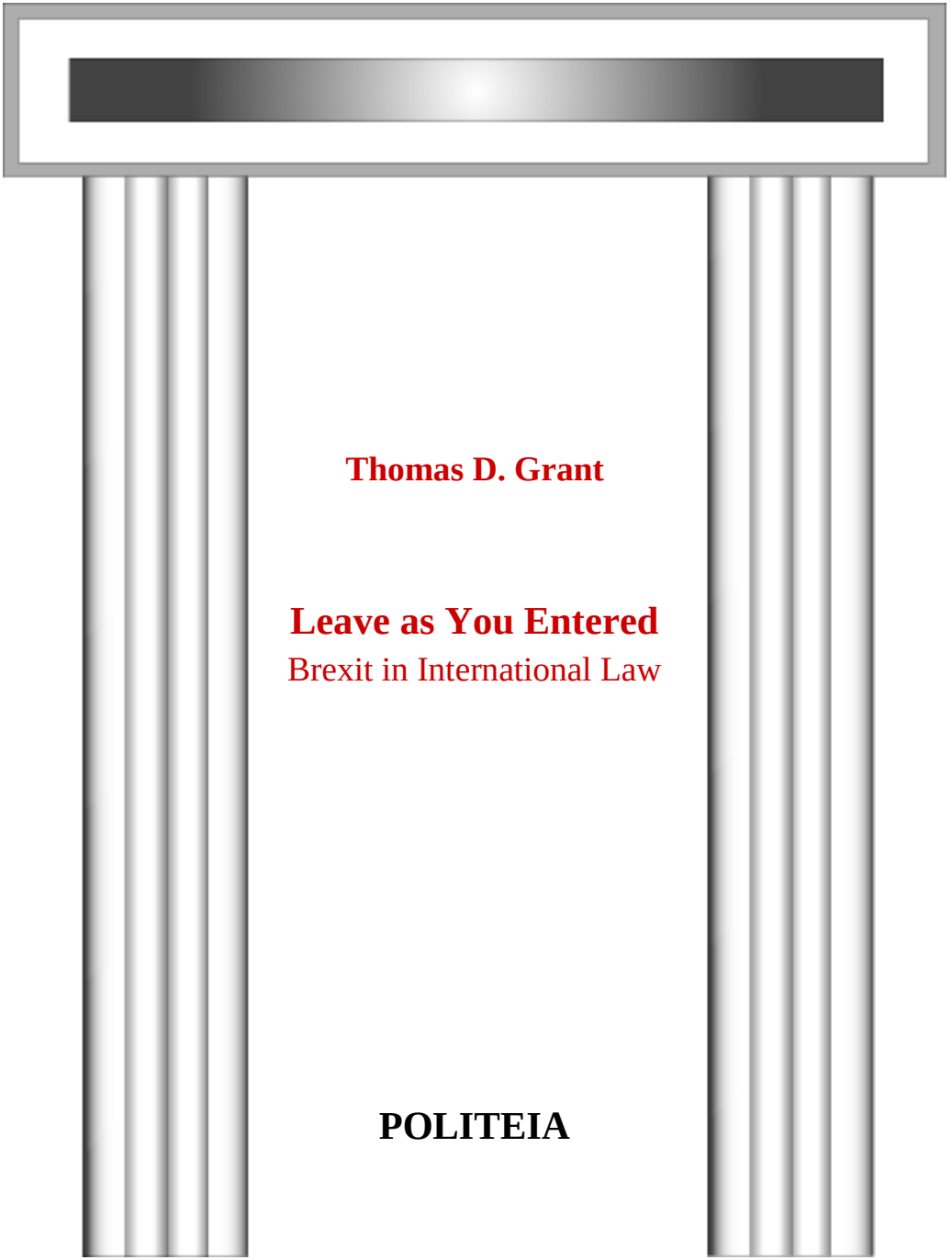

Thomas D. Grant

Leave as You Entered

Brexit in International Law

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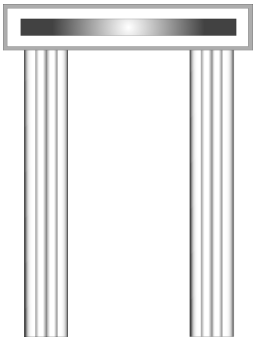

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Leave as You Entered:

Brexit in International Law

Thomas D. Grant

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THE AUTHOR

Thomas D. Grant is an international lawyer and Fellow of the Lauterpacht Centre for International Law in Cambridge and Senior Research Fellow at Wolfson College. Dr Grant's books include *Aggression against Ukraine: Territory, Responsibility, and International Law* (2015) and *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009). For Politeia he co-authored *Avoiding the Trap – How to Move on from the Withdrawal Agreement* (2019).

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I
Introduction
Misconceptions about the EU - International Organisations v States*

British politics today is rife with anticipation about how Brexit, and different proposed variations on Brexit, will affect the United Kingdom's legal order. Few ask how Brexit will affect the European Union or its implications for the EU's legal order. Yet already, in the course of UK-EU Brexit negotiations, each party's position has been affected by false assumptions and misconceptions about the legal status of the EU. In particular the UK's tendency to treat the EU as a State, which it is not, rather than an international organization under international treaty law which it is, has undermined the UK's legal identity and shaped that of the EU.

Now, as a new UK prime minister prepares for the UK to leave the EU on 31 October, the consequences of these assumptions and misconceptions loom as large as ever: for unless the UK treats the EU, not as a sovereign equal to the UK itself but, instead, as the international treaty body that the EU is, the legal status of the UK will be further undermined to the UK's detriment, whereas that of the EU's will be enhanced.

A problem for the new UK government is that it is not working with a clean slate: Theresa May's ministry conducted negotiations with the EU in a manner that, time and again, evinced a misunderstanding about the nature of the body the UK intends to leave and its international law basis. In particular the EU is not a State. This means that exiting the EU is not the same as exiting from a State. Yet in ways subtle and not-so-subtle`, the transactions between Britain and the EU up to now have reflected certain assumptions about the EU that are more consistent with that body being a State than what it really is.

The cost to the UK of acting on such mistaken assumptions could be grave because like other legal institutions, the EU is not impervious to how others characterise it. The political and other extra-legal assumptions accepted by different parties tend to evolve to a legal status - they take hold in our understandings of a given institution and are bound in time to affect the law. If we say and act as though a given body constitutes a State, then, in time, it will be one.

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*Citations and references are current as of August 2019 when text was finalised.

In an earlier *Politeia* piece[1], I suggested that the handling of the UK's withdrawal from the EU has had unfortunate implications for the independence of the UK, and for that matter of any existing Member State. The present Briefing will develop that point and consider in greater depth how Brexit affects the EU, and in particular, how Brexit might affect our understanding (and its) of what sort of entity the EU is. It argues that, though so far Brexit's effects on the EU are subtle, Brexit might ultimately have profound impact on the future of the EU, of the States that comprise it, and of others, including a post-Brexit Britain in its dealings with the EU. It is therefore imperative that the new prime minister handles the UK's withdrawal in a manner that best serves the UK's interests. This will mean effectuating Brexit in a manner that does not drive the mutation of the EU into a more State-like political and legal form.

Some people would welcome a European Federal State in place of the EU in which the sovereignty of constituent countries was submerged completely. Since the early days of the European Communities, European federalists have been open about their ambition to create such a State. However, a price federalists such as Jean Monnet had to pay in order to create the organisation that came to be the EU was to concede that it is not a State. Too many important constituencies, indeed whole States, would not accept the proposition that joining the Communities (or the eventual EU) entailed absorption into a new legal order and the disappearance as sovereigns of those that joined. Thus, signposts were included in European law, including in its interpretation by Member State courts, to make clear that the EU, while more than an ordinary international organisation, was (and is) less than a State. The erosion of those signposts is leading to a very different view of the terrain which the EU and its Member States traverse.

This analysis opens by considering the State in international law. (Part I—pp. 4-10). With a working definition of 'State' in hand, we should recall that the EU is a curious 'hybrid' or *'sui generis*' formation, something which displays certain characteristics of a State but which remains, at heart, an international organisation. This point, which I will develop in greater detail below (Part II—pp. 10-20), merits a few words of further introduction here.

[1] Thomas D. Grant, *Sovereignty Not Supplicancy: Brexit is a Matter of International, Not EU, Law,* (11 Apr. 2019): https://www.politeia.co.uk/sovereignty-not-supplicancy-brexit-is-a-matter-of-international-not-eu-law-by-dr-thomas-grant/

Although the EU exhibits State-like characteristics in the range of powers that its Members have given it to discharge, in particular legislating for the Members on issues within its competence, this is only one side of its hybrid character. In law it remains a treaty body—an international organisation—in how it is *constituted* and, as the case may be, taken apart. The *constitutive* function—the function by which the EU is assembled through the accession and departure of Members—remains a matter between States and an international organisation under treaties. In this aspect, the EU is a treaty body which exists by virtue of treaty relations under international law. When the Members relate with the EU, they relate with it in fundamentally different ways, depending on which face of the EU's hybrid character they are relating with. They are legal subjects of the EU when it comes to the EU's normal operations in regard to issues within its competence. They are States in the full sovereign sense when it comes to the decision whether or not to be Members. Or so the situation has been so far.

There is nothing in general international law—the law apart from treaties—to dictate that the situation will remain as it has been. States, as sovereigns, are free to give up their sovereignty in its entirety and become constituents of another State. Constituents who once were sovereigns under international law but have merged into a State are sovereign no more. Their legal rights from that point onward, if they have any, are rights in the law of the State they have joined. By contrast, States who join an international organisation remain subject to international law and thus remain independent. That's the difference between being a State and joining one.

How about exiting? Because different legal systems apply, exiting a State is very different from exiting an international organisation. A State is a self-contained legal order, and it sets its own terms for the purpose of constituting itself. The same goes for re-constituting itself; international law does not tell a State how to change. This holds even for the dissolution of the State or separation of a part from it. Though such an act is intended to have international effects, the act itself, when it originates within the State, is not subject to international law. Except where some discordance with a fundamental rule of international law is involved, like the prohibition against genocide, international law is agnostic as to how a State configures itself.

In view of the confusion over exit from the EU, it is important to be clear about the difference between changing a State—an act about which international law has little or nothing to say and, thus, an act that constituents of the State have no international law right to carry out; and changing an international organisation—an act governed by international law and, thus, an act that the separate sovereigns who constituted the organisation have the right, by virtue of their sovereignty, to perform. To put the matter succinctly: a constituent of a State has no international law rights against that State in regard to whether it stays or leaves; a State Member of an international organisation retains the freedom, as a sovereign under international law, to revert to being a non-Member if it chooses. The difference needs to be understood, if Britain is to get Brexit right, and so this Briefing compares leaving a State and leaving a treaty organisation (Part III—pp. 20-27).

With the difference in mind, I'll then consider how UK politicians and others have treated the EU, inappropriately, as a State (Part IV—pp. 27-38). This matters, first, because to carry out Brexit successfully, Britain's leaders need to understand what it is they are exiting. It matters further, because how you legally categorise a thing, even if at first mere shorthand, in time affects what the thing is. I therefore will consider how the further evolution of the EU into a federal State would affect the EU itself, the Member States who remain, and a post-Brexit Britain which, regardless of the terms or timing of any deal or deals, will continue to have legal relations with it (*Putting Brexit off? Or Being Put Off Brexit?*—pp. 36-38). The Briefing closes with proposals as to how the new UK Government can avoid these pitfalls and thus achieve a Brexit that positions the UK to best advantage in any future relations with the EU and the wider world (Part V—pp. 38-40).

II
The State in International Law

Endowing the EU with the status of a state would strengthen its legal standing, for in law the difference between a State (e.g. the UK) and an international organization (e.g. the EU, the UN), is significant.

So first, the point of departure must be: what is a State? In international law the classic reference, for a definition of 'State', is an old inter-American treaty, in which a handful of Western Hemisphere States in rather incidental fashion listed four elements they thought identify that most basic building-block of international order. This is what they said about the term 'State' in the Montevideo Convention of 1933:

> 'Article 1
> The state as a person of international law should possess the following qualifications:
> a. a permanent population;
> b. a defined territory;
> c. government; and
> d. capacity to enter into relations with the other states'[2].

