# THE CAPACITY OF THIRD COUNTRIES TO NEGOTIATE BILATERAL AGREEMENTS WITH THE UK UNDER WITHDRAWAL ARRANGEMENTS

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***ABSTRACT***

*Having in mind that this is the first time that a Member State decided to withdraw from the EU pursuant to Article 50 TEU there are many aspects of this process that attract the attention of scholars studying EU related issues. Regardless of the outcome of the ongoing political debate and the course of action that will be taken eventually, after the CJEU decision in Wightman, we deem the need to further explore the extent of Article 50 and its implications on a number of stakeholders self- evident. In this paper we will deal with the capacity of non-EU countries to negotiate and conclude bilateral agreements with the UK i.e. a country withdrawing from the EU. The analysis is based on the proposed framework under the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the Euratom and the possible interpretation and understanding of terms "the principle of sincere cooperation" and "the Union's interest" in this context, the principles of international law including the provisions of the Vienna Convention on the Law of Treaties and the general principles of Union law. The primary focus is on the legal uncertainty the lack of a more thorough approach creates to non- EU countries, especially to third countries aspiring to join the EU. Considering that they do not participate in the withdrawal negotiations, it is a challenge for them to take part in prospect bilateral negotiations with the UK, while, at the same time, making sure they stay on their EU path. We argue in favor of the deal, as a universally accepted approach in case of future withdrawals, not only for the purpose of establishing a reference for any future application of Article 50, but also for providing legal certainty to those parties that are not prima facie affected by the withdrawal, but that do have to act in accordance with all deals made without the right to be heard.*

***Keywords**: Brexit, Article 50 TEU, bilateral agreements, third countries, sincere cooperation*

## 1. INTRODUCTION

The Brexit debate is, by all means, more complex and difficult than it was initially expected. The debates in the British Parliament and the European institutions put the problem of Brexit in the center of political and economic spheres on both sides of the English Channel. However, after all this time, it seems that every step of the way a new Pandora's box of issues is opened. To this day, the outcome is unpredictable and highly dependent on the influence of the political leaders involved in the process. One thing is certain, the procedure under Article 50[1] has proven itself to be the beginning of a very complicated journey. What this essentially demonstrated is that the EU has been, throughout the years, almost exclusively dedicated to integration and enlargement, completely neglecting the very notion of withdrawal. When this option became a reality, it was clear that the entire process of leaving the EU is based on a single treaty article that simply derives from a universal notion of international law indicating that all states are free to enter treaties and withdraw from them at their own will and in accordance with the rules specified in the treaty. This is obviously insufficient grounds to annul decades of integration and let alone to reverse the effects of long-term harmonization of laws. Hence, a preferred withdrawal method set out by TEU is an agreement between the State exiting the EU and the Union.[2]

The UK, on the other hand, has three choices: a negotiated deal, no deal, and, since *Wightman*[3] - no Brexit. Three choices – None the good.[4] Each choice is more difficult than the other, starting from the Draft Withdrawal Agreement negotiation, hauled by politicians in the UK's and EU's political arenas for months, to a no-deal Brexit, leaving everybody involved in a rather difficult situation. Furthermore, this means that the UK will have to re-develop its international relations through agreements, where large parts of them were already regulated under the auspices of Union's external action. The existing EU division of competences, as well as the principles of sincere cooperation and primacy, also make it difficult for the UK to define its future relations with third countries. This creates uncertainty not only for the UK, but also for a number of third countries that did not have any say in the withdrawal process.

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1 Article 50, TEU (Lisbon)

2 Article 50 (1) TEU

3 Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:999 - not yet published (Court Reports - general)

4 *Three choices on Brexit- None the Good*, [https://www.nytimes.com/2018/12/13/opinion/editorials/theresa-may-britain-no-confidence-brexit.html] Accessed 01.03.2019

Imagining that "Britain could implement the (new) deals whenever the fine print is ready"[5] appears to be just wishful thinking, so the dissuasion shifted focus to actual outcomes and solutions regarding future bilateral arrangements of the UK. Following these trends, this article is dedicated to the analysis of the existing solution under the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the Euratom[6] and the possible interpretation and understanding of terms "the principle of sincere cooperation" and "the Union's interest" in this context *par rapport* the third countries. Relying on fundamental principles of international law, the provisions of the Vienna Convention on the Law of Treaties and the general principles of European Union law, certain shortcomings of the proposed solution and the disadvantages of a no-deal scenario will be discussed. Lastly, the focus is on the legal uncertainty the lack of a more thorough approach brings to those third countries aspiring to join the EU (the ones having SAA or AA agreements in force). Considering that they do not participate in the withdrawal negotiation, nor do they have formal access to EU institutions that may offer some sort of a legally viable interpretation, it presents a challenge for them to engage in prospect bilateral negotiations with the UK without any point of reference whatsoever, while, at the same time, making sure they stay on their EU path.

