



**UNIVERSITY of the
WESTERN CAPE**

**THE BRITISH EXIT FROM THE EUROPEAN UNION AND
ITS EFFECTS ON EXISTING LEGISLATION AND OTHER
MEMBER STATES**

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DECLARATION

I declare the British exit from the European Union and its effects on existing legislation and other member states has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Date:

DEDICATION

This research is dedicated to my parents Mr Samuel Manjengija and Priscila Manjengija. Your unwavering support for me is unimaginable and I appreciate you with all my heart.



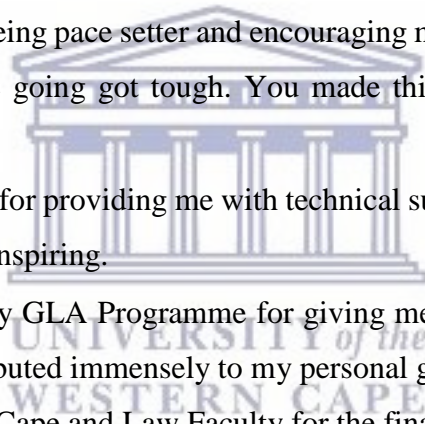
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KEYWORDS

Bilateral Agreements

Brexit

European Community

Free Trade Area

Market Access

Regional Integration

Supranational



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ABBREVIATIONS

| | |
|-----------|---|
| ACP | Africa, Caribbean and Pacific countries |
| CARIFORUM | Caribbean Forum |
| CEMAC | Central African Economic and Monetary Community |
| ECOWAS | Economic Community of West African States |
| ESA | Eastern and Southern Africa |
| COMESA | Common Market of Eastern and Southern Africa |
| EAC | East African Community |
| EBA | Everything But Arms |
| ECJ | European Court of Justice |
| ECSC | European Coal and Steel Community |
| EDC | European Defence Community |
| EEC | European Economic Community |
| EFTA | European Free Trade Area |
| EPA | Economic Partnership |
| EU | European Union |
| EURATOM | European Economic Energy Community |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Area |
| GATT | General Agreement on Trade and Tariffs |
| GSP | Generalised System of Preferences |
| MFN | Most Favoured Nation |
| NT | National Treatment |



| | |
|------|---|
| PTA | Preferential Trade Agreement |
| SADC | Southern Africa Development Community |
| SDG | Sustainable Development Goals |
| TDCA | Trade Development and Cooperation Agreement |
| TEU | Treaty of the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UK | United Kingdom of Britain |
| WEU | Western European Union |
| WTO | World Trade Organisation |



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Chapter 1: Introduction

1.1 Back Ground of Study

The European Union (EU) was formed so as to maintain peace and to unify Europe in a bid to ensure that the events caused by the Second World War would never be repeated again.¹ The idea was to bring the nations together both economically and politically and to ensure long lasting peace.²

The EU, as we know it today was the brain child of Robert Schuman, who first introduced by the Schuman Declaration in 1950. The Schuman Declaration became the heart of the European Coal and Steel Community (ECSC) in 1951.³ The EU was subsequently created through a number of treaties with each Treaty and agreement bringing economic and political unity. The treaties of Rome signed in 1957 fostered economic cooperation.⁴ The Single European Act gave birth to the Common Market thus economic unity to the member states, completing the four freedoms, the freedom of movement of goods, services, people and money.⁵ The Maastricht treaty of 1992 created the EU because it addressed the measures of security and defence as well as home affairs.⁶ These treaties were followed by the Amsterdam (1997), Nice (2001) and the Lisbon (2007) treaties, while the community grew from original 6 members to having 28 member states.⁷

The United Kingdom (UK) joined the EU in 1973, fifteen years after the original members launched the Economic Community (EEC) and almost twenty five years after the ground

¹ Cini M & Borrogon N P S *European Union Politics* 5ed (2016) 2.

² Fontaine P 'Europe in 12 Lessons' (2006) available at https://europa.rs/images/publikacije/26-EU_In_12_Lessons.pdf accessed on 05/05/2017).

³ The history of the European Union http://europa.eu/about-eu/eu-history/index_en.htm (accessed on 05/05/ 2016).

⁴ Dinan D *Ever Closer Union: An Introduction to European Integration* 3rd ed (2005) 2.

⁵ Fontaine P 'Europe in 12 Lessons' (2006) available at https://europa.rs/images/publikacije/26-EU_In_12_Lessons.pdf accessed on 05/05/2017).

⁶ 'European Law Monitor' available at <http://www.europeanlawmonitor.org/treaties/eu-treaties-treaty-on-european-union-maastricht-treaty-of-nice-lisbon-treaty.html> (accessed on 05/05/2016).

⁷ Fontaine P 'Europe in 12 Lessons' (2006) available at https://europa.rs/images/publikacije/26-EU_In_12_Lessons.pdf accessed on 05/05/2017).

breaking Schuman Declaration.⁸ The UK is short for The United Kingdom of Great Britain and Northern Ireland. The UK is made up of four states; England, Scotland, Wales and Northern Ireland.⁹ For a variety of cultural, historical, and political reasons the UK public and political opinion was largely uninterested in the supranational EU legal order.¹⁰ A supranational order is an order whereby an international organisation or union in which member states transcend national boundaries or interests to share in the decision making and vote on issues pertaining to the wider grouping.¹¹

Since 1973 the UK has enjoyed the benefits that come with the membership of the EU.¹² As a member of the EU, the UK has contributed significantly towards a closer foreign and defence policy cooperation and greater market integration.¹³ The UK has thus far implemented the rules and the regulations in keeping with the adherence of international obligations.¹⁴ However a close analysis of the actions of the UK shows a slow but deliberate move away from the EU.¹⁵ This is because while the UK is in support of the EU, it has long since resisted the institutional arrangements to deepen political and economic integration along the lines favoured by most member states in the EU.¹⁶

Recently the UK announced its desire to renegotiate its terms with the EU or an exit from the EU in terms of Article 50 of the Lisbon Treaty being led by its Prime Minister David



⁸ Dinan D *Origins and Evolution of the European Union: the New European Series* (2014) 306.

⁹ Johnson B 'The UK & Great Britain - What's the Difference?' <http://www.historic-uk.com/HistoryUK/HistoryofBritain/The-UK-Great-Britain-Whats-the-Difference/> (accessed on 29/04/2016).

¹⁰ George S *An Awkward Partner: Britain in the European Community* 3rd ed (1998) ch 2.

¹¹ 'Supranational' available at <http://www.investopedia.com/terms/s/supranational.asp> (accessed on 04/07/2016).

¹² Minford P, Gupta S, Phuong Mai Le V *Should Britain Leave the EU? An Economic Analysis of a Troubled Relationship* 2nd ed (2015) 23.

¹³ Andrew G *Britain and the European Union: The European Union Series* (2013) 174-196.

¹⁴ Wall S *A strange Europe: Britain and the EU from Thatcher to Blair 1st ed* (2008) 5.

¹⁵ Oliver T 'A European Union without the United Kingdom: The Geopolitics of a British Exit from the EU Strategic' <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/A-EU-without-the-UK-LSE-IDEAS-Strategic-Update.pdf> (accessed on 13/06/2016).

¹⁶ Dinan D *Origins and Evolution of the European Union: the New European Series 2014 OUP Oxford* 306.

Cameron.¹⁷ In his election campaign the Prime Minister promised to renegotiate the terms of British membership and lay out a referendum on 23 June 2016. The referendum resulted in a win for the exit camp with a 52% win.¹⁸ This vote also saw David Cameron stepping down as prime minister as he had promised before the referendum was held. At the time of writing the UK is still in the process of negotiating a possible exit package from the EU.¹⁹

1.2 Problem Statement

The possibility of member states exiting the EU will have an impact on the country which decides to leave, EU as a whole and third parties. The exit of the UK from the EU will not only affect the future UK-EU relationship but UK-third party relationships. Developing countries especially those in Africa stand to lose preferential access to the UK market and developmental aid which is a cause for concern.

This mini thesis will be guided by the following research questions

1. The history, origin and legal interpretation of Article 50 of the Lisbon Treaty which allows for a member State to leave the EU.
2. The approach the Brexit followed in utilising Article 50 and conditions needed to implement Article 50.
3. The legal implication of a possible Brexit in terms of Article 50 on the EU legal order and third parties in the form of developing countries.

1.3 Significance of the Study

This study is being conducted in the light of the proposed exit of the UK from the EU. This mini thesis is aimed at providing a mirror as to the advantages, disadvantages of regional integration. This research serves to show an example of how an integration model may become unsustainable due to the differences of interests of the members of a regional block. This mini thesis is to be used as a tool for further discussion on regional integration.

¹⁷ Matthijs M 'Dangerous Game: The Folly of Flirting with an EU exit' (2013) 92 *Foreign Affairs Journal* 516.

¹⁸ Wheeler B and Hunt A 'The UK's referendum: All you need to know' *BBC News* 24 June 2016 available at <http://www.bbc.com/news/uk-politics-32810887> (accessed on 10/07/2016).

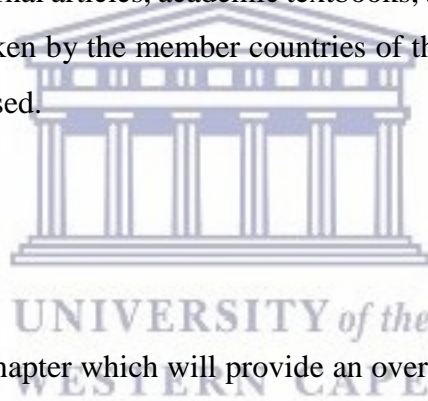
¹⁹ What next after the UK vote to leave the EU?

<http://eulawanalysis.blogspot.co.za/2016/06/what-next-after-uk-vote-to-leave-eu.html> (accessed on 10/07/2016).

For a long time Africa has looked at the EU as the model for regional integration thus it is important to learn from the history of others so as to make a more efficient and long standing model for regional integration of Africa. This study can therefore be used by Africa so as to see the possible conflict that may arise due to integration so as to guard against the same. This study will also add to the academic research on the exit of a member state from the EU, the procedure and the possible hindrances to a successful exit.

1.4 Methodology

A theoretical approach to the research will be undertaken to arrive at an answer of the research question. This research would rely entirely on materials available from various primary sources including textbooks, national legislation, international and regional agreements that propose trade facilitation and liberalisation of trade in goods. These include: the policy documents on the EU as well as sources on the British foreign policy, recommendations and reports. Secondary sources such as journal articles, academic textbooks, and commentary reports of the negotiation processes undertaken by the member countries of the EU, newspaper articles and internet sources will be also used.



1.5 Chapter Outline

Chapter 1

This will be an introductory chapter which will provide an overview of the background to the study, the problem, the significance of the study and the methodology.

Chapter 2

This chapter looks at the history of the EU integration, history and the origin of Article 50

Chapter 3

This chapter will seeks to highlight the UK approach to the exit, a theoretical framework of analysis of Article 50 and the application of Article 50 in the UK domestic system

Chapter 4

This chapter seeks find possible legal implications of a possible Brexit in terms of Article 50 on the legal systems of the UK, the EU and third parties in the form of developing countries in Africa

Chapter 5

This chapter is the conclusion of the discussion which will consist of an opinion and possible recommendations with regard to the way forward with the legal framework for the UK exit from the EU.



Chapter 2: History of the European Union Integration

2.1 Introduction

The European Union (EU) is a culmination of the great Schuman plan and a number of various agreements. The proposed British exit from the EU vexed and perplexed many.²⁰ One must, however, take into cognisance the position of Britain within the EU as its application to the EU initially was rejected by France twice.²¹ In addition to the above, Britain had Euro sceptic views subsequent to its accession into the EU.²² Britain has thus earned the name ‘an awkward partner’.²³ The process of exiting EU was unused until the UK recently indicated that they wished to exit the EU thus there are still areas of uncertainty in the exit procedure. It is therefore imperative that a closer look at Article 50 Treaty of the European Union (TEU) be taken so as to attain legal certainty.

This chapter will explore the history of the European integration process. This will assist in unravelling the complexities surrounding the emergence of the EU. The chapter also seeks to bring light to the various dimensions of the European integration and its goals. It also seeks to explore the origin of Article 50 of the TEU, what it entails and the changes it brought to the International climate. Furthermore, the chapter endeavours to explore the workings of Article 50, its interpretation, theoretic framework and the ambiguity of Article 50. The aim is to bring context to the phenomenon of an exit from the EU and check whether member states had the freedom to leave the EU prior to Article 50.

2.2 History of European Integration

²⁰ Cassidy J ‘Why the Remain Campaign Lost the Brexit Vote’ 24 June 2016 The New Yorker available at <http://www.newyorker.com/news/john-cassidy/why-the-remain-campaign-lost-the-brexite-vote> (accessed on 07/09/2016).

²¹ Petit G ‘Britain’s demands of the EU: a view from France’ 18 February 2016 The Conversation available at <http://theconversation.com/britains-demands-of-the-eu-a-view-from-france-54964> (accessed on 11/09/2016).

²² Davis R ‘Euro scepticism and Opposition to British Entry into the EEC, 1955-75’ available <https://rfeb.revues.org/1364> (accessed on 12/09/2016).

²³ George S *An Awkward Partner: Britain in the European Community* 2nd Edition 1994 52.

The 1950s represented a critical juncture for ideas concerning the political order and the construction of EU.²⁴ As of 1950, the European Coal and Steel Community (ECSC) began to unite European countries economically and politically to secure lasting peace. The ECSC proposed coordinated steel and coal production between France and Germany.²⁵ The six founding member states were Belgium, France, Italy, Germany, Luxembourg and the Netherlands.²⁶ This plan signalled the re-entry of Germany into peacetime Europe and is considered to be the most important date in the history of European unification.²⁷ The idea was to facilitate competing interests and balance out a potential rise of a powerful state and enemy, for example, the rising Germany.²⁸

2.2.1 From peace to a single market

ECSC marked an important juncture in European history, whereby national governments in Europe agreed to delegate part of their sovereignty, opting for a new and novel type of international organisation. The world leaders for the first time allowed a supranational organisation to control important policy areas, choosing an authority enjoying executive powers to take decisions in the interest of all six countries.²⁹ This marked a unique turning point in European history and set in motion a process of European unification that continues to this date.

Furthermore, the ECSC provided an organisational framework that allowed for the involvement of other European countries as well.³⁰ In the year 1950, the French government proposed the establishment of a European Defence Community (EDC).³¹ This project was aborted in 1954 when the French Legislative Assembly vetoed its application. The EDC which implied a strong military and political integration was substituted by the Western European

²⁴ The history of the European Union available at https://europa.eu/european-union/about-eu/history_en (accessed on 07/09/2016).

²⁵ Armstrong D *The Rise of the International Organisation: A Short History* (1982) 75.

²⁶ The history of the European Union available at https://europa.eu/european-union/about-eu/history_en (accessed on 07/09/2016).

²⁷ Stuart L M *The European Communities and the Rule of Law* (1977) 9.

²⁸ Ocana J 'The History of the European Union, the European Citizenship' *Historiasiglo* available at

<http://www.historiasiglo20.org/Europe/traroma.htm> (accessed 12/11/2016).

²⁹ Toepke U P 'The European Economic Community - A Profile' (1981) 6 *Northwestern Journal of International Law & Business* 2.

³⁰ Ocana J 'The History of the European Union, the European Citizenship' *Historiasiglo* available at

<http://www.historiasiglo20.org/Europe/traroma.htm> (accessed 12/09/2016).

³¹ Armstrong D *The Rise of the International Organisation: A Short History* (1982) 78.

Union (WEU).³² Since the North Atlantic Treaty Organisation (NATO) and WEU overlap, the WEU has a minor role in European defence. In spite of this mishap, the integration process went on.³³

In 1957, two treaties were signed in Rome which became known as the Treaties of Rome creating the Treaty establishing the European Economic Community (EEC)³⁴ and the European Economic Energy Community (EURATOM).³⁵ The EEC was aimed at establishing a common market abolishing barriers to trade. The common market in goods liberalisation meant streamlining or elimination of border formalities and the harmonisation of Value Added Tax (VAT) rates within wide bands.³⁶ It also meant the liberalisation of government procurement, harmonisation and mutual recognition of technical standards in production, packaging and marketing.³⁷ While the EURATOM, on the other hand was aimed at creating conditions for the development of a strong nuclear industry.³⁸ The Treaties of Rome successfully laid the foundation for 'ever closer union'³⁹ and the idea that member states should give economic support to each other to help all countries to grow at a similar rate. At this point one sees the European Community blossom into an organism of supranational character in constant evolution towards greater unity in virtually all aspects of life.⁴⁰

The creation of the EEC effectively created what is known as a Free Trade Area (FTA). The EECs' customs union and the European Free Trade Area (EFTA) were completed in 1968. The removal of capital controls and the free movement of people caused deeper capital market integration.⁴¹ This EFTA created new political pressures for other countries to join the community as trade diversion creates force for inclusion. Thus, we see more countries joining

³² Armstrong D *The Rise of the International Organisation: A Short History* (1982) 78.

³³ The History of the European Union: The Citizenship available at <http://www.historiasiglo20.org/europe/antecedentes2.htm> (accessed on 07/09/ 2016).

³⁴ Stuart L M *The European Communities and the Rule of Law* (1977) 9.

³⁵ The History of the European Union: The European Citizenship available at <http://www.historiasiglo20.org/europe/antecedentes2.htm> (accessed on 07/09/ 2016).

³⁶ Baldwin C & Wyplosz *Economics of European Integration* 2nd ed (2006) 21

³⁷ Baldwin C & Wyplosz *Economics of European Integration* 2nd ed (2006) 21.

³⁸ Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, Article 1

³⁹ Treaty of Rome (EEC) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023> accessed on 09/09/2016).

⁴⁰ Toepke U P 'The European Economic Community - A Profile' (1981) 6 *Northwestern Journal of International Law & Business* 2.

⁴¹ European Union (EU) available at <http://www.referenceforbusiness.com/small/Eq-Inc/European-Union-EU.html> (accessed on the 07 September 2016).

the EU, Denmark, Ireland and the United Kingdom joined the European Union on 1 January 1973, raising the number of member states to nine.⁴² In 1981, Greece became the 10th member of the EU, and Spain and Portugal followed five years later showing a steady growth of the European Community.

In 1986, the Single European Act (SEA) was signed and entered into force on 1 July 1987. The SEA sets forth several means of achieving European unity. It was aimed at speeding up the process of the European construction so as to complete the internal market.⁴³ The SEA dealt with the involvement of the Community in new fields, the development of a unified economic and monetary policy, a strengthening of economic and social cohesion, and the coordination of actions relating to the environment and foreign policy.⁴⁴ The SEA provided the basis for a vast six-year programme aimed at dealing with issues of the free flow of trade across EU borders creating the 'Single Market'.⁴⁵ This effectively broke down trade barriers such as taxes, import and export taxes were made uniform.

2.2.2 From an economic union to a political union

In 1993, the Single Market was completed with the 'four freedoms': movement of goods, services, people and money. The 1990s were also the decade of two treaties: the Maastricht Treaty on European Union (The Maastricht Treaty) in 1993 and Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam Treaty) in 1999. The Maastricht Treaty declared a new economic phase, the Economic and Monetary Union (EMU).⁴⁶ What this meant was that there would be a single currency between the members of the EU.⁴⁷ The idea to integrate monetary systems had already been expressed in the treaty of Rome, where it stated that each member state considers its own policy on the change of exchange rate as a common

⁴² Armstrong D *The Rise of the International Organisation: A Short History* (1982) 75.

⁴³ Single European Act 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

⁴⁴ Good K 'Institutional Reform under the Single European Act' (1988) 3 *American University International Law Review* 8.

⁴⁵ Fontaine P 'The European Union Explained: Europe in 12 Lessons' Europa 2014 available at http://europa.eu/pol/index_en.htm (accessed on 07/09/2016).

⁴⁶ European Union (EU) available at <http://www.referenceforbusiness.com/small/Eq-Inc/European-Union-EU.html> (accessed on the 07 September 2016).

⁴⁷ Rose A & Engel C 'Currency Unions and International Integration' (2002) 34 *Journal of Money, Credit, and Banking* 3.

matter.⁴⁸ The EMU needed to go past three steps in order for it to be successful, firstly the completion of the creation of a common market and economic stabilisation on convergence criteria.⁴⁹ The second stage is the establishment of institutions that would prepare countries for the adoption of a common currency.⁵⁰ The last phase is the adoption of a common currency and become a basis for the foundation of the European Bank.⁵¹

The main aim of the Amsterdam Treaty was to modify certain regulations of the Treaty of the European Union namely the Paris and Rome Treaties.⁵² Its main areas of emphasis were increasing the democratic legitimacy of the European Institutions,⁵³ achieved by increasing the powers of the European Parliament, Security and Justice Reforms. Furthermore, the Treaty included the introduction of a common foreign and security policy and the reformation of the three pillars of the EU.⁵⁴ It is also evident that the Amsterdam Treaty sought to reform the institutions in order to better prepare them for the accession of more member states in the upcoming enlargement.⁵⁵

In 1995, the EU gained three more new members: Austria, Finland and Sweden. The new members were all 'rich' countries, whereas in the two preceding rounds with Greece in 1981 and Portugal and Spain in 1986 'poor' countries had acceded to the EU.⁵⁶ The accession process

⁴⁸Lymbouris C 'The Treaty of Amsterdam' available at <http://testpolitics.pbworks.com/w/page/20734325/The%20Treaty%20of%20Amsterdam> (accessed on 08/09/2017).

⁴⁹ Davulis G 'European Integration: Historical Aspects and Current Problems' (2013) 3 *International Journals of Business, Humanities and Technology* 6.

⁵⁰ Davulis G 'European Integration: Historical Aspects and Current Problems' (2013) 3 *International Journals of Business, Humanities and Technology* 6.

⁵¹ Davulis G 'European Integration: Historical Aspects and Current Problems' (2013) 3 *International Journals of Business, Humanities and Technology* 6.

⁵²Lymbouris C 'The Treaty of Amsterdam' available at <http://testpolitics.pbworks.com/w/page/20734325/The%20Treaty%20of%20Amsterdam> (accessed on 08/09/2017).

⁵³ Moravcsik A & Nicolaidis K 'Explaining the Treaty of Amsterdam: Interests, Influence, Institutions' (1999) 37 *Journal of Common Market Studies* 1 81.

⁵⁴ Piris J & Maganza G 'The Amsterdam Treaty: Overview and Institutional Aspects' (1998) 22 *Fordham International Law Journal* 6 3.

