Voting on the Constitution

What should this country know about the consequences?

Daniel Hannan

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Introduction

What will happen if Britain votes against the EU Constitution while most or all of the other countries opt to ratify it? Will Europe's leaders drop the whole idea in deference to the British? And, if not, where would that leave Britain? It would not be able to stay where it is within the existing treaties, because those treaties would no longer exist: they would have been collapsed into the foundations of the new Constitution. At the same time, there would be no legal mechanism for excluding Britain from the existing *acquis communautaire* – that is, the accumulated pile of past EU legislation.

What, then, would the UK's status be? Most EU heads of government and Commissioners are clear about this matter: Britain, they aver, would be offered a form of associate status with the future, constitutionalised EU, based on membership of the common market but not of the new political structures. One Commissioner has gone so far as to specify that Britain would be offered a status similar to that of Switzerland.

This paper explores the likely consequences of a 'no' vote. The first section examines why the Constitution is different from past treaties, and why keeping the *status quo* is not an option for Britain. Chapter II looks at the mechanisms which the EU has evolved to circumvent a single veto, and Chapter III shows how these mechanisms could be activated to allow the Constitution to come into effect among the majority of states even if Britain – accompanied, perhaps, by one or two other peripheral members, such as Denmark – had voted against it. Chapter IV then considers what options would be available to Britain in such circumstances. It adumbrates the vital interests that Britain would wish to protect *vis-à-vis* the other members, and contemplates what kind of structures would allow those interests to be safeguarded. In particular, it examines the relations with the EU enjoyed by the four EFTA countries – Norway, Iceland and Liechtenstein, which are also EEA members, and Switzerland. It shows why these countries have managed to turn the situation to their advantage, enjoying the benefits of the single market without many of the costs of compliance. Finally, Chapter V demonstrates that, if it were to vote 'no', Britain would be able to negotiate a far more advantageous policy than these countries with the states that chose to go ahead with the Constitution.

I
Constitution or Constitutional Treaty?

The European Constitution is precisely that: a Constitution. This truism would hardly need stating, but for the fact that supporters of the Constitution in this country, including the Prime Minister and his Cabinet, always make a point of referring to it as 'the constitutional treaty'. Their intention is evidently to soothe. This document, they imply, is simply the latest in a series of EU accords stretching right back to the Treaties of Paris and Rome in the 1950s. There is nothing unusual or alarming about it. By contrast, Euro-sceptics invariably talk of 'the Constitution', so as to emphasise that it is qualitatively different from what has preceded it. Indeed, a politician's verbal preference for 'Constitution' or 'constitutional treaty' is a handy short-cut for discerning his allegiances.

To settle who is right, one need not read very far. Indeed, one need not read beyond the title page where, in large letters, one finds: 'Treaty Establishing a Constitution for Europe'. The treaty is, as it were, the delivery mechanism; the constitution the warhead.

This distinction is critical. Until now, the EU has derived its authority from a series of intergovernmental accords. Its members have been bound together as co-signatories of international treaties, and have agreed to cede certain powers to the institutions that those treaties create. On the day the Constitution enters into force, however, all existing EU treaties will dissolve.[1] From that moment, the EU will cease to be an association of states and become a single polity, deriving its legitimacy from its own founding charter.

It is not the purpose of this paper to discuss the merits of the Constitution. The arguments on both sides are already being aired and, no doubt, will be thoroughly rehearsed in the months to come. But it is essential to understand, at the outset, that what is at issue is a new legal order. Until now, when a state has baulked at parts of a new EU treaty, it has always had the option of staying where it is. With the constitutionalisation of the EU, that option effectively disappears.

II
Circumventing a Veto

When the EU began life as a treaty-based organisation, the legal position of a non-signatory state was clear. It could always deploy its veto. A treaty could come into force only following the deposit of the instrument of ratification in the vaults of the Italian government by the last signatory state. No unanimity, no deal.

In practice, however, vetoes were almost never deployed. Faced with determined intransigence by one state, the other members would find means of pushing ahead on their own. This could happen in one of three ways: by the granting of opt-outs; by the activation of 'enhanced co-operation' provisions; or, *in extremis*, by the setting up of new legal structures outside the existing treaties. It is worth examining each of these three options, for they shed a great deal of light on how the EU operates.

First, the opt-outs. The concept of a formalised derogation was dreamed up during the Maastricht negotiations in 1991, when it became clear that the British Government would not accept either the single currency or the social chapter. The other 11 governments were determined to push ahead with both these initiatives, but did not want Britain to veto the entire treaty. Accordingly, they evolved a mechanism for proceeding without Britain. John Major's Government set great store by the EMU and Social Chapter 'opt-outs'. But a close reading of the text reveals that this is a misleading phrase. What happened was not that Britain was offered a waiver from some existing initiative; rather, Britain gave its permission to the other 11 states to use the EU's common institutions among themselves. It was not so much an opt-out for Britain, as an opt-in for everyone else. This state of affairs is revealed most clearly in the clause on social policy. The relevant article refers to the 1989 Social Charter, lists the 11 countries that want to adopt it, and then goes on to:

> authorise those eleven Member States to have recourse to the institutions, procedures and mechanisms of the Treaty, for the purposes of taking among themselves and applying as far as they are concerned, the acts and decisions required for giving effect to the above-mentioned Agreement.[2]

This fact became politically significant when the Government was struggling to push Maastricht through the House of Commons. Many Euro-sceptic Tories were talked out of voting to delete this clause on the grounds that scrapping it would 'impose the social chapter on Britain'. In fact, it would have done nothing of the kind; it would have prevented the other states from adopting the Social Chapter themselves.

Not that the other states showed much gratitude for being allowed to proceed. Shortly after the treaty's ratification, the 48-hour week was imposed on the United Kingdom. When British ministers complained that they were not covered by EU social laws, and that the opt-out had been framed in the clearest language lawyers could devise, they were told that the measure was health and safety regulation, and therefore the opt-out did not apply. In 1997, Labour formally acceded to the Social Chapter. It cannot now withdraw without the unanimous consent of all the other members. There is an important lesson here: opt-outs often turn out to be ephemeral. They can be undermined by the rest of the EU and, once abandoned, they cannot be restored.

