Part I: Brexit and the Law of Treaties

The starting point for any legal analysis is the determination of the relevant parameters: what is the subject of the study and what rules apply? What is the EU and what rules apply to the situation of a state leaving it? As Isiksel once pointedly remarked, '[t]he debate over whether the EU is a state, federation, international organization or flying saucer is as old as European integration itself'[1], and still its final outcome remains uncertain.[2] Instead, a certain acceptance appears to have developed that the answer may well depend on one's perspective as well as the respective context.[3] As a result, a bouquet of designations for the EU exists, illustrating the breadth of the discussion. In contrast to the terms Isiksel references (state,

1 T Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27(3) *European Journal of International Law* 565, 571.

2 Cp eg the many different opinions expressed in commentaries on the EU Treaties alone: R Geiger and Kirchmair, 'Article 1 TEU' in R Geiger, D-E Khan, M Kotzur and Kirchmair L (eds), *EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (7th edn, CH Beck 2023) para 12 ('es handelt sich um die Neuschöpfung einer Rechtsordnung "eigener Art"'); M Pechstein, 'Article 1 TEU' in R Streinz (ed), *EUV/AEUV: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, CH Beck 2018) para 13 ('Die Diskussionen, ob die EU [...] als internationale Organisation angesehen werden konnte [...] sind nunmehr überholt: Die EU ist nunmehr als solche zu klassifizieren.'); M Nettesheim, 'Article 1 TEU' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (82nd supplement, CH Beck 2024) para 63 ('Bezeichnung des Verbundes von EU und Mitgliedstaaten als konsoziativem Föderalismus'); C Calliess, 'Article 1 TEU' in C Calliess and M Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (6th edn, CH Beck 2022) para 45 ('der so verstandene – notwendig föderale – Staaten- und Verfassungsbund'). For a recent contribution to the debate, see J Hoeksma, 'The Identification of the EU as a New Kind of International Organisation' (*Opinio Juris,* 19.11.2022) <http://opiniojuris.org/2022/11/19/the-identification-of-the-eu-as-a-new-kind-of-international-organisation/>.

3 Explaining the 'diverging views' in detail, J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 22–28. See C Binder and JA Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' in M Bungenberg and others (eds), *European Yearbook of International Economic Law 2017* (Springer 2017) 147–155 on the 'self-representation' and 'self-assessment' of different EU institutions.

federation, international organisation) many others (*Staatenverbund*[4], *sui generis*) escape traditional categories. Sometimes creating new categories is preferable to pigeonholing. Rather than cramming the EU into an existing legal drawer, it may be helpful to create a new one; however, problems arise if it does not fit into the existing chest.

International law is such a chest. It is 'the legal order which is meant to structure the interaction between entities participating in and shaping international relations'[5]. These entities are no longer just states, but today encompass a broader range of actors such as international organisations, belligerent groups and individuals, all 'capable of possessing international rights and duties'[6]. Which concrete rights and obligations these refer to, in turn, largely depends on the kind of subject. Some rules of international law apply only to states and others specifically to international organisations.[7] If the EU is now understood as an entity *sui generis*, this may allow it a more dynamic process of integration, free(r) from traditional thought patterns.[8] But where the EU is 'participating in and shaping international relations'[9] – as it has the competence to do[10] – *sui generis* is a drawer that does not fit. So, what rules of international law apply to an entity that purports to be different from all others?

4 First used by the German Constitutional Court in its judgement on the Maastricht Treaty (German Federal Constitutional Court, 2 BvR 2134/92, 2 BvR 2159/92 *Maastricht* [1993] BVerfGE 89, 155, [90]).

5 R Wolfrum, 'International Law' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) para 1.

6 C Walter, 'Subjects of International Law' in R Wolfrum (ed) (n 5) para 1.

7 Although these rules are sometimes very similar, if not partly identical. See the two conventions on the law of treaties, one limited to states (Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT]) and one applicable to agreements between international organisations and between states and international organisation (Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted and opened for signature 21 March 1986) UN Doc A/CONF.129/15 [VCLT-IO]).

8 See also J Odermatt (n 3) 12.

9 Wolfrum (n 5) para 1.

10 Cp Art. 3(5) TEU according to which the EU 'shall contribute […] to the strict observance and the development of international law'. Moreover, Art. 216 TFEU allows the EU the conclusion of international agreements 'with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'

It is important to note that the assumption underlying this question is one seldomly shared by international lawyers.[11] As Schütze argues, not only is 'the *sui generis* "theory" [...] historically unfounded'[12], it also 'only views the Union in *negative* terms', making any analysis impossible.[13] Thus, for many international lawyers, the most natural approach to viewing the EU is from an international institutional law perspective:[14] while the EU is undoubtedly the most integrated international organisation, its foundations are nevertheless international treaties concluded, revised and acceded to by its Member States.[15] With the UK withdrawing from these treaties, Brexit thus presents itself as a case of termination of membership in an international organisation (*§ 2*).

Regarded as such, Brexit is no new phenomenon. While rising scepticism among states towards international cooperation has led to recent renewed scholarly attention on the topic, withdrawals from international organisations have occurred throughout their history.[16] Moreover, many international organisations regularly engage in international treaty-making. While the EU is an especially 'active treaty-maker'[17], most international organisations possess the legal personality, capacity and competence necessary to conclude international agreements with states and other inter-

11 P Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (Illinois University Press 1966) 44; E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press 2005) 1.

12 R Schütze, *European Constitutional Law,* 2nd edn (Cambridge University Press 2015) 67.

13 R Schütze, 'On "Federal Ground": The European Union as an (Inter)national Phenomenon' in R Schütze (ed), *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 34.

14 RA Wessel, 'Studying International and European Law: Confronting Perspectives and Combining Interests' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 83.

15 See in detail, B De Witte, 'EU Law: Is it International Law?' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020).

16 CM Brölmann and others, 'Exiting International Organizations: A Brief Introduction' (2018) 15(2) *International Organizations Law Review* 243, 243–244. On the issue generally, see N Singh, *Termination of Membership of International Organisations* (Praeger 1958) and more recently, A Schwerdtfeger, 'Austritt und Ausschluss aus Internationalen Organisationen: Zwischen staatlicher Souveränität und zwischenstaatlicher Kooperation' (2018) 56(1) *Archiv des Völkerrechts* 96.

17 J Larik, 'Instruments of EU External Action' in RA Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Bloomsbury Publishing 2020) 109–110 with a graph demonstrating the increase in activity until the early 2000s and a slowing down in the years since then.

national organisations.[18] If both withdrawal and treaty-making are known phenomena in the law of international organisations, the question of the effect of the former on the latter should not be considered a Brexit novelty. What then are the rules generally applicable in the case of member withdrawal and what is the practice as regards its effect on international agreements? Can these rules or prior practice explain EU and UK claims that EU-only, bilateral mixed and *inter se* agreements cease to bind the UK, even where – as in the latter two cases – it became a party itself?

To answer these questions, two situations must be distinguished: firstly, exiting an international organisation entails direct legal consequences, in some cases also for international agreements (*§ 3*). Considering the possible effect on international agreements as a legal consequence of Brexit could provide a direct cause-and-effect nexus, speaking to the EU and UK's claim of *automatic* termination. At the same time, while the UK is leaving the EU, Brexit is still an EU internal process. Especially with regard to international agreements concluded with non-EU states, the *external* legal consequences of such an *internal* process are limited.

Secondly, withdrawal from an international organisation results in factually changed circumstances which can have an effect on international agreements (*§ 4*). Thus, while Brexit can be considered as a process entailing legal consequences, the UK's loss of EU membership is also a fact and as such may be invoked as grounds for denouncing international agreements. Consideration of Brexit with the rules for treaty denunciation appears reasonable given that the UK became party to many international agreements itself. At the same time, this questions the narrative of *automatic* termination. While treaty law generally acknowledges treaty termination as a corollary of state sovereignty, it also aims to strike a balance with the core principle of treaty stability.[19] In doing so, the procedural

18 See only the work of the International Law Commission on the VCLT-IO (ILC, 'Analytical Guide to the Work of the International Law Commission: Questions of Treaties concluded between States and International Organizations or between two or more International Organizations' (7.2.2022) <https://legal.un.org/ilc/guide/1_2.shtml>). On treaty-making by international organisations in general, see HG Schermers and N Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 1262 and J Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 251 ff.

19 H Krieger, 'Article 65' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 2.

hurdles, such as notifications, negotiations in good faith and waiting periods, *prima facie* seem to speak against any automatic effect of Brexit.

§ 2 EU Withdrawal: Exiting an International Organisation

Depending on the characterisation of a process – in this case, the UK leaving the EU – different rules of international law may apply. In the case of Brexit, the preliminary question is how the EU itself should be classified. The answer underlying the vast majority of studies on the effect of Brexit is that the EU must be characterised as an international organisation.[1] This is supported by the fact that the EU fulfils all the typical characteristics of an international organisation (I.). Moreover, in the past, the hypothetical scenario of a state leaving the EU long played a role in the debate: what did the absence of a withdrawal provision mean for the determination of the EU's legal nature? Would the question of whether a state could leave the Union have to be answered from an international or constitutional law background? The introduction of Art. 50 TEU with the *Treaty of Lisbon* resolved the question whether a Member State may withdraw, granting a clear right to do so. Its design, moreover, very much resembles the exit clauses of other international organisations (II.). Brexit being the first case of Art. 50 TEU's application, it thus presents itself as the exit from an international organisation (III.).

1 The question is rarely explicitly addressed (for an exception, see D Steiger and W Günther, 'Brexit: What's Public International Law Got to Do with it' in KA Prinz von Sachsen Gessaphe, JJ Garcia-Blesa and N Szuka (eds), *Legal Implications of Brexit* (MV Wissenschaft 2018) 95–97), but the classification shows in the comparisons drawn (see eg RA Wessel, 'You Can Check out Any Time You like, but Can You Really Leave?' (2016) 13(2) *International Organizations Law Review* 197, 197 and A Schwerdtfeger, 'Austritt und Ausschluss aus Internationalen Organisationen: Zwischen staatlicher Souveränität und zwischenstaatlicher Kooperation' (2018) 56(1) *Archiv des Völkerrechts* 96, 1 both referring to Brexit as a withdrawal from an international organisation) or the rules of international law applied (see eg S Silvereke, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced is Worse?' (2018) 15(2) *International Organizations Law Review* 321, 321 referring to Art. 70 VCLT; on the relevance of Art. 70 VCLT in the context of Brexit, see below Part I § 3).

I. (Un)Identified Legal Object²? The EU as an International Organisation

In international institutional law, definitions of the term 'international organisation' vary in detail but range around two main overlapping criteria: cooperation that is, firstly, founded on an international agreement and, secondly, features an organ with a *volonté distincte* from its Member States.[3] Considering the EU Treaties (and their predecessors) and the institutional structure of the EU[4], the Union undoubtedly falls within this definition or, as De Witte puts it, can 'tick all the boxes'[5]. Thus, the debates regarding the nature of the EU do not purport that it does not meet these criteria. Rather, the EU is considered to have outgrown them by featuring characteristics surpassing international organisations' basic attributes. While there seems to be consensus regarding the origins of the EU being international agreements between Member States, proponents of non-organisational concepts

2 Cp J Odermatt, 'Unidentified Legal Object: Conceptualizing the European Union in International Law' (2018) 33(2) *Connecticut Journal of International Law* 215.

3 See eg J Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 6–12 defines an international organisation as 'created between states', 'on the basis of a treaty' and having 'an organ with a distinct will'; HG Schermers and N Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) para 33: 'forms of cooperation (1) founded on an international agreement; (2) having at least one organ with a will of its own; (3) established under international law'. After refraining from a clear definition in previous works (cp Art. 2(1)(i) VCLT-IO: '"international organization" means an intergovernmental organization'), Art. 2(a) of the International Law Commission's (ILC) Draft Articles on Responsibility of International Organizations defines the term as 'an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to states, other entities' (ILC, 'Draft Articles on the Responsibility of International Organizations' UN Doc A/66/10, YBILC (2011) Vol. II(2)). On the drafting history of this definition, see HG Schermers and N Blokker (n 3) para 29A.

4 For the different legal instruments of the EU institutions, see Art. 288 TFEU.

5 B De Witte, 'EU Law: Is it International Law?' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 179. International institutional law literature, thus, regularly treats the EU as one of their subjects of study, see eg the seminal works by J Klabbers (n 3) and HG Schermers and N Blokker (n 3). See also RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019).

question the *continued* nature of the founding Treaties as 'ordinary international agreements'[6].[7]

In arguing in favour of the Union's 'organisationhood'[8], De Witte makes the case that the EU has been and is 'still situated *within* international law'[9] by essentially relying on three arguments.[10] Firstly, considering the history and subsequent development of the EU's foundational Treaties, he concludes that Member States never intended for the EU to depart from its international law origins. During the post-World War II rebuilding of Europe, governments resorted to the classical means of international cooperation by concluding treaties on the establishment of a variety of international organisations – the Organisation for European Economic Cooperation[11] (OEEC), the Council of Europe[12] (CoE), and the European Coal and Steel Community[13] (ECSC).[14] Although the ECSC differed from the previous two in that it encompassed supranational elements,[15] neither the *Treaty Establishing the European Economic Community*[16] (EEC Treaty) nor any of its successors evidence any intention of the Member States to

6 A notion repeatedly employed by the ECJ, see rather recently in ECJ, Opinion 2/13 *Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, 157: 'the founding treaties of the EU, unlike *ordinary international treaties*, established a new legal order' (emphasis added).

7 On the EU Treaties as 'Europe's "constitutional treat(ies)"', see R Schütze, 'On "Federal Ground": The European Union as an (Inter)national Phenomenon' in R Schütze (ed), *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 22–26.

8 The term is used in contrast to FG Mancini, 'Europe: The Case for Statehood' (1998) 4(1) *European Law Journal* 29. In response JH Weiler, 'Europe: The Case Against the Case for Statehood' (1998) 4(1) *European Law Journal* 43.

9 De Witte (n 5) 178 (emphasis in the original).

10 Ibid 179–184. See also B de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012).

11 Convention for European Economic Cooperation (adopted on 16 April 1948, entered into force 28 July 1948) 888 UNTS 141 [EEC Convention].

12 Statute of the Council of Europe (signed on 5 May 1949, entered into force 3 August 1949) 87 UNTS 103 [CoE Statute].

13 Treaty establishing the European Coal and Steel Community (adopted 18 April 1951, entered into force 23 July 1952) 261 UNTS 140 [ECSC Treaty].

14 De Witte (n 5) 179.

15 Ibid 180. Cp ECSC Treaty, Art. 9 referring to the 'supranational character' of the High Authority.

16 Treaty establishing the European Economic Community (adopted on 25 March 1957, entered into force 1 January 1958) 294 UNTS 3 [EEC Treaty].

depart from this 'treaty path'[17]. Instead, in external relations with non-EU states, and especially in the context of multilateral fora, the EU and its Member States have repeatedly accepted the EU's qualification as an international organisation.[18]

Secondly, De Witte argues that the features distinguishing the EU from (most) other international organisations neither contradict said intention nor, as such, change the legal character of the EU. While he acknowledges that features such as the EU's 'constant stream of new legislation in a broad range of policy areas'[19], vested with primacy[20] and enforced through broad judicial enforcement mechanism,[21] are not typical for international organisations, De Witte views them as exemplifying the flexibility of international law to encompass new developments.[22]

Finally, De Witte points to – what he considers – objective evidence of the continuing international character of the EU. Formally speaking, the EU's founding treaties have all availed themselves of treaty law's traditional forms and language.[23] Not only have attempts to 'constitutionalise'[24] the language of the Treaties failed with the rejection of the *Constitution of Europe*.[25] Even in the two instances that most prominently stand for a

17 De Witte (n 5) 180.

18 An example for this is the practice of including so-called REIO clauses in multilateral agreements, so as to open them for participation by the EU. These clauses allow for and regulate the participation of regional (economic) integration organisations (R(E)IOs). On the practice of REIO clauses, see J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 69–75. On the problems these can cause under international law, see E Paasivirta and PJ Kuijper, 'Does one Size fit All?: The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169, 204–212.

19 De Witte (n 5) 186.

20 Ibid 187–190.

21 Ibid 186–187.

22 Ibid 178.

23 Besides the two most prominent examples of treaty language referred to by De Witte (ibid 181) in Art. 1 TEU (use of the term 'Treaty' and reference to the Member States as 'HIGH CONTRACTING PARTIES', capital letters in the original), typical treaty elements include the preamble, comprising the enumeration of state representatives, the listing of the plenipotentiaries as well as the final provisions (Arts. 47–55) followed by the list of signatories.

24 For the expression, cp T Christiansen and C Reh, *Constitutionalizing the European Union* (Bloomsbury Publishing 2017).

25 For the draft text of the Constitution, see Draft Treaty Establishing a Constitution for Europe (18 July 2003) OJ C169/1. On the use of 'constitutional terminology', see De Witte (n 5) 192–194.

'deepening' and 'widening'[26] of European integration – revisions of and accessions to the EU Treaties – the Member States make use of the traditional means of international law.[27] The respective articles on amendment and accession procedures in the EU Treaties are not only modelled along those provided for in the *Vienna Convention on the Law of Treaties*[28] (VCLT), they are also more rigid than those included in other founding treaties of less integrated organisations.[29] Even after having introduced participation of the EU Parliament and two simplified revisions procedures, the basis for any treaty amendment and accession is still consent by all Member States.[30]

Though Member States thus remain the *Herren der Verträge* concerning amendments and accessions, for decades this was questioned regarding the termination of membership.[31] With all pre-Lisbon Treaties being silent on the issue of withdrawal from the Union, especially scholars continuously discussed the possibility of and potential conditions for an exit.[32] In con-

26 De Witte (n 5) 183.

27 Ibid.

28 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT].

29 De Witte (n 5) 183–185.

30 For amendments, Art. 48(4) sentence 2 TEU provides: 'The amendments shall enter into force after being ratified by all the member States in accordance with their respective constitutional requirements.' For accessions, Art. 49 sentence 5 and 6 TEU provide: 'The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.' On the balancing of the intergovernmental character of accession and the EU institutions influence, see C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2017) 129–134.

31 Cp U Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge?: Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht' in R Bernhardt and others (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Springer 1983) 183–185.

32 For an overview of past instances where the question gained relevance, see A Waltemathe, *Austritt aus der EU: Sind die Mitgliedstaaten noch souverän?* (Lang 2000) 22–28. For two further examples of monographs from different decades addressing the question, see H Steiger, *Staatlichkeit und Überstaatlichkeit: Eine Untersuchung zur rechtlichen und politischen Stellung der Europäischen Gemeinschaften* (Duncker & Humblot 1966) 138–143; F Götting-Biwer, *Die Beendigung der Mitgliedschaft in der Europäischen Union* (Nomos 2000). For the history of Art. 50 TEU, see KA Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (Cambridge University

trast to the prescribed amendment and accession procedures, termination of membership – in the absence of any withdrawal procedure or practice – did not inform the debate on the EU's legal nature. Rather, the different perceptions of the EU provided a point of departure from which to argue for or against an (unconditional) possibility of withdrawal.[33] With the different qualifications of the EU being the baseline, the discussion (again) revolved around the applicability of general international law to the Union. While supporters of organisationhood referred to international treaty law, advocates of supranational, federal and constitutional concepts rejected such recourse, accepting withdrawal, if at all, only under the condition of consensus among all Member States.[34]

From the vantage point of international institutional law, the absence of a withdrawal clause by no means disqualified the EU from being considered an international organisation. In contrast, discussions on member state withdrawals without a respective withdrawal provision in the founding treaty are well-known in the field.[35] While the founding treaties of many international organisations address the issue, this is far from uniform practice.[36] Recourse is then taken to the VCLT's rules on treaty denunciation.[37] Art. 56(1) VCLT sets out that '[a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal'. This general rule, however, is subject to two qualifications.

Firstly, Art. 56(1) VCLT provides for exemptions where either an initial intention of the parties to allow for unilateral withdrawal is established

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Press 2017), chapter 15 and M Dougan, *The UK's Withdrawal from the EU: A Legal Analysis* (Oxford University Press 2021) 21–25.

33 O Dörr, 'Article 50 TEU' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (82nd supplement, CH Beck 2024) para 1.

34 A Thiele, 'Der Austritt aus der EU: Hintergründe und rechtliche Rahmenbedingungen eines „Brexit"' (2016) 51(3) *Europarecht* 281, 289–290 with further references.

35 For a summary of the main arguments, see HG Schermers and N Blokker (n 3) paras 134–135.

36 While according to Schermers and Blokker '[m]ost constitutions of international organizations expressly provide that membership may be brought to an end by (unilateral) withdrawal' (see ibid para 120), Klabbers considers silence of the founding treaties on withdrawal to be the standard (J Klabbers (n 3) 85).

37 According to Art. 5 VCLT, the VCLT's provisions are applicable to the founding treaties of international organisations. On the 'intersection' between international institutional law and the law of treaties in case of member state withdrawal, see CM Brölmann and others, 'Exiting International Organizations: A Brief Introduction' (2018) 15(2) *International Organizations Law Review* 243, 247–251.

(lit. a) or the nature of the treaty implies such a right (lit. b). Secondly, withdrawal may take place in accordance with the provisions of the VCLT.[38] Thus, Arts. 60–62 VCLT allow for denunciation of an international agreement in certain extraordinary circumstances.[39] On this basis, many examples of states' notifications of withdrawal and subsequent non-participation in international organisations have been analysed regarding their legality.[40]

Most importantly, however, recourse to international treaty law does not preclude arriving at the same results as those of proponents of other concepts. When trying to establish the initial intention of the parties or the nature of the EU Treaties, one must necessarily come across the 'unlimited duration'[41] of the Treaties aimed at creating an 'ever closer union'[42].[43] Moreover, as observed by Hillion regarding Art. 62 VCLT,

> [i]t has particularly been questioned whether the strict conditions for termination based on a change of circumstances could ever be met by a Member State in view of the original 'ever closer union' purpose of the Treaties to which all had to subscribe, and considering that any significant modifications, for example of the treaties, requires unanimous approval.[44]

When, however, the conditions of Arts. 56 and 60–62 VCLT are not met, withdrawal of a treaty party may take place only based on mutual consent.[45]

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38 Art. 42(2) VCLT: 'The termination of a treaty, its denunciation or the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present Convention.'

39 Art. 60 VCLT provides for termination as a consequence of a material breach by another party, Art. 61 VCLT because of a supervening impossibility of performance, and Art. 62 VCLT as a consequence of a fundamental change of circumstances.

40 For a discussion of some pertinent examples, see HG Schermers and N Blokker (n 3) paras 125–133.

41 Art. 53 TEU and Art. 356 TFEU.

42 Preamble of the TEU, recital 13.

43 Cf Hillion, Oxford Handbook EU Law (n 30) 148.

44 Ibid with references to J Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' (2005) 6(11) *German Law Journal* 1755, 1755 and J-P Jacqué, *Droit institutionnel de l'Union Européenne* (4th edn, Editions Dalloz 2006) 115.

45 Art. 54 VCLT: 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultations with the other contracting States.'

So, while differing perceptions of the EU formed the basis of the debate on the possibility of withdrawal, this offered no definite answers: allowing only consensual withdrawal was compatible both with a claim to organisation- or (emerging) statehood. However, since its introduction with the Treaty of Lisbon, Art. 50 TEU provides an additional layer to De Witte's argument. While the absence of a withdrawal clause arguably worked both ways – and was certainly nothing unique from the perspective of the 'intergovernmentalists'[46] – its inclusion and content now can be seen as speaking in favour of the Union's organisationhood.

II. Art. 50 TEU: A Regular Withdrawal Clause

By introducing Art. 50 TEU, the EU's founding Treaties now include the possibility of withdrawal as envisaged in Art. 42(2) VCLT: the EU's Member States may terminate their EU membership in accordance with the EU's founding Treaties. While Art. 50(1) TEU pronounces the right to denunciation itself, paragraphs 2 and 4 concern procedural issues and paragraphs 3 and 5 touch upon the legal consequences of withdrawal. In its *Wightman* judgement, the European Court of Justice (ECJ) summarised Art. 50 TEU as 'pursu[ing] two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion'[47].

Art. 50 TEU not only puts an end to the debates on the possibility of withdrawal from the EU, its design also appears to firmly place the EU itself and the process of withdrawal in the realm of international institutional and treaty law. Art. 50 TEU mirrors the typical elements of a treaty withdrawal clause (A.), and the features of Art. 50 TEU that seem to 'unionalise'[48] the withdrawal process are also not so exceptional as to distinguish withdrawal from the EU from withdrawal from any other international organisation (B.).