⁵⁵ Lymbouris C 'The Treaty of Amsterdam' available at <http://testpolitics.pbworks.com/w/page/20734325/The%20Treaty%20of%20Amsterdam> (accessed on 8 January 2017).

See also Meehan E 'Citizenship and the European Union Rights: A Comparative Perspective' (1996) 26 *The Journal of Federalism* 4.

⁵⁶ Breuss F 'Austria, Finland and Sweden in the European Union' (2003) 4 *Austrian Economic Quarterly* 131.

of this round lasted a minimum of three years and could last over five years, counting from the submission of the request for EU membership. The accession of Austria, Finland and Sweden brought the number of the EU members to fifteen.

The following decade marked the most rapid growth of the EU. In the mid-1990s to around 2004 the largest accession was set in motion. The joining members were the former Soviet bloc countries consisting of Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia.⁵⁷ In 2007 Bulgaria and Romania made their entrance into the European Community. 2013 marked the entry of Croatia into the European discourse and to present day, the last and 28th member of the EU.

The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Lisbon Treaty) (2007/C 306/01) was ratified by all EU countries including the UK before entering into force in 2009. The Treaty of Lisbon provided the EU with modern institutions and more efficient working methods. The Treaty of Lisbon amends the TEU and the Treaty establishing the EEC. In this process, the Rome Treaty was renamed to the Treaty on the Functioning of the European Union (TFEU).⁵⁸ The stated aim of the treaty was to complete the process started by the Treaty of Amsterdam 1997 and by the Treaty of Nice 2001 with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action.⁵⁹ This chapter intends to expand further on the Treaty of Lisbon in detail at a later stage as it will delve into the origin and the history of Article 50 of the Treaty Establishing the European Union (TEU).

It is clear from the above discussion that the EU like Rome was not built in a day. The EU was the result of gradual integration since the 1950s, an evolution when one level of union has been seen to work, giving confidence and motivation for a next level.⁶⁰ Though sparked by the fear of future wars and single country domination, the EU evolved to become a great tool for European cooperation and a great economic platform for development. The aim of this

⁵⁷ Fontaine P 'Europe in 12 Lessons' (2006) 92 ISBN European Commission Directorate General for Communications Publications 10-11.

⁵⁸ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01.

⁵⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01, Preamble.

See also Wilde R 'The History of the European Union' 2016 available at <http://europeanhistory.about.com/od/governmentandlaw/a/europeanunionhist.htm> (accessed on 07/09/2016).

discussion is to show the kinds of agreements the UK is a part of as a member of the EU. This discussion is meant to also highlight the kind of agreements the UK is now opting out of and that the Brexit is not without consequence.

Now that we have discussed the history of the EU, it is clear that Article 50 runs contrary to the goal of the EU for more integration and unity. This research seeks to show why this seemingly contrary idea of an exit was included and affected the EU legislation when it was clearly not a part of the original plan of integration. This chapter will now explore the advent of Article 50, how it came to being and why. It will go further to discuss Article 50 in depth and its areas of uncertainty. Discussing the history of Article 50 will help one to understand the intention and the meaning of Article 50 better.

2.3 The advent of an exit clause

While it is evident that EU integration was a gradual and purpose oriented towards an even closer cooperation of the European countries, the issue of state sovereignty remained a concern especially considering that there was no express exit clause from the EU.⁶¹ The issue of state sovereignty became a topical issue because while the idea of a closer economic unit and more economically friendly trade agreements was every attractive, member states still want to enjoy unfettered authority over their domestic policies.⁶² State sovereignty, due to the sovereignty of the EU law over domestic law⁶³ seems to have been usurped thus the outcry for state sovereignty. The globalisation of the European market, the adoption of a single currency and the economic down turn that hit Europe and the increasing number of member states from six members to 28 brought a number of challenges.⁶⁴ These challenges seemed to bring scepticism

⁶¹ Griffiths L ‘A Critical Analysis of EU Member State Sovereignty under the Treaty of Lisbon: Sovereignty v Democracy’ available at <https://sites.google.com/site/349924e64e68f035/issue-4/a-critical-analysis-of-eu-member-state-sovereignty-under-the-treaty-of-lisbon-sovereignty-v-democracy> (accessed on 14/04/2017).

⁶² Buchan G ‘National Interests and the European Union’ available at https://www.brugesgroup.com/images/issues/civil_liberties/national_interests_and_the_european_union_pdf.pdf (20/04/2017).

⁶³ Law Teacher ‘Doctrine Of Supremacy Of European Union’ available at <https://www.lawteacher.net/free-law-essays/administrative-law/doctrine-of-supremacy-of-european-union-administrative-law-essay.php> (accessed on 14/04/2017).

⁶⁴ Jonung L & Drea E ‘The EURO: It can’t happen. It’s a bad idea. It won’t last: US economists on the EMU, 1989 – 2002’ 2009 *Economic Papers* 395.

towards the integration premise.⁶⁵ It therefore only seemed logical that the Treaty of Lisbon be prepared with an allowance for leaving the EU if a member state chose to do so.

2.3.1 Article 50

Article 50 was not originally a part of the EU law but came about as amendment through the Lisbon Treaty. Before the enforcement of the Treaty of Lisbon, the EU could be interpreted as a rock solid international organisation aimed at integration.⁶⁶ The EU could be characterised as such because it successfully created the three fundamental common policies to harmonise every EU member state's national interest, and went further to provide the negotiation platform to discuss and solve problems and differences.⁶⁷

However, this school of thought was no longer sustainable after the ratification of the Treaty of Lisbon, particularly Article 50. The inclusion of Article 50 instead suggests that disintegration could be another option and members may leave the bloc.⁶⁸ Treaty of Lisbon amended empowers the EU to become a global actor by means of integration strategies that gather and collect the national power and interest from the member states of EU. However, Article 50 takes the EU in a novel direction which may ultimately weaken solidity.⁶⁹

The Lisbon Treaty amends two procedures that make it possible for a European state respectively to become, and to cease to be, a member of the EU. Since the establishment of the European Communities, the accession procedure currently provided in Article 49 TEU has been used many times, whereas Article 50 TEU remains a novel and not fully used nor

⁶⁵ Riishøj S 'Europeanisation and Euro-scepticism: Experiences from Poland and the Czech Republic' available at <http://www.cepsr.com/clanek.php?ID=211> (accessed on 14/04/2017).

⁶⁶ Cheng Chin-mo* & Cheng Yu-chin 'EU Opt in and out under the Framework of Lisbon Treaty' *Tamkang Journal of International Affairs* available at http://tkuir.lib.tku.edu.tw/dspace/handle/987654321/77298?mode=full&submit_simple=Show+full+item+recordn (accessed on 9 October 2016).

⁶⁷ Cheng Chin-mo* & Cheng Yu-chin 'EU Opt in and out under the Framework of Lisbon Treaty' *Tamkang Journal of International Affairs* available at http://tkuir.lib.tku.edu.tw/dspace/handle/987654321/77298?mode=full&submit_simple=Show+full+item+recordn (accessed on 9 October 2016).

⁶⁸ Schubert M J & Schwithal T T 'Lisbon: The End of European Integration?' (2008) 4 *Hanse Law Review (HanseLR)* I available at <http://www.saylor.org/site/wp-content/uploads/2011/05/Treaty-of-Lisbon.pdf> (accessed on 07/09/2016).

⁶⁹ Cheng Chin-mo* & Cheng Yu-chin 'EU Opt in and out under the Framework of Lisbon Treaty' *Tamkang Journal of International Affairs* available at http://tkuir.lib.tku.edu.tw/dspace/handle/987654321/77298?mode=full&submit_simple=Show+full+item+recordn (accessed on 09/10/ 2016).

understood.⁷⁰ The provisions outlining how states enter the EU and how they could leave the Union offer some insight into the notion of EU membership, and more generally into the nature of the EU legal order.⁷¹ In contrast to the accession procedure, the EU exit mechanism is only being put to test now for the first time due to the proposed exit by the UK. The exit procedure is subject to considerable scholarly scrutiny especially due to the UK referendum of 2016.⁷²

Article 50 is in stark contrast to the previous European Community orthodoxy, namely that withdrawal is politically, legally and practically impossible and as such, the previous treaties do not include a withdrawal clause.⁷³ Seemingly, the main reason for refusing to acknowledge the possibility of withdrawal was to effectively ignore any criticism of the drive towards ‘an even closer union’ of Europe. It seems the idea of even contemplating the unilateral secession of a member State, was to risk this existential danger coming to fruition.⁷⁴ Article 50 comes in and brings a new dimension to the EU bringing the possibility of an exit.

Article 50 plays an important role in that it strengthens state sovereignty by allowing member states to exit the EU. The EU ceased to have vague exit procedures but rather opts for an open organisational structure in which member states have the sovereign right to leave therefore Article 50 shall now be discussed in depth.

2.3.2 Overview of the Framework for an exit in terms of Article 50

The advent of Article 50 brought about legal changes and a framework for the process of an exit. Below is the content of Article 50.

Article 50 – Treaty on European Union (TEU)

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking

⁷⁰ Hillion C *Handbook of European Union Law* (2015) 135.

⁷¹ Hillion C *Handbook of European Union Law* (2015) 137.

⁷² Miller V & Lang A ‘Brexit: how does the Article 50 process work?’ (2017) 7551 *House of Commons Library Briefing Paper* 7.

⁷³ Reid A S ‘Brexit Begins: an overview of the legal issues’ 2016 available at <http://eulawanalysis.blogspot.co.za/2016/07/brexit-begins-overview-of-legal-issues.html> (accessed on 11/09/2016).

⁷⁴ Reid A S ‘Brexit Begins: an overview of the legal issues’ 2016 available at <http://eulawanalysis.blogspot.co.za/2016/07/brexit-begins-overview-of-legal-issues.html> (accessed on 11/09/2016)

account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

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

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.⁷⁵

All these various aspects of Article 50 will be discussed in the section below.

2.3.3 Exiting state as master of the exit process

From the content of Article 50 it is apparent that an exit is not an event but it is rather a process. Section 1 of Article 50 points out that a member state may withdraw in accordance to its own constitutional requirements. Unpacking this section shows that Article 50 TEU acknowledges the possibility for any member State to withdraw from the Union under its own constitutional rules. However, the formulation of the provision suggests that it is not an absolute and immediate power on the part of the exiting member state to exit as they may please.⁷⁶

An overall look at Article 50 suggests that the decision to exit the EU is taken in accordance with the state's domestic law, whereas EU law governs the departure itself.⁷⁷ The EU exit procedure is therefore not based on 'state primacy' conception of the power to secede. By referring to any member State, instead of referring to the 'High Contracting Parties',⁷⁸ Article 50(1) TEU embeds the states' ability to withdraw within the EU legal order. This seems to suggest that the success of any exit initiative therefore depends not only on the member's

⁷⁵The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 (2007/C 306/01), Article 50.

⁷⁶ Hillion C 'Leaving the European Union, the Union way A legal analysis of Article 50 TEU' (2016) 8 *Swedish Institution for European Studies* 2.

⁷⁷ Hillion C 'Leaving the European Union, the Union way A legal analysis of Article 50 TEU' (2016) 8 *Swedish Institution for European Studies* 2.

⁷⁸ The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 (2007/C 306/01) Article 1 (1).

intention to leave. The success of the exit initiative also hinges on the fulfilment of the procedural and substantive requirements of Article 50 TEU. The exiting member state also must comply with the rules and principles underpinning the EU legal order more generally, under the control of the European Court of Justice. It becomes apparent that the states' sovereign desire to exit the European community is not enough to exit but compliance with EU law is required one last time before the member state divorces itself from the influence of the EU. A question of interest would therefore arise in the case of the UK which does not have a codified constitution as to what would constitute 'constitutional requirements'.⁷⁹

The first active move that a member state who seeks to exit the EU has to make is to notify the European Council of its intention to leave. Article 50(2) TEU states that the initiative to commence withdrawal proceedings belongs to the departing country. It however does not provide a deadline for filing the Notice, nor does it set out any requirements regarding its format. It seems that the departing country has the discretion to decide when and how to inform the others as to its intentions. The UK therefore cannot be forced to pull the trigger and hand in their Notice to withdraw from the EU to the EU Council but can indeed wait until it sees fit.⁸⁰ In the case of the UK, the referendum was rather an advisory vote by the UK public but was not in itself the official Notice to withdraw from the EU.⁸¹ It is however unclear what, in formal terms, such a notification should look like or whether a mere announcement to the European Council would qualify as such a notification is sufficient as a Notice. It however seems generally accepted that the UK referendum result does not constitute notification of intention to withdraw.⁸² There is also a consensus that the Notice must be in the form of a diplomatic letter. It is rather a foretaste of what is to come but not a notification as will be explained in chapter 3 of this research.

2.3.4 Format of the Notice of withdrawal

The EU pre-accession experience could be used as a point of reference for the exit Notice's structure. The pre-accession procedure commences with an application for membership, which

⁷⁹ 'Brexit Analysis Bulletin Triggering Brexit – the legal questions surrounding Article 50' available at https://www.shepwedd.co.uk/sites/default/files/Article50_Brexit2.pdf (accessed on 24/03/2017).

⁸⁰ Łazowski A 'Procedural Steps towards Brexit' available at <https://www.ceps.eu/system/files/Procedural%20steps%20towards%20Brexit.pdf> (accessed on 24/03/2017).

⁸¹ Barnett H *Constitutional and Administrative Law* 12th ed (2017) 208.

⁸² Barnett H *Constitutional and Administrative Law* 12th ed (2017) 208

is a diplomatic letter expressing the desire to join the EU.⁸³ The EU Notice may also take this format and be presented as a diplomatic letter to the European Council. A diplomatic letter sent by the UK Prime Minister to the European Council may be considered to constitute such a notification. The notification is likely to be in writing also considering Article 67(1) of the Vienna Convention on the Law of Treaties (VCLT) which requires a state that wants to invoke the Convention to withdraw from a treaty to notify the other parties in writing.

Another area of uncertainty is who takes the responsibility of drafting the Notice of Intention to leave the EU and under what circumstances. It was generally assumed that the Prime Minister would render the Notice under prerogative powers;⁸⁴ however this premise has been questioned. The question whether the Parliament should give its consent to the Prime Minister to give the Notice has gained currency after the referendum.⁸⁵ The question whether the Prime Minister may trigger Article 50 and whether the Parliament should give its consent became the subject of a legal challenge at the High Court and the Supreme Court in the Miller case⁸⁶ as will be further discussed in chapter 3. However, it is important to note that the content of the Notice of Intention to leave is determined by the domestic constitution of the member leaving the EU.

Once the Notice of withdrawal has been received the European Council has to formulate a negotiating mandate. This mandate will be discussed by the remaining member states in the absence of the UK.⁸⁷ This mandate will later be proposed to the UK and the negotiation of the withdrawal agreement will commence.⁸⁸ Article 50 once again does not provide for a framework as to how the guidelines or the negotiating mandate will be adopted. The EU

⁸³ O'Neill C *Britain's Entry Into the European Community: Report by Sir Con O'Neill on the Negotiations 1970-1972* (2000) 9-12.

⁸⁴ European Union (Notification of Withdrawal) Bill available at <https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0132/17132.pdf> (accessed on 30/05/2017).

⁸⁵ Miller V & Lang A 'Brexit: how does the Article 50 process work?' (2017) 7551 *House of Commons Library Briefing Paper 7*.

⁸⁶ R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768.

⁸⁷ Carmona J & Cirlig C 'UK withdrawal from the European Union' (2017) European Parliamentary Research Service available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/599352/EPRS_IDA%282017%29599352_EN.pdf (accessed on 30/05/2017).

⁸⁸ Carmona J & Cirlig C 'UK withdrawal from the European Union' (2017) European Parliamentary Research Service available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/599352/EPRS_IDA%282017%29599352_EN.pdf (accessed on 30/05/2017).

negotiator, the European Commission, will then negotiate a withdrawal agreement with the UK considering the post Brexit relationship. The withdrawal agreement will be concluded by the EU Council by a qualified majority of 72% of participating states excluding the UK after obtaining the consent of the European Parliament.⁸⁹ Qualified majority voting is a system used for EU member states to reach an agreed position. It is important to note that under the Lisbon Treaty, a majority must include 55 per cent of countries, representing 65 per cent of the total EU population. But Article 50 of the Treaty on European Union stipulates that the voting rule to be used is that set out in Article 238.3(b) of the TFEU, which requires 72 per cent of member states which in practice are 20 out of the remaining 27 member states, comprising 65 per cent of the EU population.⁹⁰

2.3.5 Prescription period for withdrawal

Once a Notice of intention to leave has been given to the European Council, a prescription of two years starts to run. Once the UK has triggered the exit procedure through the notification it has two years to negotiate its exit package, failure of which would lead to automatic removal from the EU block.⁹¹ During these two years, the exiting member is to negotiate and conclude an agreement with the EU, the arrangements for withdrawal and a future relationship with the EU in terms Article 218(3) of the Treaty on the Functioning of the European Union (TFEU). This seems to have been put in place to avoid animosity between the exiting member and the remaining members.⁹² It is worth noting that Article 8 of the Lisbon Treaty refers to the EU's aim of developing special relationships with its neighbouring countries, to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. Article 8 therefore provides room for a round

⁸⁹ Ropes & Gray 'Brexit: UK starts European Union withdrawal process' available at file:///C:/Users/Admin/Downloads/20170330_Brexit_Alert.pdf (accessed on 30/05/2017).

⁹⁰ Poptcheva E 'Article 50 TEU: Withdrawal of a Member State from the EU' available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 30/05/2017).

⁹¹ Tablot C 'No longer welcome: the EU academics in Britain told to 'make arrangements to leave' available at <http://blogs.lse.ac.uk/brexit/2017/01/26/no-longer-welcome-the-eu-academics-in-britain-told-to-make-arrangements-to-leave/> (accessed on 31/05/2017).

⁹² European Council 'Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines' available at <file:///C:/Users/hazy/Downloads/29-euco-art50-guidelines.en.pdf> (accessed on 01/06/2017).

table discussion for continued coexistence between the UK and the EU post the Brexit.⁹³ It is also important to note that Article 50 only compels the EU to seek a negotiation with the withdrawing member state not the exiting state. It therefore does not require the UK, or any withdrawing member state, to reciprocate.⁹⁴

The problem with the two-year threshold is that it is barely enough to make any meaningful agreement, given the overabundance of dossiers to negotiate.⁹⁵ Thankfully this prescribed period for negotiation can be extended, however this can only be done if the European Council unanimously agree to the extension.⁹⁶ The unanimous agreements requirement is not to be taken lightly considering the somewhat annoyance of other members for leaving the EU to begin with, worse still the UK has been accused of delaying to trigger the exit procedure.⁹⁷ This would explain the UK's delay in triggering Article 50 as they would like to put their house in order and secure a clear plan for future relations with the EU.

If a member of the EU within the two-year grace period fails to secure a withdrawal agreement and is not given an extension they are automatically ousted from the EU.⁹⁸ Which seems to point to the fact that if a member state is not keen on a withdrawal agreement, the member can therefore let the two-year period elapse. Before the lapse of the two years, the withdrawal agreement or end of extension period the UK will still be regarded as a member of the EU during the withdrawal negotiations. The UK therefore has the option to negotiate its exit agreement with the remaining member states.

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⁹³ Lea R 'Post-Brexit trading options for the UK' available at <http://www.arbuthnotlatham.co.uk/wp-content/uploads/2016/07/4th-July-Perspectives-Final.pdf> (accessed on 20/03/2017).

⁹⁴ Oliver T 'The five routes to a Brexit: how the UK might leave the European Union' available at <http://blogs.lse.ac.uk/europpblog/2014/06/27/the-five-routes-to-a-brexit-how-the-uk-might-leave-the-european-union/> (accessed on 20/03/2017).

⁹⁵ Simms B 'The EU, Germany and the British Problem' (2013) 11 *Journal for Comparative Government and European Policy* 1-5.

⁹⁶ Article 50 TEU: Withdrawal of a Member State from the EU available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 20/02/2017).

⁹⁷ Simms B 'The EU, Germany and the British Problem' (2013) 11 *Journal for Comparative Government and European Policy* 1-5.

⁹⁸ Wyrozumska A *The European Union After Lisbon: Constitutional Basis, Economic Order and External Action Withdrawal from the Union Anna* (2012) 358-361.

During the 2 year period, the UK will continue to participate in EU activities, the EU institutions and decision-making. But it will not take part or vote in any Council or European Council discussion concerning its withdrawal.⁹⁹ The UK will be expected to continue as a member and existing EU law will continue to apply in the UK, and the UK will be bound by the principle of ‘sincere cooperation’.¹⁰⁰ Gostyńska, however points out the fact that the UK position in the EU may not be so simple. Gostyńska says that it is disputable that the UK may remain actively involved in the EU during the transitional period. The full participation of the British delegation in EU decision-making, particularly in adopting EU law could encounter opposition from those member States with opposing agendas. It is, expected that a withdrawing member state should abide by a principle of sincere cooperation even though it already has one foot outside the EU which may result in a conflict of interest.¹⁰¹

2.3.6 Status of the exiting member post the withdrawal agreement

Finally, when all the procedural requirements have been met and the exiting member state has successfully left the EU bloc the member state may not simply change their minds and automatically opt back into the EU bloc.¹⁰² The member state would have to start the accession process *de novo*. All the rules of accession would therefore apply and the country will be regarded as a new member state requesting accession. It seems that Article 50 (5) was created as a deterrent used to ensure that member states do not take leaving the EU lightly and for political and practical reasons. It would be intolerable if member states could leave and come back at any point without consequence considering that the administrative and legal nightmare of having to change the structure and the legal content of the EU every single time a member state decided opt out and back in again.¹⁰³ This was intended to curtail abuse by member states who threaten to leave so that favourable decisions be taken.

⁹⁹ Poptcheva E ‘Article 50 TEU: Withdrawal of a Member State from the EU’ available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 30/05/2017).

¹⁰⁰ ‘The Process of withdrawing from the European Union’ available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf (accessed on 25/03/2017).

¹⁰¹ Gostyńska A & Parkes R ‘The renegotiation delusion? Nine questions about Britain’s EU future’ 2013 *The Polish Institute of International Affairs* 22.

¹⁰² The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 (2007/C 306/01), Article 50 (5).

¹⁰³ Gostyńska A & Parkes R ‘The renegotiation delusion? Nine questions about Britain’s EU future’ 2013 *The Polish Institute of International Affairs* 22.

