

The Withdrawal Agreement and the EU's International Agreements

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This article examines how the UK Withdrawal Agreement handles one of the most important aspects of the EU's external *acquis*: its international agreements, and the extent to which the Withdrawal Agreement clarifies the legal implications for those agreements of UK withdrawal from the EU. It is argued that although the Withdrawal Agreement is not intended to establish the future relationship, the process of 'disentanglement' should entail a recognition of the impact of withdrawal from the EU on existing treaty relations with third States and should enhance legal certainty by providing the basis for a common approach in handling negotiations with those treaty partners. Although the European Council Guidelines and Council negotiation directives recognised this as desirable, it was not translated into Withdrawal Agreement commitments.

Introduction

Membership of the European Union is not only a question of participation in the Internal Market and contributing to the evolution and management of a range of policies on the environment, competition, financial supervision, the digital economy and social welfare, among others. The European Union is an international actor, with an extensive range of international commitments and its own foreign policy objectives, to achieve which it has a number of different instruments at its disposal, ranging from diplomatic initiatives and financial instruments to international treaty-making, both bilateral and multi-lateral. As a Member State, the UK helped to shape that foreign policy of course, and it was legally engaged by the EU's international treaty-making. And as accession to the EU involves not only accepting the domestic EU *acquis* but also what we can call its external *acquis*, including its international treaty obligations, so withdrawal from the EU involves settling the status of these obligations, which may include withdrawal from separate international agreements.¹

This aspect of the withdrawal process is complicated in two ways. First, unlike disentangling from the internal EU *acquis* – complex though that is – the external *acquis* involves third countries with rights and obligations under international law vis à vis the EU and its Member States. Whereas it is clear that following withdrawal, the EU Treaties 'shall cease to apply' to the UK,² the effect of withdrawal on international obligations undertaken during and as a result of EU membership, is not so certain. Second, at an international level, including in the conclusion of international agreements, the Member States continue to act alongside and sometimes in conjunction with the EU. In considering the implications of withdrawal from the EU, therefore, including the international law implications, we need to distinguish between the international obligations undertaken by the Member State in its own right, and the obligations it is under as an EU Member State.

¹ On withdrawal and external action more generally, see I Bosse-Platière and C Flaesch-Mouglin, 'Brexit et action extérieure de l'Union européenne' (2016) RTDE 759.

² Article 50(3) TEU.

This contribution will examine how the UK Withdrawal Agreement has handled one of the most important aspects of the EU's external *acquis*: its international agreements.³ It will not discuss, except incidentally, the future international agreement between the EU and the UK, which will in due course – we hope – make a significant addition to that *acquis*. The focus is on the EU's international agreements as they stand at the time of withdrawal, and the provisions concerning them in the Withdrawal Agreement. It hardly needs saying that the Withdrawal Agreement cannot legally alter international agreements between the EU and third States or the rights and obligations they contain. We are here concerned with the ways in which the Withdrawal Agreement could clarify the legal implications of UK withdrawal from the EU and enhance legal certainty by establishing a common approach to resolving those legal issues – and the extent to which it has achieved that aim.

An initial point should be made which bears on the choices that were made in dealing with the external *acquis* during the withdrawal negotiations: the EU Treaties themselves, and the way in which the withdrawal process was structured by the European institutions, combined to ensure a highly proceduralised approach to the negotiations. This should not surprise us; it echoes the proceduralisation of the EU enlargement process, and – as in the case of enlargement – is a natural reaction to the high political sensitivity of the negotiations and the risk of divergence among Member States from a unified EU position. A procedural approach is one way to tread the path between the rigidity of a formalistic reliance on law and the unpredictability and risks of the political game. As far as the EU Treaties are concerned, Article 50 TEU, which establishes a legal framework with the aim of enabling an orderly withdrawal,⁴ creates a legal distinction between the Withdrawal Agreement and any agreement establishing a future relationship, which will have different parties, competences and procedures. As the Council stated in its directives of May 2017 on the negotiation of the Withdrawal Agreement, 'Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union.'⁵ However, Article 50(2) TEU also provides that the Withdrawal Agreement should take account of the framework for the future relationship. The Treaty framework thus set limits to what could be done in the Withdrawal Agreement, and created a natural sequence in the process.

And indeed, the European Council insisted from the start on a strict sequencing of different negotiation phases. Thus, the first statement from the other 27 Member States after the June 2016 referendum emphasised that there could be no opening of negotiations with the UK before receipt of the formal notification specified in Article 50(1) TEU.⁶ The European Council Guidelines, issued in April 2017, established the principle of a 'phased approach' to the negotiations, with the first phase concentrating on the 'disentanglement' of the UK from the EU, including in particular citizens' rights

³ See further G Van der Loo and S Blockmans, 'The impact of Brexit on the EU's international agreements', CEPS Commentary (2016), available at <<https://www.ceps.eu/publications/impact-brexit-eu%E2%80%99s-international-agreements>>; R A Wessel, 'Consequences of Brexit for International Agreements concluded by the EU and its Member States' (2018) 55 *Common Market Law Review* 101; M Cremona, 'Who Can Make Treaties? The European Union', in Duncan Hollis (ed) *The Oxford Guide to Treaties*, Oxford University Press, 2nd ed., 2020, 117 at 140-143.

⁴ 'Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion.' Case C-621/18 *Wightman and others*, EU:C:2018:999, para 56.

⁵ Council of the European Union, Directives on the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 22 May 2017, Council doc. XT 2016/17 ADD 1 REV 2, BXT 24.