Although no definite answers can be offered at this stage, it appears important to discuss the difficulties that may arise for third countries as a result of a country withdrawing from the EU. Furthermore, it can be concluded that the states participating in the withdrawal process gave very little consideration to third countries' interests that cannot be represented in any other way.

## 2. POINTS OF REFERENCE FOR THIRD COUNTRIES UNDER THE DRAFT WITHDRAWAL AGREEMENT

Regardless of the most recent developments, the shift of focus from integration to disintegration lead to much confusion, discontent and legal, social and economic intricacies, that are, at some point, bilaterally tackled only in the Draft Withdrawal Agreement. This agreement is the first step toward understanding what a discussion under Article 50 can produce at a time of disintegration. The withdrawal means that a seemingly unlimited number of issues need to be elaborately resolved

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5 [https://inews.co.uk/news/brexit/no-deal-brexit-preparation-uk-leave-eu-without-deal-consequences-theresa-may/] Accessed 05.02.2019

6 Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [www.ec.europa.eu] Accessed 22.11.2018

in a single or more agreements, that obtaining approval for mutually acceptable solutions at a national level is not as easy as expected, and that no-deal is also an option. As it is much easier for an individual to walk into a bar than to walk out of one, it appears much easier for a state to become a member rather than to leave the Union. Understandably, the current candidate countries may disagree on the latter. What the withdrawal negotiation also demonstrated is that there was barely enough time and capacity to deal with the internal aspects of the exit and let alone even consider the effects it will have on third countries. If the legal issues of leaving the Union are an uncharted territory[7] then the effects of one state leaving on countries outside the Union is outer space. The Union has exceeded its territory in many aspects and we can now, without reservation, talk about the Union outside the Union. Through its neighboring and enlargement policies, the Union created an entire system of exclusive, preferential relations with a large number of third countries which will, undoubtedly, be affected by one state leaving. Furthermore, the Union indirectly expanded the effects of its law beyond its territory in a way that creates a firm bond based on mutual, primarily economic in nature, interests. It is safe to assume that the UK would be more than interested in maintaining those preferences. On the other hand, third countries are not at liberty to grant those preferences to non-EU states without bearing the *de facto* consequences in relation to their policy toward the Union, which is, in some cases, prospective membership. If, say, a third country with a very elaborate association agreement with the Union and its Member States, would want "to do the right thing" and be a *bona fide* negotiator in all future deals with a country exiting the EU, it would be very hard for it to find a viable legally binding reference or even some simple guidelines upon which to rely. For the time being, it could rely on the general rules of international law and the little we can derive from the existing Draft Withdrawal Agreement.

The first question to be addressed in order to explain what a third country needs to consider in its future bilateral negotiations with the UK is what the actual status of this country is. Is it "business as usual"?[8] Or should the UK be regarded if it is already out? The issue is further more complicated after the decision in *Wightman* confirming that a state can unilaterally revoke the notification which results in ending the withdrawal procedure. Either way, a third country is facing a difficult question even at the very start of any future negotiations: With whom are we ne-

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7 Craig P., *Brexit: A Drama in Six Acts*, a lecture delivered at St. John's College, 2016, p. 28, [www.ora.ox.ac.uk] Accessed 07.12.2018

8 Lazowski, A.; Wessel, R.A., *The External Dimension of Withdrawal from the European Union*, Revue des Affaires européennes. 2016 (4), p. 625, [www.westminsterresearch.wesminster.ac.uk] Accessed 30.11.2018

gotiating the agreement? A Member State? A former Member State within a transition period? Or a Member State soon to be former yet again in position to revoke notification and stay a Member State? Having in mind that a number of third countries, especially those aspiring to join the EU, do not have the negotiating capacities matching those of the UK and that the negotiation of an international agreement is a cost- inflicting activity that is a certain financial strain if conducted in vain, these questions need to be addressed based on at least a minimum of solid legal framework. The Draft Withdrawal Agreement, in that sense, is the sole available document that can offer a clearer indication on how third countries should engage with the UK in the future. At least, its very entry into force would trigger the cessation of application of the Treaties under Article 50 and the revocation of notification would no longer be on the table.