A common critique in the literature is that the procedure of Article 50 TEU is formulated in an incomplete, ambiguous and unclear manner thus causes substantial legal uncertainty.¹⁰⁴ Thus this research seeks to gain an understanding on the content and interpretation of Article 50 so as to gain clarity as to the way in which article 50 would be implemented. As with any piece of legislation, Article 50 has areas of ambiguity which may prove problematic for the interpretation and the implementation of the exit clause. This research will look at some of the problematic areas.

2.3.7 Concerns of Uncertainty in Article 50

The exit clause seemingly was conceived with a view of providing for the withdrawal of one or two member states at a time rather than a group of members leaving at the same time. The European Council represents the EU in withdrawal negotiations in the same way it represents the EU in accession treaties. In the case of mass withdrawal and a more substantial number of member states were to withdraw, this role of the Council would not work for the purely practical and conceptual reason of the limited legitimacy of the Council representing a 'depleted' EU.¹⁰⁵ Article 50's failure to cater for a mass exit raises concerns because due to the increasing dissatisfaction with the EU a group of member states may opt to leave at the same time.¹⁰⁶ In this case the EU must have mechanisms to provide for such circumstance. A mass withdrawal, though highly unlikely, should have been provided for by the drafters of the Lisbon Treaty.

There is a great debate as to whether the formal Notice of withdrawal of Article 50, once communicated to the European Council can be revocable. The UK seems to largely interpret Article 50 with the possibility of a revocation of the withdrawal Notice before the withdrawal agreement has been reached.¹⁰⁷ The House of Lords EU Select Committee in its 11th Report¹⁰⁸

¹⁰⁴Hillion C *Handbook of European Union Law* (2015) 135.

See also Arnall A and Chalmers D 'Accession and Withdrawal in the Law of the European Union' (2015) 126 *The Oxford Handbook of European Union Law* 149.

See also Hillion C 'Accession and Withdrawal in the Law of the European Union' in *Handbook of European Union Law* (2015) 124-152.

¹⁰⁵ Hillion C *Handbook of European Union Law* (2015) 135.

¹⁰⁶ Rickford J & Ayling R 'Brexit Referendum and Article 50 of the Treaty on European Union A Legal Trap: the need for Legislation' available at <https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf> accessed on (27/03/2017).

¹⁰⁷ Rickford J & Ayling R 'Brexit Referendum and Article 50 of the Treaty on European Union A Legal Trap: the need for Legislation' available at <https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf> accessed on (27/03/2017).

¹⁰⁸ House of Lords European Union Committee *Report 2015 - The Process of withdrawing from the European*.

concludes that ‘there is nothing in Article 50 formally preventing a member state from reversing its decision to withdraw during the withdrawal negotiations. The political consequences of such a change of mind would, nevertheless be substantial.’ The Committee based its conclusions on the evidence of two witnesses: Edwards¹⁰⁹ and Wyatt.¹¹⁰ Edwards continued to say that a member state cannot be forced to go through with a withdrawal if it does not want to. However, Edwards does not substantiate nor justify his opinion.¹¹¹

Wyrozumska says that despite the fact the Article 50 TEU is silent on whether it is possible to withdraw the notification of withdrawal within a two-year period there would be no problem if all the member states consented. Wyrozumska goes on to say that it seems that Article 50 TEU seems to indicate that such a withdrawal does not require the consent of the other member states, especially since there are no new arrangements necessary. This is because at this point there will be no fundamental changes made. For example, representatives of that member State will still be seating in all the institutions of the EU and be functioning as normal, except for the Council’s and the European Council’s where the exiting member state’s representatives cannot participate in the discussions and decisions surrounding the withdrawal.¹¹²

Wyatt, however, argues that it imperative that comfort should not be drawn from the silence of the article on the question of whether reversal of Notification is permissible to a withdrawing member state. The fact that Article 50 does not expressly prohibit reversal does not necessarily mean that it is possible. Rather the silence is problematic as it does not address the possibility of a revocation at all therefore creating legal uncertainty and ambiguity on the matter. It is conversely dangerous to conclude that due to the lack of an express clause on the issue of revocation of a Notice then there is an implication of allowing it.¹¹³ There however is a concession that once the withdrawal agreement has been made then the Notice of Intention to leave the EU is no longer revocable.

¹⁰⁹ A former judge of the European Court of Justice.

¹¹⁰ Emeritus professor of law, Oxford University.

¹¹¹ Rickford J & Ayling R ‘Brexit Referendum and Article 50 of the Treaty on European Union A Legal Trap: the need for Legislation’ available at <https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf> accessed on (27/03/2017).

¹¹² Wyrozumska A *The European Union After Lisbon: Constitutional Basis, Economic Order and External Action Withdrawal from the Union Anna* (2012) 358-361.

¹¹³ House of Lords European Union Committee *Report 2015 - The Process of withdrawing from the European*.

2.4 Possible routes for exit prior to Article 50

Article 50 of the Lisbon Treaty brought about an express exit clause from the EU. However, there are scholar arguments as to whether the absence of an express clause prior to the Lisbon treaty meant a complete inability to leave the EU. The question of the right to withdrawal was highly controversial. There are many arguments as to whether an exit was possible through instruments already provided by the International community or not. While some scholars believed that an exit was possible prior to the express exit clause provided by Article 50 some believed that an exit was not provided for and was therefore not possible.¹¹⁴

2.4.1 Arguments for the possibility of an exit without an express clause

Some authors have argued for the application of customary international law (*clausula rebus sic stantibus*, also established in Article 62 of the Vienna Convention on the Law of the Treaties (VCLT) providing for unilateral withdrawal from international treaties) within the EU framework.¹¹⁵ Article 62 of the VCLT¹¹⁶ provides for instances where there is a fundamental change which could not have been anticipated at the time of the signing of the treaty, where a member state may use Article 62 as a tool for withdrawal from a Treaty. Therefore making an exit from the EU possible prior Article 50.

According to Lazowski, leaving the Union has always been possible, both legally and practically, despite the silence of the pre-Lisbon treaties on the matter. According to this view any of its contracting parties can leave the EU¹¹⁷ on the basis of the application of public international law, such as the VCLT, or customary international norms for those states that have not ratified the Convention.¹¹⁸ The absence of such a withdrawal clause in the statute of

¹¹⁴ Eva-Maria Poptcheva 'Article 50 TEU: Withdrawal of a Member State from the EU' (2016) European Parliamentary Research Service: Briefing available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 07 September 2016).

¹¹⁵ Eva-Maria Poptcheva 'Article 50 TEU: Withdrawal of a Member State from the EU' (2016) European Parliamentary Research Service: Briefing available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 07 September 2016).

¹¹⁶ Vienna Convention on the Law of Treaties, Article 62 UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

¹¹⁷ Lazowski A 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *European Law Review* 530.

¹¹⁸ Rieder C M 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 *Fordham International Law Journal* 1 147-154.

an international organisation does not in itself prevent withdrawal by its participating states.¹¹⁹ This is precisely because the EU treaties lack specific provisions to that effect in terms of *lex specialis derogate legi generali*¹²⁰ rule which states that in the case of two or more laws dealing with the same subject matter, priority is given to the more specific provision. From this perspective, a member state could always invoke, for example, a ‘fundamental change of circumstances’, that is, the *rebus sic stantibus*¹²¹ clause in terms of Article 62 of the VCLT¹²² to terminate its participation in the treaties, under the strict conditions of Articles 54,¹²³ 56¹²⁴ and Article 42¹²⁵ of the VCLT¹²⁶ In terms of the *rebus sic stantibus* principle a treaty is subject to an implied condition that if circumstances become substantially different from those obtained when it was concluded, then the aggrieved party to the treaty is entitled to be released from it. According to this school of thought the UK may use this rule as a point of departure.

Booth & Howarth argue that a member state could unilaterally withdraw since sovereign states are in any case free to exercise their sovereign right to withdraw from the EU.¹²⁷ According to this view in the case of the UK there are no practical impediments preventing the UK from exiting the EU. Under the British law, the sovereignty of the parliament means that the government does not need the approval of the people to exit the EU.¹²⁸ The only condition that the

¹¹⁹ Lazowski A ‘How to withdraw from the European Union? Confronting hard reality’ (2013) CEPS Commentary, available at www.ceps.eu/publications/how-withdraw-europeanunion-confronting-hard-reality (accessed on 08/09/2016).

¹²⁰ Lex Specialis Law and Legal Definition available at <https://definitions.uslegal.com/l/lex-specialis/> accessed on 06/02/17).

¹²¹ ‘Clausula Rebus Sic Stantibus Law and Legal Definition’ available at <https://definitions.uslegal.com/c/clausula-rebus-sic-stantibus/> (accessed on 06/02/17).

¹²² Vienna Convention on the Law of Treaties, Article 62 UN Doc A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

¹²³ Vienna Convention on the Law of Treaties, Article 54 UN Doc A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

¹²⁴ Vienna Convention on the Law of Treaties, Article 56 UN Doc A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

¹²⁵ Vienna Convention on the Law of Treaties, Article 42 UN Doc A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

¹²⁶ Hillion C ‘Leaving the European Union, the Union way A legal analysis of Article 50 TEU’ (2016) 8 *European Policy Analysis Journal* 7-8.

¹²⁷ Booth S & Howarth C ‘What if..? The Consequences, challenges and opportunities facing Britain outside EU’ (2015) available at <http://europas-krisen.zdf.de/media/downloads/Brexit/150507-Open-Europe-What-If-Report-Final-Digital-Copy.pdf> (accessed on 30/05/2017).

¹²⁸ Athanassiou P ‘Withdrawal and expulsion from the EU and EMU: some reflections’ 2009 available at www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf (accessed on 10/02/17).

UK has to meet is to fulfil its domestic requirements according to Article 50 (1) as previously mentioned.¹²⁹ While Poptcheva denied the possibility of a member state withdrawing unilaterally, he pointed to the role of the EU member states as 'masters of the Treaties', who could, in agreement, decide that a member state can terminate its membership which could in another sense support the ability to leave the EU.¹³⁰

2.4.2 Arguments against the possibility of an exit without an express clause

Contrary to the belief that an exit from the EU was possible prior Article 50 it has been argued by some that it was not possible.¹³¹ The application of international law to fill in alleged gaps in the EU Treaties is often viewed as flawed, due to the specific character of the EU as a supranational organisation. This is because international law in certain instances does not interpret the law in line with the objectives and the purpose of the EU. International law, which is by its nature general law in this particular instance, cannot replace the specific law of the EU. While the EU draws from international law for its own creation and a variety of rules, it was established as an autonomous legal order with its own separate rules.¹³² This would therefore bring possibilities of errors in interpretation or application as international law and EU law are two separate pieces of law.

Furthermore, Maastricht Treaty brought about the permanent nature of the EU, as now reflected in Articles 53 of the TEU and 356 of the Treaty on the Functioning of the European Union (TFEU). Article 53 of the TEU and Article 356 of the TFEU were understood by some legal scholars as excluding the possibility of unilateral withdrawal from the Treaties.¹³³ Due to the prohibition of unilateral withdrawal, the member states could not simply leave the EU on a

¹²⁹ Oliver T 'The five routes a British exit from the EU could take' Huffington Post 30 June 2014 available at www.huffingtonpost.co.uk/tim-oliver/eu-referendum_b_5542483.html (accessed on 10/02/17).

¹³⁰ Poptcheva E 'Article 50 TEU: Withdrawal of a Member State from the EU' European Parliamentary Research Service: Briefing 2016 available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) (accessed on 07 September 2016).

¹³¹ Rieder C M 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 *Fordham International Law Journal* 1 147-154.

¹³² Rieder C M 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 *Fordham International Law Journal* 1 149-152.

¹³³ Rieder C M 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 *Fordham International Law Journal* 1 154.

whim but rather a protocol for leaving was put in place and it had to be due to material changes to the original agreement. According to this school of thought, the argument is rather the Lisbon Treaty was a compromise necessary in order to reach agreement on the Constitutional Treaty, clear from the comments attached to the draft provision (Article I-59) saying that it was a 'political signal to anyone inclined to argue that the Union is a rigid entity which is impossible to leave'.¹³⁴ This follows the failure of the EU to approve a constitution after a negative outcome on the Constitution Treaty in May and June 2005.¹³⁵

Friel is of the view that, leaving the EU was inconceivable prior to the inclusion of Article 50 TEU.¹³⁶ This is based on the idea that the EU was concluded for an unlimited duration, creating a Community of unlimited duration, aimed at 'an ever closer union', thus precluded member states' unilateral withdrawal, which also included withdrawal by means of international law.¹³⁷ Notably, it has been noted that the strict conditions for termination based on a change of circumstances are unattainable for member states considering the 'ever closer union' purpose of the treaties to which all had to subscribe, and the fact that any significant modifications, for example, to the treaties, requires unanimous approval.¹³⁸ The inclusion of an exit clause was thus regarded as contravening the commitment to an ever closer union that States take on when they become members¹³⁹ and the underlying general principles of loyalty and solidarity to which they are thereby committed.¹⁴⁰ The withdrawal clause of Article 50 TEU is now the *de facto and de jure* process¹⁴¹ for any member State wishing to exit the new EU supranational organisation. Thus a withdrawal prior Article 50 was not possible.

¹³⁴ Dutheil de la Rochere J 'The Lisbon Compromise: A Synthesis Between Community Method and Union Acquis' (2007) 31 *Fordham International Law Journal* 5 4.

¹³⁵ Dutheil de la Rochere J 'The Lisbon Compromise: A Synthesis between Community Method and Union Acquis' (2007) 31 *Fordham International Law Journal* 5 4.

¹³⁶ Friel R J 'Providing a Constitutional framework for withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *International & Comparative Law Quarterly* 407.

¹³⁷ Friel R J 'Providing a Constitutional framework for withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *International & Comparative Law Quarterly* 407.

¹³⁸ Friel R J 'Providing a Constitutional framework for withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *International & Comparative Law Quarterly* 407.

¹³⁹ Friel, R J, 'Providing a Constitutional framework for withdrawal from the EU: Article 59 of the Draft European Constitution' (2004) 53 *International & Comparative Law Quarterly* 407.

¹⁴⁰ Lenaerts K & Van Nuffel P *Constitutional Law of the European Union* (2005) 363.

¹⁴¹ *De facto* describes practices that are legally recognized by official laws while *de facto* describes situations that are generally known to exist in reality, even if not legally authorized.

2.4.3 Viability of Article 10 of Protocol 36 as a tool for exit

Article 10 of Protocol 36 has been put forward as another possible way to leave the EU prior Article 50 thus this discussion shall delve in the possibility of Article 10 of Protocol 36 as a way out of the EU. Article 10 of Protocol 36 to the EU Treaties is a legislative addition which enabled members of the EU to decide by the 31st of May 2014, whether or not they should continue to be bound by the approximately 130 police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force.¹⁴² Members have the right to opt out or continue to be bound which means that those measures would all become subject to the jurisdiction of the Court of Justice of the European Union and the European Commission's enforcement powers.¹⁴³

Article 10 of Protocol 36¹⁴⁴ grants to the UK the right, five years after the entry into force of the Lisbon Treaty the option to opt out of the police and judicial cooperation in criminal matters. This is an avenue that the UK could have taken in its bid to exit the EU. Article 10(4) of Protocol 36 provides that the relevant acts 'shall cease to apply' to UK. The language used in Article 50 TEU and Protocol 36 is strikingly similar. This therefore shows that while the UK has the option of making use of Article 50 it could have also possibly used Article 10 of protocol 36 to exit the EU. However, a close look at Protocol 36 would show that Protocol 36 unlike Article 50 does not provide for a complete exit but rather an option to opt out of the specific things mentioned in Protocol 36. With the use of Article 10 of protocol 36 the UK would submit a notification to the Council and certain parts of EU law cease to apply to it.¹⁴⁵

The phrasing of the Protocol suggests that if the opt out clause is not used before May 2014 then a member state would have waived their right to opt out. Whereas other measures and protocols are of an ongoing nature, Protocol 36 opt-out was crafted as a 'one off', 'use it or

¹⁴²Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty (2013) 'Decision pursuant to Article 10 of Protocol 36 to The Treaty on the Functioning of the European Union' available at <http://www.statewatch.org/news/2013/jul/uk-article-10-protocol-36-decision-july-2013.pdf> (accessed on 27/05/2017).

¹⁴³ UK's 2014 opt-out decision (Protocol 36) available at <http://www.parliament.uk/2014opt-out> (accessed on 07/05/2017).

¹⁴⁴The Treaty on the Functioning of the European Union 2007, Protocol (No 36) on transitional provisions, Article 10 (2013) available at http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf (accessed on 11/03/17).

¹⁴⁵ Nicolaidis P 'Withdrawal from the European Union: A Typology of Effects' (2013) 20 Maastricht Journal for European and Comparative 2 209 - 211

lose it' opportunity.¹⁴⁶ It should however, be emphasised that the bloc opt-out would not apply to all pre-Lisbon 'Justice and Home Affairs' measures, but only to pre-Lisbon policing and criminal law measures.¹⁴⁷ Article 50 of the TEU, however, is a total exit from the group completely not certain measures. Evidently, the bloc opt-out could only apply to measures adopted prior to the entry into force of the Treaty of Lisbon, not measures adopted after its entry into force unlike Article 50 which would sweep away all agreements made with the EU.

From the above discussion one can note that the UK could no longer use Protocol 36 as a way to exit the EU considering that the application to opt out was not made before the end of May 2014. In the above discussion one can note that by not opting out before the end of May 2014 the UK may be said to have tacitly agreed to be bound by the EU law and waived its right to opt out using Protocol 36 thus cannot use Protocol 36 as its way out of the EU. The matter of an exit prior Article 50 is still in scholarly discussion and no absolute conclusion has been deduced. One however tends to lean on the possibility of an exit even in the absence of an express clause. The importance of state sovereignty in the light of a supranational organisation is very important. It is objectionable that an exit was tacitly incorporated in the EU law. It seems unlikely that there would be no route of an exit whatsoever in such a big organisation such as the EU either through International customary law, public international law or the VCLT. Due to this uncertainty and an evident need for an exit clause the EU decided to design and incorporate an express legislation that provided a way out of the EU which later manifested in the form of Article 50.

2.5 Conclusion

The EU was as a culmination of many agreements that were signed over a period of time. What started out as a group of six members grew and became what we call now call the EU. An exit from this prestigious Union was never the idea behind the EU; instead the aim was an even

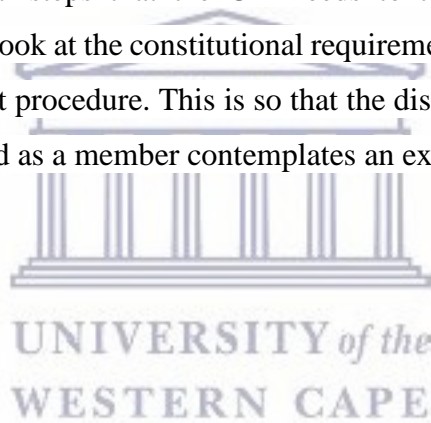
¹⁴⁶ Baker E 'The United Kingdom and its Protocol 36 Opt-Out: Is Police and Judicial Cooperation in Criminal Matters within the EU Losing Momentum?' (2013) 21 *European journal of Crime, Criminal Law and Criminal justice* 237-245.

¹⁴⁷ Peers S 'The UK's planned 'block opt-out' from EU justice and policing measures in 2014' available at <http://www.statewatch.org/analyses/no-199-uk-opt-out.pdf> (accessed on 11/03/2017).

See also The Treaty on the Functioning of the European Union 2007, Protocol (No 36) on transitional provisions, Article 10 (1) (2013) available at http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf (accessed on 11/03/17).

greater union. While an exit was never the aim it was also important that an exit clause be included in the Treaty of Lisbon in the form of Article 50. Article 50 is a seemingly short piece of legislation however, it is packed with many formalities and procedures as explained above. At the same time Article 50 is also subject to many areas of uncertainty which can be attributed to the fact that it has not been used before and the way it has been formulated by the legislators. As above mentioned, there are various scholarly arguments as to whether an exit was possible prior the express clause in the form of Article 50. This argument seems to point that to a greater extent there was a possibility of an exit rather than a complete prohibition. In this chapter the interpretation and the concerns raised by seemingly grey areas in Article 50 were also discussed. The uncertainty can also be accounted to the unprecedented and rather novel use of the Article.

The next chapter will focus on the route most likely to be taken by the UK which is Article 50. It will look into the practical steps that the UK needs to take in going for the Brexit. Furthermore, the chapter will look at the constitutional requirements that the UK needs to meet before they can invoke the exit procedure. This is so that the discussion may bring light to the practical steps that are required as a member contemplates an exit from the EU.



Chapter 3: Interpretation and Implementation of Article 50 by the UK

3.1 Introduction

The previous chapter discussed in detail the historical dynamic of the formation of the European Union (EU). The chapter discussed the Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community (Lisbon Treaty) (2007/C 306/01), the origin of Article 50, theoretical overview of Article 50 and its problematic areas in terms of interpretation. The chapter discussed the possibility of an exit prior to Article 50 and the various scholarly views on the right of withdrawal at that time. While there were many arguments for and against the possibility of an exit before Article 50 of the Lisbon Treaty it seems evident that there was no clear-cut answer as to whether there was a possibility or not. However, the advent of Article 50 answers the answer to this debate.

This chapter intends to consider practical implications of the Brexit and the route taken by the UK in going for the exit. It also looks at the domestic environment needed for the triggering of the exit procedure. Furthermore, the chapter will discuss the position of the June Referendum and the position of the UK Parliament in the decision-making process of the exit. The chapter also intends to look at the UK- Scotland conflict of interest and its implications.

3.2 The road to Brexit

The UK is on its way out of the EU which has been termed the Brexit, an abbreviation for the British exit¹⁴⁸ as per the majority vote on 23 June 2016 Referendum.¹⁴⁹ A majority of the British electorate voted to leave but this position has not been the same for the ordinary citizen. It seems that while the majority of the British people voted out of the EU most people do not understand how the EU works and it's Constitution.¹⁵⁰ Thereby bringing questions as to

¹⁴⁸ Brexit available at <http://www.investopedia.com/terms/b/brexit.asp> (accessed on 11/02/2017).

¹⁴⁹ Humphrey E 'How will Brexit affect the Caribbean? Overview and indicative recommendations' (2016) 199 *Discussion Paper European Centre for Development Policy Management* 2.

