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EDITORIAL

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This is the *Jean Monnet Supplement*'s first issue in English, rather than Brazil's mother tongue of Portuguese, done with the intention of expanding EU-Brazil collaborations and understanding between the Institute for International Relations (IRI) as well as the Caeni Center for internation negotiations, within IRI, here at the University of São Paulo. The four topics address today illustrate the breadth of coverage of the ongoing work here at IRI and Caeni in particular.

In addition to reporting by João Trigo on important lectures here at IRI – this month on European Union foreign policy strategies by Professor Isabel Maria Freitas Valente from the University of Coimbra in Portugal – this Jean Monnet Supplement includes an insight into the research by Rafael Nunes Magalhães on Brazil's aid donorship, and a topical comment by Daniela Ferreira Gomes de Matos on the potential of the US President Elect to undo the Paris Agreement. I include my working paper analysing the EU legal provision for continuity of Scotland's EU membership should it indeed seek its future at the heart of Europe rather than within the UK should it eventually seceed from the European Union.

As part of the Brazil-Caeni-EU Project, co-financed by the Erasmus+ programme of the European Union, 2017 will be an exciting year, with the kick off of the multidisciplinary Young Researcher Conference on 14 & 15 February 2017. We hope to have the benefit of your interest as we step up our activities in order to include contributions on all matters EU-Brazil. Please do get in contact should you have comments and analysis to contribute to our *Jean Monnet Supplement to the Análise Caeni Newsletter*.

With the very of the season's greetings,

Kirstyn Inglis
Visiting Professor with the Institute for International Relations (IRI), USP, and
Vice Co-ordinator of the Brazil-Caeni-EU project

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Rafael Nunes Magalhães*

In the last decade, Brazil has shifted from being a net recipient to being a net donor of foreign aid. In part, this movement follows a pattern evident in other emerging powers also, such as China, India, South Africa and South Korea, all countries that have been seeking to increase their international influence by directing aid to areas of geopolitical interest in various ways.

It is not always clear whether the intentions of these donors are wholly altruistic. The Chinese government, for example, is often accused of turning a blind eye to local governance issues in their projects, and lack the available data necessary to proper impact evaluation, which raises concerns that aid flows do the local population in recipient countries more harm than good. Moreover, this is not the only concern: most developing countries still suffer poor transparency in their projects.

This indeed represents new trend when compared to recent history. Since the end of World War II, aid donors have mostly been developed countries. Aid resources are usually channeled either via multilateral bodies like the World Bank and the IMF, or via bilateral projects involving a developed-country donor and the recipient being from an undeveloped country. Bilateral aid projects are mostly regulated by OECD's Development Co-operation Directorate (DAC), the member countries of which account for the bulk of the bilateral aid to developing countries.[1]

Although Brazil has predominantly been a recipient of aid throughout this period, it has also been an occasional donor in a few co-operation projects since the 1950s. More recently, Brazil has been participating in a new form of project: "triangular co-operation", according to which system, co-operation projects are endorsed by two developing countries, and a third, developed country offers funding, training and human resources. There is a sense of increased legitimacy in these projects, in the sense that they involve developing countries in both the co- ordination and the receiving provision by the agreements, thereby supposedly mitigating suspicions of hidden economical or political interests.

These last years, similar goals are evident but with different protagonists. Brazil has been active in committing its own resources to bilateral co-operation projects. And if it is true that the aforementioned general trend of emerging economies increasing their aid investments, helps us understand Brazil's new role as a donor, it is cannot single-handedly account for it. Incentives to international co-operation also arise from domestic factors, and this can be observed by the priorities afforded aid projects by former presidents Luis Inácio Lula da Silva and Dilma Rousseff. In the mid-2000s, there was a certain expectation that Brazil would rise to the challenges of it emerging power. The economy was booming, inequality was steadily trending downwards and *The Economist* infamously published a cover story celebrating the fact that Brazil was finally ready to realize its full potential as a world power: "Brazil takes off". Under the steam of all this economic and political enthusiasm internationally, Brazilian foreign policy was enjoying its higher profile. President Lula had a personal interest in international affairs and visited a broad range of countries during his two terms, with special attention to Africa and Latin America. In tandem with these presidential diplomacy priorities, Brazil targeted its foreign aid efforts to its Latin American neighbours and Portuguese-speaking countries in Africa.

