BREXIT AND INTERNATIONAL LAW: DISENTANGLING LEGAL ORDERS

Jed Odermatt[*]

INTRODUCTION

On March 29, 2017, British Prime Minister Theresa May gave notice under Article 50(2) of the Treaty on European Union (TEU) of the United Kingdoms' intention to leave the European Union.[1] This notification came after the British Parliament passed the *European Union (Notification of Withdrawal) Act (2017)*[2] earlier in the month, giving the Prime Minister the power to give formal notice to the Council of the European Union.[3] Such formal notice intends to give effect to the result of the 2016 referendum in which 51.9% of voters voted in favor of leaving the Union.[4] While this is a historic moment for the UK and the EU, the invocation of Article 50 TEU is only the start of a long and complicated negotiation process between the UK government and the EU.

Since the Brexit referendum, there has been intense debate about what kind of relationship the United Kingdom will have with the EU upon its withdrawal. On January 17, 2017, Prime Minister May outlined in broad strokes what such a relationship might look like,[5] and on February 2, 2017, the Government published a White Paper that provided some more detail about the UK's

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[*] Postdoctoral Research Fellow, University of Copenhagen, Centre of Excellence for International Courts (iCourts). Jed.Odermatt@jur.ku.dk. The author would like to thank Dr. Tim Corthaut and Dr. Graham Butler for their comments on previous drafts.

[1] Letter from Theresa May, Prime Minister of the U.K., to Donald Tusk, President of the Eur. Council (Mar. 29, 2017), http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf [hereinafter Letter to the European Council]; Anushka Asthana, Heather Stewart & Peter Walker, *May Triggers Article 50 With Warning of Consequence for UK*, GUARDIAN (Mar. 29, 2017, 10:13 A.M.), https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk.

[2] European Union (Notification of Withdrawal) Act, (2017) http://www.legislation.gov.uk/ukpga/2017/9/pdfs/ukpga_20170009_en.pdf (the Act is only available in online format at the time of this writing).

[3] SELECT COMMITTEE ON THE CONSTITUTION, EUROPEAN UNION (NOTIFICATION OF WITHDRAWAL) BILL, REPORT, 2016-17, HL 119, ¶ 2 (UK).

[4] *Results*, BBC NEWS, http://www.bbc.com/news/politics/eu_referendum/results (last visited Apr. 1, 2017).

[5] Theresa May, Prime Minister of the U.K., PM Speech: The Government's Negotiating Objectives for Exiting the EU (Jan. 17, 2017), https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

position.[6] The White Paper sets out twelve principles that will guide the process—such as "Taking control of our own laws" and "Providing certainty and clarity"[7]—which put forth the Government's priorities, but provide very little in terms of substance.

The UK further elaborated on its position in the letter addressed to the President of the European Council, which gave notification under Article 50 TEU.[8] The UK set out a number of "principles" that would guide the future negotiations. These include: respectful and constructive engagement; putting citizens first; working towards a comprehensive "deep and special partnership agreement"; minimizing disruption and giving as much certainty as possible for citizens, businesses, and investors; paying attention to the UK's unique relationship with Ireland; and working together "to advance and protect . . . shared European values."[9] Importantly, the UK set out its aim of reaching a comprehensive agreement on economic and security issues within the two-year period for exit talks.

There are two main takeaways from the UK position so far. First, Prime Minister May underlined the position that "no deal for Britain is better than a bad deal for Britain,"[10] meaning that the UK is willing to walk away from a deal that is punitive or seen to be not in its interests. Second, the Prime Minister stressed that the UK will not leave the EU only to then enter into a similar type of relationship in another form.[11]

On March 31, 2017, the European Council also set out its "Draft Guidelines" for negotiations, which include a list of certain "core principles."[12] These guidelines set out that there should be a "phased approach" to negotiations, stressing that "an agreement on a future relationship between the Union and the United Kingdom as such can only be concluded once the United

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[6] HM GOVERNMENT, THE UNITED KINGDOM'S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION, 2017, Cm. 9417 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf.

[7] *Id.* at 5.

[8] Letter to the European Council, *supra* note 1.

[9] *Id.* at 4–5.

[10] Theresa May, *supra* note 5.

[11] *Id.*

[12] European Council Note, XT 21001, Draft guidelines following the United Kingdom's notification under Article 50 TEU (Mar. 31, 2017) [hereinafter European Council Draft Guidelines]. *See In full: The EU's Draft Guidelines for Brexit Negotiations*, TELEGRAPH (Mar. 31, 2017), http://www.telegraph.co.uk/news/2017/03/31/full-eus-draft-guidelines-brexit-negotiations/.

Kingdom has become a third country."[13] Both the UK's principles and the European Council's Draft Guidelines should be viewed as opening positions on how negotiations should proceed. We are not much closer to knowing exactly what a post-Brexit relationship will look like.

The final deal between the EU and the United Kingdom will be shaped by power and interests, not by the strict application of legal rules. Article 50 TEU sets out the process of withdrawal, but says nothing about the most complex questions facing the Union and the withdrawing Member State.[14] This does not mean, however, that law will not play a central role. One noticeable aspect of the public debate since the Brexit referendum is how frequently parties have framed their arguments in legal terms. The UK Government, EU officials, leaders of EU Member States, as well as the media and academics often discuss Brexit in terms of what is legally permissible. For example, the debate on issues such as whether the UK could have full access to the single market without accepting the freedom of movement,[15] or whether the UK could start negotiating trade deals with third countries before it leaves,[16] are not about what is desirable, but about what the law permits. While bargaining power and interests will shape the Brexit process, these are funneled through legal arguments and debates. The role of the law in the Brexit process can already be seen, for example, in the litigation in the UK over whether the Government could trigger Article 50 TEU through the exercise of its prerogative powers.[17]

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[13] European Council Draft Guidelines, *supra* note 12, at para. 4.

[14] *See* Consolidated Version of the Treaty on European Union art. 50, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

[15] *See, e.g.*, Sunder Katwala, *Brexit Britain Can Balance Immigration and Single Market Access*, FIN. TIMES (Oct. 31, 2016), https://www.ft.com/content/d9a7163e-9129-11e6-a72e-b428cb934b78; *Merkel: No British Access to Single Market Without Free Movement*, REUTERS (Oct. 15, 2016), http://www.newsweek.com/no-british-access-single-market-without-free-movement-510317.

