

A&L Goodbody

Brexit

- How did we get here?
- What are the Lessons for Negotiators?
- Where do we go now?

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Three Questions

1

How did we get here?

2

What are the lessons for Negotiators (so far!)

3

Where do we go now?

Introduction



EU

- The focus has been, rightly, on the UK but the EU also has some responsibility
- The EU did not convince the UK electorate that remaining in the EU is worth it
- The EU has brought enormous benefits to its citizens whether as consumers, entrepreneurs, students, traders, patients or whoever but these benefits are either not understood or are taken for granted
- There is a need to keep convincing the electorate and citizenry in the EU....others outside the EU seem more convinced than some inside the EU....

EU

- But it was a long-standing stable Member State which served notice to leave...
- UK has been a Member State longer than the likes of President Macron have been alive

UK

- UK has lost an empire but not the memory of the empire – does it feel at home in an organisation where it could be vetoed by very small States?
- UK never really bonded with the EU
- UK has not seen the value of the EU – UK not invaded in a 1,000 years
- The world has moved on from the “each country alone” model
- Many in the UK media blamed and lampooned the EU

UK

- UK politicians blamed, not praised, the EU
- The EU had no champions in the UK
- The Referendum Process
- The Cameron Government gave reasons to vote against but never reasons to vote for remaining
- The Referendum Question

UK: The Question

- The Referendum Question was fatally flawed
- The “Remain” or “stay” option was fine - it was clear, ascertainable and unambiguous. One knew what the EU was and what it would be like to Remain.

UK: The Question

- The flaw was in the “Leave” question because it did not ascertain the destination to where the people wanted to go. The people were asked whether they wanted to “Leave” but they were not asked as to where they wanted to leave. Did they want to go to a destination near the EU or to go somewhere far away? Therefore no agreement in the UK on what was to come next
- No planning and information campaign – almost “we could not lose so why plan for that possibility?”
- “Do you want to remain as you are or do you want to be happy?”

UK: No decision on what it wanted

- The UK was like a large family who decided they wanted to go on holiday rather than stay at home but they never voted on the destination of that holiday; instead, they have ended up using valuable holiday time, never leaving home, because they are still arguing over where they would go and how far away they would go.
- Indeed, some family members are now so fed up with the debate, they are saying “just go somewhere, anywhere or go to wherever the loudest family member wants to go, just to shut them up!” It would have been better for that family and for the UK to first decide whether and where they collectively wanted to go before setting off on the journey.

UK: Northern Ireland

- Indeed, like the parents in the “Home Alone” film who were on the plane to Paris when they suddenly realized that their child Kevin was still at home and needed to be taken into account, many in the UK only remembered about Northern Ireland (and its unique situation) after they had voted to set out on the Brexit journey not understanding how they would accommodate that member of the UK’s family and its nearest neighbour (i.e., Ireland).

UK: Quality of the Debate

- Untruth and uncertainty are among the tangible traits of the debate and the debacle
- False equivalence and a desire for balanced debates (no matter how absurd or untrue the counter-argument) have clouded the truth.
- Social media and rolling broadcast media mean that untruths and lies can be broadcast, tweeted and spread like wildfire without corroboration or correction.
- Fact-checking (where it is done) is largely retrospective after the horse has bolted and neither contemporaneous nor prospective. These are difficult issues. There are shades of grey. It is not always so easy to reduce complex issues to simplistic binary questions.

UK: Binary Approach to the Outcome of Brexit

- For Brexiteers, leaving the EU would be a new dawn or a new Independence Day for the UK (or, at least, Britain or even just England)
- For Remainers, Brexit is more like a new dusk than a new dawn
- Hard v Soft Brexit: But it would be a Spectrum Brexit

Has “England” been here before?

- Henry VIII (not to be confused with Boris Johnson either in terms of stature or otherwise)
- wanted to break away from Rome (not to be confused with Brussels)
- so they could make their own laws (no confusion there)
- use their own language (no confusion there either) and
- follow their own path (little confusion there)

Mind the Gap

- That was the highest number of people ever to vote for a proposition in any UK referendum ever.
- While the UK does not have many nationwide referendums (this was only the third ever across the whole of the UK), the result was clear.
- Many commentators say that the result was close but the margin was not that tight - it was a difference of 1,269,501 people which is bigger than the entire population of Birmingham (the UK's second biggest city) or bigger than the populations of Liverpool and Manchester combined.
- Some commentators say that London and Scotland voted to Remain but 40.1% and 38.2% respectively of those who voted in each region voted Leave.
- While the rallying cry is that Northern Ireland voted Remain, the reality is that 44.2% of votes in Northern Ireland were for Leave.
- The gap across the UK was tight but not as tight as some on the Remain side would now believe.