A different form of derogation was granted to Denmark following its rejection of Maastricht in a referendum in June 1992. At a summit in Edinburgh that December, four new opt-outs were offered to the Danes, covering the euro, EU citizenship, defence and home affairs. These waivers were not contained in the treaty itself (that would have required all the other member states to ratify the new version) but tacked on in the form of a coda. None the less, they were enough to persuade the Danes to change their minds in a second referendum held in May 1993.

Euro-enthusiasts drew one lesson from the ratification of Maastricht: that never again should closer integration be vulnerable to a single veto. Accordingly, they set to work devising a method whereby the more federally-minded states could push ahead on their own, without needing the sceptics' permission. This method was agreed at the Amsterdam Treaty four years later, and strengthened at Nice.

The Amsterdam Treaty created the second way in which a veto can be circumvented, a mechanism for 'enhanced co-operation', allowing sub-groups of member states to pursue deeper integration among themselves,

provided certain criteria were met: the new initiative must apply to a majority of member states, it must not prejudice the rights of non-participants, and it should be open to all states to join at a later date.[3] Nice toughened up the wording slightly, making it the mechanism open to any eight states, instead of half of all members.[4] The clause has been carried over into the new Constitution.

If all else fails, it is always open to the integrationist states to set up structures of their own outside the EU: the third option. The outstanding example here is the 1985 Schengen Agreement, which created a border-free zone among its signatories. Schengen originally covered France, Germany, Belgium, the Netherlands and Luxembourg, with Italy acceding in 1990 and Spain and Portugal in 1991. Over the years, Schengen and the EU have become interleaved. From the first, the Schengen accord specified that 'the provisions of this Convention shall apply only in so far as they are compatible with Community law'.[5] Under the Amsterdam and Nice Treaties, the EU has taken over a great deal of the Schengen *acquis*, establishing common rules on visas, residence rights, immigration, justice and policing. Meanwhile, the United Kingdom has opted into some parts of Schengen, in particular those to do with police co-operation, while retaining its border controls. Yet, for all this, Schengen has a separate legal basis from the EU. Indeed, it has a separate membership: Britain and the Republic of Ireland are in the EU, but not Schengen; Norway and Iceland are in Schengen, but not the EU.

III
The Implications of Voting 'No'

From all these precedents, one important point emerges clearly: a single British veto will not be enough to stop the Constitution. Where there is a political will to push ahead, a legal way will be found. As a final resort, the other members could create a separate structure *à la* Schengen. They could, in effect, withdraw from the EU as it currently stands, and then recreate it on the basis of the new Constitution, leaving only Britain in the old Union. Realistically, however, it will not come to this: other, less dramatic ways will be found to get around a British 'no' vote.

First, though, it is worth noting that Britain is not the only state that might reject the Constitution. At the time of writing, 11 states have committed themselves to a referendum, and a 'no' vote is a possibility in at least four of them: Britain, Denmark, Poland and France. The countries that are planning to conduct a plebiscite are listed in Table One, along with the likely date of the poll.

Table One: Letting the People Decide

MEMBER STATE	LIKELY DATE OF REFERENDUM
Belgium	Early 2005
Czech Republic	June 2006
Denmark	Undecided
France	May 2005
Republic of Ireland	Undecided
Luxembourg	Undecided
Netherlands	Early 2005
Poland	Late 2005
Portugal	Early 2005
Spain	February 2005
United Kingdom	Undecided*

** There are unofficial indications that the British referendum is scheduled for March 2006*

No one in Brussels believes that a single British 'no' would derail the project. There are, it is generally understood, 'noes' and 'noes'. Certain countries are more or less expected to vote against ratification. A British 'no' would be put down to isolationism; a Danish 'nej' to small-mindedness; a Polish 'nie' to not knowing the ropes. The markets have, as it were, discounted these results in advance. But a 'no' vote in one of the founder states – France, say, or the Netherlands – would make formal implementation impossible. Not that such a setback would send EU leaders scurrying back to the drawing board. On the contrary, as we shall see, chunks of the Constitution are already being implemented, even before the first ballot has been cast. But it would prevent the official adoption of a new Constitution for the moment, forcing the EU to pursue further harmonisation through the existing treaty-based structure.

There are, then, three possible scenarios:

- Scenario one: all 25 states ratify in accordance with their own constitutional procedures. The Constitution then comes into force in November 2006 without any complications.
- Scenario two: there is a *grand non*. One of the core states – France is probably the only realistic candidate – rejects the treaty by such a margin as to make a second referendum in that country pointless. In this case, the Constitution will fall, although many of its provisions will be implemented anyway following Council of Ministers meetings.
- Scenario three: the majority of states accept the treaty, but a couple of peripheral states – let us say Britain and Denmark – persist in voting 'no'.

It is this third scenario that interests us here. And, although opinion polls are of limited value this far in advance, it currently seems the likeliest of the three outcomes. In such a situation, it is overwhelmingly likely that the Constitution will come into effect among the majority of states, leaving the non-signatories to negotiate some form of associate membership.

Why, then, will a petit non not halt ratification? For three reasons: one legal, one political and one diplomatic. First, the possibility of a 'no' vote was anticipated by the framers of the Constitution, who cleverly laid down a trigger to be crossed when 20 out of the 25 states have ratified:

> The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four-fifths of the

> Member States have ratified it and one or more of the Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.[6]

The intention of this clause was made clear at the time: in the event that one or two countries voted 'no', the European Council (that is, the heads of government) would declare that the Constitution was coming into effect with or without the recalcitrants. The hope is that this will be enough to persuade people in those countries to switch their votes. But, failing this, the Constitution will go live, with an option for the 'no' voters to join at a later date. (The two-year deadline, by the way, falls on 29 October 2006.)

Whatever the state of public opinion, all 25 governments are in favour of the Constitution. Experience to date suggests that, faced with a 'no' vote at home, governments rarely respect the verdict of their people, colluding instead with the other member states to reverse the result. This happened in Denmark in 1992 over Maastricht, and in the Republic of Ireland in 2001 over Nice. It also seems to be happening in both Sweden and Denmark with regard to the euro: successive administrations have declared their continuing ambition to join, despite thumping 'no' votes from their constituents. Remember too, that several of the governments would, in all likelihood, have recently secured 'yes' votes in their own referendums. How could they explain to their own domestic electorates that the British result was enough to wipe out their own?

Even if the British Government accepted the result – if, for example, the Conservatives were to win the next election, hold a referendum, and then go to Brussels armed with the mandate of a 'no' vote – the other member states would still have various means at their disposal to push ahead, either by invoking 'enhanced co-operation', or by setting up an alternative legal structure or, indeed, simply by quietly implementing what the Constitution proposes.