On must take care not to rely too much on the Montevideo Convention. The absence of any more authoritative and concise definition probably contributes to the Convention's purchase. At least one point of clarification, and one further criterion, need to be expressed, before one has a definition of 'State' that comports, more or less, with what we observe in the world at large.

First, the point of clarification. Where the Montevideo Convention refers to 'capacity to enter into relations with the other states', the received view is that this means *independent* capacity, which is to say capacity to enter into such relations by its own volition, free from any superseding power, such as the power a federal State exercises over its constituents. The point is nicely illustrated by the practice of certain federal States to allow their constituents a (limited) capacity to

[2] Montevideo Convention on the Rights and Duties of States, adopted 26 Dec. 1933; in force from 26 Dec. 1934; ratifications (as at June 2019 as indicated on the UN Treaty Series participant list): Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States of America, Venezuela. Published at 165 League of Nations Treaty Series 19.

engage in relations with foreign bodies and even with States: the constituents have 'capacity' but that capacity is subject to the will of the federal State and so is not the independent capacity which an entity must possess if that entity is to be a State[3].

A corollary of independence, in this sense, is that, to be a State, the entity must have the capacity to do any act that it is lawful under international law to do. The International Court of Justice (ICJ), in one of its early Advisory Opinions, said, famously, that the United Nations has capacity—but not the full capacity in the sense of a State. The Court made the point like this:

> '[T]he Organization [the UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.
>
> Accordingly ... the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a "a super-State", whatever that expression may mean... What it does mean is that it is a

[3] E.g., the U.S. Constitution, Art. 1 § 10 cl. 3, allows certain limited engagements between constituent States and foreign States, subject to 'the Consent of the Congress'. The U.S. Constitution, Art. I § 10 cl. 1 establishes that the federation is otherwise supreme in the field of treaty-making: 'No State shall enter into any Treaty, Alliance, or Confederation...' In practice, this (exclusionary) position is taken by some of the main federal States. Thus the position in Australia:

> 'Any purported treaty or agreement between any or all the Australian states and a foreign country is a nullity. States have entered into arrangements with other countries either in the belief they could do so or because of the neglect of the Commonwealth to make arrangements which were thought to be practically necessary... All such arrangements are within the exclusive authority of the Commonwealth.'

Koowarta v. *Bjelke-Peterson & Othrs; State of Queensland* v. *Commonwealth of Australia,* (1982) 68 *International Law Reports* 238 (High Court (Australia), Murphy J).

> subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims'[4].

The conclusion in the second paragraph, quoted here, follows from the first. The UN had (and has) legal capacity—to the extent that its Members entrusted (and continue to entrust) capacity to it. Because they have not merged their sovereignty into the UN, which they are free to do but not interested in doing, the UN has only certain capacities. An entity thus limited is not a State. It does not hold the full plenum of the rights that international law allows[5]. Its making, change, and, if it came to that, un-making were and are in the hands of the Members. The ICJ described the UN accurately in line with the intentions of its founders—States—which, in contrast to the UN they founded, as far as international law is concerned emerge[6], change, and disappear on their own terms.

As to the further criterion additional to those instanced in the 1933 Convention, this is the requirement that, to be a State, the thing wishing to be one must *say* that it is a State. In short, to be a State an entity must make a claim to that effect[7]. At first glance, this might look rather formalistic. On closer inspection, the further criterion is no mere formality, because the world has various highly functional, even largely independent, bodies that do not claim to be States. Even if there are other reasons to treat them as something other than States, for that reason alone

[4] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 Apr. 1949, ICJ Rep. 1949 p 174, 179.

[5] It is in this sense that James Crawford AC SC FBA (Judge, International Court of Justice, 2015-present; Whewell Professor of International Law, Cambridge, 1992-2014) refers to 'the totality of powers that States may have under international law': *The Creation of States in International Law* (2nd edn, Oxford University Press, 2006) 33. Even States, thus, meet limits in international law: it was not open to South Africa, for example, to hive off territories (the 'Bantustans') for the purpose of entrenching Apartheid.

[6] There is long-running debate about precisely how a State comes to be. Its emergence is often described as a matter of fact, but subject to the appreciation of existing States who, in marginal situations, may expedite the entry of a new State into international relations—e.g., the recognition of Bosnia and Herzegovina after the disappearance of the Socialist Federal Republic of Yugoslavia. An existing State is not, however, free to ignore the rights of a new State just by withholding recognition from it: thus, the Arab States after the independence of the State of Israel, while free to withhold recognition, were not free to invade.

[7] The most prominent suggestion of the claim criterion is that in the *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 201 Comment *f*. The Restatements, published under the aegis of the American Law Institute, are semi-authoritative texts drafted by eminent scholars and practitioners setting out rules in various fields of law.

they are not States. Taiwan is the most striking example[8]. Including in the definition of 'State' the claim to be one helps avoid confusion—especially in marginal cases where doubts otherwise may arise.

Few, if any, States in modern times have successfully emerged without being up front about their own emergence. The United States on its first day, July 4, 1776, said that it was now 'to assume among the Powers of the Earth... separate and equal Station'[9]. Its Constitution of 1787 did not evade the point either. That instrument invested plenary powers in a federal government in order to carry out the main functions of a State on the international plane[10]. When, in 1861, certain constituents of that State declared secession, the federal government went to war to keep the United States whole[11]. The emergence of a single Germany in 1871 was similarly explicit. A German public lawyer in the late 19th century said that the idea 'found no approval among jurists' that 'the German Empire represented nothing but an enlargement of the Prussian state by the incorporation of the twenty-four other single states';[12] political historians might differ considering the predominance of Prussia in the Empire as a matter of fact; but no international lawyer today would say that this was anything other than a new State subsuming, for most purposes that mattered at international level, the constituents that made it, Prussia included[13]. Nobody at that time doubted that the amalgamation of the

[8] Taiwan, as at June 2019, claims (still) to be China, not a State independent of China. It has a separate administration, stemming from the civil war between Nationalist China and the People's Republic of China.

[9] Act of the Second Continental Congress, July 4, 1776, unanimous Declaration of the thirteen united States of America.

[10] See in particular Art. I, §10, noted above, in respect of the limitations on the competence of the constituent states of the federal State. Cf. Art. II §2 (armed forces, appointing ambassadors), Art. II §3 (receiving ambassadors); Art. III §2 (jurisdiction over cases concerning ambassadors and admiralty).

[11] If the Civil War left anything unclear, the Supreme Court afterward drove home the point: 'And when these Articles [of Confederation] were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?' *Texas* v. *White*, 74 U.S. (7 Wall.) 227, 237 (Chase, C.J., 1868).

[12] Philip Zorn, 'The Constitutional Position of the German Emperor', (1899) 14 *Annals of the American Academy of Political and Social Science* 73, 79:
https://www.jstor.org/stable/1009533?seq=1#metadata_info_tab_contents

[13] Thus, Oppenheim in his first edition characterised Prussia as a 'part-sovereign' only: L. Oppenheim, *International Law. A Treatise. Vol. I. Peace* (London, Longmans, Green, and Co., 1905) § 108 p. 155.

southern German states into the North German Confederation was the start of a German Empire. It is, after all, what the German Constitution said[14].

Other examples illustrate the same point. India gained independence in 1947 on terms making clear that the result was a new State under international law[15]. The Principalities that beforehand had governed much of the Subcontinent were amalgamated, most of them voluntarily, into India under domestic law; the international law character of their earlier arrangements with British India (to the extent that those arrangements had had any such character) ceased upon independence[16]. Hyderabad was a hold out, and India did not mince words: it

[14] After a brief period (from 1 January 1871) under a continuator text based closely on the North German Confederation's basic law, the Constitution of the German Empire (*Verfassung des Deutschen Reiches*) entered into force on 4 May 1871. The constituent political units of the Empire described themselves thereby as having 'conclude[d] an eternal alliance' (Preamble), under which Imperial competence was extensive (Art. 4) and the Emperor held responsibility for foreign affairs and defence (Art. 11). Cf. regarding consular affairs Art. 56; the navy Art. 53; military affairs Arts. 57-68; finances Arts. 69-73.

Unsurprisingly, given that each is a different national legal order, not all federal constitutions are the same. The 1871 German constitution left in the hands of the member states the power to conclude treaties on minor matters, a power the member states under the U.S. Constitution, then and now, lack. Oppenheim, writing in 1905, described a world of variegated international forms, many of which did not survive the early 20th century (see, e.g., his characterisations of Siam and Persia as part-States only, of Bulgaria as a State under 'suzerainty', etc). He seems to have seen their extinction coming, for the trend he identified toward consolidation continues to this today. Consolidation, he wrote, is in particular likely where States have invested competence in confederal organs under treaty, because confederations are too weak to satisfy the wish of their organs to exercise statal competence on the international plane. Thus, while even some federal States allow their constituents certain international functions, the trend has been toward the submergence of the constituents, until the 'Federal State assumes in every way the external representation of its member-States, so that, so far as international relations are concerned, the member-States do not make an appearance at all': Oppenheim (1st edn, 1905) § 89 p. 132.

[15] The initial legal instrument establishing independence, as for many countries formerly administered by the United Kingdom, was in the form of an Act of Parliament in the UK, in that case the Indian Independence Act 1947 (18 July 1947) (10 & 11 Geo 6). Art. 1 (The new Dominions) under its ¶ 1 provided that 'two independent Dominions shall be set up in India, to be known respectively as India and Pakistan', that new state of affairs to begin from 15 August 1947. Sec. 6 disapplied all future UK legislation from India. India adopted its own constitution two years later, and this re-affirmed the international law effects of the Independence Act. The Constitution of India (*Bhāratīya Saṃvidhāna*) (adopted 26 November 1949), Art. 1(1), which provides that 'India, that is Bharat, shall be a Union of States', leaves no doubt as to its meaning when read in light of the Preamble and of various operative provisions that follow. The Preamble refers to a 'sovereign... republic' and to 'the unity and integrity of the Nation'. To take an example from the operative provisions, Art. 19(2) refers to 'the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States'—a form of words that identifies India as an international legal person on the same footing as Foreign States. As to powers exclusively of the Union, see Constitution Art. 246 (Union List).

[16] See Indian Independence Act 1947, sec. 6(7)*(b)*.

invaded and brought the recalcitrant Nizam to heel[17]. Even the emergence of the Commonwealth of Australia in 1901, mild in comparison, put the matter in terms that brooked no essential question: six separate colonies one day, a single federal State the next[18]. True, relations between the Mother Country and the new Commonwealth took time completely to clarify; the Statute of Westminster 1931 is sometimes identified as the definitive point of separation[19]. But there was no fundamental ambiguity about what had happened in 1901 as regards Australia itself[20].

Every new constitutional system has its open questions. The questions take time to settle, and new questions arise. Almost always among them have been questions concerning the allocation of competence and implementation of rights within the constitutional order of the State. For example, in India, certain residual rights of the former princes were declared to cease only after more than twenty years of independence had elapsed[21]. Acquired rights of the original peoples of Australia, which seemed for a long time to have little practical effect, took centre stage in that State's legal order after the *Mabo* case[22]. The Commerce Clause of the U.S. Constitution[23], which until the 20th century had received a narrow interpretation, during Franklin Roosevelt's New Deal came to be the foundation

[17] A plea by Hyderabad to the UN Security Council was to no avail. See Security Council Official Records, 3rd year, 357th meeting (16 Sept. 1948) p 11; see also 360th meeting (28 Sept. 1948) pp 3, 5, 8, 11-12 and 382nd meeting (25 Nov. 1948) p 29.

[18] Australian Constitution 1901, of which see in particular sec. 51, setting out the powers of the federal Parliament; and sec. 3 (Proclamation of Commonwealth), whereby 'the people of [the colonies]... shall be united in a federal Commonwealth'.

[19] Statute of Westminster 1931 (23 Geo 5).