The election of president Dilma steered a new course in the foreign policy priorities in Brazil, the new president becoming much less of an engaged actor in international affairs. The end of her first term was already signaling the economic crisis that would cripple the

[1] Not all OECD members are part of DAC. Currently, the DAC has 29 members, and membership in it entails following its guidelines for development projects.

country in the coming years. As a result, not only was Brazil's international presence dimmed, but co-operation projects dipped both in number and overall investment. With an ailing economy and a political crisis that is still lurching on, the jury is still out as to whether the country's foreign aid efforts will endure.

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The Paris Agreement and Trump's Victory

Daniela Ferreira Gomes de Matos

The Paris Agreement entered into force on 4 November 2016 and its central aim, under the United Nations Framework Convention on Climate Change, is to strengthen the global response to the threat of climate change by controlling the global temperature rise this Century in order to keep it below 2° Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further, to 1.5 degrees Celsius.

There are 197 Parties to the Convention. Its entry into force occurred after 55 Parties to the Convention – accounting for at least an estimated 55 % of the total global greenhouse gas emissions – have deposited their instruments of ratification, acceptance, approval or accession with the Depositary, as was determined by the Convention itself. Both Brazil and the European Union are committed to the cause of global warming, so much so that they have already ratified the Paris Agreement besides working together through their Strategic Partnership of 2007, a major goal of which is the pursuit of common climate and energy goals at multilateral level.

Even though it seems that the Agreement has been progressing really well, the recent US president-elect, Donald Trump, has made both troubling and controversial statements about his position as a political leader under the Paris Agreement and climate issues generally. While campaigning, Trump first declared that he would renegotiate the global agreement, but since then he said that the US would pull out altogether because the climate change deal is "bad for US business" and the agreement allows "foreign bureaucrats control over how much energy we use". At that time the agreement had not yet come into force. But it had done so on 4 November, four days before Donald Trump's actual election as the next President of the United States of America.

With his election, there has been much uncertainty and fear for those identifying with the climate challenge. During an energy policy speech on May 26, Trump said: "We're going to cancel the Paris Climate Agreement and stop all payment of U.S. tax dollars to U.N. global warming programs" and made his intentions pretty clear. On 23 of November however, Trump gave an interview to *The New York Times* where he declared: "I have an open mind to it. We're going to look very carefully." When asked whether he would take America out of the World's lead for confronting climate change, he also declared that to his mind, there is "some connectivity" between human activity and climate change.

With Trump's statements, much speculation has taken place as to what actions he will actually take in relation to the Paris Agreement. If he decides to withdraw from the Agreement, he has certain options for doing so. The more aggressive would be to withdraw from the mother agreement: the 1992 UN Framework Convention on Climate Change. Under this option, he would have to give one year's notice of withdrawal, after which the US would also be considered as having withdrawn from the Paris Agreement. Another way would be for Trump to remain Party to the Paris Agreement, but to undermine America's commitments to reduce greenhouse gas emissions under the Paris Agreement, notably by failing to meet emissions goals, which would incur few concrete penalties. The third option would be to stay three years after the Paris Agreement's entry into force, as signatory nations can withdraw with one year's notice. If that option were to be chosen, the US would be out of the Agreement by the end of the first Trump mandate.

Considering this latter option, Tomas Wyns, a climate change researcher at the Institute for European Studies of the Vrei Universiteit in Brussels, said it was eminently within Mr Trump's power as President to announce a US withdrawal from the Paris Agreement. He would not even need to be backed by the two houses of the US legislature, which now have Republican majorities in any case. Although Trump could change his mind again and decide to honour America's commitment to the accord, it is unlikely that his administration will be a great enthusiast of actions related to the Agreement, so the fear continues for climate change supporters after Trump's US victory.

With or without the United States, the fight against global warming will continue. In 2018, the Parties will take stock of the collective efforts in relation to progress towards the goals set in the Paris Agreement and to inform the preparation of NDCs. And there will also be a global stocktaking every 5 years to assess the collective progress towards achieving the purpose of the Agreement and to inform further individual actions by Parties.

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EU's global strategy on foreign and security policy: origins and challenges

Speaking on 21 November 2016 at Institute of International Relations of University of São Paulo), Professor Isabel Maria Freitas Valente from the University of Coimbra in Portugal, shared briefly her insights into European Union foreign policy strategies. She began her talk on a quick timeline review over the policies necessary to implement the institutions that deal with the block's security. Valente's first point was that the 1991 Maastricht summit was where the issue was raised and the negotiations of having a unified policy for the external affairs started to develop. Still, only six years later, at the Amsterdam summit, the European Union officially declared the need for strong institutional capacity to solve diplomatic crises and even unified military forces to be definitive and necessary.

