

CONSEQUENCES OF BREXIT FOR INTERNATIONAL AGREEMENTS CONCLUDED BY THE EU AND ITS MEMBER STATES

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Abstract

The impact of Brexit on the external relations of the EU and the UK runs the risk of receiving less attention because of the difficult internal negotiations on the future UK-EU relationship. Yet, the legal complexities related to the fact that the UK will no longer be part of the EU's external relations regime are equally challenging and increasingly present themselves now that 'Brexit day' approaches. The present contribution analyses the consequences of Brexit for the UK to negotiate and conclude new international agreements as well as the impact of the UK's withdrawal on existing international agreements concluded by the EU and its Member States with almost all states in the world.

1. Introduction

Most studies on Brexit, or on withdrawal from the European Union in general, focus on either the ways in which this can be done, or on the possible future relationship between the withdrawing state and the EU.² This should not

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² See recently some contributions to C. Closa (Ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge University Press, 2017; P. Eeckhout and E. Frantziou, 'Brexit and Article 50 TEU: A constitutionalist reading', *CMLRev.*, pp. 695-733; 'Editorial comments: Withdrawing from the "ever closer union"?', *53 CMLRev.*, 2006, pp. 1491-1499. Cf. also, *inter alia*, A.F. Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, in: A. Biondi, P. Eeckhout, S. Ripley (eds), *EU Law after Lisbon*, Oxford 2012, p. 128; H. Hofmeister, *Should I stay or Should I Go? - A Critical Analysis of the Right to Withdraw from the EU*, 16 *ELJ* (2010) p. 589; A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 *ELRev.* (2012) p. 523; P. Nicolaidis, *Withdrawal from the European Union: A Typology of Effects*, 20 *MJ* (2013) p. 209; C. M. Rieder, *The Withdrawal Clause of the*

come as a surprise. After all, in relation to Brexit in particular it is not easy to disentangle a close and long-lasting relationship and at the same time find ways to hold on to elements of that relationship. Other contributions in this special issue testify to that.

The focus of the present contribution is on a different dimension of withdrawal that is less often part of the debate:³ the consequences for international agreements concluded by the European Union and its Member States.⁴ While the external dimension of withdrawal has also been addressed by others,⁵ new questions continue to emerge and deserve legal attention. *Prima facie*, the situation is clear: from the moment of withdrawal the United Kingdom will no longer be bound by existing EU agreements with third countries. However, this is easier said than done and there are many different types of international agreements; all with their own legal complexities. Moreover, EU rules continue to apply to the UK until 29 March 2019, 23:00 GMT⁶ and both EU law and international law have something to say on the possibilities to withdraw from existing international agreements or to remain a party.

A first question to be addressed is what the international position of the UK will be during and after the withdrawal process (section 2). Secondly, the consequences for existing international agreements (concluded by the EU only, or by the EU and its Member States together, or by Member States themselves) needs to be addressed (section 3). Finally, there is the question to what extent the UK could remain part of the Union's external relations regime (section 4).

Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration, 37 FILJ (2013) p. 147; A. Łazowski, *EU Withdrawal: Good Business for British Business?*, 22 EPL (2016) p. 115.

³ See for instance F. Fabbrini (Ed.), *The Law & Politics of Brexit*, Oxford: Oxford University Press, 2017. While this volume contains a chapter on The UK Trade Regime with the EU and the World, it does not specifically address existing and new international agreements.

⁴ See in general on EU international agreements: M. Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013; and R.A. Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in: A. Dashwood and M. Maresceau (Eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press, 2008, pp. 145-180.

⁵ On external dimension of Brexit see, *inter alia*, I. Bosse-Platière and C. Flaesch-Mougin, *Brexit et action extérieure de l'Union européenne*, *Revue trimestrielle de droit européen* (2016) p. 759; J. Odermatt, 'Brexit and International Law: Disentangling Legal Orders', *Emory International Law Review*, vol.31, 2017, pp. 1051-1073; G. Van der Loo and S. Blockmans, 'The Impact of Brexit on the EU's International Agreements', *CEPS Commentary*, 15 July 2016; <https://www.ceps.eu/publications/impact-brexit-eu's-international-agreements>.

⁶ UK Prime Minister Theresa May said the EU Withdrawal Bill would be amended to formally commit to Brexit at 23:00 GMT on Friday 29 March 2019; <http://www.bbc.com/news/uk-politics-41936428>.

2. External Competences of the UK Before and After Withdrawal

Leaving the EU implies that the international legal position of the UK will have to be reset and certain dimensions of its statehood will have to be reactivated. In practical terms, it will no longer be able to rely on the EU's expertise in international trade (including in the WTO) and it will have to seriously upgrade its own delegations in international organisations, in which it was mainly active as an EU member.⁷ In other words, in many international settings the UK will have to face the reality of a major shift, that is the transition from an EU to non-EU Member State. This, *inter alia*, entails that the UK may have to negotiate a large number of international agreements, including – or perhaps above all – the so called 'EU only' agreements to which the Member States are not a party in their own right. This section will briefly highlight relevant elements of the division of external competences, before analysing the possibilities for the UK to replace the existing agreements, both during and after the process of withdrawal.

2.1. *The division of competences*

As indicated above, the United Kingdom will remain an EU Member State until the formal date of departure.⁸ This first of all implies that all existing international agreements will remain binding on the UK, either through international law or through EU law. The EU treaty database currently lists over 1100 international agreements concluded by the EU and/or Euratom with countries around the world, ranging from trade and economic issues to human rights and the environment.⁹ The division of competences would usually¹⁰ be reflected in the nature of the agreements: 'EU only' agreements

⁷ See Ch. Kaddous (Ed.), *The European Union in International Organisations and Global Governance: Recent Developments*, Oxford 2015. See also I. Bosse-Platière and C. Flaesch-Mougin, *Brexit et action extérieure de l'Union européenne*, *Revue trimestrielle de droit européen* (2016) p. 759.

⁸ Cf. Article 50(3) TEU: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

⁹ <http://ec.europa.eu/world/agreements/default.home.do>. The database allows one to search for bilateral or multilateral agreements in relation to the specific activities of the Union.

¹⁰ There may be political reasons to come to another conclusion. Thus, in relation to CETA, EU Trade Commissioner Cecilia Malmström in relation to CETA said: "From a strict legal standpoint, the Commission considers this agreement to fall within exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature." See Commission – Press release 'European Commission proposes signature and conclusion of EU-Canada trade deal', <europa.eu/rapid/press-release_IP-16-2371_en.htm>. At the same time, mixity was avoided for the conclusion of the EU-Kosovo Association Agreement (AA).

(to which the Member States are not a party in their own right) or ‘mixed agreements’ (to which both the EU and its Member States are contracting parties).¹¹ Secondly, as an EU member, the UK will remain bound by the division of external competences as laid down in the treaties and as clarified by the Court of Justice of the European Union (CJEU) in its extensive case law on this matter. Students of EU external relations law are very well aware of the fundamental role this division of competences plays in defining not only to what extent the EU can fulfil the global ambitions laid down in provisions such as Article 3(5) and Article 21(3) TEU, but also in clarifying the scope of Member States’ external competences.¹² Text books point to the importance of the link between the internal and the external dimension and the impact of increased internal Union activity on Member States’ possibilities to continue to play an international role.¹³ The rationale behind this internal-external connection is also well-known: once the Member States have transferred competences to the EU in their internal relations, they have

Although AAs are traditionally mixed, an EU-only agreement was concluded because several Member States wanted to avoid a *de facto* recognition of Kosovo through their national ratification procedure of the agreement. See P. Van Elsuwege, ‘The Stabilisation and Association Agreement between the EU and Kosovo: An Example of Legal Creativity’, *EFAR*, 2017.

¹¹ While the Europa Treaties database does not allow to search for EU-only or mixed agreements specifically, one study counted 890 bilateral and 259 multilateral international treaties and agreements which the EU or the EU and the Member States have signed and/or ratified. Of these, 745 are exclusive EU competence agreements and 230 are mixed agreements. See V. Miller, ‘Legislating for Brexit: EU external agreements’, *House of Common Briefing Paper*, Number 7850, 5 January 2017. Post-Lisbon, however, there seems to be a preference for mixed agreements. Paradoxically, despite the broadening of the Common Commercial Policy (CCP) in Lisbon Treaty, also all post-Lisbon Free Trade Agreements (FTAs) have been signed as mixed agreements. See further G. Van der Loo and R.A. Wessel, *The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions*, 54 *CMLRev.*, 2017, pp. 735-770 at 739.

¹² See recently on the division of competences S. Garben and I. Govaere (Eds.), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future*, Oxford: Hart Publishing, 2017. Earlier publications include G. Davies, *The post-Laeken division of competences*, 28 *ELRev* (2003) pp. 686-698; M. Dougan, *The Convention’s draft Constitutional Treaty: bringing Europe closer to its lawyers?*, 28 *ELRev* (2003) pp. 763-793; P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 *ELRev* (2004) pp. 323-344; T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge 2012, pp. 50-51, M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 *CMLRev.* (2008) pp. 617-703; M. Claes, B. de Witte, *Competences: Codification and Contestation*, in A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 46-87.

