections would lead to Brexit In Name Only, Brino. I use the word "document" because it was never in any true sense of the word cabinet policy, let alone agreed by Conservative MPs.

What happened at Chequers was another example of manipulation of the cabinet with all the hallmarks of Tony Blair and David Cameron. It was sad to see Theresa May associated with the same techniques – the worst being the production of a very detailed paper that was not even circulated in advance to colleagues to ponder and seek expert advice from within their departments.

"The Chequers option is holed below the waterline. There is a third way to avoid the UK being boxed in between a bad deal and no deal

The sheer pettiness was highlighted by the press being briefed that any cabinet member resigning would have to take a taxi home from Chequers and not a government car.

The deeper question is how such a document could have been presented to cabinet when it was bound to meet principled objections from the EU. After an initial pause it was predictably and comprehensively rubbished by Brussels.

"The fudge of the century" was the mildest of their comments. Normally it is civil servants who protect ministers from such a humiliation; in this case they were its authors. The resignation at midnight of David Davis, the former Brexit secretary, was inevitable, correctly followed at the Foreign Office by Boris Johnson, whose resignation speech was well judged and, ominously, contained no jokes. Why? Because he knows we face a grim situation.

I have been trying to persuade the prime minister since November 23, 2016, in a series of letters (available on my website lorddavidowen.co.uk) of the merits of preparing a reserve position in the event of the EU refusing her ambitious and now sadly flawed bespoke option.

This in essence means asserting our right to stay in the European Economic Area (EEA) as a non-EU contracting party after we leave the EU on March 29 next year. However, we should do so as part of the European Free Trade Association (Efta) governance pillar, not the EU pillar where the European Court and Commission hold sway. There is a precedent for a such a change in the other direction when Austria, Finland and Sweden transitioned smoothly from the Efta pillar to the EU pillar in 1995.

The bespoke Chequers option is probably holed below the waterline. Now, before it sinks, the UK should write to the 27 other EU members and three non-EU members in the EEA (Norway, Iceland and Liechtenstein) to ask if they are content for the UK to continue operating under the EEA as part of the Efta pillar once we depart. This would ensure no pullout, but a smooth entry into the transition period while we remain in the single market.

Those who doubt that national sovereignty exists for the national parliaments of the three countries in the Efta pillar, and insist that they are in effect under the thumb of the European Commission, should study the recent clash between Norway and the EU over snow-crab fishing rights and recognise why the House of Commons would be sovereign.

Norway recently seized and fined trawlers from the EU Baltic states licensed by the European Commission to fish in Norwegian waters off the island of Svalbard. The Efta surveillance authority was asked by the trawler owners, supported by the commission, to take the matter to the Efta court. It refused to do so in no uncertain terms.

If, notwithstanding the 1995 precedent for transition, there were principled objections to the UK's proposal to stay in the EEA in this way, the UK should make it clear that it will seek international dispute resolution, based on customary international law codified in the Vienna convention, to resolve any contentious issues.

The EEA agreement is a multilateral international treaty, and it is international law and international dispute resolution that is the appropriate arbiter, not European law and not the European Court of Justice (the supreme court of some of the parties, but not of others).

Clarifying the legal position over full EEA membership is urgent since it offers a third option to avoid the UK being boxed in between only a bad bespoke deal or exiting under World Trade Organisation rules.

It is not sufficiently realised in public debate that the draft withdrawal agreement at present anticipates the continuation of Britain's membership of the EEA, but with the UK in the EU pillar where the EU institutions are sovereign.

The UK would also be without many existing rights to participate in the relevant legislative processes. Nor would we be free to steer our own fishing and agricultural policy as the other three non-EU countries do; furthermore, the whole situation could potentially last indefinitely.

This part of the withdrawal agreement should be abandoned, along with our linked commitment to pay at least £39bn, and probably more, into EU coffers for a bespoke agreement with the UK that no longer exists.

The prime minister might be tempted to argue this can all wait until September or October and the outcome of the UK's negotiations with the EU are complete.

Such a delay would be another huge UK mistake, for we may need some months to establish our full EEA rights.

Politicians on all sides of the argument should stop frightening people by pretending the only choices for leaving the EU next March are a bespoke option or a World Trade Organisation option.

There is an alternative EEA option that can win the support of a majority of MPs. Namely to stay in the EEA single market as a non-EU country and in the Efta pillar for a limited transitional period from next year – a period long enough to reach an agreement with the EU on a Canadian-style trade agreement.

To stop foot-dragging, the withdrawal agreement would state the UK would leave the EEA having given the requisite 12 months' notice no later than the existing completion date in the agreement on December 31, 2020.

We must not hesitate to fight if necessary for our rights using international law.

Lord Owen was Labour foreign secretary in 1977-79 and co-founder in 1981 of the Social Democratic Party