⁶ Statement following the informal meeting at 27, Brussels 29 June 2016.

and legal certainty on issues impacting business, the financial settlement, and arrangements for Northern Ireland.⁷

The structured, sequenced, approach adopted by the EU no doubt contributed to the orderliness of the UK withdrawal, at least on the EU side, but it also created a dynamic in which some issues dominated others, and some important aspects of withdrawal – among them, the handling of EU international agreements – were somewhat sidelined. Nonetheless it is striking that right from the start, it was recognised that UK withdrawal would have implications for third country partners. The European Council Guidelines of April 2017 include international partners alongside EU citizens, businesses and stakeholders in speaking of the need to provide ‘as much clarity and legal certainty as possible’ during the first phase.⁸

The package eventually agreed with the UK (and at the time of writing undergoing ratification procedures in the UK and within the EU) includes the Withdrawal Agreement and a (non-binding) Political Declaration.⁹ These two documents cover three groups of issues: the arrangements for withdrawal itself and its implications (the ‘disentanglement’); the establishment of and arrangements for a transition period; and the outline of the future relationship between the UK and EU. In the following we will first outline the different types of international agreement that form part of the EU’s external *acquis* from the perspective of the withdrawal of a Member State, and then examine how the issues raised by these agreements are dealt with in the Withdrawal Agreement.

The EU’s international agreements

We need to distinguish between four types of international agreement: agreements concluded by the EU alone; agreements concluded by both the EU and the Member States (including the UK) as so-called ‘mixed’ agreements, which may be multilateral or bilateral in nature; and agreements concluded by the Member States acting on behalf of the EU.

Agreements concluded by the EU alone under its treaty-making powers are an integral part of the EU legal system,¹⁰ and are binding on the Member States as a matter of EU law.¹¹ As might be expected, these agreements cover a wide variety of subject matters, including trade,¹² mutual assistance in criminal matters,¹³ greenhouse gas emissions trading schemes,¹⁴ conformity assessment,¹⁵ and fisheries.¹⁶ The EU Treaties will cease to apply to the UK from the date of entry into force of the

⁷ European Council Guidelines following the United Kingdom’s notification under Article 50 TEU, 29 April 2017, Council doc. EUCO XT 20004/17.

⁸ *Ibid.*, para 4.

⁹ Withdrawal Agreement and Political Declaration on the framework for the future relationship, 2019 OJ C 384 I/1, 19 November 2019.

¹⁰ Case 181/73 *Haegeman v Belgium*, EU:C:1974:41, para 5.

¹¹ Article 216(2) TFEU.

¹² E.g. Trade Agreement between the EEC and Switzerland, OJ 1972 L 300/189; Agreement between the EU and Chile on trade in organic products, OJ 2017 L 331/4.

¹³ E.g. Agreement between the EU and Japan on mutual legal assistance in criminal matters, OJ 2010 L39/20.

¹⁴ E.g. Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, OJ 2017 L 322/3.

¹⁵ E.g. Agreement on mutual recognition in relation to conformity assessment, certificates and markings between the EC and Australia, OJ 1998 L 229/3.

¹⁶ E.g. Fisheries Partnership Agreement between the EU and the Republic of Mauritius, OJ 2014 L 79/3.

Withdrawal Agreement, and so such agreements will no longer bind the UK from this date (subject to the provisions on transition considered below). Since the UK is not a party to these EU agreements as a matter of international law there is no need for any formal withdrawal or denunciation, although the third country should be notified that the agreement will no longer cover the UK.¹⁷ In addition some formal adjustments may be needed; the agreement may for example include references to the UK's institutions or agencies. If the third country party takes the view that the material balance of benefits and obligations is substantially altered it may request a substantive adjustment. As far as the UK is concerned, however, in the absence of any other action or arrangement, these agreements will simply cease to cover the UK from the date of withdrawal.¹⁸

Mixed agreements offer a more complex picture, since the withdrawing Member State (the UK) is a party to the agreement as a matter of international law. This does not mean, however, that the UK will simply continue as a party, and that such agreements are unaffected by withdrawal. In order to understand better the implications of withdrawal for mixed agreements, we should distinguish between two types of mixed agreement. On the one hand, we have UK participation alongside the EU in multilateral conventions such as the WTO agreements,¹⁹ the UN Convention on the Law of the Sea,²⁰ the Paris Agreement on Climate Change,²¹ or other multilateral environmental agreements.²² In such cases the UK will, on withdrawal from the EU, regain competence over the convention as a whole and will no longer be subject to EU-derived obligations of sincere cooperation (for example, the duty to abide by common EU positions²³); nor will its vote be exercised by the EU.²⁴ Some adjustment of obligations may need to be made to separate those of the UK from those of the EU and its Member States, as for example in the WTO,²⁵ but on leaving the EU the UK will remain a party to these multilateral conventions.

On the other hand, some mixed agreements are concluded jointly by 'the European Union and its Member States of the one part' and one or more third States, and these have what the Court of Justice has called an 'essentially bilateral' character.²⁶ They include association agreements,²⁷ Partnership and

¹⁷ See Van der Loo and Blockmans, note 3.

¹⁸ It may in principle be possible, depending on the scope of the agreement, for the UK to agree with the EU and the relevant third State party or parties that it should accede to the EU agreement as a separate party in its own right following withdrawal; see further more generally Wessel, note 3.

¹⁹ Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994 L 336/1.

²⁰ United Nations Convention on the Law of the Sea, OJ 1998 L 179/3.

²¹ Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ 2016 L 282/4.

²² E.g. Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention), OJ 1993 L 39/3; United Nations Framework Convention on Climate Change, OJ 1994 L 33/13.