¹³ See for instance and much more extensively B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014, Chapters 3-5. See for a good overview of recent case law: F. Erlbacher, ‘Recent Case Law on External Competences of the European Union: How Member States Can Embrace their Own Treaty’, *CLEER Papers*, 2017/2; <http://www.asser.nl/cleer/publications/cleer-papers/cleer-paper-20172-erlbacher/>.

become far less interesting partners at the international level since they are simply no longer in the position to negotiate and conclude international agreements on issues legislated internally at EU level. It is true that areas fully covered by exclusive competences are rare, but it is equally true that there are not so many areas left in which the EU members can engage in international commitments while completely bypassing the EU.¹⁴

The EU holds exclusive competences in a number of areas falling under its external relations. As recently further clarified by the Court in Opinion 2/15,¹⁵ the scope of the Common Commercial Policy is quite broad and most competences in that area (or related to CCP) are exclusive. The same goes for the Customs Union. As also further clarified by Opinion 2/15, apart from exclusivity on the basis of the Treaties (so-called ‘a priori exclusivity’ or ‘policy area exclusivity’), exclusivity may flow from the adoption of internal Union measures and the UK would be excluded from adopting rules which affect those measures (‘conditional exclusivity’ or ‘pre-emption’). Finally, exclusive competences can occur when absolutely indispensable to achieve EU Treaty objectives, without there being internal EU measures (‘exclusivity through necessity’).¹⁶

As the EU has become a global actor in areas ranging from trade and investment to development and environment, international agreements concluded by it cover many areas, either grouped under more general association or co-operation agreements or provided for in sectoral treaties with third countries.¹⁷ As a consequence, Member States rely on the EU and the expertise of the European Commission to negotiate and conclude international agreements. And, indeed, this is particularly the case in exclusive policy areas such as trade or fisheries, in which the role of the

¹⁴ For an overview of the areas where the EU remains active, see, *inter alia*, S. Keukeleire, T. Delreux, *The Foreign Policy of the European Union*, 2nd ed., Basingstoke 2014. Yet, compare B. De Witte, ‘Exclusive Member State Competences – Is There Such a Thing?’, in Garben and Govaere, *op.cit.*, pp. 59-73.

¹⁵ Opinion 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore, 16 May 2017; ECLI:EU:C:2017:376.

¹⁶ B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, pp. 100-102.

¹⁷ In many cases a general framework treaty is supplemented by sectoral agreements of sorts. For instance, EU-Georgia relations are covered by the Association Agreement (Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 4). Furthermore, a list of sectoral agreements concluded between the parties includes, *inter alia*, Agreement between the European Union and Georgia establishing a framework for the participation of Georgia in European Union crisis management operations, OJ L 14/2014, p. 2; Agreement between the European Union and Georgia on protection of geographical indications of agricultural products and foodstuff, OJ L 93/2012, p. 3; Common Aviation Area Agreement between the European Union and its Member States and Georgia, OJ L 321/2012, p. 3; Agreement between the European Union and Georgia on the readmission of persons residing without authorization, OJ L 52/2011, p. 47; Agreement between the European Union and Georgia on the facilitation of the issuance of visas, OJ L 52/2011, p. 34.

Member States has been marginalised. Thus, while individual EU members are still full members of the WTO, most of the actual work is done by the European Commission. A side effect of this shift is that over the years the EU members have lost considerable expertise in international trade law and have not concluded any trade agreements in their own right. Not only in the area of trade, but in many other policy areas, the UK will indeed have no choice but ‘to take back control’ of its own external competences once there is simply no longer any division of competences. Yet, as the following sections will reveal, from a legal perspective this is easier said than done.

2.2. *The competence to negotiate or conclude agreements pre-Brexit*

Article 50 TEU falls short in regulating the external effects of an exit from the EU. One of the questions that is left open is to what extent the UK can already anticipate its future role as a non-EU country.¹⁸ The British international trade secretary, Liam Fox, is reported to have said that the UK is “discussing the possible shape of new agreements” with at least 12 countries, adding that dozens more were prepared to expand their UK trading links.¹⁹ And, indeed media reports indicate the attempts of the UK to discuss its future relationship with a number of third states.²⁰ Given the fact that the UK will remain empty-handed when it does not replace the trade agreements it currently has with third states on the basis of its EU membership, the question has indeed come up whether the UK can already start negotiating, and perhaps concluding agreements, with other states prior to exit day. Such a proposition seems problematic in several ways.

First, there is Article 50(3) TEU, which is quite clear (although phrased *a contrario*) on the fact that the EU Treaties remain in force for a withdrawing country until the day of actual exit from the European Union.²¹ Bearing in mind the complexity of withdrawal process, it has been argued that the European Union should develop a special status of a withdrawing country waiving some of the obligations linked to membership to allow it to prepare for the inevitable legal consequences of exit.²² When nothing special is agreed

¹⁸ See also R.A. Wessel, *You Can Check Out Any Time You Like, But Can You Really Leave? On ‘Brexit’ and Leaving International Organizations*, 13 IOLR (2016) pp. 197-209. Parts of the present contribution are based on that short Editorial. Many thanks to Christophe Hillion for the valuable discussions we had with him on the points in this section. The usual disclaimer applies.

¹⁹ ‘Pursuing trade pacts outside EU “could mean worse Brexit deal for UK”’, *The Guardian*, 25 January 2017; <https://cdn.ampproject.org/c/s/amp.theguardian.com/politics/2017/jan/25/brexit-deal-uk-eu-trade-pacts>

²⁰ ...

²¹ See *supra*.

²² A. Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 ELRev. (2012) p. 523.

upon, the UK would continue to lack a competence to conclude international agreements in many areas. Article 2(1) TFEU²³ continues to apply and implies that the UK will have to respect the division of competences and is refrained from adopting legally binding acts or conclude international agreements in an area of EU exclusive competence. The result is that the UK simply does not have the competence to conclude international agreements in the area of Common Commercial Policy, or indeed in any other area of exclusive EU competence, until it formally leaves the European Union.

Also in areas of shared competences the UK continues to be limited by the rules and principles guiding the division of competences. Again, it is helpful to make a distinction between different types of competences. In the case of so-called pre-emptive competences, Member State action is only excluded if the competence is exercised by the Union. In the case of non-pre-emptive competences the EU can fully deploy a policy, but exercising its competence does not exclude Member State action in the same field. In the realm of external relations good examples include development cooperation and humanitarian aid. A special shared (or in fact ‘parallel’) competence exist in relation to the Common Foreign and Security Policy (CFSP), but even in relation to that area it has been argued that Member States are far from free once the Union has acted.²⁴

Furthermore, during the period leading up to actual withdrawal, the United Kingdom remains bound by the principle of sincere co-operation.²⁵ It is important to underline that even in cases in which Member States do have some room for external manoeuvre, the principle of sincere cooperation will have to guide their behaviour. On the basis of this principle “the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. [...] The Member States shall [...] refrain from any measure which could jeopardise the attainment of the Union’s objectives.” (Article 4(3) TEU). The effects of this principle are well documented in academic literature and may become particularly relevant in cases in which we are not dealing with the pre-emption.²⁶ The case-law of the

²³ “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

²⁴ C. Hillion and R.A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in M. Cremona and B. De Witte (Eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing, 2008, pp. 79-121.

²⁵ See also J. Larik, “Sincere Cooperation in the Common Commercial Policy: Lisbon, a ‘Joined-Up’ Union, and ‘Brexit’”, in M. Bungenberg, M. Krajewski, C. Tams, J. P. Terhechte, A.R. Ziegler (Eds.), *European Yearbook of International Economic Law*, Berlin/Heidelberg: Springer, 2017, pp. 83-110 at 102.

²⁶ See for instance E. Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 CMLRev. (2010), pp. 323-359. B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, Chapter 6.

Court is quite clear on, for instance, the scope of the principle of sincere cooperation²⁷ but one should also remember that this principle works both ways. On the one hand, it can be relied upon by the European Union to stop the United Kingdom from engaging into negotiations of trade agreements with third countries. On the other hand, the same principle may be invoked by the UK arguing that since it is leaving the Union, there should be a fair degree of leverage and cooperation granted by the European Union, allowing it to prepare for a new future. We were confronted with a somewhat similar situation in case C-45/07 *Commission v. Greece (IMO)*.²⁸ Whereas Greece had violated its duty of abstention stemming from the pre-emption doctrine, it argued that the Commission had itself failed in its duty to cooperate loyally with the Member States by not allowing discussion of Greece's proposal in the so-called Marsec committee, a preparatory body within the Union. It thus invoked the failure of the Commission to fulfil its legal obligation with regard to the scope of Union law, as defence against its own failure with regard to Union competence. The Court's reply is important in the present context: it held that a breach by the Commission of the duty of cooperation (still) does not entitle a Member State to undertake actions which affect rules adopted at Union level.²⁹

Indeed, the rationale for pre-empting Member State action seems to remain valid in the context of a withdrawing state. In Opinion 1/03 the Court of Justice held that "[...] it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law".³⁰ The purpose of excluding Member States from acting solely has thus

²⁷ One of the leading judgments was rendered in case C-246/07, *European Commission v Kingdom of Sweden*, ECLI:EU:C:2010:203. For an academic appraisal see, *inter alia*, M. Cremona, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, 48 CMLRev. (2011) pp.1639-1665; J. Van Zeben, *The Principle of Unity under Article 10 EC and the International Representation of the Union and its Member States - Case C-246/07, Commission v. Sweden*, 1 European Journal of Risk Regulation (2010) pp.301-305. More on the (im)possibilities of Member States to be active externally in areas covered by EU law see, *inter alia*, A. Delgado Casteleiro and J. Larik, *The Duty to Remain Silent: Limitless Loyalty in EU External Relations?*, 4 ELRev. (2011) pp. 524-541.