¹⁵⁰ Dearden L 'Anger over 'Bregret' as leave voters say they thought UK would stay in the EU' 25 June 2016 Independent available at

whether the ordinary citizen made a well-informed decision with regard to Brexit. What makes the Brexit complicated is that it is notably propelled by political and economic developments within and outside of the UK.¹⁵¹ Despite these questions the new UK Prime Minister, Theresa May, has confirmed that Brexit will go ahead.¹⁵² It is far from clear at the time of writing what will happen next or how the UK proposes to proceed to leave the EU, and what agreement can be reached with the EU¹⁵³ as this will only be packaged in the withdrawal agreement.

The UK has already put forward their official Notice of Intention to leave the EU using the Article 50 procedure.¹⁵⁴ However, before this process was initiated the UK held a referendum requesting its citizens to decide whether or not they wanted to stay in the EU. It now, therefore, becomes important to discuss the legality of the referendum and its position in UK law in the light of Article 50 (1) and whether the referendum constitutes a constitutional requirement the UK has to fulfil before it can proceed with the exit. This will now be discussed below.

3.3 The Referendum

David Cameron committed the Conservative Party to hold an in or out referendum after an attempted renegotiation of Britain's membership of the EU. On 10 November 2015, David Cameron sent a letter to the EU Council President, Donald Tusk pointing out issues that he felt needed to be resolved before the UK could consider a future relationship with the EU.¹⁵⁵ These

<http://www.independent.co.uk/news/uk/politics/brexit-anger-bregret-leave-voters-protest-vote-thought-uk-stay-in-eu-remain-win-a7102516.html> (accessed on 14/03/2017).

¹⁵¹ Humphrey E 'How will BREXIT affect the Caribbean? Overview and indicative recommendations' (2016) Discussion Paper European Centre for Development Policy Management 2.

¹⁵² McSmith A 'Issue Brexit' 2016 available at <http://businessresearcher.sagepub.com/sbr-1775-100664-2746203/20160815/brexit> (accessed on 11/02/17).

¹⁵³ Weiss S & Blockmans S 'The EU deal to avoid Brexit: Take it or leave No CEPS Special ReportNo.131' available at https://www.ceps.eu/system/files/EU%20deal%20to%20avoid%20Brexit%20by%20S%20Weiss%20and%20S%20Blockmans%20CEPS%20Special%20Report_0.pdf (accessed on 10/01/2017).

¹⁵⁴ Swinford S 'Theresa May poised to announce the end of free movement for new EU migrants next month' available at <http://www.telegraph.co.uk/news/2017/02/26/theresa-may-poised-announce-end-free-movement-new-eu-migrants/> (accessed on 30/02/2017).

¹⁵⁵ Smith J 'Reform, Renegotiation and Referendum the UK's Uncertain European Future' 3 (2016) Norwegian Institute of International Affairs Policy Brief 1 available at https://brage.bibsys.no/xmlui/bitstream/id/405382/NUPI_Polic_+Brief_3_Julie_Smith.pdf (accessed on 30/02/2017).

discussions did not yield favourable results for the UK thus the referendum deciding on the future EU-UK relationship was held. Euro-scepticism views are not a novel idea. Since the 1970s and 1980s, the British Labour and Greek Panhellenic Socialist Movement (PASOK) parties have campaigned for withdrawal from what was then the European Economic Community (EEC).¹⁵⁶ The referendum is characteristic of the euro-sceptical parties across the UK coming to the limelight once again.¹⁵⁷

Article 50 states that member states may exit the EU using their own constitutional requirements.¹⁵⁸ These constitutional requirements can therefore not be found in the EU legislation but rather in the legislation of the UK. However, UK Constitutional law is ambiguous on the issue of leaving the EU. This is compounded by the fact that the UK has no codified constitution better yet legislation that specifically deals with the matter.¹⁵⁹ The British system of governance is characterised by its lack of an entrenched Constitution, unlike most modern states. The absence of a constitution does not, however, mean that the country does not have a body of constitutional law and is based entirely on custom and precedent.¹⁶⁰ In the absence of a written constitution, the government has put in place various statutes speaking into the composition of powers of particular institutions. There are statutory provisions for various institutions of government as they are provided for individually. Unlike most modern states Britain, is a combination of a monarchical system and a democratic government.¹⁶¹ Therefore one finds that the powers of the monarchy are limited by the Bill of Rights of 1689 and the Act of Settlement of 1701. The powers of the House of Lords are provided by the Parliaments Acts of 1911 and 1949 and the electoral system is regulated by the Representation of the People Acts of 1948 and 1949. The lack of a constitution means that there is no documentary and precise statement between the pillars of government.¹⁶² This, in turn, breeds

¹⁵⁶ de Waele H 'The European Union on the road to a new legal order - The changing legality of member state withdrawal' available at http://heinonline.org/HOL/Page?handle=hein.journals/tiflr12&div=14&g_sent=1&collection=journals# (accessed on 28/03/2017).

¹⁵⁷ [MacShane](#) D *Brexit: How Britain Left Europe* (2016) 1st ed 43.

¹⁵⁸ The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 (2007/C 306/01) Article 1 (1).

¹⁵⁹ Douglas-Scott S 'Brexit, Article 50 and the Contested British Constitution' available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12228/full> (accessed on 14/ 03/17).

¹⁶⁰ Blackburn R 'Britain's unwritten constitution' available at <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution#authorBlock1> (accessed on 31/03/2017).

¹⁶¹ McConnell MW 'Tradition and Constitutionalism Before the Constitution' (1998) *University of Illinois Law Review* 190.

¹⁶² Birch A H *British System of Government* 10th ed (2013) 26.

uncertainty between writers and politicians as they often produce significantly different interpretations and the separation of powers between these institutions becomes a grey area in the law.

The question whether the referendum is legally binding is therefore dependent on the legislation enabling the referendum. The June referendum held no requirement for the EU Referendum Act result to be implemented by the UK Government.¹⁶³ This scenario is not new in the British legal system. This is because referendums in the UK framework are generally not held to be significant.¹⁶⁴ The position of a referendum in the UK legal system is to a certain extent ambiguous especially with regards to its relationship with parliamentary sovereignty.¹⁶⁵ The referendum has therefore been labelled as being an advisory rather than a mandatory referendum, enabling the electorate to express its opinion before any legislation might be introduced.¹⁶⁶ The EU Referendum was put in place to reflect what the public wanted and as an expression of popular sovereignty. Yet, UK law generally does not acknowledge a principle of popular sovereignty rather parliamentary sovereignty vested in the Crown. UK law is rather based on representative democracy rather than direct democracy unlike many modern governments today.¹⁶⁷

In principle, both the government and Parliament could choose to ignore the result of the referendum and it would be perfectly legal.¹⁶⁸ They could choose never to trigger Article 50 TEU nor repeal the European Communities Act 1972 (ECA).¹⁶⁹ This goes to show that the ‘decision’ made by the UK people through voting in the referendum was not in itself a

¹⁶³ Uberoi E ‘European Union Referendum Bill 2015-16’ available at researchbriefings.files.parliament.uk/documents/CBP-7212/CBP-7212.pdf (accessed on 28/03/2017).

¹⁶⁴ Ekins R ‘The Legitimacy of the Brexit Referendum’ available at <https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexit-referendum/> (accessed on 28/04/2017).

¹⁶⁵ Glencross A ‘Going it alone? The Choice of Political Union in British Politics’ (2015) 86 *The Political Quarterly* 4 555–557.

¹⁶⁶ Douglas-Scott S ‘Brexit, Article 50 and the Contested British Constitution’ available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12228/full> (accessed on 14/03/17).

¹⁶⁷ Sully M ‘The Brexit Drama – final curtain or prelude’ 2016 available at http://oegfe.at/wordpress/wp-content/uploads/2016/06/OEGfE_Policy_Brief-2016.18.pdf (accessed on 17/03/2017).

¹⁶⁸ EU Referendum Bar Council Position Paper I available at http://www.barcouncil.org.uk/media/472106/paper_i_bar_council_eu_referendum_final.pdf (accessed on 22/03/2017).

¹⁶⁹ European Communities Act 1972.

‘decision’ nor is it the ‘trigger’ for purposes of Article 50.¹⁷⁰ A referendum alone is not enough to trigger Article 50 instead a more official decision is required.¹⁷¹

The UK referendum spells a great change in the political and economic climate of the UK yet one can note that there is a lot of uncertainty. It is important to note that the UK law does not spell out critical issues such as to who will trigger Article 50 and whether an Act of Parliament is necessary to trigger Article 50, whether another referendum should be held to approve any Withdrawal Agreement.¹⁷² This brings questions as to whose responsibility it would be to trigger Article 50 and the conditions that need to present. This paper will discuss this question more in this chapter.

The above discussion shows that the referendum is not legally binding but rather is advisory. It shows that legally the government is not compelled to implement the result of the referendum. The UK is governed based on parliamentary sovereignty and not popular sovereignty. The UK system is representative therefore the Parliament stands in the shoes of the people rather than a direct vote which the referendum would amount to.

The research will now continue to discuss the whether the Parliament needs to consent to the triggering of the exit procedure and to what extent or if a Royal prerogative will suffice. This is so that one may get a mind map of how the exit will be implemented internally thereby fulfilling the requirement of Article 50(1).

3.4 Constitutional Requirements for the Brexit

Article 50 provides that a member state has to exit the EU using its own constitutional requirements. Consequently, the UK has to exit on the basis of its constitutional requirements. The UK as mentioned in section 3.3 of this chapter has no constitution but has a constitutional body of law that it adheres to. It is however sometimes difficult to decipher where the arms of government start and end due to the lack of a constitution.

¹⁷⁰ Douglas-Scott S ‘Brexit, the referendum and the UK Parliament: some questions about sovereignty’ available at <https://constitution-unit.com/2016/06/29/brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/> (accessed on 17/03/2017).

¹⁷¹ Elliot N ‘Brexit: Legally and constitutionally, what now?’ 24 June 2016 Public Law for Everyone available at <https://publiclawforeveryone.com/2016/06/24/brexit-legally-and-constitutionally-what-now/> (accessed on 22/03/2017).

¹⁷² Douglas-Scott S ‘Brexit, Article 50 and the Contested British Constitution’ available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12228/full> (accessed on 14/ 03/17).

The principal of separation of powers which is characteristic of many democratic states today is also found in the UK government. However, in the UK it is more fluid than the strict interpretation of the separation of powers.¹⁷³ Another dominant feature of the UK system is that the legislative supremacy of Parliament seems to be fluid and flexible. The Parliament has been known to sometimes delegate its powers of legislation to the executive branch.¹⁷⁴ This delegation of the Parliament's sovereignty has been attributed to the general dominance of the House of Commons by the executive. In principle, the parliament remains sovereign but in practice, the executive commands both the principle and the detail of the statute.¹⁷⁵ In the same breath Parliament has also been known to usurp the role of the Judiciary especially in criminal cases where they pass Act of Attainder thus showing that there is not a clear separation of powers.¹⁷⁶ This, therefore, brings uncertainty as to which branch of government has to right to trigger Article 50 better yet negotiate the terms of withdrawal.

The royal prerogative speaks to the rights of the Crown which are founded in the primitive common-law privileges of the monarch rather and not a legal authority by Parliament. The royal prerogative exists by tradition and custom, not by any officially written-down code or constitution.¹⁷⁷ It is therefore difficult to assess the full measure of prerogative powers. It is undisputed that a consequence of the Revolution was the curtailing of prerogative powers through the establishment of the parliamentary control of all of the Crown's prerogatives through parliamentary sovereignty. Theresa May, however, asserted that the prerogative was still the appropriate way to trigger Article 50 on the basis that the prerogative traditionally includes powers relating to foreign affairs, such as treaty negotiation.¹⁷⁸ However, prerogative power as a means for triggering Article 50 has been found problematic. This is based on the fact that while the consent of Parliament was required for 'every word of the law', the same is not required in the creation of a Treaty. Prerogative power has thus been labelled to be totally

¹⁷³ Ministry of Justice Final Report 2010 -*The Governance of Britain Review of the Executive Royal Prerogative Powers* (2010) 30.

¹⁷⁴ Masterman R The Separation of Powers in the Contemporary Constitution in *Judicial Competence and Independence in the United Kingdom* (2010) 152.

¹⁷⁵ Allan TRS *Constitutional Justice: A Liberal Theory of the Rule of Law* (2010) 133- 134.

¹⁷⁶ Masterman R The Separation of Powers in the Contemporary Constitution in *Judicial Competence and Independence in the United Kingdom* (2010) 152.

¹⁷⁷ Ministry of Justice Final Report 2010 -*The Governance of Britain Review of the Executive Royal Prerogative Powers* (2010) 30.

¹⁷⁸ Jagran J *Current Affairs December 2016 eBook* (2016) 71.

unacceptable by some scholars.¹⁷⁹ This is because the Crown can, therefore, make Treaties without the knowledge or the consent of the Parliament which is supposed to be the law-making body of the land. This therefore leads to ambiguity as to which branch has the power to trigger Article 50.

In the UK system Parliament is sovereign. What this means is that there is no constitutional limitation to Parliamentary authority. Yet Parliamentary sovereignty finds itself in contrast to Popular Sovereignty which the referendum propagated. This leads one to believe that it is then the Parliament that has to lead in this novel and brave journey towards the Brexit and possibly pull the trigger. The ECA 1972 also states that if the UK no longer wishes to be a part of an international Treaty the Parliament has to repeal this statute and Institute replacing legislation.¹⁸⁰

3.4.1 The Position of the Parliament in the triggering of the exit procedure

Following the 2016 Referendum where the majority voted to leave the EU Gina Miller brought a claim to the court in the Miller case.¹⁸¹ The question brought before the court was whether parliamentary approval was needed before the notification could lawfully be given of the UK's intention to leave. The Government at this point was arguing that the use of prerogative powers to enact the referendum result were constitutionally proper and consistent with domestic law. Ms Miller was not convinced that this position was correct and was of the assertion that prerogative powers could not be used to set aside rights previously established by Parliament. The court delivered a unanimous judgement against the government's assertion that the Crown's prerogative allowed giving Article 50 notice, and the Court would later decide on the form of declaration it would make. The Court described the passing of the ECA 1972 as the major step of 'switching on the direct effect of EU law in the national legal systems', the court found that the Crown cannot change domestic law without the approval of the Parliament. The Court also held that Parliament has the exclusive right to trigger notification under article 50 of the TEU. This assertion was based on the fact that triggering Article 50 results in the nullification of Acts created by Parliament. Parliamentary Sovereignty principles require that only Parliament can create, dismantle internal legislation and create replacing legislation. This position is also

¹⁷⁹ Smith J *The UK's Journeys into and out of the EU: Destinations Unknown* 1st ed (2016) 301.

¹⁸⁰ European Communities Act 1972.

¹⁸¹ R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768.

expressed in the Case of Proclamations (1608)¹⁸², the Bill of Rights 1688 section 1¹⁸³, and continually confirmed since in cases including *Burmah Oil Co Ltd v Lord Advocate*¹⁸⁴, and *R (Jackson) v Attorney General*¹⁸⁵. The Crown therefore has no power to alter domestic law through prerogative power. This ruling made it clear that Theresa May may not trigger Article 50 through the use of prerogative powers rather the Parliament had to provide consent and enabling legislation.

To further substantiate the Miller case, the question as to who can trigger Article 50 is an important one and cannot be discussed without considering the powers of the Parliament as it is the law-making body in the UK. Triggering Article 50 requires that replacing legislation be created and thus the powers of the Parliament must be accessed in this regard. It is important to note that the UK provided for its accession to the EEC to be ratified by means of the ECA 1972. Under British law, a statute may only be repealed by another statute, and not through the use of prerogative power. Triggering Article 50 has the ripple effect of nullifying the effect of the ECA in UK law. On the basis of the above argument a parliamentary repeal is the most viable option for an exit.

The constitutional requirements for a decision by the UK to leave the EU include the enactment of primary legislation consenting to give legal effect to the terms of a withdrawal or authorising the UK's withdrawal from the EU in the absence of any such agreement.¹⁸⁶ Only Parliament has the constitutional authority to authorise, and give legal effect to, the changes in domestic law and existing legal rights that will follow from that decision. This therefore points to the fact that UK domestic constitutional law does not allow Theresa May to start the Brexit process in this case, through the use of the notice without the prior blessing of Parliament.¹⁸⁷ This position is further substantiated by the Miller case in the Constitutional court which is discussed below.

¹⁸² Case of Proclamations [1610] EWHC KB J22.

¹⁸³ Bill of Rights (Act) 1689 (England) 1688 c.2 (1 Will and Mar Sess 2).

¹⁸⁴ *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75.

¹⁸⁵ *R (Jackson) v Attorney General* [2005] UKHL 56.

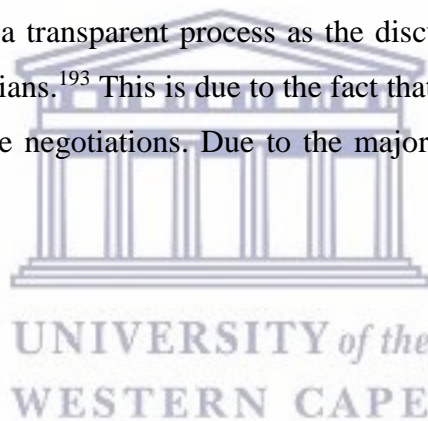
¹⁸⁶ Jagran J *Current Affairs December 2016 eBook* (2016) 76.

¹⁸⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

3.4.2 The way Forward now

In October 2016, Theresa May announced the March 2017 deadline for triggering Article 50 which was finally implemented on 29 March 2017.¹⁸⁸ In an interview, she promised a Great Repeal Bill. The Bill will however only become effective when the UK has concluded the Withdrawal agreement with the EU.¹⁸⁹ The Great Repeal Bill proposes to repeal the European Communities Act (ECA) of 1972¹⁹⁰ and to ensure that EU law that has not already been ratified into national law remains in force from the date of withdrawal. It is also aimed at ousting the effect and priority given to EU law within the UK domestic legal system.¹⁹¹ The idea behind repealing the ECA is to free the UK from the supremacy of the EU but to lean rather on national sovereignty.

The triggering of Article 50 demands that safeguard for further parliamentary control in the UK's withdrawal negotiations and future framework with the EU relations be put in place. As it stands these discussions are likely to be conducted according to the usual practice under the prerogative.¹⁹² This is hardly a transparent process as the discussions are mainly concluded behind closed doors by politicians.¹⁹³ This is due to the fact that Parliament traditionally does not major in foreign and trade negotiations. Due to the major discussions being conducted



¹⁸⁸ Hughes L 'Theresa May triggers Article 50 with warning over security as EU leaders rule out key Brexit demand' The Telegraph 30 March 2017 available at <http://www.telegraph.co.uk/news/2017/03/29/article-50-triggered-brexiteu-theresa-may-watch-live/> (accessed on 31/03/2017).

¹⁸⁹ Hughes L 'Theresa May triggers Article 50 with warning over security as EU leaders rule out key Brexit demand' The Telegraph 30 March 2017 available at <http://www.telegraph.co.uk/news/2017/03/29/article-50-triggered-brexiteu-theresa-may-watch-live/> (accessed on 31/03/2017).

¹⁹⁰ European Communities Act 1972 (1972), Chapter 68.

¹⁹¹ Carozzo B & Costo Lucco N 'Brexit means Brexit, but what does the second Brexit mean? Diritti Comparati Working Papers available at http://diritto.typepad.com/files/DirittiComparati_WorkingPapers4-2016.pdf (accessed on 29/03/2017).

¹⁹² History of Scotland available at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=oaq#ixzz4bx1WCrvM> (accessed on 30/03/2017).

¹⁹³ History of Scotland available at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=oaq#ixzz4bx1WCrvM> (accessed on 30/03/2017).

behind closed doors it is exceptionally hard for Parliament to have meaningful contribution on these Treaty issues due to its inability to access information in advance of negotiations.¹⁹⁴

The chapter will now discuss the UK-Scotland dilemma. This is because while the UK voted to leave the EU, Scotland and Ireland voted to stay in the EU. This raises the question of whether the UK as a whole will exit the EU or Scotland and Ireland will stay. This will undoubtedly have an impact on the withdrawal agreement and the future relationship between Scotland and the EU, considering that Scotland and Ireland are part of the UK. Furthermore, neither UK law nor Article 50 guarantees Scotland and Ireland specific roles in the negotiation process or in the withdrawal agreement.¹⁹⁵ At best Scotland and Ireland can only contribute to the final outcome. However, the extent of the contribution and its weight is dependent on agreement and goodwill between Westminster (Parliament of the UK) and the respective parliaments of Scotland and Ireland.¹⁹⁶ Even in this situation, the Westminster holds the balance of power and Scotland and Ireland does not have an equal footing with the Westminster.¹⁹⁷ It is thus important to clarify the positions of the two constituents of the UK so as to ensure a clear strategy for the UK withdrawal and for clarity purposes.

3.5 The UK- Scotland Dilemma

When referring to the Brexit it is easy to imply that the vote to leave represents all of the UK yet the UK is made of a number of states namely Wales, Northern Ireland, England and Scotland as mentioned in chapter 1. The referendum has cast a spotlight on the fact that the UK is indeed a divided nation. England and Wales voted to leave, while Scotland and Northern

¹⁹⁴ History of Scotland available at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=oaq#ixzz4bx1WCrvM> (accessed on 30/03/2017).

¹⁹⁵ Craig S & Fletcher M 'The implications for Scotland of a vote in the EU referendum for the UK to leave the EU' available at <file:///C:/Users/Admin/Downloads/16.06.01-ILPA-EU-referendum-position-paper-12-Implications-for-Scotland.pdf> (accessed on 30/04/2017).

¹⁹⁶ Hazell R 'Devolution and the Future of the Union' available at <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/163.pdf/> (accessed on 30/04/2017).

¹⁹⁷ Craig S & Fletcher M 'The implications for Scotland of a vote in the EU referendum for the UK to leave the EU' available at <file:///C:/Users/Admin/Downloads/16.06.01-ILPA-EU-referendum-position-paper-12-Implications-for-Scotland.pdf> (accessed on 30/04/2017).

Ireland voted to remain.¹⁹⁸ A closer analysis of the poll results showed the difference of opinions between people residing in urban and rural areas, and the youths and the elderly.¹⁹⁹ Consequently, the referendum result may not provide a true reflection of the UK as a whole. Thus we see an apparent conflict of interest between the Westminster and Scotland and Ireland who do not wish to risk their position in the EU.²⁰⁰

Leaving the EU means that the UK as a whole will lose the benefits that are attached to EU membership and the supremacy of EU law will cease to apply in the UK domestic policy. The UK will also not be forced to follow the precedent of the European Court of Justice (ECJ) nor will it have jurisdiction over UK.²⁰¹ While this may mean greater freedom of trade for the UK it also means that the UK will lose the preferential treatment it enjoyed in terms of EU membership. The UK stands to lose the benefit of the single market.²⁰² This also applies to Scotland and Ireland as they are part of the UK.