²³ Case C-246/07 *Commission v. Sweden*, EU:C:2010:203.

²⁴ Such conventions will normally contain a clause governing the participation of a regional organisation (the so-called 'REIO clause') which covers issues such as exercise of voting rights. See e.g. the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, Arts 11(2), 17 and 19(4) and (5).

²⁵ See below at note 53.

²⁶ For example, the Lomé Convention, concluded by the Community and its Member States of the one part and the ACP States of the other part, was referred to by the Court of Justice as establishing 'an essentially bilateral ACP-EEC cooperation'. Case C-316/91, *Parliament v. Council*, EU:C:1994:76, paras 29 and 33.

²⁷ E.g. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3.

Cooperation agreements,²⁸ and some bilateral sectoral agreements such as those on air transport.²⁹ Since the UK is a contracting party to these bilateral mixed agreements they will not, unlike those concluded by the EU alone, automatically cease to apply to the UK after withdrawal. However UK participation is predicated on it being an EU Member State and continuing UK participation jointly with the EU post-withdrawal would not be compatible with the UK's new status. Indeed its continuing participation may create anomalies, such as where the territorial application of the agreement is defined in terms of EU Member States and the relevant third State party or parties. The UK's legal position under a bilateral mixed agreement cannot simply continue as before, but neither will the UK automatically cease to be a party. The UK will thus need to withdraw formally from the agreement, according to the denunciation or withdrawal clause in the agreement itself, where it exists, or with the consent of the other parties;³⁰ or at least renegotiate the nature of its participation via an amending protocol. The terms of the agreement may indeed make it clear that a State that is no longer an EU Member State cannot simply remain a party without negotiating an amendment of its terms. The European Economic Area Agreement (EEA), for example, defines 'Contracting Parties' in such a way that there is no place for a Contracting Party that is neither an EFTA State nor an EU Member State.³¹ Thus if the UK wished to remain a party to the EEA in its own right after withdrawal from the EU, it would be necessary to amend the EEA (or for the UK to become a member of EFTA).³²

The fourth type of agreement are those concluded by the Member States acting on behalf of the Union. The Union may authorise the Member States to conclude an agreement on its behalf because – despite the agreement falling within the EU's exclusive competence – the agreement itself only allows for participation by States, not international organisations.³³ As expressed by the Court of Justice, '[i]n a situation where the conditions for being a party to such an agreement preclude the EU itself from concluding the agreement, although the latter falls within the EU's external competence, that competence may be exercised through the intermediary of the Member States acting in the EU's interest.'³⁴ In such a case, assuming that the agreement is of a multilateral character, an ex-EU

²⁸ E.g. Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, OJ 1997 L 327/3.

²⁹ E.g. Agreement on Air Transport between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, OJ 2007 L 134/4; Agreement on Air Transport between Canada and the European Community and its Member States, OJ 2010 L 207/32.

³⁰ Article 54 Vienna Convention on the Law of Treaties 1969 (VCLT); Article 56 VCLT implies that where there no express provision for denunciation or withdrawal at least 12 months notice should be given. See further RA Wessel, note 3.

³¹ According to Art 2(c) European Economic Area Agreement, OJ 1994 L 1/3, 'the term "Contracting Parties" means, concerning the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States.' The term EFTA State is defined in Art 2(b) EEA. Likewise, the territorial application of the EEA is defined in terms of the territories to which the EU Treaties apply (Art 126(1) EEA, and the institutional arrangements, including dispute settlement, also adopt a bilateral model (EFTA and EU parties).

³² C Hillion, 'BREXIT Means BR(EEA)XIT: The UK withdrawal from the EU and its implications for the EEA' (2018) 55 *Common Market Law Review* 135. Art 127 EEA provides for withdrawal from the EEA and the procedure for necessary modifications to the agreement. See further below.

³³ See e.g. Council Decision 2008/431/EC authorising Member States to ratify or accede to the 1996 Hague Convention on Jurisdiction and Applicable Law in respect of Parental Responsibility and Measures for the Protection of Children, OJ 2008 L 151/36. Exclusive EU competence may arise after the conclusion of a Convention to which the EU is not (and cannot become) a party; see e.g. the 1980 Hague Convention on the civil aspects of international child abduction, found to fall within exclusive EU competence in Opinion 1/13, EU:C:2014:2303.

³⁴ Opinion 1/13, note 33, para 44. See further A Rosas, 'The status in EU law of international agreements concluded by EU Member States' (2011) *Fordham International Law Journal* 1303; M Cremona, 'Member

Member State would continue as a party to the international agreement in its own right, no longer acting on behalf of the EU. Since the implementation of the agreement will in many cases have been a matter for EU legislation and EU administrative institutions, adjustment may be required for UK implementation, as well as notification to other parties. More unusually, the EU may also authorise an individual Member State to conclude a bilateral agreement on its behalf where there is a specific connection between the Member State and the third State partner.³⁵ There appear to be no examples of this latter type of delegation involving the UK; were such to be the case it would be necessary for the EU to agree with the third State as to the continuance (or not) of the agreement following withdrawal.

Implementing an orderly withdrawal

In this section, we consider how the Withdrawal Agreement deals with the implications of UK withdrawal for the EU's international agreements. We will set aside until the next section the provisions on transition.