How Did We Get Here?



Introduction

- No Single Answer
- Not a light switch moment – momentum over decades
- President Trump is not to blame
- Process not an event
- Brexit is a symptom of much bigger issues
- Brexit is a long standing issue even if the word is relatively new

UK and the EU

- Did the UK ever really join the EU?
- Semi-detached relationship
- A la carte membership
- De Gaulle
- No referendum before accession
- 1975 Referendum

UK and the EU

- Problematical relationship
- Thatcher – Major – IDS – Cameron – May – Johnson
- Wilson – Callaghan – Foot – Kinnock – Blair – Brown – Corbyn
- UK's perception of its position in the world

UK and the EU

- Loss of Empire – Need for a new identity
- People vote on what they feel, not always on what they are know
- Nostalgia – the 1955 Factor
- Independence

UK and the EU

- Becoming a Member State
 - > Step up
 - > Step down
- Contrasting Irish v UK experience (70% v 183%)
- 1975 referendum – lack of consistency
- 5 applicants, 1 departure
- Impact of Brexit process in France, The Netherlands etc.

Referendum Process

- Question
- Information
- Timing
- Campaigns
- By-election effect
- Financial crisis
- Experts

Referendum Process

- Immigration
- International organizations
- Arrogance?
- Trade
- Truth
- Simplification of messages: Northern Ireland (44%), Scotland (38%), London (40%)
- 1975 v 2016
- 2016 v 20XX?

Northern Ireland

- Why Northern Ireland?
- Is it really a big issue?
- Relationship dynamics?
- Has it been resolved?

Lessons for Negotiators

(so far!)



1. Field Experienced Negotiators

Field Experienced Negotiators

Jean Claude Juncker

- 1984 : Minister for Work and Employment in Luxembourg
- 1985 : President of the Council of Ministers (Employment)
- 1989-2009 : Minister for Finance
- 1995-2013 : Prime Minister of Luxembourg
- 2014- : President of the European Commission