After analyzing the overall state of affairs, *arguendo*, we can examine the content of the Draft Withdrawal Agreement offering some legal basis third countries can derive from in case of bilateral agreement negotiations with the UK. As a general reference, the Draft Withdrawal Agreement sets out the obligation of good faith and sincere cooperation.[9] The UK should refrain from any action or initiative that is likely to be prejudicial to Union's interest.[10] This can be a useful broader obligation for the country exiting the EU to avoid initiating and participating in negotiation that can be contrary to these provisions, however, the "Union's interest" is somewhat hard to define. Furthermore, the transition period established is a relevant timeframe even for third countries. According to Article 126, the transition period starts with entry into force and ends on a specific date[11] and all restrictions imposed in terms of the UK's external action are limited to the determined period of time. This leads us to the only provision that directly deals with the capacity of the UK to sign and ratify international agreements in the areas of exclusive competence of the Union which is Article 129 (4). The UK is free to sign and ratify international agreements in its own capacity "provided those agreements do not enter into force or apply during the transition period, unless so authorized by the Union". Although this is an obligation imposed on the UK, it is, at the same time, a relevant piece of information to all third countries approached by the UK with the aim to conclude bilateral agreements falling under the scope of Union's competences. It permits the conduct of negotiations, and even the ratification of the agreements concluded, while establishing a definable timeframe for entry into force of such agreements. Deriving from what is defined, the Draft Withdrawal

9 Article 5, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (DAWUK)

10 Article 129 (3) DAWUK

11 The end date is December 31, 2020 with possible extensions

Agreement offers some crucial information for a third country to be able to assess its interest in entering negotiation on a certain bilateral agreement with the UK: the UK is no longer a Member State and it cannot go back on its decision and change its status unilaterally starting from the agreed moment in time, and the UK's bilateral agreements concluded within the Union's exclusive competences will not have effect until the end of the transition period unless otherwise approved. This solves a number of potential dilemmas for a large portion of future international agreements, however, some may not fall under the scope of this provision *per se*. The Union has taken measures to increase connectivity in many areas, to name transportation as an example, which are necessary to ensure single market benefits and the application of uniform rules. These arrangements offer a wide range of exclusively granted preferences to third neighboring countries that in return grant preferences to Member States the UK would most probably want to maintain. This may not be contrary to Union's interests but it would interfere with the third country's policy goals toward the Union. A third country would, therefore, have to evaluate whether certain arrangements with the UK would include some preferences that the Union deems exclusive, and whether these arrangements would negatively affect its membership negotiation or the application of some of its international agreements. Moreover, agreements that fall under the scope of the shared competences are not dealt with *en general* which implies that this area is subject to either interpretation or future UK- Union agreements.

Lastly, some conclusions can be drawn from the provision of Article 184 of the Draft Withdrawal Agreement, since both the Union and the UK are obliged to use their best endeavors to take necessary steps to negotiate expeditiously the agreements governing their future relationships. This does not mean much to third countries, especially to the prospective members, however it announces that there will be a legal framework for Union- UK future relationships upon which they could model their own bilateral arrangements with the UK.

As demonstrated, little consideration is given to the fact that the Union entered numerous political and legally binding partnerships with many third countries which extended the number of parties affected by the withdrawal to states that cannot participate in the Brexit negotiation. In case of no- deal exit, international law would apply. Other Union- UK treaties are also an option, with or without a withdrawal agreement. Although this is a subject of a different debate, a more elaborate withdrawal agreement would be the most adequate solution even for third countries since additional treaties may come too late and their relationships with the core agreement[12] may be questionable.

