§ 1 Setting the Scene: Brexit and EU Treaty Practice

The UK's exit from the EU raised a plethora of (legal) questions. Some of these questions were of a fundamental nature: how could the EU and the UK square their ideas of future cooperation with the British–Irish border? Others were of a very practical character: what technological solutions could facilitate border controls? Many of them were politically charged and almost all of them – at least indirectly and in the long term – concerned the lives of British and EU citizens. Amidst the heated debates on citizens' rights, financial settlements, the future role of the European Court of Justice (ECJ), and the British-Irish border – of what relevance is the question of the effect of Brexit on international agreements?

To best understand the relevance of the topic covered in this study, it is first necessary to understand what is at stake. Over recent decades, the EU has become a global actor. This is not least thanks to its ever-growing network of international agreements in which its Member States – by way of EU or international law – participate (I.). With respect to many of these agreements, the EU and the UK took a sweeping approach expressed in their withdrawal agreement as well as in post-Brexit UK treaty practice (II.). This approach, however, raises serious questions under international law which have yet to be answered by the EU or UK and which have not been adequately addressed in the literature (III.).

I. Background: The EU as a Global Actor

The EU is increasingly depicted as a global actor. It is a characterisation that the EU ascribes to itself,[1] but also one that gradually found its way into the political and legal discourse about the Union.[2] An essential feature of this depiction and understanding is the EU's practice of concluding inter-

1 See only the EU's strategic communication on its international role, EU External Action Service, 'The EU as a Global Actor' (13.03.2022) <https://www.eeas.europa.eu/eeas/eu-global-actor_en>.

2 Recent publications include SB Gareis, G Hauser and F Kernic, *The European Union – A Global Actor?* (Verlag Barbara Budrich 2012); S Lütz and others (eds), *The European Union As a Global Actor: Trade, Finance and Climate Policy* (Springer 2021) and E

national agreements. The legal background and pre-condition for this is its treaty-making capacity. Art. 47 TEU establishes the EU's legal personality, while Art. 216 TFEU specifies the scope of its competences. According to Art. 216(1) TFEU, the EU has both explicit external competences, those provided for in the EU Treaties or secondary legislation, and implicit ones.[3] Moreover, its competences are always related to those of its Member States.[4] The question is thus not only whether the EU has the competence to conclude an international agreement, but also whether (simultaneous) action by Member States is precluded or still admissible.

In theory, this division of competences between the EU and its Member States should be an internal matter, irrelevant to their treaty partners.[5] In practice, however, it manifests itself in a variety of treaty constellations, some of which are unique to the EU's treaty practice. Moreover, the EU's specificities are not only regularly catered to in treaty practice: the EU's very own categorisation of international agreements – EU-only, mixed, *inter se* – has also diffused into international law-speak, underlining in a formal manner the weight of the EU as a global (treaty) actor. First and foremost, however, the said characterisation originates from the EU's practice of concluding international agreements with a wide variety of actors and on a broad range of topics. As put by Fahey and Mancini, '[f]rom tax

Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar Publishing 2022).

3 Art. 216(1) TFEU: 'The Union may conclude an agreement 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.'

4 HG Schermers and N Blokker, International Institutional Law: Unity within Diversity (5th edn, Martinus Nijhoff Publishers 2011) para 1752.

5 In general, an international agreement between states – such as the EU Treaties – cannot and shall not impose any rights or obligations on non-treaty parties. On the principle of *res inter alios acta*, see further below Part I § 3 section II.B. In the context of the EU's division of competences, also Art. 46(2) of the 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] is often cited whereby '[a]n international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.' For a good example, see 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, 844–848.

evasion to spam to gender to climate change to fisheries to passenger name records, nothing is beyond being included in trade agreements by the EU anymore.'[6]

Before considering the practice with regard to international agreements in the context of Brexit, it is necessary to understand these manifestations of the EU's role as a global treaty actor. It is necessary to know the EU's specific categorisation of international agreements (A.), because the EU and the UK have treated them differently in their Brexit practice. Moreover, it is necessary to understand the extent of the EU's treaty practice, both in terms of the quantity and quality of the international agreements concerned (B.), in order to understand the momentousness of the EU's and UK's Brexit approach for international (treaty) relations.

A. EU Treaty Practice: A Formal Categorisation

There are a number of ways to categorise international agreements in international law. These range from the laterality of the agreement (bi-, tri-, pluri- or multilateral), to its geographical scope (regional or universal), to its subject matter (particular or general), and to the quality of its obligations (contractual or law-making).[7] The EU categorises international agreements with the labels EU-only, mixed or *inter se*, the difference between these categorisations lying in the constellation of treaty parties on the EU side.

'EU-only' refers to international agreements which the EU concludes with one or more non-EU states or an international organisation. Although the Member States are involved in the internal EU conclusion procedure via the Council,[8] they do not act as (additional) contracting parties *vis-à-vis* non-EU state(s). Their obligation to implement these agreements, thus, does not stem from international law, but follows from Art. 216(2) TFEU, binding the Member States to international agreements concluded by the Union.[9]

6 E Fahey and I Mancini, 'Introduction: Understanding the EU as a Good Global Actor: Whose Metrics?' in E Fahey and I Mancini (eds) (n 2) 3.

7 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 8.

8 Cp Art. 218 TFEU.

9 Art. 216(2) TFEU: 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.'

International agreements where the Member States *do* act as contracting parties together with the EU are referred to as mixed agreements.[10] Here, the EU and its Member States conclude the agreement with one or more non-EU treaty partners, thus all are bound under international law. Within the category of mixed agreements, it is common to differentiate between *bilateral* mixed agreements and *multilateral* mixed agreements. In the international law sense of the terms,[11] both of these subcategories are, of course, multilateral agreements, counting several treaty parties – the EU, its Member States, and at least one non-EU treaty party. By referring to some of these agreements as *bilateral* mixed agreements, however, the EU alludes to their structure: these agreements create reciprocal rights and obligations between the EU and its Member States, on the one hand, and one or more non-EU states, on the other hand.[12] In contrast, in *multilateral* mixed agreements, the EU and its Member States do not form such a 'single contracting party'[13] and, in general[14], all treaty obligations are owed *vis-à-vis* all other contracting parties.

While EU-only and mixed agreements are directed outward, meaning that there is always at least one non-EU treaty party, *inter se* agreements are an instrument of intra-union cooperation.[15] As phrased by Heesen, '[i]n 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

10 For three seminal contributions to the many questions surrounding these agreements, see the edited volumes D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer 1983); C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010); N Levrat and others (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing 2021).

11 To illustrate the difference between agreements with two parties and those structured in a bilateral manner, McNair preferred the terms 'bipartite' and 'multipartite' instead of 'bilateral' and 'multilateral', when referring to the laterality (AD McNair, *The Law of Treaties* (Clarendon Press 1961) 29).

12 See further on this below at Part I § 4 section I.B.1 and section II.B.1.c.

13 ECJ, Case C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] EU:C:1998:292, [14].

14 In some instances, the EU and its Member States seek to exclude the application of multilateral mixed agreements among themselves. A commonly used instrument for this is the so-called disconnection clause. See in detail, J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 82–87.

15 For an extensive study of the *inter se* agreements, see J Heesen, *Interne Abkommen: Völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union* (Springer 2015).

the Member States. They form its horizontal dimension.'[16] Within the *inter se* agreements, a distinction can be made between agreements solely among Member States and agreements between Member States and the EU.

The choice of treaty constellation depends essentially on the division of competences within the Union.[17] According to Art. 216(1) TFEU, the EU may conclude international agreements only in cases in which it has the external competence to do so. The EU may thus become a party to an agreement (alongside the Member States) only where the content of the agreement also touches upon its competences; it may become the sole party to the agreement (without the Member States) where this applies to the entire content of the agreement. Said another way – where the EU does not possess the necessary competences for all subject matters of the agreement, the Member States must become parties alongside it.[18]

Considering these different categorisations, it becomes clear that they convey information only about internal EU matters – that is whether the subject matter of the agreement falls within the competence of the EU or (also) that of its Member States. For international law, however, these categories are *prima facie* irrelevant.[19] Nonetheless, the categorisation of

16 Ibid 187 ('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).

17 A vast amount of literature covers the issue of the EU's external competences. See for an instructive recent contribution, M Cremona, 'External Relations of the European Union: The Constitutional Framework for International Action' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021). The development of the EU's external competences in the jurisprudence of the ECJ can be retraced in a number of contributions in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022).