46 Cp Thiele (n 34), 290.

47 ECJ, C-621/18 *Wightman* [2018] ECLI:EU:C:2018:999, 56.

48 The term is used to describe those aspects of the withdrawal process that are less 'state-centred' and 'provide for a significant input from EU institutions […] and for the application of EU rules' (cp Hillion, Oxford Handbook EU Law (n 30) 142).

A. The International Law Template and Art. 50 TEU

Art. 42(2) VCLT explicitly envisages the possibility of withdrawal from a treaty based either on a provision in the treaty or as an application of the VCLT's provisions on treaty termination. The latter set high bars for withdrawal: Arts. 60–62 VCLT lay out strict conditions under which a state may invoke a unilateral right to withdrawal. Additionally, where such a right exists, its enactment is subject to several procedural hurdles.[49] Where, however, states include a withdrawal provision in their treaty, the VCLT makes no specifications on the design of such a clause, granting the parties full autonomy to decide on the terms of withdrawal. States make use of this freedom in varying degrees. While many treaties simply state the right to withdraw, some make withdrawal conditional on certain circumstances.[50]

First and foremost, Art. 50 TEU positively states an EU Member State's right to *unilateral* withdrawal. Most prominently, Art. 50(1) TEU reads that '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. According to Art. 50(3) TEU, such withdrawal takes effect either on the date that a withdrawal agreement enters into force or 'failing that', two years after the withdrawing state notified its intention of withdrawal. Therefore, Art. 50 TEU not only rejects the idea of consensually agreed exit among the Member States as propagated by non-intergovernmentalists,[51] read together with Art. 50(3) TEU, it also confirms the unilateral character of the right in relation to the EU itself.

Although Art. 50(2) TEU provides for treaty negotiations between the EU and the departing state, termination of membership is not dependent on the conclusion of a withdrawal agreement between them. The legal grounds for the termination of membership, thus, remain the Member State's sovereign declaration of intent.[52] In addition to being unilateral,

49 Cp Arts. 65–68 VCLT.

50 Such as a minimum period of participation, see eg Art. 25(1) United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 [UNFCCC]: 'At any time after three years from the date on which the Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.'

51 To the contrary, by introducing a unilateral right to withdrawal, recourse to a consensually agreed withdrawal has arguably been taken off the table, see eg Dörr (n 33) para 45 who concludes that a multilateral termination agreement between the Member States is excluded by EU law but would probably be valid under international law.

52 Ibid 17.

Art. 50 TEU moreover provides for *unconditional* withdrawal.[53] To invoke its right to withdraw, a Member State must not meet any substantive requirements. Reference to the Member State's 'own constitutional requirements'[54] in particular cannot be viewed as restricting a state's decision to withdraw.[55] Thus, while the EU may be the most integrated international organisation, the possibility of withdrawal from which was long highly disputed, the EU Treaties now provide Member States with the broadest possible right of denunciation.

Instead of introducing substantive conditions for withdrawal, Art. 50 TEU opts for a proceduralisation of withdrawal. In international treaty law, the procedural requirements for treaty withdrawal are relatively complex. For withdrawals based on the VCLT's grounds for termination,[56] Arts. 65–68 VCLT set out a rather elaborate procedure.[57] According to Arts. 65(1), 67(1) VCLT, a state must communicate its intention and reasons for withdrawal through written notification to the other parties. The notification takes effect at the earliest three months after its issuance,[58] except where another treaty party raises objections (Art. 65(2) VCLT) or the noti-

53 In doing so, Art. 50 TEU does not only positively introduce a right to withdrawal. The right even goes far beyond the withdrawal rights that, in the view of 'intergovernmentalists' so far existed in accordance with the VCLT's provisions on treaty termination, see ibid 4.

54 Art. 50(1) TEU.

55 Dörr (n 33) para 19. Arguing in favour of conditionality, see Hillion, Oxford Handbook EU Law (n 30) 136–137.

56 Art. 65(1) VCLT: 'A party which, *under the provisions of the present Convention*, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim' (emphasis added). Art. 66–67(1) VCLT refer to Art. 65 VCLT.

57 While the ECJ has held that 'the *specific* procedural requirements there laid down do not form part of customary international law' (ECJ, C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, [59] (emphasis added)), the International Court of Justice (ICJ) at least considers some of the underlying procedural principles to constitute customary international law (see eg ICJ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 1980, p 96, [49]; ICJ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 1997, p 7, [109]).

58 Where a party withdraws from a treaty on the basis of Art. 56(1)(a) or (b) (ie withdrawal from a treaty containing no withdrawal provision but from which the parties intended to admit withdrawal or whose nature implies it), Art. 56(2) requires that the 'party shall give no less than twelve month's notice of its intention to denounce or withdraw'.

fication is revoked (Art. 68 VCLT). In the case of objections, these must be addressed through consultations and, ultimately, through dispute settlement mechanisms provided for in Arts. 65(3), 66 VCLT. In contrast, for cases of termination pursuant to a treaty's withdrawal provision, Art. 67(2) only establishes a minimum requirement of notification to the other parties – without requiring the denouncing party to give reasons or even do so in written form.[59]

In practice, while treaty negotiators make use of their wide discretion,[60] the VCLT's core procedural elements, such as prior notification followed by a waiting period, are frequently found in international agreements as well as the founding treaties of international organisations.[61] With regard to Art. 50 TEU, explicit reference to the VCLT's withdrawal procedure can even be found in its drafting history.[62] Accordingly, the basic features of Arts. 65–67 VCLT are reflected in Art. 50 TEU. A case in point, Art. 50(2) TEU requires that '[a] Member State which decides to withdraw shall notify the European Council of its intention'. Pursuant to Art. 50(3) TEU, this

59 Art. 67(2) VCLT: 'Any act of declaring invalid, terminating, withdrawing from, or suspending the operation of a treaty *pursuant to the provisions of the treaty* or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers' (emphasis added). For these instruments, the right of revocation as per Art. 68 VCLT also applies.

60 For an overview of typical withdrawal clauses in multilateral agreements, see United Nations, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' (UN Doc. ST/LEG/7/Rev.l) 77–79 and United Nations, 'Final Clauses of Multilateral Treaties: Handbook' (2nd edn, United Nations Publications 2005) 109–111. For references to a wide variety of withdrawal clauses in founding treaties, see HG Schermers and N Blokker paras 120–122 with footnotes.

61 See eg A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press 2007) 278 according to whom withdrawal clauses usually provide 'for both duration and denunciation or withdrawal […]. This is so whether the treaty is bilateral or multilateral.' With regard to founding treaties of international organisation, HG Schermers and N Blokker (n 3) para 120 moreover find that '[p]rior notice is usually required, and after a certain period the withdrawal takes effect.'

62 Art. 50 TEU is based on the identically worded Article 46 of the failed Constitution for Europe. When the text of Art. 46 was introduced, it was stated that the 'withdrawal procedure is partly inspired by the one provided for in the Vienna Convention on the Law of Treaties' (see Praesidium de la Convention européenne, 'Titre X: L'appartenance à l'Union' CONV 648/03 (2 April 2003) 3 ('La procédure de retrait s'insipire en partie de celle prévue dans la Convention de Vienne sur le droit des traités […].' (Translated by the author)). On Art. 50 TEU's drafting history, see KA Armstrong (n 32), chapter 15.

notification – which the ECJ has found to be revocable[63] – takes effect, at the latest, after the expiry of a two-year waiting period. Beyond that, Art. 50 TEU makes no explicit mention of which form the notification has to take nor does it require the withdrawing Member State to give reasons for its decision. Thus, as with the substantive right of withdrawal, the procedure of withdrawal as provided for in Art. 50 TEU, too, is even wider than that provided for in the VCLT.

B. Unionalisation of the Withdrawal Procedure?

At the same time, Art. 50(2) TEU stipulates an elaborate procedure for negotiations on and the conclusion of a withdrawal agreement between the withdrawing Member State and the EU. Once the Member State has notified the EU Council of its intention to withdraw, the Council shall provide guidelines on the basis of which and in accordance with Art. 218(3) TFEU the Union shall negotiate an agreement 'setting out the arrangements for [the] withdrawal, taking account of the framework for its future relationship with the Union'[64]. Before conclusion by the EU Council, the European Parliament must also consent to the agreement.[65] This has led to claims that 'the EU's withdrawal clause presents major differences from standard withdrawal mechanisms' which 'do not set up full-blown procedures aimed at securing a negotiated and orderly withdrawal' – especially as between the Member State and the respective international organisation.[66]

While it is true that the EU internal procedure for the negotiation and conclusion of a withdrawal agreement is 'firmly embedded in EU constitutional law'[67], this does not change the legal character of Art. 50 TEU. As Art. 50(3) TEU clearly demonstrates, withdrawal from the EU takes effect regardless of the conclusion of a withdrawal agreement with the departing

63 See ECJ, *Wightman* (n 47).
64 Art. 50(2) TEU, sentence 1.
65 Art. 50(2) TEU, sentence 2.
66 PR Polak, 'EU Withdrawal Law After Brexit: The Emergence of a Unique Legal Procedure' in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020) 58. See also Hillion, Oxford Handbook EU Law (n 30) 136–142 and C Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process' (2018) 55 (Special Issue) *Common Market Law Review* 29.
67 Hillion, *Withdrawal under Art. 50* (n 66) 30.

Member State. Art. 50(2) TEU, thus, constitutes a mere *pactum de negotiando*,[68] positively stating an obligation to negotiate that may even emanate from the general principles of international law.[69] In any case, the idea of guaranteeing an orderly withdrawal from an international agreement through the conclusion of a new agreement – a withdrawal agreement – was also considered by Fitzmaurice, the International Law Commission's (ILC) third Special Rapporteur (SR) on the law of treaties. In his Second Report, SR Fitzmaurice considered that

> [t]he termination of a treaty, or of any particular obligation under it, or of the participation of a particular party, may give rise to a number of consequential issues. These will, despite the termination, be governed by the treaty itself if it provides for them, and if not, *must be the subject of a separate agreement between the parties*.[70]

While this notion was not included in the ILC's drafts articles, Art. 70(1) VCLT at least mentions the possibility of settling the consequences of treaty withdrawal by subsequent agreement between the parties.[71]

In practice, the founding treaties of some international organisations even impose an obligation to conclude an agreement upon withdrawal (*pactum de contrahendo*). Art. 53 of the *Convention establishing the Multilateral Investment Guarantee Agency*[72], determining the rights and duties of

68 See Dörr (n 33) paras 15, 17.

69 Ascencio in his commentary on Art. 70 VCLT argues in this direction, based on an example from practice. Following the denunciation of the 1878 Monetary Convention by Switzerland, leading to the dissolution of the Latin Monetary Union, the Member States in 1885 adopted an agreement to settle unresolved issues. Based on statements made by France requesting a mutual settlement among the parties, Ascencio draws the conclusion that 'in complex situations, new negotiations and technical agreements may [not only] prove necessary to determine in detail the consequences of a treaty's termination', '[t]he conclusion […] could even emerge as a legal obligation, resulting from the principles of legal security and good faith' (see H Ascensio, 'Article 70' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (vol II, Oxford University Press 2011)). For the French statement, see AC Kiss, 'L'extinction des traités dans la pratique francaise' (1959) 5 *Annuaire Français de Droit International* 784, 784–785.

70 ILC, 'Second Report on the Law of Treaties, by Gerald Fitzmaurice, Special Rapporteur' UN Doc A/CN.4/107, YBILC (1957) Vol. II 35 (emphasis added).

71 Art. 70(1) VCLT: 'Unless the treaty otherwise provides or *the parties otherwise agree* […]' (emphasis added). On Art. 70 VCLT, see below Part I § 3.

72 Convention establishing the Multilateral Investment Guarantee Agency (adopted on 11 October 1985, entered into force 12 April 1988) 1508 UNTS 99 [MIGA Convention].

states ceasing to be members, provides that 'the Agency *shall* enter into an arrangement with such State for the settlement of their respective claims and obligations. Any such arrangement shall be approved by the Board.'[73] Here, as in the case of Art. 50 TEU, the treaty puts the obligation on the organisation,[74] not the Member States, to address withdrawal issues with the departing state. Art. 50(2) TEU awards the EU with explicit treaty-making powers[75] and sets out a specific treaty-making procedure, validating the EU's international legal personality but also its functional limitation. Thus, as Dörr summarises, Art. 50 TEU

> confirms the continuing sovereignty of the Member States and anchors it palpably in the treaty text. The Member States are not only the often quoted 'Masters of the Treaties', something that especially Art. 48 and 54 TEU express [...], they are also the 'Masters' of their own membership. Just like the aforementioned provisions, Art. 50 thus underlines the continuing international legal basis of the Union and its special legal system.[76]

III. Brexit as Treaty Withdrawal

Being founded on treaties between its Member States and endowed with independently acting organs, the EU meets the criteria of organisationhood. And while it may display additional features unique to it, '[b]eing a supranational organization means also being an international organization'[77]. If the EU is thus considered an international organisation, Brexit must be

73 Emphasis added.

74 Art. 50(2) sentence 2 provides that 'the Union shall negotiate and conclude an agreement with that State'.

75 Dörr (n 33) para 9. On the wide scope of Art. 50(2) TEU as a treaty basis, see ECJ, C-479/21 PPU *Governor of Cloverhill Prison and Others* (Opinion of the Advocate General Kokott) [2021] ECLI:EU:C:2021:899, 45–63.

76 Dörr (n 33) para 7 (‚Sie [die Vorschrift, ie Art. 50 TEU] bestätigt die fortbestehende Souveränität der Mitgliedstaaten und verankert sie augenfällig im Vertragstext. Die Mitgliedstaaten sind also nicht nur die vielzitierten „Herren der Verträge", was vor allem in den Art. 48 und 54 EUV deutlich zum Ausdruck kommt [...], sie sind auch die „Herren" über ihre eigene Mitgliedschaft. Ebenso wie die genannten Bestimmungen unterstreicht Art. 50 damit die fortbestehende völkerrechtliche Geltungsgrundlage der Union und ihrer speziellen Rechtsordnung.' (Emphasis omitted, translated by the author)).

77 A Orakhelashvili, 'The Idea of European International Law' (2006) 17(2) *European Journal of International Law* 315, 343.

treated as the UK's termination of membership in that organisation. Or translated into treaty law terms: Brexit means that the UK unilaterally withdrew from a multilateral agreement. Thus, consideration of Brexit's effect on international agreements means looking at the effect of the denunciation of *one* international agreement on several *other* international agreements.

This effect can play out in two ways: on the one hand, '[t]he situation may arise where denunciation of a treaty produces effects on other treaties on the strength of convention provisions included in the latter.'[78] In that case, termination of membership in the founding treaties triggers, so to speak, termination provisions included in other international agreements. Analysing the effect of Brexit on international agreements would thus mean scouring every single one of these agreements for such a trigger provision.[79] On the other hand, 'the denunciation of a basic treaty can [also] bring consequences upon a group of related treaties'[80], making agreement-by-agreement scrutiny unnecessary. When and under which conditions this is the case will be analysed in the next chapter (*§ 3*).

78 Ascensio (n 69) para 6.
79 See below Part I § 4.
80 Ascensio (n 69) para 6.

§ 3 Automatic Treaty Termination: A Legal Consequence of EU Withdrawal?

In many regards, the Brexit constituted an absolute novelty. Never before had a state terminated its membership in this highly integrated organisation. At the same time, where one follows the proposition that even a supranational organisation remains an international organisation,[1] the same must hold true with regard to termination of membership in that organisation. Thus, even an exit from a supranational organisation remains a withdrawal from a multilateral agreement. Viewed from that perspective, Brexit – like any other withdrawal from an international organisation – 'moves at the cutting face of the law of treaties and institutional law'[2]. For while '[g]enerally, legal thinking about international organizations proceeds from an institutional (law) perspective', 'the scenario of a member state leaving the organization leads back to the preliminary level, that of "contractual" relations between states'[3].

What then are the rules applicable to withdrawal from a multilateral agreement? In general, the law of treaties is codified in the *Vienna Convention on the Law of Treaties*[4] (VCLT), which, according to Art. 5 VCLT, also applies to the founding treaties of an international organisation.[5] In particular, Art. 70 VCLT sets out the consequences of such a withdrawal (I.). With the article being of customary nature,[6] its provisions are applicable, even if an organisation's member state is not a party to the VCLT.

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1 A Orakhelashvili, 'The Idea of European International Law' (2006) 17(2) *European Journal of International Law* 315, 343.

2 CM Brölmann and others, 'Exiting International Organizations: A Brief Introduction' (2018) 15(2) *International Organizations Law Review* 243, 248 (emphasis omitted).

3 Ibid 247 (emphasis omitted).

4 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT].

5 Art. 5 VCLT: 'The present Convention applies to any treaty which is the constituent instrument of an international organization […] without prejudice to any relevant rules of the organization.'

6 On Art. 70 VCLT's customary status, see eg PCA *Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the "Rainbow Warrior" Affair (New Zealand v France)* [1990] 20 RIAA 217, [75]: '[…]

At the same time, both Art. 5 and Art. 70 VCLT explicitly acknowledge the contractual freedom of the parties to an international agreement to deviate from the VCLT's rules. Thus, according to Art. 5 VCLT application of the VCLT's provisions to an international organisation's founding treaties is 'without prejudice to any relevant rules of the organization' and Art. 70 VCLT begins with the caveat 'unless the treaty otherwise provides'. In some instances, the member states of international organisations have made use of this contractual freedom and modified the consequences of leaving to also apply to other international agreements. The practice of these member states not only shows what is possible; it also illustrates the limits of such *lex specialis* arrangements (II.). When applying Art. 70 VCLT and the practice of previous exits from international organisations, what conclusions can be drawn for the question of the consequences of an EU exit on international agreements (III.)? As this chapter shows, the automatic consequences are, in fact, rather limited (IV.).

I. Lex generalis: Legal Consequences of Exiting an International Organisation

Just as the VCLT regulates the grounds and procedure for treaty denunciation, it also provides for the consequences of withdrawal from an international agreement. According to Art. 70(1)(a) VCLT 'the termination of a treaty […] releases the parties from any obligation further to perform the treaty'. Subparagraph (b), however, clarifies that this 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. Where a party withdraws from a multilateral agreement, such as in the case of exiting an international organisation, this applies to the relationship between the withdrawing and the remaining states.[7] While subparagraph (a), thus, refers to the rather obvious consequence that a party withdrawing from an agreement is no longer

certain specific provisions of customary law in the Vienna Convention are relevant in the case, such as Article 60 […] and Article 70, which deals with the legal consequences of the expiry of a treaty'. See also S Wittich, 'Article 70' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) paras 38–39 with further references.

7 Art. 70(2) VCLT: 'If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that Sate and each of the parties to the treaty from the date when such denunciation or withdrawal takes effect.'

bound by this agreement and thus exempted from any further performance, subparagraph (b) highlights the non-retroactivity of termination.[8] As such

> the termination does not affect the validity of the acts of the parties performed during the treaty's existence and prior to its termination; *a fortiori* it will not dissolve rights previously acquired under the treaty. The validity of these acts persists, although the treaty which gave them life no longer does.[9]

As regards the founding treaty of an international organisation – a multilateral agreement between all member states – the consequences of withdrawal are, thus, twofold: the exiting state is exempted from any further performance provided for in the treaty, such as continued participation in the activities of the organisation or any future financial obligations.[10] At the same time, any obligations already executed – such as the payment of previous membership fees – remain valid. In addition, however, the question arises as to the continued validity of rights and obligations that do not arise *directly* from the founding treaties. What consequences occur from the withdrawal with regards to any acts of the organisation or of the withdrawing state undertaken in the context of its membership? Here, a distinction must be made as regards the legal basis and the legal effects of any such instrument.

Firstly, international organisations can take unilateral decisions binding on the member states.[11] Such decisions may concern the functioning of the organisation or impose substantive rules on the member states in the organisation's field of activity. Binding decisions are dependent on the organisation's founding treaty, their 'enactment and binding force […]

8 Especially in comparison to invalidity, see Art. 69 VCLT.

9 ME Villiger, 'Article 70' in ME Villiger (ed), *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2008) para 9.

10 On the UK's financial obligations post-Brexit, see M Waibel, 'The Brexit Bill and the Law of Treaties' (*EJIL:Talk!,* 4 May 2017) <https://www.ejiltalk.org/the-brexit-bill-and-the-law-of-treaties/>.

11 While it is generally recognised that international organisations may make internal rules, they may only make external rules where their founding treaties so provide (see with further references HG Schermers and N Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) paras 1196, 1320).

derive from this treaty'[12]. Thus, where the founding treaty terminates for a member state as provided for in Art. 70(1)(a) VCLT, so does the binding force of the organisation's decisions.[13]

Secondly, in creating internal rules, international organisations can also take recourse to traditional international treaty-making. In contrast to unilateral decisions, such 'conventions'[14] are negotiated within the framework of the organisation but acquire legal force through ratification by the member states.[15] Their legal basis, thus, is not the organisation's founding treaty. Instead, by concluding conventions the member states create a legal situation based in and binding on them through international law. As per Art. 70(1)(b) VCLT, conventions, thus, generally continue to apply to a withdrawing state and, if desired, must be terminated in accordance with the general rules of treaty law.[16]

Thirdly, to fulfil their functions, international organisations can conclude international agreements with other organisations or non-member states. But with only the organisation becoming a party,[17] what is the legal position of its member states under international law with regard to these external international agreements? Do the member states acquire a quasi-party status or must they be considered as third states[18]? When drafting the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*[19] (VCLT-IO), the Special Rapporteur (SR) of the International Law Commission (ILC), Paul Reuter, proposed the inclusion of Art. 36*bis* to address this question. According to the proposed article, member states would have been considered

12 R Bernhardt, 'International Organizations: Internal Law and Rules' in R Bernhardt (ed), *International Organizations in General: Universal International Organizations and Cooperation* (Elsevier Science Publishers 1983) 144.

13 Cp M Ruffert and C Walter, *Institutionalisiertes Völkerrecht: Das Recht der Internationalen Organisationen und seine wichtigsten Anwendungsfelder* (2nd edn, CH Beck 2015) 99.

14 HG Schermers and N Blokker (n 11) para 1262.

15 Ibid paras 1281–1294.

16 A Schwerdtfeger, 'Austritt und Ausschluss aus Internationalen Organisationen: Zwischen staatlicher Souveränität und zwischenstaatlicher Kooperation' (2018) 56(1) *Archiv des Völkerrechts* 96, 122.

17 For the special case of mixed agreements, see below Part I § 3 section III.C.2.

18 Art. 2(1)(h) VCLT defines a 'third State' as 'a State not a party to the treaty'.

19 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted and opened for signature 21 March 1986) UN Doc A/CONF.129/15 [VCLT-IO].

as third states to the international agreements of their organisation. However, this general rule was not thought to apply if the agreement intended to establish rights and obligations *also* for the organisation's member states, if the member states had 'unanimously agreed to be bound' by the agreement, and if their 'assent […] [had] been duly brought to the knowledge of' the organisation's treaty partners.[20]

In the end, Art. 36*bis* did not make it into the final text of the VCLT-IO.[21] According to Klabbers, '[w]hat it indicated, though, was that, at least within the International Law Commission, there were some strong opinions generally favouring the view of member states as legally distinct from their organizations'[22]. This view seemed to rest on the premise that states should only be bound if and when they have expressed their consent.[23] The only accepted exception appears to be if the organisation's founding treaty binds the member states to the rights and obligations stemming from external agreements of the organisation.[24] This tie would then, however, be one stemming from the organisation's rules and not bind the member states as parties under international law. Thus, as in the case of conventions, the legal basis of an organisation's external international agreements is international law. Therefore, withdrawal by a member state *per se* does not affect the validity of the agreements themselves.[25] However, as in the case of unilateral decisions, the binding force of these agreements on the member

20 ILC, 'Report of the International Law Commission on the Work of its 34th Session (3 May-23 July 1982)' UN Doc A/37/10, YBILC (1982) Vol. II(2) 43.

21 On the history of Art. 36*bis*, see CM Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36*bis*' in J Klabbers and R Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Brill Nijhoff 1998).