These ideas were brought forward in 1991 because of the fall of the Berlin wall. The end of the Soviet Union changed the political scenario of Europe, making the integration process more than a dream and even something possible in a relative short timeframe. Because of the Cold War, some European countries had already been members of a continental organization for military alliance, namely the Western European Union (WEU). Now, without this global polarity spanning political systems, Europe was able to strengthen this alliance.

Yet, even while the WEU continued to exist, the European Union arranged to develop its own internal and unified system, while merging the old military institution with the big, new, fresh project. In 1999 the European Council created an entirely new office to look after

one of the main pillars of the EU: the position of the High Representative of the European Union for Foreign Affairs and Security Policy. The consolidation of this office evolved and took shape over the years, when finally in 2010 under the Treaty of Lisbon, the Common Foreign and Security Policy (CFSP) gained a different form. It went from being one of the EU's main pillars as merely a political ideology, and was turned into a sophisticated institution at the heart of the EU system, with its own specialized staff. In this composition, the EU consolidated its goal of providing a more protective, secured and organized institution to look after its international affairs. It was then decided that North Atlantic Treaty Organization (NATO) would be responsible for the territorial defense of the continent but the EU would still have certain privileges to act independently in issues of major continental concern to the Common Security and Defense Policy (CSDP), one of the main policies imparted to the CFSP.

The WEU continued to exist while the CFSP was already functioning. It survived until 2011, when its extinction was sealed. Since then, the High Representative of the CFSP has managed areas such as the EU's external policies concerning commercial, diplomatic, defense and civilian crisis matters. These measures of the consolidation of EU unified external policies, brought to the EU a new, reinforced influencing power to military and diplomatic concerns in the international arena, the entire block now speaking in unison without overt divided or out of line opinion on these topics.

Today, Europe is passing through difficult times concerning some areas under the CFSP jurisdiction. There is a growing instability and a feeling of insecurity due to recent terrorist attacks, the refugee crisis, rising unemployment rates and the rise of populist, conservative and nationalist parties threatening EU integration. These are not problems that the countries solve individually: it is time to debate and find a more strategic and assertive policy for the continent utilizing the mechanism, influence and expertise of the CFSP.

Recently the High Representative, Federica Mogherini, presented the EU's five priorities for its external policies:

- European Union internal security;
- state and societal resilience at south and east of the continent;
- an integrated view over conflicts;
- regional co-operation, and;
- global governance.

Set in the frame of these objectives, the EU will review the existing sectoral strategies, and design and implement new thematic or geographic approaches in line with European Union Global Strategies (EUGS) priorities. Still, the EU keeps to its goal of solving its actual crisis while promoting its main global aims: preserving peace and enhancing international security; fomenting international co-operation; developing and consolidating democracy and the respect of human rights and individual liberties.

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Towards a Continuity and Transition Treaty for Scotland's EU Membership

Registered on SRRN under the link http://ssrn.com/abstract=2879849

Dr. Kirstyn Inglis*

Brexit raises important issues of the fragmentation impact in EU relations. The Scottish Government Report Scotland: A European Nation, was launched at the end of November 2016, hinting strongly at a second referendum of the Scots on UK independence as well as, significantly, EU membership and aspirations to self-determination in its international relations. Providing continuity in EU membership for Scotland should it breakaway from the UK, is the true challenge for the Union as a result of the Brexit referendum of 23 June 2016, both for its internal functioning and its external relations.

Were Scotland to reject the UK government's EU Withdrawal Agreement and seek secession from the United Kingdom, how might Scotland – legally – seek continuity in its rights and obligations as a Member State of the European Union rather than have to make a fresh application for EU membership? This is a relevant question because, at the level of the United Kingdom, being one single EU Member State comprising England, Scotland, Northern Ireland and Wales, Brexit lays bare the political and constitutional tensions between England and the devolved powers in Scotland and Northern Ireland in particular, both of which "devolved"[2] jurisdictions voted overwhelmingly to remain within the European Union, while the larger UK partner of England together with Wales, reached a lesser majority in favour of Brexit.[3]

Why does Brexit attract so much attention world-wide?

In terms of international relations, the Brexit vote has drawn much attention in Brazil because of the uncertainty implied for its international relations. The UK referendum vote to leave the European Union – Brexit – is unprecedented both within the UK and the history of the European Union. Brexit, in effect, sets a precedent for the UK reneging on the EU Treaties and is unprecedented in UK foreign policy and EU external relations. The resulting uncertainty for international relations is well founded given the economic, political and legal complexities and ambiguities that are playing out, including destabilising the institutional and decision-making integrity of the EU and its treaty-making trustworthiness. Guaranteeing legal certainty and the rule of law that underpins the trust between EU countries, favours a continuity solution for Scotland should it indeed opt for the uncertainty at national level in favour of full self-determination in its own foreign policy.