[16] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 216(2), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. *See, e.g.*, Andrés Delgado Casteleiro, *Taking Back Control Over Trade Policy: Art 50 TEU and the Repatriation of Trade Powers*, DELI BLOG (July 6, 2016), https://delilawblog.wordpress.com/2016/07/06/andres-delgado-casteleiro-taking-back-control-over-trade-policy-art-50-teu-and-the-repatriation-of-trade-powers/ ("Can the UK negotiate international trade agreements once article 50 TEU has been triggered? The short answer is no."); Adam Payne, *EU Leaders: 'It's Absolutely Clear' UK Cannot Negotiate Trade Deals with Other Countries Until After Brexit*, BUSINESS INSIDER (Jan. 23, 2017), http://www.businessinsider.com/eu-warns-theresa-may-about-post-brexit-trade-deal-with-trump-usa-2017-1?r=UK&IR=T; Francis Hoar, *The United Kingdom's Right to Negotiate Free Trade Agreements Before Leaving the European Union*, LAWYERS FOR BRITAIN (Oct. 1, 2016), http://www.lawyersforbritain.org/files/uk-right-to-negotiate-free-trade-agreements-before-leaving-eu.pdf.

[17] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng. & Wales); R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) (Q.B.) (Eng. & Wales).

The President of the Court of Justice of the European Union (CJEU), Professor Koen Lenaerts, predicts that there are myriad possible ways in which the Brexit process could come before the EU Courts,[18] a view that has been expressed by EU law experts.[19] The negotiations take place in the shadow of these legal arguments and debates.

These legal debates have focused for the most part on questions arising under either UK constitutional law or under EU law. What has been missing from this debate are the possible questions that might arise under international law. This short contribution explores some of the ways in which international law issues arise through the Brexit process. Part I explores the "external" dimension, that is, international law issues that arise concerning the UK's relationship with the rest of the world, especially international treaties entered into by the EU and the UK. Part II focuses on the "internal" dimension, examining how international law might play a role in disentangling the UK from the EU legal order. Part III discusses the future agreements between the UK and the EU, and how international law may provide some models for the UK's future relationship with the EU.

Brexit is a leap into the unknown. There are not many examples of States leaving international organizations, let alone of a State withdrawing from such a developed legal order as that of the EU.[20] The closest precedent of an entity "withdrawing" from the European Community is the case of Greenland.[21] Yet in that case, Greenland was not an EU Member State in its own right, so it was not technically possible for it to withdraw.[22] Rather, Denmark sought to modify the territorial application of substantial parts of the EU Treaties to exclude EU law applying to Greenland.[23] Special arrangements, such as those regarding fisheries and trade, were developed, and the EU Member States and

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[18] Duncan Robinson & Alex Barker, *'Many Ways' Brexit May Go to EU Courts, Top ECJ Judge Says,'* FIN. TIMES (Nov. 21, 2016), https://www.ft.com/content/6609025a-adbc-11e6-ba7d-76378e4fef24.

[19] Steve Peers, *Brexit: Can the ECJ Get Involved?*, EU L. ANALYSIS (Nov. 3, 2016), http://eulawanalysis.blogspot.dk/2016/11/brexit-can-ecj-get-involved.html.

[20] *See* Ramses A. Wessel, *You Can Check Out Any Time You Like, But Can You Really Leave? On 'Brexit' And Leaving International Organizations*, 13 IOLR 2 (2016).

[21] *See* Henry Bodkin, *Greenland Showed How to Leave Europe as Far Back as 1984*, TELEGRAPH (June 24, 2016), http://www.telegraph.co.uk/news/2016/06/24/greenland-showed-how-to-leave-europe-as-far-back-as-1984/.

[22] Maia De La Baume, *Greenland's Exit Warning to Britain*, POLITICO (June 24, 2016), http://www.politico.eu/article/greenland-exit-warning-to-britain-brexit-eu-referendum-europe-vote-news-denmark/.

[23] *Id*.

institutions were consulted at each stage.[24] Compared with the example of Greenland, the withdrawal of the UK is magnified in complexity. It will not be simply withdrawing from an international agreement; it will be extricating itself from a complex legal system that over the years has become closely entwined with UK domestic law.[25] Moreover, for decades the EU has been active on the international plane, entering into agreements in fields such as trade, fisheries, and so on. As the UK seeks to disentangle itself from these complex legal relationships, international law plays a role at each level.

I. THE EXTERNAL DIMENSION: THE UK AND INTERNATIONAL AGREEMENTS

The legal debate since the Brexit referendum has focused on two main questions. The first set of legal questions relates to the Brexit process and the triggering of Article 50 TEU. This involves constitutional questions about who may give notice to withdrawal, or whether such notice may be revoked once given.[26] The second set of legal questions relates to the type of relationship the United Kingdom might have upon withdrawal, and what kinds of structures and relationships may be put in place.[27] In these legal debates, EU law and UK constitutional law take center stage. Yet, another set of legal questions also arises regarding the relationships that the EU and the UK have with other States and international organizations, and the legal consequences that flow from the UK's withdrawal from the EU. The UK's withdrawal will have major consequences at the international level, especially for the hundreds of international treaties that have been concluded by the EU and the UK with non-EU Member States (so-called "third States") and international organizations. The EU and the UK will face an important question: what will happen to the many international treaties to which the EU and the UK are

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[24] Fisheries Partnership Agreement Between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand, EU-Green., June 30, 2007, 2007 O.J. (L 172) 4; *see What is Greenland's Relationship with the EU*, EU INFO. CTR. http://english.eu.dk/en/faq/faq/Greenland (last visited Apr. 1, 2017).

[25] *See* Mark Elliot, *The Supreme Court Judgment in Miller*, PUBLIC L. FOR EVERYONE (Jan. 25, 2017), https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/. The discussion about how UK law and EU law are entwined played out in the *Miller* litigation, discussed in Part II. A. *infra*.

[26] *See* Patrick Wintour, *UK Must Remain Under EU Law During Brexit Transition, Diplomats Say*, GUARDIAN (Feb. 3, 2017, 8:57 AM), https://www.theguardian.com/politics/2017/feb/03/brexit-transition-uk-eu-law; *See also* RICHARD GORDON & ROWENA MOFFATT, CONSTITUTION SOC'Y, BREXIT: THE IMMEDIATE LEGAL CONSEQUENCES (2016), https://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf.