²⁸ Case C-45/07 *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:2009:81.

²⁹ Par. 26. Nonetheless, the Court did take the opportunity to emphasize the reciprocal nature of the duty of cooperation. When the Union has an exclusive power, it too, has to cooperate loyally with its Member States.

³⁰ Opinion 1/03 of the Court (Full Court) of 7 February 2006. Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ECLI:EU:C:2006:81. For an academic appraisal see, *inter alia*, N. Lavranos, *Opinion 1/03, Lugano Convention*, 43 (2006) CMLRev. pp. 1087-1100; Th. Kruger, *Opinion 1/03. Competence of the Community to Conclude the New Lugano Convention on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 13 CJEL (2006) pp.189-199.

been to ensure effective application of EU rules through uniformity where the EU has exercised its shared powers conferred upon it, or where it possesses an *a priori* exclusive power.³¹ Indeed, the duty of cooperation and the principle of pre-emption are connected: pre-emption *ensures* application of EU rules through *uniformity*, whereas the duty of cooperation seeks to *facilitate* effectively attaining EU tasks and *coherent* EU international action. Phrased otherwise: when EU competences could be affected, the Member States are excluded from acting at all. Yet, when the EU treaty objectives are at stake and there is some room for manoeuvre, this triggers an obligation of the Member States and the Union institutions to cooperate loyally.³²

Translated to the obligations of the UK in the period between the notification and exit day, one could argue that there would be some room for the EU and the UK to *jointly* seek for possibilities to allow the UK to explore options for future trade deals with third countries as long as EU competences would not be affected. At the same time, it is clear, that, firstly, the division of competences, and secondly, the duty of sincere cooperation would entail that any unilateral uncoordinated actions on the side of the UK run the risk of being in violation of EU law.

Apart from the division of competences, the United Kingdom will remain bound by the principle of ‘primacy’. This doctrine is well developed and established in the Court’s case law³³ and was confirmed quite expressly in the Brexit-context by the UK’s Supreme Court in the *Miller* case.³⁴ The latter held that “Following the coming into force of the 1972 Act [European Communities Act] the normal rule is that the domestic legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law [...]”.³⁵ This primacy has traditionally not been different for

³¹ Case C-433/03, *Commission v. Germany*, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2005:462; Case C-266/03 *Commission of the European Communities v Grand Duchy of Luxembourg*, ECLI:EU:C:2005:341.

³² See more extensively: B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge 2014, Chapter 5; as well as E. Neframi, *The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations*, 47 CMLRev. (2010), pp. 323-359.

³³ See further M. Claes, *The Primacy of EU Law in European and National Law*, in A. Arnulf, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford 2015, pp. 178-211; B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. Craig, G. de Búrca, *The Evolution of EU Law*, 2nd ed., Oxford 2011, pp. 323-362; A. Capik, *Five Decades since Van Gend en Loos and Costa came to town: primacy, direct and indirect effect revisited*, in A. Łazowski, S. Blockmans (eds), *Research Handbook on EU Institutional Law*, Cheltenham 2016, pp. 379-420.

³⁴ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

³⁵ Para. 67. See <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>. See also Oliver Garner, “‘So Long (As) and Farewell?’ The United Kingdom Supreme Court in *Miller*”, European Law Blog, 26 January 2017; <http://europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/#more-3529>

internal or external activities. So, until exit day the UK will have to act upon the agreed rules and principles of EU external relations law and it will not be allowed to give preference to its (newly enacted) domestic bills.

All of this will seriously hamper the UK in preparing itself for the post-Brexit period as we would be dealing with negotiations on topics that are already covered by existing EU agreements that fall, moreover, largely under the EU's exclusive competences. In most cases the UK will simply be pre-empted to negotiate (let alone to conclude) an international agreement and it will not be able to win any time by already starting international negotiations during the withdrawal talks with the EU.³⁶ Indeed, checking out does not imply that the UK is immediately free to go its own way.³⁷

2.3 *Informal negotiations?*

But what about more informal talks between the UK and one or more third states (termed “preliminary discussions” by the UK³⁸) prior to the entry into force of the withdrawal agreement? As we have seen, most cases can easily be settled on the basis of the division of competences and the primacy of EU law. Yet, are informal talks on possible new agreements to be seen as an exercise of an external competence by the UK? Brexit Minister Davis argued that there is a difference between the negotiations (which would be allowed) and the actual signing of an agreement (for which a competence could not exist).³⁹ But is this really the case? The answer seems to depend on the meaning of the term ‘negotiations’.

In the law of the treaties, negotiations are defined as the first phase of a treaty-making process.⁴⁰ Negotiations are generally carried out, or at least initiated, by the executive (that is to say, the Head of State or a minister for foreign affairs). As recently argued by de Oliveira Mazzuoli: “Negotiations of a treaty start when the representatives of States meet at a specific place and

³⁶ Cf. the remarks by HR Federica Mogherini during her visit to the USA: “[The] UK will stay a Member State of the European Union for another two years at least. This also implies that it will not be able to negotiate any trade agreement bilaterally with any third country which is the case of all the Member States, not because we limit our Member States but because this is the guarantee for all Europeans that we are stronger in trade negotiations, being the second economy in the world, and because this guarantee is that the benefit of any trade agreement goes equally to all Europeans without any internal competition so it is a form of guarantee for all Europeans and it is not a limitation.”, Washington, 9 February 2017; https://eeas.europa.eu/headquarters/headquarters-homepage/20408/remarks-high-representative-mogherini-press-roundtable-during-visit-united-states-america_en

³⁷ Cf. Wessel, *You Can Check Out Any Time You Like, But Can You Really Leave?*, *op.cit.*

³⁸ See Theresa May: “UK will lead world in free trade”, *BBC News*, 7 September 2016, <http://www.bbc.com/news/uk-politics-37291832>

³⁹ Speech by David Davies, 2 February 2016; <http://parliamentlive.tv/event/index/bfe52708-fed8-4028-b2b8-aa8831d173cd?in=12:37:34>

⁴⁰ Cf. V. de Oliveira Mazzuoli, *The Law of Treaties: A Comprehensive Study of the 1969 Vienna Convention and Beyond*, Rio de Janeiro: Forense, 2016, at 89.

at arranged time, for the purpose of studying the possibilities to reach an agreement in connection with the conclusion of a specific international instrument in a joint manner.”⁴¹ The term ‘negotiations’ can be seen to include “every action prior to an agreement of any nature, the time of discussion and the concurrence of wills which will or will not be transformed into a legal act”.⁴² This implies that any action by the executive which is aimed to investigate the possibilities to reach an international agreement could already be regarded as falling under the umbrella term ‘negotiations’. Admittedly, the descriptions do seem to include a certain formalised procedure, which would exclude fully informal talks preceding actual negotiations, but it is equally clear that formal talks between governmental representatives of the UK and third states with the aim of discussing the terms of a new agreement would easily amount to a ‘negotiations’.

When it comes to EU law one has to note that the Court of Justice has occasionally been confronted with similar questions. In case C-433/03 *Commission v. Germany (Inland Waterway)*, the Court stated that the adoption of a decision authorising the Commission to negotiate a multilateral agreement marks the start of a concerted action triggering the duty of cooperation.⁴³ In case C-246/07 *European Commission v Kingdom of Sweden (PFOS)*, the Court held that the duty of cooperation was triggered the moment a Member State acts internationally in such a way that is “likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power”.⁴⁴ And, that was in a situation of shared competence... The moment the informal negotiations (or “preliminary discussions”) between the UK and a third state “reach a minimum threshold of specificity and could be detrimental to the EU’s own position in these negotiations”⁴⁵ the principle of sincere cooperation would be violated.

However, as mentioned before, in the case of Brexit the question of whether the European Commission has already used its competence is less relevant as in most cases we are dealing with existing EU agreements with third countries. Thus, unless as special status is given to it, the UK would simply not have the competence to negotiate new agreements with third countries.

One way out of all this would be if the UK would expressly be allowed to deviate from the division of competences. On the basis of Article 2(1) TFEU Member States may act even in area of exclusive EU competence “if so empowered by the Union or for the implementation of Union acts.” On the

⁴¹ Ibid, at 89.

⁴² Ibid, at 89.

⁴³ Case C-433/03 *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2005:462.

⁴⁴ Case C-246/07 *European Commission v Kingdom of Sweden*, ECLI:EU:C:2010:203.