For the purposes of this mini research the focus will only be on Scotland. This is because while Ireland voted to leave they are ready to concede,²⁰³ however, Scotland has been vocal about their discomfort in leaving the EU and is also currently contemplating a break away from the EU on the basis of the Brexit²⁰⁴ thus this paper will focus on Scotland rather than Ireland.

¹⁹⁸ Hunt A & Wheeler B 'Brexit: All you need to know about the UK leaving the EU' BBC News 30 March 2017 available at <http://www.bbc.com/news/uk-politics-32810887> (accessed on 31/03/2017).

¹⁹⁹ Speed B 'How did different demographic groups vote in the EU referendum?' New Statesman 24 June 2016 available at <http://www.newstatesman.com/politics/staggers/2016/06/how-did-different-demographic-groups-vote-eu-referendum> (accessed on 30/10/2016).

²⁰⁰ Syrpis P 'What next? An analysis of the EU law questions surrounding Article 50 TEU: Part One' available at <https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/> (accessed on 22/03/2017).

²⁰¹ Bush S 'What does Brexit mean? The answer is more complicated than you think' available at <http://www.newstatesman.com/politics/staggers/2017/02/what-does-brexit-mean-answer-more-complicated-you-think> (accessed on 23/02/2017).

²⁰² What Would A 'Brexit' Mean for The UK And Europe? Available at <https://www.fxcm.com/insights/what-would-a-brexit-mean-for-the-uk-and-europe/> (accessed on 23/02/2017).

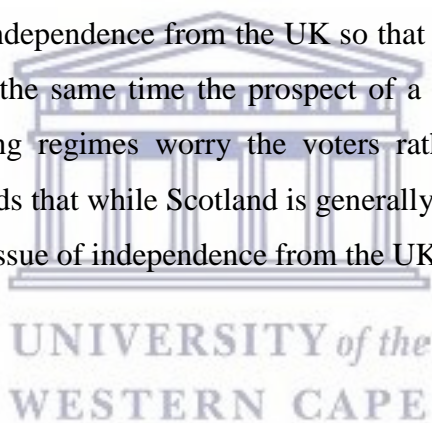
²⁰³ Tonge J 'The Impact and Consequences of Brexit for Northern Ireland' available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI\(2017\)583116_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/583116/IPOL_BRI(2017)583116_EN.pdf) (accessed on 34/02/2017).

²⁰⁴ Sloan A 'If Scotland leaves, England will lose the Brexit game' Aljazeera 14 March 2017 available at <http://www.aljazeera.com/indepth/opinion/2017/03/england-big-loser-brexit-170312092648577.html> (accessed on 20/05/2017).

Scotland has consistently voiced its desire to remain in the EU.²⁰⁵ This paper will now discuss the possible ways in which Scotland may try and counter the effects of the Brexit and whether they may still hold on to EU membership in the light of Brexit.

3.5.1 Aftermath of the UK referendum on the UK-Scotland relationship

The UK referendum came only two years after Scotland has held its own Scotland independence referendum and the majority voted to stay in the UK. The independence campaign is mainly propagated by the Scottish National Party (SNP).²⁰⁶ Despite the very recent independence referendum, the SNP has brought the issue of independence back to the discussion tables on the basis that the circumstance two years ago is not the same as they are now.²⁰⁷ Scotland is the biggest proponent of staying in the EU but may be forced to exit the EU against their will and interest. The Scots are currently the most pro-European in the whole UK considering the fact that not one of the 32 Scottish electoral regions voted to leave.²⁰⁸ Thus there has been an outcry for independence from the UK so that Scotland may safeguard their position in the EU.²⁰⁹ Yet at the same time the prospect of a border between England and Scotland, and different trading regimes worry the voters rather than shift them towards independence.²¹⁰ Thus one finds that while Scotland is generally pro EU membership they are divided when it comes to the issue of independence from the UK.



²⁰⁵ ‘Nicola Sturgeon presents complex 'independence in Europe' plan to Theresa May with warning of second referendum’ The Telegraph 20 December 2016 available at <http://www.telegraph.co.uk/news/2016/12/20/nicola-sturgeon-threatens-second-independence-vote-scotland/> (accessed on 30/04/2017).

²⁰⁶ Drake S ‘In Favour Of An Independent Scotland’ available at http://www.huffingtonpost.co.uk/selena-drake/scottish-independence_b_15896096.html (30/04/2017).

²⁰⁷ Drake S ‘In Favour Of An Independent Scotland’ available at http://www.huffingtonpost.co.uk/selena-drake/scottish-independence_b_15896096.html (30/04/2017).

²⁰⁸ Czapiewski T ‘Scotland at the crossroads: From Brexit to Neverrendum’ University of Szczecin available at http://paperroom.ipsa.org/app/webroot/papers/paper_53795.pdf (accessed on 29/03/2017).

²⁰⁹ Czapiewski T ‘Scotland at the crossroads: From Brexit to Neverrendum’ available at http://paperroom.ipsa.org/app/webroot/papers/paper_53795.pdf (accessed on 19/03/2017).

²¹⁰ Hughes K ‘Scotland and Brexit Shockwaves will spread across EU’ EU In-depth Discussion Paper (2016) available at <http://www.friendsofeurope.org/media/uploads/2016/01/FoE-FE-discussion-paper-Scotland-and-Brexit-3.pdf> (accessed on 29/03/2017).

Although Scotland voted to remain in the EU, the Scotland vote did not constitute a majority thus the Scottish result may be ignored. The SNP consequently tabled an amendment to the EU Referendum Bill, requiring that for the UK to leave the EU, each of the four constituent nations England, Scotland, Wales, and Northern Ireland would have to vote to do so in their own capacities and not jointly. This proposal by the Scottish Prime Minister Nicole Sturgeon was aimed at ensuring that none of the UK nations would be removed from the EU against their will. Sturgeon also points out that withdrawing Scotland against its will would be 'democratically indefensible'.²¹¹

A forced move out of the EU for Scotland has a ripple effect not only in the democratic structure of the nation. The effect of the move will be felt in about five areas in the Scottish legal system. Firstly, the democratic interests of Scotland as a nation seem to be ignored. Secondly, the economic interests such as safeguarding free movement of goods, services, and labour, access to a single market, the funding that farmers and universities depend on will be lost once Scotland leaves the EU together with the UK.²¹² Thirdly Scotland has social protection interests, for example, ensuring the continued protection of workers' and wider human rights that may be lost, fourthly tackling crime and terrorism and finally climate change and influence run the risk of being ignored.²¹³ It is apparent that even though the UK may not be a part of the EU some of its law will still affect the UK; Scotland wants to have an influence on the rules that will eventually affect it.²¹⁴

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²¹¹ Douglas-Scott S 'Brexit, Article 50 and the Contested British Constitution' available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12228/full> (accessed on 14/03/17).

²¹² Sanderson D 'Sturgeon's expert EU panel agrees Scotland's "red lines" for Brexit' The Herald 14 July 2016 available at http://www.heraldscotland.com/News/14620620.Sturgeon_s_expert_EU_panel_reveals_Scotland_s_red_lines_for_Brexit/ (accessed on 31/03/2017).

²¹³ Sanderson D 'Sturgeon's expert EU panel agrees Scotland's "red lines" for Brexit' The Herald 14 July 2016 available at http://www.heraldscotland.com/News/14620620.Sturgeon_s_expert_EU_panel_reveals_Scotland_s_red_lines_for_Brexit/ (accessed on 31/03/2017).

²¹⁴ McIntosh L 'Sturgeon: I'll find a way to retain Scotland's role at heart of Europe' The Times 26 July 2016 available at <http://www.thetimes.co.uk/article/sturgeon-i-ll-find-a-way-to-retain-scotland-s-role-at-heart-of-europe-msml08l6l> (accessed on 30/03/2017).

Issues of Foreign affairs including EU membership are dealt with in terms of matter under Schedule 5 of the Scotland Act of 1998.²¹⁵ Neither Article 50 nor UK law which deals with the Devolution Acts guarantees Scotland a specific role in the withdrawal. This seems to allow the Prime Minister to renegotiate Britain's EU membership with European Council, without having to secure the agreement of the devolved nations.²¹⁶ Which can in effect mean that Scotland can be taken out of the EU without its consent²¹⁷, a situation that is abnormal considering that Scotland is a nation and must be treated as such.²¹⁸ This effectively means that Scotland will have no say in the exit better yet the withdrawal agreement which could be detrimental to their interests.

Due to the UK lacking a constitution there is uncertainty as to whether the Scottish Parliament has a bearing in terms of triggering Article 50 and the withdrawal agreement and the post-Brexit relationship. The question is whether Scotland can still influence the outcome of the Brexit through the ratification of the withdrawal agreement and how much weight their ratification has on the Brexit as a whole. There is a possibility that Scotland may still choose to thwart the authority of Westminster internally. It has for example been suggested that for the enactment by the UK Parliament of the legislative mechanism to give effect to the vote for Brexit it would require the consent of the Scottish Parliament under the so-called Sewel Convention, now enshrined in the Scotland Act Article 5.²¹⁹ This is built on the fact that the withdrawal agreements have the potential to alter the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers. Therefore, in trying to ensure that their voice is being heard the Scottish Parliament may refuse to give legislative consent

²¹⁵Scotland Act 1998 Chapter 46, Schedule 5 available at http://www.legislation.gov.uk/ukpga/1998/46/pdfs/ukpga_19980046_en.pdf (accessed on 28/05/2017).

²¹⁶ Czapiewski T 'Scotland at the crossroads. From Brexit to Neverrendum' University of Szczecin available at http://paperroom.ipsa.org/app/webroot/papers/paper_53795.pdf (accessed on 29/03/2017).

²¹⁷ Czapiewski T 'Scotland at the crossroads. From Brexit to Neverrendum' University of Szczecin available at http://paperroom.ipsa.org/app/webroot/papers/paper_53795.pdf (accessed on 29/03/2017).

²¹⁸ Riley-Smith B & Hughes L 'MPs vote to renew Trident: Jeremy Corbyn suffers biggest rebellion of his leadership as Britain's nuclear deterrent backed by 472 to 117' The Telegraph 19 July 2016 available at <http://www.telegraph.co.uk/news/2016/07/18/trident-vote-jeremy-corbyn-facing-labour-mutiny-as-mps-set-to-ba/> (accessed on 29/03/2017).

²¹⁹ Scotland Act 1998 Chapter 46, Article 5 available at http://www.legislation.gov.uk/ukpga/1998/46/pdfs/ukpga_19980046_en.pdf (accessed on 28/05/2017).

thereby stalling the Brexit process.²²⁰ However, Scotland may not be able to stall or barricade the Brexit process forever when considering that the UK Parliament is sovereign as provided by the Scotland Act 1978²²¹ therefore the Parliament may continue with the Brexit without the vote from Scotland. It can be asserted that in practice there is a possibility that the Parliament may proceed without legislative consent either by not seeking it at all or by ignoring its refusal if sought.²²²

Scotland has found itself between a rock and a hard place in this Brexit dilemma. This is compounded by the fact that under Brexit, there may well be a constitutional and legal ground on which the UK government can demand or force the Scottish parliament to repeal EU legislation. The Scottish government therefore faces major decisions as to whether, and on what basis, it would go along with Brexit processes.

3.5.2 Options for Scotland

Antunes proposes that Scotland has four options that they may take so as to safeguard their interest which is to leave the EU with the rest of the UK or to move rapidly to a second independence referendum with the aim of staying seamlessly in the EU. Antunes also proposes that Scotland should challenge, block and stall the Brexit process, creating a deep political and constitutional crisis. Finally, Antunes proposes that Scotland should leave the EU with the rest of the UK, and argues for Scotland to negotiate a closer, differentiated relationship with the EU than the rest of the UK may choose.²²³ It goes without saying that all the options provided are very difficult and are followed by serious legal and political consequences.

²²⁰ Czapiewski T 'Scotland at the crossroads. From Brexit to Neverrendum' University of Szczecin available at http://paperroom.ipsa.org/app/webroot/papers/paper_53795.pdf (accessed on 29/03/2017).

²²¹ Scotland Act 1978 Chapter 46, Article 5 available at http://www.legislation.gov.uk/ukpga/1978/46/pdfs/ukpga_19780046_en.pdf (accessed on 28/05/2017).

²²² Little A 'What impact might Brexit have on Scotland's future?' BBC News 20 March 2017 available at <http://www.bbc.com/news/uk-scotland-scotland-politics-39317865> (accessed on 29/03/2017)

²²³ Sandrina Antunes 'UK, Scotland and the European dilemma: Brexit in a few words' (2016) 164 *Instituto Galego de Análise e Documentación Internacional* 3-4.

The choice to which option will be used is likely to depend on the public and political reactions across Scotland to vote for Brexit and the Brexit vote in the rest of the UK and across the EU.²²⁴ If Scotland chooses to apply as an independent state under Article 49 of the Treaty of Lisbon²²⁵ and fulfilment of accession it seems that Scotland would have to start the accession procedure *de novo* which may take time considering the complexity of international treaties. While Article 49 provides an outline of the basic assertion process and legal room for the assertion of Article 49 it is hardly an easy process. In practice membership actually, happens on the political table.²²⁶ The use of these criteria does not mean that the assertion procedure is automatically fast-tracked on the basis of previous membership for the past 43 years under the UK. This is because without the consent of all Member States, accession or remain for Scotland in the European Union will not be possible, because such action requires changes at the level of the treaty.²²⁷ One of the strongest arguments of the fast-track is that Scottish citizens clearly will be forced to leave the EU against their will.²²⁸ This alludes to the fact that in practice there is no way for Scotland may seamlessly remain in the EU as suggested by Antunes. These negative signals are however not a deterrent from leaving the EU as verbalised by the leaders of the SNP.²²⁹

It is argued by Edward and Schuibhne that an independent Scotland might also consider joining EFTA, even on an interim basis. Joining the Economic Free Trade Area (EFTA) would help Scotland in that it establishes a relationship with the EU on the basis of the EEA.²³⁰ Using that framework Scotland would have access to the internal market once it accepts the legal obligations that follow this relationship. Scotland could also retain full participation in other

²²⁴ Sandrina Antunes 'UK, Scotland and the European dilemma: Brexit in a few words' (2016) 164 *Instituto Galego de Análise e Documentación Internacional* 3-4

²²⁵ The Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Lisbon Treaty) (2007/C 306/01), Article 49.

²²⁶ Hughes K 'Scotland and Brexit Shockwaves will spread across EU' 2016 EU In-depth Discussion Paper' available at <http://www.friendsofeurope.org/media/uploads/2016/01/FoE-FE-discussion-paper-Scotland-and-Brexit-3.pdf> (accessed on 29/03/2017).

²²⁷ McEwen N 'One answer, many questions? Centre on Constitutional Change' available at <http://bit.ly/2a7UUyB> (accessed on 22/03/2017).

²²⁸ McEwen N 'One answer, many questions? Centre on Constitutional Change' available at <http://bit.ly/2a7UUyB> (accessed on 22/03/2017).

²²⁹ Gutteridge N 'Exposed: Nicola Sturgeon in 'secret plot' for second independence referendum next year' Express 9 August 2016 available at <http://www.express.co.uk/news/politics/697762/Nicola-Sturgeon-SNP-denies-leader-planning-independence-Brexit-Scotland-EU-membership> (accessed 30/03/2017).

EU aided programs including regulatory competence over considerably more policy areas such as agriculture and fisheries. And difficult questions such as the issue of currency could at least be postponed.²³¹

It is important to note that every option is not without consequence. Scotland is also in limbo as to the position it will take in future.

3.6 Conclusion

This chapter provided a basic understanding of the route taken by the UK in their quest for an exit. The chapter brings to light the conditions required for triggering Article 50 and answers the question of who has the right to trigger Article 50 while giving context to internal constitutional requirements. It highlights that the lack of a codified constitution does not mean the lack of a constitutional body of law. However, it does mean there is no clear separation of the pillars of government.

The chapter concludes that it was not permissible for the Prime Minister to invoke the royal prerogative so that she may invoke Article 50. Instead, the Parliament has to agree and create replacing legislation as the law making body of the UK. The question as to the influence of the Parliament with regards to the withdrawal agreement remains open as it is not clear how much influence they can exercise. It is also apparent that the triggering of Article 50 brings concern to Scotland, a constituent of the UK which does not intend to leave the EU. This has raised a lot of questions as to the options that Scotland has. It seems that despite the protest of Scotland the UK is still going forward with the Brexit. It still remains unclear what Scotland will do to remedy this conflict of interest.

The next chapter will now look at the implications of the Brexit on the UK, the EU and particularly the trade implications of the Brexit on developing countries with reference to preferential trade agreements.

²³¹ Edward D & Shuibhne N ‘While Europe’s eye is Fix’d on Mighty Thing: Implications of the Brexit Vote for Scotland’ (2016) available at <http://www.law.du.edu/documents/judge-david-edward-oral-history/2016-while-europes-eye.pdf> (accessed on 21/03/2017).

Chapter 4: The ripple effects of the Brexit on Developing countries in Africa

4.1 Introduction

The United Kingdom (UK) has triggered Article 50 of the Lisbon Treaty, therefore, putting forward its intention to formally leave the European Union (EU).²³² It has been found that while the June 2016 Referendum was a critical point in the exit of the UK from the EU, the Referendum was not legally binding but rather advisory.²³³ The UK had to fulfil its constitutional requirements before it could trigger the exit procedure as mentioned in the previous chapter. It also became apparent that the Parliament has to create replacing legislation and therefore trigger the exit procedure as pointed out by the Miller case.²³⁴ It was also found that the withdrawal of the UK was not representative of the whole of the UK. The UK is constituted of a number of constituencies including Scotland and Ireland who indicated their wish to stay in the EU through the Referendum but may be forced to go ahead with the Brexit regardless of their desire to remain in the EU.²³⁵ The previous chapter highlighted the possibility that Scotland may opt to break away from the UK and the possible implications thereof.

One of the major reasons for the Brexit was the need to attain state Sovereignty.²³⁶ The exit from the EU will bring a measure of Sovereignty. The UK for the first time in forty years will no longer be under the jurisdiction of the European Court of Justice (ECJ). The UK no longer be expected implement EU law within their domestic system neither will EU law be supreme above the UK domestic policy.²³⁷ As part of the EU, the UK has had little control over its

²³² 'No turning back: On Brexit as Article 50 triggered' 30 March 2017 BBC News available at <http://www.bbc.com/news/uk-politics-39431428> (accessed on 06/05/2017).

²³³ Siddique H 'Is the EU referendum legally binding?' 23 June 2016 The Guardian available at <https://www.theguardian.com/politics/2016/jun/23/eu-referendum-legally-binding-brexit-lisbon-uk-sovereign-parliament> (accessed on 06/05/2017).

²³⁴ R Miller v Secretary of State for Exiting the European Union [2016] EWHC.

²³⁵ Minto R & Hunt J 'The Changing UK in a Changing Europe: The UK State between the European Union and Devolution' (2016) 87 *The Political Quarterly* 2 179.

²³⁶ Gordon M 'The UK's Sovereignty Situation: Brexit, Bewilderment, and Beyond' (2016) 26 *Kings Law Journal* 341.

²³⁷ Gee G & Young A 'Brexit: Regaining Sovereignty?' available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&uact=8>

trading arrangements with developing countries. Leaving the EU Customs Union means that the UK it will regain control of the tariffs, policies, and rules governing its own trade.²³⁸ Thereby finally realising the UK's desire to become a global leader in free trade. It is therefore imperative that one looks ahead to see what the post Brexit future holds. There are a myriad of implications not only for the UK but for the EU and the future relationship of the UK and developing countries regarding trade agreements.

In the light of the above observation this chapter will look briefly at the possible implication of the Brexit for the UK, EU and third parties, specifically developing countries in Africa. The chapter will look at the changes ahead of both the UK and developing countries with regard to trade agreements. The chapter therefore starts with the current position of the UK as a member of the EU and its relationship with third parties in light of Preferential Trade Agreements (PTAs), after which the chapter will discuss the UK future foreign policy with third parties. The chapter will go on to discuss the effect of the Brexit on developing countries and the possible options for UK with regard to developing countries and its future foreign policy. Measures that may be also taken to counter the effects of the Brexit will end this discussion of the Brexit for this mini thesis.

It is important to note that until the withdrawal agreement has been finalised it is not possible to provide a thorough or detailed synopsis of what the UK domestic policy will look like as well as its foreign policy and how it will impact third parties. One can however predict some elements of the UK foreign policy and its implications.

4.2 The UK as a member of the EU and its relationship with third parties

The history of the UK foreign policy is inextricably joined to the hip with the EU foreign policy. As a signatory of the EU, UK adopted and nationalised the EU foreign policy for the past 40 years. One would therefore not do justice to discuss the UK foreign policy without mentioning the EU policy.

<https://fora.ox.ac.uk/objects/uuid/3Aacbc4331-40d4-4245-9d3d-6bc2604acbe5%2Fdatastreams%2FATTACHMENT01&usg=AFQjCNHL3YA8do9jtgxqjTFZSJXZf8nCw&sig2=qPStn6V61BaBOGOYZj79Bg> (accessed on 06/05/2017).

²³⁸ Webb D & Booth L 'Brexit: trade aspects' (2016) 7694 *House of Commons Library Briefing Paper* 24.

The EU is part of various multilateral agreements one of which is the World Trade Organisation (WTO). The WTO was birthed from the General Agreement on Tariffs and Trade (GATT) whose main intention was to create an economic foundation, based on the theory of comparative advantage and preferential trade.²³⁹ In 1995, the GATT was replaced by the WTO established by the Marrakesh Agreement.²⁴⁰ For the purposes of this research the discussion will look focus on EU membership to the WTO only. The EU joined the WTO in 1995 as the European Community which later became the EU after the Lisbon Treaty. As part of the WTO, the EU is bound by WTO principles. Two of the most important principles of the WTO are the Most Favoured Nation (MFN) principle and the National Treatment (NT).²⁴¹ MFN treatment principle provides that a member of the WTO may not enter into a preferential agreement with a specific country without providing the same preferential treatment for all members of the WTO.²⁴² This means that a member of the WTO may not enter into a Preferential Trade Agreement (PTA) with another country which is exclusive of other members of the WTO. While NT provides a prohibition of discrimination between imported and domestically produced goods with respect to internal taxation or other government regulation.²⁴³ In short a member of the WTO cannot discriminate goods from another member state purely on the basis of their origin. The UK as a part of the EU is bound by these rules as well.