18 There are two exceptions to this rule where the Member States co-conclude international agreements without any legal necessity. The first exception is the so-called 'facultative mixed agreement'. Here, the EU possesses the competence to conclude the agreement, but the scope of its *exclusive* competences does not cover the whole agreement. Opting for a mixed agreement is thus a political choice; the EU could have also concluded an EU-only agreement, exercising its shared competences. The second exception is the so-called 'false mixed agreement'. Here, co-conclusion is legally speaking the wrong procedure; the agreement falls completely within the EU's exclusive competence. On these two categories, see J Heliskoski and G Kübek, 'A Typology of EU Mixed Agreements Revisited' in N Levrat and others (eds) (n 10) 31–34 On false mixity, see also HG Schermers, 'A Typology of Mixed Agreements' in D O'Keeffe and HG Schermers (eds) (n 10) 27–28.

19 But see the discussion on the division of international responsibility in case of mixed agreements, eg in MD Evans and P Koutrakos (eds), *The International Responsibility*

international agreements as EU-only or mixed has been adopted by many treaty partners[20] and is meanwhile quite naturally used in international legal scholarship.[21] One could consider the adoption of these categories as harmless, seeing that 'the undertaking to classify treaties is [in any case] primarily of academic interest'. However, toying with existing categories such as 'bilateral' or 'multilateral' not only leads to confusion if not legal uncertainty[22] – the consequences of such classification can also be witnessed in the context of Brexit, where different legal outcomes were attached to the different categories of agreements.[23]

B. The Global Scale of EU Treaty Practice

The EU has concluded international agreements since the year of its nascency. Only 7 months after the entry into force of the *Treaty of Rome*[24] on January 1, 1958, the EU signed the *Agreement on Relations between the International Labour Organization and the European Economic Community*[25]. Since then, not only the number of international agreements has exponentially increased, also the subject areas covered by these agreements have significantly grown. Both aspects are essential to understanding not only the relevance of these agreements for the EU, but also the significance of the question what happens with them post-Brexit.

At the time of Brexit, the EU's treaty database counted a total of 1262 international agreements.[26] These agreements encompassed 266 mixed

of the European Union: European and International Perspectives (Hart Publishing 2013).

20 This is not, however, without criticism on especially the concept of mixed agreements. See eg P Olson, 'Mixity from the Outside: The Perspective of a Treaty Partner' in C Hillion and P Koutrakos (eds) (n 10).

21 See eg the two standard works on international organisation that both include a section on mixed agreements, J Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 263–266; HG Schermers and N Blokker (n 4) paras 1756–1762.

22 See eg below Part I § 4 section II.B.1.c.

23 See below § 1 section II.

24 Treaty Establishing the European Economic Community (adopted on 25 March 1957, entered into force 1 January 1958) 294 UNT 3 [TEEC].

25 Agreement on Relations between the International Labour Organization and the European Economic Community (27 April 1959) OJ 27/521 [ILO-EEC Agreement].

26 The EU's External Action Service used to provide a treaty database on its official website (https://www.eeas.europa.eu/_en). This database was recently removed. The

agreements, of which 158 can be categorised as bilateral mixed and 108 as multilateral mixed agreements. The vast majority of international agreements – 873 – were EU-only agreements.[27] In addition, the database listed 26 agreements which cannot definitely be placed in one of the aforementioned categories. These are international agreements which, for example, the EU and only some EU Member States have concluded, because the subject matter does not pertain to all Member States.[28] The geographical scope of these 1262 international agreements is close to global. Counting all territories[29] with which the EU is in a treaty relationship – including in large multilateral fora[30] – the number of the EU's treaty partners amounts to 152.

However, also content-wise, the scope of the EU's international agreements is far-reaching. In the EU's treaty database, the agreements were divided into 33 subject matters. While lengthy, only a listing of these can provide an accurate impression of the scale of the EU's international relations and what is potentially at risk for Member States upon EU withdrawal. At the time of Brexit, the EU (partly together with its Member States) had concluded international agreements relating to:

> Agriculture; Audiovisual and Media; Commercial Policy; Competition; Consumers; Culture; Customs; Development; Economic and Monetary

following information is based on data download by the author prior to the removal of the database. The table including all international agreements listed in the database in January 2018 is on file with the author.

27 This number does not include the EU-only agreements concluded by the EU with international organisations on their mutual cooperation. These were not included in the database.

28 An example of this is the Protocol on Integrated Coastal Zone Management in the Mediterranean (4 February 2009) OJ L34/19 to which besides the EU itself only those Member States are a party that border the Mediterranean Sea (Croatia, France, Greece, Italy, Malta, Slovenia, and Spain).

29 This includes agreements with entities such as Hong Kong and Kosovo, which are not independent states or have not globally been recognised as such.

30 With many states, the EU has concluded international agreements dealing with specific issues in their bilateral relations. With some states, however, the EU only has treaty relations via (universal) multilateral agreements to which both are parties. Examples for such agreements are the Agreement Establishing the Common Fund for Commodities (adopted on 27 June 1980, entered into force 19 June 1989) 1538 UNTS 3 [Commodities Agreement], the International Tropical Timber Agreement (adopted on 27 January 2006, entered into force 7 December 2011) 2797 UNTS 75 [Timber Agreement], and the International Cocoa Agreement (adopted on 25 June 2010, provisionally applied since 1 October 2012) 2871 UNTS 3.

Affairs; Education, Training, Youth; Education; Employment and Social Policy; Energy; Enlargement; Enterprise; Environment; External Relations; Fisheries; Foreign and Security Policy; Fraud; Human Rights; Humanitarian Aid; Information Society; Internal Market; Justice, Freedom and Security; Monetary Policy; Public Health; Research and Innovation; Tax Fraud; Taxation; Trade; Transport; World Trade Organization.[31]

The question if and how post-Brexit UK still participates in international agreements concluded by the EU and often by the UK itself during its EU membership is thus not only relevant for the UK in many respects, ranging from air transport to fishing quotas and trade; for the same reasons, it is also relevant for a large number of states worldwide.

For a Member State leaving the EU, the task of gaining an overview of the (possibly affected) international agreements is further complicated by the fact that the EU database may not be the sole point of reference. In fact, the EU's treaty partners may approach the question coming from entirely different numbers. In the context of Brexit, Larik demonstrated how difficult even a first inventory can be, describing the challenge of simply attempting to determine the number of agreements in force between the EU and the United States of America (USA).[32] While he counted 21 bilateral agreements between the EU and the USA in the official US database, the EU's database listed 52.[33]

In comparison to the sheer mass of international agreements with non-EU states and the issues that they cover, one may be tempted to disregard the importance of the EU Member States' *inter se* agreements. Being agreements only between EU Member States, these are, by their very nature, not global. In the case of the UK, moreover, the number of concluded *inter se* agreements is vanishingly small.[34] Of what relevance can these agreements be in the overall context of EU withdrawal? In fact, however, the three *inter se* agreements to which the UK had become a party as an EU Member State demonstrate in a particularly illustrative way what –

31 Subject areas as taken from the EU's treaty database, see (n 26).

32 J Larik, 'Brexit and the Transatlantic Trouble of Counting Treaties' (*EJIL:Talk!,* 6.12.2017) <https://www.ejiltalk.org/brexit-and-the-transatlantic-trouble-of-counting-treaties/>.

33 Ibid. The US treaty database can be accessed at https://www.state.gov/treaties-in-force/.

34 While the UK initially ratified a fourth *inter se* agreement, the Agreement on a Unified Patent Court (20 June 2013) OJ C175/1 [UPC Agreement]), this agreement did not enter into force before Brexit. Meanwhile, the UK has withdrawn its ratification.

in case of EU withdrawal – may be at risk and which (legal) problems could arise therefrom.