This point brings us on to the *second* awkward truth. Large parts of the Constitution will be implemented with or without a formal legal base. Indeed, this is already taking place. There was a minor storm in Britain when, in August 2004, the Commissioner-designate, Peter Mandelson, announced that a British 'no' vote would not be treated as final. What was less widely appreciated, at least in Britain, was that all the incoming

Commissioners were saying the same thing. Indeed, doing so was a condition of their appointment. During the hearings, each nominee had the following question formally put to him by MEPs:

> Which are in your view the actions which the Commission can already undertake without waiting for [the Constitution's] formal ratification?

One did not need to be familiar with Brussels-speak to catch the subtext: how much of this can you ram through anyway in the event of a 'no' vote?

The answers were illuminating. The German, Günter Verheugen, claimed that 'the Commission should take into account the perspective of the new Constitution, without prejudging the result of national ratification procedures.' The Italian, Rocco Buttiglione, suggested that 'the existing Treaties offer the possibility of anticipating the goals of the Constitution.' The Pole, Danuta Hübner, urged 'where innovations brought by the Constitution require implementing measures based on a Commission proposal, the Commission should not await the formal entry into force of the Constitution to start the necessary preparatory work.'*

It was apparent that many of the Commissioners' replies had been drafted by the same officials. These officials have already set to work making good their masters' pledges. For example, one of the more contentious provisions in the Constitution is the proposed creation of an EU Foreign Ministry and diplomatic service – a process that is already well underway before a single ballot has been cast in a single referendum. At the same time, Interior Ministers have anticipated the Constitution by pushing ahead with the so-called 'Tampere II' agenda, which strengthens the common immigration and asylum policies and harmonises elements of national jurisprudence. Most controversial of all is the incorporation of the Charter of Fundamental Rights and Freedoms, which will subject new swathes of national life to the jurisdiction of the European Court of Justice. Without even waiting for the

* Some further remarks by Commissioners on the same lines include:
'Instead of standing idle until the formal entry into force of the Constitution, we should start the necessary preparatory work wherever appropriate' (László Kovács, Hungary); 'The actions of the Commission can already be guided by the spirit of the Constitution.'(Stavros Dimas, Greece; Viviane Reding, Luxembourg; Dalia Grybauskaité, Lithuania; Olli Rehn, Finland; Neelie Kroes, Netherlands; Peter Mandelson, UK.)

formal signature of the Constitution, let alone its ratification, the ECJ has indicated that it will treat the Charter as justiciable.[7] The British Government, alone in Europe, continues to maintain that the Charter will not have binding force; but it is the ECJ, not British ministers, who will settle the question.

There is nothing especially new about the EU's readiness to act without a formal legal basis. On the contrary, it is common practice for Brussels to extend its jurisdiction into a new field of policy and then, years later, to regularise that extension in a treaty. The Single European Act put a belated stamp on the EU's intrusion into environmental policy. Maastricht formally recognised the common foreign policy, which had been launched unofficially in the mid-1980s. Amsterdam and Nice retrospectively authorised a great deal of harmonisation in the fields of criminal justice and immigration.

In the words of Emile Noël, the Commission's most senior official for several decades, 'Blanks in the treaties may be filled by the institutions'.8 Indeed, the British obsession with the exact wording of the treaties is seen in Brussels as quaint Anglo-Saxon literal-mindedness. Few of the EU's leaders believe that the dots and commas of the law should be allowed to stand in the way of a political imperative. The fact is that, even if the Constitution did not contain a mechanism for getting around a 'no' vote, a way would be found. For the response to such a vote will be political, not legal.

Let us turn, then, to the third brute fact. The other states, or at any rate the most important among them, are set on this project. They have invested two years in the drafting process, and a further year in intergovernmental negotiations. It is simply inconceivable that, faced with a British 'no', they would tear up the draft and start all over again. The leaders of the EU have made clear their position on the subject in recent months. Romano Prodi, President of the European Commission, said:

> If you [British] say "no" to this, it is not the same thing politically as saying "no" to a treaty written in one night. I think the political consequences would be heavy.[9]

The German Chancellor, Gerhard Schröder, has commented:

> We must find an arrangement by which the Constitution can still come into force if the process of ratification in a country has not yet been brought to a conclusion. [10]

and, Jacques Chirac, the French President, has opined that:

> England would not have to leave the EU. But if, finally, the English said 'no', and the other Europeans said 'we want to go ahead', then we would have to find an accommodation. In that case, England would not be at the core of the system, but at its margin.[11]

Most EU heads of government, and almost all European Commissioners, have said similar things. These quotations may not have legal status, but they have something far more important in European terms: political force. It is, after all, these men, or successors who think as they do, with whom a British government would have to negotiate in the event of a 'no' vote.

When put on the spot, most EU leaders talk of offering some sort of special arrangements to non-signatories, whereby they would remain within the single market, but be excluded from most common European political structures. Valéry Giscard d'Estaing, for example, the Constitution's father, has said that, while Britain would not have to leave the EU, it would perforce have excluded itself from the new structures of European decision-making. When pressed at a meeting of the European Parliament's Constitutional Affairs Committee on what this would mean in practice, he eventually said that Britain, and any other state that refused to sign, would be offered a form of 'associate membership', based on economic but not political integration.

The EU spokesman who has gone furthest in spelling out precisely what this would involve is Mr Prodi's Trade Commissioner, Pascal Lamy, in May 2004. Asked outright what would happen to Britain if it voted 'no', he replied that, in such circumstances, the United Kingdom would be offered a status similar to Switzerland's, adding:

> Switzerland has to match each and every bit of what we do, so they have lost sovereignty in many ways, but they keep the formal side of sovereignty, and they can remain neutral, and it works.[12]

As we shall see, Mr Lamy is wrong to say that Switzerland must 'match each and every bit of what we do'. Like its three partners in the European Free Trade Area (EFTA), Iceland, Norway and Liechtenstein, it enjoys a great deal of freedom of action. But there is every reason to hope that Britain could strike a more favourable deal than the EFTA four.