On the face of it, the MFN treatment does not allow for WTO members to enter into preferential treatments.²⁴⁴ The EU was able to enter into preferential trade agreements with developing countries on the basis of what is called the Regional exception or the enabling clause.²⁴⁵ The

²³⁹ Pischel G 'Trade, Treaties and Treason: Some Underlying Aspects of the Difficult Relationship between the EU and the WTO' (2001) 6(1) *European Foreign Affairs Review* 103 105.

²⁴⁰ Bazerkoska J B 'The European Union and the World Trade Organization: Problems and Challenges' available at file:///C:/Users/Admin/Downloads/CYELP_7_cijeli_t_pdf_15.pdf (accessed on 02/05/2017).

²⁴¹ Gonzales-Diaz F E & Bennet M 'The Law and Economics of the Most Favoured Nation Clauses' 2015 1 *Competition Law & Policy* 30.

²⁴² United Nations Conference on Trade and Development Most-Favoured Nation Treatment UNCTAD (2010) *Series on Issues In International Investment Agreements II*.

²⁴³ Van de bosche P *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 80.

²⁴⁴ Cole T 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 *Michigan Journal of International Law* 3 538-541.

²⁴⁵ 'The EU has preferential trade agreements with most of the members of the World Trade Organization (WTO). It has been argued that this tendency to liberalize trade on a bilateral basis is a 'stumbling block' for multilateral negotiations. Do you agree? Discuss' available at <https://www.essex.ac.uk/economics/documents/eesj/neagu.pdf> (accessed on 02/05/2017).

Regional Exception is provided in Article XXIV of the GATT²⁴⁶ which provides an exception for entry into preferential trade agreements exclusive of WTO member states. In terms of Article XXIV, WTO members with a common interest may conclude agreements themselves without extending the same preferences to WTO members.²⁴⁷ A further look at Article XXIV shows that Article XXIV permits the formation of international economic integrations as long as they follow principles of non-discrimination, transparency and reciprocity.²⁴⁸ Economic integration according to Article XXIV is also permissible if it removes all trade restrictions between members.²⁴⁹ These guidelines for an exception have been termed as interpreted quite loosely, and as a result no trading agreement has been rejected by GATT so far.²⁵⁰ Due to this exception the EU is therefore able to enter into preferential trade agreements with third parties. This same legislation allowed the UK to engage with developing countries and form economic relationships over the years.

Since the Regional exception has been put in place there has been a boom in the WTO members entering into PTAs.²⁵¹ The average WTO member is a party to at least thirteen preferential trade agreements.²⁵² These trade agreements take the form of bilateral and multilateral

²⁴⁶ General Agreement on Tariffs and Trade 1947, Article XXIV.

²⁴⁷ Vandenborre I & Frese M 'Most Favoured Nation Clauses Revisited' (2014) 12 *European Competition Law Review* 589.

²⁴⁸ 'Most-Favoured-Nation Treatment Principle' available at http://www.meti.go.jp/english/report/downloadfiles/2012WTO/02_01.pdf (accessed on 02/05/2017).

²⁴⁹ Paulwelyn J & Alschener W 'Forget About the WTO: The Network of Relations between PTAs and 'Double PTAs' available at http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/people/students/Wolfgang%20Alschner/Pauwelyn_Alschner-Relations%20between%20PTAs.pdf (accessed on 02/05/2017).

²⁵⁰ Brkić, Snježana & Efendić 'Regional Trading Arrangements – Stumbling Blocks or Building Blocks in the Process of Global Trade Liberalization? Available at <https://poseidon01.ssrn.com/delivery.php?ID=980119000072116066125086086078020098118002064083044031109124064112110093005102008025056030043025033007124027102121120083126117061055008035004072126091100001069090095030075082001083116098086115006004025088109009011112111064125125092002006019006066016078&EXT=pdf> (accessed on 02/05/2017).

²⁵¹ World Trade Report 2011 The WTO and preferential trade agreements: From co-existence to coherence available at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (accessed on 02/05/2017).

²⁵² Abreu M D 'Preferential Rules Of Origin In Regional Trade Agreements' available at https://www.wto.org/english/res_e/reser_e/ersd201305_e.pdf (accessed on 02/05/2017).

agreements and half of them are not strictly regional.²⁵³ Trade agreements have become more cross regional especially in the last few decades thus one finds that these agreements are now extending to developing countries.²⁵⁴ One of the main reasons for the proliferation of preferential trade agreements is that rather than providing completely free trade, PTAs provide preferential market access relative to a situation in which no such agreement exists.²⁵⁵ The PTAs are also in keeping with the rules of the WTO as they have a reciprocal element to them which also accounts for the proliferation of PTAs as will be discussed later in the chapter.²⁵⁶ The PTA agreements of the WTO members with developing countries count for about the quarter of the average 36 agreements per member, with the rest being between the developed countries amongst themselves.²⁵⁷ The EU is currently party to more than 36 preferential trade agreements of which covering more than 60 developing countries, which the UK benefits from as an EU Member State.²⁵⁸ These statistics highlight the fact that as part of the EU, the UK has been in many PTAs with developing countries which may be affected. This therefore leads one to the point that many developing countries will be affected by the UK's decision to opt out of the EU. While developing countries in Africa may not be part of the EU they are still affected by EU politics.



²⁵³ World Trade Report 2011 The WTO and preferential trade agreements: From co-existence to coherence available at

https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (accessed on 02/05/2017).

²⁵⁴ Draper P 'Impacts of the CETA agreement on developing countries' available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578037/EXPO_STU%282017%29578037_EN.pdf (accessed on 04/05/2017).

²⁵⁵ World Trade Report 2011 The WTO and preferential trade agreements: From co-existence to coherence available at

https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (accessed on 02/05/2017).

²⁵⁶ 'Study on Benefits of Preferential Trade Agreements' available at [http://kthemani.com/download/general_guides/\[O\]%20STUDY%20ON%20BENEFITS%20OF%20PREFERENTIAL%20TRADE%20AGREEMENTS.pdf](http://kthemani.com/download/general_guides/[O]%20STUDY%20ON%20BENEFITS%20OF%20PREFERENTIAL%20TRADE%20AGREEMENTS.pdf) (accessed 28/04/2017).

²⁵⁷ Rocha N & The R 'Preferential trade agreements and the WTO' available at <http://voxeu.org/article/preferential-trade-agreements-and-wto> (accessed on 02/05/2017).

²⁵⁸ Chapter 7: The EU and preferential trade with third countries available at <https://www.publications.parliament.uk/pa/ld201617/ldselect/lducom/129/12910.htm> (accessed on 02/05/2017).

4.2.1 UK foreign policy with Africa under the EU

EU-Africa relations are currently contained in the Cotonou Agreement and the Joint Africa-EU Strategy, which both include political, economic and development dimensions.²⁵⁹ The Cotonou Agreement was preceded by the Lome Convention of 1975.²⁶⁰ The Lome Convention marked the beginning of a preferential trade relationship between the EU and the developing Africa. The Lome Conventions resulted in a preferential relationship between the EU and 71 African, Caribbean and Pacific (ACP) countries.²⁶¹ It is important to note that the chapter refers to the Lome Conventions because the Lome Convention was reviewed every year until it was replaced by the current Cotonou Agreement.²⁶² The Lome Convention granted the ACP countries non-reciprocal trade preferences for the export of agricultural and mineral products duty free to the EU.²⁶³ The EU and the WTO waiver requirements soon desired a more reciprocal relationship, whereby ACP countries equally open their markets to EU exports thus the birth of the Cotonou.²⁶⁴ These agreements were not easily made considering that Africa as a developing continent is reluctant to liberalise its markets and some countries did not see the effectiveness of the existing trade agreements to their economies.²⁶⁵

The Lome Conventions were replaced by the Cotonou on 23 June 2000. The Cotonou like the Lome Convention encompasses many countries.²⁶⁶ The Cotonou was created with the aim of

²⁵⁹ Fact Sheets on the European Union available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.6.5.html (accessed on 03/05/2017).

²⁶⁰ 'The Lome Convention Background Note No. 15/1977 May 24, 1977 A North / South Initiative' available at http://aei.pitt.edu/60103/1/BN_15.77.pdf (accessed on 03/05/2017).

²⁶¹ Laaksonen K & Mäki-Fränki P 'Lomé Convention, Agriculture and Trade Relations between the EU and the ACP Countries in 1975-2000' <http://ageconsearch.tind.io/record/18853/files/wp060020.pdf> (accessed on 03/05/17).

²⁶² 'Negotiating The Fourth Lome Convention' Overseas Development Institute Briefing Paper October 1989 available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6750.pdf> (accessed on 03/05/2017).

²⁶³ 'Negotiating The Fourth Lome Convention' Overseas Development Institute Briefing Paper October 1989 available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6750.pdf> (accessed on 03/05/2017).

²⁶⁴ The Cotonou Agreement of 2000 Article 34 (4) available at http://eeas.europa.eu/archives/delegations/namibia/documents/eu_namibia/cotonou-agreement_en.pdf (accessed on 03/05/2017).

²⁶⁵ Holland M '20/20 Vision? The EU's Cotonou Partnership Agreement' (2003) 6 *The Brown Journal of World Affairs* 2 163.

²⁶⁶ Kone S 'Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization (WTO) and the Regional Integration Process Journal of Economic Integration'

implementing change in the ACP countries and the EU through introducing the concept of reciprocity. ACP countries were for the first time required to reduce their tariff barriers, both tariff and non-tariff barriers.²⁶⁷ At this point we start to see PTAs become more reciprocal as compared to the pre-existing free trade agreements. The ACP countries are now obliged to open up their markets to the EU. This however, is not to say that the Cotonou has not been subject to criticism from the WTO members on the basis of incompatibility with Article XXIV of the GATT 1947.²⁶⁸ This however is not the crux of this discussion though it is a very topical subject.

In order to facilitate the negotiations of the Economic Partnership Agreements (EPAs), the ACP countries divided themselves into regional groupings under Article 37(5) of the Cotonou Agreement.²⁶⁹ These groupings manifest themselves in the form of six groups namely the Southern Africa Development Community (SADC) consisting of Southern African countries and the Eastern and Southern Africa (ESA) constituting of countries from East Africa. The Economic Community of West African States (ECOWAS) constituting of West African countries is also one of the groupings emerging from the ACP countries, including the Central African Economic and Monetary Community (CEMAC), a grouping of Central African countries. The Caribbean Forum (CARIFORUM) made up of Caribbean countries and the Pacific Forum constitution of Pacific Countries is also one of the groupings which sprung from the ACP countries. This research paper will look at the SADC group mainly.

The EU-SADC agreement was signed on the 10th of June 2016 with Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa (SA).²⁷⁰ The other six SADC members

http://www.geg.ox.ac.uk/sites/geg/files/documents/Trade%20Document_Ghana.pdf available at (accessed on 03/05/2017).

²⁶⁷ Kone S 'Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization (WTO) and the Regional Integration Process Journal of Economic Integration'

http://www.geg.ox.ac.uk/sites/geg/files/documents/Trade%20Document_Ghana.pdf available on (accessed on 03/05/17).

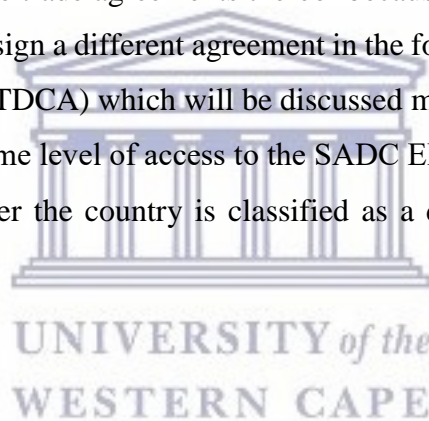
²⁶⁸ Gathii J T 'The Cotonou Agreement and economic partnership agreements' available at <http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIIChapter19.pdf> (accessed on 03/05/2017).

²⁶⁹ National Legislative Bodies / National Authorities, Liberia: Cotonou Agreement, 25 July 1993, Article 37(5) available at <http://www.refworld.org/docid/3ae6b5796.html> (accessed 06/05/2017).

²⁷⁰ Grant C 'Southern Africa and the European Union: the TDCA and SADC EPA' available at <http://paulroos.co.za/wp->

the Democratic Republic of Congo (DRC), Madagascar, Malawi, Mauritius, Zambia and Zimbabwe were negotiating trade agreements with the EU as part of other regional groups namely Central Africa and South Africa.²⁷¹ The EU is SADC's largest trading partner with SA imports and EU exports making the largest chunk of the SADCs trade.²⁷² It is important to note that SADC's member states are also part of the WTO thus the EU was able to have a trading relationship with the SADC in the first place.

The EU-SADC EPA brought improved opportunities for trade in goods for the SADC.²⁷³ The EPA guarantees access to the EU market without duties or quotas for the signing members Botswana, Lesotho, Mozambique, Namibia and Swaziland. The signatories will have duty free access to the EU market.²⁷⁴ SA's access to the EU market is different as only 98.7% of the customs duties have been partly or wholly removed.²⁷⁵ It is important to note that while all the SADC members are signatories of the Cotonou Agreement between the ACP countries and the EU, SA was excluded from the trade agreements thereof because of its relatively higher level of development.²⁷⁶ SA had to sign a different agreement in the form of the Trade Development and Cooperation Agreement (TDCA) which will be discussed more in the chapter shortly. EU therefore does not have the same level of access to the SADC EPA Member States' markets it is rather dependent on whether the country is classified as a developing country or a least



content/blogs.dir/12/files/2011/uploads/20060518_TDCA_SADC_EPA_Grant.pdf (accessed on 10/05/2017).

²⁷¹ Page S & Robinson P 'SADC-EU Trade Relations in a Post Lomé World' available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2402.pdf> (accessed on 03/05/2017).

²⁷² 'Southern African Development Community (SADC)' available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/> (accessed on 03/05/2017).

²⁷³ Page S 'Some Implications of the SADC Trade Protocol' available at <file:///C:/Users/hazy/Downloads/194.pdf> (accessed on 15/05/2017).

²⁷⁴ Page S 'Some Implications of the SADC Trade Protocol' available at <file:///C:/Users/hazy/Downloads/194.pdf> (accessed on 15/05/2017).

²⁷⁵ Grant C 'Southern Africa and the European Union: the TDCA and SADC EPA' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20060518_TDCA_SADC_EPA_Grant.pdf (accessed on 10/05/2017).

²⁷⁶ Mbatha C N "The Relevance of European Union-South African Trade and the TDCA from a perspective of South African's Agricultural exports between 1997 and 2008' (2011) 50 *Agrekon* 79.

developed country.²⁷⁷ EU access to the SADC is still restricted to a certain extent as SADC still has some tariffs and quotas in some areas of trade.²⁷⁸ One therefore notes a stark difference between the Lome Conventions and the new PTAs such as the SADC- EU as the new PTAs with the EU are characterised by reciprocal access to the markets of the signatories in return for access to the EU market. The agreement might not be equally affording access between the signatories as the EU offers more access than the SADC members yet there is an element of reciprocation.

The above discussion was done in order bring out the fact that the UK has multiple trade relationships with developing countries in Africa under the EU. What the Brexit entails is that each one of these will be affected once the UK officially pulls out of the EU. This has led to uncertainty as to future UK-Africa trade relations. Until the final agreement is made Africa is in limbo and remains uncertain of its access to the UK market.

4.2.3 UK trade relations with South Africa

South Africa (SA) shares a trade relationship with the EU that is different to other African states. SA benefits from an additional trade agreement with the EU which is called the TDCA. The TDCA was concluded between the EU and SA in 1999.²⁷⁹ The TDCA was created with the aim of establishing a Free Trade Area (FTA) between SA and the EU.²⁸⁰ Through this agreement the EU gained meaningful access to the SA market. The EU eliminates tariffs on approximately 95% of goods traded while SA eliminates around 85% of its tariffs.²⁸¹ This

²⁷⁷ Mbatha C N “The Relevance of European Union-South African Trade and the TDCA from a perspective of South African’s Agricultural exports between 1997 and 2008’ (2011) 50 *Agrekon* 79.

²⁷⁸ Muntschick J *The Southern African Development Community (SADC) and the European Union (EU): Regionalism and External Influence* (2017) 15.

²⁷⁹ Roger L & Gibb R ‘The SA-EU TDCA: An Analysis of Decision-making Procedures and Processes in South Africa’ available at <http://dSPACE.africaportal.org/jspui/bitstream/123456789/29741/1/SAIIA%20Reports%20no%2015.pdf?1> (accessed on 30/5/2017).

²⁸⁰ Bezuidenhout H & Wroblewski J ‘South African trade hegemony, is the Trade, Development and Cooperation Agreement heading for a BRIC wall?’ available at file:///C:/Users/Admin/Downloads/essa2011_2346.pdf (accessed on 30/05/2017).

²⁸¹ Nkomo M ‘TDCA and SADC EPA: Facilitation of Market Growth and Integration Or Decline Within SACU? - A Critical Analysis’ 2014 Published masters ; the University of Cape Town

relationship has allowed SA to grow its economy and is now one of the fastest growing and the largest economy in Africa.²⁸²

As a signatory of the EU the UK has a number of PTAs with SA that may be affected by the impending Brexit. What this may entail is an end to the trade agreements between the UK and SA. This would result in the loss of market access to the UK by SA. Considering the downgrading of the SA rand to junk status this Brexit could not have come at a worse time and have a negative effect on the SA economy.²⁸³ However, this may be mitigated by putting forward an agreement for continued future trade even before the withdrawal agreement is finalised to avoid gaps in the economic sector. This would also put an end to the uneasiness followed by not knowing if the UK will propose a replacing trade agreement.

However, the Brexit has been said by some to not have such a devastating blow on the TDCA. This is because while the EU is SA's biggest trading partner totalling about 30% of SA's total exports.²⁸⁴ Of this 30% UK trade counts for about 3.2% of that trade with Germany being the largest EU trading partner worth 7.2% of SA trade.²⁸⁵ Better yet new market opportunities have been presented to SA. Developing countries such as China, India and Brazil have captured some of SA's total exports which according to Sandrey signal a move away from reliance on the EU.²⁸⁶ One may therefore argue that the Brexit is only propelling SA towards other trade parties outside of the EU. Considering that some have termed EU relationships as a dead horse, SA should now focus on emerging markets which provide more favourable deals as compared to the EU.²⁸⁷ While this is a very topical issue this chapter will not dwell on these arguments.

²⁸² 'South Africa-EU: A strategic partnership based on shared values and interests' available at <file:///C:/Users/hazy/Downloads/South%20Africa-EU%20A%20strategic%20partnership%20based%20on%20shared%20values%20and%20interests%20Opinion%20piece%20by%20President%20Zuma.pdf> (accessed on 30/05/2017).

²⁸³ Green J 'Fitch downgrades SA to junk status' 7 April 2017 Daily Maverick available at <https://www.dailymaverick.co.za/article/2017-04-07-breaking-fitch-downgrades-sa-to-junk-status/#.WTmGsGiGO00> (accessed on 30/05/2017).

²⁸⁴ 'SA's trade with the EU: Before Brexit' available at <http://www.southafricanmi.com/eusa.html> (accessed on 02/06/2017).

²⁸⁵ 'SA's trade with the EU: Before Brexit' available at <http://www.southafricanmi.com/eusa.html> (accessed on 02/06/2017).

²⁸⁶ 'Transportation DBE Advisory Committee (TDAC) Vdot / Richmond District Auditorium' available at http://virginiadot.org/business/resources/TDAC_Minutes_6-13-2006.pdf (accessed on 02/05/2017).

²⁸⁷ Mbatha C N 'The Relevance of European Union-South African Trade and the TDCA from a perspective of South African's Agricultural exports between 1997 and 2008' (2011) 50 *Agrekon* 75-79.

Another reason that the Brexit may not have crippling effects is that the UK represents only a portion of EU. In essence SA only loses a part of the EU and not the whole EU market access. SA will still have access to the remaining 28 member states particularly Germany. However one can note that SA carries a greater burden of reciprocity towards the EU as compared to other African or developing countries in terms of the TDCA.²⁸⁸ However one cannot ignore the fact that South Africa due to its special relationship with the UK is one of the hardest hit African countries by the Brexit move. It is most affected as it has a relatively far reaching agreement with the UK through the TDCA.

The above discussion shows that the UK has various trade agreements with developing countries in Africa and that these relations hang on a balance in the light of the Brexit. The chapter will now discuss the implications of the Brexit on developing countries in Africa and how the economic landscape may change in the light of trade relationships.

4.3 Implications of the Brexit on developing countries in Africa

Currently, the UK shares the EU's trade policy, including its tariff levels, trade agreements, and preferences for poorer countries. The EU has an array of different agreements with different countries including the General System of Preferences (GSP) which offers reduced tariffs for a broad group of developing countries on around two-thirds of products, Free Trade Agreements (FTA) or Economic Partnership Agreements (EPAs) and the Everything but Arms Agreement (EBA) to which the UK is currently a party to.²⁸⁹ As an EU member, the UK is part of 36 trade agreements which will remain in force until the conclusion of the withdrawal agreement.²⁹⁰ Post-Brexit, these trade agreements will need to be renegotiated. Irrespective of the type of trade relationship negotiated with the EU, the UK may have to renegotiate all its

²⁸⁸ Mbatha C N "The Relevance of European Union-South African Trade and the TDCA from a perspective of South African's Agricultural exports between 1997 and 2008" (2011) 50 *Agrekon* 75-79.

²⁸⁹ 'World Trade Report 2011 The WTO and preferential trade agreements: From co-existence to coherence' available at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (accessed on 07/05/2017).

²⁹⁰ 'Chapter 7: The EU and preferential trade with third countries' available at <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldecom/129/12910.htm> (accessed on 28/04/2017).

trade agreements with third countries. The exit of the UK from the EU is likely to have an impact on the developing countries.

While the Brexit is the UK exiting from the EU on its own volition developing countries may be at the receiving end of a raw deal.²⁹¹ Developing countries markets are affected by world trade fluctuations because they have little and in some cases no leverage at all over their export prices according to Broda.²⁹² In practice wealthy first-world markets dictate the price of the goods that developing countries trade in.²⁹³ Contrary to developing countries, developed countries exert a substantial influence on export prices. In this instant developing countries in Africa have found themselves at the mercy of the world's economic giants and are affected by their decisions even though they never had a meaningful influence on world economic issues.