The first *inter se* agreement is the *Convention Defining the Statute of the European Schools*[35] (ES Convention). Having initially been concluded in 1957 between the Member States, the Convention was reformed in 1994 and has since counted the EU itself as a contracting party.[36] Its aim is the establishment of schools in EU Member States for the children of the Union's employees.[37] In 1978, one such school was founded in Culham in the UK.[38] Besides the financing and functioning of European Schools, the ES Convention also regulates the recognition of degrees obtained at these schools.[39] The second *inter se* agreement is the *Convention Setting up a European University Institute*[40] (EUI Convention), an international agreement concluded only between the EU Member States. It established the European University Institute (EUI), a Florence-based research institute for international postgraduate and post-doctoral teaching and studies.[41] Both educational institutions – the European Schools and the EUI – are financed by the EU and its Member States.[42] Although the European Schools and the EUI do exceptionally admit non-EU nationals, they are primarily aimed at pupils and students coming from EU Member States.[43]

The third *inter se* agreement differs from the previous two in that it does not establish a common educational institution. Instead, the *Internal*

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

36 On the history of the ES Convention, see J Heesen (n 15) 29. On the European Schools, see also J Gruber, 'Europäische Schulen: Ein in die EG integriertes Völkerrechtssubjekt' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1015.

37 Art. 1 ES Convention.

38 See the former website of the school, Office of the Secretary-General of the European Schools, 'United Kingdom – Culham' <https://www.eursc.eu/en/European-Schools/locations/Culham>.

39 Art. 5 ES Convention.

40 Convention Setting up a European University Institute (9 February 1976) OJ C29/1 [EUI Convention]. On the history of the EUI, see J Heesen (n 15) 30–31. On the EUI, see also S Kaufmann, *Das Europäische Hochschulinstitut: Die Florentiner »Europa-Universität« im Gefüge des europäischen und internationalen Rechts* (Duncker & Humblot 2003).

41 Arts. 1, 2 EUI Convention.

42 Art. 25 ES Convention, Art. 19 EUI Convention.

43 Art. 1 ES Convention, Art. 16(2) EUI Convention.

Agreement on the Financing of European Union Aid[44] (EDF Agreement) set up the European Development Fund (EDF), 'the EU's main instrument to finance development cooperation with African, Caribbean and Pacific (APC) countries and overseas countries and territories (OCTs)'[45]. In a mixed agreement between the EU and its Member States, on the one hand, and ACP states, on the other hand, the former have committed themselves to the payment of development aid.[46] The extent to which each Member State contributes to that sum is, in turn, agreed upon *inter se* in the EDF Agreement.[47]

On whether the UK remains a party to these agreements post-Brexit thus hinges, first, the continued financing of the two educational institutions and the EDF. Where the Member States (and the EU) agreed to contribute certain shares to a fixed (annual) budget, this may be to the detriment of the remaining treaty parties. Alternatively, the institutions' and the EDF's budgets would need to be decreased. Apart from many practical problems, in the case of the EDF, this could result in the EU and its remaining Member States incurring international responsibility *vis-à-vis* the ACP states. Secondly, the example of the European Schools and the EUI shows how Brexit – also via its impact on international agreements – may very tangibly affect individuals: if a European School is suddenly in a non-EU state; if a withdrawing state's national suddenly no longer fulfils the criteria for admission to educational institutions; and if the recognition of their degrees previously obtained at these institutions is suddenly in question.

What is at stake when considering the effect of a state's withdrawal from the EU on international agreements is thus, on the one hand, a geographically and content-wise broad network of international relations with states

44 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].

45 EU, 'European Development Fund' <https://eur-lex.europa.eu/EN/legal-content/glossary/european-development-fund.html>.

46 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 (15 December 2000) OJ L317/3 [EU-ACP PCA].

47 On the history and role of the EDF Agreement and its predecessors, see J Heesen (n 15) 37–39.

outside the EU and, on the other hand, common institutions aiming to deepen European integration but set outside the EU legal order. Against this backdrop, what role did the issue of international agreements play in the wake of Brexit? Furthermore, how were the questions surrounding these agreements addressed by the EU, its Member States, the UK and their non-EU treaty partners?

II. Brexit Practice: Out Means (Almost Always) Out

'Out means out' was a catchphrase often used on both sides of the Channel during the EU and the UK's Brexit talks.[48] On the EU side, this motto was based primarily on the conviction that 'cherry picking'[49] must be avoided at all costs. A Member State that decides to leave the EU should bear the full consequences of this decision and not be able to cherry-pick those aspects of European cooperation that it considers most advantageous. On the British side, 'out means out' stood above all for the idea of 'taking back control'[50], the complete regaining and exercise of supposedly lost sovereignty, that in future, the UK Parliament – or government, depending on political preferences – alone should decide on all British matters.

Very early on in the Brexit negotiations, both the UK (A.) and the EU (B.) settled on an 'out means out' approach also with regard to most international agreements concluded by the EU or its Member States in the context of their EU membership. Accordingly, the withdrawal agreement

48 In the UK, Prime Minister David Cameron already used the phrase pre-referendum, warning the British public that following the referendum no further negotiations with the EU would take place (see G Parker, 'Out means out in EU vote, warns David Cameron' (*Financial Times,* 25.10.2015) <https://www.ft.com/content/b52f1b0a-7aee-11e5-a1fe-567b37f80b64>). It was also employed to rally against a possible revocation of the Art. 50 TEU notification (see UK Government, 'Archived Petition: Respect the majority vote on the EU-out means out!' (08.03.2017) <https://petition.parliament.uk/archived/petitions/189340>) and later adapted by Prime Minister Theresa May to describe her Brexit politics (see N Allen, 'Brexit Means Brexit: Theresa May and post-referendum British Politics' (2018) 13 *British Politics* 105). But see also A Rinke, '"Out means out", German lawmakers warn Britain on Brexit' (*Reuters,* 26.04.2016) <https://www.reuters.com/article/britain-eu-germany/out-means-out-german-lawmakers-warn-britain-on-brexit-idINKCN0XN26Z>.

49 See eg European Economic and Social Committee, 'There is no cherry-picking on Brexit' (*Press Release,* 06.07.2017) <https://www.eesc.europa.eu/en/news-media/press-releases/there-no-cherry-picking-brexit>.

50 UK Government, 'EU Exit' Taking back control of our borders, money and laws while protecting our economy, security and Union (November 2018) Cm 9741.

concluded between the EU and the UK mirrored said approach, addressing the issue of international agreements under a withdrawal and a transition perspective (C.). With the UK setting out to establish its own international treaty network, non-EU states were also finally confronted with the Brexit repercussions (D.).

A. The UK Position: From Continuity to 'Global Britain'

The UK gave a first indicator of its position towards international agreements concluded by the EU (with or without the Member States) post-Brexit prior to the EU referendum. In a booklet, the UK government explained why it 'believe[d] that voting to remain in the European Union is the best decision for the UK'[51]. In describing the consequences of leaving the EU, the booklet stated that this 'could result in 10 years or more of uncertainty as the UK unpicks [its] relationship with the EU and *renegotiates new arrangements* with the EU and *over 50 other countries around the world*'[52]. The following footnote referred to the 'European Commission, DG Trade's World map of trade agreements in force giv[ing] a list of the markets covered by EU Trade Agreements'[53]. The statement is somewhat ambiguous. *Re*negotiations can take place where a previous agreement still exists but is no longer suitable. The negotiation of *new arrangements* could, at the same time, suggest that previous ones are no longer in place.

Following the referendum but prior to the UK's Art. 50 TEU notification, the UK government issued a white paper to Parliament. The white paper, *inter alia*, informed the parliamentarians of possible adverse Brexit effects on trade and investment relations with non-EU partners. While the paper was silent on the exact consequences of Brexit on EU trade agreements, it stated the government's aim to 'achieve continuity in our trade and investment relationships with third countries, including those covered by

51 UK Government, 'Why the Government believes that Voting to Remain in the EU is the Best Decision for the UK' Booklet Providing Important Information about the EU Referendum on 23 June 2016 (6 April 2016) 1.