22 J Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 261.

23 ILC, 'Tenth Report on the Question of Treaties concluded between States and International Organizations or between two or more International Organizations, by Paul Reuter, Special Rapporteur' UN Doc A/CN.4/341 and Add.1 & Corr.1, YBILC (1981) Vol. II(1) ('The real question which may be dealt with in article 36 *bis* is how *direct* relationships can evolve between States members of an organization and parties other than the organization to a treaty concluded by the organization. The ultimate source of such direct relationships is clear: it can only be the consent of all interested parties.', (emphasis in original)).

24 Note, however, that, according to Klabbers, the EU is the only organisation with a respective provision in its founding treaties (Klabbers, *International Institutional Law* (n 22) 262). On Art. 216(2) TFEU, Part I § 3 section III.C.1.

25 On the possibility of denunciation following the withdrawal of a member state, see below at Part I § 4.

states (if at all) stems from and ceases with the application of the founding treaty to the member states.

II. Lex specialis: Arrangements between Member States

Applying the general rules as set out in Art. 70(1) VCLT, withdrawal terminates the application of the founding treaty and any secondary law of the organisation for the exiting state. At the same time, based on Art. 70(1)(b) VCLT, it does not affect the validity of any international agreements concluded by the organisation or the member states during the course of membership. However, Art. 70(1) VCLT provides the parties to an international agreement with twofold autonomy: to modify the provision's specifications either by defining legal consequences of withdrawal in the agreement itself or by (subsequent) agreement between the parties. While a limited practice in that regard exists in some founding treaties (A.), general principles of international law set strict limits on any such special arrangements (B.).

A. The Practice: Conventions Concluded between Member States

Not many founding treaties include special arrangements for the consequences of a member state's withdrawal, much less on the effect of such withdrawal on other international agreements. Nevertheless, a limited practice to that effect can be observed in founding treaties that explicitly envisage the established international organisation to promote convention-making.

One rare – and early – example is provided by the *Constitution of the International Labour Organization*[26] (ILO Constitution). Besides being the first founding treaty to expressly refer to conventions as instruments that give binding force to organisations' proposals,[27] Art. 1(5) sentence 3 ILO Constitution also provides that '[w]hen a Member has ratified any inter-

26 Constitution of the International Labour Organisation (adopted on 1 April 1919, entered into force 28 June 1919) 15 UNTS 40 [ILO Constitution].

27 Art. 19 ILO Constitution: 'When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation […].' Cp HG Schermers and N Blokker (n 11) para 1271.

national labour Conventions, [its] withdrawal [from the ILO Constitution] shall not affect the continued validity' of these conventions. A similar provision can be found in the *Agreement Establishing the World Trade Organization*[28] (WTO Agreement) regarding the so-called Plurilateral Trade Agreements. Although included in Annex 4 of the WTO Agreement,[29] these conventions constitute separate international agreements that are only binding to those member states who have ratified them. In relation to the denunciation of a Plurilateral Trade Agreement, Art. XV(2) WTO Agreements provides that '[w]ithdrawal […] shall be governed by the provisions of that Agreement'. Thus, while both the ILO's and the WTO's founding treaties expressly address the consequences of a member state withdrawal for the organisations' conventions, Art. 1(5) ILO Constitution and Art. XV(2) WTO Agreement are of a mere declaratory nature. They confirm the continued validity of the agreements as per Art. 70(1)(b) VCLT.

A contrary example is provided by Art. 25(3) of the *United Nations Framework Convention on Climate Change*[30] (UNFCCC). According to Art. 17 UNFCCC, UNFCCC's primary organ – the Conference of the Parties (COP) – 'may, at any ordinary session, adopt protocols to the Convention' that shall then be communicated to UNFCCC's parties and enter into force in accordance with the respective protocol's final provisions. While entry into force of the protocols is, thus, independent from the UNFCCC, their termination is not: Art. 25(3) UNFCCC provides that '[a]ny Party that withdraws from the [UNFCCC] shall be considered as also having withdrawn from any protocol to which it is a Party'. Art. 25(3) UNFCCC thus provides for legal consequences of withdrawal from UNFCCC going beyond those provided for in Art. 70 VCLT.

From these cases, two constellations must be distinguished that only appear to be referring to Art. 70(1)(b) VCLT. For both of them, the WTO provides instructive examples. Firstly, besides including a declaratory statement on the continued validity of the Plurilateral Trade Agreements, Art. XV WTO Agreement also addresses the Multilateral Trade Agreements. Contrary to Art. XV(2), paragraph 1 provides that any withdrawal from the WTO Agreement shall also apply to the Multilateral Trade Agreements.

28 Agreement Establishing the World Trade Organization (adopted on 15 April 1994, entered into force 1 January 1995) 1867 UNTS 4 [WTO Agreement].

29 Art. II(3) WTO Agreement.

30 United Nations Framework Convention on Climate Change (adopted on 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 [UNFCCC].

While this appears to mirror the constellation in the UNFCCC, in contrast to Art. 25(3) UNFCCC, Art. XV(1) WTO Agreement does not amend the legal consequences provided for in Art. 70(1)(b) VCLT. This is due to the different status of the Multilateral Trade Agreements compared to their plurilateral siblings and the protocols to the UNFCCC. While the latter two are independent from their respective organisation's founding treaty,[31] the Multilateral Trade Agreements constitute 'integral parts of [the WTO] Agreement'[32]. As such, withdrawal from the founding treaty inevitably means withdrawal from the Multilateral Trade Agreements. Thus, instead of modifying the legal consequence of treaty withdrawal as per Art. 70(1)(b) VCLT, Art. XV(2) WTO Agreement only clarifies the scope of Art. 70(1)(a) VCLT.

Secondly, while Art. XV WTO Agreement confirms the validity of the Plurilateral Trade Agreements, some of these agreements themselves address the effect of a party's withdrawal from the WTO on its continued status as a party to these Plurilateral Trade Agreements. Art. XXII(13) of the *Agreement on Government Procurement*[33] (GPA), for example, states that '[w]here a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect on the date on which it ceases to be a Member of the WTO'. However, in doing so, the GPA does not adapt Art. 70(1)(b) VCLT with regards to the *direct* consequences of withdrawal from the WTO Agreement. Instead, in Art. XXII(13) GPA, the parties to the GPA have set out the terms for termination of membership in the GPA as envisaged in Art. 54(a) VCLT.[34]

31 Art. 16(1), sentence 1 UNFCCC provides that only the '[a]nnexes to the Convention shall form an integral part thereof'. According to Art. 16(1), sentence 2 'annexes shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.' Thus, protocols, as provided for in Art. 17 UNFCCC, are not part of the annexes.

32 Art. II(2) WTO Agreement.

33 Agreement on Government Procurement (signed on 12 April 1979, entered into force 1 January 1981) 1235 UNTS 258 [GPA].

34 Art. XXII(13) GPA is thus an example for the first scenario described by Ascencio, ie that 'denunciation of a treaty produces effects on other treaties *on the strength of convention provisions included in the latter*' (H Ascensio, 'Article 70' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (vol II, Oxford University Press 2011) para 6 (emphasis added)). On (explicit or implicit) termination provisions in international agreements of the EU and its Member States, see below at Part I § 4.

B. The Limits: Agreements Concluded with Non-Member States

All of the previous examples have two characteristics in common: firstly, all provisions in founding treaties addressing the legal consequences of withdrawal on other international agreements do so only with regard to conventions. They do not refer to, let alone modify, the legal consequences for international agreements concluded by the organisation with non-member states. Secondly, in all of the above examples, participation in the conventions is linked to membership in the organisation in the first place. Art. 17(4) UNFCCC, for example, expressly states that '[o]nly Parties to the [UNFCCC] may be Parties to a protocol'. Besides demonstrating the practice surrounding modifications to Art. 70 VCLT, the examples thus also illustrate the limit of the contractual freedom it allows: the customary principle of *pacta tertiis nec nocent nec prosunt*.[35]

According to the *pacta tertiis* principle, 'a treaty only creates law as between States which are parties to it'[36]; it may not create rights or obligations for third states.[37] Thus, the members of an international organisations may agree on legal consequences of withdrawal from the founding treaty for any further agreements *between themselves*. Such a provision of the founding treaty cannot, however, have any legal effect on *non*-member states and thus has no effect with regards to any agreements to which non-member states are parties. First and foremost, this precludes the member states of an international organisation from stipulating legal consequences in the event of withdrawal that relate to the organisation's international agreements with non-members. In addition, the *pacta tertiis* principle can

35 The rule was repeatedly applied by the Permanent Court of International Justice (PCIJ), eg in PCIJ *Certain German Interests in Polish Upper Silesia* (Judgement) [1926] Series A No. 7 Series A No 7, 27–29; PCIJ *Free Zones Case of Upper Savoy and the District of Gex* (Judgement) [1932] Series A/B No. 146 Series A/B No 146, 141, and confirmed by the ICJ in ICJ *Case Concerning the Aerial Incident of July 27th, 1955 (Israel/Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 1959, p 127, 138; ICJ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgement) [1969] ICJ Rep 1969, p 3, [28]. On the *pacta tertiis* principle, see also AD McNair, *The Law of Treaties* (Clarendon Press 1961) 309.

36 PCIJ, *Certain German Interests* (n 35) 30.

37 Cp Art. 34 VCLT ('A treaty does not create either obligations or rights for a third State without its consent.') which codifies the principle. See ILC, 'Reports of the International Law Commission on the Work of its 18th Session (4 May-19 July 1966)' UN Doc A/CN.4/191, YBILC (1966) Vol. II 226: 'There is abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals as well as in the writings of jurists.'

also set limits with regard to conventions. A case in point is the convention practice of the Council of Europe (CoE).

While conventions are regularly only open to members of the international organisation in whose framework they were negotiated, some exceptions exist. A pertinent example is the practice of the CoE which is very active in the sponsoring of conventions.[38] Initially, only member states of the CoE could become parties to these agreements. However, over the years, the CoE also started inviting non-member states to accede to certain conventions.[39] In light of this change in practice, is has proven useful that the *Statute of the Council of Europe*[40] is silent on the consequences of withdrawal from the CoE on any of its conventions. With non-CoE members becoming parties to the conventions, any provision in this regard would violate the *pacta tertiis* principle. Instead, conventions that are intended to remain limited to CoE member states now deal with the question themselves. As in the example of the GPA, linking its parties' continued participation in the agreement to membership in the WTO, these conventions now address the effect of a party's CoE withdrawal themselves.[41]

Finally, the practice and its limits of modifying Art. 70 VCLT with regard to the consequences of treaty withdrawal for other international agreements is an expression of and is underpinned by the overarching principle of *pacta sunt servanda*, whereby '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'[42] To release a party from said binding force requires either the consent of the treaty parties or the existence of the narrow conditions for treaty termination as provided for in the VCLT. The member states party to a convention can express their consent that the binding force of conventions is terminated for a member state withdrawing by means of a provision in the founding

38 Including additional protocols, the CoE's database lists 226 conventions (CoE, 'Complete list of the Council of Europe's treaties' (*Treaty Office,* 22.02.2023) <https://www.coe.int/en/web/conventions/full-list>).

39 See HG Schermers and N Blokker (n 11) para 1300.

40 Statute of the Council of Europe (signed on 5 May 1949, entered into force 3 August 1949) 87 UNTS 103 [CoE Statute].

41 See eg Art. 15(3) of the European Convention on the Suppression of Terrorism (adopted on 10 November 1976, entered into force 27 January 1977) CoE No. 090 [ECST]: 'This Convention ceases to have effect in respect of any Contracting State which withdraws from or ceases to be a member of the Council of Europe.' On (explicit or implicit) termination provisions in international agreements of the EU and its Member States, see below Part I § 4.

42 Art. 26 VCLT.

treaty of their organisation. Non-member states party to a convention or international agreement with the organisation, however, cannot do so.

III. EU Withdrawal: Applying the Treaty Law Template

Based on the previous analysis, three findings follow: firstly, the parties to an agreement have the autonomy to regulate the legal consequences of treaty withdrawal. The member states of some international organisations have made use of this in the respective founding treaties also with regard to international agreements. Secondly, regarding the consequences for international agreements, this autonomy is limited to agreements among member states. The principles of *pacta tertiis* and *pacta sunt servanda* prevent any determination of the consequences for international agreements including a non-member state as a contracting party. Thirdly, where no special arrangement has been made, recourse must be taken to Art. 70(1)(b) VCLT. Based in international law, the international agreements concluded by or within the framework of an international organisation constitute a legal situation created outside the international organisation's founding treaty and thus remain valid following withdrawal.

It is against this background that one must evaluate whether Brexit had any direct legal consequences for international agreements concluded by the EU or its Member States. In that context, the first question that arises is whether the Member States have made any arrangements regarding the consequences of EU withdrawal deviating from those set out in Art. 70 VCLT. The obvious place to look – Art. 50 TEU – makes no reference to international agreements (A.). In contrast, the *UK-EU Withdrawal Agreement*[43] (UK-EU WA) does make mention of some international agreements concluded by the EU and its Member States. However, the extent to which it does so – and can serve as *lex specialis* at all – differs between the EU Member States' *inter se* agreements (B.) and international agreements concluded by the EU (and its Member States) with non-EU states (C.).

43 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019) OJ C384 I/1 [UK-EU WA].

A. Art. 50 TEU: *Lex specialis* Arrangements for International Agreements?

Besides providing for a right to withdraw and the respective procedure, Art. 50 TEU also addresses the most apparent legal consequence of an exit from the EU: according to Art. 50(3) TEU, '[t]he Treaties shall cease to apply to the State in question'. In doing so, Art. 50 TEU mirrors the general rule of Art. 70(1)(a) VCLT. As in the example of the WTO Agreement provided above, this consequence of withdrawal is not restricted solely to the TEU itself. The term 'Treaties' by definition also includes the TFEU[44] and encompasses the Protocols and Annexes that 'form an integral part' of the Treaties.[45] However, in contrast to the WTO Agreement, Art. 50 TEU does not address the legal consequences of EU withdrawal for any other international agreement, be it EU-only, mixed or *inter se* agreements. Art. 50 TEU does not explicitly refer to them nor can the term 'Treaties' be interpreted to encompass them.[46]

Does Art. 70 VCLT then function as a default rule for questions – such as the effect on international agreements – for which Art. 50 TEU does not provide any answers? Recourse to Art. 70 VCLT may be questionable for two reasons. While the VCLT applies to the founding treaties of an international organisation, not all Member States of the EU are parties to the VCLT.[47] Thus, its rules – including Art. 70 VCLT – are not directly applicable to those states' international agreements, such as the EU Treaties. However, Art. 70 VCLT is an expression of principles of customary international law, such as *pacta sunt servanda*, and is itself accepted as custom.[48] As such, Art. 70 VCLT can be applied to the EU Treaties. Secondly, it has been argued that while the VCLT *in general* applies to founding treaties,

44 Art. 1(3) TEU: 'The Union shall be founded on the present Treaty and on the [TFEU] (hereinafter referred to as "the Treaties").'

45 Art. 51 TEU: 'The Protocols and Annexes to the Treaties shall form an integral part thereof.'

46 To differentiate between the 'Treaties' as defined by Arts. 1(3), 51 TEU, international treaties concluded by the EU are generally referred to as 'agreements', cp Art. 216(1): 'The Union may conclude an agreement with one or more third countries or international organisations'.

47 France and Romania are not parties to the VCLT. A list of all parties is provided on the UN's depositary page, see United Nations Treaty Collection, 'Vienna Convention on the Law of Treaties' (*Chapter XXIII,* 22.02.2023) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

48 See above Part I § 3 fn. 6.

it does not do so with regard to the *EU's* founding treaties.[49] However, any attempt to deny recourse to Art. 70 VCLT is unconvincing. Where the founding treaties of international organisations leave an issue unregulated, international treaty law fills the gaps.[50] This is true also for the TEU and TFEU.[51] Moreover, as regards the legal consequences of withdrawal for international agreements, it is not Art. 70 VCLT that brings about the continuity of the agreements. Rather, Art. 70(1)(b) is an expression of the principle *pacta sunt servanda* applicable to all international agreements – including those concluded by the EU and its Member States.

Accordingly, as an immediate consequence of EU withdrawal, the validity of international agreements – whether concluded by the EU (with or without its Member States) with external treaty partners or by its Member States *inter se* – remains unaffected. However, something different could apply in the event of an orderly, that is treaty-based, exit from the EU. While Art. 50 TEU does not address any consequences of withdrawal beyond the general rule of Art. 70(1)(a) VCLT, they both provide for the possibility of agreement by the parties on further consequences of EU withdrawal. Art. 50(2) TEU envisages an agreement, *inter alia*, 'setting out the arrangements for […] withdrawal'.[52] Although the negotiations between the EU and the UK often hung in the balance, the UK's withdrawal was ultimately effected through a withdrawal agreement. In contrast to Art. 50 TEU, the UK-EU WA makes reference to international agreements. But to what extent can it be considered a *lex specialis* arrangement?

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49 It is noteworthy that this position was, *inter alia*, presented at a hearing of the UK House of Lords' European Union Committee in a session on Brexit and the EU budget. See UK House of Lords, 'Brexit and the EU budget' European Union Committee – 15th Report of Session 2016–17 (4 March 2017) HL Paper 125 33–37.

50 Brölmann and others (n 2), 249–251.

51 Discussing and rejecting the position presented in the House of Lords (see above n 49), Waibel (n 10) and CM Brölmann, 'Brexit en bestaande verdragsverplichtingen' (2017) 95(25) *Nederlands Juristenblad* 1748. On the EU Courts approach to the VCLT and the EU Treaties, see the analysis of case law by PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).

52 Besides withdrawal arrangements, the withdrawal agreement should also 'tak[e] account of the framework for [a] future relationship with the Union' (Art. 50(2) TEU). On the two-phased approach – first, withdrawal negotiations, and only then negotiations on the future relationship – see eg PR Polak, 'EU Withdrawal Law After Brexit: The Emergence of a Unique Legal Procedure' in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020) 60.

B. *Inter se* Agreements: The UK-EU Withdrawal Agreement as *lex specialis*?

In the context of its EU membership, the UK became a party to three *inter se* agreements.[53] While the *Internal Agreement on Financing of European Union Aid*[54] (EDF Agreement) and the *Convention Setting Up A European University Institute*[55] (EUI Convention) are agreements solely between Member States, the EU is a co-contracting party to the *Convention Defining the Statute of the European Schools*[56] (ES Convention). All three agreements have in common that membership in the EU is a prerequisite for becoming a party.[57] Nevertheless, given their nature as international agreements, withdrawal from the EU as such – in the absence of a contravening provision in Art. 50 TEU – does not terminate the UK's status as a party to these agreements. At the same time, as the practice of other international organisations shows, silence in the TEU, at least with regard to *inter se* agreements, was not legally required.

If the EU Treaties could theoretically provide for automatic termination of participation in *inter se* agreements as a consequence of withdrawal from the EU, in principle, *ad hoc* arrangements should also be able to address the question. And indeed, the UK-EU WA explicitly mentions two *inter se* agreements. As regards the European Schools, Art. 125(1) UK-EU WA provides that

> [t]he United Kingdom shall be bound by the Convention defining the Statute of the European Schools, as well as by the Regulations on Accredited European Schools adopted by the Board of Governors of the

53 On these three *inter se* agreements, see above § 1 section I.B.

54 Internal Agreement between the Representatives of the Governments of the Member States of the European Union meeting within the Council, on the Financing of European Union Aid under the Multiannual Financial Framework for the Period 2014 to 2020, in Accordance with the ACP-EU Partnership Agreement, and on the Allocation of Financial Assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies (6 August 2013) OJ L210/1 [EDF Agreement].

55 Convention Setting up a European University Institute (9 February 1976) OJ C29/1 [EUI Convention].

56 Convention Defining the Statute of the European Schools (17 August 1994) OJ L212/3 [ES Convention].

57 Art. 32 EUI Convention, Art. 32 ES Convention. The EDF Agreement does not include an explicit provision in this regard. Being concluded as an 'Internal Agreement between the *Representatives of the Governments of the Member States* of the European Union *meeting within the Council*', it is inherently limited to EU Member States.

> European Schools, until the end of the school year that is ongoing at the end of the transition period.

In a very similar manner, Art. 152(1) UK-EU WA addresses the EDF, stipulating that

> [t]he United Kingdom shall remain party to the European Development Fund until the closure of the 11th EDF and all previous unclosed EDFs, and shall in this respect assume the same obligations as the Member States under the Internal Agreement by which it was set up ('the 11th EDF Internal Agreement').

At first sight, the two provisions seem declaratory, confirming that the UK – as envisaged by Art. 70(1)(b) VCLT – remains a party to these agreements and thus continues to enjoy the rights and remains bound by the obligations. However, the provisions limit the UK's continued participation in the agreements to a specific date.

Thus, one way of reading Arts. 125(1), 152(1) UK-EU WA is that as a consequence of the withdrawal agreement, the UK would eventually cease to be a party to these two *inter se* agreements. However, such a reading of the UK-EU WA is incompatible with the *pacta tertiis* principle as discussed above. Regarding international agreements concluded by the EU and its Member States, any withdrawal agreement again faces limits when addressing legal consequences. *Pacta tertiis* prohibits arrangements from affecting non-EU states. Additionally, with the UK-EU WA concluded only between the exiting state and the EU – thus without the Member States becoming parties – the same applies to the *inter se* agreements. A withdrawal agreement between the EU and the UK cannot set out the consequences of such withdrawal for an international agreement concluded between the Member States, even where the EU itself is a party to said agreement.

However, there is an alternative reading of Arts. 125(1) and 152(1) UK-EU WA. According to the position taken by the EU and the UK, the UK, upon leaving the EU, automatically ceased to be a party to *inter se* agreements. Starting from this position, it would have been possible for the EU to agree with the UK on a continued performance of the obligations included in the *inter se* agreements for a further, pre-defined period.[58] The obligation is then one stemming from the UK-EU WA and not the *inter se* agreements

58 See on this also M Cremona, 'The Withdrawal Agreement and the EU's International Agreements' (2020) 45(2) *European Law Review* 237, 245–247.

themselves. Such an interpretation of Arts. 125(1) and 152(1) UK-EU WA is more in line with the *pacta tertiis* principle. While an agreement – here, the UK-EU WA – may *not* create obligations for third states – here, the Member States parties to the *inter se* agreements – it *can* accord rights to them.[59] However, this would, of course, still presuppose finding a justification for the EU and the UK's 'out means out' position with regard to the UK's participation in *inter se* agreements. For in the absence of a *lex specialis* arrangement, Art. 70(1)(b) VCLT applies and the UK's status as a party to the *inter se* agreements does not end as a consequence of Brexit.

C. The EU's External International Agreements

The number of international agreements concluded by the EU with non-EU states and international organisations by far exceeds the number of *inter se* agreements concluded between the Member States. Correspondingly, the practical consequences would be far more severe if withdrawal of a Member State from the EU were to have direct legal consequences for these agreements. Legally, it is excluded that EU Member States regulate the legal consequences of a withdrawal from the EU in deviation from Art. 70 VCLT: Both EU-only and mixed agreements are concluded with at least one non-EU state or international organisation. Hence, any such regulation with regard to international agreements with non-EU states – whether in Art. 50 TEU or the UK-EU WA – would run contrary to the *pacta tertiis* principle.

Thus, with no *lex specialis* arrangement possible, in principle, the lack of legal consequences of withdrawal would be applicable to the external agreements of the EU just as to those of other international organisations – except that the EU's treaty practice differs from that of other international organisations in two ways. First, its Member States (indirectly) participate in the EU's international agreements by way of Art. 216(2) TFEU (1.). Secondly, Member States may also participate as co-contracting parties where the EU does not have the exclusive competence to conclude agreements (2.).

59 Cp Art. 36(1) VCLT: 'A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.'

1. The EU's International Agreements and Art. 216(2) TFEU

While the EU's external agreements with non-EU Member States or international organisations are clearly *international* agreements, the ECJ has nevertheless referred to them as 'an integral part of EU law'[60]. This classification does not intend to negate their basis in international law but derives from their internal effects on the EU's legal order.[61] While international agreements of international organisations are generally only binding on the organisation itself,[62] the EU is the only international organisation to explicitly include a provision on the relationship of its Member States to its international agreements. As per Art. 216(1) TFEU, '[a]greements concluded by the Union are binding upon the institutions of the Union *and on its Member States*'[63]. As Klabbers writes, '[i]t is important to realize, though, that the binding force stems from [EU] law'[64]. Thus, even where the Member States are not contracting parties themselves – as in the case of EU-only agreements – they are nevertheless bound by the EU's external agreements via EU law. And where the Member States are parties themselves – as in the case of mixed agreements – this EU law tie supplements the international law tie.