There is uncertainty as to whether developing member states will be able to attain the same level of preferential treatment from the UK or the UK will offer less preferential treatments while taking a more aggressive trade policy.²⁹⁴ It is also an issue of concern as to what will happen to the developing countries markets before the UK can renegotiate trade agreements. There is fear that developing countries may lose their markets while the UK puts its house in order. It therefore becomes clear that while the UK is practising its right to leave the EU, leaving the EU has a ripple affect not only on the EU but also on developing countries in Africa.

4.3.1 Loss of funding under the European Development Fund

The UK has been one of the biggest contributors to the European Development Fund (EDF), the EU's development assistance sector, which aids developing countries and regions through the provision of funds.²⁹⁵ Assisting the poorest countries, and among populations affected by

²⁹¹ Broda C & Tille C 'Coping with Terms-of-Trade Shocks in Developing Countries' (2003) 9 *Current Issues in Economics* 11 6.

²⁹² Broda C & Tille C 'Coping with Terms-of-Trade Shocks in Developing Countries' (2003) 9 *Current Issues in Economics* 11.

²⁹³ International Monetary Fund 'Global Trade Liberalization and the Developing Countries' available at <https://www.imf.org/external/np/exr/ib/2001/110801.htm> (accessed on 29/05/2017).

²⁹⁴ Olivie I & Perez A 'Possible impacts of Brexit on EU development and humanitarian policies : Directorate-General For External Policies Policy Department April 2017' available at <http://www.realinstitutoelcano.org/wps/wcm/connect/ff77712c-30ec-4950-97a0-ebc62b106163/Olivie-Perez-EP-Possible-impacts-Brexit-EU-development-DEVE-EP.pdf?MOD=AJPERES&CACHEID=ff77712c-30ec-4950-97a0-ebc62b106163> (accessed on 07/05/2017).

²⁹⁵ Watkins K, a Brookings non-resident senior fellow and executive director of the Overseas Development Institute (ODI), an international development think tank based in London.

conflict, state fragility and climate change is the aim of the EDF.²⁹⁶ The EU upon recognising that trade is a more powerful tool for inclusive growth and poverty reduction than aid; the EU started the initiative of offering financial aid to the developing countries. The EU is by far the world's largest provider of aid-for-trade.²⁹⁷ The UK as part of the EU currently contributes about £409 to £585 million making up 14.8 % of contributions to the EDF. The fund is one of the world's largest providers of multilateral concessional aid, with pay-outs exceeding ones directed through the World Bank's International Development Association (IDA).²⁹⁸ The Brexit may result in the EU having fewer funds to put into the aid program. Contrary to this assertion, Watkins argues that while a Brexit would deprive the EDF of British resources for development assistance, the direct disbursement of aid, set to replace the UK's contribution to the fund from the UK to recipient countries will have a narrower geographical reach than aid funnelled through the EDF.²⁹⁹

Despite the size of the aid budget and the strong mandate on poverty reduction enshrined in the Lisbon Treaty, the EU is still failing to meet its targets on development assistance. Economic giants such as Germany and France have failed to match the UK's achievement of the 0.7% aid-to-GNI target. In fact, only five member states, including the UK, met the target in 2015.³⁰⁰ To make matters worse, the share of EU aid going to sub-Saharan Africa and the least developed countries has been shrinking from an inadequate base.³⁰¹ This gives rise to concerns as to whether the aid given to developing countries will significantly decline considering that

²⁹⁶ Watkins K, a Brookings non-resident senior fellow and executive director of the Overseas Development Institute (ODI), an international development think tank based in London.

²⁹⁷ Tindale S 'Priorities for EU development aid' (2013) available at https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/pbrief_sct_development_14june13-7556.pdf (accessed on 07/05/2017).

²⁹⁸ Olivie I & Perez A 'Possible impacts of Brexit on EU development and humanitarian policies : Directorate-General For External Policies Policy Department April 2017' available at <http://www.realinstitutoelcano.org/wps/wcm/connect/ff77712c-30ec-4950-97a0-ebc62b106163/Olivie-Perez-EP-Possible-impacts-Brexit-EU-development-DEVE-EP.pdf?MOD=AJPERES&CACHEID=ff77712c-30ec-4950-97a0-ebc62b106163> (accessed on 07/05/2017).

²⁹⁹ Sy A & Sow M 'The Brexit: What implications for Africa?' available at <https://www.brookings.edu/blog/africa-in-focus/2016/06/21/the-brexit-what-implications-for-africa/> (accessed on 27/04/2017).

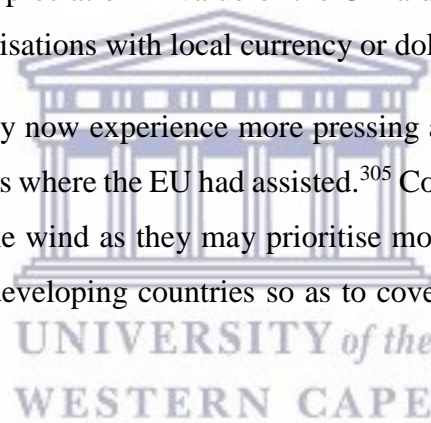
³⁰⁰ Fitzsimons E & Rogger D 'UK development Aid' available at <https://www.ifs.org.uk/budgets/gb2012/12chap7.pdf> (accessed on 05/05/2017).

³⁰¹ Watkins K 'What would a Brexit mean for EU development assistance?' available at <https://www.devex.com/news/what-would-a-brexit-mean-for-eu-development-assistance-88265> (accessed on 28/04/2017).

the UK one of the greatest supporters of the Aid programs are going to be officially out of the EU in two years.

The UK has been leading the EU in the aid program thus having led by example the UK on the 0.7% aid target, is well placed to call on others to follow suit.³⁰² The UK's Brexit has now left a gaping hole in the aid programme. The UK's commitment to continue spending 0.7% on aid may be abandoned if the fiscal position deteriorates and the government has to find further spending reductions, or wishes to switch public spending to programmes with a greater domestic multiplier to stimulate the economy.³⁰³ Depending on the political complexion of the government, this could result in substantial contraction of aid spending. Even if the 0.7% commitment is maintained, lower Gross Domestic Product (GDP) will reduce the aid budget compared to where it would have been. The immediate effect of the depreciation of sterling anticipated upon the Brexit being finalised and a recession forecast given by many economists may lead to the depreciation in value of the UK aid programme. This may create short-term problems for organisations with local currency or dollar liabilities.³⁰⁴

On the other hand the UK may now experience more pressing agendas not only internally as they also need to fill in the gaps where the EU had assisted.³⁰⁵ Consequently, the UK may leave the developing countries in the wind as they may prioritise more financially gratifying deals rather than the wellbeing of developing countries so as to cover the deficit of funds and EU assistance.³⁰⁶



³⁰² Watkins K 'What would a Brexit mean for EU development assistance?' available at <https://www.devex.com/news/what-would-a-brexite-mean-for-eu-development-assistance-88265> (accessed on 28/04/2017).

³⁰³ 'Post-Brexit Trade and Developing countries: Can the UK set the Gold Standard in Development-Friendly Trade Policy?' available at <http://www.realinstitutoelcano.org/wps/wcm/connect/ff77712c-30ec-4950-97a0-ebc62b106163/Olivie-Perez-EP-Possible-impacts-Brexit-EU-development-DEVE-EP.pdf?MOD=AJPERES&CACHEID=ff77712c-30ec-4950-97a0-ebc62b106163> (accessed on 28/04/2017).

³⁰⁴ Watkins K 'What would a Brexit mean for EU development assistance?' available at <https://www.devex.com/news/what-would-a-brexite-mean-for-eu-development-assistance-88265> (accessed on 28/04/2017).

³⁰⁵ Springford J & Tilford S 'The Great British trade-off The impact of leaving the EU on the UK's trade and investment' available at https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_britishtrade_16jan14-8285.pdf (accessed on 20/05/2017).

³⁰⁶ Springford J & Tilford S 'The Great British trade-off The impact of leaving the EU on the UK's trade and investment' available at

The loss of aid may however not be as bad as it is assumed to be considering that from 2014, the EU has been slowly phasing out direct aid to large countries such as India and other countries like Malaysia, SA and many Latin American countries.³⁰⁷ This process is called 'graduation'. The funds are redirected to the poorest regions of the world. During the period 2014-2020, it was proposed that about 75% of EU support will go to these countries which, in addition, often are hard hit by natural disasters or conflict, something that makes their citizens particularly vulnerable.³⁰⁸ The Brexit may therefore not be too hard on African countries as aid may be taken from those states which are now able to sustain their economies better and aid is now concentrated on those who need it the most.³⁰⁹ While some countries like Nigeria and SA whose economies are progressing faster may lose out on the aid program those who are in dire need will benefit. Therefore the deficit faced by the EU in terms of funds may be combated by redirecting the funds.³¹⁰

Considering that the UK is one of the largest economies in the EU and contributes a substantial amount to the EU concerns about the impact of the Brexit on the EU budget has been lingering. However some scholars have found that the impact will be rather small. The UK may be expected to pay a rebate and contributing in order to obtain access to the EU market.³¹¹ The UK is likely to negotiate continued access to the EU market for which it will have to pay the tariffs for such access. These payments may well be able to make up for a measurable share of the funds the EU lost when the UK opted to leave the bloc.³¹² Therefore the Brexit may only

https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_britishtrade_16jan14-8285.pdf (accessed on 20/05/2017).

³⁰⁷ 'EU development aid: 15 things you may not know about EU development cooperation in 2015' available at <https://europa.eu/eyd2015/en/content/eu-development-aid> (accessed on 04/05/2017).

³⁰⁸ EU development aid: 15 things you may not know about EU development cooperation in 2015 available at <https://europa.eu/eyd2015/en/content/eu-development-aid> (accessed on 04/05/2017).

³⁰⁹ Watkins K 'What would a Brexit mean for EU development assistance?' available at <https://www.devex.com/news/what-would-a-brexite-mean-for-eu-development-assistance-88265> (accessed on 28/04/2017).

³¹⁰ Bond I & Besche S 'Europe after Brexit Unleashed or undone?' available at https://www.cer.org.uk/sites/default/files/pb_euafterBrexit_15april16.pdf (accessed on 30/07/2017).

³¹¹ Nunez-Ferrer J & Rinaldi D 'The Impact of Brexit on the EU Budget: A Non-Catastrophic Event' 2016 347 *Centre for European Policy Studies* 1.

³¹² Nunez-Ferrer J & Rinaldi D 'The Impact of Brexit on the EU Budget: A Non-Catastrophic Event' 2016 347 *Centre for European Policy Studies* 1.

cause minimal losses which the remaining member states may be able to manage and work around.

From the above discussion one notes that the Brexit has a negative effect on the poorest developing countries as they will automatically lose their duty-free, quota-free access to UK consumers and the liberalised rules of origin, which they currently get under the Everything But Arms (EBA) agreement and the European Partnership Agreements (EPAs). Market access to the UK will not automatically continue as usual once the UK leaves the EU. Alternatively, UK could make similar arrangements itself for some or all developing countries as will now be discussed by this mini thesis.³¹³ Uncertainty about future access to the UK market has brought great uneasiness as it may mean the reduction of investments, growth and jobs in developing countries with PTAs with the UK. As a short term plan the UK has indicated that it intends to transfer EU provisions for developing countries into UK law. There has however been no ministerial statement to this effect. It is uncertain as to whether transporting EU law regarding developing countries is in fact legally permissible and whether developing countries will actually agree to this new venture.³¹⁴

4.3.2 Trading options for future UK-Africa trading relations

Brexit means that EU legislation which was entrenched into the UK domestic policy is no longer subject to EU Treaties unless the withdrawal agreement stipulates otherwise.³¹⁵ The UK faces the possibility of having gaps in their law if it does not create replacing legislation.³¹⁶ The UK may in a bid to cover those gaps, temporarily export EU law into their domestic system while creating desired legislation at a more relaxed pace rather than being forced to create meaningful legislation within the two-year exit period.³¹⁷ The quality of the legislation would

³¹³ Tindale S 'Priorities for EU development aid' 2013 available at https://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/pbrief_sct_development_14june13-7556.pdf (accessed on 07/05/2017).

³¹⁴ Thorton D 'Leaving the EU Customs Union: what is involved?' available at <https://www.instituteforgovernment.org.uk/blog/leaving-eu-customs-union-what-involved> (accessed on 06/05/2017).

³¹⁵ Heywood D 'Brexit – the potential impact on the UK's legal system' available at <https://www.taylorwessing.com/download/article-brexit-uk-legal-system.html> (accessed on 06/05/2017).

³¹⁶ Baldwin R & Collier P 'Post-Brexit trade and development policy' 2017 88 Policy Insight CEPR 5.

³¹⁷ Crawford L & Michael Anderson 'Beyond Brexit: How Britain Can Have the Best Trade Policy for Development'

be better if sufficient time is spent on creating the legislation. The UK's PTAs with developing countries under the EU may also cease to exist once the UK repeals the European Communities Act. This may cause a huge blow on the developing countries' economies.

The UK has made it known that it is committed to the Sustainable Development Goals (SDGs) and has long championed the benefits of trade as a driver of better living standards worldwide and intends to continue to do so.³¹⁸ The UK is a significant export destination for products from some of the world's poorest countries. Because of EU measures to benefit the poorest developing countries, many of these goods enter the UK tax-free. This helps their products remain competitive and supports decent livelihoods and working conditions, which are central to the SDGs.³¹⁹ Once the UK, leaves the EU customs union and does not immediately put in place equivalent provisions then developing countries could lose out. Approximately £1 billion in additional taxes could be added to imports from developing countries.³²⁰ This would significantly increase the costs of their products, potentially pushing farmers into poverty and increasing pressure on labour rights and wages. It is very important that UK continues to maintain its EU preferential trade arrangements with developing countries as it not only affects the developing countries but it can potentially have negative effects on the UK market. For example losing the preferential access would lead to higher duties on imports on those destination countries who would have lost access.³²¹

The UK is likely to take a more progressive approach in its foreign policy now that it is exiting the EU, covering areas that have been left out by the EU.³²² This may include investment, services, government procurement and regulatory cooperation. There has also been an indication that the UK will also follow a more progressive approach in terms of its development

<http://www.cgdev.org/publication/beyond-brexite-britain-global-leader-trade> (accessed on 06/05/2017).

³¹⁸ House of Commons International Development Committee Report 2016 -UK *implementation of the Sustainable Development Goals 2016–17* (2016) 40.

³¹⁹ House of Commons International Development Committee Report 2016 -UK *implementation of the Sustainable Development Goals 2016–17* (2016) 40.

³²⁰ 'The Impact of the UK's Exit from the EU on the UK-Based Financial Services Sector' available at

<http://www.fairtrade.org.uk/~media/fairtradeuk/get%20involved/documents/current%20campaigns/brexit%202017/mp%20brexit%20briefing.pdf> (accessed on 07/05/2017).

³²¹ 'Trade Justice Movement 'Trade and international development' available at <http://tjm.org.uk/trade-issues/international-development> (accessed on 28/04/2017).

³²² House of Commons International Development Committee Report 2016 -UK *implementation of the Sustainable Development Goals 2016–17* (2016) 46.

policy. It seems that the UKs work on international development via the Department for International Development (DFID) will focus more on trade than before.³²³

It goes without saying that trade negotiations are time consuming and complex.³²⁴ Due to the complexity of PTAs the UK is now likely to focus on developing country PTAs that will deliver maximum benefit to the UK.³²⁵ The UK is therefore more likely to focus on countries where there are already FTA's so as to secure the existing access to the markets of those countries enjoyed by the UK. One can therefore note that the UK is likely to negotiate new PTAs with the ACP countries in their various groupings rather than try and negotiate completely novel PTA agreements with new or single countries. The existing PTAs are therefore going to form a starting place for the new PTAs with the UK.³²⁶

The UK government has signalled its desire to negotiate a range of FTAs with countries such as the US, Canada, China, Australia, India and Singapore.³²⁷ The UK while under the EU was not able to enter into trade agreements with these countries. By leaving the EU the UK is now free to enter into such agreements with the above mentioned countries. While this is a positive move for the UK in the sense that it is now able to expand its markets and can enter into unfettered agreements world-wide,³²⁸ the shockwaves of this move will be felt by developing countries. This is going likely to have a negative impact particularly where countries export similar products. For example, a trade deal with Australia would have significant implications for beef exporters in countries such as Namibia.³²⁹ What this could mean for Namibia is that

³²³ Trade Justice Movement 'Trade and International Development' available at <http://tjm.org.uk/trade-issues/international-development> (accessed on 28/04/2017).

³²⁴ Brenton P & Ferrantino P 'Trade and Investment Implications of Brexit' available at <http://documents.worldbank.org/curated/en/177291468937534200/pdf/107118-REVISED-PUBLIC-TradeandInvestment-Implications-of-Brexit-note-docx-July-14-REVISED-clean-AO.pdf> (accessed on 07/05/2017).

³²⁶ UK Parliament 'The EU and preferential trade with third countries' available at <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/129/12910.htm> (accessed on 27/04/2017).

³²⁷ 'Post-Brexit Trade and Developing countries: Can the UK set the Gold Standard in Development-Friendly Trade Policy?' available at <http://www.fairtrade.org.uk/~media/fairtradeuk/get%20involved/documents/current%20campaigns/brexit%202017/mp%20brexit%20briefing.pdf> (accessed on 05/05/2017).

³²⁸ Dhingra S & Ottaviano G 'The consequences of Brexit for UK trade and living standards' <http://cep.lse.ac.uk/pubs/download/brexit02.pdf> (accessed on 29/04/2017).

³²⁹ 'Brexit and Commonwealth Trade' Commonwealth Trade Policy Briefing available at <http://thecommonwealth.org/sites/default/files/news-items/documents/BrexitPolicyBrief18112016.PDF> (accessed on 20/05/2017).

its products will lack competitiveness on the market considering that Australian farmers are granted some subsidies from their government.³³⁰ Subsidisation by the government means that the Australian products will be priced lower than the Namibian product due to the high costs of production. This means that developing countries may not be able to compete even though they may have access to the UK market which defeats the whole point of the PTA in the first place.

It has been argued by some that the Brexit will in fact strengthen UK- Africa relations. This is yet to be seen considering that we do not yet know the UK foreign policy with regard to developing countries. This view is based on the fact that the UK has supported developing countries interests in trade during its membership of the EU putting forward an anti-protectionist policy. The UK now has a chance to rethink its trade policies with the developing countries.³³¹ The UK is now free of the influence of the EU therefore can negotiate better trade deals with African nations, without the obligation to consider the interests of other EU member states.³³² This may effectively result in the boosting of investment and opportunities especially for those working in the agriculture sector in Africa. Theresa May, has not yet addressed issues of the UK foreign policy with developing countries expressly but has committed to retaining an 'open mind' in respect of the UK's trading relationships post-Brexit.³³³

There are alternatives for trade agreements for the UK and developing countries that serve the needs of the developing countries without disrupting their trade regime while the UK makes its grand exit from the EU. Instead of negotiating a new trade agreement the UK may immediately put in place a non-reciprocal tariff-free market access scheme for the economically vulnerable countries.³³⁴ By enabling tariff free imports from the developing

³³⁰ Dhingra S & Ottaviano G 'The consequences of Brexit for UK trade and living standards' <http://cep.lse.ac.uk/pubs/download/brexit02.pdf> (accessed on 29/04/2017).

³³¹ Baldwin R & Collier P 'Post-Brexit trade and development policy' available at <https://www.theigc.org/wp-content/uploads/2017/03/Baldwin-et-al.-2017-Policy-Note.pdf> (accessed on 30/04/2017).

³³² Lydgate E & Rollo J 'The Uk Trade Landscape After Brixit' available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=briefing-paper-2.pdf&site=18> (accessed at 30/04/2017).

³³³ Boakye A 'The effects of Brexit on trade in Africa' 2016 available at <http://www.lexology.com/library/detail.aspx?g=42e31cb3-ac19-4749-abab-5d14b79a18f9> (accessed on 27/04/2017).

³³⁴ Barder O 'Brexit: Threats and Opportunities for Global Development' available at <https://www.cgdev.org/blog/brexit-threats-and-opportunities-global-development> (28/04/2017).

countries the UK would ease the pressure off of the developing countries and brings much needed stability to the developing countries. This could potentially bring more developmental changes than the EU. This system would improve existing EU provisions by incorporating more flexible rules of origin allowing developing countries to increase their share of exports.³³⁵ Offering this non-reciprocal access would be a politically smart option for the UK. It would not require long drawn out negotiations or government resources and would ensure a continued relationship for developing country exporters and UK consumers. This would also be compatible with WTO rules of the MFN treatment and the UK would be joining a host of other leading economies including the USA, Japan, Australia, New Zealand and Norway which operate similar schemes.³³⁶ However, duty free imports also mean higher competition with the domestic products which may in turn cause more harm to the economic growth of the UK as reflected in its GDP. This is an opportunity for the UK to improve on existing schemes and set the gold standard in development-friendly trade policy.

4.3.3 Incentives for UK trading with Africa post Brexit

The UK government has found itself in a position whereby it is under pressure to conduct reciprocal trade agreements with developing countries as soon as the UK leaves the EU. However, inadequately prepared trade agreements tend to struggle to deliver outcomes intended by the development objectives of the signatories.³³⁷ While many developing countries prioritise regional integration, market diversity, and the protection of their markets from vulnerability from the global price volatility, EU efforts to negotiate reciprocal deals have been found to pose a potential threat for developing countries.³³⁸ Chances are that these PTAs made in haste with the UK will be detrimental to the developing countries.³³⁹ Yet in their desperation

³³⁵ Boakye A 'The effects of Brexit on trade in Africa' 2016 available at <http://www.lexology.com/library/detail.aspx?g=42e31cb3-ac19-4749-abab-5d14b79a18f9> (accessed on 27/04/2017).

³³⁶ Barder O 'Brexit: Threats and Opportunities for Global Development' available at <https://www.cgdev.org/blog/brexit-threats-and-opportunities-global-development> (28/04/17).

³³⁷ 'Post-Brexit Trade and Developing countries: Can the UK set the Gold Standard in Development-Friendly Trade Policy?' available at <http://www.fairtrade.org.uk/~media/fairtradeuk/get%20involved/documents/current%20campaigns/brexit%202017/mps%20brexit%20briefing.pdf> (accessed on 27/04/2017).

³³⁸ 'Trade traps Why EU-ACP Economic Partnership Agreements pose a threat to Africa's development' available at https://www.actionaid.org.uk/sites/default/files/doc_lib/trade_traps.pdf (accessed on 07/05/2017).