⁴⁵ As phrased by Larik, *op.cit.*, at 103.

basis of this, it has been argued that “authorizing the UK to start trade negotiations with third countries would be a possibility, especially for the period after triggering Article 50 TEU, but depends entirely on the goodwill of the EU institutions and the remaining Member States.”⁴⁶

From a more practical perspective the question emerges what would happen if the UK would violate EU external relations law before it formally departs from the European Union. In a legal sense, nothing seems to stand in the way of the European Commission using its usual armoury of infringement proceedings based on Articles 258 and 260 TFEU. The same would hold true for the 27 other Member States. The Court, in turn, could use the fast track procedure in order to render a judgment before the Brexit actually takes place. Yet, in purely political terms, any violation of EU law during the negotiations would most likely backfire and not help the UK’s position and be potentially detrimental to the result it aims to achieve.

2.2. *Post-Brexit Obligations*

A final question in relation to the UK’s competences would be to what extent it would really be completely free to conclude international agreements *post-Brexit*. Obviously, as a non-EU Member State, the UK would no longer be restricted by the division of competences or by any principle guiding the EU and its Member States’ external activities. Yet, in some situations an echo of its former membership may still affect the freedom the UK so dearly awaits. First of all, the way in which the UK remains connected to the internal market may have some influence. While most options that are currently discussed (at least by academics) foresee a clear decoupling between the UK and the EU, participation in parts of the internal market may lead to (*de jure* or at least *de facto*) restrictions on the substantive issues the UK can agree on in international agreements with others. Thus, acceptance of EU-standards to guarantee market access will make it difficult to negotiate completely different rules for goods or services with third states. Secondly, participation in external policies, such as the Union’s foreign and security policy, will result in restraints on the UK’s foreign policies as it will be unacceptable for the EU and its Member States that the UK participates in Union policies (e.g. in relation to sanctions or military missions) while maintaining a different agenda outside those policies. Finally, it is not completely excluded that certain restraints may still flow from previous arrangements. Increasingly, the need for transition arrangements is mentioned to allow the UK and the EU to have more time for the rearrangements. It is thus not to be excluded that the UK, while being formally out, will still be bound by a number of transitional

⁴⁶ Ibid.

arrangements and hence perhaps even by some aspects of the division of competences.

Finally, it goes without saying that also post-Brexit the rules and principles on the division of competences remain intact for the remaining 27 EU Members. This also implies that the exclusive competence of the EU in trade and other matters prohibits them from engaging in any separate deals with the UK the moment this would “compromise the principle of unity in the international representation of the Union” to refer back to the *PFOS*-formula mentioned above.

3. International Agreements concluded by the EU and its Member States

Apart from the possibilities to conclude *new* international agreements, the question is what will happen to *existing* agreements, or at least to the position of the UK in relation to those agreements. The many different types of international agreements do not allow for a detailed analysis, but many specific studies have already pointed to the extreme complexities in areas such as trade or fisheries.⁴⁷ Furthermore, as for instance pointed to by Odermatt, the European Council’s Draft Guidelines are far from consistent. On the one hand, they seem to accept that after withdrawal, “[t]he United Kingdom will no longer be covered by agreements concluded by the Union or by Member States acting on its behalf or by both acting jointly.” At the same time, the Guidelines also set out that “[t]he European Council expects the United Kingdom to honour its share of international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners and international organisations concerned should be engaged.”⁴⁸

This section will address the question of the post-Brexit relationship between the UK and bilateral or multilateral international agreements concluded before exit-day. A distinction is made between agreements that were concluded by the EU only (to which the Member States are not a party in their own right), mixed agreements to which both the EU and its Member

⁴⁷ For an analysis of the many existing arrangement in the common fisheries policy, see for instance the EP Report *Research for PECH Committee - Common Fisheries Policy and Brexit*, Directorate-General for Internal Policies, Policy Department for Structural and Cohesion Policies, Fisheries, June 2017; [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU\(2017\)601981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU(2017)601981_EN.pdf)

⁴⁸ European Council Note, XT 21001, *Draft guidelines following the United Kingdom's notification under Article 50 TEU*, 31 March 2017, par. 13; <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf>

States are contracting parties), and international agreements concluded by the Member States, either *inter se* or with third states.

3.1. *EU-only Agreements*

Agreements concluded by the EU usually apply to the territories in which the Treaty on European Union is applied.⁴⁹ These agreements are not just concluded in the area of the Common Foreign and Security Policy,⁵⁰ but may also cover trade with key global partners.⁵¹ Unless some kind of transitional regime is agreed to, the territory of the UK will no longer be covered by the agreements after Brexit-day. Article 216(2) of the TFEU furthermore makes clear that international agreements concluded by the EU are (arguably *only*) “binding upon the institutions of the Union and its Member States”. From the EU side the situation is therefore quite clear: international agreements concluded by the EU are no longer binding on the UK. The latter is neither bound through EU law (Art. 216(2) TFEU), nor on the basis of international treaty law (Art. 34 VCLT⁵²).

One could perhaps argue that the EU merely concluded the agreements ‘on behalf of’ its Member States and that the UK would thus remain bound once the competences are returned to it. Thus, it has for instance been argued in relation to the 2014 WTO Government Procurement Agreement – to which the EU is a party, but the UK is not – that “on leaving the EU, the UK will succeed to the GPA in its own right, in accordance with

⁴⁹ See for instance Article 360(1) of the 2014 Association Agreement between EU and Central American States provides: “For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties.” (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>). Or, Article 52 of the EU-Korea Framework Agreement: “This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Korea.” (http://eeas.europa.eu/archives/docs/korea_south/docs/framework_agreement_final_en.pdf). Compare also Article 29 VCLT, which sets out that a treaty is binding on a party in respect of its entire territory.

⁵⁰ The international agreements concluded under the CFSP may be found in the EU database. See for a recent example the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information (OJ L106, 22/04/2017).

⁵¹ See for instance the Agreement between the European Community and Canada on trade in wines and spirit drinks (Official Journal L 035, 06/02/2004) Similar ones was concluded with the USA in 1994 and with South Africa in 2002. See for other examples the Agreement between the EC and Australia on trade in wine [2009] OJ L28/3; or the Agreement between the European Community and the State of Israel on government procurement.

⁵² Article 34 of the 1969 Vienna Convention on the Law of Treaties provides: “A treaty does not create either obligations or rights for a third State without its consent”. Art. 34 VCLT is considered a principle of customary international law and is as such also binding on the Union (Judgment in *Brita v Hauptzollamt Hamburg Hafen*, C-386/08, EU:C:2010:91, paras 40–45).

rules of customary international law on the succession of States to treaties, and practice under the GATT 1947, which ‘guides’ the WTO.”⁵³

Yet, there are some serious flaws in this argument. Firstly, the text of the agreements does not indicate the UK (or any other Member State) as a contracting party. In many cases we are dealing with bilateral agreements and it would be difficult to simply read ‘the European Union’ as ‘the United Kingdom’ in those cases. Secondly, given the EU’s separate international legal status and its autonomous position as a global actor, it is difficult to hold on to the idea that the EU acted ‘on behalf of’ its Member States. The Treaty on European Union clearly presents the EU as a separate international actor and over the years it has been accepted as such (and alongside its Member States) by almost all countries in the world. Finally, as also held by Odermatt, it is far from clear that international law accepts the succession of international organizations by former Member States. The Vienna Convention on Succession of States in Respect of Treaties, for example, applies only “to the effects of a succession of States in respect of treaties between States” and it is clear that the EU is not a state.⁵⁴

In other words, the UK will have to start from scratch, although it may in some cases aim at what could largely be a copy of the agreements that were concluded by the EU. This, of course, assumes that the other contracting parties would agree to such a solution. In fact, this should not be taken as a given. One thing is to negotiate a trade agreement with the biggest trade block in the World, quite another to negotiate it with a medium size country on the fringes of Europe.⁵⁵ This is all the more so given the new preference in world trade for big package deals that require big markets to support them. Furthermore, in some cases copy-pasting existing agreements to make them adjusted for the United Kingdom would be less easy than it sounds as many of the provisions were tailor-made for the EU-situation and may require approximation of domestic law with EU *acquis*.⁵⁶

⁵³ L. Bartels, ‘The UK’s Status in the WTO After Brexit’, in R. Schütze and S. Tierney (Eds.), *The United Kingdom: ‘Federalism’ Within And Without*, 2017 (forthcoming; available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747).

⁵⁴ Odermatt, *op.cit.*, at 1059. The non-state nature of the EU was confirmed by the Court in Opinion 2/13 of 18 December 2014, para 156.

⁵⁵ Cf. also P. Koutrakos, Monckton Chambers Blog, 6 July 2016: “Once the UK relied on the good will of a third country to extend these deals to a completely new context, it could not be certain that the latter party would resist the temptation to unravel specific aspects of the deal. It is difficult to envisage, for instance, the automatic rolling over of an existing trade agreement concluded by the EU without adjusting the quotas already applicable to trade between the UK and the third country concerned. The rolling over of existing trade agreements, therefore, would involve renegotiation of at least some of their provisions.” <https://www.monckton.com/brexit-mean-international-trade-agreements/>

⁵⁶ See, for instance, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3. For an academic appraisal see, *inter alia*, G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration Without*

Most likely the third countries will need to be notified of the fact that their respective agreements will no longer apply to a former part of the ‘EU’s territory’.⁵⁷ And, indeed, the ‘territorial scope’ of international agreements concluded by the EU is not without meaning. In the case of trade or investment agreements, for instance, a shrinking territory may be particularly worrisome for a third party, if only because in the case of Brexit it loses 65 million consumers.⁵⁸ In addition, with regard to multilateral agreements in particular, other aspects, including budgetary reallocations, could become part of the deal.⁵⁹

Membership, Brussels 2016, M. Emerson and V. Movchan (eds), *Deepening EU-Ukrainian Relations: What, why and how?*, Brussels 2016.