IV
Britain's Interests and its Options

Let us now consider the scenario sketched out earlier. Most member states have decided to adopt the Constitution. Britain, perhaps accompanied by Denmark and possibly Poland, votes 'no'. Remaining in the EU on current terms is not an option, since the old EU no longer exists: the former treaties have all been folded into the new Constitution. Britain is therefore left to negotiate a new deal, allowing the other states to integrate more closely while remaining bound to them through the constant nexus of the free market.

In such a situation, Britain would have numerous objectives:

- To preserve its access to European markets
- To enjoy free trade arrangements with non-EU states
- To attract inward investment from EU and non-EU sources by managing a competitive and deregulated economy
- To maintain its military and diplomatic alliances with Nato, the Commonwealth and the United States
- To minimise its budgetary contributions to the EU
- To control its territorial resources, including energy and fisheries
- To suit agricultural policy to the needs of its own farmers
- To co-operate with its neighbours on cross-border issues, such as environmental pollution
- To work with the rest of Europe in the fight against international crime and terrorism
- To restore the supremacy of Parliament

Is it possible to secure most, or even all, of these goals? Would the other member states be content to let Britain participate only in those common policies that suited it? While it is impossible to answer these questions definitively, one can learn from looking at the way in which some non-EU states maintain their position within Europe's markets and their voice in Europe's councils. The four EFTA countries, in particular, come close to meeting these objectives, *mutatis mutandis*. In reality, there is every reason to assume that Britain could secure an even more attractive settlement than the EFTA states, both because it is an existing member of the EU, and

because it is a far larger economy – one, incidentally, that has run a huge trade deficit with the other member states over the 30 years of its membership. So Britain should look on EFTA as, so to speak, the baseline: minimum terms, on which it would aim to improve.

Different Levels of Association

Both sides of the European debate tend to present the question as a Manichean choice. Britain must choose between independence and submersion – or, if you prefer, between isolation and participation. In reality, though, things are not so simple. European integration is not an all-or-nothing decision. There are shades of grey, degrees of association. The European Economic Area (EEA) forms a kind of penumbra around the EU, drawing three more countries into the single market while excluding them from the EU's political institutions. One step further away stands Switzerland, which is a member of EFTA but which relies on bilateral mechanisms to keep it in the single market. Following Commissioner Lamy's advice, we shall look in detail at both the EEA and Swiss models shortly, but these are not the only available options. Several other countries stand at one further remove from the EU, but none the less enjoy substantial participation in the common market. For example:

- Turkey is inside the customs union, and participates in certain joint projects, but is outside the main EU framework
- Romania and Bulgaria are subject to certain transitional provisions (although, as in the case of Norway, these provisions can unexpectedly become permanent)
- Mexico has a comprehensive free trade deal with the EU while simultaneously being a member of NAFTA
- The Channel Islands and the Isle of Man are inside the free market by virtue of their political union with the United Kingdom, but are outside the EU, and therefore outside the Common Agricultural and Fisheries Policies, the EU representative institutions and the jurisdiction of EU law
- Gibraltar, by contrast, is considered to be inside the EU, and subject to most of its rules
- Greenland is outside the EU, but inside the single market because of its political union with Denmark; it became the only country to leave the EU in 1984

Similar forms of partial association are enjoyed by several other states on the EU's periphery, including Monaco, Andorra and the Faroe Islands. Moves are underway to draw the Russian enclave of Kaliningrad into the single market, without prejudice to Russian sovereignty.

At the same time, of course, there are different levels of integration among existing EU states. Some are in the euro, others not. Some have specific opt-outs on particular issues: Malta has an exemption allowing it to restrict the purchase of property by other EU nationals; Sweden, Austria and Finland have a special deal on neutrality; Denmark has its four Maastricht derogations and so on. Indeed, the rules on border-free travel cover some states that are outside the EU, but not all states within it.

The more the broad picture is considered, the harder it is to sustain the idea of EU membership as an all-or-nothing option. It would be more accurate to think of integration on an issue-by-issue basis: defence, fisheries, free movement of people and so on. It is evidently feasible to participate in some of these areas but not others. Let us now look at the countries which have evolved the most sophisticated mechanisms for doing so: the four EFTA members.

How EFTA Works

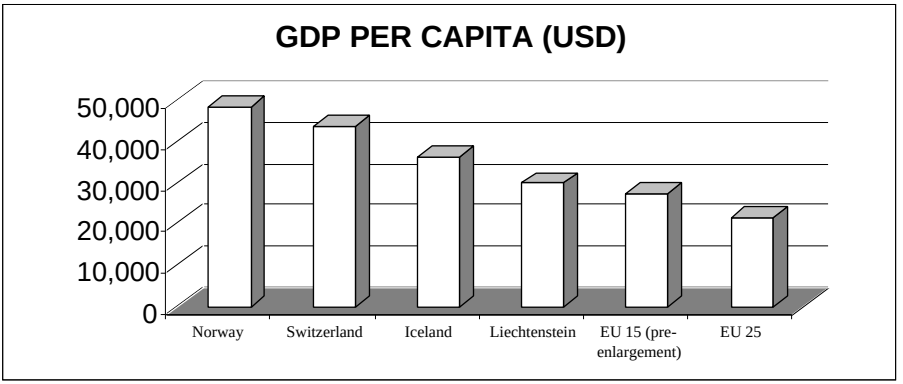
British Europhiles often argue that, while the idea of a European free market without accompanying political union might seem superficially attractive, it does not work in practice. 'We have already tried that', they say. 'It was called EFTA.

This is not quite true. Britain did indeed take the lead in establishing EFTA in 1960, along with Austria, Denmark, Norway, Portugal, Sweden and Switzerland (Finland, Iceland and Liechtenstein joined later). But little effort was made to build it up. Within 18 months, Harold Macmillan had applied to join the EU and, from then on, it was clear that Britain had scant interest in EFTA. Many of the other members felt that EFTA would not be viable without the United Kingdom. Denmark, the Republic of Ireland and Norway all applied to join the EU in Britain's wake (although Norwegians rejected membership in a referendum in 1972). It is inconceivable that these countries would have sought membership had Britain not done so. In 1986,

Portugal felt obliged to follow. 'We had stuck with England for 600 years', the Portuguese defence minister once observed. 'We would never have joined the EU if you hadn't.' Austria, Finland and Sweden followed suit in 1994, although Norwegians once again disregarded their government's advice and voted 'no'.