[12] Craig, *op.cit.,* note 7, p. 38

## 3. NO- DEAL SCENARIO: WHAT CAN A THIRD COUNTRY EXPECT?

In the case of a no-deal Brexit the UK would have to deliver an agenda to both the Union and third countries, considering that this scenario looms large as a possible outcome.[13] The UK will need to demonstrate that it takes its future role seriously both inside and outside the Union. No-deal scenario means that the possibility of "cherry picking",[14] as political experts in the UK dubbed the negotiations with EU27, comes to an end and that UK, at that point, will be a "rule-taker" rather than a "rule- maker".[15] Simply put, it will become a third-party *par rapport* the EU and its members. It will also be hundreds of bilateral and multilateral agreements away from the privileged position it has as a Union member. Obviously, the counterparts do not share the same views on no-deal Brexit: the President of the European Council Donald Tusk calls a "No-deal scenario worst deal of all, especially for the UK",[16] whereas Theresa May repeatedly said that: "No-deal Brexit is "not the end of the world",[17] which renders the outcome even more unpredictable.

Putting aside the political analysis of the no-deal Brexit, there is a plethora of issues that need to be covered in the case of a "cliff-edge Brexit".[18] We will briefly analyze the rules of international law that could apply to those situations where there are no rules laid down by Withdrawal or other transitional agreement(s). This is the remaining point of reference for third countries to derive from in case of no-deal exit.

Firstly, the specificity of the UK's situation could be explained as a limbo between having a transitional period and not having a period to adjust at all. The termination of UK membership is conducted under Article 50 TEU, but the rules of international law must also be taken into consideration. The rules laid down in Vienna Convention on the Law of the Treaties (VCLT),[19] are considered a codifi-

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13 Dr Niblett R. CMG, *Finding a Sensible Brexit*, 2018, [https://www.chathamhouse.org/expert/comment/finding-sensible-brexit] Accessed 21.02.2019

14 *ibid*.

15 *ibid*.

16 [https://www.bbc.com/news/uk-politics-39294904] Accessed 01.03.2019

17 Pickard J., *Theresa May says no-deal Brexit 'not the end of the world'*, 2018, [https://www.ft.com/content/8afc0f88-aa8d-11e8-89a1-e5de165fa619] Accessed 16.02.2019

18 Morris C., *Brexit: What would no-deal look like?*, [https://www.bbc.com/news/uk-politics-39294904] Accessed 10.02.2019

19 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, Vienna, 23 of May 1969. (VCLT)

cation of existing customary law[20] and, in many respects regarded as the primary source of international contract law especially when there are no applicable international rules or customs. Having that in mind, the UK is, in the context of International Law, a party to a Treaty which means: "a State which has consented to be bound by the treaty and for which the treaty is in force"[21] and will be bound until the day it ceases to apply to it, again in conformity with Article 54 (a) VCLT. One of the options that was mentioned is that an altered principle of continuity may apply against any finding of automatic termination,[22] in the case of no-deal Brexit. However, in this case, the rules of international law and VCLT are clearly pointing to state succession, so the succession from an international organization *sui generis* such as the EU to a former member state cannot be assumed.[23] For third countries, it essentially means that the UK cannot maintain the same relationships and positions toward them it had as a Member State which translates to countless pending bilateral negotiations.

Furthermore, in December 2018 the European Commission published a No-deal Contingency Action Plan[24] which includes 14 necessary measures, in order to prevent a major disruption that would ensue as the result of non-deal Brexit. This is not a consolation prize in case the Draft Withdrawal Agreement is not ratified, but a document showing that the Union is preparing in case it needs to protect its interests. The uncertainty of a fading deal outcome was underlined when the European Commission announced having adopted two more proposals regarding Fisheries, in the case of no-deal Brexit in 2019.[25] However, the measures adopted by the Commission are merely a temporary solution, very limited in scope, implying that other solutions have to be considered. Furthermore, the Communication

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20 Brownlie I., *Principles of Public International Law*, Oxford University Press, New York, Sixth Edition, 2003, p. 580

21 Article 2.1 (g) VCLT

22 Dr Gehring W.M., *Brexit and EU-UK Trade Relations od Third States*, 2016, [http://eulawanalysis.blogspot.com/search?q=brexit+and+international+agreements] Accessed 10.03.2019

23 Wessel R., *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, Draft paper – presented at the 60th anniversary conference of the Europa Institute, Brexit and the Future of the European Union, University of Leiden, 30 November 2017, p. 15, [www.utwente.nl] Accessed 29.11.2018