The Guidelines adopted by the European Council in April 2017, following the UK's notification under Article 50 TEU, signal the EU's expectations with respect to international agreements under the 'arrangements for an orderly withdrawal'. It first states that '[f]ollowing the withdrawal the United Kingdom will no longer be covered by agreements concluded by the Union, or by Member States acting on its behalf or by the Union and its Member States acting jointly.'³⁶ Reference is made here to three of the four categories of agreement mentioned above; as we have already seen, the UK will continue as a party to multilateral mixed agreements. The European Council groups together agreements concluded by the EU alone and bilateral mixed agreements (agreements concluded 'by the Union and its Member States acting jointly') and the phrase 'will no longer be covered' is ambiguous. It potentially refers both to cases where the UK is no longer bound in EU law by an agreement concluded by the EU alone, and to bilateral mixed agreements where although the UK formally remains a party, the agreement is not structured to apply to non-EU Member States. As has been argued above, the UK will need to take steps to withdraw from the latter and clarity over the legal position in these cases would also be in the EU's interest. The Guidelines continue, referring to 'international agreements' in general,

'The Union will continue to have its rights and obligations in relation to international agreements. In this respect, the European Council expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common

States as Trustees of the Union Interest: participating in international agreements on behalf of the European Union' in A Arnall, C Barnard, M Dougan and E Spaventa (eds) *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood*, Hart Publishing 2011.

³⁵ As has been the case in the context of agreements concerning the euro; see e.g. Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Republic of San Marino, 2001, authorized by Council Decision 1999/97/EC, OJ 1999 L30/33. Monetary policy is an exclusive competence for the Member States whose currency is the euro (Article 3(1)(c) TFEU) and the Eurozone Member States may in consequence act in this field only where 'empowered' or authorized to do so by the Union (Article 2(1) TFEU). The Council authorization decision will contain the Union's position as to the terms of the agreement.

³⁶ European Council Guidelines following the United Kingdom's notification under Article 50 TEU, EUCO XT 20004/17, 29 April 2017, para 13.

approach towards third country partners, international organisations and conventions concerned should be engaged.’³⁷

Here the European Council recognises that its own position under international agreements is concerned by the UK’s withdrawal, either because the UK is ‘no longer covered’ and its own commitments will be affected or because it can no longer count on the UK following an agreed EU position under multilateral conventions. It is not very explicit as to what it will look for from the UK, beyond a general expectation that the UK will honour ‘its share of all international commitments contracted in the context of its EU membership’, and a reference to a ‘possible common approach’ to third countries. Again we have an ambiguity which the Withdrawal Agreement might be expected to resolve: what exactly does ‘honouring its share of international commitments’ entail if the UK is ‘no longer covered’ by bilateral mixed agreements? The reference may be to multilateral mixed agreements (e.g. climate change commitments), or it may be intended to refer to any outstanding (e.g. financial) commitments under bilateral mixed agreements that should be resolved as part of UK withdrawal.

The Negotiating Directives, adopted by the Council in May 2017, contain an allusion to these aims, but not a clarification:

‘... a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, by which the United Kingdom remains bound, as well as on the method to ensure that the United Kingdom honours these commitments.’³⁸

Neither of these rather brief statements refer to the inclusion of substantive provisions in the Withdrawal Agreement. However, in the context of the EU’s commitment to clarity and legal certainty for (among others) the EU’s international partners in the first phase of the withdrawal negotiations,³⁹ we might expect the Withdrawal Agreement to contain something along the following lines.

We might expect a provision on an orderly UK withdrawal from bilateral mixed agreements, such as Association Agreements. Such a provision would reflect, in reverse, the clause providing for the accession of a new Member State to the EU’s bilateral mixed agreements, now normally included in EU Treaties of Accession.⁴⁰ Depending on the type of agreement and its terms, this may simply require notification, or may include the possibility of a jointly negotiated amending protocol where needed. The Withdrawal Agreement could not of course provide a solution applicable to every agreement, but would establish the principle of orderly, negotiated withdrawal.

The UK might have committed, with EU support, to (seek to) continue as a party to certain bilateral mixed agreements. The fulfilment of such a commitment would certainly depend on third country

³⁷ Ibid.

³⁸ Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, Council doc. XT 21016/17, ADD 1 REV 2, 22 May 2017, para 18.

³⁹ European Council Guidelines following the United Kingdom’s notification under Article 50 TEU, EUCO XT 20004/17, 29 April 2017, para 4.

⁴⁰ See e.g. Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ 2012 L 112/21, Art 6(3). On the view that such a provision could be expected in the Withdrawal Agreement, see RA Wessel, note 3, at p.123.

agreement and would require the negotiation of an amending protocol to the mixed agreement in question; the Withdrawal Agreement would only be able to establish that such should be a joint objective of the EU and UK. However, as we shall see, a provision that is dependent on third country approval was nonetheless included in the Withdrawal Agreement provisions on transition. In addition, the commitments in accession agreements by the new Member State to accede to bilateral mixed agreements also require approval of the third country party. In this context, in some cases (e.g. development agreements) third country agreement would be likely; in others difficult questions over (for example) the balance of participation rights or budgetary contributions might well arise.

We might expect a provision on cooperation and a joint approach to third country treaty partners, especially where adjustments to multilateral conventions need to be made, with or without explicit reference to specific conventions.⁴¹ We might even have expected to see a commitment from the UK to maintain its existing obligations under specific international agreements, perhaps in the context of an acknowledgement of continuing common goals, such as the agreements on climate change,⁴² and perhaps – as suggested by the Council – some attempt to establish a ‘method to ensure that the United Kingdom honours these commitments.’⁴³

In fact, the Withdrawal Agreement (apart from the provisions on transition, considered in the next section) contains very few references to EU international agreements and resulting UK commitments. There are no general clauses of the kind just mentioned, but instead three rather different provisions.