[20] There were signs that the six constituents, even as members of the Commonwealth of Australia, had retained certain, if diminished, colonial ties directly to the United Kingdom, which would be to say that some aspect of their legal systems remained outside, or by-passed, the Commonwealth (see, e.g., Statute of Westminster 1931, sec 9 (Saving with respect to States of Australia)). However, to the extent that a lingering colonial relationship existed separately from the Commonwealth, it did not impede the emergence of that body as an independent State, and in time no trace at all of such relationship remained, just as the Commonwealth's own residual ties to the former colonial administering power eventually disappeared. See esp. Australia Act 1986 (Cth) and the corresponding Australia Act 1986 (UK).

[21] See Constitution of India, Art. 363A and Constitution (Twenty-sixth Amendment) Act 1971. Rights of such Princes under pre-independence instruments, however, the Constitution as originally adopted (Art. 363) already had made non-justiciable.

[22] *Mabo* v *Queensland* [Nº 2] (1992), 175 C.L.R. 1, 41-43 (Aust.) (Brennan J), in which see ¶¶ 28, 32 *ff*, esp. ¶ 64.

[23] United States Constitution, Art. I, §8, Cl. 3.

of a vastly expanded federal regulatory apparatus[24]. But the threshold question in all these cases had been answered in clear terms: a system that intended itself to be a State—that is, 'to assume among the Powers of the Earth... separate and equal Station'—said so from the start. States, when it comes to being States for purposes of international law, have, for the most part, done just that. They have said precisely what they mean.

What, then, of the European Union? What does it claim to be, and what do recent transactions concerning Brexit say it is?

[24] The turning point is often identified as *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). A tug-of-war between restrictive and liberal interpretations of the Commerce Clause has periodically intensified, and by turns subsided, with every flux in the jurisprudence affecting the power of the federal government to enact legislation in respect of the national economy. Exemplifying the pull against the liberal interpretation, see *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012): https://supreme.justia.com/cases/federal/us/567/519/

III
The *Sui Generis* European Union

The European Union is not a State, but it is not merely an international organisation. The UN, the African Union, the Organization of American States—to name but a few of the many hundreds of inter-governmental bodies that States have formed under treaties around the world—are international organisations in the classic sense. They have their own rules for internal operation, but the States that made them retain independence as sovereigns under international law. Such organisations embody separate legal orders only to a very limited extent; their rules are restricted mainly to the management of the bureaucracies, small or in the case of the UN not-so-small, that carry out the organisations' functions[25].

The EU, by contrast, contains a legal order that reaches far past mere housekeeping of the organisation. At least to the extent its Member States have conferred the power upon it to do so, the EU regulates, legislates, and adjudicates across a vast swathe of subject matter. Moreover, its powers, which are binding directly upon the Member States, supersede those of national courts and national legislatures[26]. The Member States, for the purposes that they have agreed, are subjects of the EU legal order. How far the Member States have agreed to be subjects of this super-national legal order, and how far they should in future agree, has been a matter of controversy from the start. Put another way, the EU since its beginnings has been influenced by very different ideas about what it should claim to be.

Ambitious founders

The Coal and Steel Community created in 1952 was a common market of six countries in the two products named in its title[27]. The founders of the Community,

[25] Staff and employment regulation within the larger international organisations has been one of the main topics subject to an internal law of the organisations, as to which see C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press, 2005) pp 271-313.

[26] British politicians failed to appreciate at the outset when the UK joined the EEC in 1973 that joining entailed jurisdiction of the ECJ to determine whether UK legislation is in accord with Community law, that power of the Community becoming clear only some 20 years later with the *Factortame* case, as to which see Martin Howe, Richard Aikens, T.D. Grant, *Avoiding the Trap: How to Move on from the Withdrawal Agreement* (Politeia, June 2019) p 5.

[27] See Treaty between the Federal Republic of Germany, the Kingdom of the Belgians, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands instituting the European

however, had a more ambitious design in view. Jean Monnet, often called the 'Father of Europe', is representative of the politicians and technocrats who were instrumental in setting up the Community. Monnet was not interested in coal and steel alone; he was an articulate and talented exponent of a federal European State[28]. Early in his career, in the 1920s, Monnet had served as Deputy Secretary-General of the League of Nations. He quit the League civil service, because he was disappointed in how little power a purely inter-governmental organisation wielded over its Member States. The League was made under an international law agreement, the League Covenant, which formed a common part of the Treaty of Versailles and the other post-war peace treaties[29]. The League had its own rules of procedure and housekeeping, and so in the limited way that all treaty-based international organisations have since, it had a sort of legal order of its own. It remained, however, a treaty body, which is to say an organisation under international law. It had nothing like the legislative competence of a State. Monnet, familiar with this conventional form of international organisation, found it wanting. The League was certainly not a State, nor was it ever going to become one. Monnet and like-minded European federalists after the Second World War were ambitious to create a very different kind of organisation for Europe. 'The European states', Monnet said, 'must constitute themselves into a federation'[30].

The EU has come to embody important elements of what the federalists of the early years hoped it would be.

Federalist ambitions for the EU surface most explicitly in the Preamble to the Treaty on the Functioning of the European Union and Article 1 of the Treaty on European Union. Both announce the goal of the EU to create 'an ever closer union'. The phrase denotes change—a movement toward something. True, it does not say precisely toward *what*. Nor does it say when the EU might get there.

Coal and Steel Community (Treaty of Paris), signed 18 Apr. 1951, entered into force 23 July 1952, expired 23 July 2002: 261 UNTS 140 *ff*.

[28] The biographies are generally complimentary. See, e.g., François Duchêne, *Jean Monnet: the first statesman of interdependence* (New York: Norton, 1994). Monnet's memoirs were published in English translation in 1978: Jean Monnet, *Memoirs* (Richard Mayne, trans.) (London: Collins, 1978).

[29] See, e.g., Treaty of Versailles, Part I, Arts. 1-26, signed 28 June 1919.

[30] See the European Commission's document, *Jean Monnet: the unifying force behind the birth of the European Union*: https://europa.eu/european-union/sites/europaeu/files/docs/body/jean_monnet_en.pdf

However, the goal of a federal European State is visible not just in that one rather evasive phrase. It also is implied by the EU's structures and practices.

The EU has a parliament with directly-elected representatives. Its court system has a highly developed jurisprudence; its General Court has original jurisdiction in certain cases brought by individuals; its Court of Justice adjudicates disputes between Member States, between institutions of the EU, and between those institutions and the Member States. Its executive and regulatory apparatus are highly-developed: the Competition Directorate (part of the EU Commission), for example, has only the U.S. Department of Justice Antitrust Division as a global peer[31]; or, to give another example, the European Medicines Agency (a decentralised EU Agency), matched in global influence only by the U.S. Food and Drug Administration[32]. The EU has a sophisticated diplomatic apparatus, with missions in capitals around the world. It enters into treaties with third parties. In short, the EU, while it refrains from exactly saying so itself, has come more and more to resemble and to act like a full-functioning State with a constitutional order of its own.

Treaty organisation or constitutional order?

Some Member States go so far as to say that this transition from treaty organisation to constitutional order—i.e., from an international organisation made and governed by treaties under international law; to a legal order that supersedes those who made it—was inherent in the plan. Take, for example, France, which addressed the legal character of the EU in recent proceedings before the European Court of Human Rights:

[31] Comparing the two, see European Parliamentary Research Service, *EU and US competition policies. Similar objectives, different approaches* (27 Mar. 2014): http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf

[32] Thus, the large number of works comparing the two agencies' approaches. See, e.g., Gail A. Van Norman MD, 'Drugs and Devices: Comparison of European and U.S. Approval Processes', (August 2016) 1(5) *Journal of the American College of Cardiology* 399-41: https://www.sciencedirect.com/science/article/pii/S2452302X16300638

> 'As the European Court of Justice had always held, the EU legal order was of a *sui generis* nature, being distinct from the international legal order and based on treaties of a constitutional nature'[33].

If this characterisation is right, then the EU is independent from the treaties that created it: those treaties are, at least in some sense, 'distinct from the international legal order' and are, instead, instruments of 'a constitutional nature'. A treaty is an instrument governed by international law[34]; a treaty thus is not distinct from the international legal order but, instead, part of it. An international organisation 'based on treaties' is, accordingly, part of the international legal order as well; the rules that constitute it are international law rules[35]. A State's legal order, by contrast, *is* 'distinct from the international legal order'; a State forms *its* legal order with rules of a 'constitutional nature'.

So how can the EU be at once based on treaties and distinct from international law? A way possibly to reconcile the two assertions here is to accept that the EU is not an international organisation in the usual sense. It is '*sui generis*'—and its treaties are no longer entirely international law instruments: they have somehow

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[33] France's submission in *Al-Dulimi & Montana Management Inc.* v. *Switzerland,* Application No. 5809/08, ECtHR, Judgment (Merits and Just Satisfaction), 21 June 2016) quoted in the Judgment at ¶123.

[34] See Vienna Convention on the Law of Treaties 1969, Art. 2(1)*(a)*: '"Treaty" means an international agreement concluded between States in written form and governed by international law..." Concluded 23 May 1969, entered into force 27 Jan. 1980: 1155 UNTS 333.

[35] Some experts on international organisations, especially the United Nations system, posit the independence of the rules of the organisation from international law. This, however, gives rise to conceptual difficulties, given the treaty-basis of the organisations and the limited functions that the treaty parties (i.e., the Member States) have conferred on them. The better view, which is that taken by the author of the leading English-language work on the topic, is this: 'the internal law [of international organisations] is a branch of and forms part of international law'. Amerasingh, op. cit., at 274. Amerasinghe bases this conclusion on the following observations:

> '[T]he internal law is the constituent treaty of the organization and the power to enact the internal law and its effects are derived from this treaty and its interpretation. The treaty itself is international law and, therefore, generates international law which is also the implied intention behind the treaty. Moreover, because member states act through and in the organs of the organization or ultimately give the organs the authority to act, they are the final source of this branch of the law which is, thus, international law created by states'. Id.

One might add that, to the extent that a treaty-based organisation has an internal law that goes further than that—a law that functions and is formed autonomously—the organisation, to that extent, is no longer an international organisation. Thus, perhaps an even better way to describe the situation is this: what the organisation has the power under its internal rules to do depends on what the Member States permit it to do; so long as that relation holds true, they're still States, and it is not.

been imparted a 'constitutional nature'. That is to say, they have come to be like the constitution of a State.

The term '*sui generis*' is in widespread use when people try describing the EU[36]. International lawyers sometimes remonstrate against use of the term[37], because it is overused and they worry that it fails to say much about the thing to which it is applied. It certainly is used a variety of different ways[38]. One way the term '*sui generis*' has been used is to denote a thing that does not belong wholely to one category or wholely to another, but is, instead, a hybrid[39].

The EU is a hybrid. It is an inter-governmental organisation comprised of sovereigns—meaning, of States that have kept their sovereignty or at least enough of it that they still are States—and a self-contained legal order into which its Members have integrated themselves, at least enough that they have discontinued certain functions that a State normally performs[40]. In other words,

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[36] Jan Klabbers, '*Sui Generis?* The European Union as an International Organization' chapter in Dennis Patterson & Anna Sodersten (eds.), *A Companion to European Union Law and International Law* (Malden, John Wiley & Sons, Ltd., 2016) pp 3-15. As will be seen below, national courts and governments have referred to the EU as *sui generis*. Cf. Dis. Op. Justice Müller, *Organstreit* cases, 26 Feb. 2014, referring to the European Parliament as a 'parliament *sui generis'*. The EU is not the only body to which courts have applied the term. E.g., the EFTA Court has referred to the EEA Agreement as 'an international treaty *sui generis* that contains a distinct legal order of its own'. *Fürstliches Landgerict* v. *A*, EFTA Court, EFTA Case E-1/07 (3 Oct. 2007) ¶ 37.

[37] See, e.g., Klabbers, op cit, pp 3-4.

[38] Thus, to give just a few examples, the Court of Justice has referred to a contract as *sui generis*: *Kergall* v. *Common Assembly of the European Coal and Steel Community*, Judgment, 19 July 1955, Case I/55 p. 156; certain insurance benefits: *Heinze* v. *Landesversicherungsanstalt Rheinprovinz*, Judgment, 16 Nov. 1972, Case 14/72 p. 1107; customs duties: *Schlüter* v. *Hauptzollamt Lörrach*, Judgment, 24 Oct. 1973, Case 9/73 p. 1147. The Advocate-General has referred to legal persons (as distinct from natural persons) as *sui generis*: *Case 15/63*, Opinion, Mr. Advocate-General Lagrange, 5 Nov. 1963, p. 55; to causes of action: *Cases 24 and 34/58*, Opinion, Mr Advocate-General Roemer, 1 Apr. 1960, p. 319.