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[2] See *Collins Dictionary of Law* definition: "in constitutional law, the giving of a degree of power, functional, sectional or geographic, to an inferior body". However, in this context, see the UK Government Cabinet Office guidance, to be found at www.gov.uk/guidance/devolution-of-powers-to-scotland-wales-and-northern-ireland

[3] The percentages: entire UK vote for leaving the EU amounted to 51.89% with 33,577,342 unspoiled votes cast. Scotland voted by 62% to remain in the EU, with every Scottish council area voting to remain in the EU. The Scottish Government Report is available at www.gov.scot.

Third countries participating in regional integrations and international organisations, are necessarily concerned by the way in which Brexit is represented and conducted, and also as to how the principles, rights and obligations under existing relationships are respected, starting in the first instance with their existing and future relations with the Member States individually as well as with the EU as the World's deepest and widest regional integration. How Brexit and the potential fragmentation of the UK is conducted becomes the EU's example to other continents and international organisations, of the potential of and limits to regional integrations, their internal integration ambitions and potential, and ultimately the peace and security they are designed for.

A presumption in favour of continuity of EU membership for Scotland

The EU Treaties make no express provision as such for continuity of membership rights and obligations in the event of the fragmentation of a state and desire of a breakaway entity to accede to the EU in its own right. Significantly, nor do the Treaties demand the ejection of the breakaway entity in the event of such a fragmentation situation. Here, Brexit points the finger at the blind spots in the European Union's constitutional arrangement. This lack of foresight as to precisely how to smooth the transition of Scotland while the UK transitions into secession from the EU, causes legal uncertainty. Coupled with the lack of UK national level constitutional procedures and provision for rights, "the rule of law" enshrined in Article 2 of the Treaty on European Union (TEU) is compromised by the (legally uncertain) implications for directly effective and directly applicable rights of EU citizens and businesses, as much as for UK citizens and businesses and their legitimate expectations to rely on those rights.[4]

From the vantage point of legal certainty however, and ultimately the rule of law, many individuals' and companies' rights and obligations throughout the EU are already threatened and undermined.

Principles such as direct effect and direct applicability have given national level character to EU rights and obligations, under interpretation from the Court of Justice of the European Union, and their deletion at national level threatens a vacuum in governance and legal principles at UK level, leaving individuals and companies in short and long term legal uncertainty. Much of the national provisions securing non-discrimination on grounds of race, gender, sexual orientation, age and disability emanate from directly effective EU provisions. Rights to travel and live and work are also involved. Recent reporting in the press on European Parliament proposals to extend citizenship to UK nationals in a Brexit situation would not resolve the lesions appearing in UK legislation and judicial practice concerning British and EU nationals in the UK.[5]

Also remarkable, but perhaps beyond the scope of this paper, is the lack of primary EU law paramaters to the (mis)use of national referendums under the European Treaties through the slowly self-revealing lack of national constitutional provision for the situation at hand within the UK.[6]

At the level of the region, Brexit is an unprecedented contradiction of the very raison d'être of the EU, which has the ultimate goal of peace and stability on the European

[4] On the principle of sincere co-operation, loyalty and good faith (Art. 4(3) TEU) and the debate surrounding individuals and acquired rights in EU legal tradition and the UK context, dating back to 1963, as well as under international law, see. A. Harg, T. Mullen, N. Walker, "The Scottish Independence Referendum: Constitutional and Political Implications", Oxford, Oxford University PRess 2016, pp. 179-181.

[5] For a general understanding of EU citizenship, see the European Commission's documentation to be found at http://ec.europa.eu/justice/citizen/, last visited on 30 November 2016.

[6] For a broad sweep of the issues in the UK, England, Wales, Scotland and Northern Ireland, see the pamphlet by R. Gordon QC and R. Moffat, *Brexit: The Immediate Legal Consequences*, London, The Constitution Society 2016.

continent. The parallel driving forces of deepening and widening – integration and enlargement – have formed the foundation stone of the Union. Such continuity is fully intended under the core EU agenda that was declared by the original EU Member States at The Hague summit of 1969 [7], which paved over De Gaulle's 2 vetoes of UK membership in 1963 and 1967, firmly setting enlargement alongside integration as means of consolidating the end to divisions on the European continent and fostering an ever closer union among the peoples of Europe.