The first is designed to safeguard the rights of nationals of the EFTA States that have free movement rights under EU law: Iceland, Liechtenstein, Norway (the EFTA parties to the EEA) and Switzerland. Under Article 33 WA, nationals of these States will have their rights preserved in the same way as EU citizens in the UK (and similarly, UK citizens within the EEA and Switzerland). This equality of treatment is conditional on the conclusion and application of new agreements between the EFTA States and the UK and EU respectively,⁴⁴ but there is no obligation to initiate the negotiation of such agreements.⁴⁵ No other implications for the EEA are referred to in the Withdrawal Agreement, and it is thus left to the UK to arrange its withdrawal with the EFTA parties under the provisions of the EEA itself. This has in fact led to a position of considerable uncertainty: despite the general opinion that explicit withdrawal from mixed agreements will (if desired) be necessary,⁴⁶ and the existence of a withdrawal clause in the EEA (Article 127 EEA), the UK has maintained that the EEA will automatically cease to apply to the UK following its withdrawal from the EU, and that formal notification is consequently unnecessary. Instead of following the Article 127 EEA procedure, which would involve all EEA parties including the EU, it has negotiated separately with the EFTA EEA States.⁴⁷ Far from legal certainty, the

⁴¹ Wessel, note 3, at p.124.

⁴² A clause to similar effect is presented as a desirable component of a future EU-UK agreement: see note 75.

⁴³ See note 38.

⁴⁴ Art 33 Withdrawal Agreement, note 9.

⁴⁵ In December 2018 the UK reached agreements with Iceland, Liechtenstein and Norway, and with Switzerland; at the time of writing these are in the process of ratification. The UK-EFTA ‘Separation Agreement’ also includes provisions on other ‘separation issues’, notably ongoing transactions for goods and services, as well as data protection and other ongoing procedures, modelled on the EU-UK Withdrawal Agreement. See further <<https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer>>

⁴⁶ See above, and further Van der Loo and Blockmans, note 3; Wessel, note 3; Hillion, note 32.

⁴⁷ See note 32. Art 127 EEA envisages at least 12 months’ notice before withdrawal and the convening of a diplomatic conference to oversee the necessary adjustments. It thus envisages, inter alia, that the EU and its Member States will be involved in the process. It is notable that the UK-EFTA agreement assumes, contrary to what is argued above, that the EEA will automatically cease to apply to the UK following its withdrawal from the EU.

UK's position with respect to the EEA is profoundly ambiguous: it has not formally withdrawn as a party, but, as Clifton has pointed out, 'the UK would neither be subject to the EU nor EFTA pillars of the Agreement ... the EEA Agreement's effects vis-à-vis the UK would enter into abeyance as it would be subject to neither the EU or EFTA supervisory and judicial mechanisms.'⁴⁸ While some conditional safeguards are offered to EEA and Swiss nationals by the EU-UK Withdrawal Agreement, the absence of any general provision relating to the EEA underlines the absence of a common approach towards an agreement of major importance to both the EU and its EFTA partners.

The second provision ensures that the UK fulfils commitments under specific existing agreements relating to nuclear equipment and material. Article 82 WA, which forms part of Title IX on Euratom-related issues, provides that:

'The United Kingdom shall ensure that any specific obligations under agreements concluded by the Community with third countries or international organisations in relation to any nuclear equipment, nuclear material or other nuclear items present on the territory of the United Kingdom at the end of the transition period are fulfilled, or otherwise identify appropriate arrangements in agreement with the third country or international organisation concerned.'

This is the only example of such a clause in the Withdrawal Agreement, and it reflects the degree to which the operation of Euratom is linked to the wider international regulatory framework for nuclear material and nuclear energy, underpinned by international agreements. Note that the clause refers to agreements concluded by the Community (i.e. Euratom), a phrase which includes mixed agreements,⁴⁹ as well as agreements concluded by Euratom alone.⁵⁰ As far as the latter are concerned, it thus seeks to ensure continuing UK compliance, even after the transition period, with obligations under agreements to which it is currently bound as an EU Member State and by which it would otherwise cease to be bound following withdrawal. UK obligations as an EU Member State result from Union law, and its continuing obligations after withdrawal flow from this provision in the Withdrawal Agreement.

The third explicit reference in the Withdrawal Agreement to an existing international agreement is to the Convention on the Statute of European Schools, and is essentially a transitional provision. Article 125 WA provides that the Convention will bind the UK 'until the end of the school year that is ongoing at the end of the transition period' and also preserves, for a limited time, the right of recognition of the European baccalaureate obtained at a European School.⁵¹

Beyond the Withdrawal Agreement itself, some joint and cooperative action has taken place as regards the WTO. As already noted, after withdrawal the UK remains a party to the WTO Agreements in its own right, but adjustments need to be made to reflect the fact that the UK is no longer part of the EU customs union, as well as the complex arrangements for Northern Ireland.⁵² An initial approach

⁴⁸ See further M J Clifton, 'The UK's Creative Ambiguity towards the EEA: Immediate and Future Relationship Problems', UK Constitutional Law Association Blog, 20 February 2019, <<https://ukconstitutionallaw.org/>>

⁴⁹ E.g. the Convention on Nuclear Safety 1994, OJ 1999 L 318/21.

⁵⁰ E.g. the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities, OJ 2008 L 34/3.

⁵¹ Art 5 Convention defining the Statute of the European Schools, OJ L 212/3. Art 125 of the Withdrawal Agreement preserves the rights granted by Art 5 for European baccalaureates granted before, or granted to pupils enrolled before, 31 August 2021.