[27] *See* Thomas Brown & Eren Waitzman, *Leaving the European Union: Future UK-EU Relationship*, HOUSE OF LORDS LIBRARY (Nov. 25, 2016), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2016-0063.

parties? Will they continue to apply to the UK as a non-EU Member State? The EU is generally a party to two main types of agreements. The first are those to which the EU is a party, but not the EU Member States ("EU-only agreements").[28] The second type are those agreements that include both the EU and the EU Member States, usually because the agreement touches upon the competences of both the EU and the EU Member States ("mixed agreements").[29] These will be discussed in turn.

A. EU-only Agreements

EU Member States are bound by "EU-only agreements" by virtue of EU law, specifically Art. 216(2) of the Treaty on the Functioning of the European Union (TFEU).[30] The EU concludes these agreements in its own right, without the participation of the EU Member States.[31] This is the case, for instance, with agreements in the field of the EU's Common Foreign and Security Policy (CFSP) or where the EU has exclusive competence, such as agreements in the field of maritime resources.[32] Upon the UK's withdrawal from the EU, these EU-only agreements will no longer apply with respect to the UK.[33] This is because such agreements usually stipulate that they apply to territories in which EU law is applied. Therefore, since EU law will no longer apply with respect to the UK territory upon its withdrawal, such agreements would no longer be binding upon the UK from the date of withdrawal.[34] The EU is

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[28] Ramses A Wessel, *The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities*, *in* LAW AND PRACTICE OF EU EXTERNAL RELATIONS: SALIENT FEATURES OF A CHANGING LANDSCAPE 159 (Alan Dashwood & Marc Maresceau eds.).

[29] *See* PIET EECKHOUT, EU EXTERNAL RELATIONS LAW 212–20 (2011). *See* HOUSE OF COMMONS LIBRARY, EU EXTERNAL AGREEMENTS: EU AND UK PROCEDURES (Mar. 29, 2016), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7192.

[30] TFEU, *supra* note 16, art. 216(2).

[31] Wessel, *supra* note 28, at 159.

[32] *Id*.

[33] Guillaume Van der Loo & Steven Blockmans, *The Impact of Brexit on the EU's International Agreements*, CTR. FOR EUR. POL'Y STUD. (July 15, 2016), https://www.ceps.eu/publications/impact-brexit-eu's-international-agreements.

[34] For example, Article 15(15) of the Free Trade Agreement between the EU and the Republic of Korea sets out the territorial application of the treaty:

> This Agreement shall apply, on the one hand, 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, and, on the other hand, to the territory of Korea. References to 'territory' in this Agreement shall be understood in this sense, unless explicitly stated otherwise.

arguably obliged, however, to communicate to its treaty partners that the EU consists of twenty-seven Member States.[35] Since the EU informs treaty partners when new States have joined the EU, and in some cases adopts protocols to include acceding Members to existing agreements,[36] the EU would similarly be required to inform third States of an EU Member State leaving. Van der Loo and Blockmans also point out that the EU's treaty partners "may feel cheated at the sudden loss of access to a sizeable chunk of the Single Market (64 million fewer consumers) and the cost and time of having to renegotiate a bilateral agreement with the UK."[37] The departure of such a large and economically important country from the EU will have an impact on those third countries, who might seek to either renegotiate or even withdraw from the agreement with the EU. For those agreements that contain a specific termination or denunciation clause, one party may terminate the agreement by giving the required notice as set out in the clause. For agreements that do not explicitly include such a termination or denunciation clause, such a process would be governed by the principles set out in the 1969 Vienna Convention on the Law of Treaties (VCLT), in particular Article 56.[38]

One could make the argument, however, that the UK continues to be bound by the obligations under such EU-only agreements by way of succession. According to this argument, the EU entered into these agreements "on behalf of" its Member States,[39] and the international obligations would flow back to the withdrawing Member State upon leaving. The CJEU has held that, under certain circumstances, the EU may be bound by the legal international obligations of the EU Member States by way of succession, where they are all

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part art. 15(15), May 14, 2011, O.J. (L 127) 1.

35 Van der Loo & Blockmans, *supra* note 33.

36 *See, e.g.*, Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union, 2006, O.J. (L 185) 17.

37 Van der Loo & Blockmans, *supra* note 33.

38 Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

39 *See* Adam Łazowski & Ramses A. Wessel, *The External Dimension of Withdrawal from the European Union*, REVUE DES AFFAIRES EUROPÉENNES (forthcoming 2017) (https://www.utwente.nl/en/bms/pa/research/wessel/wessel122.pdf).

a party to an international agreement.[40] However, there is no indication whether the opposite is the case, that is, that when competences are handed back to a Member State, that state would be bound by commitments entered into by the EU. Bartels makes such an argument with regard to the World Trade Organization's (WTO) 2014 Government Procurement Agreement (GPA 2014), which is a plurilateral WTO agreement to which the EU is a party, but the UK is not. Bartels submits that "on leaving the EU, the UK will succeed to the GPA 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, which 'guides' the WTO."[41] There are two main arguments put forward in support of this. The first is based on the practice of the dissolution of unions and federations. In these cases, Bartels argues, the entity gaining autonomy succeeded to the rights and obligations of treaties entered into by the federation or union.[42] The second argument is that the EU entered into the GPA 2014 "on behalf of" its Member States, and that this was accepted by the other parties to the agreement.[43]

Łazowski and Wessel argue that there are some "serious flaws" with the succession argument.[44] The first is that EU-only agreements do not include the UK as a contracting party.[45] Second, these agreements are often structured in a bilateral way, or include commitments that can only be effectively exercised within the EU framework, and it might prove difficult or impossible to apply these agreements to the UK.[46] The third issue is that automatic succession denies the EU's personality as a separate and distinct legal entity in international law.[47] Given the EU's status as an autonomous actor in international law, they argue, "it is difficult to hold on to the idea that the EU acted on behalf of its Member States."[48]

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[40] *See* Joined Cases 21 & 24/72, Int'l Fruit Co. & Others v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, ¶ 18 (" … in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.").

[41] Lorand Bartels, *The UK's Status in the WTO After Brexit*, *in* THE UNITED KINGDOM: 'FEDERALISM' WITHIN AND WITHOUT (Robert Schütze & Stephen Tierney eds., forthcoming 2017) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747).

[42] *Id.* at 19.