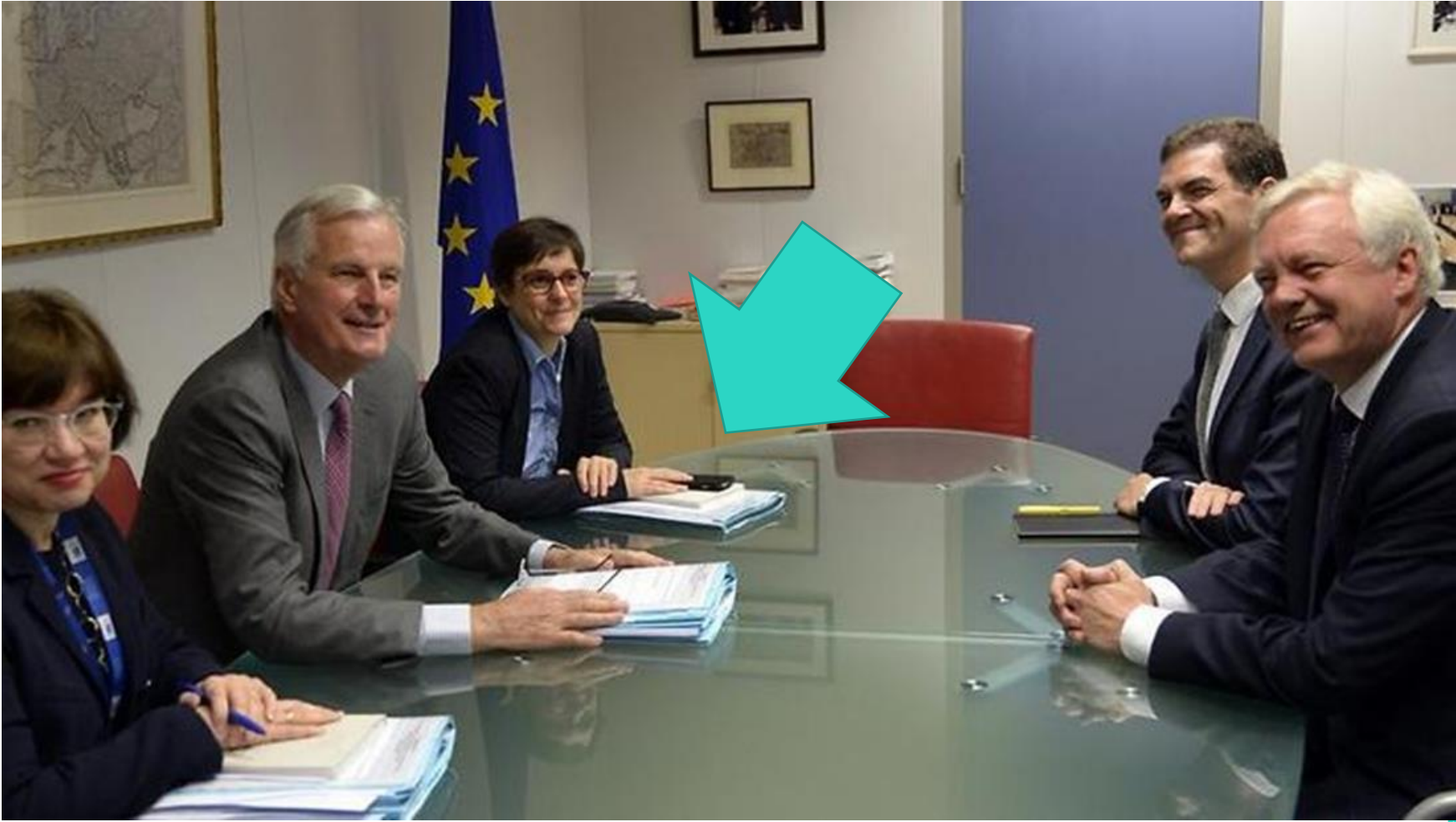
Field Experienced Negotiators

Michel Barnier's Ministerial CV before the Brexit Negotiations

- Minister for the Environment
- Minister for European Affairs
- Minister of Agriculture and Fisheries
- European Commissioner for Regional Policy
- European Commissioner for Internal Market and Service

2. Be Prepared





3. Don't Assume the Outcome

Who is Likely to Win? Taking Stock



1 Side

1 Institution

1 Language

Experienced in Leaving Negotiations

Who is Likely to Win? Taking Stock



1 Side
1 Institution
1 Language
Experienced in Leaving Negotiations



27 Sides & Several Factions
Several Institutions
24 Official Languages
No Member State has ever left
Enormous Diversity

4. Get the Timing Right

Timing

- 2016-2017 Timeline
- Summer Time Migration Crisis
- Immediately after a General Election
- A Thursday
- Late June

5. Have a Clear Vision of what you Want



6. Second Mover Advantage

The early worm is often
eaten by the bird.....the
second mouse gets the
cheese.....

7. Your Word is Your Bond: Be Consistent

■ Remain Consistent throughout the Negotiations

- UK has been giddy
- UK has sought to vary deals
- Remain true to your word!



- Remain Consistent throughout the Negotiations
- 4 December 2017
- 8 December 2017
- March 2018
- November 2018
- 29 January 2019

- **Clichés only get you so far....**
- **“Brexit means Brexit”**
- **“Strong and Stable”**
- **“Red, White and Blue Brexit”**
- **“Deeper Partnership”**
- **“Regulatory Alignment”**
- **Fudges work occasionally but not as a mainstay strategy**
- **Etc etc**

- **Remain Consistent (where possible) throughout the Negotiations**



- July 2016 – October 2016 Tory Party Conference – March 2017 Article 50 triggering – September 2017 Florence – December 2017 Brussels 1 and 2 – November 2018 Draft Withdrawal Agreement/Nebulous Moments – 29 January 2019 – Last Week – Next Week?

8. Remember you are being Watched

- You are always being watched and find friends



- You are always being watched



9. Lock Down Your Valuables: Cover all Angles

Once bitten, twice shy

ARTICLE 8

Access to networks, information systems and databases

Unless otherwise provided in this Agreement, at the end of the transition period the United Kingdom shall cease to be entitled to access any network, any information system and any database established on the basis of Union law. The United Kingdom shall take appropriate measures to ensure that it does not access a network, information system or database which it is no longer entitled to access.