52 Ibid 8 (emphasis added).

53 Ibid. For a more recent map of EU trade agreements, see EU Council, 'Infographic: EU Trade Map' (25.11.2021) <https://www.consilium.europa.eu/en/infographics/eu-trade-map/>.

existing EU free trade agreements or EU preferential arrangements'[54]. The government was in the process of 'exploring with [its] trading partners ways to achieve this'[55].

During the course of the Brexit negotiations with the EU, however, the tone in the UK very much changed. The government started to pursue a strategy of 'Global Britain', aiming to take advantage of the (perceived) freedoms it gained when no longer being an EU Member State.[56] The primary goal was, thus, no longer to 'achieve continuity'[57], but to negotiate new and better trade agreements.[58] Nevertheless, what did the government believe would happen to the EU's trade agreements which, being mostly mixed agreements, it had often co-concluded? Moreover, apart from trade agreements – what was the UK's general stance on international agreements post-Brexit?

In detail, the UK government commented on the issue of international agreements post-Brexit in a guidance note on its website. According to this note, '[a]s the UK leaves the EU, it will leave international agreements to which it is currently party by virtue of EU membership'[59]. Further on, this is specified as follows:

> If the UK leaves the EU without a deal, it will no longer be covered by EU-only international agreements, or by 'mixed' bilateral agreements between the EU and its Member States on one hand, and a third party on the other, unless the UK and the third party agree to transition the agreement, or agree to other measures to ensure the continuity of the effect(s) of the agreement.
>
> The UK will remain a party to most mixed multilateral agreements after exit day, where it is already a party in its own right. […] Whether or

54 UK Government, 'The United Kingdom's Exit from and New Partnership with the European Union' White Paper (2 February 2017) Cm 9417 55.

55 Ibid.

56 For a comprehensive report on this strategy, see UK House of Commons, 'Global Britain' Sixth Report of Session 2017–19 (6 March 2018) HC 780.

57 'UK Brexit White Paper' (n 54) 55.

58 On the UK government's mixed record so far, see P Foster, 'UK has failed to demonstrate benefit of post-Brexit trade deals, MPs warn' (*Financial Times,* 18 March 2022) <https://www.ft.com/content/af1ef504-ee32-43c0-b7d5-81d045714618>.

59 UK Government, 'International Agreements if the UK leaves the EU without a Deal', Guidance Note (5 November 2019) 1.

> not the UK will remain a party to mixed agreements after exit day will depend on the terms and structure of the agreement in question.[60]

Thus, the UK differentiated between EU-only and bilateral mixed agreements, on the one hand, and multilateral mixed agreements, on the other hand. From an international law perspective, this differentiation is surprising, given that the UK had become a party to *both* bilateral and multilateral mixed agreements. Moreover, the guidance note provided no explanation as to *why* two categories of international agreements would no longer cover the UK, while it remained a party to another. The agreements' 'terms and structure' are relevant to identify which mixed agreement is structured bilaterally and which multilaterally. However, reference to an agreement's terms and structure alone fails to explain why this – in the view of the UK government – is legally relevant.

B. The EU Position: Of Guidelines and Directives

The EU first addressed the issue of Brexit and international agreements following the UK's Art. 50 TEU notification. At a special meeting on occasion of the notification, the European Council adopted a first set of guidelines which were to 'set out the overall positions and principles that the Union [would] pursue throughout the negotiation'[61] with the UK. In 'defin[ing] the framework for negotiations under Art 50 TEU'[62], the guidelines aimed to set the tone for the talks with the UK, both as regards the sequencing and the content of the negotiations. The guidelines already included a 'phased approach to negotiations'[63] – separating the withdrawal from the future relationship negotiations – as well as the EU's core substantive points to be included in an 'agreement on arrangements for an orderly withdrawal'[64].

However, the EU's Brexit guidelines were also of relevance for an external audience. Not only do they acknowledge that the withdrawal negotiations should 'aim to provide as much clarity and legal certainty as possible *to* […]

60 Ibid 2.
61 European Council, 'Guidelines following the United Kingdom's Notification under Article 50 TEU' (29 April 2017) EUCO XT 20004/17 2.
62 Ibid.
63 Ibid 4.
64 Ibid 5.

international partners on the immediate effects of the United Kingdom's withdrawal from the Union'[65]. The section on withdrawal also states the EU's position on the effect of Brexit on international agreements:

> Following the withdrawal, the United Kingdom will no longer be covered by agreements concluded by the Union or by Member States acting on its behalf or by the Union and its Member States acting jointly. The Union will continue to have its rights and obligations in relation to international agreements. In this respect, the European Council expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners, international organisations and conventions concerned should be engaged.[66]

Just as the UK's guidance note, the EU's statement is somewhat ambiguous.[67] On the one hand, the first sentence claims that the UK 'will no longer be covered' by certain agreements, which itself raises the question what is meant by 'covered'.[68] Does this refer to the UK no longer being bound by international agreements via Art. 216 TFEU or also under international law, where the UK is a party itself? On the other hand, expecting the UK to 'honour its share of all international commitments' suggests at least a certain continuity of international obligations. In any event, the fact that the EU reminded the UK of its commitments and recognised the necessity to engage with the non-EU treaty partners indicates two things: First, the EU seemed to acknowledge that its own formal status with regard to these international agreements does not change with the UK's exit, and, secondly, that Brexit will nevertheless have an effect on these agreements.

The EU's negotiating directives did not provide further clarity. Instead, they reiterated the necessity to seek solutions in dialogue with the UK and the affected treaty partners, this time, however, with a view to obligations for which the EU seemed to assume continuity. The directives stated that

65 Ibid 4 (emphasis added).
66 Ibid 6.
67 On this, see also M Cremona, 'The Withdrawal Agreement and the EU's International Agreements' (2020) 45(2) *European Law Review* 237, 243–244.
68 The same can be said of the formulation in the UK's guidance note, see above at § 1 section II.A.

> a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, *by which the United Kingdom remains bound*, as well as on the method to ensure that the United Kingdom honours these commitments.[69]

What then were international agreements to which the UK would, in the view of the EU, remain bound and by which would it 'no longer be covered'[70]? The Brexit guidelines had referred to three types of international agreements, all of which would cease to apply to the UK: 'agreements concluded by the Union', that is EU-only agreements; agreements concluded by 'Member States acting on behalf of the Union', meaning agreements to which the EU could not itself become a party, although being competent to conclude them; and agreements concluded by 'the Union and its Member States acting jointly', which appeared to refer to mixed agreements. By which agreements concluded with 'third country partners'[71] or international organisations would the UK then remain bound, as stated in the negotiating directive?

The EU's approach was finally refined in an internal preparatory document prepared by the Commission's Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU. On January 31, 2018, the Art. 50 Task Force presented slides on 'Internal EU27 preparatory discussions on the framework for the future relationship: "International Agreements"' to the Art. 50 Working Party of the Council laying out the consequences of withdrawal concerning international agreements and the types of agreements to which they were thought to apply.[72] According to this document, the phrase 'the United Kingdom will no longer be covered' used in the Brexit guidelines was to be understood

69 Council of the European Union, 'Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland setting out the Arrangements for its Withdrawal from the European Union' (22 May 2017) XT 21016/17 ADD 1 REV 2 7 (emphasis added).

70 'EU Brexit Guidelines' (n 61) 6.

71 'EU Brexit Directives' (n 69) 7.

72 EU Commission, 'Internal EU27 Preparatory Discussions on the Framework for the Future Relationship' International Agreements and Trade Policy (6 February 2018) TF50(2018) 29.

in the sense that 'the agreement no longer applies to the *territory* of the UK; *the UK* loses the benefits and is no longer bound by the obligations; *automatic*, from the day of withdrawal'[73]. These consequences were thought to apply to

> 'EU only' agreements: agreements concluded by the EU (and/or Euratom); or by the Member States on its behalf; Bilateral 'mixed' agreements: concluded on the one hand by the Union and its Member States, and on the other hand by the third country partner (e.g. Association agreements; Aviation agreements; European Economic Area).[74]

In contrast, the 'UK [would] remain party to multilateral agreements to which the EU is also a party, to the extent that UK is party in its own right (eg WTO agreements, Paris climate).'[75] Here, the UK would 'recover the full competence'[76].