24 Communication From The Commission To The European Parliament, The European Council, The Council, The European Central Bank, The European Economic And Social Committee, The Committee Of The Regions And The European Investment Bank: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: Implementing the Commission's Contingency Action Plan, OJ, 19 December 2018

25 Proposal for a Regulation Of The European Parliament And Of The Council amending Regulation (EU) No 508/2014 as regards certain rules relating to the European Maritime and Fisheries Fund by reason of the withdrawal of the United Kingdom from the Union, 23rd of January 2019, [https://ec.europa.eu/info/sites/info/files/com-2019-48-final_en.pdf] Accessed 05.03.2019

from the Commision describing all urgent steps and measures to be taken by the EU and its institutions, in the very last paragraph underlines that all Member states need to refrain «from bilateral arrangements that would be incompatible with EU law and which cannot achieve the same results as action at the EU level. Such arrangements would also complicate the establishment of any future relationship between the EU and the United Kingdom".[26] If a no-deal scenario happens, the UK will no longer be bound by the principles of sincere cooperation and loyalty- the EU values and constitutional principles, that are not only core of the Treaty but also are firmly elaborated and reconfirmed in the case-law of CJEU in judgments *Commission v Germany and Luxembourg*[27] *and PFOS*.[28] With the *PFOS* formula CJEU clarified that loyalty also means abstention from acting under certain circumstances.[29] However, we must not forget, when that happens, on the other side of the negotiating table, concluding bilateral treaties there will be, among others, the Member States and the Union itself, still bound by the same principles acting in or outside of the EU. As briefly demonstrated, the EU is preparing for the impact of no-deal Brexit, still it fails to give due consideration to the interests of third countries with whom it has very elaborate bilateral relations.

Recalling that the UK will, after no-deal Brexit, be considered immediately a third country, the only guidance to regulating bilateral agreements would be the two universally recognized principles laid down in the Preamble and Article 26 of the VCLT- *pacta sunt servanda*[30] and, its main component or the *animus*, the *bona fides* principle. In this regard, however, the maxim *pacta tertiis nec noent nec prosunt* [31] that expresses a fundamental international principle that a treaty applies only between parties, is not fully applicable, when we have in mind that Member States are acting in accordance with the EU division of competences and that they are responsible to the EU as an entity as well as to other Member States. Pursuant to the fact that each Member State is part of the Union and is bound by principle of loyalty, all acts regarding bilateral arrangements of a Member State with the UK need to be negotiated and concluded under international law but also in the spirit of sincere cooperation. Moreover, in the spirit of the *pacta sunt servanda* and other VCLT principles stated, an emphasis should be put not only on bilateral agreements between Member States and the UK, but also on SAA and AA

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26 *Ibid*, p. 9

27 Case C-433/03 *Commission v Germany*, [2005] ECR I-0698 par. 64 and Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, par. 58

28 Case C 246/07, *Commission v Sweden*, [2005] ECR I-03317, par. 70

29 Kuijper P *et. al., The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Acto*r, Oxford University Press, First edition, 2013, p. 202

30 Article 26, VCLT

31 Artcle 34, VCLT

agreements.[32] The no- deal scenario does not mean, when it comes to the mixed agreements which the UK signed and concluded in this context, and is a party to alongside the Union and prospective candidate countries, that an umbilical cord is cut. It is clear that those agreements were tailor-made for the EU enlargement purposes situation, but in the no-deal case the question remains: in what capacity the UK stays (or leaves) in those agreements where it is a party as a country, *en face* the third states *i.e* candidate countries? More importantly, this issue has bigger impact on the future conduct of third countries towards the UK in those areas covered by the SAA, since none of the signatories envisaged this situation. Should it be regulated under International law rule of *rebus sic stantibus*[33]? Will it continue to be applied bilaterally or partially in relevant aspects between the UK and a third state? Will it be regulated by one or more *lex posteriori* acts? One thing is sure, this question deems closure and remains to be settled throughout numerous arrangements, and it would be an opportunity for the EU to correct its previous oversight and establish a model for third countries to be included.