This intention was apparent prior to the UK's accession to the EU in 1973, based on the legal basis of Article 49 TEU, the legal basis for EU accession, which has always existing in the EU Treaties and determinedly opens EU membership to willing counties of the region. Scots rightly should be able to rely on legitimate expectations of continuity in EU membership. Continuity in membership rights and obligations to a willing Scotland, would be consistent with over 60 years of EU integration based on Article 49 TEU and the primary law instrument in the form of the UK's Accession Treaty.

Of course, the Member States could simply amend the existing Treaties, using Article 48 TEU as a legal basis: Article 48 TEU enables to the Member States to convene an intergovernmental conference and vote by unanimity to make amendments – as opposed to adjustments – to the Treaties. Article 48 TEU could easily be used to secure the continuity and a smooth transition in Scotland's membership. Like Article 49 TEU, it also requires unanimity among the Heads of State and Government of every Member State. Indeed, Scotland has already acceded to the EU under the UK Accession Treaty 1972, in conformity with UK national constitutional arrangements at the time and under Article 49 TEU. The resounding endorsement of the UK's membership of the then EEC by the 1975 UK referendum[8] was sure. At the time of the 1975 referendum, ten of the twelve counting areas in Scotland voted comfortable majorities in favour of remaining in the EU.

Since UK accession, the evolution in integration at EU level has seen the UK's 'opt-out' of various fields of integration within the EU, ie. the Schengen Convention and the Euro. However, countries seeking membership can never secure opt-outs. It is a fallacy that "cherry picking" is possible, as is clear from every round of accession negotiations. To continue those opt-outs would be a considerable departure from accession practice. But transitional arrangements under Article 49 TEU are a proven enabling mechanism for the benefit of all the Parties. Article 49 TEU is an adjustment mechanism, foreseeing transitional derogations – by implication being time limited – from the body of laws and practice known as the *acquis communautaire*. They enable incoming and existing Member States time to reach full equality in their rights and obligations. In the case of the Euro for instance, few of the CEEC Member States that acceded in 2004 and 2008 for example have been able to adopt the Euro. Transitional arrangements have been core to every single accession treaty, ensuring the smooth transition of the incoming country to the full rights and obligations of membership.[9]

Adapting the (pre-)accession practice to Scotland's needs of continuity would have to be worked out, but implementation of Article 49 TEU has ever been flexible in insisting on equality of rights and obligations of the Member States, and meeting the EU's ultimate objective of peace and stability on the European continent.[10]

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[7] See *Bull. EC* 2/70. See K. Inglis, *Evolving Practice in EU Enlargement*, (Leiden, Martinus Nijhoff Publishers 2010) at p. 25.

[8] In the first UK wide referendum, 67.23% of the votes cast by the British public voting, voted to stay in the "Common Market".

[9] See K. Inglis, "Accession Treaties: differentiation versus conditionality" in A. Ott & E. Vos, Fifty Years of European Integration, (The Hague, TMC Assser Press 2009), pp. 139-156.

[10] See M. Chamon and G. Van der Loo, "The temporal Paradox of Regions in the EU seeking independence", in European Law Journal (2013) at p. 10.

So, while the TEU lacks a 'continuity procedure' as such to meet the European Union's needs in such a fragmentation situation, historically speaking, inclusiveness has always been the guiding principle, and the Union has always been 'open' to all European countries respecting the values of the Union.[11] That openness has to be read in conjunction with the wealth of practice under the Copenhagen Criteria [12], the rule of law and functioning democratic principles, good neighbourly relations, and so on. Article 49 TEU necessarily implies a presumption to provide for continuity of the Union's consecutive enlargements and integration achievements over the unraveling of the rule of law and shared values [13] that provides the fabric of trust between Member States necessary to guarantee the economic, political and legal rights and obligations throughout the 28 Member States. In this light, for the Member States to refuse Scotland continuity, should it declare its aspirations to EU membership in its own right, would be to do further damage to the Union's international relations, and its strength and integrity as an regional integration.

Such a presumption or implication is reinforced by the inadequacies of Article 50 TEU.

Inadequacies of the withdrawal procedure support the implication of continuity

Article 50 TEU – the legal basis for withdrawal of a Member State from the EU – is only in existence since 2010, introduced by the Treaty of Lisbon, and is not only procedurally inadequate but entirely lacking in substance. It introduces counter forces of contraction, disintegration, fragmentation, and the unraveling of legal principles such as direct effect and direct applicability, and in so doing, undermines the rule of law that underpins the European Union and its international relations. Article 50 is clear that a withdrawal must be conducted conform to national constitutional arrangements, but even this proviso is not fit for purpose in the Brexit scenario: the tears and shadows appearing in the UK's national constitutional situation, clash with notions of shared values, democratic principles and the rule of law and solidarity among Member States, all of which are core to EU integration.