[39] This is a definition that emerges from consideration of cases involving a variety of legal relations, not just the legal relations that define the EU itself. See, e.g., *MTÜ Liivimaa Lihaveis* v. *Eesti-Läti programme 2007-2013 Seirekomitee*, Case C-562/12, Op. Adv. Gen. Jääskinen, (13 Mar. 2014) (referring to the Monitoring Committee of the Estonia-Latvia Programme, which does not belong to any 'clear cut examples' of EU institution, as '*sui generis*') (36). From the ECtHR, see *Case of Károly Nagy* v. *Hungary*, Application No. 56665/09, 14 Sept. 2017, Dis Op Judge Pinto de Albuquerque (referring to national law systems as *'sui generis'* in which employment matters concerning the clergy are subject to a mixture of civil and religious jurisdiction) (¶¶ 20, 21) and *Case of the Former King of Greece & othrs* v. *Greece*, Application no. 25701/94, 23 Nov. 2000, Dis. Op. Judge Koumantos, joined by Judge Zupančič (using the term to refer to a (putative) form of property in Greek law partaking in aspects both public and private).

[40] There is nothing original, as such, in this characterisation. Numerous academic writers have suggested approximations of it. See, e.g., Cesare P.R. Romano, 'Comment on the UNCLOS Annex VII proceedings in MOX Plant at Sellafield (UK)', (2007) 101 *American Journal of International Law* 171, 175:

'the depth of integration… goes [well] beyond what is usual for an agreement under public international law'[41].

Remarkable enough is this phenomenon that academics have coined the expression 'pooling sovereignty' to refer to it[42]. The EU, as an organisation of 'pooled sovereignty', neither has absorbed all the rights, duties, and powers of the States who made it; nor have those States remained quite independent in the way States remain after joining, say, the UN. By joining the EU, a State is joining a hybrid organisation. The State is submerging itself into the constitutional order of the EU. But it keeps its head above water at the same time. It keeps its sovereign rights under the Treaties, which for purposes of constituting and re-constituting the EU are instruments of international law.

National courts of Member States have been clear, at least at times, that the Member States have not joined a State. The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) in 1974 classically described the law of the European Communities as being

> 'neither a component part of the national legal system nor international law, but form[ing] an independent system of law flowing from an autonomous legal source, for the Community is not a State, especially not a federal State, but a *sui generis* community in the process of

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> 'The European Community/European Union is an entity *sui generis*. It is more than a classic international organization, but not quite a federation of states. Its members have transferred to it more competences than has ever been done for any other international organization, but the states nevertheless retain international legal personality'.

[41] *Furstliches Landgerict* v. *A*, op. cit., comparing the even more integrated EU to the EFTA (citing Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Court Report 95).

[42] An expression, while evocative, with almost no practical utility. The ICJ hasn't used it; the ECtHR hasn't used it; the ECJ, chief judicial organ of the supposed most 'pooled' of all sovereign repositories, hasn't either. It is, however, a popular expression among academics in the fields of international law and international relations, especially among those who like what they think it denotes. A difficulty with it is the imprecision of what it denotes, and the doubtfulness of whether a special turn of phrase is needed to denote what it might. As best as can be discerned, 'pooling sovereignty' means a State agreeing, by treaty, to share or delegate, revocably, to some non-State third entity some of the rights and functions that the State otherwise exercises under international law. But, if that is what it means, then much the better to say *what* precisely the rights and functions are that the State has shared or delegated, and on what terms. Doing so permits greater analytic rigour and, in turn, makes it harder for those entities that are the beneficiaries of 'pooling' to assert ripple effects that aggrandise their powers past those conferred.

> progressive integration, an "interstate institution" within the meaning of Article 24(1) German Constitution'[43].

As did the later EU Treaties, the German Federal Constitutional Court embraced a conception of the Community moving toward something more and more like a State; the court referred to 'the process of progressive integration'. It nevertheless was explicit: this Community was no State.

Twenty years later, and in the aftermath of the Maastricht Treaty, the same court described the EU like this:

> 'The European Union, which sees itself as a union among the peoples of Europe... is a union of democratic States based on the principle of dynamic development'[44].

Taking care not to exaggerate what that 'union' had become, the Court hastened to say that the legal relation created by EU citizenship is not one 'having a closeness comparable to common citizenship of a State'[45]. Again, the legal character of the EU is not quite pinned down; to the extent that it is defined, it is defined as changing ('dynamic development'). But German jurists (at least up to 1993) still backed off from attributing to the union a 'closeness' that would make it a State.

What would the EU look like, if the 'ever closer Union' became complete? If 'ever closer' became complete, the Treaties would no longer be treaties in the international law sense of the term. They would be a constitution. As a constitution, they would define a legal order that functions on its own terms, separately from the international legal order, in respect of all those who are subject to it.

Already, as recalled above, the EU functions like a State under a constitution when it comes to its legislative apparatus, its courts, etc. This is one face of the

[43] *Internazionale Handelgesellschaft mbH* v. *Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, reprinted in English translation, 93 *International Law Reports* 362, 365.
[44] *Maastricht Treaty Constitutionality Case*, Cases Nos 2 BvR 2132 and 2159/92, *Bundesverfassungsgericht*, 12 Oct. 1993: reprinted in English translation, 98 *International Law Reports* 223.
[45] Id.

hybrid character of the 'ever closer Union'. However, as that Union stands today, the other face is still visible. The EU is still a treaty organisation—when it comes to constituting itself and re-constituting itself. That is to say, the EU is not a self-contained legal order independent or separate from international law, as far as concerns the accession of States as Members.

Accession and the EU's still-visible treaty face

Accession of new members is where the treaty face of the EU has remained most visible. The constitutive function—the function by which it is determined what States are constituents of the body—is, for the EU, most visibly subject to international law at this, the front end of a State's relations with the EU. A State does not become a Member by EU law act. To be sure, the EU has its internal procedures and must carry out EU law acts before it is ready to commence an accession; and the EU has rules concerning how the EU concludes treaties with States under international law. But if EU law acts were the only acts to take place, then there would be no accession. There couldn't be, because for accession to take place, both the EU and the applicant State must act. For them both to act, then both must act under the Treaties—and under the Treaties as international law instruments, not, *pace* the French Republic, 'treaties of a constitutional nature'. If you are a State, and even if it is a State that you are joining, instead of a *sui generis* international organisation, the act of joining is an international law act. So it must be, because otherwise 'joining' would be a unilateral act of absorption by the State and thus not joining at all; we call that act annexation, and without an international agreement it is illegal under modern international law[46].

The legal character of accession to the EU as a treaty act is evident in the relevant treaty provision, Article 49 of the Treaty on European Union. Under Article 49, second paragraph,

> '[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the

[46] This is why the Russian Federation in 2014 carried out the (fictive) exercise of a 'Declaration of Independence' of Crimea, followed by a 'treaty' between that 'State' and the Russian Federation. The names Russia used practically nobody else has accepted; and so they didn't change the reality: it was an invasion followed by unilateral absorption.

> subject of an agreement between the Member States and the applicant State'.

At its founding, the Community from which the 'Union' eventually emerged was undoubtedly created by an international law act; otherwise, it sprang out of nothing, and nobody (not even Jean Monnet) said that that is what happened. Adjusting the treaties that accomplished that founding, likewise, entails action at the international law level. This, too, is evident in the Treaty. Article 49 requires separate ratification by each of the 'contracting States in accordance with their respective constitutional requirements'. The States are 'contracting', which means in context they are acting not as Member States under EU law, but as they were *ab initio*—independent sovereigns free to determine their relation to this entity that they created.

Consider, further, whom the 'agreement' to which Article 49 TEU refers is between: this is 'an agreement between the Member States and the *applicant* State' (emphasis added). The newcomer, at the moment of the conclusion of the agreement, is a stranger to the Member States. It therefore, presumptively, is operating not on their terms, but on the terms common to them all. It is acting under international law.

Another way to look at it is to ask what other law might the applicant be acting under? As a third party, the applicant is doing either one of two things:

> *(i)* it is agreeing to hand over certain powers to another entity under terms of that entity's own internal law;
> or
> *(ii)* it is agreeing to hand over the same powers to that entity under terms of international law.

States on many occasions have done something like the latter. Treaty bodies since the League of Nations or even earlier[47] have been created by States entrusting to

[47] It is debated which was the first genuine 'sovereignty pooling' international organisation under treaty. A popular candidate is the Danube River Commission, established under the General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey (30 Mar. 1856) by which the Crimean War was brought to a close. Rüdiger Wolfrum, in 'International Administrative Unions', *Max Planck Encyclopedia*

them defined functions under international law. Those cases involve(d) much more limited functions than States have handed over to the EU, but the concept is analogous.

Only infrequently have States done the former. To do that—to give away some part of a State's sovereignty under the law of the entity to which the State is giving it—is an extraordinary act. This is the act, which extended far enough, means consenting to one's disappearance as a State and absorption into another. It means transferring one's relations from the international legal order—under which one enjoys independence because one is a State—to the internal legal order of the other party—under which one is a subject under the terms that that legal order sets. To establish that *that* is what a State is doing requires expression by the State that that is what it intends to do[48]. As a State, you don't conclude a treaty under any law other than international law unless you re-define the term 'treaty'.[49] There is nothing in the EU Treaties, or in practice, to support the proposition that the acceding States have done that. The acceding States have acceded under the EU Treaties in their character as instruments of international law, not EU law, and it is their intention that those treaties remain just that: international law instruments.

EU law sets many of the terms of accession, not least of all requiring adherence to the values named in Article 2 TEU. Those are terms limiting what the EU may

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of Public International Law (Oxford University Press, September 2006) (¶ 10), says the first was *L'Administration générale de l'octroi de navigation du Rhin*.

[48] That express consent is needed so to curtail sovereign discretion is a basic maxim of international law. People and institutions who favour the 'progressive development' of international law into fields heretofore subject to sovereign discretion sometimes say that the maxim no longer holds. States, in their overwhelming majority, assume that it does. Its *locus classicus*, the *Lotus* case, thus is salient still today:

> 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed'.

Case of the S.S. 'Lotus', Judgment, 7 Sept. 1927, Permanent Court of International Justice, Ser. A No. 10 p 18. Cf. compulsory and binding jurisdiction, such as under the Statute of the ICJ, which is established only by 'an unequivocal indication of the desire of [the] State to accept... jurisdiction in a voluntary and indisputable manner': *Armed Activities in the Territory of the Congo (New Application:2002) (Democratic Republic of the Congo* v. *Rwanda),* Jurisdiction and Admissibility, Judgment, 3 Feb. 2006, ICJ Rep. 2006 p. 6, 18 (¶ 21).

[49] See the definition, n. 34 above.

do in the accession process; they limit what States the EU may invite to accede. But deciding to accept the invitation is not an EU law act. It is a sovereign act. It takes place under international law. And it concedes to the EU only the powers indicated in the Treaties. Crucially, those conceded powers do *not* include the power to take them back. *That* power remains in the hands of each Member.

The continuing character of the EU Treaties as instruments of international law thus is fundamental, but it is increasingly overlooked in the EU itself and by others dealing with the EU. British politicians, diplomats, and commentators in particular, when speaking about Brexit, at times have spoken injudiciously about EU law as if it is from that law that the right of exit springs. Talking about Brexit as if it is essentially about EU law is not just mistaken as a formal matter; it carries serious risks for the future relations of the UK to the EU. I will turn to these matters below (Part IV). First, however, having here considered the international law character of joining the EU, some brief observations are in order concerning the other side of the constitutive function—namely, how international law, not EU law, governs *leaving* the EU—because we need to keep that choice of law straight if we are to keep from talking as though the EU were a State—and if we are to get Brexit right.