## 4. NOT ALL THIRD COUNTRIES ARE THE SAME: HOW ARE THE UNION'S CLOSEST NEIGHBORS AFFECTED?

The Union created a unique legal system that is effective even outside its territory. A certain group of third countries have elaborate relationships with the Union grounded in international agreements governing various modes of application of Union law. Under its Enlargement and Neigbourhood policies the Union develops legally binding relationships with its Southern and Eastern neighbors and with the third countries eligible for membership. An instance of a very elaborate agreement between the Union and an eastern partner is the EU- Georgia Association Agreement including a Deep and Comprehensive Free Trade Area (DCFTA)[34] covering a wide spectrum of issues dealing with political association and economic integration. The signatories also formed a free trade area[35] which may be of interest to the UK to maintain post-exit. It goes without saying that the states are free to enter negotiations and regulate their future trade relations as they wish, however, can this potentially be against Union's interests? Even if not, can it hamper Georgia's

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32 Stabilisation and Association Agreements are concluded in the form of mixed agreements between EU (European Communities), Member States and candidate countries such as Albania, Bosnia and Herzegovina, Montenegro, North Macedonia (ex FYROM) and Serbia. Kosovo* SAA is the only EU-only agreement

33 Shaw N. M., *International Law*, Cambridge University Press, New York, Sixth Edition, 2008, p. 950

34 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of one part, and Georgia, of the other part, Official Journal of the European Union L 261/7, 30/8/2014

35 Article 22 EU- Georgia Association Agreement

future plans to become a candidate for membership? Based on the premise that the Union has, and will continue to have, economic integration as a core value, can Georgia's bilateral agreements concluded today affect its efforts to join the EU in the future? The answers to these questions have a strong political dimension yet they create a number of legal intricacies which cannot be handled without knowing what the status of the UK will be after Brexit.

Arguably, a group of third countries that is expected to be the most affected by Brexit are the countries that fall under the scope of the Enlargement Policy.[36] There appears to be no area of policy left in which the Union and its Member States have not engaged with these third countries and there is hardly any reference in the Union's external framework regulating the involvement of third countries in general, including candidate countries and potential candidates.[37] This means that a third country candidate or potential candidate should align its policies with the Union's external action, however, the modalities of how this should be done are non- existent. On the other hand, disengaging their external action from the course set out by the Union will affect the political dimension of their respective membership negotiations. When dealing with major foreign policy decisions, it is not awfully hard to establish whether they are in line with the Union's external action or not. Still, this could be a demanding task when establishing whether a country applies the same measures as the Union. For instance, as a rather simplified experiment, does a candidate country have to introduce a flight ban against an airliner banned in the Union? The answer is yes, because the odds are that, after years of being a candidate, there must be an agreement that stipulates that. Can a candidate country make the same arrangements with the UK? Can it agree that all airlines banned in the UK will automatically be banned in its territory? This appears to be in order since *prima facie* the Union interest is not affected, because, normally, flight bans are introduced on safety grounds. However, what happens if, while applying its national law that, in the future, may introduce some additional criteria for flight bans unrelated to safety, the UK declares a flight ban against an airliner of a Member State that is allowed to operate within the EU? What is a candidate country to do in this case? Should it introduce the flight ban pertaining to its contractual obligations to the UK, or decline to introduce it pertaining to a multilateral aviation agreement it has with the Union and its Member States within the common aviation area framework? This rudimentary thought experiment depicts a situation that could happen in many Union policy areas with an external component. If a candidate country wanted to protect itself from entering bilateral arrangements that it will need to withdraw from or break in the future,

[36] Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, Serbia and Turkey

[37] Lazowski; Wessel, *op.cit.*, note 8, p. 2

it could not derive much from the Draft Withdrawal Agreement and it could not get any indication whatsoever in case of a no- deal scenario. It could wait for the Union and the UK to conclude individual agreements governing withdrawal issues and hope these issues will be addressed in due time.

For reasons presented above, these two categories of third countries, are, in our view, especially vulnerable to all disturbances Brexit can cause and are exposed to its effects almost as simultaneously as the EU27.