⁵⁷ Article 56(2) VCLT would imply to give the respective third parties 12 months’ notice of the fact that the UK will cease to be a member of the Union and that therefore the agreement will cease to apply to its territories. As the UK is not a party, the regular termination/denunciation clauses in these agreements do not apply. For an example of a termination clause, see Article 18(4) of the agreement between the European Union and the Republic of Niger on the status of the European Union mission in Niger CSDP (EUCAP Sahel Niger) (OJ, 2013, L 242/2). For an example of a denunciation clause, see Art. 16 (5) of the agreement between the EU and Macedonia establishing a framework for participation of Macedonia in EU crisis management operations (OJ, 2012, L 338/3). Some EU-only agreements even explicitly mention that the EU can only terminate the agreement “in respect of all its Member States” (see for example Article 8(7) of the agreement between the EU and the Commonwealth of Dominica on the short-stay visa waiver (OJ, 2015, L 173/21), emphasis added). See also Van der Loo and Blockmans, *op.cit.* for these examples.

⁵⁸ International agreements may even have effects beyond the territory of the UK in Europe. See on the scope of EU law in relation to overseas territories recently D. Kochenov, ‘European Union Territory from a Legal Perspective: A Commentary on Articles 52 TEU, 355, 349, and 198-204 TFEU’, in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights – A Commentary*, Oxford University Press, 2018 (forthcoming); University of Groningen Faculty of Law Research Paper 2017-05; available at SSRN: <https://ssrn.com/abstract=2956011>.

⁵⁹ In the reverse situation, when a new state joins the EU, the effects for third countries are determined in the accession treaties. See, for instance, Article 6 of the Accession Treaty with Croatia (Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, OJ L112/2012, p. 10. See further, *inter alia*, A. Łazowski, *EU do not worry, Croatia is behind you: A Commentary on the Seventh Accession Treaty*, 8 CYELP (2012) pp. 1-30, at pp. 32-33.

3.2. *Mixed Agreements*

At first sight, the situation could be easier in the case of so-called ‘mixed agreements’ (concluded by both the EU and its Member States and one or more third States or international organizations) as the UK as one of the signatories seems to be a ‘party’ in its own right and bound directly under public international law.⁶⁰ According to Article 2(1)(f)-(g) of the Vienna Convention on the Law of Treaties (VCLT), a State constitutes a ‘party’ to an international treaty so long as it has consented to be bound by the provisions of that treaty, which continues to be in force with respect to it and which has not been terminated in conformity with its own terms, or the VCLT rules on the termination of treaties. While most mixed EU FTAs contain specific provisions for the termination of their operation, they do not provide for a special termination clause in case of withdrawal of a state from the EU. For some, this leads to the conclusion that “the UK’s withdrawal from the EU will not as such affect its capacity as a formal ‘party’ to mixed EU FTAs.”⁶¹ Perhaps the better question is to what extent they will continue to *apply* to the UK.⁶²

In that respect, it is essential to recall that these are not just international agreements that the UK entered into individually. As an ‘integral part of EU law’ – in the words of the EU Court – they are closely connected to other EU legislation and policies. Moreover, many mixed agreements are concluded without a strict indication of what falls under EU competences and what is still in the hands of the Member States.⁶³ In fact, few Council decisions only refer to the participation of Member States in the agreement alongside the Union,⁶⁴ or explain in general terms that the agreement is only

⁶⁰ See, *inter alia*, Ch. Hillion, P. Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World*, Oxford and Portland-Oregon, 2010; as well as J. Heliskoski, *Mixed Agreements as a Technique for Organizing the External Relations of the European Community and its Member States* (Kluwer Law International 2001).

⁶¹ See also R.G. Volterra, ‘The Impact of Brexit on the UK’s Trade with Non-EU Member States Under the EU’s Mixed Free Trade Agreements’, *Oxford Business Law Blog*, 17 May 2017; <https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/brexit-negotiations-series-impact-brexit-uk’s-trade-non-eu-member>.

⁶² *Ibid.* Volterra rightfully draws attention to the distinction between ‘entry into force’ and ‘application’: “Whilst the ‘entry into force’ and the ‘application’ of a treaty typically coincide, this does not necessarily have to be the case. While a treaty might be in force between two or more States, it might not be applicable with respect to a specific Party (*ratione personae*), a specific territory (*ratione loci*) or a set of events situated in time (*ratione temporis*).

⁶³ This was exactly what was at stake during the procedure that led to Opinion 2/15 on the allocation of competences in the Free Trade Agreement between the European Union and Singapore (see *supra*).

⁶⁴ For example, the Council Decision 2010/48/EC concerning the conclusion of the United Nations Convention on the Rights of Persons with Disabilities states that “both the Community and its Member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting

concluded insofar as the agreement's provisions fall under Union competences.⁶⁵ To distill the division of competences from the Council decision adopting the Agreement remains difficult. The Council decisions on signature and provisional application state that the listed provisions shall only provisionally apply "to the extent that they cover matters falling within the Union's competence".⁶⁶ Several Council decisions even explicitly state that "the provisional application of parts of the Agreement does not prejudice the allocation of competences between the Union and its Member States in accordance with the Treaties".⁶⁷ Thus, also the provisional application does not provide a clear indication of the provisions falling under Union or Member State competences.⁶⁸ The same holds true for so-called 'Declarations of competence' that may be attached to an international agreement to give third parties an indication of the responsible parties on the side of the EU. Both the dynamic character of the division of competences and the sometimes not very concrete wording does not allow for too much reliance on these declarations in defining the exact delimitation.⁶⁹

Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner."

⁶⁵ See for instance Council Decision 94/800/EC on the conclusion of the WTO Agreement and its Annexes, which states that these agreements "are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community" (OJ, 1994, L 336). For a more recent example, see Council Decisions 2008/801/EC on the conclusion of the United Nations Convention against Corruption (OJ, 2008, L 287).

⁶⁶ See for example the Council decisions mentioned in the previous note.

⁶⁷ See for example Council Decision 2016/2232/EU on the signing on the EU-Cuba Political Dialogue and Cooperation Agreement (n 33). A similar formulation can also be found in Council Decision 2017/38/EU of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ([2017] OJ L11/1080). The Council and Member States also adopted numerous Statements and Declarations to the Council minutes in which they emphasize that the provisional application of the agreement in several areas such as transport and moral rights does not prejudice the allocation of competences between the EU and the Member States. On the various statements, see G Van der Loo, 'CETA's signature: 38 statements, a joint interpretative instrument and an uncertain future' (*CEPS Commentary*, 31 October 2016).

⁶⁸ In addition, the Council is not always clear or consistent in defining the scope of the provisional application. For examples and comments, see Van der Loo and Wessel, *op.cit.* The lack of a clear demarcation of competences in mixed agreements has been criticized. See Heliskoski, *op. cit.*, p. 98.

⁶⁹ See, for instance, Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11/2017, p. 1080. On Declarations of competence, see A. Delgado Casteleiro, "EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?", *European Foreign Affairs Review* 17(4), (2012), 491-509.

One might argue that all of this is no longer relevant since the UK would become responsible for the entire set of provisions anyway, including the ones that previously fell under the exclusive powers of the EU. Yet, the problem is that on the EU-side mixed agreements were concluded by the states as *Member States* functioning within the institutional and substantive setting that governs the status and implementation of international agreements in the EU and domestic legal orders.⁷⁰ And, in some agreements ‘the Member States of the European Union’ are indeed referred to as such.⁷¹ Elsewhere we have argued that the deletion of the UK as a party could lead to a form of ‘incomplete mixity’.⁷² In any case, negotiations will be time consuming, not only for the UK but also for all third parties. As most (at least bilateral) mixed agreements will not contain clauses on the consequences of parties, the consent of the third state(s) will be needed for the UK to be allowed to withdraw as a party (cf. Art. 54 of the VCLT). Unwillingness on the side of other parties may result in an interesting legal situation in which the UK would not be able to withdraw under international treaty law, despite the fact that this withdrawal may be seen as a logical consequence of Brexit under EU law. At the same time, it would be difficult to force third states to continue to accept the UK as a partner to an agreement even if this were possible. After all, the very reason that the signature of the UK was accepted may have been its EU membership. Finally, for third states, withdrawal from the EU by a treaty partner may form a fundamental change in circumstances (cf. Art. 65 VCLT).⁷³

Would it be possible for the UK to remain a party to a mixed agreement? Theoretically this would not be impossible.⁷⁴ International treaty

⁷⁰ Or, as nicely phrased by Volterra, *op.cit.*: “Where mixed agreements are framed as bilateral agreements between ‘the EU party’ and third States, the intention was presumably to grant benefits to the EU ‘as a whole’ rather than to individual Member States. Accordingly, the provisions of the FTA might not continue to apply automatically to the UK *ratione personae* post-Brexit.”