[43] *Id.*

[44] Łazowski & Wessel, *supra* note 39, at 13.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

International law regarding the succession of treaties gives no clear guidance. The Vienna Convention on Succession of States in Respect of Treaties, for example, applies only "to the effects of a succession of States in respect of treaties between States."[49] It is questionable whether these rules can be applied by analogy to the context of a state leaving a regional organization. The examples discussed by Bartels pertain mostly to unions of states and federations—it is equally unclear whether these examples are appropriate to the Brexit context. In his report on succession in respect of treaties, Sir Humphrey Waldock cautioned against treating economic organizations as unions of states: "there are some hybrid unions which may appear to have some analogy with a union of States but which do not, in the opinion of the Special Rapporteur, form part of the present topic … One such hybrid is EEC [European Economic Community]."[50] For the purposes of succession, it was argued the EEC was to be dealt with as an intergovernmental organization.

Autonomic succession arguably has the benefit of allowing greater continuity in treaty relations. However, it may not always be possible to continue to apply certain agreements with respect to the UK as a non-EU member. The question of whether a leaving state will succeed to treaty obligations does not have a clear answer, and will depend on specific circumstances, and the type of agreement in question. Moreover, the fate of EU-only agreements with respect to the UK could be dealt with in part through the exit agreement that will be negotiated between the EU and the UK, which will be discussed in Part III, *infra*.

B. Mixed Agreements

Different questions arise in relation to mixed agreements. *Prima facie*, where the United Kingdom is a party to such mixed agreements (alongside the EU), the UK would continue to be bound by such an agreement under international law.[51] However, one problem is that such mixed agreements are often structured in a way so that the EU Member States and the EU are parties together, with the EU responsible for obligations touching upon its fields of competence, and the EU Member States responsible for implementing the agreement in their fields of competence. These agreements do not specify with

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[49] Vienna Convention on Succession of States in Respect of Treaties art. 1, Aug. 23, 1978, 1946 U.N.T.S. 3 (entered into force Nov. 6, 1996).

[50] Sir Humphrey Waldock, Special Rapporteur, *Fifth Report on Succession in Respect of Treaties*, [1972] 2 Y.B. Int'l L. Comm'n 18, U.N. Doc. A/CN.4/SER.A/1972/Add.1.

[51] Van der Loo & Blockmans, *supra* note 33.

any degree of certainty who is responsible for which fields. While the EU is often under an obligation to render a "declaration of competences," which sets out who is responsible for implementing different parts of the treaty, in practice such declarations are worded in a vague manner giving little practical guidance.[52] Another problem is that many mixed agreements are structured in a bilateral manner, with the EU and its Member States on one side of the agreement, and the other State or group of States on the other.[53] The Cotonou Agreement, which involves the EU and the Member States as well as seventy-nine countries from Africa, the Caribbean, and the Pacific, is structured as a bilateral treaty.[54] This means the two sides of the agreement have legal obligations towards the other, as opposed to there being a set of mutual obligations owed among the parties.

The continued application of agreements to the UK may depend on how "party" is defined in an agreement.[55] In some cases, an agreement will apply to the EU and its *Member States*.[56] In other instances, the UK is named as a party in its own right. In the latter case, the UK would remain a party to the agreement, but the EU and UK will likely have to inform treaty partners about the change in status.[57] For instance, the EU and the UK are both members of the WTO, and will continue to be WTO members after Brexit.[58] There is sharp disagreement, however, about what consequences this will have for the UK. For years, the EU has exercised powers and rights on behalf of the EU Member States. Questions arise regarding whether and to what extent the UK will have to renegotiate the terms of its future WTO membership outside the EU.[59]

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[52] *See* Andres Delgado Casteleiro, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, 17 EUR. FOREIGN AFF. REV. 491–509 (2012).

[53] *See* Van der Loo & Blockmans, *supra* note 33 (citing Case C-316/91, European Parliament v. Council, 1994 E.C.R. 1-625, ¶ 29).

[54] *See generally* Cotonou 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, June 23, 2000, 2000 O.J. (L 317) 3.

[55] Thanks to Tim Corthaut for drawing my attention to this point.

[56] *See, e.g.*, Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, June 26, 2012, 2006 O.J. (L 354) 3.

[57] Łazowski & Wessel, *supra* note 39, at 15.

[58] SECRETARY OF STATE FOR FOREIGN & COMMONWEALTH AFFAIRS, THE PROCESS FOR WITHDRAWING FROM THE EUROPEAN UNION, 2016, Cm. 9216, at 15 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf.

[59] Peter Ungphakorn, *Nothing Simple About UK Regaining WTO Status Post-Brexit*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (June 27, 2016), http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit. *See* Bartels, *supra* note 41. Bartels argues that "the UK already today possesses full WTO rights and obligations under the WTO multilateral trade agreements, even if these are, at present, for the most part, exercised and performed on its behalf by the EU." *Id.*

For these and other issues, international law does not provide clear solutions. Some of these questions, such as the fate of agreements, could be dealt with in the withdrawal agreement negotiated between the UK and the EU (see Part III *infra*). The European Council's Draft Guidelines, for instance, seem to accept that after withdrawal, the UK will no longer be covered, not only by EU-only agreements, but mixed agreements as well: "The United Kingdom will no longer be covered by agreements concluded by the Union or by Member States acting on its behalf or by both acting jointly."[60] However, the Guidelines also set out that "[t]he European Council expects the United Kingdom to honour its share of international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners and international organisations concerned should be engaged."[61] The parties may decide, for instance, that certain agreements will continue to apply with respect to the UK for a specific transitional period while the UK negotiates and concludes new agreements. However, any withdrawal agreement dealing with these issues would not be capable of affecting the rights of third parties.[62] The principle of *pacta tertiis nec nocent nec prosunt* ("a treaty binds the parties and only the parties; it does not create obligations for a third state") enshrined in Article 34 of the VCLT[63] is a principle of customary international law binding on the EU and the UK.[64]

The fate of these international agreements after Brexit is not clear-cut. One should bear in mind that Brexit not only affects the UK and the EU, but will also have important consequences for the many other States with whom they have entered into international agreements.

II. THE INTERNAL DIMENSION: INVOKING ARTICLE 50 TEU

Article 50 of the Treaty on European Union provides the legal avenue for an EU Member State to withdraw from the EU.[65] This provision did not create such a right—a Member State possessed an inherent right to leave the

60 European Council Draft Guidelines, *supra* note 12, at para. 13.
61 *Id.*
62 Van der Loo & Blockmans, *supra* note 33.
63 VCLT, *supra* note 38, art. 34.
64 C-386/08, Brita v. Hauptzollamt Hamburg Hafen, 2010 E.C.R. 1-1289, ¶¶ 40–45.
65 TEU, *supra* note 14, art. 50.