Article 50 TEU lacks the substantive character to override the parallel driving forces of deepening and widening – of integration and enlargement – that have together formed the foundation stone of the Union's raison d'être from the original Treaties, and clearly established prior to the UK's accession. The rationale and substantive limits to Article 50 TEU deserve fuller comment. Further on, the legal basis for the "openness" of the European Union contained in Article 49 TEU, the legal basis for accession to the European Union, is considered. The criticisms of the poor design and conduct of the referendum itself have been generally reported. No such legal basis existed in the founding Treaties.[14] Indeed, deliberations on such a withdrawal clause in the context of the Convention on the Future of the European Union which spanned 2001 to 2003, insisted on the clause as an endorsement of the irrevocable and onerous commitment in accession to the EU.

However, such deliberations are not entirely convincing given the exhaustive debate that preceded the eventual introduction of Article 50 TEU in 2010 by the Treaty of Lisbon. It

[11] See K. Inglis, *Op. Cit.* at p. 45.

[12] The Copenhagen Criteria take their name from the place where the political body representing the Council of the Ministers of the EU – the political body representing the Heads of State and Government of the Member States at that time – met, Copenhagen, and adopted the political, economic and legal criteria that underpinned the pre-accession strategy to apply to the countries of Central and Eastern Europe after the fall of the Berlin Wall. It is important that these criteria amalgamated previous practice and continued to be expanded upon in order to respond to the needs of the EU and candidate countries, and since 1997 in particular, they embrace specific conditionality in good neighbourly relations.

[13] See D. Kochenov, Working Paper *The Issue of Values*, 2013, University of Groningen Faculty of Law Research Papers 19, available at http://ssrn.com/abstract=2295154.

[14] See J. V. Louis, "Le droit de retrait de l'Union européenne", Cahiers de droit européen, 3-4, 2006, p. 293.

is the declared brain child of Lord Kerr,[15] a current British peer sitting in the House of Lords. But the Praesidium of the Convention on the Future of Europe [16] which ultimately led to the restructuring and update of the EU Treaties through the Treaty of Lisbon, in fact envisaged Article 50 TEU effectively as a political signal from the Member States that they recognize the Union as being a rigid entity from which it is impossible to exit.[17] However, the provision for the reversibility of the transfer of competences to the EU level which was also introduced through the Treaty of Lisbon (Art. 2 TFEU), are arguably on the one hand supporting a withdrawal agreement, and on the other hand, supporting alternatives to withdrawal.

Simply to read Article 50 TEU, reveals the general and ill-defined scope of the procedure for the negotiation of the withdrawal agreement, even for triggering the procedure. The lack of "a plan" of the British government for the withdrawal, including the date for triggering the procedure, has been slipping further into the future with every inch of constitutional wranglings within the UK. It cannot even be said that the withdrawal procedure must run its course once it is actually triggered by the UK government, [18] apparently giving the UK the upper hand in deciding whether to actually withdraw from the EU up until the very last minute – that is to say within the 2 year deadline provided for in Article 50 TEU, beginning from the date when the procedure is triggered – and further entrenching the political and economic uncertainty home and abroad.

Article 50 TEU is obviously divisive in a reading of practice in international relations. When considering Article 54, 56 and 62 of the VCLT, it is well established under international customary law that unilateral withdrawal from an international organization is excluded in the absence of an express provision to this effect in the given treaty, otherwise withdrawal must always be negotiated. Because of this, until the introduction of Article 50 TEU, the debate centered more the limits to the extent of the transfer of national sovereignty to the EU level and the rights and obligations involved[19], rather than on the motivations and procedures of withdrawal. The need for unanimity among participating member countries in the international organisation concerned was a given. A limp attempt by the UK Prime Minister at the time of Brexit, David Cameron, was made to renegotiate UK terms[20] but the momentum behind the Brexit referendum without any clearly set legal scope having been given to the renegotiation, emptied that deal of any true significance.

A reading of Article 62 VCLT governing withdrawal by a State from a regional integration, makes clear that such a clause should provide that the state seeking to withdraw having experienced some fundamental change in circumstances, and to seek some preliminary phase for airing clearly defined grievances, to formally propose Treaty change or test out potential grounds or routes for conciliation.

Article 50 TEU is a flawed procedural invention that runs counter to the very purpose of the EU, which is to deepen the integration between Member States and widening this

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[15] Lord Kerr was the UK Foreign Office Secretary at the time of the Convention on the future of Europe. *The Guardian* on 27 November 2016, quotes Kerr himself in painting the reality of the inadequacies – "a decade of uncertainty" – of Article 50 TEU, see https://www.theguardian.com/politics/2016/nov/27/chance-orderly-brexit-within-two-years-less-than-50-percent-lord-kerr.