Only four EFTA members were left: Iceland, Liechtenstein, Norway and Switzerland. The success of these four tiny states has settled the question of EFTA's viability beyond doubt. Over the past decade, they have comprehensively outperformed their gigantic neighbour. The statistics in Table Two speak for themselves. Average per capita GDP in EFTA is $45,400 a year; in the EU, it is $21,800. EU citizens, in other words, have less than half the income of Eftans. Even if new entrants are excluded, EFTA is vastly wealthier than the old EU 15. Every EFTA state enjoys a higher standard of living than every EU state except, in some cases, Luxembourg.

Table Two: Better Off Out



Source: OECD 2003

How does EFTA work? It is, in essence, a classical free trade area. It operates a tariff-free zone as well as setting down common standards for products traded within that zone. Unlike the EU, however, it does not concern itself with 'behind border' issues. Goods intended for export must meet the specified criteria; goods that are for wholly domestic consumption are the business only of the nation concerned.

Unsurprisingly, EFTA does not require the EU's gargantuan enforcement machinery. Its regulatory bodies are the EFTA Surveillance Authority, which is the equivalent of the European Commission, and the EFTA Court, analogous to the European Court of Justice (ECJ). Both bodies are sited near their EU counterparts in, respectively, Brussels and Luxembourg. But they have remained slim, efficient agencies. The EFTA Surveillance Authority employs fewer than 50 staff, compared to the 18,000 who work at the European Commission. The EFTA Court has just 15 officials, as against 1,800 in the ECJ.

Whereas the EU is a customs union, EFTA is a free trade area. In other words, individual members of EFTA are allowed to negotiate their own free trade deals with third countries, provided this does not prejudice the position of their EFTA partners. In practice, EFTA tends to negotiate as a bloc, since its member states have tiny domestic markets. Indeed, it often replicates what the EU is doing, for reasons of economies of scale. It can, however, go further if it chooses. EFTA has, for example, signed a free trade agreement with Singapore that goes beyond what the EU was prepared to negotiate, and is in discussions with Canada to similar effect. Thus, EFTA is in the happy position that it need never be worse off than the EU, since it can always piggy-back the EU's negotiations with third countries; but it can be better off, if it feels that the EU is being unduly protectionist. The EU's Common Commercial Policy is a floor, upon which EFTA can build more comprehensive agreements if it wishes.

Above all, EFTA structures are intergovernmental, not supranational. The rulings of the EFTA Surveillance Authority and Court do not have direct effect in the member states until the appropriate implementing legislation has been passed.[13] It is always open to the national parliaments to decline to implement such legislation, although so far they have not chosen to do so. Thus, EFTA membership involves no loss of sovereignty (using the word in its precise sense, rather than as a loose synonym for 'power').

We have so far been treating the four EFTA countries as a bloc, but they do differ one from another in their relations with the EU. The most important distinction is between the three EEA countries, Norway, Iceland and Liechtenstein, and Switzerland, whose voters rejected EEA membership in a referendum in December 1992. There are some minor differences even

among the three EEA members: Iceland and Norway, which were already bound to several EU states through the Nordic Passport Union, have joined Schengen, whereas Liechtenstein has not. Iceland accepts the EU's veterinary and hygiene rules for fish, but not animals (almost no animals have been imported into Iceland since the tenth century, and the islanders are understandably keen to protect their stock from diseases to which they have no immunity). There are other minor differences in the precise status of the EEA three. But the gap between these three states and Switzerland is such that they must be considered separately.

The EEA: Benefits without Costs

There are plenty of arguments against the EEA in theory, but they do not seem to apply in practice. On paper, the three EFTA members of the EEA are at a disadvantage *vis-à-vis* the 25 EU members. They are obliged to implement EU regulations in whose framing they have played no role. Since the EEA Agreement was signed in 1992, the three EFTA states have had to assimilate over 3,000 EU legal acts. Diplomats and politicians in these three countries – who, as in the EU, tend to be far more Euro-enthusiastic than the general population – bemoan what one Norwegian socialist calls 'fax democracy'.[14] Every month, they say, dozens of EU laws are sent for automatic implementation: the politicians are simply waiting for their orders to be faxed from Brussels.

This is true, as far as it goes. But it is important to remember that the legislation in question covers only a small and clearly delineated part of the EFTA countries' public life. Huge areas of policy are wholly excluded: agriculture, fisheries, some aspects of social policy and employment law, foreign affairs, defence, criminal justice, most of immigration and asylum policy and the Charter of Fundamental Rights. The vast majority of these directives are technical in nature, dealing principally with the adoption of common standards for the facilitation of trade. The implementation of 3,000 EU legal acts has required only 49 changes of the law in Norway and Iceland, and fewer still in Liechtenstein, which joined the EEA later. Table Three, which contains the number of EEA directives up to the end of 2000 and the instances of non-implementation, illustrates this point admirably.

Table Three: The EEA In Practice

Policy Area	Number of directives in the EEA *acquis*	Cases of non- or partial implementation		
		Norway	Iceland	Liechtenstein
Technical barriers to trade	486	20	16	4
Other trade in goods	13	0	0	0
Veterinary and related measures*	235	15	33	0
Free movement of persons	71	3	4	4
Free movement of capital	1	1	1	0
Financial services	53	2	1	4
Information technology and audio-visual	22	1	0	6
Transport (road, rail, maritime and air)	70	5	10	4
Social (health and safety, labour law and equal rights)	50	2	1	4
Consumer protection	12	3	2	2
Environment (air, water and waste)	43	1	0	0
Public procurement	9	0	4	0
Company law	12	0	0	0
State aid	3	0	0	0
Statistics	9	0	0	0

** Iceland and Liechtenstein are exempt from many of these measures*

Source: Centre for European Policy Studies [15]

The number of instances of non-implementation is small – similar, indeed, to that within the EU. But the fact that EFTA parliaments have the ability to say 'no' is significant. In Britain, as in any other EU member, the courts give automatic precedence to EU rules, regardless of the will of Parliament. For instance, to take a recent case, Britain's Court of Appeal ruled that it was illegal for Steve Thoburn, a Sunderland grocer, to sell his produce in Imperial measures, even though the 1985 Weights and Measures Act explicitly allows traders to use either metric or Imperial units.