IV
Leaving States v Leaving Treaties

If you're a territory that belongs to a State, you leave the State under the terms set by that State's law. By contrast, the members of a treaty organisation leave—as they entered—under international law. Member States might agree to procedures to regularise how one leaves. They can agree like that under the treaties that constituted the organisation in the first place; or they can agree *ad hoc*. But the legality of leaving is not a matter internal to the organisation. Leaving is not subject to a law of the organisation separate from international law. In this way, leaving a State and leaving an international organisation are fundamentally different.

As the preceding section recalled (II), when it comes to its own formation—the making of the EU and the configuring and re-configuring of its membership through accessions—the EU is created and sustained by international treaties. In that characteristic, it is an international organisation, not a State. The same holds for leaving the EU. Leaving the EU is withdrawing from a treaty-based organisation under international law. This elementary relation, as the next section will catalogue (IV), is one that has been badly confused during Brexit. And, so, before we get back to leaving the EU, let's clarify what it would be like, if, instead, the UK were leaving a State.

Leaving a state - Subject to state's law

Different States have taken different approaches to the exit of territories that are their legal subjects. There are States with constitutions that permit a member to leave. The old USSR Constitution, Article 70, did. In practice, Article 70 had no real life; nobody left, and nobody thought you could leave. You had a right to leave, but the right was a lawyer's formality. In contrast, some States have no such provision but have been ready to work out arrangements for territories that wish to leave. The United Kingdom has perhaps the most comprehensive list of examples.

When colonies sought to leave it, the United Kingdom, adopted Independence Acts, like that of 18 July 1947 for India. But either way—whether the State's constitution says you may leave, or whether that matter is open to future negotiation and agreement—you are subject to the State's constitution—to its

internal legal order—and thus whether you leave, and how you leave, is not for you to say. You are not a sovereign under international law. You are a subject of the State.

If no rule in the State's general law lets you leave, and if the State refuses to adopt a purpose-made leaving act (like the Independence Acts), then your choices are limited to (1) stay or (2) leave in violation of the State's law. Kosovo, in 2008, chose the latter[50]. So, in 1776, did the United States[51]. Either way you choose, your decision is a matter of the State's law. International law does not characterise your choice.

The International Court of Justice, in the *Kosovo* Advisory Opinion (2010), was clear that international law says nothing to prohibit declarations of independence;[52] nor does it permit them. International law is silent as to such acts. The United Kingdom expounded more fully on the act that often follows—the act of secession, by which a territory in fact separates from a State:

> 'It is not surprising that existing States have generally felt an aversion to secession... [A]ttempts at secession may well... be contrary to the municipal law of the State concerned. The Declaration of Independence of 4 July 1776 was (at the time) considered an act of treason under British law. But, from the standpoint of international law there was, and is, no prohibition *per se* of secession...

[50] See Kosovo Declaration of Independence (17 Feb. 2008): https://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf. As to the declaration by Serbia's National Assembly that Kosovo's independence was illegal and void, see Security Council proceedings, Statement of President Tadić (Serbia), S/PV.5839 p. 5 col. 1 (18 Feb. 2008).

[51] There was one other entity that separated unilaterally from Great Britain. This was Southern Rhodesia, which adopted a unilateral declaration of independence on 11 Nov. 1965 to establish *de facto* separation from Britain in violation of UK law. Exceptionally, this separation was also a violation of international law, the United Nations Security Council condemning the racist minority régime and its independence and calling on all States to isolate and refrain from recognising it. See SC resol 216 (1965) (12 Nov. 1965); SC resol 217 (1965) (20 Nov. 1965). The Proclamation of Independence in Ireland on 14 Apr. 1916 is sometimes described as a further example of a unilateral separation from the UK, but the Irish Free State came to be established, as an effective fact on the ground, only in 1922 under terms of an Anglo-Irish Treaty that had been concluded on 6 Dec. 1921, for which see https://www.difp.ie/docs/1921/Anglo-Irish-Treaty/214.htm

[52] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, International Court of Justice, Advisory Opinion, 22 July 2010, ICJ Rep 2010 p. 403, 438 (¶ 84).

> [I]nternational law favours the territorial integrity of States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any "right to secede". But neither, in general, does it prohibit secession or separation, or guarantee the unity of predecessor State against internal movements leading to separation or independence with the support of the peoples concerned'[53].

So, if your territory is part of a State, then you find no impediment under international law against leaving. But nor do you find support. It is the law of the State that applies. Your act of separation is an act under the State's law, either in accordance or in breach.[54]

The Supreme Court of Canada, considering a possible future secession of Quebec, reached a similar conclusion, though with somewhat different emphasis. The Supreme Court concluded that there is either no international law right of unilateral secession—or only a right that is limited to the most extreme cases, such as those where the incumbent State perpetrated genocide or ethnic cleansing against a group and leaving is that group's only realistic choice[55]. Other than such extreme cases, 'the legality of unilateral secession must be evaluated, at least in the first instance', said the Supreme Court, 'from the perspective of the domestic legal order of the state from which the unit seeks to withdraw'[56].

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[53] *Kosovo* ICJ Advisory Proceedings, Written Statement of the United Kingdom (17 Apr. 2009), pp 87, 93 (¶¶ 5.13, 5.33).

[54] A qualification is in order in view of the development of the law of self-determination. Modern international law—especially from 1960 onward—came to posit that territories subject to colonial rule are a special case. The UN General Assembly rejected claims (in particular by Spain and Portugal) that certain colonies were integral parts of the colonial power's territory. Instead, these colonies were to be treated as possessing a right—under international law—to separate from the colonial power, irrespective of that power's domestic law. See GA resol 1514(XV) (Declaration on the granting of independence to colonial countries and peoples), 14 Dec. 1960; GA resol 1541(XV) (Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter), 15 Dec. 1960; GA resol 1542(XV) (Transmission of information under Article 73 e of the Charter), 15 Dec 1960; GA resol 1699 (XVI) (Non-compliance of the Government of Portugal with Chapter XI of the Charter and with General Assembly resolution 1542(XV)), 19 Dec. 1961. Self-determination, in the sense of the concept thus developed, has no such accepted application in regard to territories that have been integrated into States and are not of the classic overseas colonial type.

[55] See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ¶¶ 134-35.

[56] Id. ¶ 83.

A Member State exiting the EU does not face the dilemma that a territory is presented when it seeks to leave a State. The Member State is not subject to EU law in respect of the constitutive decision whether to accept an invitation to join the EU; nor is it subject to EU law in respect of the decision to leave. To paraphrase the Canadian Supreme Court, exit is ***not*** to be 'evaluated... from the perspective of the [internal] legal order of the [treaty organisation] from which the unit seeks to withdraw'. In its actual statement, the Supreme Court was talking about leaving a State. The State's internal legal order evaluates that act. To talk that way about leaving the EU, however, would confuse the treaty organisation with a State. Thus, here, the paraphrase, prefaced by a negation: the retentive power of the internal legal order of a State over its subjects finds no equivalent in the internal legal order of a treaty organisation in respect of its Members. The internal rules of the organisation—even when they have grown to such scope and power as the internal rules of the EU—are still treaty rules under international law as far as concerns entering and leaving the organisation. The Member State does not act under EU law when it exits, and so to speak of compliance with that law in connection with exit is a *non sequitur*. To exit from the EU, unlike to exit from a State, is to act under international law.

Leaving an international organisation - Subject to international law

Indeed, the relevant provision in the EU Treaties reflects this, the international law character of leaving.

The relevant provision, now famous, is Article 50 of the Treaty on European Union (TEU). As is typical of provisions concerning termination of a treaty, this is included as part of the Final Provisions of the treaty. Paragraph 1 of Article 50 states that...

> '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.

In short, the State acts as a sovereign. It acts under its own rules, which is to say under rules limited only by its discretion and by international law.

Paragraph 2 of Article 50, to which I shall return below, calls for the State with the intention to withdraw to notify the European Council of that intention—i.e to invoke Article 50. Paragraph 2 suggests a preference for the conclusion of a

further agreement prior to the effective date of withdrawal but does not require it. It requires the EU to negotiate about a possible further agreement. The precise content of an obligation to negotiate is determined by reference to the particular instrument that stipulates it[57]; such an obligation is one of best efforts, not of result[58]; and in this instance the obligation to negotiate only extends to one party[59]. All that is required of the other party, the exiting State, all that Article 50 stipulates, is notification—and a two-year wait.

The wait is stipulated in paragraph 3, which provides for the timing of the effective date of exit:

> '3. The [EU] Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'.

Withdrawal, accordingly, happens two years after invocation of Article 50. Those are the agreed terms. It is open to the parties to adopt a further agreement—a 'withdrawal agreement'–under which they may adopt the same date for withdrawal as provided by the two-year stipulation; and open to them to make the exit date earlier or later. The flexibility in these terms is consistent with the international character of the transaction concerned: the EU and the intending

[57] *Affaire du Lac Lanoux (Spain, France)*, Award, 16 Nov. 1957, 12 Reports of International Arbitral Awards 30-307 (¶ 11).

[58] A distinction that the EU recognises in its international relations: see, e.g., Sixth Review Conference of the States Parties to the Biological Weapons Convention, BWC/CONF.VI/WP.2, 'Biosafety and Biosecurity', paper submitted by Germany on behalf of the European Union, p. 1 (¶ 4) (20 Oct. 2006). Cf. *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 15 Oct. 1931, PCIJ Ser. A/B No. 42 at p. 116; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Judgment, 10 Oct. 2002, ICJ Rep. 2002 p. 303, 424 (¶ 244); *Guyana* v. *Suriname*, Award, 17 Sept. 2007, UNCLOS Annex VII/PCA p. 153 (¶ 461); *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS, Judgment, 23 Sept. 2017, ITLOS Reports 2017, pp. 170-171 (¶ 627).

[59] Paragraph 2 stipulates that the 'EU shall negotiate and conclude an agreement with that State'. If one were to interpret the provision to mean that there can be no exit unless a further agreement is concluded, then one would deprive of effect paragraph 3, which provides for exit with no further agreement. If one were to interpret it to mean that the 'EU *and the exiting State* shall negotiate and conclude', then one would ignore that the text, as adopted, attaches the mandatory verb 'shall' only to the EU. It should also be said that 'cumulative' practice does not combine with paragraph 2 to impose an obligation to negotiate on the UK: see *Obligation to Negotiate Access to the Pacific Oceans (Bolivia* v. *Chile)*, ICJ, Judgment, 1 Oct. 2018, p. 54 (¶ 174).

exiting State are two international legal persons functioning under international law; they have all the options such legal persons enjoy in setting the terms of their relations.

As to the intending exiting State acting on its own, its options as an international legal person include that of not being an EU Member State. In other words, it is a sovereign and determines its own relations on the international plane—not least of all, relations that constitute commitments as regards the conduct of is domestic policy[60].

European federalists paint Article 50 as though it were a grant of permission. They portray it as a concession by the EU to a Member State, under which the latter has a license to withdraw. It is nothing of the sort. Article 50 is a re-statement in treaty form of a right that exists, whether or not a State is a member: every State has the right not to be in the EU. The EU Treaties supply no evidence that accession to the EU causes that right to disappear for the acceding State. From the wording and context, that this is the legal character of Article 50 is clear. It is further clear when one considers what the acceding State would relinquish, if it gave up the right to withdraw: it would cease to be a State. If withdrawal requires agreement with the EU, then the EU legal order has subsumed the Member State as the legal order of a State does constituents of the State. International law would cease to be the governing law of the process. The EU's internal law—operating like the law of a State—would govern.

The EU is, as yet, not a State, and withdrawal is, as yet, still an option open to a Member State *ipso facto* and without special agreement. Withdrawal is, in short, still an act of a sovereign under international law. Article 50 specifies procedures for an orderly withdrawal. Those are the terms that set the withdrawal date at the two-year mark following invocation of Article 50, or at what date the parties agree. The general law of treaties functions just like that: withdrawal from a treaty is in the manner the treaty specifies or as the parties agree[61].

[60] It is upon this freedom of action that the ICJ placed so much emphasis in the *Nicaragua* case: *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Judgment, 27 June 1986, ICJ Rep 1986 p 14, 130-131 (¶¶ 257-259).