C. The UK-EU Withdrawal Agreement: Transitioning International Agreements

It was on this basis that the EU and the UK proceeded to negotiate an agreement on withdrawal arrangements. The outcome of these negotiations, the *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Atomic Energy Community*[77] (UK-EU WA), served two main goals: on the one hand, it aims to permanently settle issues arising as an immediate consequence of the UK's withdrawal[78] and, on the other hand, it provides for a transition period during which the UK is no longer a Member State but continues to be treated as such in certain respects[79]. The Withdrawal Agreement deals with the effect of Brexit on international agreements – as approached by

73 Ibid 4 (emphasis in original).
74 Ibid 5.
75 Ibid.
76 Ibid.
77 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].
78 See in the UK-EU WA: Part Two – Citizens' Rights, Part Three – Separation Provisions, and Part Five – Financial Provisions.
79 See in the UK-EU WA: Part Four – Transition.

the EU and the UK – both under the aspect of separation issues as well as regarding to a transition phase.

The first mention of international agreements features very early on in the agreement's text. Art. 2(a) UK-EU WA defines 'Union law' for the purposes of the agreement as, *inter alia*,

> (iv) the international agreements to which the Union is a party and the international agreements concluded by the Member States acting on behalf of the Union
>
> (v) the agreements between Member States entered into in their capacity as Member States of the Union.

Thus, whenever a provision in the Withdrawal Agreement refers to Union law, this encompasses EU-only and *inter se* agreements. This is especially notable in the context of the transition phase. According to Art. 126 UK-EU WA, '[t]here shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.' Pursuant to Art. 127 UK-EU WA, '[u]nless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.' Considering the definition of Union law in Art. 2 UK-EU WA, the continued application was thus thought to encompass EU-only and *inter se* agreements.

In addition, Art. 129 UK-EU WA provides for '[s]pecific arrangements relating to the Union's external action'. In so doing, the article, on the one hand, broadens the transitional arrangements with regard to international agreements even further, by also addressing mixed agreements. According to Art. 129(1) UK-EU WA, 'the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, *or by the Union and its Member States acting jointly*'[80]. Thus, while the EU and the UK took the position that certain international agreements would no longer be binding for the UK (under EU, respectively international law), they sought to provide for temporary continuity for the duration of the transition period. On the other hand, Art. 129(2) UK-EU WA severely limits the UK's institutional rights with regard to these agreements:

> During the transition period, representatives of the United Kingdom shall not participate in the work of any bodies set up by international

80 Emphasis added.

> agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly […].

An exception was only made for those international agreements in which 'the United Kingdom participates in its own right'[81]. Considering the EU and the UK's previous statements, this most likely refers to multilateral mixed agreements, where the EU and its Member States are not treated as one party. Moreover, the UK could participate in treaty bodies if and when the EU considered the UK's presence necessary and 'exceptionally invite[s]'[82] it to attend.

There are two further aspects of Art. 129 UK-EU WA which warrant attention in the context of international agreements. The first is a footnote to Art. 129(1). Here, the EU and the UK specify the method by which they sought to achieve the temporary continuity of international agreements envisaged in that article. After all, all the agreements mentioned in Art. 129(1) were international agreements concluded with *external* partners. Thus, the EU and the UK intended to 'notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements'[83]. And indeed, following the signing of the Withdrawal Agreement, the EU sent a *note verbale* – explicitly 'endorsed by […] the United Kingdom'[84] – to its treaty partners and the depositaries of multilateral agreements. In this *note*, the EU and the UK informed the recipients of the factual circumstances of Brexit and of their position as regards EU-only and bilateral mixed agreements: 'During the transition period, the United Kingdom is treated as a Member State of the Union […] for the purposes of these international agreements'[85]. At the same time, the *note* also informed treaty partners that, thereafter, 'the

81 Art. 129(2)(a) UK-EU WA.

82 Art. 129(2)(b) UK-EU WA. The full text reads: '(b) the Union exceptionally invites the United Kingdom to attend, as part of the Union's delegation, meetings or parts of meetings of such bodies, where the Union considers that the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of those agreements during the transition period; such presence shall only be allowed where Member States participation is permitted under the applicable agreements.'

83 See Art. 129(1) Withdrawal Agreement, footnote.

84 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.

85 Ibid 2.

United Kingdom will no longer be covered by [these] international agreements […]. This is without prejudice to the status of the United Kingdom in relation to multilateral agreements to which it is a party in its own right.'[86]

The second noteworthy aspect of Art. 129 UK-EU WA is its fourth paragraph. In contrast to the previous paragraphs, Art. 129(4) does not deal with international agreements concluded prior to Brexit. Instead, it aims to regulate the UK's treaty-making *after* withdrawal from the EU. Considering that during the transition phase, the UK was to be treated like a Member State, paragraph 4 provides that

> the United Kingdom may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union.

Thus, during the transition phase, the UK was not only banned from participating in treaty bodies pursuant to Art. 129(2) UK-EU WA. It was also prohibited from establishing through the conclusion of new agreements alternative fora for international cooperation in areas covered by EU agreements.

Besides these general provisions with regard to international agreements, two agreements find explicit mention in the UK-EU WA. These are, remarkably, two *inter se* agreements, a category of international agreements which had so far not been mentioned in EU or UK position papers on international agreements.[87] However, the way in which the Withdrawal Agreement approaches two of the three *inter se* agreements that the UK had concluded as a Member State demonstrates their approach rather clearly.

The first *inter se* agreement addressed in the UK-EU WA is the ES Convention. Regarding the European Schools, Art. 125 UK-EU WA not only contains a transitional provision, similar to that of Art. 129(1) with regard to other international agreements, but subject to a different time limit. It also seeks to provide a permanent solution as regards the recognition of degrees. Art. 125(1) provides that '[t]he United Kingdom shall be bound

86 Ibid 3.

87 The EDF had been mentioned in the EU's Negotiating Directives. However, these addressed the EDF only in the context of aiming for a 'single financial settlement' regarding different EU institutions/instruments such as the European Investment Bank, the European Central Bank and the EDF. The directives did not refer to the nature of the EDF as an international agreement (see 'EU Brexit Directives' (n 69) 10).

by the Convention defining the Statute of the European Schools […] until the end of the school year that is ongoing at the end of the transition period.' Thus, the UK-EU WA aims to prevent larger disruptions in school operations in the immediate aftermath of Brexit. However, the need for such a transitional arrangement exists only where the two parties to the withdrawal agreement – the EU and the UK – are of the view that the UK will no longer be bound by the ES Convention following Brexit. This view is also reflected in Art. 125(2), which contains an obligation for the UK to continue to recognise – as provided for in Art. 5(2) ES Convention – the degrees of pupils previously, or by a certain cut-off date, enrolled at a European School.

The second *inter se* agreement explicitly mentioned in the UK-EU WA is the EDF Agreement. With regard to this agreement, Art. 152(1) UK-EU WA stipulates a similar solution as in the case of the European Schools. It provides that

> [t]he United Kingdom shall remain party to the European Development Fund ('EDF') 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.

At the same time, Art. 152(2) UK-EU WA limits the continued participation of the UK in the EDF. While it 'may participate […] in the EDF Committee as established in accordance with Article 8 of the [EDF Agreement]', it may do so only 'as an observer without voting rights'.

Finally, there is one *inter se* agreement which had not been dealt with in the UK-EU WA. Following the approach of the EU and the UK, the UK's membership in the EUI Convention also ended with Brexit. As with the other *inter se* agreements, however, the UK and the EUI treaty parties did not immediately agree on a permanent solution, but only settled on a transitional arrangement. Thus, since Brexit, '[t]he UK [had] been operating under the terms of an interim arrangement with the EUI […], while discussion took place to explore the possibilities for future UK participation.'[88]

88 UK Government, 'Written Questions, Answers and Statements' European University Institute (tabled on 22 September 2022; answered on 11 October 2022) UIN 54450.