The same thing could not happen in the EFTA states. Their parliaments can always ignore an EU regulation that they deem deleterious to their national interests. This might theoretically open them to the charge of breach of treaty obligations under international law or, even more implausibly, lead to their expulsion from the EEA by the other members. But it is hard to imagine that the EU states would choose to take such drastic action over a question of

essentially domestic concern, such as the selling of a pound of bananas.
A point often missed is that the EEA Agreement reflects the state of the European Treaties as they were on 2 May 1992. It is not automatically 'upgraded' to take account of subsequent treaty changes. This means that recent extensions of EU authority, in particular into the fields of social, employment and fiscal policy, do not apply to the EFTA three unless they deliberately opt to amend their own statutes in synchronisation with the EU treaties.

Finally, EEA members pay a substantially reduced contribution to the Brussels budget. Iceland makes over less than 0.07 per cent of its GDP. In Norway, the sum is higher, but this is largely because the Norwegians have opted to participate in a number of EU programmes, including foreign aid and research and development initiatives.

Since the signing of the EEA Agreement, the three EFTA signatories have grown significantly faster than their EU counterparts, and from a much higher base. The combination of access to European markets and exemption from many EU social costs has proved stunningly successful. EFTA's growth is in marked contrast to what was expected in the early 1990s. Then, the Eftans were warned that they would pay a high price for staying out. Norwegians were told that unemployment would rise, that interest rates would go through the roof, and that the stock exchange would collapse. In fact, unemployment fell to half the EU average, interest rates were cut and the Oslo stock exchange enjoyed the biggest one-day rise in its history. As the secretary of the Norwegian Press Union, Per Edgar Kokkvold, puts it: 'We have more money and a better life than anybody else in Europe. We have an enormous budget surplus every year – seven per cent – at a time when France and Germany are failing to stay above the three per cent deficit which is the EU's bottom line. So what's in it for us?'[16]

Europhiles sometimes claim that Norway's success is wholly due to its oil reserves – as though Britain were not also an oil exporter. The truth is that Norway's happy surplus exists independently of its oil wealth. For the past 13 years, Norway has been stashing away its oil revenues in the so-called Petroleum Fund, in case it should find itself meeting unexpected pensions liabilities or other unforeseen costs. In other words, even with this income excluded from the statistics, Norwegians are the richest people in Europe.

In Iceland, the transformation has been even more astonishing. The past ten years have seen one of the fastest rates of growth in Europe. Icelandic entrepreneurs have expanded into the single market, buying up banks, retail chains and pharmaceutical companies throughout Europe. Icelandic life expectancy is now the highest in the world. Under the government of David Oddson, Iceland pursued the kind of Thatcherite agenda that was off-limits to EU members because of the Social Chapter, the 48-hour week, the euro and all the rest of it. It cut taxes and regulation, and made itself an attractive place to do business. It is, for example, 30 times cheaper to trade on the Reykjavik stock exchange than in London. Once again, Europhiles like to claim that Iceland is a special case because of its fish stocks – and, once again, they ignore the fact that, but for the EU, Britain might have enjoyed a similar bonanza. It is certainly true that an ingenious quota system has converted Iceland's fish into a profitable renewable resource. But this alone does not explain what has happened on the island. A people two generations away from subsistence farming have been turned into international tycoons because they have been able to exploit the single market while evading the costs of EU regulation. No wonder the government refuses to contemplate accession negotiations.

Liechtenstein, with a population of just 18,000, is of less interest as a role model. None the less, it seems content with its membership terms. Liechtenstein was a late-comer to the EEA. It had previously been in a customs union – and, in some senses, a political union – with Switzerland. So when the Swiss rejected EEA membership in 1992, Liechtenstein was obliged to renegotiate its relationship with Switzerland in order to join. This delayed its formal entry until May 1995. The intervening years have, however, been good ones. A formal assessment by the Liechtenstein government, written in the delightfully qualified and ponderous language of civil servants everywhere, concludes that 'on the whole, joining the EEA can be depicted as mainly a correct step'.[17] Although, as in the other EFTA states, a number of diplomats hanker after full membership, the majority of the population have no intention of subjecting themselves to EU regulations, especially on taxation.

The Swiss Option

Switzerland, of which Commissioner Lamy was so dismissive, stands at one remove further from the EU. It is in EFTA, but outside the EEA, having

rejected membership in a referendum in 1992. Once again, Europhiles threatened the terrors of the earth in the event of a 'no' vote; and once again, their predictions were confounded. A year later, the stock exchange had risen by 30 per cent against the background of a stable Swiss Franc and falling interest rates. Even the normally Europhile Financial Times had to admit:

> The benefits of staying outside the EEA appear to have outweighed the disadvantages so far. A year ago, most economic pundits, both inside and outside the country, were warning that the arrogant Swiss would pay heavily for their rejection of EEA membership in a referendum. Today, the Swiss appear to be having the last laugh.[18]

Ten years on, that is truer still. Switzerland has outperformed the EU on most measures: growth, unemployment, inflation, interest rates, currency stability. 75 per cent of Swiss voters oppose membership (although, naturally, a number of politicians and diplomats continue to dream of accession).

Instead of relying on international institutions to maintain their place in the market, as the EEA states do, the Swiss use bilateral treaties. Switzerland had already signed a comprehensive free trade accord with the EU in 1972, as had the other EFTA states. Following the 1992 referendum, Switzerland negotiated a series of sectoral treaties with the EU, covering all aspects of the single market: land transport, air transport, free movement of workers, agricultural standards, public procurement, research and development, mutual recognition of qualifications and technical barriers to trade. These treaties were duly approved by the Swiss parliament, and endorsed in a referendum.

And that, as far as the Swiss are concerned, is that. They feel that they now have everything they want from the EU, and would gain nothing further by integrating more closely. Switzerland exports more than twice as much per head to the EU as does Britain, despite not being a member. Its banks and corporations operate internationally. Yet there is no clamour whatever for EEA membership, let alone for accession to the EU.

This attitude is partly a question of economics. Switzerland's unemployment rate is four per cent, less than half that in the EU; interest

rates, too, are half those in the euro-zone; taxes are far lower. One immediate consequence of membership would be to raise Swiss VAT on many goods from 7.6 per cent to the EU minimum of 15 per cent. A second would be to close down the many businesses whose employees exceed the EU's working time rules. But an even bigger issue, for most Swiss voters, is the confederation's peculiar system of direct democracy. At both national and cantonal level, Switzerland makes frequent use of referendums. Issues as diverse as tax rates, holiday entitlements and the acceptance of individual asylum claims are subject to popular plebiscite. The Swiss are reluctant to hand such powers, even to their own politicians, let alone the EU. They know that adopting the *acquis communautaire* – the accumulated pile of EU law that all members must accept – would be incompatible with the principle that new laws should be put directly to the voters.