[61] Vienna Convention on the Law of Treaties 1969, Art. 54 (Termination of or Withdrawal from a Treaty Under Its Provisions Or By Consent of the Parties). Cf. the similar terms in Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986 (adopted 21 Mar. 1986; not in force), Art. 54.

What if the treaty says nothing and the parties don't agree? What if, hypothetically, Article 50 did not stipulate a procedure for exit? In the absence of such specification as Article 50 provides, the right of withdrawal would be assumed, because the nature of the treaty in question requires it[62]. This is a treaty under which States have assigned vast sovereign powers to a third party. A State may assign practically all its regulatory, legislative, and even foreign relations powers to another and remain a State—assuming that it can take them back. If it can't take them back, then the treaty is no longer a treaty—it is a constitution; and the State is no longer a State—it is a subject of that constitution. Assigning the powers that the UK did to the EU, but without having kept the power to retrieve them, would have been inconsistent with still being a State[63]. No State makes such assignment without being very (very) clear that that is what it is doing[64]. And no State did that when joining the EU; most, if not all, have been expressly clear that they are still States. Accordingly, the treaty act of joining the EU necessarily entails the continuing character of the treaty as an international law instrument—and the right to withdraw. To the extent that that treaty act stipulates a procedure for withdrawal (as Article 50 in fact does), the procedure does not depend upon consent or judgment of the EU: otherwise, the powers the Member conceded upon joining no longer would be its own, no longer retrievable as of right and, thus, the Member no longer would be a State.

Westminster in and around the date for withdrawal of the UK from the EU, 29 March 2019, gave the impression, contrary to the actual legal position, that Brexit

[62] See Vienna Convention on the Law of Treaties 1969, Art. 56(1)*(b)*. Cf. the similar terms in Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, Art. 56(1)*(b)*.

[63] The right to retrieve sovereign competences under a treaty was precisely the issue that had concerned the Council of Europe (the Strasbourg body, not the EU Council) when it entertained the application for membership of the Principality of Monaco. Monaco, under a treaty of 1918, had very close ties to France. Substantial sovereign competences of Monaco were entrusted to the French government, even regarding matters as sensitive as the selection of the Prince who serves as head of State. The CoE was concerned that Monaco might not, in truth, be an independent State, because it was unclear under the 1918 treaty how, if at all, Monaco could ever recover from France the competences it had entrusted. The matter was resolved by adoption of a new treaty containing modern terms that avoid the earlier implication of French protectorate: see Treaty of 24 Oct. 2002, as discussed in PACE Doc. 10138, Opinion, Committee on Legal Affairs and Human Rights (Mr Andrea Manzella, Rapporteur) (14 Apr. 2004) ¶¶ 7-13. The contrasting case is a true Protectorate, of the kind which, in the heyday of colonial empires, left the Protected State no option to become sovereign again, unless the Protector agreed. See, e.g, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921,* Advisory Opinion, PCIJ 1923 Ser. B No. 4 (7 Feb.) ¶¶ 19, 53.

[64] See above n. 48.

depends on EU consent. Let's turn now to consider how the transactions surrounding Brexit came to make leaving the EU sound more like leaving a State than withdrawing from a treaty.

V
UK Muddle – Leaving the EU or Leaving a State?
Entitlement or Supplicancy?

In at least four ways, the manner in which Brexit has been handled to date makes leaving the EU more like leaving a State than a treaty organisation. First, the insistence that a withdrawal agreement is a prerequisite to orderly withdrawal trivialises the terms of Article 50, and, in turn, tends to imbue the EU Treaties with a constitutional nature they so far have lacked. Second, to speak of exiting as a process 'under EU law' compounds that mistake: exit is an international law act, not an EU law act. Third, transactions between the UK and the EU Council, especially in March when Theresa May postponed Brexit, were cast as internal procedures of the EU, when to achieve the effect May intended, they had to take place on the international plane. Finally, postponing Brexit, by adding uncertainties and hesitations over a post-EU future, imparted more gravity to EU exit—and thus to EU membership—than deserved. Each of these merits a brief word.

The Withdrawal Agreement - Unnecessary in law, untested by precedent, uncertain in operation

Reading the political news, and the communications between the UK Government and the EU since 2016, the impression is given that Brexit cannot take place without a withdrawal agreement. In particular, parliamentary drama over the Withdrawal Act dominated the news for months in the first part of 2019. However, no Member State has ever tied itself to the EU in a way that requires the EU's agreement to undo. As the preceding section of this Briefing has emphasised (Part III—pp. 20-27), leaving the EU is done under international law as a matter of sovereign right. It is an act that is open to a Member State as an exercise of the State's independence on the international plane. Article 50 of the Treaty on European Union reflects—does not create—this right. A Member State needs no withdrawal agreement to exit.

It is true that, under Article 50, paragraphs 2 and 3, an option is available to make exit a process rather than an event. If a Member and the EU both wish to pursue the option, then they may carry out, as far as they agree, a partial or stepwise disengagement. An agreement between the Member and the EU serves, in that situation, to implement the Member State's exit right on substitute terms that, by

the agreement, they have specified. Pursuing the option of such a process, by its nature, is just that: optional. If the Member State prefers, it exits simply through the invocation of its right to do so.

The experience of Brexit suggests that there are advantages to implementing the exit right as such, rather than pursuing a process under substitute terms. One advantage is the avoidance of delay. The circumstance, in retrospect, seems readily predictable that the exiting Member and the EU find that they do not agree on the substitute terms and, so, end up taking considerable time trying to agree, or come to a standstill if they can't.

Another advantage to exit *simpliciter* is that it avoids the uncertainty that will arise over the meaning of substitute terms, if it ever came to pass that such terms were agreed. Whether one favours the EU or not, EU law is a familiar quantity. Disputes as to particular provisions of EU law, when they arise, are addressed through well-known mechanisms of dispute settlement. A State that embarks instead on a process of exit fashioned *ad hoc* is by definition placing itself under a new set of rules—the substitute terms. Uncertainty is inherent in new rules. New rules of high complexity (see the 599-page Withdrawal Agreement drawn up in November 2018), and the interactions of which with national law, EU law, and international law are untested, present particularly vexing uncertainties. Add to that the unknown ways new dispute settlement procedures will function (see the mix of ECJ and arbitral jurisdictions stipulated in the Withdrawal Agreement[65]), and a future under an Article 50 agreement is *terra incognita.* This

[65] The interaction between the two institutions—the new arbitral institution and the existing ECJ—is untested but would not be the only unknown quantity. Also novel would be the relation of the ECJ to the UK-*qua*-third-State. The subjection of a third State to the jurisdiction of one party's judicial machinery is extremely unusual in international law, as to which see Howe et al (June 2019) n. 26 above at pp 10-11, 22.

Every given legal order has its own personnel, its own professional cadres. Their job is to function within their order, not to transcend it. It is the job of EU lawyers—their professional function and responsibility—to address the EU as an autonomous legal order, a body that functions on its own terms. This is a further powerful reason that EU lawyers, like those who sit on the ECJ, should not have jurisdiction to bind the UK in respect of the UK's future relations with the EU. The contrast between the public international lawyers' view and the EU lawyers' has been noted before:

> 'Public international lawyers generally presume the application of public international law and the character of the EU as an international organisation (i.e. focusing on its formal sources [the Treaties as international law instruments]), while EU lawyers tend to adopt the perspective of the EU as an autonomous legal order or even a self-contained regime, stressing its *sui generis* nature…'

is the legal situation under a process-based approach to exit. It is not obvious that that approach leads to a more certain outcome than the simple application of the exiting State's right of exit[66].

Of course, the future relations between the UK and the EU will involve international agreements. But to say that Brexit itself takes agreement between the two parties, UK and EU, is fundamentally mistaken. It conflates exit itself—exit *simpliciter*—and whatever particular legal relationships might exist post-Brexit between the parties. Panicked cries about allegedly fatal consequences of 'no deal' Brexit are distracting, because they address an imagined future situation that will not arise—a situation in which there are no international law instruments in force to regulate UK-EU relations[67]. And they are misleading, because they misconstrue what the EU is.

Katja Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation' chapter in *Research Handbook on the Theory and History of International Law* Alexander Orakhelashvili, ed. (Edward Elgar, 2011) 268, 270. Cf. Jan Klabbers, 'Straddling the Fence: The EU and International Law' chapter in Damian Chalmers & Anthony Arnull (eds), *The Oxford Handbook of European Law* (2015) 53: 'The relationship of EU with international law—public international law, that is—has always been highly ambivalent'.

[66] Another uncertainty that has been identified is that which would arise in regard to future trade agreements with non-EU parties. The extension of Brexit into a process, including a long transition period, would delay such agreements and, thus, place markets in doubt as to the future applicable rules. See Martin Howe QC, *The Cost of Transition. Few Gains, Much Pain?* (Politeia, 2017) p. 6: http://www.politeia.co.uk/wp-content/Politeia%20Documents/2017/Oct%20-%20The%20Cost%20of%20Transition/M%20Howe%2C%20'The%20Cost%20of%20Transition%20-%20Few%20Gains%2C%20Much%20Pain'.pdf

[67] The rules of the WTO, in particular, are a detailed and long-tested system; it is under that system that the UK already conducts most of its trade with the rest of the world. See John Redwood, *How to Take Back Control. Trading Globally Through the WTO* (Politeia, 2018) p 4 and *passim*: http://www.politeia.co.uk/wp-content/Politeia%20Documents/2018/John%20Redwood/'How%20to%20Take%20Back%20Control,%20Trading%20Globally%20Through%20the%20WTO'.pdf. The UK has some 100 Bilateral Investment Treaties (BITs). For a list, see ICSID database: https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a3; and for comment see David Collins, add *2019 title 2nd edn. and Negotiating Brexit. The Legal Basis for EU & Global Trade* (Politeia, 2018) p. 13: http://www.politeia.co.uk/wp-content/Politeia%20Documents/2018/Collins%2C%20Negotiating%20Brexit%2C%204th%20Edition/Collins%2C%20'Negotiating%20Brexit'%20-%204th%20Edition%20-%20Final.pdf. As to international law instruments that will enter into force post-Brexit for purposes of managing various practical issues in UK-EU relations, such as aircraft landing rights, driving permits for freight haulers, etc., see Howe et al (June 2019) n. 26 above at p. 26. As to the legal framework for financial services, see generally Barnabas Reynolds, *The Art of the No Deal. How Best to Navigate Brexit for Financial Services* (Politeia, 2017), especially the subsections thereof entitled 'The "Cliff Edge" Fallacy: Contrary to EU and International Law' (pp 9-10) and 'The Cliff Edge of the Mind—International Law: Property Rights and Contractual Rights are Protected' (pp 21-23):

Exiting 'under EU law'- Mistaken in law, misconceived in practice

Politicians and their legal advisers have talked about leaving the EU 'under EU law'. In Section (III) above, I've suggested why talking this way about Brexit is misleading: to talk about leaving the EU as an EU law function is to imply that the EU is a self-contained legal order for omnibus purposes, including its own creation and continuance. This, too, like insisting that agreement is a prerequisite of exit, implies, in turn, that the EU is a State.

Addressing Brexit in this manner has not been confined to political leaders. Theresa May's negotiations in Brussels with the European Council about extending the Brexit Date will be touched on later (pp 38-41). But, for now, consider what Lord Pannick had to say in the first week of April 2019. He suggested that the Bill before Parliament at that time 'will send the Prime Minister into the Brussels meeting overdressed with legal requirements'.[68] The 'overdressed... legal requirements' to which he was referring were the UK's constitutional procedures for the domestic ratification of a major change to the UK's international law obligations—namely, an extension of the UK's membership in the EU. He didn't like that the Prime Minister would have to negotiate with the European Council with such procedures as a constraint. Thus 'overdressed', the Prime Minister would 'have to return to the House of Commons—presumably the next day, given the urgency of the matter'. And why did Lord Pannick think returning to the House of Commons would be a problem? The problem, he said, would be that 'meanwhile the European Council will not be sitting in Brussels waiting for the deliberations of the House of Commons; its members will all have gone home because the European Council meeting ends on Wednesday night'.