However, this interim arrangement ended on 31 December 2022.[89] Since then, the UK no longer participates in the EUI.[90]

The transitional arrangements put in place in the UK-EU WA confirm what the EU and the UK's individual position papers suggested. Both distinguished among different, EU-specific categories of international agreements – EU-only, bilateral and multilateral mixed, and *inter se* agreements. Furthermore, they both attached certain legal consequences of Brexit to the respective categories. In their view, for EU-only, bilateral mixed and *inter se* agreements, being out of the EU meant being out of these agreements. Continued participation was only assumed for multilateral mixed agreements. In numbers, this means that post-Brexit UK is left with only 108 of the 1262 international agreements previously applicable to the UK.

D. Rolling Over: The UK's (Re)Conclusion of International Agreements

The UK was well aware of the extent to which its international treaty relations with non-EU states would suffer if the approach of considering most international agreements as ceasing to apply to the UK was carried through. In its guidance note on international agreements, the UK government confirmed that '[t]he UK greatly values its relationship with partners across the globe and is seeking to preserve and strengthen these as we leave the European Union'[91]. However, it also acknowledged that the EU Treaty Database listed over 1000 agreements 'that the UK is covered by via membership of the EU' and that, following Brexit, action was thus required if the UK's international relations were to be indeed preserved and strengthened.[92]

As a first step, the UK sought to identify those international agreements which in its view did *not* require action. These were, primarily[93], inter-

89 European University Institute, 'United Kingdom' (10.11.2022) <https://www.eui.eu/en/services/academic-service/doctoral-programme/funding-information/united-kingdom>.

90 The European University Institute (EU Exit) Regulations 2022 (25 November 2022) 2022 No. 1231.

91 'UK Guidance Note' (n 59) 1.

92 Ibid 2.

93 The UK also noted that in some cases re-conclusion was not necessary because the EU treaty database was partially outdated, listing international agreements that had already been superseded by more recent (see ibid).

national agreements that because of their subject matter were not of relevance or interest to the UK,[94] and agreements to which it still considered itself to be a party, because they were of a multilateral mixed character.[95] For the remaining international agreements, the UK suggested two different methods of future cooperation. One possibility was to opt for non-legal instruments where cooperation through 'dialogues and Memoranda of Understanding'[96] would – in the UK's view – suffice. The other possibility was, of course, the conclusion of new international agreements. Where the UK aimed at securing a continued legal relationship, its treaty practice specifically depended on the type of agreement to be replaced.

First, the UK sought to replace multilateral EU-only agreements, ie multilateral agreements which had been concluded with several non-EU states by the EU alone and where, accordingly, the UK was not a party 'in its own right'[97]. Depending on the provisions in the respective multilateral agreement, the UK acceded to them either by depositing an instrument of accession or by concluding an accession agreement with the existing treaty parties.[98] However, even where the UK chose this path of accession, it was often acknowledged by the treaty parties that the UK was not entirely new to these agreements, but had already participated in them prior to leaving the EU. An example of such an EU-only multilateral agreement to which the UK acceded is the *Government Procurement Agreement*[99] (GPA).[100] In its decision on the UK's intended accession, the GPA Committee 'acknowledged that the United Kingdom [had been] covered by the Agreement on

94 As examples, the UK referred to 'agreements relating to the use of the Euro or the accession of new EU Member States' and those agreements in which '[t]he UK does not have any commercial interest', such as 'the Fisheries Partnership Agreement with the Republic of Kiribati' (see ibid).

95 Ibid.

96 Ibid.

97 Ibid.

98 Cp Art. 15 VCLT whereby the consent to be bound by an agreement can be 'expressed by accession when: (a) the treaty provides that such consent may be expressed [...] by means of accession; (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession'.

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

100 Suggesting that the UK could by unilateral notification succeed in the GPA, see 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) 244–248.

Government Procurement, as a member State of the European Union, until the date of its withdrawal from the European Union' and now 'may accede to the Agreement on Government Procurement in its own right'[101]. The UK itself referred to its accession to the GPA as now participating 'in its own right' and 'as a full party'[102].

Secondly, the UK approached states worldwide to (re)establish bilateral treaty relations which had previously been based on bilateral EU-only or mixed agreements. Initially, the UK's 'Global Britain' strategy had envisaged a realignment of the UK's (trade) treaty relations. Soon, however, it became clear that the UK would not be able to negotiate agreements on withdrawal and future relations with the EU and simultaneously strike (more) beneficial (trade) agreements with non-EU states. Thus, the UK ultimately reversed its course and sought a consensual solution to continue many EU-only and mixed bilateral agreements at least for as long as no new agreement had been reached. Illustrative of the UK's practice are the results achieved in the context of trade agreements. Here, the UK settled on a practice of 'rolling over'[103] many agreements that had previously been concluded by the EU, the majority of cases jointly with its Member States. Many of these rollover agreements are essentially a simple continuation, as in some instances the titles, such as *Agreement on Trade Continuity*[104], already make clear. Here, the UK and the other treaty partners either copy-pasted the text of the EU agreements[105] or even merely incorporated the EU agreement's provisions into their rollover agreements by way of reference.

101 WTO, 'Accession of the United Kingdom to the Agreement on Government Procurement in its own Right' Decision of the Committee on Government Procurement of 27 February 2019 (28 February 2019) GPA/CD/2 1.

102 See UK Government, 'UK Statement to the WTO Committee on Government Procurement' (07.10.2020) <https://www.gov.uk/government/speeches/uk-statement-to-the-wto-committee-on-government-procurement>.

103 A term frequently used by the UK to refer to its post-Brexit practice of re-concluding international agreements by which it had been covered during its EU membership, see eg D Webb, 'UK Progress in Rolling over EU Trade Agreements', Briefing Paper (13 December 2019) Number 7792.

104 See eg Trade Continuity Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Mexican States (15 December 2020) CS Mexico No.1/2021 [UK-Mexico Trade Continuity Agreement].

105 See eg Partnership and Cooperation Agreement Establishing a Partnership between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Uzbekistan, of the other part (31 October 2019) CS Uzbekistan No. 1/2019 [PCA UK-UZB].

An example of the latter case is the *Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Chile*[106] (UK-Chile AA), which the UK and Chile signed in January 2019 and which rolled over the *Association Agreement between Chile, on the one side, and the EU and its Member States, on the other side*[107] (EU-Chile AA). In the UK-Chile AA's preamble, the UK and Chile

> recogniz[e] that the 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, […] will cease to apply to the United Kingdom when it ceases to be a Member State of the European Union.

Subsequently, they expressed their desire 'that the rights and obligations between them as provided for by the EU-Chile Agreement should continue after the United Kingdom has left the European Union'. Thus, the 'overriding objective of this [UK-Chile] Agreement is to preserve the links between the Parties established by the association created in Article 2 of the EU-Chile Agreement'. To achieve this, '[t]he provisions of the EU-Chile Agreement […] in effect immediately before they cease to apply to the United Kingdom are incorporated into and made part of this Agreement, mutatis mutandis, subject to the provisions of this Instrument'. The 'subject to' caveat relates to the Annex of the UK-Chile AA, which contains modifications to the wording of certain provisions in the EU-Chile AA, adapting them to the new treaty relationship between the UK and Chile.

In some instances, the conclusion of a rollover agreement could not be achieved fast enough. The UK-Canada *Agreement on Trade Continuity*[108], for example, was signed on December 9, 2020, incorporating the EU-Canada *Comprehensive and Economic Trade Agreement*[109] (CETA). However, domestic procedures hampered it from entering into force or

106 Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Chile (30 January 2019) CS Chile No. 2/2019 [UK-Chile AA].

107 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].

108 Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (9 December 2020) CS Canada No.1/2020 [UK-Canada Trade Continuity Agreement].