An EFTA Model for Britain

Let us review the position of the four EFTA countries. They are covered by the so-called four freedoms of the single market: free movement, that is, of goods, services, people and capital. They are able, too, to opt into other common policies on a case-by-case basis, whether on research and development, classification of medicines, border-free travel or whatever. Yet they are spared the huge costs and inefficiencies of the Common Agricultural Policy. They are free to control their own fisheries and their own energy reserves. They are able to sign free trade deals with third countries. They are outside much EU social and employment regulation (all of it, in the case of Switzerland). They have their own foreign policies, immigration controls, legal systems and civil rights. Their parliaments are sovereign. And they pay only a token amount to the EU budget.

It is true that their businesses must meet EU standards when selling to the EU – as exporters the world over must do. But they are not forced to apply these standards to their domestic commercial activity – at least, not on anything like the scale of their EU counterparts. It is interesting to note that every one of the EFTA countries exports more per head to the EU than does Britain. EFTA is a living, thriving refutation of the argument that Britain is too small to flourish on its own, and must be part of a larger European polity. The EFTA countries are tiny by comparison: Switzerland has 7.3 million inhabitants, Norway 4.6 million, Iceland 280,000 and Liechtenstein 18,000.

Small countries can also thrive within the EU, of course. The Republic of Ireland is often cited by Euro-enthusiasts as an example of what can be achieved. But Ireland's success, despite what many people in the UK believe,has almost nothing to do with Brussels subventions. On the contrary, EU subsidies have tended to go into the least productive sectors of the Irish economy, notably agriculture. Rather, Ireland owes its success to a domestic reform programme of tax cuts and economic liberalisation which has run into trouble in Brussels. In 2001, the Irish Finance Minister, Charlie McCreevy, was startled to be told by the Commission that he had cut taxes too radically, and should reverse elements of his programme. This, of course, is not a problem for the EFTA states, which can pursue whatever domestic reforms they please.

Supporters of closer integration like to claim that the EFTA countries are, in their different ways, unique. 'You can't compare us to Iceland,' they say, 'Iceland has fish'. So, of course, would Britain, if it were not subject to the Common Fisheries Policy. 'We're nothing like Norway,' they continue. 'Norway has oil'. Indeed. And Britain is the EU's only net exporter of oil, which is why it should be so concerned about the repeated attempts to make energy supplies a common European resource. 'Switzerland is a special case,' they protest. 'They have financial services'. And Britain, in the City of London, has the EU's – arguably the world's – leading financial centre, although it is unlikely to remain so if Brussels continues to harmonise taxes and impose regulations on takeovers, investment advice and banking practices.

Then, in a delicious back-flip, pro-Europeans try a new argument. 'But we're nothing like these EFTA countries,' they say. 'They're much *smaller* than us.' What they probably mean by this is that Britain is a country with global interests. The tiddlers may be able to absent themselves from the Councils of Europe, runs the reasoning, but it would be harder for Britain to do so. Yet not even this argument stands up.

For an example of a country with truly impressive global reach, consider Norway. Norwegian diplomats are playing a key role in the Middle East, Sudan, South-East Asia and Sri Lanka. Being outside the EU's cumbersome development programmes, they are able to use their overseas aid as an instrument of foreign policy. They are regarded as reliable, neutral

arbitrators of third country disputes. How much of this would still be true if they were one of the EU's smaller members? As one of their ambassadors explained:

> Our worst time was just before the 1994 referendum [on EU membership]. Since everyone assumed that we were going to join, I was always being asked to meetings with my 15 European counterparts. Often, I wouldn't even get to speak. Once we voted 'no', people had to start dealing with me separately again.

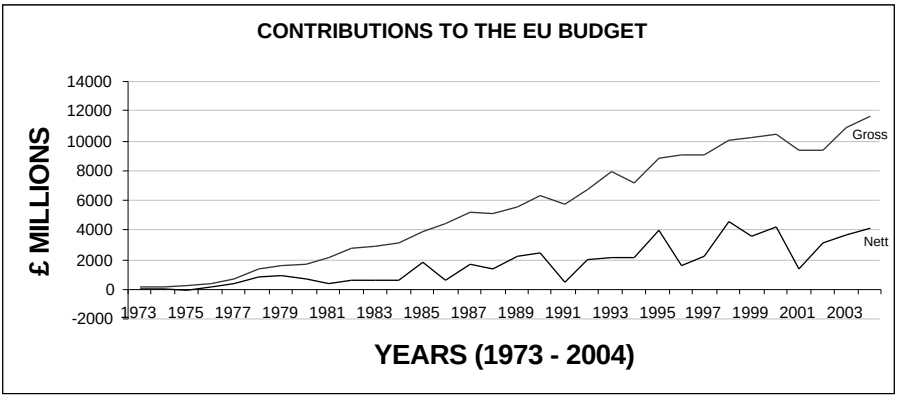
The Swiss, although deeply suspicious of international entanglements, none the less manage to host most of the big international organisations, including the Red Cross and large chunks of the UN. Iceland, with a population about the size of Croydon's, has received state visits from four US Presidents, two Russian leaders and, most recently, the Chinese premier, who stayed for several days to study the island's economic success. These countries have evidently judged that they have more influence by having foreign policies of their own than they would have as tiny statelets within the EU. Surely Britain, with a population of 60 million, with immense global experience, the fourth-largest economy in the world and the fourth military power, would be able to retain an international presence without having to go through Brussels.

V
Britain's Negotiating Strength

It is sometimes argued that Britain would be offered less attractive terms than the EFTA states, since the EU would resent its non-participation. But diplomacy does not generally operate in such a way. Trade-offs are made on the basis of future advantage, not past grudges. Negotiations between Britain and the other states would presumably be premised on a desire for maximum mutual prosperity. In any case, it would not be a matter of Britain's abandoning existing structures. Rather, it would be the other states which were seeking to adopt a new structure – the Constitution. Britain would be beginning from where it is today: a full member of a single market, whose rules it had already played a substantial part in shaping.