European Union prior to the inclusion of Article 50 in the EU Treaties[66]—rather, it provided a legal mechanism and process by which this right is to be exercised. The VCLT establishes that a party may withdraw from a treaty "in conformity with the provisions of the treaty."[67] While Article 50 TEU is the starting point for exiting the European Union, it has been debated whether it is the only legal avenue. Some argued that the UK might be able to "bypass" Article 50 TEU using international law, for instance, by invoking the Brexit vote as a "fundamental change in circumstances" according to Article 62(1)(a) VCLT.[68] Such proposals were not serious. This article of the VCLT was deliberately worded negatively, stating that a fundamental change in circumstances *cannot* be invoked unless two highly restrictive conditions are fulfilled.[69] The International Court of Justice (ICJ) has also pointed out "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases."[70] It is unlikely that the CJEU would allow international law to be used in this manner, especially when Article 50 TEU provides a clear avenue for withdrawing from the EU Treaties.[71] An argument can be made that Article 50 TEU was intended to provide the only avenue for withdrawal from the EU; therefore Article 50 TEU displaces other methods of withdrawal from a treaty that exist under international law.

The UK has now given notice of its intention to withdraw, according to Article 50(2) TEU.[72] The question remains whether this provision provides the complete and exhaustive set of rules that apply to the withdrawal process. Article 50 TEU is silent on a number of important issues that will face the UK,

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66 EUROPEAN UNION COMMITTEE, THE PROCESS OF WITHDRAWING FROM THE EUROPEAN UNION, 2015-6, HL135, ¶7 (UK).

67 VCLT, *supra* note 38, art. 54(a).

68 *See* Frank Vibert & Gunnar Beck, *The Seven Days of Brexit: How a Leave Government Could Bypass Article 50*, LSE BREXIT BLOG (June 15, 2016), http://blogs.lse.ac.uk/brexit/2016/06/15/the-seven-days-of-brexit-how-a-leave-government-could-bypass-article-50/.

69 These conditions are "(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty." VCLT, *supra* note 38, art. 62(1).

70 Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep 7 ¶ 104 (Sept. 25).

71 As Professor Kenneth Armstrong argues, "there is simply no way that the European Court of Justice would permit the autonomous legal order of the European Union and the specific procedural mechanism of Article 50 TEU to bend to international law in this manner." Kenneth Armstrong, *The Vote Leave Framework for a New UK-EU Deal: Analysis* (Ctr. for European Legal Studies Working Paper No. 3, 2016), http://resources.law.cam.ac.uk/cels/working_papers/CELS_Analysis_the_Leave_Roadmap.pdf.

72 European Union (Notification of Withdrawal) Act, (2017) http://www.legislation.gov.uk/ukpga/2017/9/pdfs/ukpga_20170009_en.pdf.

the EU, and international partners. To what extent can rules of international law or EU law come in to fill these gaps? For instance, international law arguments may be invoked to answer one of the most debated questions regarding Article 50 TEU: can notification be revoked once given?

A. Revocability of Article 50 TEU Notification: Dodging a Bullet

In *R (Miller) v. Secretary of State for Exiting the European Union* (*Miller*), (discussed in more detail in Part II.B. *infra*) the UK Supreme Court did not examine the question of whether Article 50 notification could be revoked.[73] The parties in the case agreed that notification could not be revoked, and the Court found that it was not necessary to examine that issue.[74] One might argue that the Court was reluctant to examine this delicate question, in part, because it would have involved the Court interpreting the EU Treaties, meaning that it would arguably have had to refer the question to the CJEU.[75] On this issue, it was in both parties' interest to argue that notification could not be revoked. For the applicants, the effects of invoking Article 50 TEU were all the more drastic if notification is irreversible. The Government was also adamant—perhaps as much for political as legal reasons—that Article 50 notice is a step that cannot be taken back.[76] The question of whether the Government might be capable of "reversing" its Article 50 notification remains an important one.[77] This could

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[73] *See* R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng. & Wales).

[74] *Id.* at [26].

> [I]t is common ground that notice under article 50(2) . . . cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. Especially as it is the Secretary of State's case that, even if this common ground is mistaken, it would make no difference to the outcome of these proceedings, we are content to proceed on the basis that that is correct, without expressing any view of our own on either point.

Id.

[75] The preliminary reference procedure is established by Article 267 TFEU. TFEU, *supra* note 16, art. 267. Experts disagree on whether the UK Courts were under an obligation to refer the question regarding Article 50 TEU to the CJEU. *See* VAUGHNE MILLER, ARABELLA LANG & JACK SIMSON-CAIRD, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER NO. 7763, BREXIT: ARTICLE 50 TEU AND THE EU COURT 8–9 (Nov. 14, 2016).

[76] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [26] (appeal taken from Eng. & Wales).

[77] Jake Rylatt, *The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke*, UK CONST. L. BLOG (July 27, 2016), https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/; Charles Streeten, *Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?*, UK CONST. L. BLOG (July 13,

occur, for instance, if a new Government were to win an election on the platform of remaining within the EU, and then sought to revoke the UK's Article 50 notification. There are also some fears that the UK could "abuse" the right to withdrawal notification in order to extend the two-year negotiation period.[78] Many have argued that once invoked, Article 50 notification cannot be revoked.[79] But is this really the case?

The applicants in *Miller* invoked the metaphor of Article 50 notification being like pulling the trigger of a gun—by giving notice under Article 50 the UK will be "pulling . . . the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply."[80] Three main arguments were put forward to support this argument:

> Article 50 is deliberately designed to avoid any such consequence. There is no mention of a power to withdraw. And the very possibility of a power to withdraw a notification would frustrate, again, Article 50(3), which sets out in the clearest possible terms, what the consequences are of giving the notification under Article 50(2).[81]

2016), https://ukconstitutionallaw.org/2016/07/13/charles-streeten-putting-the-toothpaste-back-in-the-tube-can-an-article-50-notification-be-revoked.

[78] Daniel Boffey, *Barnier 'Lobbied to Stop May Withdrawing Article 50 in Two Years,'* GUARDIAN (Apr. 7, 2017), https://www.theguardian.com/politics/2017/apr/07/michel-barnier-eu-red-line-theresa-may-article-50-brussels. A European Parliament resolution has stressed that the withdrawal process could only be stopped with the consent of the other twenty-seven Member States.

[79] Eva-Maria Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, EUR. PARLIAMENT RES. SERV. (Feb. 2016), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf.

> Most commentators argue that [unilateral revocation] is impossible or at least doubtful, from a legal point of view. Indeed Article 50 TEU does not expressly provide for the revocation of a notice of withdrawal and establishes that, once opened, the withdrawal process ends either within two years or later, if this deadline is extended by agreement.