109 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].

being provisionally applied before the end of the transition period on December 31, 2020. Thus, the UK and Canada signed a 'Memorandum of Understanding […] concerning temporary arrangements to continue certain benefits of [CETA] pending the entry into force or provisional application of the Canada-United Kingdom Trade Continuity Agreement'[110]. Based on this non-legally binding Memorandum of Understanding[111], the UK and Canada '[desired] […] to continue the benefits of CETA […] to the extent possible, as between them, without interruption, once CETA ceases to apply to the United Kingdom'[112].

Primarily thanks to this method, three years after Brexit, the UK had put in place trade agreements with 67 states worldwide, with most of which it had previously conducted trade under EU trade agreements.[113] Even though the majority of these agreements have been rolled over, this is a remarkably high number considering that the responsible Department for International Trade had not even existed prior to Brexit. However, the UK's treaty practice of (re)concluding international agreements in the wake of Brexit becomes even more noteworthy when shifting the focus to its treaty partners. The UK's rolling over practice is an expression of the fact that many states accepted the UK's position on international agreements post-Brexit. While it is unclear whether they shared it from a legal standpoint, to the author's knowledge, no state openly opposed it. Instead of insisting on the fulfilment of pre-Brexit agreements, many states not only accepted the (renewed) conclusion of agreements with the UK as the sole treaty partner; in the case of rollover agreements, they also did so on very similar – if not identical – terms, thus granting the UK the same rights and benefits as during its EU membership.

110 Canadian Government, 'Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland and Canada' (22 December 2020) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cuktca-acccru/mou-pe.aspx?lang=eng>.

111 See Section 7: 'This Memorandum is not legally binding and records the understanding between the Participants on the matters referred to in this Memorandum.'

112 See Introduction, last indent.

113 UK Government, 'UK Trade Agreements in Effect' (03.02.2023) <https://www.gov.uk/guidance/uk-trade-agreements-in-effect>. Note that the number of 67 states includes a trade agreement with Palestine whose statehood is controversial under international law.

III. The Research Question: What's International Law Got to Do with It?

From a practical standpoint, the output of the UK's treaty-making efforts since Brexit is remarkable. For Brexit watchers, moreover, it is noteworthy that the question of the effect of Brexit on international agreements was not only one of the few on which the EU and the UK seemed to be in agreement, but that their approach was also accepted by their treaty partners. For an international lawyer, finally, this acceptance is even more astounding. Neither the EU nor the UK has yet provided any legal justification for its position.[114] However, from an international law perspective, the sweeping manner in which the UK announced termination of participation in different categories of international agreements – despite the variety of treaty constellations – appears problematic. This applies all the more against the background of the basic principle of *pacta sunt servanda* under international law. So, from a legal perspective: does out really (almost always) mean out?

On the one hand, the impulse to resort to the specifics of Union law in search of a legal explanation for the actions of the EU and the UK is almost reflexive. After all, not only do all agreements in question have the EU context in common. Their categorisation in EU-only, bi- and multilateral mixed and *inter se* agreements, along which the dividing line between 'out means out' and continued participation following Brexit was drawn, originates solely from EU internal necessities. On the other hand, a Union law perspective (alone) can never suffice as a rationale. After all, the UK is, except in the case of EU-only agreements, bound by these agreements under international law. Nevertheless, the specifics of the EU legal order and the EU's external action cannot be disregarded, even when taking the viewpoint of international law.

That this can lead to problems, especially in the area of mixed agreements, is demonstrated by the abundance of literature published on these agreements. For a long time, the focus of (scholarly) interest primarily lay on the intra-European distribution of competences and their external

114 In its internal slides on Brexit and international agreements, the EU's Task Force 50 simply referred back to the EU's Brexit Guidelines (see 'EU Internal Preparatory Discussions' (n 72) 4–5). In the UK, neither the Guidance Note nor further reports presented to Parliament offered any legal explanation (see 'UK Guidance Note' (n 59); V Miller, 'Legislating for Brexit' EU External Agreements, Briefing Paper (5 January 2017) Number 7850).

effects.[115] More recent scholarship has also started to engage more intensely with the reception of the EU's characteristic in the international legal order.[116] Still, the termination of mixed agreements has only been discussed sporadically and limited to classic denunciation.[117] This is most probably due to the – until Brexit – lack of practical and legal relevance. So long as a state is an EU member, the principle of sincere cooperation under Art. 4(3) TEU would apply in the case of both a Member State's and the EU's intention to terminate an agreement. There therefore seems to be a consensus that the right of termination in the case of mixed agreements would have to be exercised jointly in all cases.[118] In the case of Brexit, however, two particularities come together. First, the UK is no longer bound by Art. 4 TEU when it leaves the EU. Secondly, it regains its full competence to act under international treaty law.[119]

When it became clear that the UK would withdraw from the EU, scholarship began to engage with the question of what effect this would have on international agreements concluded by the EU or its Member States in the context of EU membership. The opinions expressed varied. Few legal

115 On the development of the EU's external competences, see eg Cremona, Evolution of EU Law (n 17). On the reception of the EU's division of competences in mixed agreements, see eg J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International 2001).

116 For a recent monograph, see Odermatt, *International Law and the EU* (n 14). See also, eg, RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019) placing the EU in the context of international organisations. On the responsibility of the EU under international law, see PJ Kuijper, 'International Responsibility for EU Mixed Agreements' in C Hillion and P Koutrakos (eds) (n 10); PJ Kuijper and E Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in MD Evans and P Koutrakos (eds) (n 19).

117 Mentioned, eg, in CD Ehlermann, 'Mixed Agreements: A List of Problems' in D O'Keeffe and HG Schermers (eds) (n 10) 16. See also R Mögele, 'Article 218' 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) paras 24–26; O Dörr, 'Article 47 TEU' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union* (82nd supplement, CH Beck 2024) para 35. On denunciation provisions in the EU's mixed trade agreements, see S Schaefer and J Odermatt, 'Nomen est Omen?: The Relevance of "EU Party" In International Law' in N Levrat and others (eds) (n 10) 147–149.

118 KD Stein, *Der gemischte Vertrag im Recht der Außenbeziehungen der Europäischen Wirtschaftsgemeinschaft* (Duncker & Humblot 1986) 183.

119 See ibid 78.

evaluations corresponded in their result with the position (later) adopted by the EU and the UK.[120] The majority of scholars came to conclusions contrary to that of the EU and the UK and the practice that would later enfold.[121] Against this background, it is all the more remarkable that ever since Brexit took place, scholars have remained largely silent. Scholarship that does continue to engage with the issue of Brexit and international agreements generally focuses on the questions *following* Brexit, looking, for example, at the UK's practice of rollover agreements.[122] Thus, there exists a body of pre-Brexit scholarship arguing how dealing with international agreements *should* be done and some post-Brexit writing summarising how it *was* done and otherwise focusing on post-Brexit issues. What is missing, however, is a critical debate on what happened and what to make of it.

However, this is not the only reason why the question was put aside prematurely as having been conclusively treated. Most writing on the topic of Brexit and international agreements has also been limited to one single explanatory approach. It has analysed the effect of Brexit on international

120 See eg C Herrmann, 'Brexit, WTO und EU-Handelspolitik' (2017) 24 Europäische Zeitschrift für Wirtschaftsrecht 961, 966; 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); 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).

121 See eg 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; S Silvereke, 'Withdrawal from the EU and Bilateral Free Trade Agreements: Being Divorced is Worse?' (2018) 15(2) *International Organizations Law Review* 321; 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; J Odermatt, 'Brexit and International Legal Sovereignty' in J Santos Vara, RA Wessel and PR Polak (eds) (n 120); C Kaddous and HB Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in N Levrat and others (eds) (n 10); 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.