### 4.1 The Implications of Balancing EU Association Arrangements and Bilateral Relations with an Exiting State

The association agreements, and specifically the stabilisation and association agreements (SAA) concluded with the Western Balkans countries, cover many areas which need to be regulated independently with the UK. Even if these new agreements are not reached swiftly, the application of some existing bilateral agreements, temporarily set aside by the *lex posterior* effect of the subsequent agreements with the Union and its Member States, will be automatically activated, which can present a problem due to the fact that they may be anachronous. The UK, as a state with a long tradition in international relations, already assessed the impact of leaving the EU[38] and examined all areas requiring immediate external action, most notably, trade, business and finance, but also criminal justice, defense, migration, science, transportation, environment and others. On the contrary, the candidates and potential candidates, largely focused on their internal issues, seem to be utterly unprepared for participating in extensive bilateral negotiations involving a counterpart with such a substantial political and economic leverage. Yet again they will soon have to find a way to balance their obligations assumed under their respective SAAs and their bilateral negotiations with the state trying to do the exact opposite of what they are doing. Not to mention that they will have to assess their interest in engaging in any negotiation with a country that can have a change of heart and remain in the EU.

Although, this legislative and political limbo created at the time of Brexit can be a major nuisance to the Western Balkans and Turkey, Southern Neighbourhood and Eastern Partnership countries, this is also an aspect that requires a closer inspection from the Union and its members. The proper application of some regulations

[38] Review of the Balance of Competences between the United Kingdom and the European Union presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, [www.official-documents.gov.uk] Accessed 30.01.2019

and directives largely depends on these countries,[39] some of them may eventually become Member States and even disintegration and future withdrawals can be prevented by simply including the prospective members in various policies not only as consumers but also as actors. This clearly indicates that they are being unjustifiably neglected in the Brexit debate. Similarly, these countries appear to have benevolently accepted their disinvolvement and to have been approaching all consequences deriving from it on a case-by-case basis.

### 4.2 Consideration for Others: Why is Exit with a Deal Important Beyond the EU?

The Union is based on the notion of integration but it is also largely based on expansion. To this day, the enlargement aspect has not been fully examined and it has been subject to much debate and conflicting views. The idea of expanding has been a constituent element of the Union even before integration became a priority. With integration, it only became evident that the Union cannot limit itself solely to the territory of its current Member States. The internal market and the proper application of Union law largely depend on maintaining strong bonds with the neighbors. Apart from that, the external action offers a completely different perspective from which some processes within the Union can be observed. Through its external action the Union achieved certain policy goals, however, it also assumed responsibility for the third countries introducing Union law into their legal systems through an elaborate mechanism of legal harmonization. If proper implementation of international agreements concluded with the Union and its Member States depends on internal debates third countries cannot participate in, it is the responsibility of those who can to ensure all potential issues are duly addressed. This obligation derives from the principle of sincere cooperation which needs to be understood as a principle upon which the relations with neighboring countries are also based.

The Union concluded over one thousand agreements with third countries and international organizations according to European External Action Service Treaties Database. The UK will need to take action to re-establish those relationships on its own

[39] There are many instances of this claim. The Energy Community was founded with the aim to properly implement the Electricity Directive adopted around the time of the Athens Memorandum negotiations which preceded the signing of the Treaty. The Union realized that the EU internal energy market cannot exist without the involvement of a number of third neighboring countries which lead to the founding of an entire international organization. Another instance is the most recent European migrant crisis which, once again, clearly indicated that some Union policies cannot be fully effective without an engagement of the countries surrounding it

which will most probably take years, if not even a decade.[40] If they just simply cease to apply at the moment of actual exit that will cause substantial disturbance in many areas of external cooperation. A phase- out is a necessity and some of those agreements would most certainly require additional scrutiny. The UK's ability to conclude agreements with third countries is limited depending on whether the agreement in question falls under the Union's exclusive competences or the shared competences.[41] In that sense, different rules may apply to different agreement negotiations depending on the subject matter and on whether the negotiation is conducted pre-withdrawal, during the transition period, or after exit. Considering that the UK and the EU could conclude additional treaties regulating their future relationships, even post- Brexit can introduce a new dimension to this complex situation.

A third country, even a candidate country, cannot afford to be in a situation that violates Union law, however, the UK could take action that is contrary to the obligations of a Member State. The question remains whether the Union can do something to deal with these infringements. It is suggested that the Commission and the Member States could start infringement procedures under Articles 258 and 260 TFEU[42] which seems undisputable, but the duration of such procedures might easily exceed the transition period which would render them groundless and ineffective. Regardless of how a potential infringement is settled, this is another unforeseen circumstance that a third country needs to factor in when deciding on its bilateral negotiation with the UK.