⁷¹ See more extensively K. Fernekeß, S. Palevičienė and M. Thadikkaran “The Future of The United Kingdom in Europe - Exit Scenarios and Their Implications On Trade Relations” Graduate Institute Trade and Investment Law Clinic Papers, 2013, 07 January 2014, at 49; http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI_2013-01_LawClinic_FutureUKinEurope.pdf

⁷² G. Van der Loo and R.A. Wessel, “The Non-Ratification of Mixed Agreements: Legal Consequences and Options”, *Common Market Law Review*, 2017, No. 3, pp. 735-770 at 748.

⁷³ Yet, see the restrictive interpretation of the principle by the International Court of Justice: “the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases” (Judgment of 25 September 1997, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*). Cf. also Van der Loo and Blockmans, *op.cit.*

⁷⁴ Yet, see the remarks made by Prof. Alan Dashwood in evidence before the UK Foreign Affairs Committee: “Take the example [...] of the free trade agreement with South Korea, which has been very favourable to the UK. [...] The UK will not be able to – well, it could not – stay as a part. Although it is a free trade agreement, it is still a mixed agreement because it goes a little further than the core area of the common commercial policy. Nevertheless, I don’t believe that the UK could retain the rights and obligations that apply to it under the

law is quite flexible, as long as all parties agree. In any case, a legal instrument (for instance a protocol) seems to be required stating that the withdrawing Member State takes over the rights and obligations it previously had under the agreement as an EU Member State and that it joins the agreement as a third party. In all likelihood, this would trigger negotiations to accommodate unforeseen practical problems. Obviously, such a legal instrument would need to be ratified by the EU, its 27 Member States, the third party and the withdrawing Member State. Furthermore, this would change the nature of a bilateral agreement to a multilateral agreement.⁷⁵ Finally, in this respect, it is important to underline that international agreements that have not been ratified by the UK may have to be adapted. While they may already provisionally apply on the basis of the ratification by the EU, their full entry into force may depend on the ratifications of all parties.⁷⁶

With regard to mixed agreements, different considerations indeed apply to *bilateral* and *multilateral* agreements.⁷⁷ In the case of *bilateral* agreements (between the EU/Member States and a third party),⁷⁸ the UK would cease to be a party, but this will not happen automatically. The question is whether a simple notification to third parties would suffice, or whether renegotiations are in order. It has been argued that “in order to extract itself from a mixed agreement, the UK will need to repeal its approval act that ratified the agreement and terminate or denounce the agreement as foreseen in the agreement’s termination or suspension clause. Contrary to EU-only agreements, the UK is a contracting party to the agreement for the mixed elements of the agreement and these termination and denunciation clauses are applicable.”⁷⁹ And, indeed, we may very well need arrangements “between the EU, its 27 remaining member states and the other contracting parties, and

agreement. We would have to renegotiate ...”. Foreign Affairs Committee, Costs and benefits of EU membership for the UK’s role in the world, HC 545, Q219 Q217.

⁷⁵ Ibid. See also on this point, see G. Van der Loo and S. Blockmans, “The impact of Brexit on the EU’s International Agreements”, *CEPS Commentary*, 15 July 2016.

⁷⁶ This is not an unusual situation for international agreements and applies for instance to the EU’s FTAs with Peru and Colombia, Central America, Eastern and Southern African States, Cameroon, more Southern African States, and most Caribbean countries. See more extensively on this intermediate situation Van der Loo and Wessel, *op.cit.*

⁷⁷ Ibid.

⁷⁸ The bilateral nature of these agreements is often underlined by the preamble, where it provides that the agreement is concluded between the third country, of the one part, and the European Union and its Member States, of the other part, jointly referred to as “the Parties”. Significantly, several mixed agreements include a clause defining the term “Parties” as “the Union or its Member States, or the Union and its Member States, in accordance with their respective competences, on the one hand, and [the third country], on the other”. See more extensively Van der Loo and Wessel, *op.cit.*, at 741-742. This has also been affirmed by the Court in Case C-316/91, *European Development Fund* [...]. Interestingly, Article 1.1 of CETA defines the parties as “the European Union or its Member States or the European Union and its Member States, within their respective areas of competence as derived from the [EU Treaties] (hereinafter referred to as the ‘EU Party’)” (emphasis added).

⁷⁹ Van der Loo and Blockmans, *op.cit.*

laid down in a legally binding act”, which as an amendment of the mixed agreements “may need the consent of all involved and – depending on the format – possibly even ratification”.⁸⁰ It is expected that all of this will form part of the withdrawal agreement, possibly on the basis of transition provisions. It remains important to keep in mind, however, that these arrangements cannot simply be done unilaterally, but will have to include the respective third states.

In the case of *multilateral* agreements (between the EU, the Member States and a (large) number of other states), the UK could perhaps remain a party,⁸¹ although a notification regarding the changed situation would be required and an adjustment of some of the commitments could be necessary. Indeed, it should not be excluded that also in this case the UK’s continued participation may become subject to negotiations between the EU, its Member States and third countries (including the UK in a new special position). This may result in solutions on the basis of, for instance, additional Protocols or by replacing the UK’s participation in a multilateral mixed agreement by a ‘UK only’ agreement. For this reason, the withdrawal agreement may perhaps include some provisions on how to proceed in these situations, including the need for notifications and other arrangements. A transition period, allowing the UK to remain covered by certain international agreements for a certain period after Brexit, could also be envisaged (see further below). In any case, it is clear that also in relation to multilateral agreements, the UK will become responsible for the implementation of all provisions, including those related to the EU’s external competences. Depending on the type of agreement, this may require a number of additional domestic implementation measures as these will no longer reach the UK through EU law.

3.3. *Agreements concluded by EU Member States*

A separate category is formed by, what we may perhaps term ‘Member States-only’ agreements. Obviously, Member States have remained ‘states’ and in areas in which they are still competent to do so, they have continued to conclude international agreements, either with third states or among

⁸⁰ Ibid.

⁸¹ Cf Bartels, *op.cit.*, who argues that “the UK already today possesses full WTO rights and obligations under the WTO multilateral trade agreements, even if these are, at present, for the most part, exercised and performed on its behalf by the EU.” As indicated above, the suggestion that the Union merely acts ‘on behalf’ of the Member States in these situations seems flawed. Cf. also P. Ungphakorn, ‘Nothing Simple About UK Regaining WTO Status Post-Brexit’, *ITCSD Opinion*, 27 June 2016; <http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit>.

themselves (*inter se*).⁸² The EU treaties even expressly mention the competence of Member States to enter into international agreements with third countries;⁸³ and this competence may also be part of EU secondary legislation.⁸⁴ While, *prima facie*, these agreements are not part of the Union's legal order⁸⁵ and would thus not be affected by the withdrawal of a Member State from the EU, there may be clear links with EU law. This is particularly true when Member States are authorised by the EU to conclude international agreements, for instance in areas in which the EU is exclusively competent, but for practical reasons not able to exercise this competence.⁸⁶

Allan Rosas listed four main reasons why some international agreements do not count the EU among their contracting parties:⁸⁷ 1. many agreements were concluded by Member States before they became EU members or before an EU competence in a particular area became clearly established; 2. the agreement may concern a matter that is still outside an EU competence; 3. the EU Commission or the Council may prefer, for political or other non-legal reasons, not to conclude an agreement despite the existence

⁸² Cf. B. De Witte, "Old-Fashioned Flexibility: International Agreements between Member States of the European Union", in G. De Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Oxford, Hart, 2000, pp. 31-58.

⁸³ See, for instance, Article 34(2) TEU; Articles 165(3), 166(3), 167(3), and 168(3) TFEU; and Articles 191(4), 209(2), 212(3), and 214(4) TFEU.

⁸⁴ See further below.

⁸⁵ Indeed, it is generally held that the general rules and principles of EU law are not applicable to these agreements. See A. Rosas, "The Status in EU Law of International Agreements Concluded by EU Member States", *Fordham International Law Journal*, 2011, pp. 1303-1345, at 1314. Cf. also Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*: the Court "does not, in principle, have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries."

⁸⁶ Examples include the air service agreements, which, after a judgment by the Court, suddenly proved to be covered by the Union's exclusive competences, but need time to be replaced (see Parliament and Council Regulation No. 847/2004 on the Negotiation and Implementation of Air Service Agreements between Member States and Third Countries, 2004 O.J. L 157/7). Similar situations arose in relation to the bilateral investment treaties (BITs) (see Regulation ...) and with respect to European private law (Parliament and Council Regulation No. 662/2009 Establishing a Procedure for the Negotiation and Conclusion of Agreements between Member States and Third Countries on Particular Matters Concerning the Law Applicable to Contractual and Non-Contractual Obligations, 2009 O.J. L 200/25; and Parliament and Council Regulation No. 593/2008 on the Law Applicable to Contractual Obligations, 2008 O.J. L 177/6 [Rome I Regulation]; and Parliament and Council Regulation No. 864/2007 on the Law Applicable to Noncontractual Obligations, 2007 O.J. L 199/40 [Rome II Regulation]).