Indeed, Britain has a considerably stronger negotiating hand than is sometimes appreciated. This can be clearly seen in Tables Four and Five. Britain is a structural net contributor to the EU budget. At the same time, Britain is running a large and growing trade deficit with the other member states. To put it simply, the other states do better out of the single market than Britain does. It is not normal, in any commercial transaction, for the salesman to have the upper hand over the customer, or the recipient over the donor.

Table Four: British Paymasters



Source: HM Treasury

The United Kingdom is a food-importer with an efficient farming sector: our consumers disproportionately fund the Common Agricultural Policy. Britain's unusually high proportion of non-EU trade means that it is especially badly hit by the Common External Tariff. The result is that, even following the budget rebate negotiated by Margaret Thatcher, the UK is a permanent net contributor to the EU budget. For almost the entire period of its membership, Britain has been the second highest net contributor after Germany. Only once in 30 years has it received more than it paid.

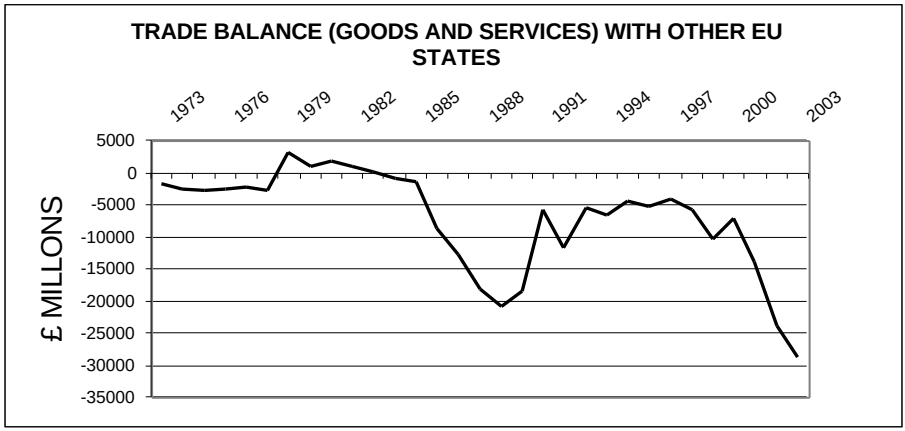
Incidentally, although most commentary tends to focus on Britain's net contributions, it is perhaps the gross figure that is the more important. For while some EU money is spent in the UK, it is not necessarily allocated to schemes that the British would have chosen themselves. Indeed, it is often spent on projects whose chief purpose is to advertise the EU. In no other field of public life do we concentrate on the net figures. No one would argue that basic rate income tax, rather than being 22 per cent, is in fact zero, on grounds that the whole sum is 'given back' in roads, schools and hospitals.

The figures for contributions to the EU are not insignificant. To put them in context: at the last election, the difference between the two main parties hinged on whether it would be possible to save £8 billion over two years *across the whole of government spending*. This year, Britain will hand over £12 billion to Brussels.

Such figures, though, are dwarfed by Britain's trade deficit with the rest of the EU, as can be seen in Table Five.

A glance at these figures should dismiss any notion that the countries wishing to adopt the Constitution would impose economic sanctions against Britain if it refused to join them. Since joining, the UK has run a trade deficit with the other member states of, on average, £30 million *per day*. This contrasts with a structural surplus in the years before 1973. For most of the past 30 years, the UK has been in surplus with every continent in the world except Europe. These figures do not prove that EU membership is bad for Britain; but they do prove that British membership is good for the EU. Our bargaining position is enviable.

Table Five: Europe's Best Customer



Source: The Pink Book

VI
Conclusion

Few political questions are addressed disinterestedly. A politician's analysis of what will happen is often informed, consciously or subconsciously, by what he wants to happen. So it is with the Constitution. Both sides are divided about the likely consequences of a 'no' vote. Supporters of the Constitution want to be able to threaten voters with the prospect of being excluded from European markets. At the same time, they like to claim that the Constitution is not an especially significant document – that it is, in Peter Hain's now notorious assessment, a 'tidying-up exercise'. This being so, they can hardly simultaneously aver that rejecting it will lead to a crisis.

Precisely the same inconsistency exists, in reverse, on the 'no' side. On the one hand, Euro-sceptics want to quell the fear of being left behind. They therefore find it politic to claim that a 'no' vote will stop the entire ratification process, and that there is no need to worry about being shut out. On the other, they understand that public opinion is resentful of much of what the EU is already doing, and so are tempted to assert that a 'no' vote might catalyse a wider renegotiation of Britain's relationship with Brussels.

This pamphlet has argued that a 'no' vote in Britain would not stop ratification across the EU. For a host of legal and diplomatic reasons, the Constitution would come into effect in the majority of states, leaving Britain to define a new relationship with those states. It has also sketched how such a relationship might work, and to suggest why it would be happier than the current arrangements.

It is surely tactically wise for opponents of the Constitution to recognise these facts. Claiming that a 'no' vote would halt the whole process is, in the correct sense of the word, incredible. No one will believe that, having invested three years – in some senses, 50 years – in getting to this point, the other countries will abandon their plans in order to humour Britain.

Perhaps more important, such a strategy would be unpopular. 'Vote no for the *status quo*' is hardly an appealing slogan when the majority dislikes the *status quo*. Euro-scepticism in Britain is chiefly animated, not by concerns

about future transfers of power to Brussels, but by what has already happened. Better by far to set out what kind of relationship Britain should aim for, and how it intends to get there. All the polling evidence suggests that, by large margins, people want to have a trading relationship with the rest of the EU, but to repatriate several powers currently exercised by Brussels. Rejecting the Constitution is an opportunity to arrive at precisely such a dispensation. It would be perverse for the 'no' campaign not to say so.

The referendum will not simply be a vote on the Constitution itself. Rather, it will be a surrogate plebiscite on 30 years of successive transfers of power to Brussels. It will draw to a head the issue that Britain has been putting off throughout this time: whether to become part of a European polity, or whether to stand amicably aside while its neighbours push ahead with federation. That, of course, is a decision for the electorate as a whole. But let us at least be clear as to what the alternative is. Rejecting the Constitution might lead to the kind of relationship that many people thought they were voting for in the 1975 referendum: membership of a free market, but not of a political union.

Such a settlement is as much in the interest of the more integrationist countries as of the UK. The pattern of constant British vetoes, with all the associated acrimony, would be broken. By going ahead without Britain, the federalists would lose a bad tenant, but gain a good neighbour. Britain, for her part, would be wealthier, freer, and better liked.

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