10. Keep Your Big Guns in Reserve

- **Keep the Big Guns in Reserve**



11. Compliment your Opponent where it is Tactically Useful

- **Compliment your Opponent where it is Tactically Useful**



**Mrs May is a
tough
negotiator**

- **Compliment your Opponent where it is Tactically Useful**



I hope the Daily Mail picks this up...I don't want any more changes

12. Be Friendly where Possible



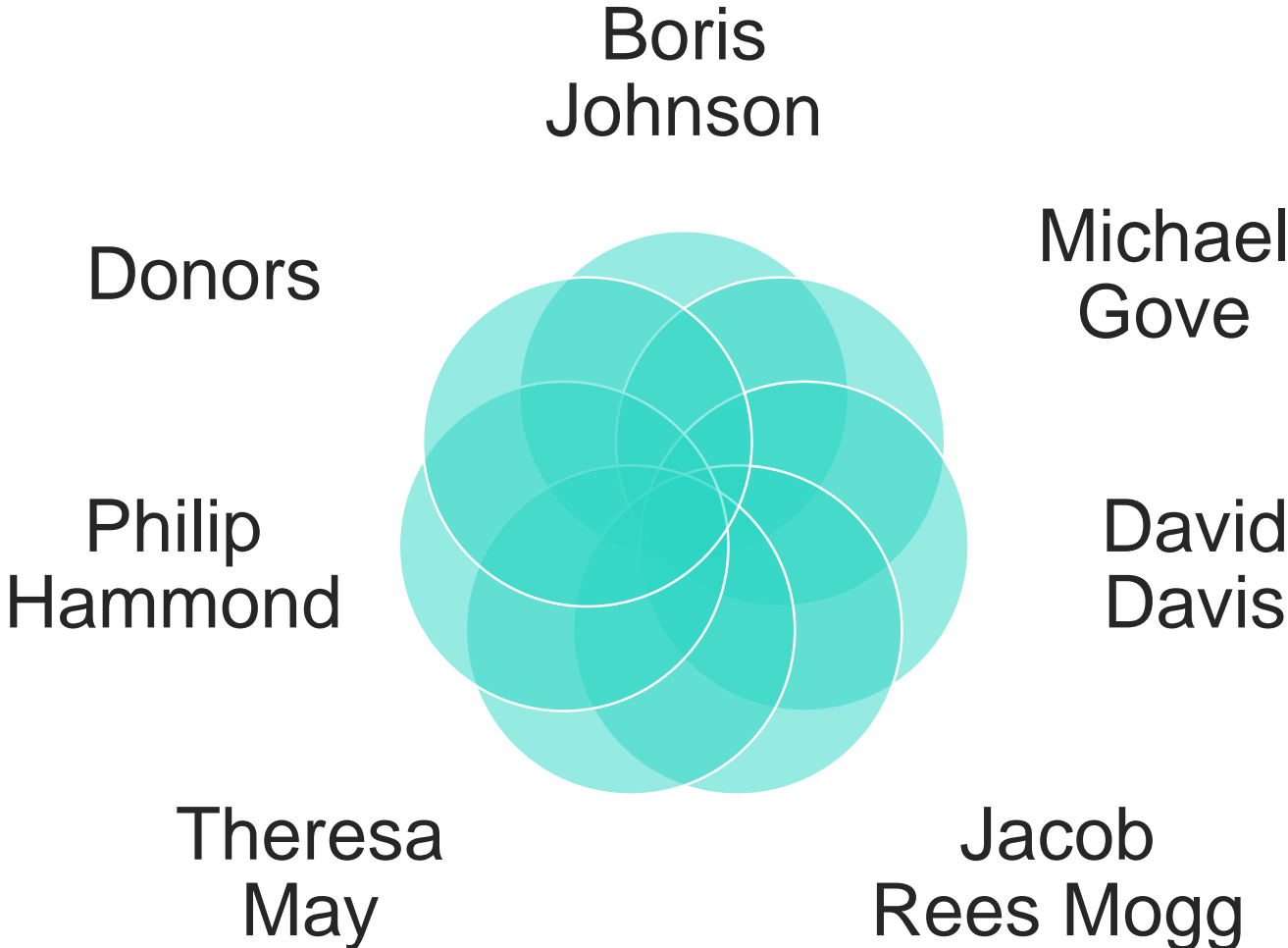


- Do Not Insult Someone whom you may Need One Day
- **David Davis**
 - > refers to Guy Verhofstadt stating "Get thee behind me, Satan!"
 - > calls Michel Barnier "silly" over his stance on Brexit negotiations
- **Nigel Farage** warned Jean-Claude Juncker that his “bloody rude” behaviour and attempt to “bully the Brits” could force Britain to walk away from Brexit talks within months