Finally, the post- Brexit period is also an enigma to those outside the Union. Even if the UK is to become "the best friend and neighbor",[43] this status implies the need for hundreds of agreements to be concluded allowing for Union law to became an integral part of the friend's and neighbor's legal system. Although the initial idea was to work closely on defense and security and work independently on everything else,[44] being a Union's neighbor leaves very little room for complete autonomy. This means that a third country that is already a best friend and neighbor has probably entered relationships with the UK through some of the treaties the Union concludes with its close partners and the UK would eventually have to re-enter them.

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40 Wessel *op.cit.*, note 23, p. 6

41 *Ibid.*

42 *Ibid.,* p. 9

43 An extract from Theresa May's speech outlining Britain's 12- point plan for Brexit, [https://www.politicshome.com/news/europe/eu-policy-agenda/brexit/news/82451/read-theresa-mays-full-speech-outlining-britains-12] Accessed 23.11.2018

44 Henökl T., *How Brexit affects EU External Action: the UK's legacy in European international cooperation*, 2017, p. 9, [https://www.researchgate.net/publication/318476547] Accessed 26.02.2019

## 5. CONCLUSION

Having in mind these *prima facie* difficulties in relation to UK- third countries future contractual endeavors, it is clear that it is both the responsibility of the Union and the exiting state to make sure due consideration is given to third countries and their respective agreements with the EU, as an obligation deriving from *pacta sunt servanda* i.e. the basic principle of the law of treaties. The Draft Withdrawal Agreement expresses some consideration for these issues, and the accompanying Political Declaration[45] also references the application of Article 218 TFEU as a model for shaping future relations post- Brexit, while touching upon the issues of dispute settlement and institutional and horizontal arrangements. In that sense, the EU27, the UK and the Union are clearly aware of the obligations deriving from their external action and hopefully they will follow through with them.

One thing is certain, deal or no deal, the UK cannot be "all things to all people",[46] which was proved numerous times during the last two years with all ups and downs that Brexit brought. However, it needs to bear in mind that most rights are followed by obligations, and in this case, these obligations are the ones toward its international partners. Moreover, the Union has an even greater responsibility to a number of actors outside its territory whose participation in various political and economic arrangements throughout the years has been a significant contributor to its political stability, economy, security, migration challenges and proper application of its law. The fact that all these partners have been merely courteously mentioned during Brexit negotiation appears to be contrary to the Union's and the Member States' obligations. In that sense, a withdrawal agreement is a must, not only in the best interest of its signatories, legal certainty, proper way of handling international affairs and avoiding a legal, economic and social havoc that could otherwise ensue, but also to make sure the Union's third country partners are not regarded with disdain which could result in their tendencies to withdraw from their respective modes of cooperation with the EU.

However, the issues presented in this paper are merely an indication of what can befall a third country as a result of Brexit and expanding this research is to be expected. Although the issue of UK's bilateral relations post- Brexit with the United States, China, the Caribbean nations and many other significant EU partners around the globe have already been discussed, it is important to identify a group

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45 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom OJ C 66I, 19.2.2019, pp. 185–198

46 Wright G., *Britain Must Decide What Kind of Power It Wants to be After Brexit*, 2018, [https://www.chathamhouse.org/expert/comment/britain-must-decide-what-kind-power-it-wants-be-after-brexit] Accessed 15.02.2019

of third countries that are arguably the most affected i.e. those with a prospective membership. It is beyond conceivable to imagine a model that will allow for all third countries to be involved in the withdrawal negotiation, still it would be useful for the Union to find a mechanism to have at least the aspiring members interests addressed in order to avoid future withdrawals and overall instability. While analyzing the situation in which the aspiring members found themselves, we can see more clearly the impact the Union has outside its territory which can, ultimately, help assess the actual outreach of a withdrawal and all its legal consequences. Nevertheless, both the UK and the Union demonstrated a considerable neglect for the interests of its international partners which is understandable bearing in mind the internal impact expected, but most certainly not recommended in terms of handling business post- Brexit. It should not be forgotten that the external component is of pivotal importance for the Union to function properly. Furthermore, over the years the Union established itself as a prominent figure in the international arena, assuming a very significant role in various negotiations. On the other hand, the Member States, including the UK, relied heavily on the Union's external activities which means they have spent many years off-court. Evidently, changing this order of things will not go smoothly and without affecting numerous interests both inside and outside the Union.

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