⁸⁷ Rosas, *op.cit.* See also R. Schütze, "EC Law and International Agreements of the Member States – An Ambivalent Relationship", *Cambridge Yearbook of European Legal Studies*, 2006, p. 387; J. Klabbers, *Treaty Conflict and the European Union*, [...] 2009; J.W. van Rossem, "Interaction between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but Not the Community", *Netherlands Yearbook of International Law*, 2009, p. 183.

of a Union competence to do so and, in the case of a multilateral convention, despite the existence in the agreement of a clause enabling an integration organization like the EU to become a contracting party; and 4. a multilateral agreement may be closed to EU adherence by limiting the right to adhere to “states”. To complicate things, agreements can be concluded before and after EU membership and can, in both cases, be concluded with third countries or between Member States *inter se*.

What consequences will Brexit have on these agreements? Specific references in the treaties to agreements *inter se* (such as on the Benelux in Article 30 TFEU) do not seem to apply to the UK. Yet, some secondary instruments also allow for specific arrangements between Member States, despite the fact that a clear link with EU law is maintained.⁸⁸ A case in point is also formed by the over 150 intra-EU bilateral investment treaties (BITs). Despite the fact that the Commission works hard to make an end to these agreements – in particular now that direct investments are covered by EU exclusivity – these agreements have not completely disappeared.⁸⁹ One could argue that, post-Brexit, the UK as a third state, would be free to maintain its 12 existing agreements with EU Member States.⁹⁰ While this may be the case for the UK, it may not be the case for EU Member States. In areas such as air transport, investments of specific parts of private law, the intention is to gradually phase out agreements concluded by Member States, and this will also affect the UK. Hence, renegotiations may be in order even for these agreements. Furthermore, the state of European integration may stand in the way of new bilateral agreements with EU Member States. Thus, it has been argued that negotiating post-Brexit bilateral arrangements in the area of free-movement with selected Member States may be deeply problematic from the point of view of non-discrimination and the basic idea of European unity.⁹¹

In contrast to the agreements *inter se*, the well-known Article 351 TFEU allows for agreements concluded prior to EU Membership with third countries to be (temporarily) maintained even if they would conflict EU law and irrespective of the obligation “to take all appropriate steps to eliminate

⁸⁸ Rosas, *op.cit.*, at 1318 refers to the ‘Brussels 1’ Regulation (Council Regulation No. 44/2001), the (above-mentioned) Rome 1 and 2 Regulations. In addition, some agreements are concluded outside the Union law framework to promote closer cooperation. Examples include the 1985 Schengen Agreement and the 2005 Prüm Convention.

⁸⁹ See M. Bungenberg and A. Reinisch, “Special Issue: Legal Problems of Intra-EU BITs – An Introduction”, *The Journal of World Investment & Trade*, 2016, pp. 871-872; as well as other contributions to this special issue.

⁹⁰ J. Rogers, S. Goodall and C. Dowling, “Brexit and investor-state dispute Settlement”, *International Arbitration Report*, June 2017, pp. 24-27. The UK has intra-EU BITs with Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

⁹¹ See D. Kochenov, ‘EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?’ University of Groningen Faculty of Law Research Paper 2016-23; LEQS Paper No. 111, June 18, 2016; available at SSRN: <https://ssrn.com/abstract=2797612>.

the incompatibilities established.” (par. 2). While it is generally held that these incompatibilities should also be solved or avoided in relation to future EU norms,⁹² Article 351 regulates the intra-EU status of international agreements concluded by Member States “before the date of their accession”. It does not seem to allow for (previously *inter se*) international agreements to be in conflict with EU law once the UK becomes a third country, despite the fact that these agreements may have been around for a long time (and theoretically even pre-date UK accession).

In relation to agreements concluded by the Member States and other third countries the question may also arise whether they have no effect at all on the Union. After all, “After 50 years of existence, the EU has engendered a dense legal order. On occasion, its legislative activity reaches beyond the EU’s legal space and incidentally affects relations between third parties and EU members.”⁹³ It is well-known that in *International Fruit*,⁹⁴ the Court had no difficulties in accepting a binding effect of the GATT 1947 on the Community, despite the fact that it was not a party to that agreement. Indeed, the notion of ‘succession’ played a crucial role in that respect: competences were fully transferred from the Member States to the Community *and* this was recognised and accepted by third states.⁹⁵ Exceptional as this situation may be, the question is what the legal and/or practical status is of agreements in which the UK mainly acted as an ‘agent’ of the Union as (over time) it lost competences in this area⁹⁶ as the Union exercised its so-called ‘normative control’.⁹⁷ True, the UK remains a party in its own right, and one might argue

⁹² In general, the Court held that Member States may not escape from applying Union law with reference to an existing international agreement. A case in point is Case 812/79 *Attorney General v. Juan C. Burgoa*: “in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT”. See also Case C-158/91 *Criminal proceedings against Jean-Claude Levy*.

⁹³ M. Ličková, ‘European Exceptionalism in International Law’, *EJIL*, 2008, pp. 463-490, at 466. This statement is even more valuable after 60 years of existence.

⁹⁴ Joined Cases 21-24/72, paras.14-18; see also Schütze, *op.cit.*, at 394-99; Van Rossem, *op.cit.*, at 30-31.

⁹⁵ Rosas, *op.cit.*, at 1326.

⁹⁶ Remember the importance of the fact that in the *ERTA* case, the court recognised that the Member States “acted in the interest and on behalf of the Community.” Case 22/70, paras. 80-90. And, in relation to the ILO, it held that competences “may, if necessary, be exercised through the medium of the Member States acting jointly in the Community’s interest.” Opinion 2/19, par. 37.

⁹⁷ Cf. also Delgado Casteleiro, *op.cit.* This doctrine was mentioned by the Commission in the discussions on the ILC Draft Articles on the Responsibility of International Organizations: “European Union member States have transferred competences (and therefore decision-making authority) on a range of subject matters to the European Union. [...] This requires special rules of attribution and responsibility in cases where European Union member States are in fact only implementing a binding rule of the international organization. In other words, the European Union exercises normative control of the member States who then act as Union agents rather than on their own account when implementing Union law.” ILC, Responsibility

that it simply regains its status as a full party in any practical sense now that it becomes responsible again in substantive terms. Yet, the implementation of those agreements was basically done on the basis of EU rules and in close alignment with EU law and policies. One may think of multilateral international agreements in the maritime or fisheries area, on the basis of which the UK is a member of international organizations (such as the ILO or the IMO) in which it, so far, mainly or partly acted as an agent of the Union. A recent statement of the International Tribunal for the Law of the Sea (ITLOS) is illustrative in that respect: “In cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, *the obligations of the flag State become the obligations of the international organization.*”⁹⁸ While the status of agreements concluded by the Union may be clear, the question may be raised to what extent agreements concluded by Member States are (also) part of the Union’s legal order,⁹⁹ in which case disentanglement from that order may be more complex than a withdrawal of a Member State would suggest. It is true that the situations that come to mind concern multilateral agreements to which all Member States are a party, but even ‘UK-only’ agreements should not be a priori excluded. As an example, the UK is a signatory to 84 BITs with other countries.¹⁰⁰

A related question concerns the relevance of so-called ‘disconnection clauses’, that may have been inserted in multilateral conventions (as for instance the ones concluded in the framework of the Council of Europe) to ensure that *between* EU members the relevant provisions of Union law apply rather than the provisions of the international agreement.¹⁰¹ These clauses thus regulate the applicable law between Member States *inter se* (or between the Union and the Member States) on issues dealt with by the multilateral agreement. They are meant to solve potential conflicts between EU law and international law and preserve the autonomy of the Union’s legal order. The question of whether and how the UK should be ‘reconnected’ after Brexit

of international organizations Comments and observations received from international organizations, Sixty-third session, UN Doc. A/CN.4/637, pp. 37-38.

⁹⁸ Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (‘Request for Advisory Opinion submitted to the Tribunal’), Advisory Opinion of 2 April 2015, Case No. 21, para. 172 (emphasis added). Cf. also H. Tuerk, ‘Liability of International Organizations for Illegal, Unreported and Unregulated Fishing’, *Indian Journal of International Law*, 2015, p. 161-176.

⁹⁹ Rosas, *op.cit.*, at 1333 pointed to some Council decisions authorizing Member States to conclude international agreements “in the interest of the Union”.