Thus, at first glance, the withdrawal of a state from the EU does not have any direct legal consequences for the EU's external agreements. Under international law, the non-EU state and the EU – and in the case of mixed agreements, the (present and former) Member States – remain bound by the agreements.[65] At second glance, however, withdrawal from the EU does have consequences for these agreements which concern all parties. With the EU Treaties ceasing to apply as per Art. 50(3) TEU, Art. 216(2) TFEU no longer applies to the withdrawing Member State. Accordingly,

60 See eg ECJ, C-181/73 *R. & V. Haegeman v Belgian State* [1974] ECLI:EU:C:1974:41, [5].

61 See in detail RA Wessel, 'International Agreements as an Integral Part of EU Law: Haegeman' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022).

62 Cp Brölmann, Essays on the Law of Treaties (n 21); J Klabbers, 'The European Union in the Law of International Organizations: Misfit or Model?' in RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019) 39–40. On the discussion surrounding Art. 36*bis* VCLT-IO, see above at Part I § 3 section I.

63 Emphasis added.

64 Klabbers, *International Institutional Law* (n 22) 262–263.

65 On (explicit or implicit) termination provisions in international agreements of the EU and its Member States, see below at Part I § 4.

the withdrawing Member State no longer enjoys the rights and participates in fulfilling the obligations as it did by way of EU law. Moreover, the EU must fulfil its international obligations towards its treaty partners without the contribution of the leaving Member State. And, finally, for the non-EU treaty partners the scope of application of their agreements with the EU has been reduced by – depending on the withdrawing Member State – a sizeable portion. The practical implications of this have been discussed particularly with regard to the WTO at length.[66] Pre-Brexit, the EU's tariff quotas – negotiated by the EU with WTO members for all its Member States – applied to the UK. Which quotas would apply to the UK post-Brexit? How would or should this affect the EU's quotas?

In the case of EU-only agreements, this consequence occurs inevitably and for the entirety of rights and obligations stemming from these agreements. Here, only the EU is a treaty party under international law and the Member States' participation is based on EU law – Art. 216(2) TFEU – alone. With regard to mixed agreements, however, Art. 216(2) TFEU also binds the Member States internally. At the same time, the agreements being mixed, the Member States are also parties to the agreements themselves and thus bound by way of international law. Whether and to what extent the discontinuation of the binding effect under Art. 216 TFEU has an effect on a withdrawing state's status as regards mixed agreements, therefore, depends on the extent to which the Member States are parties to these agreements themselves.

2. *Lex mixity*? The Status of EU Member States in Mixed Agreements

The reason for the EU's practice of concluding mixed agreements is the division of competences between the EU and its Member States. Where the EU does not possess the competences to conclude an agreement alone, it is joined by its Member States.[67] Thus, undisputedly, the Member States be-

66 C Herrmann, 'Brexit, WTO und EU-Handelspolitik' (2017) 24 Europäische Zeitschrift für Wirtschaftsrecht 961; L Bartels, 'The UK's Status in the WTO Post-Brexit' in R Schütze and S Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing 2018); G Messenger, 'EU-UK Relations at the WTO: Towards Constructive Creative Competition' in J Santos Vara, RA Wessel and PR Polak (eds) (n 52).

67 On the EU and its Member States' division of competences as regards external action, see above at § 1 section I.A.

come formal parties to these agreements as defined in Art. 2(1)(g) VCLT.[68] With the Member States being parties themselves, withdrawal from the EU as such cannot change that status. Unless the mixed agreements contain an (implicit) termination clause for the event of a Member State leaving the EU, the withdrawing state remains a party to these agreements.[69] At the same time, the division of competences also means that both the EU and Member States become parties to an agreement for the content of which neither are fully competent. It has thus been argued that the extent of both the EU and its Member States' party status to those agreements is limited to only those parts for which they are competent.[70] In that case, following withdrawal, the Member State parts of a mixed agreement would continue to bind the withdrawing state under international law, while the EU parts – previously binding on that state under Art. 216(2) TFEU – would cease to apply to it.

The practical difficulties of this approach are obvious. Practitioners and scholars alike have long commented on the lack of transparency of the EU and its Member States' division of competences in the context of

68 Art. 2(1)(g) VCLT: '"party" means a State which has consented to be bound by the treaty and for which the treaty is in force'. On the Member States' formal status as a treaty party, see S Schaefer and J Odermatt, 'Nomen est Omen?: The Relevance of "EU Party" In International Law' in N Levrat and others (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2021) 132–134. See also with regard to the Member States' party status in mixed agreements and the implications of Brexit, C Kaddous and HB Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in N Levrat and others (eds) (n 68) 273–274; Y Kaspiarovich and N Levrat, 'European Union Mixed Agreements in International Law under the Stress of Brexit' (2021) 13(2) *European Journal of Legal Studies* 121, 136–139.

69 On this question, see below at Part I § 4.

70 A view which Advocate General Tesauro seemed to corroborate when referring to 'the provisions to which the EEC may possibly subscribe' (see ECJ, C-53/96 *Hermès International v FHT Marketing Choice BV* (Opinion of the Advocate General Tesauro) [1998] ECLI:EU:C:1997:539, [14]). See in detail, KD Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Duncker & Humblot 1986) 93–107. Using the examples of mixed agreements in the area of international environmental law, V Rodenhoff, *Die EG und ihre Mitgliedstaaten als völkerrechtliche Einheit bei umweltvölkerrechtlichen Übereinkommen* (Nomos 2008) 229–255.

mixed agreements.[71] It is arguably impossible[72], or at least unreasonable[73], to expect a non-EU treaty partner to know where the competence of the EU starts and that of the Member States ends. Attempts to achieve more clarity and legal certainty for treaty partners failed in the past: the so-called Declarations of Competence (DoCs) submitted by the EU, especially in the context of multilateral fora, are generally considered to be 'imprecise, incomplete and open-ended'[74].[75] Additionally, internal disputes between the EU and its Member States on the exact scope of their competences remain.[76] Against this background, withdrawal from the EU would then not only mean 'disentangling'[77] different legal orders, it would also become the ultimate test for 'unmixing'[78] mixed agreements.

Moreover, from a legal perspective, the approach of considering the EU and its Member States each as 'partial parties'[79] is highly questionable. Under international law, the default rule is that a party's consent covers the

71 As pointedly put by Olson from the US perspective: 'When a sovereign State becomes party to a treaty, it is clear what it has committed itself to. It has typically accepted the same package of rights and obligations as every other party – and, as a general proposition, if a party understands its own rights and obligations, it also understands those of every other party. It is clear, as a matter of international law, who bears operational and legal responsibility for addressing any problems that may arise. This clarity largely disappears, however, in the context of mixed agreements.' (see P Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 333). See also AD Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17(4) *European Foreign Affairs Review* 491 and Y Kaspiarovich and RA Wessel, 'Unmixing Mixed Agreements: Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements' in N Levrat and others (eds) (n 68).

72 P Allot, 'Adherence to and Withdrawal from Mixed Agreements' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer 1983) 105.

73 C Tomuschat, 'Liability for Mixed Agreements' in D O'Keeffe and HG Schermers (eds) (n 72) 130.

74 J Heliskoski, 'EU Declarations of Competence and International Responsibility' in MD Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 202.

75 On DoCs in general, see Casteleiro (n 71); Heliskoski (n 74).

76 For a rather recent ECJ judgement on the division of competences in the EU's Free Trade Agreements, see ECJ, Case 2/15 *FTA Singapore* [2015] EU:C:2017:376.

77 Cp J Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 *Emory International Law Review Recent Developments* 1051.

78 Cp Kaspiarovich and Wessel (n 71).

79 Schaefer and Odermatt (n 68) 134.

entire agreement.[80] The division of competences between the EU and its Member States, being a *res inter alios acta* for their treaty partners, cannot change this.[81] An exception to the default rule is only possible under narrow circumstances. According to Art. 17(1) VCLT, 'the consent of a State to be bound *by part of a treaty* is effective only if the treaty so permits or the other contracting States so agree.'[82]

To the knowledge of the author, no explicit agreement on the limitation of the EU and its Member States' consent exists for any mixed agreement. In the absence of any agreement on partial consent, the question is whether (some) mixed agreements nevertheless (implicitly) provide for it. Naturally, it is impossible to consider all mixed agreements here. However, two instruments of the EU's treaty practice come to mind that could potentially serve as implicit permission: the DoCs in multilateral mixed agreements and the definition of the parties in bilateral mixed agreements. While the DoCs usually list some of the EU's competences relevant to the subject matter of the respective agreement, they also regularly include a dynamic reference to the EU's evolving division of competences. The definitions of the parties in bilateral mixed agreements, in turn, are limited from the outset to a general reference to the EU's internal division of competences. A typical example is Art. 1.1(c) CETA Canada, according to which

> Parties means on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competences as derived from the [TEU] and the [TFEU] […], and on the other hand, Canada.[83]

While both the DoCs and the definition clauses explicitly point the non-EU treaty partners to the EU's division of competences, neither fulfil the

80 ILC, 'First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' UN Doc A/CN.4/144 and Add. 1, YBILC (1962) Vol. II 53; Draft Convention on the Law of Treaties (adopted 20 February 1928) 1935 (29) AJIL 657 [Harvard Draft], Art. 20.

81 A Bleckmann, 'The Mixed Agreements of the EEC in Public International Law' in D O'Keeffe and HG Schermers (eds) (n 72) 161. Rather, a lack of internal competence may lead to the treaty being voidable; something neither the EU nor the Member States have so far invoked, see, eg E Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO' (2006) 17(4) *European Journal of International Law* 837, 844ff.

82 Emphasis added.

83 Emphasis omitted.

requirements of Art. 17 VCLT. In particular, they cannot be considered as granting permission to partial consent.

'So permit'[84], read according to its ordinary meaning,[85] generally means 'to consent to expressly or formally'[86]. This is supported by Art. 17 VCLT's drafting history.[87] In its commentaries on Art. 17 VCLT, the ILC held that '[s]ome treaties *expressly* authorize States to consent to a part or parts only of the treaty […] and then, of course, partial ratification […] is admissible'[88]. In international agreements that served the ILC as state practice, the 'express' condition had been fulfilled in two ways: the respective clauses *explicitly* referred to the act of expressing consent and *precisely* named the parts that would be included or excluded by a party's consent.[89] In contrast, neither the DoCs nor the definition clauses expressly refer to a limitation of consent or precisely delimit the EU or Member States' competences.

Finally, any precise delimitation of competence – as Art. 17 VCLT requires – would, in any case, be contrary to the EU's interest. This is not only due to the precise scope of its competences often being contested even internally, but also because the scope evolves dynamically. Over the duration of an international agreement, the EU can gain competences that still lay with the Member States at the time of treaty conclusion. Only partly consenting to an international agreement based on the competence lines at the time of conclusion, would thus 'freeze'[90] the division of competences externally.[91]

84 Art. 17(1) VCLT.

85 Cp Art. 31(1) VCLT: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

86 'Definition of 'permit'' (*Merriam-Webster Dictionary)* <www.merriam-webster.com/dictionary/permit>.

87 According to Art. 32 VCLT, an agreement's *travaux préparatoires* can be used as a supplementary means of interpretation. On the drafting history of Art. 17 VCLT in more detail, see Schaefer and Odermatt (n 68) 134–135.

88 'Reports 18th Session' (n 37) 201–202 (emphasis added); see also 'SR Waldock First Report' (n 80) 53. The drafting of Art. 17 VCLT-IO is based on the drafting of Art. 17 VCLT ('Report 34th Session' (n 20) 32).

89 For an overview of the state practice cited by the ILC, see Schaefer and Odermatt (n 68) 135. For the ILC's analysis of it, see ILC, 'Summary Records of its 14th Session (24 April-29 June 1962)' UN Doc A/CN.4/SR.647, YBILC (1962) Vol. I 112.

90 JH Weiler, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in D O'Keeffe and HG Schermers (eds) (n 72) 181.

91 See in detail, Schaefer and Odermatt (n 68) 136–138.

Upon withdrawal from the EU, Art. 216(2) TFEU ceases to apply to a former Member State, thereby freeing it from its obligation under EU law to perform international agreements concluded by the EU. In the case of mixed agreements, however, this consequence is absorbed by the state's status as a party to these agreements in their entirety. Following withdrawal, the former Member State is thus not only bound by all provisions of a mixed agreement, it has also regained its competence to perform them.

IV. Brexit and its (Limited) Automatic Consequences

When treating the EU as an international organisation, Brexit – like any previous exit from an international organisation – lies at the 'intersection of the law of treaties and the law of the organization'[92]. How the meeting of the two plays out with regard to international agreements concluded by the EU or its Member States in the context of their membership is demonstrated by the practice of other organisations. While some founding treaties address the issue of termination of membership and its consequence for agreements between their Member States, most are silent on the issue. The same is true for the EU's founding treaties. Moreover, while Art. 50 TEU even provides for an *ad hoc* agreement on the consequences of withdrawal, the party constellation of the UK-EU WA – concluded between the EU and the withdrawing state – impedes it from addressing the consequences for international agreements. Any arrangement between the EU and the withdrawing state on the question would constitute a *pacta tertiis* for non-EU states as parties to EU-only and mixed agreements and for the remaining Member States as parties to the *inter se* agreements.

Where no *lex specialis* arrangement exists, recourse must be taken to international treaty law, which spells out the consequences of withdrawal from an international agreement in Art. 70 VCLT. Based hereon, withdrawal from an international organisation does not impact the validity of any international agreements – whether concluded with an external treaty partner or between Member States – nor does it affect the withdrawing state's participation in international agreements to which it is itself a party. An EU Member State's participation in EU-only agreements ceasing as a consequence of withdrawal is solely owed to its previous participation being one under EU law only. Where the EU Treaties cease to apply to a state –

92 Brölmann and others (n 2), 247.

as envisaged by Art. 70(1)(a) VCLT – so does Art. 216(2) TFEU, establishing the obligation for Member States to respect the EU's international agreements.

The preliminary result that a state does not lose its status as a party to mixed and *inter se* agreements as a consequence of withdrawal from the EU is, however, only half the story. To understand it in its entirety, one must shift the approach from *considering* Brexit as a legal act to *accepting* it as a legal fact. Factual circumstances – such as the loss of membership in an organisation – can have effects on international agreements, potentially even leading to a party's (automatic) withdrawal.

§ 4 EU Withdrawal: Grounds for Treaty Termination?

It seems almost banal to state that when a state leaves the EU, the EU Treaties are no longer binding. Anything but banal, on the other hand, is the statement that this has consequences – albeit indirectly – for other international agreements. EU-only agreements are, as their name clearly states, concluded with non-EU states by the EU alone, its Member States' participation being a matter of EU law. Thus, in the case of an EU withdrawal, these agreements continue to bind the EU and its non-EU treaty partner under international law but cease to apply to the withdrawing state. However, where the withdrawing state is a party itself under international law – as in the case of mixed and *inter se* agreements – this status is not automatically terminated as a legal consequence of Brexit. From the perspective of international treaty law, there is, however, a second possibility: withdrawal from the EU may present a legal ground for termination of the withdrawing state's party status.[1]

The *Vienna Convention on the Law of Treaties*[2] (VCLT) regulates when and how international agreements may be denounced, providing the substantive reasons under which states have the right to denounce and the procedure to be followed. Concerning the legal grounds for ending a treaty relationship, the VCLT knows two alternatives: firstly, a party may denounce an agreement where the agreement itself – explicitly[3] or implicitly[4]

1 Note that the same question could be asked with regard to the EU-only agreements and their treaty parties. The EU-only agreements, of course, continue to bind the EU and its treaty partners after Brexit. Nevertheless, Brexit has an effect on these agreements by, *inter alia*, reducing their scope of application (see above at Part I § 3 section III.C.1). Following Brexit, the EU or its treaty partners could thus consider invoking these changed circumstances to denounce these agreements.

2 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT].

3 Cp Art. 54 VCLT: 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty.'

4 Cp Art. 56(1) VCLT: 'A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.'

– allows for denunciation. Where an agreement provides for denunciation, the respective provisions can also modify or completely discard the procedural requirements of the VCLT. Secondly, the parties to an international agreement can invoke legal grounds for termination as provided for in the VCLT.[5] However, in so doing, they must respect the procedure as envisaged in the VCLT.

One possibility is, thus, that the EU's mixed agreements and the Member States' *inter se* agreements themselves provide for the termination of a Member State's party status once it leaves the EU (I.). Alternatively, EU withdrawal, or the circumstances created through the state's loss of membership, could potentially fulfil the requirements of one of the VCLT's grounds for treaty termination (II.).

Before looking at these two alternatives, two preliminary remarks are necessary. Firstly, to fully answer the questions raised, this chapter – in contrast to the previous one – would essentially require a case-by-case examination of all mixed and *inter se* international agreements. A closer look is, thus, taken at the three *inter se* agreements to which the UK became a party as an EU Member State before withdrawing from the EU. With regard to mixed agreements, this is – for obvious quantitative reasons – impossible. Thus, the aim of this chapter is to draw some generalisable conclusions where possible and, where better suited, provide some guidance as to what to look for in international agreements when assessing the effect of withdrawal from the EU.

Secondly, the VCLT's provisions cited are often not directly applicable. Not only are not all Member States of the EU parties to the VCLT.[6] But the VCLT's scope of application is also limited to international agreements concluded between states.[7] In relation to the EU, the VCLT's successor, the *Vienna Convention on the Law of Treaties between States and International*

5 Cp Art. 42(2) sentence 1 VCLT: 'The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention.'

6 France and Romania are not parties to the VCLT. For a full list of VCLT treaty parties, see United Nations Treaty Collection, 'Vienna Convention on the Law of Treaties' (*Chapter XXIII,* 22.02.2023) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

7 Art. 1 VCLT: 'The present Convention applies to treaties between States.'

Organizations or between International Organizations[8] (VCLT-IO) would thus be better suited. However, so far the VCLT-IO still lacks the number of ratifications required for its entry into force.[9] Thus, the European Court of Justice (ECJ) regularly applies the VCLT, even to mixed agreements where the EU is one of the contracting parties.[10] The VCLT's provisions are often of a customary law character. The VCLT-IO's provisions, for example as regards treaty withdrawal, are, moreover, largely identical to those of the VCLT.[11] Where these two conditions are met, this chapter will thus follow the approach taken by the ECJ.

I. Termination by Design: EU Membership as a Resolutory Condition?

Arts. 42(2), 54(a) VCLT acknowledge that the termination of or withdrawal from an international agreement is always possible if it takes place 'in conformity with the provisions of the treaty'[12]. Put differently, the VCLT limits the possibility of termination to several reasons provided for in the Convention,[13] but leaves it to the contractual freedom of an agreement's parties to decide under which circumstances they are willing to allow for it.

8 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted and opened for signature 21 March 1986) UN Doc A/CONF.129/15 [VCLT-IO].

9 For a full list of all contracting states and international organisations, see United Nations Treaty Collection, 'Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations' (*Chapter XXIII,* 22.02.2023) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-3&chapter=23&clang=_en#1>.

10 At least in the application between the Member States and the non-EU treaty partners, this corresponds with Art. 3 VCLT: 'The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law […] shall not affect: […] (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.' On the ECJ's application of the VCLT, see also PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) and J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 63–66.

11 On the method behind the drafting of the VCLT-IO, see below Part II Concluding Remarks. In detail FL Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2019) 39–43.

12 Art. 54(a) VCLT.

13 Cp Arts. 56, 59–64 VCLT.

In doing so, the parties to an international agreement may not only decide on the substantive preconditions for a valid denunciation (if any), but also on the procedure to be adhered to. The procedural provisions in Arts. 65–68 VCLT and many withdrawal clauses in international agreements regularly provide for a certain waiting period between notification and when denunciation takes effect.[14] Parties are, however, also free to include denunciation clauses providing for immediate termination or termination upon the occurrence of certain conditions or a certain event.

In the case of international agreements concluded together with the EU or in the context of EU membership, such an event could be the withdrawal of a Member State from the EU. For this to be the case, the mixed or *inter se* agreements would have to provide for the termination of a Member State's party status on account of its withdrawal from the EU. The obvious instrument to do so would be an explicit provision to this effect (A.). However, where no such explicit provision exists, an implicit link between a state's participation in a certain agreement and its continued EU membership may suffice (B.).

A. Explicit Termination and Withdrawal Clause

The founding treaties of some international organisations explicitly provide for the effect of terminating the membership in said organisation for the continued participation in international agreements concluded under its auspices. Such provisions adapt the legal consequences of treaty termination – the withdrawal from the organisation's founding treaty – as provided for in Art. 70 VCLT.[15] Where the legal consequences for international agreements concluded in the framework of membership in an international organisation are not addressed in the founding treaties, these agreements may, nevertheless, automatically end with a state's membership if the agreements themselves include a termination clause in this regard. Or, as put by Ascensio, 'the situation may arise where denunciation of a treaty produces effects on other treaties on strength of convention provisions included in

14 According to Art. 65(2) VCLT a minimum waiting period of three months is required. Art. 56 VCLT, which allows for denunciation based on the established intention of the parties or the nature of the agreement, even provides for twelve months notice period.

15 See above Part I § 3 section II.

the latter.'[16] In practice, this is a method regularly used in the agreements concluded within the framework of an international organisation. By linking the termination of the party status in an international agreement to the withdrawal from another international agreement – an international organisation's founding treaty – membership in said organisation, in effect, becomes a resolutory condition. If and when a state loses its membership in a specified international organisation, this automatically triggers a withdrawal clause of another international agreement.

An example of such a provision is Art. 58(3) of the *European Convention on Human Rights*[17] (ECHR), according to which '[a]ny High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions'. In contrast to the previous examples, it is thus not the organisation's founding treaty – the *Statute of the Council of Europe*[18] – which provides for the termination of a state's party status in an international agreement – the ECHR – concluded in its context. Instead, the ECHR itself provides for the loss of a state's party status where that state ceases to be a member of the Council of Europe. A veritable cascade of treaty withdrawals can be triggered by a state's exit from the International Monetary Fund[19] (IMF): loss of IMF membership functions as a resolutory condition for membership in the International Bank for Reconstruction and Development[20] (IBRD), loss of IBRD membership in turn as a resolutory condition for membership in the International Finance Cooperation (IFC)[21] and in the International

16 Cp H Ascensio, 'Article 70' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (vol II, Oxford University Press 2011) para 6.

17 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 [ECHR].

18 Statute of the Council of Europe (signed on 5 May 1949, entered into force 3 August 1949) 87 UNTS 103 [CoE Statute].

19 Articles of Agreement of the International Monetary Fund (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 39 [IMF Agreement].

20 Articles of Agreement of the International Bank for Reconstruction and Development (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 134 [IBRD Agreement], Art. VI Sec. 3: 'Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member.'

21 Articles of Agreement of the International Finance Corporation (adopted 25 May 1955, entered into force 20 July 1956) 264 UNTS 117 [IFC Agreement], Art. V Sec. 3: 'Any member which is suspended from membership in, or ceases to be a member

Development Association[22] (IDA). In each case, it is not the agreement from which the state actually withdraws that provides for this cascade: it is the respective agreement itself that provides for this domino effect.

The advantage of including a termination provision in the agreement itself instead of in the organisation's founding treaty is that this constellation could also work in those cases where international agreements are open to states not members of a given international organisation. Where all parties consent to the fact that the participation of some states in the agreement is linked to their membership in an international organisation, termination of said membership would not constitute a *res inter alios acta*, incapable of having any effect on other international agreements. Both the EU's *inter se* (1.) and its mixed agreements (2.) could, thus, include provisions explicitly terminating the UK's participation as a party upon its withdrawal from the EU.

1. The EU's *inter se* Agreements

At the time of Brexit, the UK had been a party to three *inter se* agreements: the *Internal Agreement on the Financing of European Union Aid*[23] (EDF Agreement), the *Convention Setting Up a European University Institute*[24] (EUI Convention) and the *Convention Defining the Statute of the European Schools*[25] (ES Convention). Do these agreements include provisions on their termination or the possibility of withdrawal of a treaty party? And, if

of, the Bank shall automatically be suspended from membership in, or cease to be a member of, the Corporation, as the case may be.'