For Lord Pannick the matter seemed to be about the internal constitutional rules of the EU. He spoke of those rules as if they are a fixed constraint in the process of exiting the EU. By contrast, he suggested that the internal constitutional rules of the exiting State are dispensable—and, in the circumstances, it would follow from Lord Pannick's view, one had better dispense with them. The two rules

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http://www.politeia.co.uk/wp-content/Politeia%20Documents/2017/The%20Art%20of%20the%20No%20Deal/Reynolds,%20Barnabas%20'The%20Art%20of%20the%20No%20Deal%20-%20How%20Best%20to%20Navigate%20Brexit%20for%20Financial%20Services'.pdf

[68] House of Lords Hansard, 04 April 2019, vol 797 col 337 (European Union (Withdrawal) (No. 5) Bill.

systems, thus, on Lord Pannick's understanding, are not on an equal footing: the UK must treat its system as subordinate to the other, including to the other's timetable. In this view, even trivial engagements of the superior power must be accommodated by the subordinate.

There is nothing wrong in principle with Lord Pannick's understanding—*if one applies it to a constituent territory* that seeks to leave a State. He would treat the exiting territory as a subject of a superior legal order and, thus, as obliged to work within the rules comprising that order. It is true that the UK, as a Member State, agreed to subordinate itself in many ways to decisions reached under the rules of the EU legal order. That is the bargain entailed by membership in the EU. However, the bargain has never been that the Member States subsume themselves as international actors under the Treaties that constituted their membership. That is to say, the Member States did not agree to join a State. When it comes to membership *ab initio* and to the re-constituting of the EU that results when one or more States withdraw, the legal relations are not a matter of EU law. They are a matter of general international law. Under *that* law, the exiting State and the EU are equals. The UK didn't have to go to the Council in March at all, for there's no law requiring an agreement to exercise the right to leave. If the UK did choose to go there, then it went under international, not EU, law.

Mark Elliott, an eminent public lawyer and Legal Adviser to the House of Lords Constitution Committee[69], of which Lord Pannick is a Member (Crossbench), also approaches Brexit as an EU law matter. Professor Elliott, in a distinguished contribution to the wider legal discussion entitled *Extending Article 50: Separating myth from legal reality* (23 March 2019), contends that 'That process [i.e., the UK's departure from the EU] is governed by EU law and, in particular, Article 50 TEU'[70] and '[The UK can "take back control"] only in accordance with the law—in particular, and primarily, EU law'[71]. The analysis includes a

[69] https://www.law.cam.ac.uk/people/academic/mc-elliott/25

[70] Mark Elliott, *Extending Article 50* (23 Mar. 2019): https://publiclawforeveryone.com/2019/03/23/extending-article-50-separating-myth-and-legal-reality/

[71] Id. The assertion appears again here (the 'UK will leave the European Union under EU law'): Elliott, *Did the UK Government act unlawfully by extending Article 50?* (26 Mar. 2019): https://publiclawforeveryone.com/2019/03/26/did-the-uk-government-act-unlawfully-by-extending-article-50/ ; and repeatedly here ('[a]s a matter of EU law, the UK will, by default, leave the EU on a no-deal basis…'; 'a no-deal departure arises by operation of EU law…'; 'the timescale for the UK's departure from the EU as determined by EU law…'; 'no possibility in EU law of seeking an extension to the Article 50 period…'): Elliott,

heading for EU law and one for UK law, but none for international law. The omission leads Professor Elliott to the same inference as Lord Pannick: both see the EU as a self-contained legal order, superior to the Member States, a legal order which controls the terms of its own making and re-making, rather than a treaty organisation made, and as the case may be re-made, by the States Parties to the treaty, and thus itself subject to international law.

Professor Elliott suggests that advocates of Brexit dislike the EU because 'the EU is a *rules-based international order* that limits domestic freedom of action, up to and including the enactment of primary legislation' (emphasis added)[72]. Aside from any questions of like/dislike, the statement appears to accept that international law matters, but Professor Elliott does not follow through to the logical conclusion: an international organisation, as a body created under international law, changes under international law. Changes in the States which are the EU's Members are international law acts. As such, such changes are not acts that can be understood as exclusively subject to the internal rules of the EU. If that were the case, then the EU would no longer be an international rules-based organisation. It would be a State that sets its own terms, including the terms for exit.

Nobody contests that the EU is a rules-based organisation whose Members have consented to certain limits on their own action. The limiting powers of the EU upon 'domestic freedom of action' may go 'up to and including the enactment of primary legislation'-- but they do not go as far as removing the *international* freedom of action of States as regards constituting and re-constituting the EU. Unless the EU is a State, its constituents retain this freedom on the international plane. At the very least, each State decides whether or not to accept an invitation to be a Member and whether or not a Member to remain. Professor Elliott's description of the EU as a 'rules-based international order' is hard to reconcile with his assertion that it is EU law that governs even leaving. If that is how far EU law goes, then the EU is not an international organisation in any sense at all;

The Cooper-Letwin Bill: Parliamentary control over the extension of Article 50 (4 Apr. 2019): https://publiclawforeveryone.com/2019/04/04/the-cooper-bill-parliamentary-control-over-the-extension-of-article-50/

[72] Elliott, *Extending Article 50* (23 Mar. 2019) op cit.

it is a State. And, if that's the case, then a 'rules-based international order' has nothing to do with it[73].

The German Federal Constitutional Court in the *Maastricht Treaty 1992 Constitutionality Case* had important things to say about this relationship which has so confounded politicians and lawyers in the present days of Brexit, the relationship between the EU as a treaty-based body and the international legal order that governs it. Unclear in that case had been whether the EU itself could make changes that significantly expand the programme of EU integration contained in the Maastricht Treaty. The Federal Constitutional Court, among other determinations in the judgment, said that it could not:

> 'The exercise of sovereign authority by a union of States such as the European Union is based on powers conferred by States which remain sovereign and which, at international level, always act through their governments and thereby control the process of integration...
>
> Because the German citizen entitled to vote exercises his right to participate in conferring democratic legitimacy on the institutions and bodies entrusted with the exercise of sovereign authority principally through the election of the German *Bundestag*, that parliament must also decide what is to be done about Germany's membership of the European Union, its continuance and development'[74].

The Federal Constitutional Court understood that there exist acts within the independent province of a Member State which take place 'at international level'—and thus under international, not EU, law. An act that elected not to maintain 'continuance' in the EU is an example of such an act. That Court, there, it is to be submitted, had it right. Those in 2019 who have spoken of exiting 'under EU law' have it wrong.

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[73] It seems that Professor Elliott's use of the expression 'rules-based international order' is more a rhetorical flourish, a signal that the EU is a virtuous thing, than an attempt to give a rigorous legal characterisation of the EU. Of course, whether the EU is an international organisation, or the State that some would like it to be, international law rules still will matter—as regards its *external* relations—i.e., its relations with other international legal persons.

[74] *Maastricht Treaty Constitutionality Case*, Cases Nos 2 BvR 2132 and 2159/92, *Bundesverfassungsgericht*, 12 Oct. 1993: reprinted in English translation, 98 *International Law Reports* 225.

Confusing Council

The European Council, in its Room Document of 15 March 2019 concerning '[p]ossible extension of the withdrawal period', like the UK lawyers just mentioned, was confused about the locus of decisions about membership. It referred to 'a decision on extension… taken by the European Council… with 27 Member States, after having obtained the agreement of the withdrawing Member State *on that decision'* (emphasis added)[75]. Speaking this way suggests that the Council Decision is the act in which an extension is established and that the exiting State participates in that act. Neither is the case.

First, as to the exiting State's participation: Article 50(4) TEU is explicit that the exiting State 'shall not participate in the discussions of the European Council or Council or in decisions concerning it'. This is not a mere formality concerning only discussions. The phrase 'shall not participate' applies both to 'discussions' and to 'decisions' reached. An example of such decisions is that which the Council eventually reached, on 22 March 2019, concerning the UK's membership[76]. The UK, as a withdrawing State, did not confer its agreement 'on that decision' in any sense of participating in it.

And, regardless of who participated in it, that decision did not bring about an extension, because the Council Decision is an internal EU law act, and an internal EU law act cannot extend. To understand why, it helps to consider what extension is. People speak of the coming and going of 29 March without Brexit as a *change of exit date*. More enlightening, instead, is to speak like this: not exiting on 29 March means a *prolongation of the EU membership* of the exiting State—i.e., a continuation *ratio temporis* of the rights and obligations contained in the EU Treaties. In other words, a treaty act. A State is an EU Member State by virtue of that sort of act, and so in that way may continue as a Member too. That sort of act, regardless what steps other legal orders might need to take to effectuate it, is an international law act, not a domestic act of the Member, not an internal act of the EU[77].

[75] Council of the European Union, Room Document, 15 Mar. 2018 ¶ 12.

[76] European Council Decision taken in agreement with the United Kingdom, extending the period under Article 50(3) TEU, EUCO XT 20006/19 (22 Mar. 2019): https://www.consilium.europa.eu/media/38783/xt20006-en19-003.pdf

[77] See Part II of this Briefing above.

Now, as is plain on the text, after a Member invokes Article 50 and two years elapses, Membership is done. The Member is a Member no more. This is the complete effect of invocation under the rules agreed when the Member and the EU adopted Article 50 as part of the act of accession. Query, then: if the Member invokes Article 50, two years elapse, but membership *continues*, then on what basis does it continue? Saying that an EU law act supplies the basis would present much the same difficulty as saying that an EU law act supplies the basis of accession—i.e., of membership from the start: a third State is not made a Member by the EU on its own; it becomes one by international law agreement. Likewise, so-called exit-date-extension, which is better understood as membership continuance, requires agreement at that level.

It is this requirement of an international law act that, around the time of the Council Decision, was too much obscured. The Prime Minister did nothing to dispel the obscurity. In correspondence of 5 April 2019 with the President of the European Council, Donald Tusk, the Prime Minister said that it was *'[i]n* the European Council Decision of 22 March' (emphasis added) that extension had been established. Nothing of the kind was established 'in' the Decision. The letter, throughout, eschewed the language of international negotiation, using instead terms of supplicancy (or, at best, of administrative procedure)[78].

[78] Prime Minister Theresa May to H.E. Donald Tusk (5 Apr. 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793058/PM_letter_to_His_Excellency_Mr_Donald_Tusk__1_.pdf The letter read in part as follows:

> 'In the European Council Decision of 22 March, taken in agreement with the United Kingdom, the European Union and the United Kingdom agreed that if the House of Commons had approved the Withdrawal Agreement by 29 March 2019, the period provided for by Article 50 of the Treaty on European Union would be extended until 22 May 2019 to provide for ratification. The House of Commons declined to approve the Withdrawal Agreement and take up that option. Therefore unless we agree a further extension at the European Council you have convened for 10 April, the United Kingdom will leave the European Union without a deal at 2300 BST on 12 April 2019.'

In addition to the impression that might be drawn that extension is established '[i]n the European Council Decision', the letter suggests that a 'further extension', likewise, would be established 'at the European Council'—i.e., within an internal European Union process. Both phrases miscast the legal character of extension. Further on in the letter, the Prime Minister referred to a 'request to extend the Article 50 period'. A 'request' is made to an authority that may in its own power grant, or withhold, the request; what the Prime Minister should have said is a 'proposal to extend the Article 50 period'. A 'proposal' is an invitation to reach agreement. A similar infelicity appears in the letter's penultimate paragraph, where the Prime Minister 'inform[ed] the European Council that the United Kingdom is *seeking* a further extension…' (emphasis added). Again, 'proposing' would have reflected the legal relation correctly.

The UK's ambassador to Brussels, Sir Tim Barrow, in a reply letter to the Council[79], and the Department for Exiting the European Union, in an Explanatory Memorandum to the regulation addressing a change of exit day in domestic law[80], similarly opened the door to misconstruing the legal relations involved. However, in fairness, both also may be read to have identified extension for what it is—an international law act adopted between equal negotiating parties.

Sir Timothy referred to the Decision 'taken in agreement with the United Kingdom' as extending the exit date. The UK took no part in the Decision, and the Decision didn't extend the exit date. However, to the credit of the Ambassador and FCO drafters, the letter, separately, 'confirmed the agreement of the Government', a form of words that should be read to distinguish the act of the Council from the necessary international act.