¹⁰⁰ Rogers, Goodall and Dowling, *op.cit.*

¹⁰¹ M. Cremona, ‘Disconnection Clauses in EU Law and Practice’, in Hillion and Koutrakos, *op.cit.*, pp. 160-186 at 160.

seems to be provided by the clauses themselves, that (in their quite standard form) read like this:

“Parties which are members of the European Union shall, in their mutual relations apply Community and European Union rules in so far as there are Community and European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.”¹⁰²

The EU and its Members made clear that the disconnection clause does not affect the rights of third parties.¹⁰³

One could argue that post-Brexit, the disconnection clauses will simply no longer apply to the UK. As a non-EU state, the UK will become bound by the full range of obligations in the multilateral conventions, irrespective of any existing EU rules governing the subject. At the same time, the disconnection clauses seem to have created two separate sets of rules on the basis of which – in the words of Cremona – “the EC/EU and its Member States’ are to be regarded as linked to each other rather than completely independent vis-à-vis other Parties.”¹⁰⁴ Also in this case, practice will reveal to what extent the UK can easily shift from one regime to the other. Ten years ago, the question was already raised “whether it will always be easy to draw a clear line between ‘legal relations between EU Member States *inter se*’, on the one hand, and their relations towards third states, on the other.”¹⁰⁵ Again, it may be difficult to disentangle the UK from the EU-regime and to change the relationship with its former fellow EU-members overnight. And, just like the above-mentioned distinction between EU-only and mixed agreements, also in this case differences will emerge between areas in which the Member

¹⁰² Art. 26(3) of the Council of Europe Convention on the Prevention of Terrorism 2005, CETS No. 196. As exemplified by the 2015 Hague Convention on Choice of Court Agreements, the text of a clause may also be more abstract and not refer to the EU expressly: “This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention – a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation; b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.” (Art. 26(6)).

¹⁰³ This is done in an additional declaration, attached to the Convention: “[...] This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this convention. [...] They will thus guarantee the full respect of the Convention’s provisions vis-à-vis non-European Union Parties”.

¹⁰⁴ Cremona, *op.cit.*, at 171. This idea is supported by the provision in the mentioned Declaration that “[...] the Convention applies fully between the European Community/European Union and its Member States *on the one hand*, and the other Parties to the Convention, *on the other*.” (emphasis added).

¹⁰⁵ M. Ličková, *op.cit.*, at 486.

States are still largely in control and areas that have become subject to (almost) complete harmonisation.¹⁰⁶

3.4 UK alignment to parts of the EU's external relations regime

This brings us to the question to what extent there will be possibilities for the UK to stay close to EU external policies and to what extent this could even be institutionalised. Obviously, the political will on the side of the UK (and the EU) is uncertain. The regained freedom may trigger the UK to align with other states and seek new coalitions, also in other international organizations such as the WTO, the FAO or in fisheries organizations. Legal possibilities will furthermore largely depend on the chosen future arrangement between the EU and the UK, which is analysed in other contributions to this special issue. Nevertheless, some general remarks can be made.

First of all, nothing would formally stop the United Kingdom from associating itself with EU's Common Foreign and Security Policy. This can take two forms. The UK could simply, informally, align itself to positions taken by the Union on foreign policy. Apart from the fact that the UK will no longer be able to consult the EU members 'within the European Council and the Council',¹⁰⁷ nothing seems to stand in the way of informal consultations either at those levels or at the level of the working parties.

A second, more formal, possibility would be for the UK to join EU statements, policies and even international agreements. It is not uncommon for third states to do this.¹⁰⁸ A particularly relevant example is the alignment of third states with EU sanctions, something that happens quite often and obviously strengthens the sanction regime.¹⁰⁹ But alignment is also possible in other areas of EU foreign and security policy. Thus, Declarations by the EU can be joined by third states, and international agreements can be

¹⁰⁶ This complexity is exemplified by the Lugano Convention, which was signed by the Community alone (following Opinion 1/03), but nevertheless refers to the fact that for EU Member States internal EU legislation (in casu Regulation 44/2001) applies (Art. 64(1)). See further Cremona, *op.cit.*, at 177.

¹⁰⁷ Article 32 TEU provides: "Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity."

¹⁰⁸ In this respect the Association Agreements with Ukraine, Georgia and Moldova may serve as an example as all three comprise more comprehensive measures regulating alignment of these countries with EU's foreign and security policy activities.

¹⁰⁹ See for instance E. Hellquist, *Either with us or against us? Third-country alignment with EU sanctions against Russia/Ukraine*, 29 CRIA (2016), pp. 997-1021.

concluded on for instance the participation in EU military missions.¹¹⁰ Dashwood even suggested that “with some legal tweaking (or perhaps by establishing a new ‘European Foreign, Security and Defence Community’), the UK should be able to retain a place at the Council table” in the area of CFSP.¹¹¹ The quite demanding obligations in the CFSP area¹¹² may, however, form a reason for the UK to conclude that this does not really contribute to its newly regained freedom in international affairs. At the same time, the EU 27 may be hesitant to institutionalise any form of structural cooperation so soon after the withdrawal phase.

With regard to international agreements more generally, the question is whether the UK would be able to continue to connect to the many far-reaching agreements the EU has concluded. With regard to Association Agreements in particular, the special close (sometimes even ‘deep and comprehensive’) relationship was not just created with the EU, but also with the Member States. To maintain a similar regime between the UK and those third states post-Brexit would perhaps call for a continued dialogue and perhaps even an institutional arrangement between the UK and the EU. Again, this may be less easy than it sounds. For instance, a decision would have to be made on the participation of the United Kingdom in regular updates to Association Agreements with Ukraine, Georgia and Moldova.¹¹³ Or, *modus operandi* would have to be developed for participation of the UK in regular updates of the European Economic Area,¹¹⁴ in the case it remains an EEA member after Brexit.

The question is to what extent the agreement between the EU and the UK regulating relations post-Brexit can regulate participation of the United Kingdom in the EU’s external activities. In this case, much will depend on the will of both sides, but existing practice can already be somewhat instructive. For instance, the European Economic Area, which is based on an association agreement, does not include provisions on the external dimension. To put it differently, its scope is limited to EU-EFTA countries relations. The same applies to dozens of EU-Swiss Agreements regulating the bilateral

¹¹⁰ The participation of third states in EU military missions is usually done on the basis of a special agreement to that end. See, for instance, the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, OJ L 143/2011, p. 1.

¹¹¹ A. Dashwood, *After the Deluge*, 41 ELRev. (2016) pp. 469-470.

¹¹² R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *European Foreign Affairs Review*, 2015, pp. 123-146.

¹¹³ Association Agreement between the European Union, the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ L 161/2014, p. 3; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/2014, p. 4; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260/2014, p. 4.

¹¹⁴ Agreement on the European Economic Area, OJ 1994 L 1/1.

relations. The situation is different, however, with other agreements concluded with EU's immediate neighbours. Thus, the Stabilisation and Association Agreements with the Western Balkans provide for co-operation between the associated states and the European Union in the fields covered by the Common Foreign and Security Policy. This, however, is not a very comprehensive legal framework as the matters in question fall under a more general umbrella of Political dialogue.¹¹⁵ A similar model has been followed in Association Agreements with the Mediterranean countries.¹¹⁶ It remains to be seen if provisions of that kind could find their way into the legal framework governing the post-Brexit relations between the European Union and the United Kingdom.

4. Conclusion

This contribution focussed on two particular aspects of Brexit: the extent to which the UK is competent to negotiate and conclude new agreements to replace the ones concluded by the EU, and the consequences of Brexit for existing international agreements. Our main point was that the UK will have to start from scratch in re-developing its international relations as large parts of it were regulated on the basis of EU external relations law. The existing division of competences as well as the principles of sincere cooperation and primacy also make it difficult for the UK to fully prepare future relations with third states prior to exit day. A special transition arrangement for the UK, either during or after the negotiation period, may be necessary to solve this problem.

As to the existing agreements, it was pointed out that with regard to all existing – EU-only and (bilateral and multilateral) mixed – agreements there are legal obstacles preventing the UK to simply ‘take over’. As rightfully noted by Volterra, “There is no ‘one-size-fits-it-all’ solution to this problem. Each mixed EU FTA must be considered on a case-by-case basis.

¹¹⁵ See Article 7 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, OJ L 84/2004, p. 13; Article 8 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L 107/2009, p. 166; Article 10 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, OJ L 278/2013, p. 14; Article 10 of Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, OJ L146/2015, p. 2; Article 11 of Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo *, of the other part, OJ L 71/2016, p. 3.

¹¹⁶ See, for instance, Article 3 of Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, OJ L 304/2004, p. 39.

Each is a separate agreement that needs to be interpreted in accordance with its own wording, taking into account its specific context, its object and purpose, as well as any special meaning that the parties might have intended, pursuant to Article 31 of the VCLT.”¹¹⁷ In most cases renegotiations are in order, or – as in the case of multilateral mixed agreements – at least notifications to inform the other parties of a change in the division of competences. Also in the case of agreements between the Member States, situations may change as the UK will no longer be bound by the rules restraining cooperation of EU Member States *inter se*. As a third state, the UK will most probably occupy a different position in those frameworks. Many of these issues may be dealt with by the agreement negotiated between the UK and the Union on their future relationship. This arrangement could include provisions allowing these agreements to continue to apply with respect for the United Kingdom for a specific period during which the UK will have time to rearrange its external legal relations.

This is not to say that the UK’s external relations regimes will by definition be very different compared to what it is now. In a substantive manner it may be possible to copy-paste many of the arrangements that are currently in EU-only agreements. At the same, there will be possibilities for the UK to align itself to the EU’s foreign and security policy and to other external policies and it may continue to contribute to EU military missions. All of this, however, will be done as a non-EU member and the UK will not only have to be ready to ‘take back control’ in areas in which it was used to leave international negotiations and participation in international institutions to the EU, but also to ‘give up control’ in the Institutions of one of the most influential global actors.

¹¹⁷ Volterra, *op.cit.*