22 Articles of Agreement of the International Development Association (adopted 29 January 1960, entered into force 24 September 1960) 439 UNTS 249 [IDA Agreement] Art. VII Sec. 3: 'Any member which is suspended from membership in, or ceases to be a member of, the Bank shall automatically be suspended from membership in, or cease to be a member of, the Association, as the case may be.'

23 Internal Agreement between the Representatives of the Governments of the Member States of the European Union meeting within the Council, on the Financing of European Union Aid under the Multiannual Financial Framework for the Period 2014 to 2020, in Accordance with the ACP-EU Partnership Agreement, and on the Allocation of Financial Assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies (6 August 2013) OJ L210/1 [EDF Agreement].

24 Convention Setting up a European University Institute (9 February 1976) OJ C29/1 [EUI Convention].

25 Convention Defining the Statute of the European Schools (17 August 1994) OJ L212/3 [ES Convention].

so, do these provisions explicitly address the situation of a Member State withdrawing from the EU?

The EDF Agreement does not envisage the possibility of withdrawal by any of its treaty parties. Instead, Art. 14(2) EDF Agreement provides for a limited duration of the agreement. It is 'concluded for the same duration as the multiannual financial framework for the period 2014 to 2020' and is thus intended to automatically expire after six years. Theoretically, the EDF Agreement would thus have terminated in the year of Brexit regardless. However, the second sentence of Art. 14(2) includes an exception whereby the agreement 'shall remain in force for as long as is necessary for all the operations financed under the ACP-EU Partnership Agreement, the Overseas Association Decision and the multi-annual financial framework to be fully executed'[26]. Based hereon, the EDF Agreement remains in force until today,[27] with no possibility for the UK to withdraw – let alone automatically terminate the agreement based on its exit from the EU – provided for by the agreement. The same holds true for the EUI Convention. While it is concluded with an unlimited duration, it does not provide for any withdrawal provision. Quite independently of EU withdrawal, a state's membership in the EDF Agreement and the EUI Convention can thus be terminated only based on a reason provided for in the VCLT.

The ES Convention, finally, does provide for a withdrawal provision. According to Art. 31(1) ES Convention, '[a]ny Contracting Party may denounce this Convention by written notification […]. Denunciation shall be notified by 1 September of any year in order to take effect on 1 September the following year.' With the article not containing any material conditions for denouncing the agreement, the UK could have withdrawn from the ES Convention anytime subsequent to announcing its decision to withdraw from the EU. At the same time, since Art. 31(1) does not link denunciation to any substantive requirements, withdrawal from the EU as such does not simultaneously end the UK's participation in the European School system. Thus, none of the *inter se* agreements to which the UK became a party

26 The 'ACP-EU Partnership Agreement' refers to a mixed agreement with several African, Caribbean and Pacific states, see Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part (23 June 2000) OJ L317/3 [Cotonou Agreement].

27 See EUR-Lex, 'Document 42013A0806(01): EDF Agreement' (*Official Journal,* 23.02.2023) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2013.210.01.0001.01.ENG>.

during its EU membership includes a termination clause explicitly linking the continued participation as a party to the agreement to a continued membership in the EU.

2. The EU's Mixed Agreements

In examining the EU's mixed agreements and their final clauses, the differences in the design of these agreements make it necessary to distinguish between two types. The first type consists of bilateral mixed agreements in which the EU and its Member States are said to form a 'single contracting party'[28] and which create a reciprocal relationship between this 'single contracting party' and one or more non-EU states. The second type consists of the multilateral mixed agreements, where the EU and its Member States are both parties but the structure of the treaty creates a truly multilateral setting with a larger number of non-EU states. While the former is negotiated by the EU to specifically fit its needs, the latter is usually less adapted to the EU and its special features.[29] The inclusion of a withdrawal clause explicitly accommodating the withdrawal of a Member State from the EU thus, if at all, appears more likely in bilateral mixed agreements.

Since the conclusion of the first bilateral mixed agreement with Greece in 1963,[30] the EU and its Member States have developed an impressively stringent treaty practice. While varying in content, the contractual design of most bilateral mixed agreements follows a template tailored to accommodate the EU and its Member States as a 'single contracting party' rather than as independent parties of the same agreement.[31] Thus, not only do many mixed agreements define the EU and its Member States as one 'EU

28 ECJ, C-53/96 *Hermès International v FHT Marketing Choice BV* (Opinion of the Advocate General Tesauro) [1998] ECLI:EU:C:1997:539, [15].

29 Although many multilateral mixed agreements still include some EU specificities, such as 'regional economic integration organisation' clauses (on these see also further down in this section) or Declarations of Competence (on these see also Part I § 3 section III.C.2). See in detail, J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International 2001).

30 Agreement establishing an Association between the European Economic Community and Greece (18 February 1963) OJ L26/294 [AA Greece].

31 On this treaty design, see S Schaefer and J Odermatt, 'Nomen est Omen?: The Relevance of "EU Party" In International Law' in N Levrat and others (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2021).

Party'[32]. Their connectedness also becomes visible in bilateral mixed agreements' final provisions which regularly contain a termination provision. The EU's bilateral mixed trade agreements present a good example.[33] These typically provide that '[e]ither Party may give written notice to the other of its intention to denounce this Agreement. Denunciation takes effect six months after notification by the other Party.'[34] 'Either Party' in that context is defined as the EU Party or the non-EU treaty partner.[35] Not a single one of these provisions, however, ties the possibility of denouncing the agreement to withdrawal from the EU, let alone provide for the automatic termination of an EU Member State's participation as a party on account of its withdrawal from the EU.

This is especially striking given the denunciation provisions' close proximity – content-wise but often also as regards the sequencing in the agreements – to accession provisions. Besides providing for denunciation, most of the bilateral mixed trade agreements also include a provision addressing the effects of a new Member State acceding to the EU. Some of these accession provisions simply set out the procedure to be followed for the new Member State to also become a party to the bilateral mixed agreement.[36] Others, however, even allow for automatic accession, providing that '[a]ny new Member State of the EU shall accede to this Agreement from the date of its accession to the EU by means of a clause to that effect in the act of

32 See in detail below Part I § 4 section I.B.1.

33 For a thorough analysis of denunciation provisions, see Schaefer and Odermatt (n 31) 147–149.

34 Stepping Stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part (21 October 2016) OJ L278/3 [EPA Ghana], Art. 75(7).

35 See eg EPA Ghana, Art. 72: '1. The Contracting Parties of this Agreement shall be the Republic of Ghana, referred to as the "Ghanaian Party" or "Ghana", of the one part, and the European Community or its Member States or the European Community and its Member States, within their respective areas of competence as derived from the Treaty establishing the European Community, referred to as the "EC Party" or the European Community, of the other part. 2. For the purpose of this Agreement, the term "Party" shall refer to the Ghanaian Party or to the EC Party as the case may be. The term "Parties" shall refer to the Ghanaian Party and the EC Party.'

36 See eg Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part (24 August 2018) OJ L216/4 [SPA Japan], Art. 49 which stipulates that the EU shall inform Japan of any accession requests, the process of EU accession negotiations and the signing and entry into force of the accession agreement with the new Member State.

accession.'[37] The term '[a]ct of accession' refers to the accession agreement between existing EU Member States and the new Member State. Thus, for the situation of accession, the EU accession agreement – usually a *res inter alios acta* for a non-EU state – is referenced in the mixed agreement with the non-EU state consenting to it developing a legal effect in its treaty relationship with the EU. While the parties to bilateral mixed agreements are thus aware of the possibility of changes to the composition of the EU Party, they have only explicitly acknowledged and provided for the situation of accession in their agreements.

Like many bilateral agreements, most multilateral agreements today include denunciation provisions.[38] While these generally stipulate a notification period of at least several months, they only rarely provide for substantive prerequisites for exercising the right to denunciation.[39] Moreover, the structure and formulations used in multilateral agreements are – in general – less adapted to the needs of specific parties. Accordingly, the membership of (one of) its parties in the EU or any other international organisation is generally irrelevant for multilateral agreements and is not specifically addressed in their denunciation clauses.

An exemption to this is multilateral agreements with so-called 'REIO clauses'.[40] Their treaty text has been designed to accommodate the participation of regional economic integration organisations (REIOs; also known as regional integration organisations, RIOs) as parties. In so doing, one could say that these multilateral agreements have, in fact, been designed to accommodate the EU as a treaty party (besides its Member States). In general, the REIO clauses in multilateral agreements not only address the conditions under which a REIO may become a party (among its Member States) to the agreement, but also the relationship between the REIO and its Member States in the exercise of rights and fulfilment of obligations under these agreements.[41] Thus, presumably, if any multilateral agreement addresses the effect of a state withdrawing from a (regional economic integration) organisation for that state's continued participation as a party

37 Art. 77(2) sentence 1 EPA Ghana.

38 LR Helfer, 'Part VI Avoiding or Exiting Treaty Commitments: Terminating Treaties' in DB Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, Oxford University Press 2020) 633.

39 See LR Helfer, 'Exiting Treaties' (2005) 91(7) *Virginia Law Review* 1579, 1596–1599 providing an overview of the different variations of denunciation clauses.

40 On these clauses, see J Odermatt (n 10) 69–77.

41 For a discussion of different variations of REIO clauses, see ibid.

it will be those including specific clauses on the participation of (regional integration) organisations.

The first multilateral agreement to introduce elaborate provisions on accession of international organisations was the *United Nations Convention on the Law of the Sea*[42] (UNCLOS). According to Art. 305(1)(f) UNCLOS, the Convention 'shall be open for signature by: […] international organizations, in accordance with Annex IX'. The annex, in turn, provides for the conditions under which international organisations can become a party and the extent to which they can participate and exercise rights and fulfil obligations under the Convention. Moreover, Art. 8 of Annex IX also addresses the applicability of the Convention's final provisions – including its withdrawal provision – to international organisations.

For withdrawals in general, Art. 317(1) UNCLOS stipulates that

> [a] State Party may […] denounce this Convention and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

Art. 8(c) of Annex IX, however, adapts this for international organisations:

> (i) an international organization may not denounce this Convention in accordance with article 317 if any of its member States is a State Party and if it continues to fulfil the qualifications specified in article 1 of this Annex;
>
> (ii) an international organization shall denounce this Convention when none of its member States is a State Party or if the international organization no longer fulfils the qualifications specified in article 1 of this Annex. Such denunciation shall take effect immediately.

Thus, in a sense, Art. 8(c) of UNCLOS' Annex IX does, in fact, deal with the possible effects of member States withdrawing from an international organisation which is a party to UNCLOS: the withdrawal of member States from an international organisation could, theoretically, lead to a situation where the international organisation consists only of member States that are themselves not parties to UNCLOS.[43] In that case, Art. 8(c)(ii) would

42 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1836 UNTS 3 [UNCLOS].

43 According to Art. 2 UNCLOS '[a]n international organization may sign this Convention if a majority of its member States are signatories of this Convention'. It is

require the international organisation to withdraw from UNCLOS with immediate effect. Hence, UNCLOS is one of the few multilateral agreements with a REIO-specific denunciation provision and, additionally, the result is exactly the opposite of that discussed in connection with Brexit. As concerns UNCLOS, withdrawal from an international organisation party to UNCLOS does not affect the withdrawing state's participation in UNCLOS; rather, withdrawal of a member State may affect the organisation's status as a party to UNCLOS.

B. Implicit Termination Clauses

Neither the EU's mixed agreements nor its Member States' *inter se* agreements explicitly provide for the effect of a Member State's EU withdrawal on that state's status as a party to these agreements. While this has generally been acknowledged, reference has been made in practice and in scholarship to treaty provisions that could implicitly establish such a link. In this context, two provisions have attracted particular attention: the definition of the parties regularly included in bilateral mixed and *inter se* agreements (1.), and the territorial scope of application as defined in bilateral mixed agreements (2.).[44] Moreover, it has been argued that where mixed or *inter se* agreements are substantively linked to the EU and its institutions, or to the

thus possible for an international organisation to have members who are parties to UNCLOS and others that are not. If those who are parties to UNCLOS besides the organisation terminate their membership in the organisation, the preconditions of Art. 8(c)(ii) Annex IX are fulfilled.

44 See eg JWJ Kim, 'Is the United Kingdom Still a Party to the EU-Korea FTA after Brexit?' in JA Hillman and GN Horlick (eds), *Legal Aspects of Brexit: Implications of the United Kingdom's decision to withdraw from the European Union* (Georgetown Law 2017); A Kent, 'Brexit and the East African Community (EAC)-European Union Economic Partnership Agreement (EPA)' in JA Hillman and GN Horlick (eds) (n 44); RA Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55 (Special Issue) *Common Market Law Review* 101, 119–124; T Voland, 'Auswirkungen des Brexit auf die völkervertraglichen Beziehungen des Vereinigten Königreichs und der EU' (2019) 79(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 14–17; P Koutrakos, 'Managing Brexit: Trade Agreements Binding on the UK pursuant to its EU Membership' in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020) 77; C Kaddous and HB Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in N Levrat and others (eds) (n 31) 282–283.

Member States' capacity as *Member* States, loss of that quality may put into question the agreement as such (3.).[45] All of these arguments have a certain merit to them. To a varying degree, the contractual design of mixed and *inter se* agreements creates a link between being an EU Member State and being a party to these agreements. But while loss of EU membership thus certainly has practical implications for these agreements, the question still remains what would – or could – legally follow from this link (4.).

1. Definition of Parties: EU Member State Status in International Agreements

Undeniably, the EU and its Member States are respectively parties to mixed and *inter se* agreements in the sense of Art. 2(1)(g) VCLT[46].[47] As put by ECJ Advocate General (AG) Sharpston with regard to mixed agreements, a Member State's 'participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union'[48]. Nevertheless, in the debate surrounding the effect of Brexit on international agreements, the party status of the Member States has repeatedly been questioned. Depending on the circumstances of conclusion and especially the text of the respective agreements, the argument has been made that the EU Member States have become parties only in their capacity as EU Member States.[49] This connection between status as a treaty party to international agreements and being an EU Member State comes in two different shapes: the less EU-specific one in *inter se* agreements and the distinctly EU-specific one in the context of bilateral mixed agreements.

In the three *inter se* agreements which the UK concluded during its time as an EU Member State, participation as a party is clearly linked to EU membership. The text of these agreements explicitly refers to the parties as EU Member States. Art. 1 EUI Convention provides that '[b]y this Convention, *the Member States of the European Communities* (hereinafter called the "Contracting States") jointly set up the European University Institute

45 See eg Wessel (n 44), 122–123.
46 Respectively Art. 2(1)(g) VCLT-IO.
47 See also above Part I § 3 section III.C.2.
48 ECJ, Opinion 2/15 *FTA Singapore* (Opinion of the Advocate General Sharpston) [2017] EU:C:2016:992, [77].
49 See eg Wessel (n 44), 121–122; Kaddous and Touré (n 44) 275–277.

[…]'[50]. Similarly, the preamble of the ES Convention defines the parties as 'the High Contracting Parties, *Members of the European Communities*, and the European Communities'[51]. While lacking an explicit definition of the parties, the EDF Agreement is titled 'Internal Agreement between the Representatives of the Governments *of the Member States of the European Union*'[52] and refers to its parties simply as 'the Member States'[53]. Moreover, at least for the EUI and the ES Convention, EU membership is also an explicit precondition for becoming a party. According to Art. 32(1) EUI Convention, '[a]ny Member State of the European Communities besides the Contracting States may accede to this Convention […]'. And for the ES Convention, Art. 31(1) limits '[a]pplications for the accession to this Convention' to 'any State becoming a member of the Community'.

In internal agreements between the member states of an international organisation, this is a regular practice. The participation in most conventions adopted within the framework of international organisations is restricted to the organisation's member states, leading to accordingly formulated accession clauses.[54] But linking the party status of its Member States to their EU membership is a technique that the EU also successfully applies in its external agreements. In fact, the definition of parties in many mixed agreements is the reason why these are – despite the number of treaty parties – often referred to as bilateral. While mixed agreements are, formally speaking, necessarily multilateral agreements because they encompass the EU, its Member States and at least one non-EU Member State as treaty parties, some agreements create the impression of a bilateral relationship:

> […] a treaty with a multitude of signatories may be bilaterally structured if it is concluded between one or more States on the one side and two or more States on the other side, creating rights and obligations only between the mutually facing sides (formal reciprocity).[55]

50 Emphasis added.
51 Emphasis added.
52 Emphasis added.
53 See eg Art. 1(1): 'The *Member States* hereby set up an eleventh European Development Fund […].' (Emphasis added).
54 HG Schermers and N Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) paras 1298–1305.
55 K Schmalenbach, 'Article 2' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (, 2nd edn, Springer 2018) para 9 with reference to the EU's Second ACP-Convention as an example. See AD McNair, *The*

A prominent example is Art. 1.1 of the *Comprehensive Economic and Trade Agreement*[56] (CETA) between Canada, the EU and its Member States, according to which

> Parties means, on the one hand, 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 Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'EU Party'), and on the other hand, Canada.[57]

A near identical definition of the parties is contained in all bilateral mixed trade agreements.[58] In most cases it is supplemented by the introduction of the 'EU Party' as a collective reference to the EU and its Member States.[59] Where treaty provisions are reciprocal between, for example, Canada, on the one side, and the EU and its Member States, on the other side, reference is made to the 'Parties'.[60] Where a provision is intended to address solely the EU and/or its Member States, reference is made to the 'EU Party'.[61] In so doing, it remains for the EU and its Member States to fulfil their treaty obligations in accordance with the (changing) division of competences between them.

> Having consented to and being bound by the whole agreement, the term 'EU Party' [and the definition of the parties] is open to interpretation and a dynamic division of competences. Defined as 'the EU or its Member States or the EU and its Member States according to their respective competences', the term avoids direct reference, especially where compe-

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Law of Treaties (Clarendon Press 1961) 29 who preferred 'bipartite' for agreements with two and 'multipartite' for agreements with several parties.

56 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (14 January 2017) OJ L11/23 [CETA].

57 Emphasis omitted.

58 Based on an analysis of these agreements by the author; full analysis of typical treaty provisions in bilateral mixed (trade) agreements on file with the author.

59 On the use of the term 'EU Party' in bilateral mixed trade agreements, see Schaefer and Odermatt (n 31).

60 See eg Art. 1.4 CETA: 'The Parties hereby establish a free trade area […].' See in detail, ibid 143–149.

61 See eg Art. 8.2 paragraph 3 CETA: 'For the EU Party, Section B and C do not apply […].'

tence is controversial, and provides for a joint or alternative performance of treaty obligations.[62]

Thus, while Member States become parties to these agreements under international law, it has been argued that '[t]he Member States should not be considered as having an independent and autonomous status as states parties to these mixed agreements'[63] and consequently 'do not enjoy the autonomy that is attached to this status under international law'[64].

But what does it mean for a state to lose its capacity as an *EU Member* State if membership is a precondition for accession, as in the case of *inter se* agreements? And where '[t]he contracting party "the Union and its Member States" has a composite character that implies prior membership'[65] as in the case of bilateral mixed agreements? For some authors, the consequence is the automatic termination of the former Member State's participation as a party to those agreements.[66] As Koutrakos states with regard to Brexit, '[…] once the UK left the EU and lost its status as a Member State, it would also cease to be a party to such Agreements […]'[67].

In essence, this mirrors what Schermers and Blokker argue with regard to membership in international organisations, claiming that '[i]n all international organizations it should be possible to declare that membership is terminated if a state has ceased to fulfil the conditions for the *existence* of membership. […] Membership will end *ipso jure* if the member […] changes in such a way that it loses essential qualifications for membership'[68]. Thus, for example, '[i]f the organization unites a well defined group of states such as oil exporting states (OPEC), a state will no longer qualify for membership when it ceases to export such products'[69]. Based hereon, it could be argued that the EUI Convention, the ES Convention and the EDF Agreement, respectively, unite a well defined group of states – EU Member

62 Schaefer and Odermatt (n 31) 144. On the extent to which the EU and its Member States are bound by mixed agreements, see above Part I § 3 section III.C.2. On the joint and alternative treaty performance of mixed agreements, cp in detail J Heliskoski (n 29) chapter 4.
63 Kaddous and Touré (n 44) 275.
64 Ibid 276.
65 Ibid.
66 See eg C Herrmann, 'Brexit, WTO und EU-Handelspolitik' (2017) 24 Europäische Zeitschrift für Wirtschaftsrecht 961, 966; Kim (n 44) 44–50; Kent (n 44) 62; Koutrakos (n 44) 77.
67 Koutrakos (n 44) 77.
68 HG Schermers and N Blokker (n 54) para 149.
69 Ibid para 152.

States – in running two common institutions – a *European* University Institute and a system of *European* schools – and financing a common *European* development fund.

Moreover, in the debate over the effect of EU withdrawal on international agreements, a link is created between termination and accession: what is considered a condition for accession to *inter se* agreements must also serve as a reason for resolution of the treaty relationship. For the fact that membership in the EU is a prerequisite for accession demonstrates the intent of the parties to limit the agreement to EU Member States. A similar argument is also made for bilateral mixed agreements, although here the circle of treaty parties is obviously not limited to Member States. In general, new Member States accede to mixed agreements by concluding an accession protocol with the non-EU treaty partner(s) and the EU.[70] However, some more-recent bilateral mixed agreements also provide for the possibility of *automatic* accession of new EU Member States if such accession is agreed upon in the EU Act of Accession.[71] Where an agreement provides for automatic accession of new EU Member States, for exiting Member States

> an analogous analysis could be proposed. It would lead to the conclusion that when a state withdraws from the EU, it may lose its participation to the mixed agreements if the Withdrawal Agreement provides for an automatic termination of the participation of that state to the mixed agreements.[72]

Where the automatic termination of the former Member State's party status in bilateral mixed agreements is justified with the definition of the parties, another typical treaty clause in the EU's bilateral mixed agreements – the territorial scope of application – is also regularly mentioned.

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70 On accession clauses in bilateral mixed trade agreements, see Schaefer and Odermatt (n 31) 146–147.

71 See eg Art. 30.9(5) CETA: 'Any new Member State of the European Union shall accede to this Agreement from the date of its accession to the European Union by means of a clause to that effect in the act of accession to the European Union. If the act of accession to the European Union does not provide for the automatic accession of the European Union Member State to this Agreement the European Union Member State concerned shall accede to this Agreement by depositing an act of accession to this Agreement […].'

72 Kaddous and Touré (n 44) 281.

2. Territorial Scope of Application

In early bilateral mixed agreements, the territorial scope of application was defined with reference to the territory of the Member States. Art. 73(1) of the former AA Greece, for example, provided that

> [t]his Agreement shall apply to the European territories of the Kingdom of Belgium, of the Federal Republic of Germany, of the French Republic, of the Italian Republic, of the Grand Duchy of Luxembourg and of the Kingdom of the Netherlands on the one hand, and to the Kingdom of Greece on the other.

The disadvantage of this becomes obvious when considering the number of Member State accessions that the EU has experienced since. With every new accession to the EU, the provisions on territorial application in these bilateral mixed agreements had to be supplemented accordingly. In all current bilateral mixed trade agreements, the territorial scope of application is thus defined by reference to the TEU and TFEU's scope of application.[73] According to Art. 1.3(b) CETA Canada, for example, the agreement applies 'for the European Union, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties'.

This formula not only accommodates accessions to EU membership without requiring amending: it also allows for constitutional changes within Member States, affecting the application of EU law. An example is Greenland, still part of the territory of Denmark but to which the TEU and TFEU and accordingly bilateral mixed agreements do not apply.[74] Based hereon, the articles on the territorial scope of application in the EU's external agreements are often described as establishing a so-called moving treaty frontier that flexibly widens and narrows with the increasing or decreasing

73 Based on an analysis of these agreements by the author; full analysis of typical treaty provisions in bilateral mixed (trade) agreements on file with the author.

74 On Greenland and further constitutional or territorial changes to EU Member States, see below Part II § 5 section I.C.2. On state succession and the EU legal order in general, see A Zimmermann, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation,* (Springer 2000) 673 ff.

reach of the EU Treaties.[75] And accordingly, the conclusion that withdrawal from the EU *automatically* leads to the termination of that state's status as a party to bilateral mixed agreements 'is also borne out by a clause in a large number of mixed agreements on their territorial application'[76]. For where a moving treaty frontier allows for the application of an agreement to a new Member State, it must, arguably, also work the other way around: when a Member State withdraws from the EU, the TEU and TFEU are necessarily no longer applicable to it;[77] and where the TEU and TFEU cease to apply to a state, so do the bilateral mixed agreements whose scope of application is linked to the EU Treaties.