Id. This analysis does not rule out the possibility of suspending withdrawal, with the agreement of the EU Member States and institutions. *See* Nick Barber, Tom Hickman & Jeff King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, UK CONST. L. BLOG (June 27, 2016), https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/. "The first point to note about Article 50 is that it is a once-and-for-all decision; there is no turning back once Article 50 has been invoked." *Id.*

[80] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [36] (appeal taken from Eng. & Wales) (quoting Lord Pannick QC). Lord Carnwath criticizes this metaphor as "superficially attractive, but (with respect) fallacious." *Id.* at [262].

[81] Santos and M -v- Secretary of State for Exiting the European Union: Transcripts, COURTS & TRIBUNALS JUDICIARY, https://www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf (last visited Apr. 1, 2017) (follow "Full Day Transcript for 13 October 2016" hyperlink).

These arguments are based on a similar premise: that Article 50 provides the *complete* picture about withdrawal. It was argued that since there is no explicit mention of the ability of an EU Member State to revoke its Article 50 notification, this is not allowed under the EU Treaties.[82] While the EU Treaties are silent on the question of whether Article 50 notification can be revoked, one may find guidance from international law, notably Articles 65–68 of the VCLT.[83] Article 65 provides a procedure with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty, and Article 68 sets out that "a notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect."[84] If one assumes that Article 68 VCLT represents customary international law (which is not entirely clear), then it would seem that a party has the right to revoke unilaterally its notification to withdraw from the EU Treaties.[85] The UK would therefore have the right to withdraw its notice at any point up until withdrawal takes effect.[86] This argument is based on the premise that the law of treaties, particularly Article 68 VCLT, actually applies to the Article 50 TEU process.[87] If one views the EU legal order as a "self-contained regime,"[88] the EU Treaties provide for a complete system and remedies.[89] As long as the EU Treaties themselves provide for a *complete* set of rules, recourse should not be made to rules of general international law, including the customary law of treaties. In this case, it could be argued, Article 50 sets out the entire procedure that should take place in the event that a Member State chooses to leave the EU.[90]

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[82] SELECT COMMITTEE ON THE CONSTITUTION, THE INVOKING OF ARTICLE 50, 2016–7, HL44, ¶ 11–12 (UK).

[83] Rylatt, *supra* note 77.

[84] VCLT, *supra* note 38, art. 68.

[85] Rylatt *supra* note 77.

[86] EUROPEAN UNION COMMITTEE, *supra* note 66.

[87] Rylatt *supra* note 77.

[88] *See* Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006).

[89] In Commission v. Luxembourg & Belgium the Court held that:

> [T]he Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands.

Joined Cases 90/63 and 91/63, Commission v. Lux. & Belg., 1964 E.C.R. 01217. *See* Eckhart Klein, *Self-Contained Regime*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006).

[90] Steve Peers, *Article 50 TEU: The Uses and Abuses of the Process of Withdrawing from the EU*, EU L. ANALYSIS (Dec. 8, 2014), http://eulawanalysis.blogspot.dk/2014/12/article-50-teu-uses-and-abuses-of.html.

Whereas the right to revoke a notification of withdrawal under Article 68 VCLT may make sense for a "normal" treaty, one could argue that Article 50 introduces a specific set of rules that were designed for the situation of a Member State leaving the EU, displacing the application of general international law through the rule of *lex specialis.* One could make the case that specific rules of withdrawal were necessary in the EU context, especially given the drastic effects that such a move would have, not only for the withdrawing Member State, but also for the other members of the Union.

Although the UK Supreme Court dodged this bullet, the question of revoking Article 50 notice remains an unsettled and important question. Litigation has been brought before the High Court in Ireland on this issue, in which litigants are hoping that Irish Courts will refer the question to the CJEU in Luxembourg.[91]

B. Miller*: International and European Law Issues*

The UK Government initially decided to invoke Article 50 TEU via royal prerogative, instead of involving the British Parliament.[92] This gave rise to litigation before the High Court of England and Wales brought by applicants who argued that Article 50 TEU could only be invoked with the consent of the Parliament.[93] On November 3, 2016, the High Court held in *R (Miller) v. Secretary of State for Exiting the European Union*, that the British Government did *not* have the power to give notification under Article 50 to withdraw from the EU without involving Parliament.[94] If this were not the case, the Court held, the Crown would be able to make drastic changes to domestic law and affect citizen's rights through an action on the international plane.[95] The Government appealed this decision to the Supreme Court, which delivered its

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[91] Dennis Staunton, *Dublin High Court Case to Establish if Britain Can Halt Brexit*, IRISH TIMES (Jan. 26, 2017), http://www.irishtimes.com/news/crime-and-law/courts/high-court/dublin-high-court-case-to-establish-if-britain-can-halt-brexit-1.2952654.

[92] Gavin Barrett, *Tackling Brexit in the Irish Courts is a Long Shot. But Sometimes Long Shots Work*, GUARDIAN (Jan. 26, 2017), https://www.theguardian.com/commentisfree/2017/jan/26/tackling-brexit-irish-court-long-shot-article-50; Owen Bowcott, *Royal Prerogative Takes Centre Stage as Supreme Court Brexit Case Opens*, GUARDIAN (Dec. 5, 2016), https://www.theguardian.com/politics/2016/dec/05/supreme-court-brexit-case-whose-prerogative-is-it-anyway.

[93] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (appeal taken from Eng. & Wales).

[94] R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) (Q.B.), [94] (Eng. & Wales).

[95] *Id.* at [69].

judgment on January 24, 2017.[96] By an 8–3 majority, the Court upheld the decision of the Divisional Court.[97] On a separate issue, it held 11–0 that permission of the devolved nations within the United Kingdom was not needed.[98]

The legal questions in *Miller* were ostensibly only about British constitutional law; they did not relate to the interpretation of EU or international law. Rather, the legal questions focused on the inherent powers of the executive (the "royal prerogative") to act on the international plane. Ordinarily, the royal prerogative includes the power to negotiate and ratify international agreements, as well as the power to withdraw from a treaty.[99] Given the UK's dualist system, however, such action on the international plane can only have domestic effect through legislation passed by Parliament.[100] Moreover, the royal prerogative may not be used in a way that removes rights upon individuals.[101]

The UK Government argued that there is no constitutional requirement to involve Parliament, since invoking Article 50 TEU is a step to withdraw from a treaty, one that is ordinarily done through royal prerogative.[102] It argued before the High Court that "[s]uch a notification [under Article 50 TEU] would be an administrative act on the international law plane . . . ."[103] However, the High Court found that withdrawal from the EU would not only produce effects on the plane of international law, as is the case with other treaties, but would have the effect of modifying domestic law, in particular by interfering with the rights of individuals.[104] The Supreme Court also accepted this reasoning.[105]

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96 R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5.