[16] See, The Praesidium of the Convention, CONV 724/03, 26 mai 2003, at p. 134

[17] See F.X. Priollaud and D. Siritzky, *Le Traité de Lisbonne*, (Paris Cedex, La documentation Française 2008).

[18] See, www.independent.co.uk/news/uk/home-news/article-50-brexit-stopped-court-ruling-lord-kerr-high-court-theresa-may-a7394816.html, visited on 3 November 2016.

[19] Supporting Feinberg's study of State Practice and *La Doctrine* concerning the UK's withdrawal from the EEC, already in the 1980s Weiler eloquently exposed how logically even inactive, overactive or selective membership was severly limited, and unilateral withdrawal to be "fascinating" but of "little political relevance". See J. H. H. Weiler, "Alternatives to withdrawal from an international organisation: the case of the European Economic Community", in *Isreal Law Review*, 1985, pp. 282-298.

[20] The outcome was announced on 19 February 2016. Se E. Spaventa, "Explaining the EU deal: the 'Emergency Brake', to be found at https://fullfact.org/europe/explaining-eu-deal-emergency-brake/ last visited on 22 February 2016.

integration to the broader European continent. This, together with the blatant threat to rights and obligations of individuals and companies throughout the EU under long-established principles of direct effect and direct applicability, lends considerable weight to interpreting Article 50 TEU in the light of Article 49 TEU, the legal basis for accession to the EU, for the purposes of providing legal certainty for Scotland's quiet transition to EU membership in its own right should it so choose, in line with national constitutional arrangements.

The bottom line of the rule of law that guarantees the fabric of trust imperative to international relations, is certainly eroded by the UK reneging on the irrevocable transfer of sovereignty under the (UK) European Communities Act 1972 [21] as well as in the UK's Accession Treaty of the same year, which it entered into with the unanimous support of the EU Member States at the time and its own people's supporting referendum not long after. This also lends weight to continuity in the aftermath of any fragmentation of the UK. Always, Accession Treaties have involved unending and perpetual commitments, and as a Member State since the early 7Os, the UK has imposed the same unending engagement on 16 other of its counterpart Member States through their Accession Treaties.

Brexit: a dangerous scenario for UK foreign policy, but also EU external relations

In terms of international relations, the Brexit scenario as much sets a dangerous precedents for the UK foreign policy as for the external relations of the entire EU as a regional integration and all its Member States' national foreign policies.

Article 50 is a contraction and disintegration mechanism. In fact, it would be a blatant distortion to interpret Article 50 TEU as enabling the UK to renegotiate its relations in any single area of EU activity: Article 50 TEU is rather to be read as enabling negotiations for the UK financial liabilities for doing such violence to its commitments to its partners. Clearly, Article 49 TEU and the wealth of pre-accession practice implementing it, prevents such abuse of the principle of the equality of rights and obligations of the Member States.

Article 50 erodes the trust that underpins international treaties generally, including under the amalgamation of customary international law practice set out in the Vienna Convention on the Law of Treaties of 1969 concerning the conduct of relations under regional integrations. Its inadequacies are thrown into sharp relief by the Brexit referendum, revealing Article 50 to be a most divisive mechanism in intra-EU relations. In the Brexit situation, Article 50 TEU is notably inadequate in relation to national constitutional arrangements needed to trigger a withdrawal scenario. No standards are set for the conduct of the referendum nor provision for continuity of the EU membership rights and obligations of a devolved entity/decentralised region.

The rule of law must be respected by national constitutional arrangements

In order to address questions arising as a result of the provision in Article 50 TEU for the respect of national constitutional procedures, certain undeniable flaws within the UK's constitutional set up lead to well founded accusations of their constitutional illegality. The rule of law should contain such political vagaries and it underlines the irrevocable transfer of sovereignty and respect for the primacy of EU law, the equality of rights and obligations of the Member States that makes the commitment of all Member States to the direct effect and direct applicability of EU law possible. In fairness, other well established principles such as sincere co-operation and legal certainty, loyalty and good faith [22], also demand that

[21] See the UK's European Communities Act 1972.

[22] See Art. 4(3) TEU. See also "Editorial Comments, Union Membership in Times of Crisis" (2014) 51 *CMLRe.,* pp. 1-12.

Scotland's search for paths of continuity in its international relations to enable its transition to full membership status, be accommodated by all partner Member States, including the UK government.