3. Frustration of the Object and Purpose

Finally, the debate about the effect of EU withdrawal on international agreements is not only conducted on the basis of two rather formal treaty clauses: the content of these agreements also plays a role. The question that explicitly or implicitly resonates in most contributions on the topic is whether and what role a former EU Member State can play in these agreements.[78] It is a question that can again be raised with regard to *inter se* and bilateral mixed agreements that both establish this close link between EU membership and being a party to the agreement. And it again requires a differentiated consideration: in *inter se* agreements, a continued party status of a former EU Member State would transform the agreements from internal agreements, restricted solely to EU Member States, to external agreements, encompassing a non-EU state. The question here is, thus, whether participation of a non-EU Member State in a circle of EU Member States is compatible with an agreement's object and purpose. Bilateral mixed agreements, on the one hand, already encompass at least one non-EU state as a

75 Ibid 698–701; 711. See also PJ Kuijper, 'The Community and State Succession in Respect of Treaties' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration* (Martinus Nijhoff Publishers 1994) 624.

76 Koutrakos (n 44) 77.

77 Cp Art. 50 TEU.

78 See eg Wessel (n 44), 122 who cautions that '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.' Where continued UK participation is accepted, this could lead to 'unforeseen practical problems' and 'change the nature of a bilateral agreement to a multilateral agreement.'

party. On the other hand, these agreements present the EU and its Member States as a 'team'[79] *vis-à-vis* a pre-defined (group of) non-EU state(s). Is a former Member State's participation – belonging neither to the former nor the latter – compatible with the agreements' aims?[80]

As regards *inter se* agreements, it has been stated that

> [w]ithout the inclusion of primary or secondary [EU] law, the agreements often cannot be understood at all. In this sense, the agreements, regardless of their legal nature under international law, are part of the law of the European association between the Union and the Member States. They form its horizontal dimension.[81]

Nevertheless, there are significant differences in the degree to which their content and structure are linked to EU membership.[82] Of the three *inter se* agreements concluded by the UK, the EUI Convention has the weakest connection to the EU legal order. The purpose of the EUI Convention is to set up the European University Institute, the aim of which

> shall be to contribute, by its activities in the field of higher education and research to the development of the cultural and scientific heritage of Europe, as a whole and in its constituent parts. Its work shall also be concerned with the great movements and institutions which characterize the history and development of Europe. It shall take into account relations with cultures outside Europe.[83]

79 Ibid 119.

80 Ibid 122.

81 J Heesen, *Interne Abkommen: Völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union,* (Springer 2015) 187 ('Ohne Einbeziehung des [EU-] Primär- oder Sekundärrechts sind die Abkommen häufig gar nicht zu verstehen. In diesem Sinne sind die Abkommen, ungeachtet ihrer völkerrechtlichen Rechtsnatur, Bestandteil des Rechts des europäischen Verbundes aus Union und Mitgliedstaaten. Sie bilden seine horizontale Dimension.', translated by the author).

82 But see Heesen who warns of a fragmentation of the integration process through permanently established further 'integration tracks' such as the EUI Convention and the ES Convention (ibid 206: 'Das Problem einer Aufspaltung des Integrationsprozesses stellt sich bei solchen internen Abkommen verschärft, die nicht auf eine spätere Integration in das Unionsrecht angelegt sind, sondern die dauerhaft als zusätzliche Integrationsschienen bestehen bleiben sollen, wie die Gründungsabkommen über die Europäischen Schulen und das Europäische Hochschulinstitut. [...] Das Problem der Fragmentierung, mit dem das Völkerrecht kämpft, wird durch den Abschluss monothematischer interner Abkommen in das Unionsrecht re-importiert.').

83 Art. 2(1) EUI Convention.

Thus, while the parties are limited to Member States of the *European Union*, the Institute's research shall be concerned with *Europe* (as a whole). Moreover, while the agreement makes mention of the EU and its institutions, it only does so in very limited instances and without attributing any active role to them[84].

In contrast, the ES Convention more closely links the European Schools to the EU. According to Art. 1 ES Convention, '[t]he purpose of the Schools is to educate together children of the staff of the European Communities'. To do so, 'in the territory of a Member State' schools may be set up at which children of EU staff may acquire the European baccalaureate or other 'diplomas and certificates' which 'shall be recognized in the territory of the Member States'. The EU – itself being a party to the ES Convention – is represented by a member of the Commission in the Board of Governors and the Administrative Board and contributes to the schools' budgets.

But these interrelations between an international agreement and the EU legal order are even more striking in the case of the EDF Agreement. An 'internal agreement', the EDF Agreement, is concluded 'between the Representatives of the Governments of the Member States of the European Union meeting within the Council' to finance European development aid agreed upon with the African, Caribbean and Pacific Group of States (ACP States) in a bilateral mixed agreement.[85] In so doing, it delegates tasks to EU institutions, makes use of their legislative and decision-making functions and closely links the agreement with EU secondary law instruments and the EU's multiannual financial framework.[86] It is because of these close connections that the EDF in 2021 itself became an integral part of the EU's multi-annual financial framework, thereby being funded through the EU budget and no longer via an international agreement between Member States.[87]

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84 According to Art. 6(3), representatives of the EU may take part in meetings of the Institute's High Council but without a right to vote. Art. 17(3) acknowledges the possibility of the EU awarding grants to researchers at the Institute. Art. 29 tasks the President of the CJEU with determining an arbitration body in case of a dispute between the parties to the Convention.

85 Cotonou Agreement (n 26).

86 See eg Art. 1 on allocation of funds by the Council and the Commission, Arts. 4 and 5 on the role of the European Investment Bank, Art. 7 on the Commission's contributions.

87 EU, 'European Development Fund' <https://eur-lex.europa.eu/EN/legal-content/glossary/european-development-fund.html>; EU Commission, 'EU and EDF Annual

Similarly, there are also differences in the content of bilateral mixed agreements, with some being rather general in nature and others distinctly EU-specific. Bilateral mixed agreements spread a whole range of topics. Thus, as Eeckhout has noted, it is, in general, 'preferable to look at the practice on its own merits and not to base oneself on a pre-conceived typology'[88]. Indeed, to determine the exact content and accordingly the object and purpose, it would be necessary to consider each bilateral mixed agreement on a case-by-case basis. While this goes well beyond the scope of this study, considering a rough classification of typical bilateral mixed agreements should suffice to give an impression of the differences.

Often, mixed agreements are typologised based on formal criteria, such as the distribution of competences (mandatory, facultative or false mixity) or the number of parties (complete and incomplete, bilateral or multilateral mixed agreements).[89] In contrast, Maresceau attempted a classification along four more substantive categories, dividing bilateral mixed agreements into association agreements, cooperation agreements of a general nature, mixed trade and cooperation agreements with political dialogue, and mixed sectoral agreements without political dialogue.[90] How far is participation by a former Member State compatible with the objects and purposes of these agreements?

Association agreements have, for example, often been concluded with a 'genuine pre-accession nature'[91] with the treaty partners 'aspir[ing] to become members of the EU'[92]. A rather recent example of this is the Association Agreement with Ukraine[93], the aims of which are, *inter alia*, 'increas-

Accounts' (*Directorate-General for Budget,* 23.07.2021) <https://commission.europa.eu/publications/eu-and-edf-annual-accounts_en>.

88 P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press 2004) 191.

89 See J Heliskoski and G Kübek, 'A Typology of EU Mixed Agreements Revisited' in N Levrat and others (eds) (n 31). Along the same lines, HG Schermers, 'A Typology of Mixed Agreements' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer 1983).

90 M Maresceau, 'A Typology of Mixed Bilateral Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 17 ff.

91 Ibid 17.

92 Ibid 18.

93 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (29 May 2014) OJ L161/3 [AA Ukraine].

ing *Ukraine's association with EU policies* and participation in programmes and agencies'[94] and 'to establish conditions for enhanced economic and trade relations leading towards *Ukraine's gradual integration in the EU Internal Market*'[95]. It is easy to see how continued participation of a withdrawing EU Member State may be questionable here. Which role should or could a former Member State play in the rapprochement of another state to the EU? At the same time, throughout the decades, the EU has also increasingly concluded association agreements 'totally disconnected from the enlargement question'[96], rather 'symboliz[ing] the EU's political and economic interest'[97] in a certain region. The differences are distinctly visible as can be seen, for example, in the objective and scope of the EU-Chile Association Agreement[98]: 'This Agreement establishes a Political and Economic Association between the Parties, based on *reciprocity* [...]. The Association is a process that will lead to a growing relationship and cooperation between the Parties structured around *the bodies created in this Agreement*'[99]. Here, a distinct interest – and purpose – in the former Member State's continued participation appears less far-fetched.

Similar differences as regards agreements' substantive relation to the EU – its institutions and legal order – exist between but also within the further subcategories of bilateral mixed agreements. For example, Partnership and Cooperation Agreements (PCAs), forming a subcategory of the cooperation agreements of a general nature, have been described as 'meagre' with 'the concrete substantive scope of the provisions of the PCAs [being] limited'[100]. An example for this is the 2016 PCA with Cuba[101] in which Cuba and the EU Party commit to cooperation and dialogue in generally held subject areas such as human rights promotion, the modernisation of the Cuban economy and the development of joint responses to global

94 Art. 1(2)(a) (emphasis added).
95 Art. 1(2)(e) (emphasis added).
96 Maresceau (n 90) 17.
97 Ibid 20.
98 Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (30 December 2002) OJ L352/3 [EU-Chile AA].
99 Art. 2(1) and (2) (emphasis added).
100 Maresceau (n 90) 21.
101 Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part (13 December 2016) OJ L337I/3 [PCA Cuba].

challenges.[102] Discussing these broad issues of international cooperation is certainly something possible for former EU Member States.

Mixed sectoral agreements on the other hand are – as the category suggests – thematically much more specific. Some of them are part of the so-called Bilaterals I and II, EU-only and mixed agreements concluded between the EU and Switzerland.[103] Content-wise, Swiss-EU treaty relations have been described as 'integration without membership'[104], with 'the agreements [being] based on European law' and '[dealing] with cooperation between Switzerland and the EU within the framework of EU agencies and programmes'[105]. Other sectoral agreements exclusively address the participation of non-EU Member States in EU projects, such as the agreements on participation in the EU's Civil Global Navigation Satellite System (Galileo System).[106] And yet others are thematically not *per se* EU-specific, such as, for example, the *EU-China Maritime Transport Agreement*[107] or the different EU Air Transport Agreements[108]. While these agreements are, of course, tailored to the circumstances of transport and air services specif-

102 For the general objectives, see Art. 2 PCA Cuba. Part II provides for political dialogue, *inter alia*, on human rights (Art. 5), illicit arms and weapons trade (Art. 6), disarmament and non-proliferation (Art. 7), fight against terrorism (Art. 8) as well as serious crimes (Art. 9), combating trafficking and smuggling (Arts. 11, 12) and sustainable development (Art. 14).

103 The Bilaterals I and II were drawn up to shape the EU-Swiss relations following the Swiss referendum on the European Economic Area in which majority voted against a Swiss accession. Cp Swiss Federal Department of Foreign Affairs/Federal Department of Economic Affairs, 'Bilateral Agreements Switzerland-EU' (August 2009) 4. On the Bilaterals I, see also Maresceau (n 90) 24–25.

104 See M Vahl and N Grolimund, 'Integration without Membership' Switzerland's Bilateral Agreements with the European Union, CEPS (2006).

105 'Bilateral Agreements Switzerland-EU' (n 103) 5.

106 Maresceau (n 90) 25–26. See eg Cooperation Agreement on a Civil Global Navigation Satellite System (GNSS) between the European Community and its Member States, of the one part, and the Republic of Korea, of the other part (19 October 2006) OJ L288/31.

107 Agreement on Maritime Transport between the European Community and its Member States, of the one part, and the government of the People's Republic of China, of the other part (21 February 2008) OJ L46/25 [EU-China Maritime Agreement].

108 See eg Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part (25 May 2007) OJ L134/5 [EU-US Open Skies].

ically between the EU and its treaty partners, the subject matter of these agreements is not limited to this relationship.[109]

4. Legal Consequences of Changes to An International Agreement

It has been argued that the agreements concluded by a Member State in connection with its membership in the EU are 'package deals, and part of the package is the status of the [withdrawing state] as a Member State of the EU'[110]. This becomes visible in the content, structure and formulation of individual treaty provisions of *inter se* and bilateral mixed agreements. These agreements – as any international agreement – have undeniably been adapted to the specific situation and needs of the treaty parties. This unquestionably leads to problems where this specific situations change, here because of the withdrawal of a state from the EU. At the same time, the question still remains as to how far this change not only creates practical problems but is indeed *legally* relevant. Can the definition of the parties, the agreements' territorial scope of application or their object and purpose really lead to the termination of the former Member State's status *as a party* to these agreements? Several factors speak against this.

Firstly, the practice concerning conventions concluded within the framework of other international organisations does not support the argument that the loss of membership in an international organisation *automatically* leads to the termination of conventions for the respective state. In contrast, the legal consequences of termination of a state's membership in an organisation for any other international agreements concluded in the context of said membership is regularly either spelt out in the organisation's founding treaty or in the conventions themselves.[111] Even where membership in a certain organisation is an explicit accession criterion, conventions inextricably linked to membership still include a corresponding cessation provision. Thus, if the disappearance of an accession criterion would suffice as a

109 A good example is the EU-US Open Skies Agreement. Before a ruling of the CJEU, many Member States had individual air transport agreements with the United States. The EU-US Open Skies Agreement did not only replace them. It also adapted these classic bilateral air transport agreements between two states to the situation of a European Common Aviation Area. On the EU-US Open Skies Agreement, see Maresceau (n 90) 26. On Brexit and air transport, see W Douma, 'Come Fly With Me?: Brexit and Air Transport' in J Santos Vara, RA Wessel and PR Polak (eds) (n 44).

110 Koutrakos (n 44) 77.

111 See above Part I § 3 section II.A.

resolutive condition, why would states deem it necessary to additionally include provisions on the agreements' termination?

Despite this practice, Schermers and Blokker nevertheless seem to advocate exactly this: that a state's party status in an agreement terminates *ipso jure* where it loses an essential quality such as its membership in an international organisation. But while the authors include illustrations where they deem such a condition fulfilled – an OPEC state that ceases to export oil or a Member State of the World Meteorological Organization that no longer has a meteorological service – they do not point to any actual example to corroborate their claim. Instead, they go on to explain that '[s]ome international organizations restrict their membership to members of specific organizations. States will then no longer qualify for membership when they lose their membership of these specific organizations'. But the examples used to substantiate this proposition include precisely conventions that *explicitly* regulate the loss of the party status where a party withdraws from a certain international organisation, such as the IMF, the World Bank, the IFC and the IDA.[112]

Secondly, practice also speaks against reading the provisions on the bilateral mixed agreements' territorial scope of application as implicit termination clauses. Reference to the territorial application of the TEU and the TFEU is made in the respective provisions of many EU-only and mixed bilateral agreements. In the case of EU-only agreements, the provisions on territorial application may truly be considered as an expression of the moving treaty frontier rule. The EU gains more or loses parts of its territory and thus the scope of its EU-only agreements changes accordingly. In the case of bilateral mixed agreements, however, the treaty frontier does not, in fact, move automatically, the difference to EU-only agreements being their co-conclusion by the EU *and* its Member States. Practice shows that new EU Member States do not automatically also become parties to bilateral mixed agreements simply because they fall under the scope of application of the TEU and the TFEU. Instead, they must conclude accession agreements with the EU (usually representing its existing Member States) and the non-EU treaty partner(s). The lesson to be learned from joining the EU is, thus, not one of moving treaty frontiers but rather that with regard to mixed agreements a formal act of accession is required. Transferred to the withdrawal situation, the *actus contrarius* would thus be a formal denunciation of the mixed agreements.

112 See above Part I § 3 section II.A.

Even where more recent bilateral mixed agreements include a clause allowing for the automatic accession of new EU Member States,[113] these cannot by an 'analogous analysis'[114] be applied to the reverse situation. An automatic accession clause still does not introduce the moving treaty frontier principle into the mixed agreement. Instead, it expresses the anticipated consent of all parties to the mixed agreement to the accession of a new EU Member State. The new EU Member State, in turn, would have to express its consent to be bound by these mixed agreements in the EU Act of Accession.[115] The analogy to be drawn from automatic accession clauses would thus be that automatic termination is possible with the previous consent of all parties. However, in proposing the analogy, Kaddous and Touré themselves admit that the EU's bilateral mixed agreements do not contain such an automatic withdrawal provision. Accordingly, nowhere have the EU's treaty partners consented to an automatic cessation of a state's party status following withdrawal from the EU – or to the resulting loss of their rights *vis-à-vis* that state.

Thirdly, understanding the bilateral mixed agreements' territorial scope as implicitly providing for a withdrawing Member State's loss of its party status is incompatible with the wording of Art. 29 VCLT[116] and the Convention's systematicity. Art. 29 VCLT addresses the issue of an agreement's territorial scope: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' The parties to bilateral mixed agreements are, therefore, free to determine the territorial scope of their agreement. However, in

113 For an example, see above Part I § 4 section I.B.1.

114 Kaddous and Touré (n 44) 281.

115 See eg the automatic accession clause in Art. 77(2) EPA Ghana that provides: 'Any new Member State of the EU shall accede to this Agreement from the date of its accession to the EU by means of a clause to that effect in the act of accession. If the act of accession to the Union does not provide for such automatic accession of the EU Member State to this Agreement, the EU Member State concerned shall accede by depositing an act of accession with the General Secretariat of the Council of the European Union, which shall send certified copies to the Ghanaian Party.'

116 On the customary status of Art. 29 VCLT, see K Odendahl, 'Article 29' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 3. Art. 29 VCLT-IO has an identical wording; in particular, it does not define the territorial scope of international agreements for international organisations. Nevertheless, Art. 29 VCLT can be applied in the case at hand as the extent to which the mixed agreements bind the UK – not the EU – is in question. The UK is not only a state, but it is also a party to the VCLT.

so doing, the exact formulation is crucial: there is a difference between the 'geographical application of the relevant treaty and the geographical reach of its binding force'[117]. Thus, where an agreement '*applies* […] for the European Union, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied'[118], following withdrawal from the EU, that agreement's geographical application may no longer cover the leaving Member State. However, the agreement may, according to Art. 29 VCLT, nevertheless continue to be '*binding* upon each party in respect of its entire territory'[119].

Moreover, while Art. 29 VCLT encompasses the moving treaty frontier rule,[120] that rule has never been understood in the sense of terminating a state's participation *as a party* to an international agreement. It does not deal with the status of a state with regard to an agreement. Instead, it is designed to address the effect of changes to one state's *territory* either because part of that territory separates or because more territory is incorporated. Thus, the rule has been described as

> stat[ing] that any territorial change affecting a States Parties after the entry into force of a treaty alters the treaty frontiers. Neither the treaty regime itself *nor the number* or identity of the States Parties is affected. Only the territorial scope of the treaty changes, since it depends on the geographical expansion of the States Parties.[121]

This description accords with the VCLT's systematicity. Art. 29 VCLT is included in Part III of the Convention dealing with the 'observance, application and interpretation of treaties'. It is neither included nor referred to in Part V, addressing the 'invalidity, termination and suspension of the operation of treaties'. Thus, a territorial change as such does not relieve a party of its obligations under an agreement.[122] Rather, where the change

117 Ibid para 18.
118 Art. 1.3 CETA Canada.
119 Emphasis added.
120 Odendahl (n 116) para 28.
121 Ibid para 29 (emphasis omitted, emphasis in italics added).
122 'Draft Convention on the Law of Treaties (Harvard Draft)' (1935) 29 (Supplement: Research in International Law) *American Journal of International Law* 635, Art. 26: 'A change in the territorial domain of a State, whether by addition or loss of territory, does not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change.'

leads to a disruption of the treaty relation, the State concerned may invoke a corresponding right of treaty termination.[123] This may specifically be the right to withdraw in the case of the impossibility of performance[124] or in the case of a fundamental change of circumstances. The former does not apply in the case of Brexit for it requires the disappearances or destruction of an indispensable object – not to be mistaken with the impossibility to realise the treaty's objective.[125] The latter ground for withdrawal, however, leads over to the final argument on implicit automatic termination.

The latter ground for treaty withdrawal – a fundamental change of circumstances – is addressed in detail below. The reason for that is that this ground for treaty termination is designed precisely to deal with the situations described above. It allows a party to withdraw from a treaty where its 'stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances'[126]. This is, *inter alia*, the case where 'changes in the factual basis of the parties' consent'[127] occur, such as the extent of a party's territory but also the loss of an essential qualification.[128] Where these changes come to frustrate the agreement's object and purpose, the threshold of an undue burden is reached.[129] Thus, if it is, for example, established that a state's EU membership is a quality essential to a particular agreement and loss of that quality puts into question the achievement of the agreement's object and purpose, this does not *ipso facto* terminate that state's status as a party to the agreement. Rather, where a state has lost an essential qualification, or a change to an agreement's

123 Odendahl (n 116) para 31.

124 Art. 61 VCLT: '1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty. 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.'

125 T Giegerich, 'Article 61' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 13.

126 ILC, 'Reports of the International Law Commission on the Work of its 18th Session (4 May-19 July 1966)' UN Doc A/CN.4/191, YBILC (1966) Vol. II 258.

127 T Giegerich, 'Article 62' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 40.

128 Ibid paras 34–44.

129 See in detail below Part I § 4 section II.B.2.

scope of application has occurred, and that changed situation puts into question the attainment of an agreement's object and purpose, this is generally considered under the terms of Art. 62 VCLT providing for the possibility of treaty withdrawal – not *automatic* termination. The answer to the question if the interaction between the definition of the parties, the agreements' territorial scope of application, their object and purpose and EU withdrawal are *legally* relevant is yes, but only if the cumulative conditions of a fundamental change of circumstances as per Art. 62 VCLT are fulfilled.

II. Termination by Invocation: EU Withdrawal as a Fundamental Change of Circumstances

An infamous exception to the principle of *pacta sunt servanda* is the so-called *clausula rebus sic stantibus*, allowing for the unilateral denunciation of an international agreement where its 'stipulations come to place an undue burden on one of the parties as a result of a fundamental change of circumstances'[130]. To limit the disruptive potential of the *clausula* for the stability of international treaty relations, its codification in Art. 62 VCLT[131] is formulated in the negative, with Art. 62(1) VCLT providing that a 'fundamental change of circumstances [...] *may not be invoked* as a ground for terminating or withdrawing from the treaty *unless* [...]'[132] certain very narrow, cumulative conditions are met. Moreover, it also provides for two exceptions which render invocation of Art. 62 VCLT inapplicable altogether.[133]

Despite its exceptional character and strict requirements, Art. 62 VCLT received considerable attention in the context of Brexit.[134] Neither the EU

130 'Reports 18th Session' (n 126) 258.

131 On the customary nature of Art. 62 VCLT, see ICJ *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)* (Jurisdiction) [1973] ICJ Rep 1973, p 3, [36]; ICJ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 1997, p 7, [38]; ECJ, C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, [55].

132 Emphasis added.

133 On the conditions, see below Part I § 4 section II.B.2. On the exceptions, see below Part I § 4 section II.B.1.a.

134 Scholarly contributions discuss Art. 62 VCLT when analysing the possible consequences of EU withdrawal on international agreements, see eg Voland (n 44), 25–28. Moreover, after conclusion of the withdrawal agreement, the UK contemplated

nor the UK explicitly invoked a fundamental change of circumstances in justifying their 'out means out' approach. This is rather unsurprising given that they claimed an *automatic* termination of the UK's status as a party to all bilateral mixed and *inter se* agreements (A.). However, where a former Member State remains a party to these agreements, the question arises as to whether or not the parties to these agreements – the EU, Member States, a former Member State or non-EU states – can invoke Art. 62 VCLT *post*-withdrawal (B.).

A. Automatic Termination: The Inappropriateness of Art. 62 VCLT

With regard to the effects of Brexit on international agreements, the EU, its Member States and the UK took the same approach: the UK would cease to be a party to bilateral mixed and *inter se* agreements, while remaining one in multilateral mixed agreements. Two things are noteworthy about this positioning: the categorisation of these international agreements based solely on their structure (bilateral or multilateral) and the constellation of the parties (with a non-EU treaty partner or without); and the blanket assignment of legal consequences based on these categorisations. In assessing whether the EU and the UK approaches to Brexit and international agreements can be justified in terms of a fundamental change of circumstances, both of these points are highly relevant.