97 *Id*. at [74]–[93].

98 *Id*. at [126]–[135].

99 LUCINDA MAER & OONAGH GAY, PARLIAMENT & CONSTITUTION CTR., THE ROYAL PREROGATIVE, SN/PC/03861 (Dec. 30, 2009), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861.

100 *Id.*

101 *Id*.

102 R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [5] (appeal taken from Eng. & Wales).

103 Detailed Grounds of Resistance on Behalf of the Secretary of State at [5], R (Miller) v. Secretary of State for Exiting the European Union, [2016] EWHC 2768 (Admin) (Q.B.) (Sept. 2, 2016).

104 R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) (Q.B.), [96] (Eng. & Wales). "[T]he Crown cannot through the exercise of its prerogative powers alter the domestic law of the United Kingdom and modify rights acquired in domestic law under the ECA 1972 or the other legal effects of that Act." *Id.*

105 R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [69].

The Supreme Court further noted the *unique* nature of the EU Treaties and the way in which EU law is given effect in the UK legal order. EU law is a "dynamic, international source of law":

> The EU Treaties as implemented pursuant to the 1972 [European Communities] Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts.[106]

One of the main findings of the Supreme Court in this regard was that EU law is a "source of UK law."[107] The Court acknowledged that there are many statutes that give effect to treaties in domestic law; however, the European Communities Act 1972 (ECA 1972) goes much further: "It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes."[108] EU law is an "independent and overriding source of domestic law"[109] and the ECA 1972 acts as a "conduit pipe"[110] linking EU law and UK domestic law. The Court therefore accepted the special nature of EU law within the UK legal system. This reflects the notion, developed by the CJEU in *van Gend en Loos*, that EU law is a "new legal order."[111] Given this nature of EU law as an independent source of law, the Government could not, using unilateral action under its prerogative "turn off" these effects of EU law. The Court acknowledged that in normal circumstances the withdrawal from a treaty on behalf of the UK would be a matter for the Crown.[112] However, the EU Treaties have transformed from international

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> Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected.

Id.

106 R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [90].

107 *Id.* [60].

108 *Id.*

109 *Id.* [65].

110 *Id.*

111 Case C-26/62, N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, Judgment, 3.

112 R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [5] (appeal taken from Eng. & Wales).

treaties that have effect between States, to the constitutional foundations of a legal order, which, among other things, confers rights on individuals that can be guaranteed in other EU Member States.

The judgment and legal discussion surrounding *Miller* therefore highlights the diverging views about the nature of the EU and EU law. Are the EU Treaties a form of "ordinary" international law, which is then given effect through the ECA 1972? This was the starting point of the Government's arguments, as well as the dissenting opinions in *Miller*.[113] Or are they, as the majority held in *Miller*,[114] an independent source of law? The constitutional question about the exercise of prerogative powers turns on this more fundamental question. Moreover, *Miller* will not be the last of these types of cases.[115] There will likely be many more cases involving Brexit issues before courts in the UK, other EU Member States, the CJEU, as well as before international dispute settlement mechanisms. The legal outcome of these disputes may depend on what conception of the EU and EU law one accepts. As Elliott argues, *Miller* demonstrates "fundamentally different views about the constitutional status that EU law has (and will, until Brexit, continue to have) within the UK's legal system."[116] Are the EU Treaties to be dealt with in the same way as other "ordinary" international instruments, or are they to be treated as the foundations of different type of constitutional legal order?[117]

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[113] *Id.* [34], [159]. In his dissent, Lord Reed states that the ECA 1972 "simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be." *Id.* [187].

[114] *Id.* [65].

[115] For a discussion of some of these envisaged legal issues, see Phedon Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MAASTRICHT J. 209 (2013); Adam Łazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 EUR. L. REV. 523, 530 (2012). Hannes Hofmeister, *Should I Stay or Should I Go?' – a Critical Analysis of the Right to Withdraw From the EU*, 16 EUR. L.J. 589 (2010).

[116] Mark Elliot, *Analysis: The Supreme Court's Judgment in Miller*, PUBLIC L. FOR EVERYONE (Jan. 25, 2017), https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/.

[117] *See* Piet Eeckhout & Eleni Frantziou, Brexit and Article 50 TEU: A Constitutionalist Reading 42 (Dec. 2016) (Univ. College London European Institute Working Paper), https://www.ucl.ac.uk/european-institute/news/2016-17/working-paper-art50.

> Article 50 raises important constitutional concerns not only for the withdrawing state - an issue that thrives in the UK blogosphere - but also from the perspective of the EU and its identity as a new legal order that creates rights and duties and safeguards them through accountable institutions, rather than being merely an international treaty signed by states.

Id.

III. THE FUTURE: THE WITHDRAWAL AGREEMENT

A final issue relates to the agreements that will be concluded between the UK and the EU (and its Member States). Under Article 50(2) TEU, the EU is obligated to negotiate and conclude an agreement with the withdrawing State, which sets out the arrangements for withdrawal "taking account of the framework for its future relationship with the Union."[118] This means that there will likely be two international agreements. The first will deal with the modalities for withdrawal ("withdrawal agreement"), whereas a second will set out the future arrangements between the EU and the UK after the date of withdrawal ("UK–EU relationship agreement").

The withdrawal agreement will have to deal with the immediate issues that arise from disentangling the UK from the EU legal system. These include the rights of EU citizens in the UK and of UK citizens in the EU, the closure of EU agencies in the UK, cross border security arrangements, and so on.[119] On the EU side, the withdrawal agreement is to be negotiated according to Article 218(3) TFEU, which sets out the procedure for the EU to enter into treaties with third countries and international organizations (although the UK will not technically be a "third country" during the negotiations).[120] This also raises the question of whether such an agreement is to be considered a form of EU primary law (a "reverse accession treaty")[121] or an international legal instrument.

Such an agreement is to be concluded on behalf of the EU by the Council acting by qualified majority.[122] Since the EU Member States will not be a party to the withdrawal agreement, it will not require ratification by national parliaments.[123] The European Parliament must also give its consent to such an agreement.[124] As with any agreement concluded by the Union, the withdrawal agreement must also be compatible with the EU Treaties and primary EU

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118 TEU, *supra* note 14, art. 50(2).