⁵² Under the Protocol on Northern Ireland, Art 4, Northern Ireland is part of the UK customs territory; '[n]othing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of its Schedules of Concessions annexed to the General Agreement on Tariffs and Trade 1994' and goods originating in Northern Ireland may benefit from UK trade agreements. At the same time, under Art 5(4) and

to WTO members was made jointly by the EU and UK, intimating that after withdrawal the UK would remain a member of the WTO with its own separate schedule of commitments, and indicating that the UK 'intends to replicate as far as possible its obligations under the current commitments of the EU.' The EU and UK undertake, in adjusting their tariff-rate quota commitments, to 'strive to minimise disruption to trade' and to 'maintain existing levels of market access.'⁵³ In June 2018 the Council authorised the Commission to open negotiations with WTO partners on the adjustment of its tariff-rate quotas to reflect UK withdrawal.⁵⁴

The very limited provisions in the Withdrawal Agreement illustrate the piecemeal way in which the negotiators have addressed the consequences of UK withdrawal from the point of view of third countries. As it is, there is no indication, either in the Withdrawal Agreement or in other statements, that the UK might be interested in, or the EU willing to support, continuing UK participation in EU external agreements.⁵⁵ For some third countries – those with which the UK is in any case keen to establish treaty relations, especially on trade – this may be of less significance. For others, especially developing countries about to lose preferences on the UK market, an attempt to mitigate the uncertainty for third country parties and provide continuity beyond the rather short transition period would surely have been welcome.

The transition period

The establishment of a transition period occupies an important part of the Withdrawal Agreement, and in contrast to the general arrangements for withdrawal, specific attention is paid to international agreements. The EU was clear from the start of discussions about a transition period that if agreed, the Union *acquis* should apply to the UK 'as if it were a Member State,' and should cover the whole of the EU's *acquis*, including the EU's international agreements.⁵⁶ Thus, during the transition period, which is due to end on 31 December 2020 unless extended for a maximum of a further two years,⁵⁷ Union law shall apply in and to the UK,⁵⁸ and 'Union law' is defined to include 'the international

Annex 2 of the Protocol, provisions of EU customs law apply in Northern Ireland, and this includes '[o]bligations stemming from the international agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, insofar as they relate to trade in goods between the Union and third countries.'

⁵³ Joint letter from the EU and the UK Permanent Representatives to the WTO, 11 October 2017, <https://ec.europa.eu/commission/publications/joint-letter-eu-and-uk-permanent-representatives-wto_en>.

On third country reactions to the proposed approach to tariff quotas, see <<https://tradebetablog.files.wordpress.com/2017/10/us-et-al-letter-on-trqs.pdf>>; see further P Ungphakorn, 'What's really happening on tariff quotas and Britain's WTO commitments?', Tradebetablog, 12 September 2018, <<https://tradebetablog.wordpress.com/2018/09/12/happening-tariff-quotas-uk-wto/>>

⁵⁴ General Affairs Council 26/06/2018, Council doc. 10519/18.

⁵⁵ The UK has signalled its desire to become a party to the Lugano Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial cases (OJ 2007 L 339/3), to which the current parties are the EU, Denmark, Iceland, Norway and Switzerland. The EU concluded the Convention under exclusive competence (Opinion 1/03, EU:C:2006:81), Denmark being a party in its own right as a result of its opt-out from EU policy on Justice and Home Affairs (Protocol 22 to the TEU and TFEU).

⁵⁶ Council supplementary directives for the negotiation of an agreement with the UK setting out the arrangements for its withdrawal from the EU, Council doc. XT 21004/18 ADD1 REV2, 29 January 2018, paras 13 and 15.

⁵⁷ Arts 126 and 132(1) WA.

⁵⁸ Art 127(1) WA.

agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union.’⁵⁹

Article 129 WA sets out the position as regards the external *acquis* in more detail. Article 129(1) WA stipulates that during the transition period, the UK ‘shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly.’ The Withdrawal Agreement thus requires the UK to comply with the external *acquis* during the transition, including that part of the *acquis* arising from international agreements. As with the Union *acquis* generally, it does not have rights of institutional participation; it will not participate in bodies set up under international agreements unless it participates in its own right, or is exceptionally invited to do so by the EU.⁶⁰

The wording here is important. First, it should be noted that the obligations in question ‘stem from’ the agreements, but their binding character for the UK flows from the Withdrawal Agreement (the UK ‘shall be bound’) and their status as Union law. This is distinct from any obligations the UK may be under if it continues as a party to mixed agreements. Since Union law applicable by virtue of the Withdrawal Agreement is to have the same effect in the UK as Union law within a Member State,⁶¹ provisions of these agreements which have direct effect under EU law will continue to do so in the UK during the transition period.

Second, it is argued above that international agreements concluded ‘by the Union and its Member States acting jointly’ refers to bilateral mixed agreements. Since the expectation is that the UK will withdraw from these agreements (or possibly negotiate continuing participation in its own right), this clause essentially provides a space until the end of the transition period for the necessary arrangements to be made. However it is not explicit about this, nor does it specify what needs to be done. If the view is taken that the phrase also covers multilateral mixed agreements, then Article 129(1) WA has the effect of making compliance with such agreements for the duration of the transition period a matter of obligation under the Withdrawal Agreement (i.e. owed to the EU) as well as under international law.

Third, Article 129 WA only refers to the obligations under these EU agreements, not to any rights that the UK, while a Member State, may have derived from them. This flows inevitably from the fact that the Withdrawal Agreement cannot commit third States to confer those rights on the UK, as a former EU Member State. Article 129(1) WA carries a footnote in which it is stated that ‘The Union will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements,’ and the Commission has published a draft ‘Note Verbale’ to this effect to be sent to relevant treaty partners, but of course there is no guarantee that the third State parties will accede to this.⁶² Given the short time-frame for the transition period as envisaged at the time of writing (1 February – 31 December 2020) it is perhaps unlikely that third States will object, but it is nevertheless novel for a State (the UK) to agree to be bound by the terms of international agreements without any guarantee of reciprocal implementation.