The question of whether or not EU withdrawal constitutes a legal ground for treaty denunciation can only be truly answered when individually analysing every single international agreement. The need for such a case-by-case analysis is reemphasised by the exceptional character of Art. 62 VCLT, which prohibits any generalising statements. This is all the truer for a generalising categorisation – based on treaty structure or the treaty parties – as done in the case of Brexit. Assessing whether the circumstances surrounding an agreement have fundamentally changed so as to affect its continued performance also necessarily involves considering its content. Moreover, even where agreements with a certain structure all contain similar provi-

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the invocation of Art. 62 VCLT to relieve itself of the withdrawal agreement's provisions on trade between its main island and Northern Ireland, see eg M Milanovic, 'Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances' (*EJIL:Talk!*, 2019) <https://www.ejiltalk.org/brexit-the-northern-irish-backstop-and-fundamental-change-of-circumstances/>.

sions as, for instance, the definition of the parties and the territorial scope of application, it is impossible to make a general statement on the circumstances surrounding and the parties' intentions upon conclusion of these agreements.[135] Thus, the question of whether EU withdrawal constitutes an invokable fundamental change of circumstances as per Art. 62 VCLT for *any* of the EU and its Member States' international agreements cannot be exhaustively analysed here; nor is it possible to apply Art. 62 VCLT in a manner that would justify the EU and the UK's generalised approach with regard to certain categories of agreements.

Moreover, the consequence of a successful invocation of Art. 62 VCLT is not an *automatic* termination of treaty relations. Rather, where the requirements of Art. 62 VCLT are fulfilled, the parties have a right to invoke the fundamental change of circumstances to denounce the agreement or to suspend its operation. To make use of this right, they must follow the procedural steps set out in Arts. 65–67 VCLT. This encompasses, *inter alia*, a written notification communicated to the other parties that 'shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor'[136]. While it is unclear whether the procedural requirements of Arts. 65–67 VCLT – especially with their technical character and great level of detail[137] – can be considered customary, at least certain parts of its procedural standards already derive from the principle of good faith.[138] The parties may thus not be obliged to provide as detailed a notification as Art. 65(1) VCLT demands. However, good faith – and practicability – will

135 On this point, see further below Part I § 4 section II.B.2.

136 Cp Art. 65(1), 67 VCLT.

137 S Wittich, 'Article 70' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 7.

138 See ICJ, *Gabčíkovo-Nagymaros Project* (n 131) [109] noting that Arts. 65–67 VCLT 'if not codifying customary international law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.' Notably, the UK has repeatedly relied on Arts. 65–68 VCLT, even before entry into force of the VCLT. In ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction) [1973] ICJ Rep 1973, p 3, [44] The Court noted: 'In the United Kingdom Memorial it is asserted that there is a flaw in the Icelandic contention of change of circumstances: that the doctrine never operates so as to extinguish a treaty automatically or to allow an unchallengeable unilateral denunciation by one Party; it only operates to confer a right to call for termination and, if that call is disputed, to submit the dispute to some organ or body with power to determine whether the conditions for the operation of the doctrine are present. In this connection the Applicant alludes to Articles 65 and 66 of the Vienna Convention on the Law of Treaties.'

at least require a denouncing party to provide the other party/parties with some form of notification and information.

Before the UK withdrew from the EU, the EU indeed sent a *note verbale* to non-EU states and other international organisations and requested those governments and organs acting as depositaries for international agreements to which the EU is a party to circulate said *note* among the other parties.[139] The content of the *note verbale*, however, is of a purely informative character. It informs the recipients of the signing of a withdrawal agreement between the EU and the UK and the transition period agreed therein. As regards international agreements, the EU notifies the other parties 'that, during the transition period, the United Kingdom is treated as a Member State of the Union [...] for the purposes of these international agreements'[140]. However, 'at the end of the transition period, the United Kingdom will no longer be covered by the international agreements [...]', this being 'without prejudice to the status of the United Kingdom in relation to multilateral agreements to which it is a party in its own right'[141]. Thus, the *note* does not indicate the measures – in the sense of 'a step or legal act performed with respect to the treaty'[142] – that the EU intends to take, nor is it, being sent by the EU, an invocation of grounds for treaty termination or withdrawal by the UK, the party deemed to leave the agreements.

Based on these considerations, it is consistent that neither the EU – effectively as a proxy for the UK – nor the UK itself invoked Art. 62 VCLT. Recourse to the *clausula* does not and cannot justify the approach taken by the EU, its Member States or the UK with regard to the effects of Brexit on international agreements. Considering their structure and the constellation of parties, the categorisation into mixed and *inter se* agreements and the distinction between bilateral and multilateral mixed agreements is comprehensible. However, international treaty law does not provide for specific termination rules for (EU-)specific categories of agreements. In particular, a change in the composition of parties neither blanketly amounts to a fundamental change of circumstances nor does it lead to an *automatic* loss of party status.

139 EU Commission, 'Cover Letter and Note Verbale on the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern' (5 December 2018) COM(2018) 841 final 1.

140 Ibid 2.

141 Ibid 3.

142 ILC, 'Summary Records of the 18th Session (4 May – 19 July 1966)' UN Doc. A/CN.4/Ser.A/1966, YBILC (1966) Vol. I(2) 150.

B. Invoking Art. 62 VCLT: Terminating International Agreements Post-Withdrawal

The EU and the UK's 'out means out' approach with regard to the UK's status as a party to bilateral mixed and *inter se* agreements cannot be justified with reference to a fundamental change of circumstances. Still, Art. 62 VCLT may nevertheless play a role in the context of EU withdrawal as a regular ground for treaty denunciation invoked *following* withdrawal by *any* state or international organisation party to an agreement affected by the withdrawal. Thus, many authors critical of the EU and the UK's position point to Art. 62 VCLT. Where the UK is a party under international law, it remains a party also following Brexit; if this leads to disruptions reaching the threshold of Art. 62 VCLT, the article provides the parties with a possibility to free themselves of burdensome treaty obligations.

However, given the necessary case-by-case analysis and the hundreds of international agreements concerned, most authors indicate only a general tendency as regards the actual possibility of invoking Art. 62 VCLT, often without closer examination of its requirements.[143] Yet there are some general obstacles that would have to be overcome with regard to *all* concerned international agreements (1.), before one could even consider whether in the case of a *particular* agreement the narrow criteria of Art. 62 VCLT may be satisfied (2.).

1. Possible Obstacles in the Case of EU Withdrawal

The substantive requirements of Art. 62 VCLT demand a thorough analysis of each international agreement for which a party intends to invoke a fundamental change of circumstances. When considering invoking Art. 62 VCLT in the context of EU withdrawal, there are, however, also some general issues which states would have to consider. The first two are the

143 G van der Loo and S Blockmans, 'The Impact of Brexit on the EU's International Agreements' (*CEPS Commentary,* 2016) <https://www.ceps.eu/ceps-publications/impact-brexit-eus-international-agreements/> Fn. 9; Wessel (n 44), 122; Koutrakos (n 44) 77; Kaddous and Touré (n 44) 281; Y Kaspiarovich and N Levrat, 'European Union Mixed Agreements in International Law under the Stress of Brexit' (2021) 13(2) *European Journal of Legal Studies* 121, 141. More in detail, see S Silvereke, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced is Worse?' (2018) 15(2) *International Organizations Law Review* 321, 333–335; Voland (n 44), 25–28.

questions of whether a fundamental change of circumstances may be invoked by (all) states party to international agreements affected by Brexit at all or if an (implicit) exception applies (a.). The third preliminary question concerns the consequences of Art. 62 VCLT, which does not differentiate between bilateral and multilateral agreements (b.), something that could especially cause difficulties in the case of bilateral mixed agreements (c.).

a. The Applicability of Art. 62 VCLT

In practice, states rarely invoke a fundamental change of circumstances to denounce their international treaty commitments. Instead, they turn to the regular termination provisions often included in international agreements. On the one hand, these usually provide for far less strict conditions for denunciation; often, no substantive requirements must be met, only procedural aspects complied with. On the other hand, the narrow conditions of Art. 62 VCLT not only make invocation of a fundamental change less attractive – in many cases, recourse to Art. 62 VCLT is also legally impossible.

The application of the *clausula* is subject to exceptions. Two explicit ones are specified in Art. 62(2) VCLT:

> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
> (a) if the treaty establishes a boundary; or
> (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Before the introduction of Art. 50 TEU, one could have debated whether exiting the EU may – in the absence of a right to withdraw – be considered a breach of international obligations owed to the remaining EU Member States under the EU Treaties. In that case, Art. 62(2)(b) VCLT would have barred the UK from invoking a fundamental change of circumstances with regard to mixed and *inter se* agreements where the EU's Member States are all parties. However, with Art. 50 TEU now explicitly providing for a right to EU withdrawal, neither of the two exceptions mentioned in Art. 62 VCLT apply.

There are, however, potentially two further exceptions to Art. 62 VCLT that are unwritten but could be relevant in the case of EU withdrawal.

The first is advocated for by Villiger. In his view, 'from the principle of good faith it follows […] that a fundamental change of circumstances may not be invoked by a party which *by its own acts or omissions caused* the fundamental change of circumstances'[144]. At first sight, such an exception is not only supported by Art. 62 VCLT's drafting history: in their first reports, the International Law Commission's (ILC) Special Rapporteurs (SR) Fitzmaurice and Waldock even included an explicit exception to that effect.[145] This also appears reasonable considering the object and purpose of Art. 62 VCLT.

> For the sake of equity and justice, the concept of *rebus sic stantibus* codified in Art. 62 is intended to offer relief to *an innocent party* which *unexpectedly* faces intolerable burdens *imposed on it* by an unforeseeable fundamental change of circumstances.[146]

Art. 62 VCLT thus aims to protect the 'innocent party' by providing it the possibility of escaping burdensome treaty obligations. Where a party has, however, contributed to its situation, it shall not profit from the same right. Against this background, can a state withdrawing from the EU be considered 'innocent'? A Member State leaving the EU does so of its own free will and in the knowledge that this may affect the treaty relations created in the context of its membership. The change may thus have been unforeseen, in the sense that the state did not know at the time of concluding these agreements that it would someday withdraw from the EU. However, when

144 ME Villiger, 'Article 62' in ME Villiger (ed), *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2008) para 23 (emphasis added). But see Giegerich, 'Art. 62 VCLT' (n 127) para 84 who claims that Villiger 'goes too far in qualifying any failure to prevent the change as a breach of good faith' (Fn. 168).

145 ILC, 'Second Report on the Law of Treaties, by Gerald Fitzmaurice, Special Rapporteur' UN Doc A/CN.4/107, YBILC (1957) Vol. II 33: 'Even where the character of the change of circumstances itself is such as to conform to the foregoing conditions, it may not be invoked: […] (iii) If the change of circumstances has been caused, brought about, or directly or proximately contributed to, by the act or omission of the party invoking it.' See ILC, 'Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' UN Doc. A/CN.4/156 and Add.1 – 3, YBILC (1963) Vol. II 80: '4. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of denouncing or withdrawing from a treaty if – (a) it was caused, or substantially contributed to, by the acts or omissions of the party invoking it […]'.

146 Giegerich, 'Art. 62 VCLT' (n 127) para 46 (emphasis added).

deciding to leave the EU, the exit's consequences are neither unexpected nor imposed on the withdrawing state.[147]

In any event, reading an implicit good faith exception into Art. 62 VCLT is unconvincing when considered in the context of the explicit exception in Art. 62(2)(b) VCLT. During the VCLT's drafting process, the initially proposed exception based on *any* act or omission causing a change was replaced with an exception limited to *unlawful* acts or omissions. Why should Art. 62(2)(b) VCLT provide for an exception for unlawfully caused changes if Art. 62 implicitly (still) provides for an exception even in the case of the lawful conduct of a state? Art. 62(2)(b) would be unnecessary, if *any* self-inflicted change of circumstances would bar the responsible state from invoking Art. 62 VCLT. Thus, in general, a state withdrawing from the EU would not be excepted from invoking Art. 62 VCLT with regard to any international agreements affected by the exit. Interestingly in the case of Brexit, though, is the British delegation (of all) keeping to the original understanding of the exception even after it had been amended to today's version. The delegation expressed its understanding at the Vienna Conference on the ILC's VCLT draft that 'no State was entitled to invoke its own act or omissions as amounting to a fundamental change of circumstances giving rise to the operation of article 59 [now 62]'[148]. Thus, at least when holding the UK to its own understanding, it would not be able to invoke a fundamental change to free itself from treaty obligations post-Brexit.

The second implicit exception to Art. 62 VCLT is not only by far less controversial; it is also highly relevant for a large number of international agreements affected by an EU withdrawal and concerns the possibility of all treaty parties to invoke Art. 62 VCLT, not just that of the withdrawing state. This involves the relationship of Art. 62 VCLT to other grounds for termination. On this question, SR Fitzmaurice held in his Second Report on the Law of Treaties that

147 And indeed, discussion, *inter alia*, in the UK Parliament show that the UK was well aware of the fact that Brexit would not only terminate their EU membership, but also affect many of its treaty relations with non-EU states, see eg the expert hearing with Prof Alan Dashwood and Prof Panos Koutrakos (UK House of Commons, 'Oral Evidence' Costs and Benefits of EU Membership for the UK's Role in the World (8 December 2015) HC 545 27–28.).

148 UN Conference on the Law of Treaties, 'Official Records of the UN Conference on the Law of Treaties (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole)' First Session, 26 March – 24 May 1968 369.

> [e]ven where the character of the change of circumstances itself is such as to conform to the foregoing conditions, it may not be invoked: (i) Unless the treaty is of indefinite duration, *and contains no provisions,* express or implied, *for its expiry or termination* on giving notice […].[149]

Just as the previously discussed good faith exception, a subsidiarity exception had thus also been explicitly included in early drafts of the *clausula*; in contrast to the former, however, it continues to enjoy wide support in spite of its deletion from the article's text. Today, 'given the exceptional nature of the invocation of a fundamental change of circumstances' the view is still widely shared 'that Article 62 is subsidiary to Articles 54–60 and Articles 63 and 64'[150]. With Art. 62 VCLT being of a subsidiary character, however, it could only be invoked where the termination of an agreement is not possible 'in conformity with the provisions of the treaty'[151]. With most *inter se* and mixed agreements including an explicit right to denunciation[152], recourse to Art. 62 VCLT – for example to avoid long notification periods provided for in the agreement itself – is thus barred.

b. The Consequences of Invoking Art. 62 VCLT

In contrast to the first two, the third obstacle is not *prima facie* a legal one. Instead, it concerns the question of in whose interest it would be to invoke a fundamental change of circumstances at all. Art. 62 VCLT provides the parties to a treaty with three possibilities: to invoke the fundamental change as grounds for terminating a bilateral agreement, to invoke it to withdraw from a multilateral agreement or to invoke it in order to suspend the operation of an agreement. Thus, for an EU Member State (in the case of an *inter se* agreement) or a non-EU treaty party (in the case of a mixed agreement), the changed circumstances due to another state's EU withdrawal may cause a real dilemma: on the one hand, it is possible that these parties become overly burdened as a result of the other state's EU exit.

149 'SR Fitzmaurice Second Report' (n 145) 33 (emphasis added).
150 Villiger (n 144) para 28 (emphasis omitted). See also W Heintschel von Heinegg, 'Treaties, Fundamental Change of Circumstances' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) para 29; Giegerich, 'Art. 62 VCLT' (n 127) para 110.
151 Cp Art. 54(a) VCLT.
152 See above Part I § 4 section I.A.

On the other hand, invoking Art. 62 VCLT would – most likely – not lead to the desired outcome.

Were a Member State to invoke another state's EU withdrawal as constituting a fundamental change of circumstances in the context of an *inter se* agreement, this would *prima facie* lead to *its* withdrawal from the agreement, while the former Member State would remain a party. Likewise in the context of mixed agreements, invocation by a non-EU treaty party would affect *that state's* status as a party to the agreement, not that of the former Member State. Most probably, however, the remaining Member States will want to continue their *inter se* agreements, albeit without the former Member State. Similarly, in the case of mixed agreements, it is probably in the non-EU treaty partner's interest to continue its treaty relations with the EU and its Member States, only its relationship with the *former* EU Member State being strained by the withdrawal. However, considering its wording, Art. 62 VCLT is not designed to expel a disruptive treaty party from an agreement. Instead, it is intended as a 'safety valve'[153], offering an unduly burdened state treaty termination as an alternative 'option [to] the unlawful breach of the defective treaty'[154].

Considering the (potential) interests involved, the question is if a more accommodating legal solution can be found. Unlike Art. 60 VCLT,[155] Art. 62 does not contain elaborate specifications on if (and if so, when) the invocation of a fundamental change of circumstances necessarily affects all parties to an international agreement or if (and if so, when) it affects the treaty relations of only a limited number of parties. However, Art. 62 VCLT was not designed this way from the outset. To the contrary, SR Fitzmaurice argued that '[t]he application of the principle *rebus sic stantibus* is subject to condi-

153 'Reports 18th Session' (n 126) 258.

154 MN Shaw and C Fournet, 'Article 62' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) para 1.

155 Cp Art. 60(2) VCLT: 'A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all parties; (b) a party specifically affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.'

tions and limitations broadly analogous, *mutatis mutandis*, to those set out in article 19 above regarding the case of termination resulting from a fundamental breach of the treaty'[156]. Thus, just as with breaches, Fitzmaurice suggested '[l]imitations arising out of the type of treaty involved'[157] to the application of the *clausula*. Parties should not be able to invoke the *clausula* at all

> [i]n the case of law-making treaties (*traités-lois*), or of system or regime creating treaties [...], or of treaties involving undertakings to conform to certain standards and conditions, or of any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties.[158]

From such multilateral law-making agreements, Fitzmaurice differentiated a multilateral 'treaty which consists in a reciprocal grant or interchange between the parties of rights, benefits, concessions or advantages'[159]. With regard to the latter, the parties were to be able to invoke a fundamental change. However, 'in the case of an essential change of circumstances affecting one or more parties only', it should not 'be invoked as a ground for the termination of the treaty itself, but only as a ground for the withdrawal, or of the suspension of the obligations of such particular party or parties'[160]. Finally, in the case of multilateral treaties where the 'performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties'[161], the 'withdrawal [...] of one party, on grounds of *rebus sic stantibus*, may justify the withdrawal of the other parties'[162].

Thus, Fitzmaurice differentiated among multilateral agreements that were bilaterally structured, those of an *erga omnes partes* and those of a law-making nature. Depending on the nature of the agreement, a fundamental change of circumstances could be invoked only concerning the treaty relation affected by the change with regard to all parties, or not at all. Waldock, following Fitzmaurice as Special Rapporteur, in his first dealing with the *clausula* dropped any reference to the structure or nature of an agreement. Instead, he introduced exceptions to the *clausula* based on the

156 'SR Fitzmaurice Second Report' (n 145) 32.
157 Ibid.
158 Ibid 31–32.
159 Ibid 31.
160 Ibid 32.
161 Ibid 31.
162 Ibid 32.

agreements' content, one of which (concerning boundary agreements) is still included in Art. 62 VCLT today. This is understandable, given that neither state practice nor scholarship on the *clausula* (then or now) seem to draw a distinction between the invocation of a fundamental change of circumstances with regard to bilateral as opposed to multilateral agreements. Furthermore, it is questionable whether (all) international agreements could be classified strictly according to Fitzmaurice's categories at all.[163]

Nonetheless, there are good reasons for a more differentiated solution for multilateral treaties. Feist demonstrates the potential of a fine-tuning of the consequences of invoking Art. 62 VCLT by adapting an example originally used by Fitzmaurice:[164] states A, B, C and D conclude a multilateral agreement granting their respective merchant fleets reciprocal access to their ports. State A loses parts of its territory and is subsequently a landlocked state. With ships sailing under state A's flag still entering the ports of the other state parties to the agreement, state B invokes a fundamental change of circumstances, claiming that the fair balance of rights and obligations is disturbed. This is, however, only the case in the relation between state A and B. State B's ships are not only still traveling to any other state party's ports, but its ships will most likely also have an interest in maintaining this access. Based on a traditional understanding, invocation of Art. 62 VCLT – assuming that the conditions are fulfilled – would lead to the complete withdrawal of state B from the multilateral agreement. The interests of state B – and arguably also state C and D – would, however, be better served, if state B were able to invoke a fundamental change *only* in relation to state A.

A possible textual point of reference for such an application of Art. 62 VCLT could be paragraph 1, lit. b. For a state to be able to invoke a fundamental change of circumstances, such a change must have 'radically […] transform[ed] the extent of obligations still to be performed under the

163 Schmalenbach (n 55) para 14. Criticising the distinction between law-making agreements and contractual agreements, see in more detail A Pellet, 'Article 38' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) para 205: 'In reality, all treaties are 'particular' in one sense – since they only apply to the parties – and all are 'law-making' in that they create rights and obligations – still for the parties – even if there is no doubt that some treaties have an influence far beyond the circle of the parties.' (Footnotes omitted).

164 C Feist, *Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen* (Duncker & Humblot 2001) 179–180 adapting the example provided in 'SR Fitzmaurice Second Report' (n 145) 61.

treaty'. Where a change has, however, only affected the obligations to be performed with regard to a *certain* treaty party, the preconditions of Art. 62 VCLT are strictly speaking only fulfilled in their bilateral relations. The already restrictive nature of Art. 62 VCLT speaks in favour of this reading: 'so as to disparage as little as possible the rule *pacta sunt servanda*'[165]. Providing states the possibility of terminating their treaty relations only *vis-à-vis* a certain state in a multilateral agreement arguably better serves the interest of the affected state and the international community's interest in treaty stability. In the port agreement example, state B will most likely want to continue its treaty relations with all parties but state A. Allowing it to do so would encourage state B to remain a party to the agreement.

What would this mean with regard to EU withdrawal and international agreements?[166] With regard to *inter se* and multilateral mixed agreements, the answer is relatively straightforward. Firstly, it would be necessary to analyse whether these create reciprocal relations between the parties or obligations owed *erga omnes partes*. In the former case, any party – the EU, its Member States, the former Member State or a non-EU party – could terminate the agreement with respect only to this party in relation to which the obligations – as a consequence of the EU withdrawal – have become overly burdensome. In the case of bilateral mixed agreements, however, the answer is more complex: it depends on one's preconception of these agreements and how this is affected by a Member State's withdrawal. The first possibility is to view them as formally multilateral agreements, based on the number of parties. In that case, it would be possible to apply a nuanced withdrawal approach. The alternative is to treat them as bilateral agreements based on their structure, in which case termination of the agreement could be the only option.

c. *Lex mixity* again? Art. 62 VCLT and Bilateral Mixed Agreements

On the one hand, being *mixed*, the bilateral mixed agreements formally encompass 30+ parties – the EU, its Member States, the UK and at least one non-EU state. This is reflected in the number of ratifications as well as

165 Giegerich, 'Art. 62 VCLT' (n 127) para 101.

166 Assuming that Brexit – the UK's loss of EU membership, the diminishment of the EU's internal market, etc. – would, indeed, amount to a fundamental change of circumstances. On Art. 62 VCLT's conditions, see below Part I § 4 section II.B.2.

in – to some extent – the agreement's text.[167] As Schmalenbach describes it, a 'bilaterally structured' multilateral agreement, '[i]n principle [...] adds up to the same legal effect as when one State concludes a number of textually identical treaties separately with two or more States except that these treaties may evolve in different ways'[168]. Accordingly, a bilateral mixed agreement such as CETA could, in essence, be viewed as 29 bilateral agreements (of the EU, the Member States, and the UK) with one non-EU State. As Advocate General Sharpston has argued, this individual party status of the Member States also extends to denunciation.

> Finally, where an international agreement is signed by both the European Union and its Member States, each Member State remains free under international law to terminate that agreement in accordance with whatever is the appropriate termination procedure under the agreement. Its participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the European Union [...].[169]

Following this understanding, allowing for a 'partial' invocation of Art. 62 VCLT would provide the parties to such mixed agreements with a potentially more interest-oriented solution: the non-EU state, for example, could invoke a fundamental change of circumstances only in the bilateral relation with the UK if it feels that the UK's loss of EU membership has overly burdened their relation.