119 *See* ROBYN MUNRO, INST. FOR GOV'T, BRIEFING PAPER: NEGOTIATING BREXIT (2016), https://www.instituteforgovernment.org.uk/sites/default/files/publications/5040%20IFG%20-%20Negotiating%20Brexit%20v4.pdf.

120 TFEU, *supra* note 16, art. 218(3).

121 Sarah Gordon, *Untangling Britain from Europe Would Cause Constitutional 'Havoc,'* FIN. TIMES (June 20, 2016), https://www.ft.com/content/d7ae7b70-361a-11e6-9a05-82a9b15a8ee7.

122 TEU, *supra* note 14, art. 50(2).

123 *See* MUNRO, *supra* note 119, at 5.

124 According to Article 50(2) TEU, the withdrawal agreement "shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament." TEU, *supra* note 14, art. 50(2).

law.[125] While it is conceivable that the CJEU could be asked to give an opinion pursuant to Article 218(11) TFEU on whether such an agreement is compatible with the EU Treaties,[126] given the tight time frame involved in negotiating and securing the withdrawal agreement within two years, it is unlikely that the CJEU would be asked to become involved. On the UK side, such a withdrawal agreement would also be subject to its constitutional requirements, including gaining the consent of the UK Parliament.

The UK–EU relationship agreement, on the other hand, will deal with the relations between the UK, the EU, and its Member States following the UK's departure from the Union.[127] It is most likely that such an agreement will include not only the UK and the EU, but also the remaining twenty-seven EU Member States.[128] Although it would be technically possible for such an agreement to fall within areas of exclusive EU competence, thereby excluding the other twenty-seven Member States, in light of recent case law, this would be a rather "bare bones" agreement.[129] Unlike the withdrawal agreement, the UK–EU relationship agreement (assuming it is concluded as a mixed agreement) would have to be ratified by the other twenty-seven EU Member States.[130] Also unlike the withdrawal agreement, there is no timeframe imposed on the UK–EU relationship agreement.[131]

The UK has stated that it wants a "deep and special partnership" that would involve economic and security cooperation.[132] It has stated its preference for negotiating such an agreement alongside the withdrawal agreement, and is confident that these can be negotiated and concluded within the two-year period for withdrawal discussions.[133] The European Council, on the other hand, has shown a preference for a two-step process: the first phase is to

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125 *See* Poptcheva, *supra* note 79, at 5.

126 *See id.*

127 *See* MUNRO, *supra* note 119, at 5.

128 *Id.*

129 Press Release, Court of Justice of the European Union, Advocate General Sharpston Considers that the Singapore Free Trade Agreement Can Only Be Concluded by the European Union and the Member States Acting Jointly (Dec. 21, 2016), http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160147en.pdf. An agreement that seeks to deal exclusively with trade issues may therefore easily end up involving elements that require the consent of the EU Member States. *Id.* In the recent Opinion of Advocate General Sharpston, she expressed the opinion that EU-Singapore Free Trade Agreement (EUSFTA) should be concluded as a mixed agreement. *Id.*

130 MUNRO, *supra* note 119, at 6.

131 *Id.* at 7.

132 Letter to the European Council, *supra* note 1, at 2.

133 *Id.* at 6.

disentangle the UK from the EU and to deal with the immediate effects of withdrawal; the second phase will focus on the future partnership, only once the UK becomes a non-EU Member State.[134] Whereas the UK wants to negotiate the two agreements together, the Draft Guidelines state that the EU and the Member States will only be involved in "preliminary and preparatory discussions" on the partnership agreement during the first phase.[135]

While trade will be the main issue in any agreement on the future relations, it may also include other issues, such as cooperation between the UK and EU in areas like international security, or the UK's involvement in certain EU programs (e.g., in areas of scientific research). The UK government has stated that it will not seek to replicate any existing "model," such as those of Norway or Switzerland, favoring a bespoke arrangement.[136] Such an agreement will be in the form of a treaty between the EU and its Member States and the UK as a "third country."

The withdrawal agreement and the UK–EU relationship agreement cannot possibly address all of the complex issues that will arise from the UK's departure from the EU. It will be necessary for these agreements to address certain legal innovations, such as transitional arrangements or the establishment of dispute settlement procedures. The UK Government's White Paper mentions the need for some type of dispute settlement mechanism to exist post-Brexit, but does not offer any detail on what type of arrangement it may seek.[137] The Draft Guidelines also state that the withdrawal agreement should include dispute settlement mechanisms for the interpretation and application of the withdrawal agreement.[138] In light of the CJEU's case law on international dispute mechanisms, which stress the need to preserve the autonomy of EU law,[139] and the UK's insistence that the CJEU will not have

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134 European Council Draft Guidelines, *supra* note 12, para. 4.

135 *Id.*

136 Theresa May, *supra* note 5. "Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave." *Id.*

137 HM GOVERNMENT, *supra* note 6, at 2.4–2.10, Annex A.

138 European Council Draft Guidelines, *supra* note 12, para.16.

139 *See* Opinion 2/13 of the Court (Full Court), 2014 E.C.R. 2454. Bruno de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES (Marise Cremona & Anne Thies eds., 2014). The Draft Guidelines also stress that dispute settlement mechanisms should be developed "bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union." European Council Draft Guidelines, *supra* note 12, para. 16.

jurisdiction with regard to the UK post-Brexit, the design of such a dispute settlement mechanism will be another sensitive legal issue. The negotiators may find inspiration from the example of other international organizations and international agreements in designing such arrangements. International law could therefore provide the building blocks for these post-Brexit innovations.

CONCLUSION

The Brexit process involves the complicated disentangling of legal orders. This not only includes the UK withdrawing from the EU legal order, which has become closely entwined with UK law, but involves questions on the international level, including the UK's relationship with third States and international organizations. While issues of UK law and EU law will be predominant in the process, this contribution has shown how international law issues come into play at every level. As the *Miller* case shows, some of these issues touch upon more fundamental questions, such as the very nature of the EU legal order. Whether such questions should be approached according to an international law paradigm or using a constitutionalist approach remains to be seen. The intense legal debate about Article 50 TEU foreshadows the types of disputes that will continue to arise as the Brexit process unfolds. International law will not just play a "gap-filling role," however. Just as international law initially provided the building blocks to establish the EU legal order, international law will be used, perhaps in innovative ways, to establish the new relationship between the UK and the EU.