While the Withdrawal Agreement itself does not – and could not – confer rights under EU agreements on the UK during the transition period, the UK itself may seek, with individual third States, to ensure

⁵⁹ Art 2(a)(iv) WA.

⁶⁰ Art 129(2) WA.

⁶¹ Art 4(1) WA.

⁶² Cover letter and Note verbale on the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, COM(2018) 841 final, 5 December 2018.

continued exercise of its rights, and for their orderly termination at the end of the transition period. It has done so in relation to the EFTA EEA States in the Separation Agreement intended to ensure protection of the rights of EEA nationals in the UK and British nationals in the EEA States and to deal with other 'separation issues'.⁶³ The Separation Agreement reveals some of the complexities involved.⁶⁴ For example, one of its provisions refers to the agreement between the EU, Iceland and Norway on the surrender procedure between EU Member States and Iceland and Norway, which essentially extends the European Arrest Warrant procedure to those EFTA States, and which applies to the UK by virtue of its EU membership.⁶⁵ Under the terms of Article 129(1) WA the UK would continue to be bound by its obligations under the EU agreement with Iceland and Norway during the transition period, but no provision is made for reciprocal application during the transition period or for dealing with ongoing processes at the end of transition.⁶⁶ The UK-EFTA EEA Separation Agreement fills this gap by providing for the continued application of surrender procedures involving the UK, Iceland or Norway started before the end of the withdrawal transition period.⁶⁷ It thus seeks to ensure, not only the full application of the EU agreement as regards the UK during the transition but an orderly termination of its operation at the end of the transition period. It is notable that it does so in an agreement with the non-EU parties in which the EU (the party to the agreement with Iceland and Norway) does not participate.

In addition to providing for the UK to continue to be bound by existing EU agreements, Article 129 WA places an obligation of sincere cooperation on the UK during the transition period. It is to refrain 'from any action or initiative which is likely to be prejudicial to the Union's interests, in particular in the framework of any international organisation, agency, conference or forum of which the United Kingdom is a party in its own right.'⁶⁸ Thus during transition the UK will need to have regard to the EU's position while participating in mixed agreements and international fora more generally, and exercising the powers it has 'in its own right' (for example, voting powers). The use of the term 'sincere cooperation' implies a strong obligation actively to support agreed EU positions,⁶⁹ (albeit not having participated in formulating them) but it could be argued that in this transition context something less constraining is implied, such as an obligation not to directly prejudice EU interests. Recalling the distinction between different types of mixed agreement, it could also be argued that the obligation of sincere cooperation operates more strongly in the context of bilateral mixed agreements, where the Member States and Union are 'of the one part', than in multilateral mixed agreements.

For EU Member States, the obligation of sincere cooperation imposes constraints on their ability to negotiate new agreements with third States, even where EU competence is non-exclusive.⁷⁰ The Withdrawal Agreement recognises the nature of the transition period by expressly providing that the

⁶³ UK-EFTA Separation Agreement, note 45. The agreement is not yet in force at the time of writing.

⁶⁴ Further on this issue, including the example given here, see M-J Clifton, 'The EEA EFTA Separation Agreement – Problems Galore', LSE Blog, 26 February 2019, available on <<https://blogs.lse.ac.uk/brexit/2019/02/26/uks-idea-for-withdrawal-from-the-eea-agreement-is-highly-problematic/>>

⁶⁵ The UK 'opted in' to the Council decision concluding the agreement: Council Decision 2014/835/EU on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, OJ 2014 L 343/1.

⁶⁶ C.f. in comparison, on the European Arrest Warrant, Art 62(1)(b) WA.

⁶⁷ UK-EFTA Separation Agreement, note 45, Art 51(2);

⁶⁸ Art 129(3) WA.

⁶⁹ See e.g. case C-620/16 *Commission v Germany*, EU:C:2019:256.

⁷⁰ See e.g. cases C-266/03 *Commission v Luxembourg* EU:C:2005:341 and C-433/03 *Commission v Germany* EU:C:2005:462.

UK may negotiate and even conclude new agreements with third States ‘in its own capacity’, even in fields of exclusive EU competence such as trade policy, as long as the agreement does not come into force before the end of the transition period.⁷¹

The intention of the provisions on transition in the Withdrawal Agreement is therefore that the external *acquis* – including international agreements – will continue to apply to the UK for a short period after withdrawal.⁷² The incorporation of these provisions in the Withdrawal Agreement are perhaps one reason for the absence of any separate focus on ‘transition’ in a more active sense, such as provisions on negotiated withdrawal from bilateral mixed agreements. It is nevertheless rather surprising that the UK is enjoined to comply with obligations derived from EU agreements (including mixed agreements) until December 2020, the Withdrawal Agreement being however completely silent as to the future of these agreements, and the UK’s participation in them, following that date. It does not even resolve the ambiguity (if there is any) as to the need for withdrawal from bilateral mixed agreements such as the EEA. The parties (EU and UK) commit to negotiate in good faith so as to avoid a post-transition ‘cliff edge’ in their mutual relations,⁷³ but there is no such commitment to seek to ensure a smooth post-transition for third State partners. The result is a transition period designed (understandably) to smooth the transition for the EU and UK but which does not create any transitional process designed to address the interests of third State treaty partners, nor even express the sentiment that such a process (an ‘orderly withdrawal’ by the UK from these obligations) would be beneficial.

