

'Britzerland': the problem of dispute resolution post-Brexit



*Both the UK and Switzerland are trying to negotiate a dispute resolution mechanism that would give the European Court of Justice the final word on the interpretation of EU law. **Carl Baudenbacher (Monckton Chambers and former president of the EFTA Court)** looks at the inspiration for this arrangement – the EU-Ukraine Agreement – and explains why it is a totally unsuitable framework for both the UK and Switzerland. He argues that the EFTA Court would be a far better place to resolve disputes.*

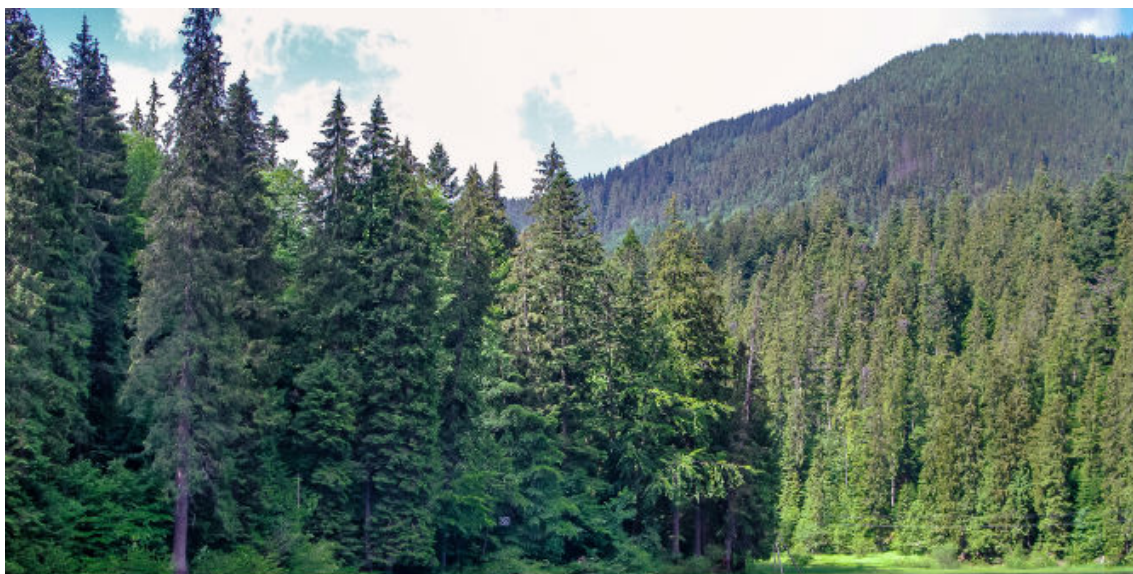
The arbitration mechanism of the White Paper and the draft framework agreement

The UK and Switzerland have so far tried to regulate their future relationship to the EU completely independently of each other. So it is all the more noteworthy that the draft for a so-called 'framework agreement' between Switzerland and the EU, and the UK proposal for a post Brexit EU-UK Association Agreement as set out in the Chequers plan and the White Paper, provide for essentially the same dispute resolution mechanism.

According to the White Paper, both contracting parties should have the option of referring a conflict to an "independent arbitration panel". Where the UK and the EU agreed to retain a common rulebook, the UK would recognise the Court of Justice of the European Union ("ECJ") to be supreme on the interpretation of EU law. In these instances, there should thus be the option to refer questions to the ECJ. The Swiss government has agreed to the same type of conflict management. And as with the UK, the Swiss government claims that an arbitral tribunal would be free to decide whether to make a reference to the ECJ. It also wants people to believe that large parts of the cases would concern Swiss law.

The arbitration mechanism of the EU-Ukraine agreement

An arbitration mechanism is also contained in the Association Agreement between the EU and Ukraine. According to Articles 306 et seqq. of that treaty, a dispute between the contracting parties may be referred to a three-member arbitration panel by either side. However, under Article 322 the arbitration panel is obliged to request a binding ruling from the ECJ where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1 or of a provision "which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law".