As to the Explanatory Memorandum, it described the Council Decision as one 'to extend the period provided for in Article 50(3) TEU in agreement with the UK', wording susceptible to the misinterpretation that the UK is a participant in the Council Decision[81]. But, approximating the better understanding, the Memorandum went on to say this:

> 'The European Council decision and the United Kingdom's agreement to it constitute a binding agreement to extend in EU and international law'.[82]

So a decision is taken by the Council; the UK separately expresses its agreement (if it chooses); and a 'binding agreement' under international law results. This sentence may be read as a more accurate reflection of how an extension would take form.

In the round, however, too much of the UK's dealing with the EU to date has failed to get the legal relations right. A final example may be given of how

[79] Permanent Representative of the United Kingdom to the EU Ambassador Sir Timothy Barrow KCMG to H.E. Donald Tusk, 11 Apr. 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/794748/Confirmation_of_UK_Government_Agreement_to_Article_50_Extension.April.pdf

[80] Explanatory Memorandum to the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 (2019 No. 859): http://www.legislation.gov.uk/uksi/2019/859/pdfs/uksiem_20190859_en.pdf

[81] Explanatory Memorandum, op cit. ¶ 2.3.

[82] Id.

Westminster has acted as though the EU is a State: the very act of putting Brexit off has given the impression that what the UK contemplates is not withdrawal from a treaty organisation but, instead, a much more momentous step—leaving a State.

Putting Brexit off? Or being put off Brexit?

Over the past two hundred years, many communities have left established States to set up their own. Some of these have endured isolation and disarray. Independence for a State, newly gained, is fraught with difficulty, because a new State has no established footing in the world it enters. No treaties. No trade relations. No memberships in security alliances. No channels of communication to countries through which such things might even be discussed. Putting Brexit off, the way the May Ministry in March 2019 did, heightened the impression, given in much of the media and in academic commentary, that leaving the EU would be just like that. Seized by that impression, one would struggle not being put off Brexit[83].

It will be a result, if the UK fails to exit, that the off-putting will have had real effects. For one, and obviously, there will be the effect that the UK will remain in the EU. Less obviously, but, I would submit, just as real, there will be carry-on effects that reach well past Britain's particular experience with the EU today. A rescission of Brexit will change the perception globally of the EU.

If Brexit were rescinded, then all Member States (among which the UK would remain), third States, and the EU itself would see the EU to be much more a State-like, constitutional body than heretofore it has been, a body with its own gravitational pull, independent of the treaties that made it. What they will have witnessed is this: the region's premier hub of technology and creative industries, the second largest economy of the region, the largest financial centre of any region, the EU Member with the most options and opportunities on the global stage—and yet even *that* State was so embedded that it could not finalise an exit. The conclusion that many will draw is that the integration of the EU is simply too

[83] The words of off-putting—decrying a so-called 'no-deal' exit from the EU—have been continuous since the start. For a recent example, see remarks of Carolyn Fairbairn, Director General of the Confederation of British Industry, quoted in Alex Morales & Joe Mayes, 'No-Deal Brexit Threat is Act of Self-Harm, Business Chief Says', Bloomberg (14 June 2019): https://www.bloomberg.com/news/articles/2019-06-14/no-deal-brexit-threat-is-act-of-self-harm-business-chief-says

deep, too pervasive for any Member State to leave. To invoke Article 50 comes to look like an inevitable trigger for staggering, delay, and uncertainty—subsiding, after a string of crises, into resigned acceptance. The EU—after all that— really does start to resemble the federal legal order that the Community founders in their ambitions had desired.

Now, a lawyerly objection to forecasts of a post-no-Brexit federal EU is this: the Treaties are the *fons et origo* of the EU; if they, as the source they are, stay the same, then so does the organisation which springs from them; with no change to Article 50, the exit option would remain. There is a difficulty with this line of thinking, however. It ignores the larger reality in which the text is interpreted, one part of that reality being who holds the authority to interpret it. True, on paper, Article 50 will say the same thing the day before no-Brexit as it does the day after. The larger reality is what will have changed. The implications of a failure of British exit are, I have suggested, far-ranging. The obvious implication for the UK—its continuance as an EU Member State—is not the only one. The EU will also be affected, and in a potentially transformative way. No-Brexit does not entail a reversion to the status quo ante. It entails instead membership in a Union that has, in political fact, undergone a substantial consolidation. It will have faced its first attempted withdrawal; and, having hinted that leaving will be as hard as leaving a State, prevailed in keeping the putative exiting State in. The Treaties will be that much less treaties, and that much more a constitution. At some point, they will be 'treaties' in name only, and a constitution in every way that matters.

Guardians of constitutions don't guard lightly. They don't look with any more favour on exit options than the European Union has done since June 2016. Quite the contrary: they tend to do all they can to whittle those options away. To remain in the EU now would have subtly different legal implications than what that choice would have meant in June 2016. Again, yes: Article 50 would still exist on paper. But the reality of its invocation after a failed Brexit would have shifted. The claim, so long made only *soto voce*, that the EU really *is* a State would start to resonate.

Some Brexit supporters worry that hidden elites will close the door to any future attempt at Brexit. But surreptitious stratagems are not needed to attain that end. What just as effectively may block the option of leaving is very much out in the

open, if you know where to look: if Brexit is as off-putting as unilateral secession from a State, then few if any future leaders will pursue it.

The train careering off a cliff edge—the cartoon *The Economist* can't seem to take off its website[84] —symbolises the disaster that supposedly would follow leaving the EU. 'Slow down', it suggests. 'Put Brexit off, at least long enough to negotiate some more. That is only reasonable, no?' But putting Brexit off in March 2019, at least so far, has achieved no new negotiated terms. It, instead, has turned Brexit from an act into a process, and a process of long duration. During that process, the UK faces all the unpredictability of events. It is possible that, as they wait, people will be put off Brexit. If that happens, and if Brexit is revoked, then the EU emerges that much closer to a full-fledged constitutional order that sets its own terms—including, in time, the terms for any future departure. *That* is a cliff edge, a precipice separating sovereignty under international law from submission to a national legal order.

The public is presented with harrowing, if imprecise, pictures of a future outside the EU, but they are little asked to think about the consequences if they now were to choose to stay. European federalists embedded the phrase 'ever closer union' in the EU Treaties. If an exit were to prove unworkable, then that phrase would become a trend, and a powerful one. Choices that exist today will not under the union that the EU will have come so much closer to being. Before the referendum of June 2016, divergence of values between the EU and the majority of people in the UK was giving rise to ever more friction as the UK undertook to implement EU laws and policies. The divergence, which we may assume will remain, will not be any easier to manage, if the EU emerges as an even closer, more tightly-regulated union. To the contrary; there being that much less political space within a statal legal order than in the international legal order, the divergence will lead to practically permanent crisis. That is the future that the UK—and EU—risk, if Brexit is put off much more.

The means for averting such a future, however, are not impossible to grasp. What they require is a well-informed shift in how we talk about the EU—and a shift in how we handle Brexit.

[84] It seems to have made its first appearance on 24 Nov. 2018: https://www.economist.com/leaders/2018/11/24/the-truth-about-a-no-deal-brexit

VI
How to Handle Brexit

What lessons are we to draw from the considerations set out above? The overarching lesson is this: The new Prime Minister should address the EU as it is, not as its more ambitious founders imagined it would be. The EU served a purpose, to the extent it acted like an international organisation dedicated to trade and investment among its members. It attracted resistance, to the extent it acted like a State. Movement of the EU further toward a self-contained legal order, in the short run, would give the appearance of strengthening the EU, as more power is consolidated in its institutions. However, in the long run, that path leads to permanent crisis.

The proper way to manage Brexit for the UK also will benefit the organisation that remains,. That is because the proper way to manage Brexit treats the EU as a treaty organisation, not a State. Making the EU, and re-making it, States act under international law, not EU law. The UK Government, in transactions with the EU, should leave no doubt as to which law applies.

Instead of speaking in pejorative terms about ‘no deal’, the Government should recognise that the United Kingdom and the EU already have a deal in place.

This is the deal embodied in Article 50 TEU as it stands; in general international law; and in the network of international agreements and practices, as well as the mechanisms for reaching new agreements, that operate between the UK, other States, and the EU. Those politicians who say that further terms *must* be agreed before exit can take place implicitly re-inforce the *sotto voce* claim of the EU to be a State. You don’t need further terms to leave a treaty organisation. International law already provides for your exit. You require such terms only when the thing you are leaving is a State. Politicians who insist that Britain *must* deal on the EU’s terms in order to effectuate Brexit are doing the country a disservice—and they are, unwittingly, re-casting the organisation that Britain should leave behind.

Based on the above, this Briefing concludes with five points of policy that should guide HMG in the process of completing Brexit.

VI
A Brexit Checklist for the Prime Minister

Policy points for HMG

(1) Any future talks with the EU should be treated as bilateral discussions between a state and an international treaty organisation under international law.

> The government should bear in mind the EU is not a state, but merely an international treaty organisation. Mistakenly approaching the EU as if it were a state unnecessarily complicates Brexit and possibly impedes it. The upshot of that mistake can be that over time the law follows where practice began, and the EU ends up acting even more like a state than it has so far.

(2) Exit from the EU requires no special arrangements, such as a 'deal'. This is because of the clear legal principles at stake:

> * The United Kingdom's right to leave the EU derives from the United Kingdom's right under general international law to determine its international relations, including, in particular, those relations that entail obligations upon the United Kingdom in respect of how it legislates in its territory.
>
> * Article 50 TEU is not the source of the UK's right to leave; Article 50 TEU is itself a withdrawal agreement under which the parties agree terms by which to implement a Member State's general international law right to leave. That right is self-sufficient.
>
> * Any further terms that might apply to the UK's exit and to its future relations with the EU would be governed by international law, not EU law, and therefore would have to be agreed between the parties at the international, not the EU, level.

(3) The United Kingdom should not have preconceived notions about the precise format or title, whether a treaty, a standstill, an interim agreement, 'mini-deals', etc. of its future relationship with the EU.

(4) What matters is that the *substance* of the UK's future relationship with the European Union is consistent with the implementation of the UK's right of exit under international law. It must therefore respect the meaningful freedom of the UK on the international plane.

(5) No substitute or alternative terms for exit should be agreed other than those already in the text of Article 50 TEU—without utmost scrutiny in order to mitigate the risks and uncertainties that new rules normally entail. The next step should be to establish a working group of relevant Ministries, departments, agencies, and other public bodies to carry out this scrutiny under clearly set out terms and directions.

(6) No EU organ—e.g., the Council, the Commission, the ECJ—should have the right to exercise jurisdiction over the UK or adopt binding decisions that determine the UK's rights or obligations. This is because future UK-EU relations will be under international law, not EU law.

The UK can only accept future dispute settlement machinery that is fair, neutral and independent. This is the common international practice. It should be taken as a given in negotiations with the EU, because a State functioning in international law as the UK is in exiting the EU and will be doing in its future relations with the EU, is independent. So it cannot be presumed to be subject to such compulsory procedures by a partial, not international, court.

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Avoiding the Trap – How to Move from the Withdrawal Agreement
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The EU, the UK and Global Trade – A New Roadmap
David Collins (2nd edition, June 2019, with New Direction)

How to Take Back Control: Trading Globally Through the WTO
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John Marenbon

Deal, No Deal? The Battle for Britain's Democracy
Sheila Lawlor

Brexit: Options for the Irish Border
Ray Bassett

Commercial Law After Brexit: Next Steps for the UK
Thomas Sharpe QC

The last UK Government made serious mistakes in its dealings with the EU. In particular, as Dr Thomas Grant explains, it treated the EU as a state rather than an international treaty organization under international law.

In *Leave as You Entered: Brexit in International Law*, the author, an international lawyer at the Lauterpacht Centre for International Law in Cambridge, urges the new prime minister not to repeat the mistakes. He should recognize that the UK is a sovereign state under UK law, not a constituent territory of another state and under its constitution.

Indeed, member States that choose to leave do so at their own discretion. It is a unilateral action, not dependent on the will of a parent power. Any additional agreement or 'deal' is optional. If adopted, it is adopted under international law, not EU law.

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