Conclusion

As has become clear, the Withdrawal Agreement does not, with a couple of specific exceptions, look beyond the end of the Transition period in its handling of existing international agreements. We have also seen that the UK itself may seek to deal with the ‘transition from the transition’ in separate bilateral agreements, but this is necessarily piecemeal and highly selective, and there is no agreed position on the issue or involvement of the EU in the process. Many agreements will thus suffer a ‘cliff edge’ at the end of the transition period. It has been argued here that although the Withdrawal Agreement is not intended to establish the future relationship, the process of ‘disentanglement’ should entail a recognition of the impact of withdrawal from the EU on existing treaty relations with third States and provide the basis for a common approach in handling negotiations with those treaty partners. The European Council Guidelines and Council negotiation directives recognised this as desirable but it was not translated into Withdrawal Agreement commitments. A variety of factors explain this outcome, notably the dominance of other issues in the negotiations, the lack of time (and political will) to focus on the future, the UK’s lack of clarity about what it wanted in its future relations with the EU (and therefore how closely it wished to remain aligned with existing EU international commitments), and the transition period which, once agreed, allowed the ‘future’ to be postponed.

Given this position, it was not to be expected that the Political Declaration on the Future Relationship would contain much detail on specific objectives with respect to maintaining or managing ongoing international commitments. The European Council’s Guidelines on the negotiation of the Political

⁷¹ Art 129(4) WA.

⁷² Art 129 WA contains other provisions relating to the application of other aspects of the external *acquis*, notably the Common Foreign and Security Policy, which are not discussed here; see Art 129(6) and (7) WA.

⁷³ Art 184 WA.

Declaration, issued in December 2017 at the end of the first phase, includes among its aims the need to ‘avoid upsetting existing relations with other third countries’.⁷⁴ The context in which this is placed (referencing the UK’s desire to leave the EU’s customs union and single market, and the need to preserve a level playing field), indicate that the European Council is concerned that the UK should not look for a special status or combination of rights and obligations which the EU is not prepared to countenance for other third countries. It is not directed at ‘avoiding upsets’ in the sense of preserving continuity in existing third State relations.

The Political Declaration does contain one provision by which the parties seek to ensure continuing mutual commitment to certain multilateral conventions: those concerned with climate change.⁷⁵ In the context of development, the parties affirm their support for the European Consensus on Development,⁷⁶ and agree to ‘consider how the United Kingdom could contribute to the Union’s instruments and mechanisms,’⁷⁷ but there is no suggestion that the UK might continue to participate in (for example) the EU’s development agreements such as the Cotonou Convention,⁷⁸ valuable though that would be for the EU’s developing country partners.

The section of the Political Declaration on foreign policy, security and defence contains commitments to future cooperation and ‘shared positions’. These are framed in terms which could be applied to any third State, although given the necessary political will on both sides they could certainly provide the basis for a close partnership:

‘The Parties should seek to cooperate closely in third countries, including on security, consular provision and protection, and development projects, as well as in international organisations and fora, notably in the United Nations. This should allow the Parties, where relevant, to support each other’s positions, deliver external action and manage global challenges in a coherent manner, including through agreed statements, demarches and shared positions.’⁷⁹

This paragraph, and other similar statements in the Political Declaration underline the obvious but crucial fact that after transition the UK will itself be a third State. Here we see one of the paradoxes of the withdrawal process: the legal questions arising from the external *acquis* largely concern the UK’s future participation in, or withdrawal from, the EU’s wide range of international commitments; as such they might appear to belong to future post-withdrawal negotiations and not to the Withdrawal Agreement. However once the Withdrawal Agreement enters into force the legal position in respect of these international agreements changes dramatically, since the UK is no longer a Member State. In many cases the UK will simply no longer be covered by the agreement and in others its position will be anomalous. The Withdrawal Agreement, and especially its provisions on transition, are designed to bridge the gap between membership and non-membership; it is, as the Council said, an exceptional

⁷⁴ European Council Guidelines, EUCO XT 20011/17, 15 December 2017.

⁷⁵ ‘The future relationship should reaffirm the Parties’ commitments to international agreements to tackle climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement.’ Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 2019, C 384 I/178, para 76.

⁷⁶ *Ibid.*, para 91. The European Consensus on Development, adopted as a joint statement by the Council, the representatives of the Member States meeting in Council, the Commission and the European Parliament, OJ 2006 C 46/1.

⁷⁷ *Ibid.*, para 107.

⁷⁸ The Cotonou Convention is currently under renegotiation; for the negotiating directives, see Council doc. 1894/18 ADD 1, 21 June 2018.

⁷⁹ *Ibid.*, para 96.

and one-off competence created for that purpose.⁸⁰ The opportunity having been missed for inserting into the Withdrawal Agreement a legal basis for ongoing cooperation, or even joint action, in handling issues relating to external agreements, it will hardly be possible to remedy the lack in a future EU-UK agreement. In resolving difficulties that may arise over the operation of existing international agreements with respect to the UK post-transition, and in their relations with third States, the EU and UK will no longer be 'of the one part'. Obligations of solidarity and sincere cooperation will no longer apply, except insofar as they apply to the continued operation of the Withdrawal Agreement itself.⁸¹ The special nature of the Withdrawal Agreement testifies to the particularity of the withdrawal process, the ramifications of which – including its impact on relations with third countries – are still largely unknown.

⁸⁰ See text at note 5.

⁸¹ See e.g. Art 5 WA, raising questions as to the interpretation of 'good faith' in this context.