Synevyr lake, Ukraine. Photo: [Vladimir Klud](#) via a [CC-BY-NC 2.0 licence](#)

Paragraph 1 mentions disputes concerning the interpretation and application of a provision relating to regulatory approximation, i.e. technical barriers to trade, sanitary and phytosanitary measures, customs and trade facilitation, establishment, trade in services, and electronic commerce, public procurement or competition. I understand the expression “which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law” as meaning identical in substance to EU law. This means that essentially all significant questions must be referred to the ECJ.

Would the UK and Switzerland get a better deal than Ukraine?

It is obvious that the arbitration models of the Chequers plan and of the Swiss-EU framework agreement were inspired by the Ukraine Agreement. It is, however, unlikely that the EU will agree to an arbitration model that is more favourable to the UK or to Switzerland than the Ukraine model is to Ukraine.

Arbitration models in agreements between the UK and the EU and between Switzerland and the EU would in all probability be submitted to the ECJ for approval. In this context, we should not overlook the fact that the Commission, as the EU’s negotiator, has repeatedly agreed to a dispute resolution mechanism that was ultimately rejected by the ECJ (see in particular Opinion 1/91 on the First Draft of the EEA Agreement; Opinion 1/09 on a European and EU Patents Court; Opinion 2/13 on Access of the EU to the European Convention on Human Rights).

In all important cases, the ECJ – ie the court of the other side – would therefore take the binding decision. Neither a British nor a Swiss judge would sit on the ECJ.

Amateurish bricolage: the Ukraine model doesn’t fit

The EU-Ukraine treaty was concluded in a specific historical and political context. When it entered into force, EU Commission President Jean-Claude Juncker said, inter alia:

“With the entry into force of the Association Agreement with Ukraine, the European Union is delivering on its promise to our Ukrainian friends. I thank all those who made it possible: those who stood on Maidan and those who are working hard to reform the country for the better.”

As a withdrawing EU state and the world’s fifth largest economy, the UK is in a completely different situation – not to mention the significance of the common law and the UK’s position in defence and security. The Swiss economy is also highly developed and the degree of economic integration with the EU is immense.

The attempt to break elements out of the Ukraine agreement and transplant them into agreements concluded by the EU and the UK or Switzerland is amateurish bricolage that runs counter to all the rules of comparative law. It was French social anthropologist Claude Lévi-Strauss who called those who construct something new from any material they find “bricoleurs”.

A solution based on the model of the Ukraine Agreement would have a substantially detrimental impact on legal certainty. The arbitration procedure itself would take time and would be in addition to the processing time of cases before the ECJ.

British people and businesses have enjoyed access to a European Court for the last 45 years. The Ukraine approach would cut that off. Whether a dispute would go to arbitration would be a matter for HM Government to decide. Swiss citizens and economic operators never had access to a European Court. Dependency on the grace of the government has passed into their flesh and blood. The situation is at odds with what we understand a direct democracy to be.

The court model of the EEA Agreement

The EEA Agreement gives the associated states the right to have their own independent supervisory body and their own independent court. It is based on a two pillar system, with the ECJ as one pillar and the EFTA Court the other. Surveillance of the EU pillar is in the hands of the European Commission, while in the EFTA pillar this task lies with the EFTA Surveillance Authority.

Experience shows that under such a system the most important cases concerning non-EU states are decided by the EFTA Court. The EFTA Court has in the past upheld values that are important for 'Britzerland', such as free trade, competition, and fair taxation. With a Swiss and one or two British judges, this orientation could become even stronger.

The EEA/EFTA states of Iceland, Liechtenstein, and Norway have retained their sovereignty in the fields of foreign policy and foreign trade, agriculture, fisheries, taxation, and currency.

Conflicts between the ECJ and the EFTA Court are in practice resolved by judicial dialogue between the two courts, no matter what the written provisions foresee. The first 24 years of the EFTA Court's existence show that both courts may yield their position. This dialogue is similar to that conducted by common law courts around the world. The relevant figures make it clear that the EFTA Court has a disproportionate influence on the ECJ.

The EU has never ruled out British or Swiss EEA membership in the EFTA pillar. Nor has it excluded a "docking" or "third pillar" solution which would give Britain and Switzerland the right to conclude tailor-made agreements with the EU that institutionally would be subject to the EEA two pillar system.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

[Professor Dr. Dr. h.c. Carl Baudenbacher](#) is former President of the EFTA Court and now a tenant at Monckton Chambers, London.