The constitutional court level challenges within the UK brought both before and after the referendum itself, also highlight the lack of constitutional provision in the UK for giving effect to the referendum vote to quit the EU, as do the constitutional arrangements of the constitutional (UK) acts giving effect to the devolved powers of the Scottish Parliament and the Northern Irish Assembly of the late 1990s. Both of these devolved jurisdictions contest[23] the constitutional powers of the British government to proceed with negotiating and giving effect to an Article 50 TEU withdrawal agreement without their input in a variety of ways. And rightly so: That the Government in Westminster should seek to use executive powers introduced in the 16th Century under Henry VIII as a mechanism to bypass the Westminster Parliament in London, let alone the devolved Parliament and Assemblies (also including Wales), obviously adds insult to injury in what, is after all, a parliamentary democracy.[24] In those smaller jurisdictions where their devolved arrangements are not even 20 years old, and being common law, a vote in the Westminster Parliament alone would be a dangerous precedent that would obviously demand challenge in a national constitutional setting where the constitutional sands are shifting constantly.

Indeed, Scotland and Northern Ireland – like England and Wales – will continue to be subject to the obligations and rights of EU membership until the actual date of the UK's eventual secession. While Scotland and Northern Ireland both voted to remain in the European Union, it is not to be assumed at this date in time that they would opt to secede from the United Kingdom in order to accede to the European Union. However, from a rule of law perspective, such national constitutional arrangements should be settled before a withdrawal agreement enters into force. Scotland could be forced into leaving the Union against its will, although again, at present it could not be said that their is obvious popular preference there for UK independence/EU membership.

Article 50 TEU being a purely procedural provision will result in an international agreement between the UK and the EU Member States, voting by qualified majority. Article 50 TEU must take a back seat to the use of Article 49 TEU as a vehicle for the easy transition of Scotland's EU membership in its own right. An Accession Treaty by contrast is primary law of the European Union, and both in the heirarchy of laws and a superficial reading of Article 49 TEU which is the legal basis for any Accession Treaty, should be respected in the interpretation of Article 50. It seems plausible to argue that Article 49 TEU be interpreted so as to disarm the intent and purpose of Article 50 TEU in favour of Scotland's continuity in governance, irrevocable rights and obligations, as well as a smooth transition to full-membership, and before completion of any withdrawal agreement with the exiting countries of the UK. That Article 50 TEU is mute on the legality of national constitutional arrangements surely cannot be read as an endorsement of Article 50 TEU taking precedence over the continuity of rights and obligations of Scotland in the continuity of its rights and obligations, all being expressions of the Union's very purpose for existence.

Conclusion

It is clear therefore, that continuity of Scotland's membership lies squarely within the logic of the "openness" of the European Union in the text of the legal basis for applications for

[23] The Scotland Act 1998, section 29(2)(d), provides that Acts of the Scottish Parliament that are incompatible with EU law are outside the legislative competence of the Scottish Parliament. The Government of Wales Act 2006, section 108(6) is the equivalent for Wales. The Northern Ireland Act 1998, section 24, prohibits any legislation that is contrary to EU law.

[24] See Gordon and Moffat, Op. Cit. n. 5.

membership of the Union under Article 49 of the Treaty on European Union (TEU). Continuity is certainly intended under the core EU agenda that has existed since The Hague summit of 196925, which set the tone for enlargement as a means of consolidating the end to divisions on the European continent and fostering an ever closer union among the peoples of Europe.

Precedence should logically be given to the continuity of Scotland26 and/or Northern Ireland Member State that have already acceded under Article 49. Therefore, given the constitutional question marks overhanging the UK but also the substantive emptiness of the withdrawal procedure, Article 50 TEU must at least not be interpreted in such a way as to negate the 1972 Accession Treaty under which the Scots have legitmate expections based on the rule of law and direct effect, not to mention other core principles, now well established in Scots law. Used in such a fragmentation scenario, Article 50 TEU undermines the deepening and widening model that underpins EU integration. Article 49 TEU provides an accession vehicle for Scotland's smooth transition to EU membership in its own right should it indeed opt out of the UK and for its future at the heart of Europe.

The question is: will the EU allow its historic prerogative of inclusive openness on the European continent to be subjugated to the purely destructive nature of Article 50 TEU, and the predictable weakening of values, economic, political and legal uncertainty that will inevitably ensue, in EU and international relations?

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[25] See *Bull. EC* 2/70. See K. Inglis, *op cit* n. 6 at p. 25.
[26] And/or Northern Ireland, which faces its own singular constitutional questions and challenges, which deserves consideration in its own right and lies beyond the scope of this paper.