13. Get Your Team Aligned

What can we learn as lawyers from the Brexit Negotiations?

Get your team aligned



14. Plot and Re-Plot where everyone is on the Negotiation

Know not only where your enemies are but also where your “side” is on every issue



Know not only where your enemies are but also where your “side” is on every issue



**15. Read the Small Print (notice
the capital letters!)**

What can we learn as lawyers from the Brexit Negotiations?

- Pay Attention to the Drafting – notice the “Internal Market” and the “internal market”

45. The United Kingdom respects Ireland's ongoing membership of the European Union and all of the corresponding rights and obligations that entails, in particular Ireland's place in the Internal Market and the Customs Union. The United Kingdom also recalls its commitment to preserving the integrity of its internal market and Northern Ireland's place within it, as the United Kingdom leaves the European Union's Internal Market and Customs Union.

16. Take Advice and Keep your Counsel



17. There must be Enough in the Outcome for Everyone

18. Watch out for the Small Signs

What can We Learn as Lawyers from the Brexit Negotiations?

■ Watch the Other Side and *understand* the other side – what do they need and what are they saying?



19. Understand the bonds that link some of your interests on the other side of the table....

Armistice Day in Paris on 11 November 2018



Armistice Day in Paris on 11 November 2018

Notice President Macron's Right Hand



Armistice Day in Paris on 11 November 2018

“To think...we're the married couple!”