122 See eg P Koutrakos, 'Negotiating International Trade Treaties After Brexit' (2016) 41(4) *European Law Review* 475; Koutrakos, Routledge Handbook Brexit (n 120); A Łazowski, 'Copy-Pasting or Negotiating?: Post-Brexit Trade Agreements between the UK and non-EU Countries' in J Santos Vara, RA Wessel and PR Polak (eds) (n 120); P Koutrakos, 'Three Narratives on the United Kingdom's Trade Agreements post-Brexit' in A Łazowski and AJ Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022).

agreements from the viewpoint of international treaty law and international institutional law: how does Brexit compare to the withdrawal of Member States from (other) international organisations?[123] Do the international agreements concluded in the context of EU membership – explicitly or implicitly – provide for the withdrawal of a Member State?[124] Is a denunciation in line with the grounds for treaty termination provided for in the *Vienna Convention on the Law of Treaties*[125] (VCLT) possible in the case of Brexit?[126]

While these appear like the natural questions to ask, there is a risk to analysing Brexit only from the perspective of international organisations: what if such comparisons prove futile? What if the answers to these questions do not match with the practice that unfolded during Brexit negotiations and which is now, nearly three years after the UK's withdrawal, very much settled? An approach that has so far been very much underexplored is to change perspective on the EU as the object of study. When considering '[t]he UK's Status in the WTO Post-Brexit'[127], Bartels

> submitted that on leaving the EU, the UK is entitled to succeed to the [Government Procurement Agreement] in its own right, in accordance with rules of customary international law on the succession of states to treaties, and practice under the GATT 1947 [...].[128]

Thus, instead of comparing Brexit to prior withdrawals from international organisations, Bartels compared Brexit to the 'succession of states from unions and federations'[129]. The rules applied to the disintegration of such entities differ from treaty law as codified in the VCLT and generally referred

123 See eg in A Schwerdtfeger, 'Austritt und Ausschluss aus Internationalen Organisationen: Zwischen staatlicher Souveränität und zwischenstaatlicher Kooperation' (2018) 56(1) *Archiv des Völkerrechts* 96; CM Brölmann and others, 'Exiting International Organizations: A Brief Introduction' (2018) 15(2) *International Organizations Law Review* 243.

124 See eg in Kim (n 120); A Kent, 'Brexit and the East African Community (EAC)-European Union Economic Partnership Agreement (EPA)' in JA Hillman and GN Horlick (eds) (n 120); I Fressynet, 'The Legal Impact of Brexit on the Comprehensive Economic Trade Agreement (CETA) Between the European Union and Canada' in JA Hillman and GN Horlick (eds) (n 120).

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

126 See eg Voland (n 121).

127 Bartels (n 100) 227.

128 Ibid 244.

129 Ibid 245.

to in the context of Brexit. The question would then be whether the outcome of applying the law of treaty succession would, in turn, accord with actual Brexit practice. However, the few authors who have subsequently addressed this line of reasoning have not only approached it with a good amount of scepticism but also treated it rather curtly.[130] Their main argument is based again on their perspective on the EU as an international organisation to which the law of *state* succession does not apply.[131] There are, however, two ways of approaching Bartel's argument.

The first is to revisit the debate on the nature of the EU. Is the EU an international organisation, a state, state-like or an entity *sui generis*? Discussions regarding the nature of the EU are sometimes considered 'academic' or purely 'semantic'.[132] But as Odermatt argues,

> [a]s the EU seeks to play a greater role in the international legal order, and as one of its Member States seeks to extricate itself from the EU legal order, the Union, its Member States, and third states will be faced with legal questions that touch upon the EU's legal order.[133]

Where the EU presents itself on the global stage, its characterisation matters. 'While it may be possible to create special rules for *sui generis* entities', international law as a legal system 'only works when it is applied across the board for certain categories of international actors'[134]. Yet, determining the nature of the EU as an international actor is not only about international law functioning as a legal system. The qualification of a legal actor also

130 J Odermatt, 'Brexit and International Law: Disentangling Legal Orders' (2017) 31 *Emory International Law Review Recent Developments* 1051, 1057–1059; Wessel, *Consequences of Brexit* (n 121) 116.

131 Odermatt, *Disentangling Legal Orders* (n 130) 1059; Wessel, *Consequences of Brexit* (n 121) 116.

132 For an overview of the different notions, see 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).

133 J Odermatt, 'Unidentified Legal Object: Conceptualizing the European Union in International Law' (2018) 33(2) *Connecticut Journal of International Law* 215, 216. See also J Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81(1) *The Modern Law Review* 1, 16: 'There is considerable tension within the EU legal order between the underlying international law framework of treaties, and the internal law of the EU, which is not international law in any straightforward sense. But when negotiating within the EU for a situation outside it, the hybrid character of the EU is very much in issue.'

134 RA Wessel, 'Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon' (2013) 8 *SIEPS Reports*, 16–17.

impacts its reception under international law. International organisations have long been accepted as subjects of international law in addition to states.[135] Nevertheless, in many fields, different international legal regimes apply to states than to international organisations.[136]

For the EU, such a categorisation does not always appear clear-cut. As Eckes and Wessel have shown, at least since the *Treaty of Lisbon*, 'the EU has been taking up 'state-like functions' in more areas than before'[137]. In doing so, the EU's growing international role is often accepted by the international community at large and many non-EU Member States in particular. This is also mirrored in the EU's treaty-making practice, with its international agreements appearing 'much more "state-like" in nature'[138]. At the same time, in the context of multilateral treaty-making, the EU's participation has repeatedly failed at provisions in multilateral agreements limiting accession to states. This again has led to a special qualification of the EU as a 'regional economic integration organization'[139].

Thus, the EU's nature may be discussed controversially. Against this background, however, it is more than unlikely that it would be recognised internationally as a predecessor *state*. There is, however, a second way of approaching Bartel's argument. The EU does not necessarily need to *be* a state to apply the rules on *state* succession to it. It may suffice, if the nature of its treaty practice is sufficiently similar to that of a state. Legal reasoning could then present an alternative to direct application of a rule. A method that has been used before to transfer rules for states to other subjects of international law is reasoning by analogy.[140]

The following two parts, each divided into three chapters, will offer two alternative viewings of the EU and accordingly Brexit and analyse their

135 See eg the seminal case of ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 1949, p 174.

136 See eg in the law of treaties the 1969 VCLT and the 1986 VCLT-IO, even though the rules contained therein are only marginally different. See also on the issue of responsibility the ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts', YBILC (2001) Vol. II(2) and the ILC, 'Draft Articles on the Responsibility of International Organizations' UN Doc A/66/10, YBILC (2011) Vol. II(2).

137 C Eckes and RA Wessel, 'An International Perspective' in R Schütze and T Tridimas (eds), *The Oxford Principles of European Union Law: The European Union Legal Order* (Oxford University Press 2018) 74.

138 Odermatt, *International Law and the EU* (n 14) 62.

139 Ibid 18.

140 On the use of analogies in international law, see below Part II § 5 section II.

respective effects on the international agreements concluded by the EU and its Member States. *Part I* will analyse Brexit from the viewpoint of international institutional and treaty law. Characterising the European Treaties as founding treaties of an international organisation, withdrawal from the EU must be perceived as a member state's exit from this organisation. The question is, then, which consequences arise from the termination of membership for agreements concluded by or within the framework of an international organisation and how this compares to the Brexit practice.

Part II will focus on those aspects of the EU that differentiate it from (other) international organisations and have earned it 'state-like'[141] attributes. The EU has been positioned in the context of (con)federations and federalism[142] and Art. 50 TEU has been referred to as a 'secession clause'[143]; here, recourse to international institutional and treaty law potentially lacks adequacy. Instead, drawing an analogy to the law of state successions could, indeed, offer a more suitable approach. Rather than directly discarding the comparison between unions and federations because of the EU's lack of direct correspondence, it therefore seems sensible to take a closer look at their similarities and the rules on state succession to be analogically applied.

141 See eg Odermatt, *International Law and the EU* (n 14) 62. See also Eckes and Wessel (n 137) 76–80 and, more generally, RA Wessel, 'Can the EU Replace its Member States in International Affairs?: An International Law Perspective' in I Govaere and others (eds), *The European Union in the World: Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff Publishers 2014).

142 See with further references in 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. On the EU and federalism, see, eg, M Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (Routledge 2000). On the EU as an actor on 'federal middle ground', 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).

143 See eg M Gatti, 'Art. 50 TEU: A Well-Designed Secession Clause' (2017) 2(1) *European Papers – A Journal on Law and Integration* 159.