On the other hand, in bilateral mixed agreements, the EU and its Member States are often described as forming a 'single contracting party'[170] or even expressly defined as the 'EU Party'[171]. Provisions such as the definition of the parties create not only a linguistic connectedness between the EU and its Member States; they also enable a joint and alternative performance of the treaty obligations *vis-à-vis* their non-EU treaty partner(s).[172] In that sense, the 'EU Party' differs significantly from groups of non-EU states which have jointly concluded a mixed agreement with the EU and its Member States. Although these states – like the EU and its Member States – stand on one side of the agreement, they are generally completely inde-

167 See above Part I § 3 section III.C.2.
168 Schmalenbach (n 55) para 9.
169 ECJ, *FTA Singapore AG Sharpston* (n 48) [77].
170 ECJ, *Hermès AG Tesauro* (n 28) [15].
171 See eg Art. 1.1 CETA. On the definition clauses, see also above Part I § 4 section I.B.1.
172 On the term 'EU Party', see Schaefer and Odermatt (n 31). On the joint and alternative performance of mixed agreements, see J Heliskoski (n 29), chapter 4.

pendent from each other, unless they explicitly commit to act collectively, for example, within the institutional framework of an agreement.[173]

An illustrative example for this is the *Trade Agreement with Colombia and Peru*[174] (TA Colombia/Peru). Here, 'the European Union or its Member States or the European Union and its Member States within their respective areas of competence' form the 'EU Party'[175]. Art. 6(1) TA Colombia/Peru provides that '"Parties" means, on the one hand, the EU Party and, on the other hand, *each* signatory Andean Country'[176]. Thus, 'for the signatory Andean Countries the terms "another party" or "the other Parties" shall mean the EU Party'[177]. This ensures that

> [t]he provisions of this Agreement apply to the bilateral trade and economic relations between, on the one part, each individual signatory Andean Country and on the other part, the EU Party; but not to the trade and economic relations between individual Andean Countries.[178]

This impression of a single 'EU Party' and two individual non-EU parties is further emphasised in the context of denunciation. Art. 331(3) TA Colombia/Peru provides that

> [w]hen a signatory Andean Country withdraws from this Agreement, this Agreement shall continue to be in force between the EU Party and the other signatory Andean Countries. This Agreement shall be terminated in case of withdrawal by the EU Party.

While the non-EU states may individually withdraw from the agreement, the individual denunciation of a Member State is not provided for. Based on the wording of the denunciation provisions, read together with the 'EU

173 See eg Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (15 December 2012) OJ L346/3 [AA Central America], Art. 352(3): 'For the purposes of this Agreement, the Republics of the [Central America] Party agree and commit to act collectively in the following provisions: (a) in the decision making through the bodies referred to in Title II (Institutional Framework) of Part I of this Agreement […]'.

174 Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (21 December 2012) OJ L354/3 [TA Colombia/Peru].

175 Art. 6(1).

176 Emphasis added.

177 Art. 6(3).

178 Art. 7(1).

Party' definition, any notification of denunciation by *one* member of the 'EU Party' would have to be counted for and against the whole 'EU Party'. Thus, in agreements such as the TA Colombia/Peru, it is questionable whether the individual EU Member States are really still in a position to denounce these agreements individually, at least – as suggested by AG Sharpston – 'in accordance with whatever is the appropriate termination procedure *under the agreement*'[179].[180]

However, based on an understanding of a single 'EU Party', invocation of Art. 62 VCLT by a non-EU party *vis-à-vis only one* Member State is inconceivable. Schmalenbach's description of a bilaterally structured but formally multilateral agreement would still fit where the agreement is concluded with two or more non-EU states: *one* EU Party has concluded *two* bilateral agreements, one with Colombia and one with Peru, both encompassed in one instrument. However, even when applying a narrow reading of Art. 62 VCLT allowing for partial withdrawal, withdrawal by Colombia or Peru would take effect with regard to the *whole* EU Party, that is the EU *and* all Member States. In contrast, with the EU and its Member States forming one EU Party, a bilateral mixed agreement concluded with *one* non-EU state, such as the CETA Canada, would no longer fall under Schmalenbach's description.[181] Instead, it would have to be treated as a bilateral agreement, the consequence of invoking Art. 62 VCLT thus being the termination of the agreement.

Whether or not withdrawal *vis-à-vis only* the UK following Brexit is a possibility then depends on how one considers Brexit to affect the 'EU Party'. Would the UK following Brexit still have to be counted as part of the 'EU Party' for the purpose of these agreements? That is, at least, how the treaty parties entered into the agreement and how the agreements continue

179 ECJ, *FTA Singapore AG Sharpston* (n 48) [77] (emphasis added).

180 On this question and the denunciation provisions in the EU's mixed bilateral trade agreements, see Schaefer and Odermatt (n 31) 147–149.

181 It is unclear how Schmalenbach views the EU's bilaterally structured mixed agreements. She describes an agreement as 'bilaterally structured if it is concluded between *one or more* States on one side and *two or more* States on the other side' and names the Cotonou Partnership Agreement, an agreement between a group of African, Caribbean and Pacific states, on the one side, and the EU and its Member States, on the other side, as an example (Schmalenbach (n 55) para 9 and fn. 24, emphasis omitted, emphasis in italics added). Depending on the understanding, this could be an example of an agreement between *one* party (the EU Party) and several states on the other side, or an agreement between the EU and several states, on the one side, and several non-EU states, on the other side.

to list the UK.[182] Or would it step outside the EU bloc, essentially trilateralising the bilaterally structured mixed agreements? With the Member States becoming full parties to these agreements, thus being bound by all rights and obligations,[183] this would be possible. If, however, as Wessel writes 'the changing status of the UK would change the nature of a bilateral agreement to a multilateral agreement'[184], there would again exist a separable bilateral relation between the UK and another non-EU state that the latter could terminate – independently of the mixed agreement with the EU.

2. The Substantive Conditions of Art. 62 VCLT: EU Withdrawal as a Fundamental Change of Circumstances?

Based on the above considerations, a state contemplating the invocation of Art. 62 VCLT following a (or its) withdrawal from the EU would be well advised to first consider the applicability of the article and its consequences. Where invocation of Art. 62 VCLT is possible and desired, its substantive requirements come into play. Stating the obvious, the most basic requirement for invoking Art. 62 VCLT is, of course, the occurrence of a change of circumstances. Such a change undoubtedly occurs for the international agreements concluded by a state within the context of membership in the EU when this state leaves the EU.[185] Not only does the state lose a characteristic – EU membership – to which many of these agreements expressly refer; in many cases, the territorial scope of application of the agreements is also affected. However, to be invokable as a ground for denouncing an international agreement, the change must fulfil several further criteria.

Art. 62(1) VCLT further qualifies the change: it must pertain to circumstances that existed at the time of conclusion, be unforeseen and be fundamental in nature. A change is unforeseen when it is not anticipated by the parties, even though it may have been foreseeable.[186] Whether or not a change can be deemed fundamental, in turn, seems to correlate with the additional conditions of Art. 62(1)(a) and (b) VCLT. These provide that the circumstances which have changed 'constituted an essential basis of the consent of the parties' and that 'the effect of the change is radically

182 See eg the preamble in CETA.
183 See above Part I § 3 section III.C.2.
184 Wessel (n 44), 122.
185 See in detail above Part I § 4 section I.B.
186 Giegerich, 'Art. 62 VCLT' (n 127) para 58.

to transform the extent of obligations still to be performed'. In the eyes of Giegerich, these additional requirements inform the decision on the magnitude of the change, for

> [o]ne can indeed scarcely conceive of any change which firstly affects circumstances whose existence formed an essential basis of the consent of the parties to be bound by the treaty and secondly radically transforms the extent of the remaining treaty obligations but is still not fundamental.[187]

For certain circumstances to have formed the essential basis of the parties' intent, they 'must have been the determining factor for all the parties to enter the treaty, not just the motive or inducement of one or a few of them'[188]. Such an intention of the parties is determined objectively by applying the rules of interpretation as per Arts. 31–33 VCLT. The condition of a radical transformation of obligations, in turn, has been described by the International Court of Justice (ICJ) as an increase in 'the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'[189]. Performance must, thus, not be impossible, but in burdening the party invoking Art. 62 VCLT must exceed a *de minimis* threshold.[190] Notably, however, this is the case where the change has led to the frustration of an agreement's object and purpose, that is in the case of an impossibility as regards its objective.[191]

At least as regards the *inter se* and bilateral mixed trade agreements, the UK's EU membership is undoubtedly a circumstance that existed upon conclusion of these agreements. While not as visible in their design and text, the same is true for multilateral mixed agreements that were concluded by the UK *after* accession to the EU.[192] Especially where the EU and its

187 Ibid para 49.
188 Ibid para 59 (emphasis omitted).
189 ICJ, *Fisheries Jurisdiction (Germany v Iceland) (Jurisdiction)* (n 131) [43].
190 Giegerich, 'Art. 62 VCLT' (n 127) paras 62, 66.
191 See Waldock's draft article 22 on a fundamental change of circumstances whose para. 2 lit. (c) read: 'the effect of the change in that fact or state of facts is such as – (i) in substance to frustrate the further realization of the object and purpose of the treaty; or (ii) to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken.' ('SR Waldock Second Report' (n 145) 79). See also Giegerich, 'Art. 62 VCLT' (n 127) para 65.
192 Where the UK concluded multilateral agreements and the EU later acceded to that agreement, the circumstance 'EU membership' did not exist upon conclusion of the agreement.

Member States jointly participate in the negotiations and the conclusion of these agreements, the fact that the UK was an EU Member State at that time is also abundantly clear to all non-EU treaty parties. While all treaty parties were thus aware of the same circumstances upon conclusion of the agreements, the change to them was not foreseen. Since the inclusion of Art. 50 TEU, the withdrawal of a Member State may have increasingly become foreseeable. However, the actual withdrawal of the UK could not have been foreseen by any of the concerned treaty parties. An exception is the international agreements concluded after the Brexit referendum in June 2016 or latest after the UK's Art. 50 notification. Here, not only the EU and its Member States but also non-EU states will, with all likelihood, have known of the situation of a Member State leaving the EU and could have provided for this change in the agreements.

But for all agreements prior to 2016/2017, the question is, firstly, whether the UK's loss of EU membership can be considered a *fundamental* change and, relatedly, whether the UK's EU membership lies at the heart of the parties' consent. Secondly, does the UK's EU withdrawal radically change the treaty obligations?

In the case of mixed agreements, one could argue that EU membership was essential at least for the EU and its Member States so as to form one 'team'[193], indicators of which being the definition of the parties in bilateral mixed agreements and the disconnection clauses in multilateral mixed agreements.[194] For the non-EU treaty partners, the answer is perhaps less straightforward: on the one hand, the EU membership of all (at the time of conclusion) 28 European states may have been an essential factor for a non-EU state intending to establish, for example, trade relations with the EU as an economic bloc. On the other hand, in multilateral agreements such as UNCLOS, EU membership as a determining factor for the parties' consent can almost certainly be negated. While these agreements accommodate for joint participation by the EU and its Member States, they do not build on it. Even in *inter se* agreements, the question of whether membership in the EU constitutes an essential basis is by no means answered by reference to their restrictive accession criteria. Member States certainly conclude these agreements *knowing* that all parties are EU Member States, but whether

193 Wessel (n 44), 119.
194 On disconnection clauses, J Odermatt (n 10) 82–87.

this was *essential* to them would have to be established.[195] Judging solely from the text of the agreements, this seems less likely in the case of the EUI Convention, more probable in the case of the ES Convention and quite likely in the case of the EDF Agreement.[196]

Similar considerations can be made with respect to the effect of a loss of EU membership on the contractual obligations arising from *inter se* and mixed agreements. Without doubt, following Brexit, the UK and all participating EU Member States continue to be able to pay their financial contributions to the European University Institute, the size of which is unaffected by the change from a purely *inter se* agreement to an agreement including a non-EU state.[197] Even so, Brexit may nevertheless frustrate an agreement's purpose. Debatable is, for instance, whether participation of the UK as a non-EU state would really frustrate the ES Convention's stated purpose of '[educating] together children of the staff of the European Com-

195 An interesting case in this regard would have been the Agreement on a Unified Patent Court (20 June 2013) OJ C175/1 [UPC Agreement]. The UK ratified this *inter se* agreement before Brexit but subsequently withdrew its ratification, before the agreement entered into force. The UPC Agreement in its current form was drawn up following an opinion by the ECJ declaring its predecessor – the Draft Agreement Creating a Unified Patent Litigation System – incompatible with the EU Treaties (ECJ, Opinion 1/09 *Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123). The first draft agreement had envisaged participation by all states parties to the Convention on the Grant of European Patents (adopted 5 October 1973, entered into force 7 October 1977) 1065 UNTS 199 [Patent Convention], thus being open to non-EU states. Following the ECJ's Opinion, the UPC Agreement is restricted to EU Member States. The shift to an *inter se* agreement was, in the eyes of the Commission, necessary to meet the Court's concerns with the first draft agreement. Here, the fact that all parties are EU Member States would, thus, arguably have to be considered essential to the consent of the parties, taking into consideration the agreement's drafting history (cp Art. 32 VCLT). On the UPC Agreement and Brexit, see T Jaeger, 'Reset and Go: The Unitary Patent System post-Brexit' (2017) 3 International Review of Intellectual Property and Competition Law 254.

196 See above Part I § 4 section I.B.3.

197 Cp Art. 19 EUI Convention which determines that '[t]he financial contributions of the Contracting States to cover the expenditure provided for in the Institute's budget shall be determined on the following scale', subsequently listing all parties and the respective fixed percentage to be borne. Likewise, the financing of the European Schools would not change as a result of Brexit. Cp Art. 25 ES Convention: 'The budget of the Schools shall be financed by: 1. contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution decided on by the Board of Governors acting unanimously […]'.

munities'[198], especially as Art. 1 explicitly allows children whose parents are not EU staff to attend European Schools. It is also debatable whether or not the purpose of promoting reciprocal trade relations between a non-EU state and the EU and its Member States may be frustrated by the UK leaving the EU. At the same time, rollover agreements concluded by the UK and non-EU treaty partners that simply copy and paste the content of the agreement with the EU are testimony to the fact that the UK – and the non-EU treaty partner – are able and willing to continue to comply with the obligations included in these agreements.[199] In that case, performance of the agreement does not appear overburdensome.

III. Brexit and its (Practical) Effects

The VCLT provides parties to an international agreement with two possibilities to terminate their status: 'as a result of the application of the provisions of the treaty or the present Convention'[200]. In the sweeping terms claimed by the EU and the UK, neither of these options apply in the case of Brexit. The mixed and *inter se* agreements do not explicitly provide for the loss of a Member State's party status upon withdrawal from the EU nor can the fact that the UK concluded these agreements as a Member State be understood as an implicit resolutory condition. A blanket reference to Art. 62 VCLT as a ground for the UK's loss of party status neither does justice to the provision's narrow wording and its exceptional character nor does it take into account the procedural obstacles that an invocation of Art. 62 VCLT would entail.

The EU and the UK's 'out means out' approach in the case of Brexit pertains to two categories of international agreements: Member States' *inter se* agreements and the bilateral mixed agreements concluded by the EU and its Member States with one or more non-EU states. It is true that the treaty design and wording of both of these categories of agreements often establish a close connection between the Member States' status as parties to these agreements and their capacity as EU Member States. It thus suggests itself to seek the reason for the former in the latter. However, treaty law simply does not justify such a result: a state does not simply cease to be a

198 Art. 1 ES Convention.
199 On the UK's rollover practice, see above § 1 section II.D.
200 Art. 42(2) VCLT.

party to an international agreement because of how the parties are defined or because it falls outside the territorial scope of application.

That is not to say that withdrawal of a Member State from the EU does not have an effect on these international agreements. Where the parties of an international agreement are defined as EU Member States, one can argue that the agreements no longer apply to a former Member State *ratione personae*. Likewise, the territorial scope of application of an agreement linked to the application of the TEU and the TFEU will, following withdrawal from the EU, no longer cover the former Member State *ratione loci*. It would be wrong, however, to mistake an agreement's application to a state with its binding force on that state. But what would be the consequence of a state being party to an international agreement but no longer being covered by its substantive provisions? Where the consent of all parties is required, as for example in case of accessions or treaty amendments, would this still include the UK? Could the UK then – no longer being a Member State – effectively hold a veto in the EU's external actions?

From the perspective of treaty law, withdrawal from the EU may render an international agreement inapplicable – at least in relation to the withdrawing state – or to some extent even dysfunctional. It does not, however, mean that the withdrawing state ceases to be a party. Thus, with regard to Brexit many authors referred to the need for the EU and the UK to enter into negotiations with their treaty partners. Depending on the respective author's opinion on the effect of Brexit on international agreements, proposals ranged from suggesting negotiations with the aim of treaty termination to negotiations with the aim of treaty adaption to negotiations as required under Art. 62 VCLT.[201] The fact is, however, that neither the EU nor the UK negotiated with non-EU treaty partners on the agreement's termination or adaption. Instead, they assumed an *ipso facto* termination of *inter se* and bilateral mixed agreements for the UK.

201 See eg Wessel (n 44), 122; Silvereke (n 143), 335–336; Kaddous and Touré (n 44) 283–284. For the House of Common's hearing, Prof Alan Dashwood summarised the UK's position, using the example of the Free Trade Agreement with Korea, as follows: 'I don't believe that the UK could retain the rights and obligations that apply to it under the agreement. We would have to renegotiate and, of course, we would be renegotiating from a much less favourable position because we wouldn't be able to offer the South Koreans access to the internal market, which is the quid pro quo for the extent to which they were willing to open up their market. I think we would find that difficult, and we would probably be in a somewhat less favourable position.' (see 'UK House of Commons 2015' (n 147) 28).

Concluding Remarks: Brexit and Treaty Law – Match or Misfit?

§ 2 began with a widely shared and well-founded proposition: that the EU – despite any peculiarities – for the purposes of international law can (still) be categorised as an international organisation. This is not to say that different categorisations may not prove more fitting in other settings. While one *can* consider the EU's internal rule-making from the perspective of international institutional law, other approaches *may* be more useful. However, where the EU and its Member States enter into exchange with the international community or resort to traditional legal instruments under international law, such as the conclusion of international agreements, *sui generis* labelling is neither helpful nor appropriate: '[h]ow the EU fits within the wider system of international law […] is legally relevant when the EU acts on the plane of international law'[1].

Attaching a label to the EU is one thing: by and large the EU at least does not reject its classification as an international organisation. However, having its conduct judged based on the consequences that this label entails is quite another thing. While the EU may exhibit the typical characteristics of an international organisation, one can question the extent to which it accepts and acts according to the rules that international law imposes on such an international legal subject. An often-cited yet legally relatively trivial example of this is the European Court of Justice's reference to rules of the 1969 *Vienna Convention on the Law of Treaties* when dealing with international agreements between non-Member States and the EU.[2] As the 1969 VCLT and 1986 *Vienna Convention on the Law of Treaties between States and International Organization and between Organizations* are nearly identical, the consequences are at most marginal. In contrast far more consequential, is the clear deviation from the rules on and practice by international organisations in case of memerbship withdrawal as witnessed in the EU's and UK's Brexit practice.

1 J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 9.

2 See in detail, ibid 63–66 and PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).

§ 3 and *§ 4* considered the effect of EU withdrawal on international agreements concluded by the EU and its Member States from the perspective of international institutional and treaty law. Art. 70 VCLT formed the starting point, although its appropriateness may well be doubted. How useful is a provision dealing with the consequence of withdrawal from one agreement – in this case, the TEU/TFEU – when looking into effects on other international agreements? Primarily, if not exclusively, Art. 70 VCLT and the principles of international law expressed therein focus on the consequences of an agreement being terminated or withdrawn from for the treaty parties. It is for this reason that reference to Art. 70 VCLT – though not tailored to the situation of interrelated agreements – is appropriate with regard to conventions. Here, a group of treaty parties to an international organisation's founding treaty is typically identical with those of the conventions concluded in the context of membership in that organisation.

In the context of their EU membership, EU Member States conclude *inter se* agreements. In all EU treaty practice, these agreements are the most comparable to those found in the context of other international organisations. Conventions concluded under the auspices of other international organisations and EU *inter se* agreements are both, subject-wise, generally linked to the aim and functioning of the respective organisation. Both create a layer of rights and obligations beyond but not separate from the organisations' founding treaties. Thus, EU Member States resort to a classic organisational method by opting for an *inter se* agreement to set common rules or establish common institutions.

Accordingly, what is applicable to the conventions of other international organisations should also apply to *inter se* agreements. EU Member States are able to determine the fate of their *inter se* agreements in case of EU withdrawal through provisions to that effect in the TEU and TFEU. Additionally, they could include a respective provision in the *inter se* agreements themselves that establishes loss of EU membership as a resolutory condition. Where neither is done, however, a withdrawing state remains a party to the *inter se* agreements. A change to the constellation of treaty parties may only be brought about by the valid invocation – by one or several of the *inter se* agreement's parties – of a right to withdraw. This did not take place in the case of the UK's withdrawal from the EU, but it is still understood that the UK ceased being a party to all *inter se* agreements. The practice of other international organisations shows that international treaty law – and specifically Art. 70 VCLT – is capable of engaging with the

broader consequences of a party exiting an international organisation. It was, however, not followed in the case of Brexit.

With regard to the EU's agreements concluded with non-EU states, with or without co-conclusion by its Member States, only considering Art. 70 VCLT as a starting point is unsatisfactory. Art. 70 VCLT does not and cannot truly provide for situations where states – or other subjects of international law – beyond the parties to the agreement being denounced are affected by said denunciation. It is, of course, nevertheless possible to broadly resort to treaty law. The principles of consent and *res inter alios acta* would then lead to the conclusion that – contrary to Brexit practice – a withdrawing EU Member State does *not* automatically cease to be a party to bilateral mixed agreements. Yet the question remains – is it actually satisfactory, appropriate or even possible to treat Brexit (solely) through the lens of treaty law? While the EU 'ticks all the boxes'[3] of what defines an international organisation, its treaty practice with non-EU states does not. A general comparison to the practice of other international organisations becomes difficult, if not futile.

Firstly, the EU's external agreements differ from international agreements concluded by other international organisations as regards the constellation of how they are concluded. Mixity is a phenomenon strictly limited to the EU context. No other international organisation co-concludes international agreements with its Member States. Additionally, the construction of Art. 216 TFEU, binding Member States via EU law to EU-only agreements, is unique. Secondly, while the international agreements of international organisations generally differ content-wise from those concluded by states, this is not the case for many of the EU's external international agreements concluded with or without its Member States: 'in the case of a supranational organisation – which has taken on certain functions of the member states, mostly to the exclusion of the latter […]' international agreements will '*in substance* be similar to state treaties'[4]. Thirdly, and related to the previous points, many EU-only and (bilateral) mixed agreements feature a reference to the territory of the EU's Member States, a characteristic rarely seen in the treaty practice of international organisation.

3 B De Witte, 'EU Law: Is it International Law?' in C Barnard and S Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 179.

4 CM Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 131 (footnote omitted, emphasis in the original).

> The law of treaties is premised on an important distinction. States possess full competence to enter into binding agreements on a range of issues, whereas international organizations exercise only limited powers, and may only enter into agreements in a limited capacity such as headquarter agreements. However, the agreements to which the EU is a party fall more in the first category, that is, its commitments are much more 'state-like' in nature. This practice calls into question the logic of the dichotomy between states and international organizations.[5]

In the context of states, however, one must differentiate between territorial changes that treaty law, as codified in the VCLT, is capable of dealing with and changes that fall outside of its scope. In general, changes to a state's territory may move an agreement's frontier as per Art. 29 VCLT or – in extraordinary circumstances – allow for treaty denunciation in accordance with Art. 62 VCLT. These provisions, however, 'shall not prejudge any question that may arise in regard to a treaty from a succession of States'[6]. Thus, situations of uniting and separation leading to the creation of a new state are governed not by the VCLT, but the law of state succession in respect of international agreements. This domain of international law acknowledges that the separations of states can have external repercussions and attempts to strike a balance between the interests of the states involved and the treaty partners affected. In so doing, might the law of succession be better suited to examine a case of disintegration from the EU?

5 J Odermatt (n 1) 62.

6 Cp Art. 73 VCLT: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.' Particularly noteworthy is the VCLT-IO's equivalent. According to Art. 74(2) VCLT-IO, '[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty […] *from the termination of participation by a State in the membership of the organization*.' (Emphasis added).