Understand the relationships on the other side of the table



20. Your enemy's friends are your enemies but your enemy's enemies are your friends?

21. Control even your own side of the table

French and German Reaction to Brexit

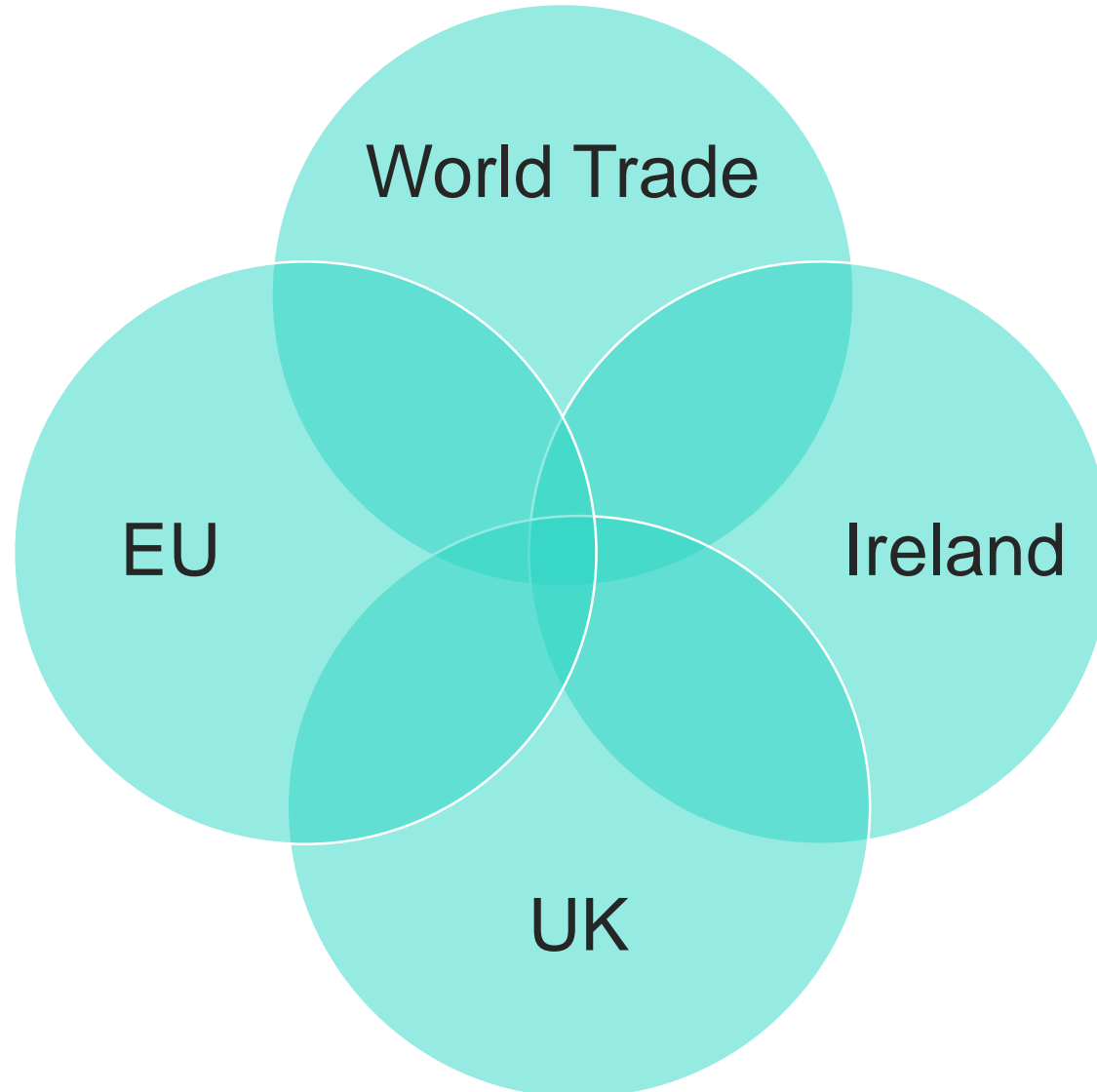


22. Understand the Other Side of the Table – You have to Win Them over, not Yourselfes

FINAL WORD

- **THE FUTURE**

FINAL WORD



**Where
do we
go from here?**



Background

- It's going to get worse.
- How could it? 3.5 years. 12 years.
- Enjoy the war, the peace will be terrible
- Withdrawal Agreement v Relationship Agreement

Background

- UK needs to clarify its position. What it wants. What it needs. That will be very difficult - even potentially impossible.
- Ramifications worldwide
- So much going on at the same time
- Will it really boost the UK?
- Each move has implications (Gibraltar blockaded for 13 years)

UK

- Two tribes: 19 October 2019 v 3 April 1982
- UK 16% of the EU GDP - table tennis ball v basketball
- 47% of the UK's trade is with the EU. Nearest. Language. UK's global trade: 11% to Germany, France/Netherlands/Ireland 5% each. 51% of the UK's imports are from the EU. UK imports more from Germany than from the US or China.
- Most Labour constituencies voted to leave but two thirds of Labour voters voted to Remain.
- Trade talks - 500m people v 60m people.
- Common law

UK

- The Californian economy is larger than that of the UK
- Trade talks are long and intensive.
- While the UK was working on the Brexit negotiations, the EU concluded trade deals.
- Trade wars
- Ireland will be difficult... But Ireland is just a symptom.
- Human rights – e.g., women’s rights
- Common law

EU

- We must not forget the Second World War. The EU exists largely because of that war. Europe brought the world into two world wars. 45 minutes.
- We must not forget the unifying force of the EU. France and Germany, Poland and Romania.
- Will the UK leave - Quebec - Bobby Ewing - Who Shot JR? NATO. UNESCO.
- Article 49
- Is Brexit inevitable? No.
- Brexit is difficult.
- Services
- People aren't always rational - Nissan workers in Newcastle.

EU

- Cliches Hard or Soft. Spectrum Brexit. Mirror Brexit. Bifurcation.
- EU as a lobster pot.
- Careful about future members
- How little is understood about the EU
- History can go backwards
- Watch out for the Danger Signs

EU

- Has Brexit been Good for the EU?
- Sovereignty emphasized – Wightman judgment
- Explain itself
- Inform its citizenry – “EU Loves you”
- Konrad Hermann Theodor Schiemann
- The Nobel Prize and “45 minutes”

EU

- When the UK wants to leave, take notice....

EU

- When the UK wants to leave, take notice....
- “EU” have been warned...



Thank you



Questions?

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