³³⁹ 'Trade traps Why EU-ACP Economic Partnership Agreements pose a threat to Africa's development' available at

to retain access the UK the market, developing countries are likely to conclude those detrimental agreements especially the least developing countries.³⁴⁰ Worse still the EU's so-called EPAs have, in reality, been neither partnerships nor agreements in the strict sense.³⁴¹ This is because for example, the EPAs for both East and West Africa remain unsigned, after nine years of negotiations.³⁴² The EU is now threatening to put up tariffs against African exports, as long as the agreements are not signed soon.³⁴³ The UK will on that basis be more than welcomed by developing nation leaders, if it proposes a different set of trade and development policies. In the same vain, despite resistance from developing countries the EU has insisted on significant liberalisation which threatens to undermine the development of developing countries, an ideal that the UK can take advantage of.³⁴⁴ While the desperation of Africa may prove beneficial to the UK, these agreements made in haste may look beneficial to Africa at face value but may be detrimental to developing countries in the long run.

It has been noted that leaving the EU's ACP arrangements would have implications for the UK's ability to use trade as a tool of development policy.³⁴⁵ For example, the EU offered duty-free access in certain products from ACP countries. If the UK reverted to WTO terms for trade with ACP countries, it would have to grant the same tariffs on those products on an MFN basis to all countries, unless it adopted a GSP scheme for developing and LDCs or signed FTAs with

https://www.actionaid.org.uk/sites/default/files/doc_lib/trade_traps.pdf (accessed on 07/05/2017).

³⁴⁰ Mwaza W 'Update on Economic Partnership Agreements between the EU and African regions' available at <https://www.tralac.org/discussions/article/8429-update-on-economic-partnership-agreements-between-the-eu-and-african-regions.html> (accessed on 16/05/2017).

³⁴¹ Lande S & Matanda D 'Economic Partnership Agreements: A case of unfortunate timing?' available at <https://www.tralac.org/images/docs/10077/unfortunate-timing-of-epas-lande-and-matanda-article-12-july-2016.pdf> (accessed on 15/05/2017).

³⁴² Mwaza W 'Update on Economic Partnership Agreements between the EU and African regions' available at <https://www.tralac.org/discussions/article/8429-update-on-economic-partnership-agreements-between-the-eu-and-african-regions.html> (accessed on 16/05/2017).

³⁴³ Baldwin R & Collier P 'Post-Brexit trade and development policy' available at <https://www.theigc.org/wp-content/uploads/2017/03/Baldwin-et-al.-2017-Policy-Note.pdf> (accessed on 29/04/17).

³⁴⁴ 'Post-Brexit Trade and Developing countries: Can the UK set the Gold Standard in Development-Friendly Trade Policy?' available at <http://www.fairtrade.org.uk/~media/fairtradeuk/get%20involved/documents/current%20campaigns/brexit%202017/mp%20brexit%20briefing.pdf> (accessed 29/04/17).

³⁴⁵ Chalmers M 'UK Foreign and Security Policy after Brexit' 2017 Royal United Services Institute for Defence and Security Studies Briefing Paper, January 2017' available at https://rusi.org/sites/default/files/201701_bp_uk_foreign_and_security_policy_after_brexit_v4.pdf (accessed on 02/05/2017).

these countries.³⁴⁶ In the absence of such preferential agreements, the UK would not have the privilege of choosing whom to grant preferential treatment. Instead the UK would be forced to grant all members of the WTO access to its markets.³⁴⁷ So one notes that in practice the UK although they have the option to renegotiate the PTAs with Africa this does not exactly mean that the UK can completely do away with the agreements with Africa. The UK may still be pushed by WTO legislation to grant some kind of preferential treatment to Africa.³⁴⁸ It therefore becomes apparent that it is better the UK comes to an agreement with developing countries on its own volition rather than be mandated to enter into agreements by the WTO. While advantageous to the UK it may also be beneficial to developing countries as it will ensure continued access to the UK market and possibly better deals than the existing ones.

However, some scholars believe that instead of the UK having less influence it will actually have more influence than it did under the EU.³⁴⁹ This assertion is based on the premise that the UK has a rather progressive worldview. The UK during its time in the EU has pushed for European policies promoting a more open, liberalised trading system.³⁵⁰ The UK has also opposed agricultural subsidies, pushed for a more generous, effective, poverty-focused foreign aid programme. Therefore it will look less towards Europe and more towards the rest of the world. The absence of the UK in the EU as the protector of the rights of the developing countries to stand against issues such as agricultural production and export subsidies, and in favour of liberalisation of trade with developing countries, may cause EU trade policy to tip more towards protectionism and away from development-friendly trade policies.³⁵¹

³⁴⁶ Trade Justice Movement ‘Trade and international development’ available at <http://tjm.org.uk/trade-issues/international-development> (accessed on 28/04/2017).

³⁴⁷ Hannan D ‘Brexit means that Britain will be boss again’ available at <https://www.spectator.co.uk/2016/08/brexit-means-that-britain-will-be-boss-again/> (accessed on 06/05/2017).

³⁴⁸ ‘Post-Brexit Trade and Developing countries: Can the UK set the Gold Standard in Development-Friendly Trade Policy?’ available at <http://www.fairtrade.org.uk/~media/fairtradeuk/get%20involved/documents/current%20campaigns/brexit%202017/mps%20brexit%20briefing.pdf> (accessed on 27/04/2017).

³⁴⁹ Hannan D ‘Brexit means that Britain will be boss again’ available at <https://www.spectator.co.uk/2016/08/brexit-means-that-britain-will-be-boss-again/> (accessed on 06/05/2017).

³⁵⁰ Irwin G ‘Brexit: the impact on the UK and the EU’ available at https://www.global-counsel.co.uk/sites/default/files/special-reports/downloads/Global%20Counsel_Impact_of_Brexit.pdf (accessed on 06/05/2017).

³⁵¹ ‘Brexit: what can the EU do now the UK is leaving?’ available at <https://www.ft.com/content/7478c568-08bc-11e7-ac5a-903b21361b43> (accessed on 02/05/2017).

It is unclear what the Brexit deal will look like especially in the light of the rejection of the recent deal proposed by May and the chair of the EU referred to the UK as cherry picking.³⁵² May has been campaigning for a deal where the UK is out of the trade union and the single market. In a way she has been campaigning for a deal that is similar to the Norwegian systems while negotiating 'mutual recognition' of standards with the EU. She is campaigning for free trade agreements with European markets through a bold and ambitious deal.³⁵³ Consequently, allowing the UK to conclude trade agreements with emerging economies such as China which they could not do so in terms of the EU agreement. May's deal allows the UK to maintain existing trade relations yet allowing the UK to be in a position to trade with non EU members, enlarging its trade capacity. While this may spell better trade agreements for the emerging African States, it may also mean that they run the risk of being side tracked while the UK goes for better and mutually benefiting trade deals with faster growing economies such as China. This as mentioned above, may lead to the African products being booted from the market. This is a result of these countries produce likely being less expensive due to the issue of subsidies which are almost non-existent in Africa.

May's deal has been rejected and campaigned against by the Labour party led by Jeremy Corbyn. The Labour party is campaigning that the UK remains in the customs union but renegotiate the emigration policies.³⁵⁴ This notion by the Labour party has been criticised as it could preclude the Government from concluding deals with other countries post Brexit.³⁵⁵ This could lead to the status quo when it comes to PTAs for developing countries in Africa remaining materially unchanged.

³⁵² 'The EU rejects Theresa May's "pick 'n' mix" Brexit plan' *Economist* 8 March 2018 available at <https://www.economist.com/news/britain/21738336-britains-trade-proposal-dismissed-brussels-more-cherry-picking-eu-rejects-theresa> (accessed on 05/03/2018).

³⁵³ Dominiczak P 'The 12-point Brexit plan explained: Theresa May warns EU she will walk away from a 'bad deal' for Britain' *The Telegraph* 17 January 2017 available at <https://www.telegraph.co.uk/news/2017/01/17/theresa-may-warns-eu-will-walk-away-bad-deal-britain/> (accessed on 05/03/2018).

³⁵⁴ 'Negotiating Brexit' available at <https://labour.org.uk/manifesto/negotiating-brexit/> (accessed on 01/02/2018).

³⁵⁵ Maidment J 'Labour admits Brexit plan could prevent UK from striking global free trade deals' *The Telegraph* 7 February 2018 available at <https://www.telegraph.co.uk/politics/2018/02/07/labour-admits-brexit-plan-could-prevent-uk-striking-global-free/> (accessed on 01/02/2018).

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³⁵⁶ 'The EU rejects Theresa May's "pick 'n' mix" Brexit plan' *Economist* 8 March 2018 available at <https://www.economist.com/news/britain/21738336-britains-trade-proposal-dismissed-brussels-more-cherry-picking-eu-rejects-theresa> (accessed on 05/03/2018).

³⁵⁷ Dominiczak P 'The 12-point Brexit plan explained: Theresa May warns EU she will walk away from a 'bad deal' for Britain' *The Telegraph* 17 January 2017 available at <https://www.telegraph.co.uk/news/2017/01/17/theresa-may-warns-eu-will-walk-away-bad-deal-britain/> (accessed on 05/03/2018).

³⁵⁸ 'Negotiating Brexit' available at <https://labour.org.uk/manifesto/negotiating-brexit/> (accessed on 01/02/2018).

³⁵⁹ Maidment J 'Labour admits Brexit plan could prevent UK from striking global free trade deals' *The Telegraph* 7 February 2018 available at <https://www.telegraph.co.uk/politics/2018/02/07/labour-admits-brexit-plan-could-prevent-uk-striking-global-free/> (accessed on 01/02/2018).

The above discussion shows that the future is rather uncertain and the UK has an array of options to choose from, any of which has the potential to affect developing countries either positively or negatively. At this point the ball is in the UK's court and developing countries market access is in limbo.

4.4 Conclusion

The Brexit has had its fair share of implications on the UK, EU and developing countries. The UK entered into PTA agreements with developing countries under the EU therefore the rules of trade of the EU was exported and therefore applicable to the UK. The EU as a part of the WTO as bound to the MFN rule, which provides that a member of the WTO may not enter into preferential trade agreements exclusive of other WTO members. This rule is accompanied by an exception in terms of Article XXIV which allows a member to enter into preferential trade agreements if a benefit is attached. On the basis of that exception the EU was able to enter into PTAs with developing countries. The UK transacted with the ACP countries and the various groupings that they divided themselves into and an economic relationship was formed.

The Brexit means that the PTAs signed by the UK and developing countries will come to an end, raising questions as to the implications of the Brexit to those trade agreements. Until the withdrawal agreement has been signed it is not possible to project what the implications may be for the developing countries. The UK may opt to retain the current agreements and continue with those agreements which may be advantageous to the developing countries as they get to maintain UK market access. However there is a possibility that the UK may not be willing to maintain preferential access to the development. The UK may opt to maintain access in only with economically beneficial circumstances which may work against the developing countries that rely on UK market access. Furthermore the Brexit leaves the EU and a financially weaker position which may result in developing countries having less aid which they desperately need.

Chapter 5: Conclusions and Recommendations

5.1 Overview

The above mini thesis looks into the dynamics of the European Union (EU) and how the United Kingdom (UK) is now on its way out of the EU. The discussion is meant to discuss the exit of the UK from the EU which came at a time where there were uncertainties regarding the

implementation of the exit procedure. While the Treaty of Lisbon provides for an exit exists it had never been used prior the Brexit thus there are a number of grey areas in the procedural implementation of the enabling legislation. The idea behind this study is to bring to light how Regional Integration may come to an end and how this may affect not only the leaving member state by the remaining member states and third parties. The EU has been the shining example for African Regional Integration for many years. Africa has been modelling the EU structure as they come up with their own Regional Integration structure customised to Africa. However the Brexit serves to show that the Supranational Regional system of the EU may come to end and that while integration is the goal, integration may not always be permanent. Should Africa be faced with members who would like to exit the Regional bloc, it is best that they prepare for such incidents. This discussion serves to remind Africa of the shortcomings of Regional Integration, the process of an exit from the bloc and the implications thereof.

5.2 Conclusions

It is impossible to speak to the Brexit without first looking at the history of integration. The EU was a creature of the Schuman declaration and was built over a period of time and a series of agreements.³⁶⁰ The EU was brought to life starting with the European Coal and Steel Community (ECSC) of 1951 which spoke of cooperation and later broadened to the economic monetary and political union it is today.³⁶¹ With each treaty a greater level of cooperation was forged.

The United Kingdom of Great Britain, which is made up of England, Scotland, Wales and Northern Ireland made their entry into the EU in 1973 on the first enlargement.³⁶² Even then the UK was divided internally about joining in the Regional Integration programme.³⁶³ Thus it has been noted by some historians that the UK had been distancing itself from the EU gradually over the years.³⁶⁴ The UK eventually held a referendum proposed by David Cameron, the former UK Prime Minister, for an exit from the EU for which the leave campaign won by a slim margin.³⁶⁵ The UK is currently on its way to an exit from the EU.

³⁶⁰ See generally 1.1 Background of study.

³⁶¹ See generally 1.1 Background of study.

³⁶² See generally 1.1 Background of study.

³⁶³ See generally 1.1 Background of study.

³⁶⁴ See generally 1.1 Background of study.

³⁶⁵ See generally 1.1 Background of study.

The exit clause, Article 50 of the Lisbon Treaty was not always a part of the legislation of the EU. Prior to the inclusion of an express exit clause there are many arguments as to the possibility of a member state leaving the bloc.³⁶⁶ These arguments for the possibility of an exit prior the exit clause are based on customary international law in the form Article 62 of the Vienna Convention on the law of the Treaties (VCLT) and state sovereignty to name a few.³⁶⁷ Proponents of the possibility of an exit also propose Protocol 36 of the Treaty on the Functioning of the European Union (TFEU) as a viable option that UK may use to leave the EU. A close look at Protocol 36 shows that the prescription of this provision ran out and Protocol 36 is no longer an avenue for exit. However, arguments against exit without an express clause were based on the fact that an exit from the bloc was never part of the design of the EU.³⁶⁸ With the coming of the enabling clause in the form of Article 50 these arguments were silenced. Thus the UK is using Article 50 as a tool for its exit.³⁶⁹

Article 50 has been shown to be a seemingly short clause but is considered packed piece of legislation. In terms of Article 50 the exiting member state has to leave in line with its domestic constitutional requirements.³⁷⁰ The UK does not have a codified constitution; however it still has a constitutional body of law.³⁷¹ It was also found that the June Referendum though important, it was not legally binding and was not the official trigger to the exit procedure. Rather the handing of the letter of intention to leave the EU to the European Council serves as the trigger of the exit procedure and the two year prescription.³⁷² Even though the Referendum voted to leave, the Parliament still had to initiate the leave process. The constitutional requirements for the exit are that the exit must be initiated and led by the Parliament.³⁷³ The Parliament must agree upon the exit and create replacing legislation in terms of the Mille case. It became clear that it is not the invocation of the Royal prerogative by the Prime Minister that would set the exit procedure into motion.³⁷⁴

Brexit has a myriad of implications not only on the UK but third parties as well. It is also important to note that the Brexit has been found to be at a crossroads with Scotland. Scotland

³⁶⁶ See generally 2.4 Possible routes for exit prior to Article 50.

³⁶⁷ See generally 2.4.1 Possible routes for exit prior to Article 50.

³⁶⁸ See generally 2.4.2 Possible routes for exit prior Article 50.

³⁶⁹ See generally 2.3 The advent of the exit clause.

³⁷⁰ See generally 3.5 Internal Road to Brixit.

³⁷¹ See generally 3.5.3 The position of the Parliament in the triggering of the exit procedure.

³⁷² See generally 3.1 Introduction to the UK Approach.

³⁷³ See generally 3.5.3 The position of the Parliament in the triggering of the exit procedure.

³⁷⁴ See generally 3.5.3 The position of the Parliament in the triggering of the exit procedure.

indicated in the referendum that it does not want to leave the EU and wants to maintain its relationship with the EU.³⁷⁵ Unfortunately Scotland was outvoted by the rest of the UK and may be forced to exit the EU against its will. Scotland has indicated that it may opt to leave the UK in order to maintain its relationship with the EU.³⁷⁶ This possibility raises many questions as to the future of the UK outside the EU.³⁷⁷

There is a proverb that says when the elephants fight it is the grass that suffers.³⁷⁸ In the same way when the major economic powers fight it is the poorer developing countries that will suffer. In terms of third parties developing countries are most likely to be hit hard by the Brexit.³⁷⁹ This is because most developing countries in Africa are dependent on the aid provided by the EU to which the UK was a party to.³⁸⁰ The Brexit may result in a reduction of such aid therefore leaving the developing countries at a disadvantage. Developing countries in Preferential Trade Agreements (PTAs) with the UK will also be left at a disadvantage as the PTAs will come to the end when the withdrawal agreement is finalised.³⁸¹ This leaves many questions as to the future relationship of the UK and these developing countries. The UK has indicated that it may offer developing countries PTAs as they were under the EU.³⁸² There is a possibility that developing countries may not get the short end of the stick after all.³⁸³ It is important to note that while Theresa May may have not addressed issue of the UK foreign policy with developing countries, she has committed to retaining an open mind in respect of future trading relationships post-Brexit with African developing countries. This means that African trading relations with the UK will not simply be ignored but will be taken into account.

This mini thesis is aimed at discussing the effects of the Brexit on the UK and developing countries, specifically those in Africa. The mini thesis therefore endeavoured to look into how Regional Integration was created, whether the exit procedure was readily available and what

³⁷⁵ See generally 3.4 The Referendum.

³⁷⁶ See generally 3.6 The UK-Scotland Dilemma.

³⁷⁷ See generally 3.6 The UK-Scotland Dilemma.

³⁷⁸ African Proverbs Organisation 'African Proverb of the Month November, 2001' available at <http://afriprov.org/african-proverb-of-the-month/27-2001proverbs/172-nov2001.html> accessed on (20/05/2016).

³⁷⁹ See generally 4.2 The UK, the EU, WTO and Preferential Trade Agreements.

³⁸⁰ See generally 4.4 The possible withdrawal of development aid post Brixit.

³⁸¹ See generally 4.4 The possible withdrawal of development aid post Brixit.

³⁸¹ See generally 4.1 Introduction.

³⁸² See generally 4.5 UK foreign policy with regard to developing countries.

³⁸³ See generally 4.5.2 UK preferential treatment agreement options with the developing countries.

the process of the exit is. The mini thesis furthermore looked closer at the exit procedure so as to come up with a clear synopsis of the effects that the Brexit will have on the UK and third parties.

5.3 Recommendations

1. The UK has in the past few months attempted to broker deals with some European countries with regard to their future preferential agreements.³⁸⁴ However this courtesy has not been extended to Africa. As a short term solution to combat the uncertainty and the continuing drop in exports, Africa in their regional blocks should approach the UK government and the EU for an agreement. The agreements should contain clauses detailing the future UK-African and EU-African developing countries future relationship with regard to preferential access to the UK market. The reason why Africa should Approach the UK in blocks is that it makes the negotiation process to go faster as compared to individuals seeking individual agreement. This is also time sensitive as it would be more beneficial for the developing African countries to seek the agreements even before the withdrawal period is done so as to secure their already struggling markets. The uncertainty does not do African countries any favours thus it is better to devise solutions as soon as possible.
2. It would be wise that as Africa looks towards Regional Integration they use the example of Brexit and ensure that they do not omit to include a clear exit procedure. The Brexit is evident of the importance of state sovereignty. While the supranational organisations are good and bail out economies the issue of state sovereignty is important and every supranational organisation has the potential to lose members on the basis of the need for sovereignty. Therefore legislation must definitely be put in place to deal with that possibility. Unlike Article 50 that legislation must be clear on the process and procedure of such so as to clear out the grey areas. Issues such as the exiting member remaining in decision making position should however be reviewed. It is better that once the intention to leave has been granted the exiting member ceases to make decisions on the future of the bloc to avoid a conflict of interest and the exiting country putting in place

³⁸⁴ See generally 4.5.2 UK preferential treatment agreement options with the developing countries.

decisions to its advantage thus ensuring continued benefit from a bloc it does not want to be a part of. Another important area is that of increasing the exit period from 2 to 4 years to ensure meaningful agreements actually being made. Africa as it looks into creating a regional bloc should take this into cognisance.

3. It is apparent that third parties are affected by the decision to move out of the EU bloc, however, unlike the members of the EU these third parties are not given an opportunity to discuss an exit plan. In future an exit arrangement for the affected third parties must be put in place so as to avoid economic losses caused by uncertainty. The exiting member must be forced to hold these discussions with the affected parties concurrently with the exit period in the EU bloc. This strategy may also be taken into cognisance by the African leaders as they look deeper into Regional Integration.
4. The UK as an activist of the development aid programme should provide opportunities for the development of developing African countries for access into their markets.³⁸⁵ Africa may prove itself to be an ally in the future. While Africa's exports are almost insignificant as compared to the rest of the world, the UK has been facing trade diversion in the past months as a result of the Brexit. Other European states would now rather directly import goods rather than take them from the UK. Africa on the other hand is ready and willing to trade with the UK. In order to cut the renegotiation period short the UK may carry over the existing preferential trade agreements until the Brexit has been completed. The UK may customise and improve these agreements at a much more relaxed pace after the Brexit is complete and there is less pressure on the government to act at such a rapid pace.
5. A recommendation for the EU is that Brexit does not spell the end of the EU but should be taken rather as a speed bump that calls for structural change within the EU. This is because the remaining member states have a lot more to lose than gain by exiting the EU. In the same way Scotland is trying to hold on to the single market, the remaining member states are also dependent on the single market. The EU therefore needs a more flexible and transparent rule structure, allowing proper checks and balances within the

bloc. The EU has a lot of benefits yet statistics show that the ordinary person is unaware of these benefits. This calls for educational campaigns aimed at educating the ordinary people of the role and function of the EU in the economy. This will help to lower the rising level of EU scepticism which was very prevalent in the Brexit.

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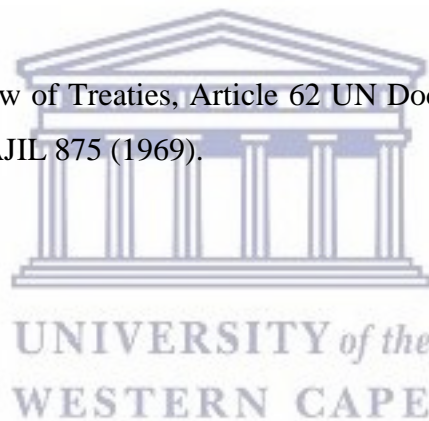
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