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Institutional Aspects of the Withdrawal Process from the European Union – Brexit and Post-Brexit

Tanja MIŠČEVIĆ[1], Nemanja PURIĆ[2]

Abstract: Interdependence in a globalized world implies managing processes in many areas that are regulated at the international level – this is the role that International Governmental Organizations have adopted during the century of their existence. Their work and success are causally linked to the competencies and decision-making processes, as well as to the breadth and agility of member states. This is the reason why many International Organizations do not provide options for withdrawal or exclusion from membership. In that regard, European Union, as a supranational international organization, is proving its uniqueness in the international organizing. Considering that the Lisbon Treaty envisaged for the first time institute of withdrawal in Article 50, this possibility has been the subject of numerous theoretical debates, but it also become practice. The UK's withdrawal agreement from the EU marked the beginning of new type of negotiations as well as the future relations between former Member State and the European Union. The paper analyzes three institutional aspects of the withdrawal process. Firstly, the procedure envisaged in Article 50 of the Treaty which is, in comparison to typical international organizations, more institutionalized. Secondly, the withdrawal negotiations concluded with the signing of the Trade and Cooperation Agreement that set standards for potential future withdrawals, and this paper examines its institutional aspects focusing on dispute resolution. Thirdly, the paper analyzes the institutional aspects of the Trade and Cooperation Agreement, which establishes a new form of association as a legal framework for the future relations between the withdrawing state and the European Union. The authors use a comparative method to determine the institutional peculiarities of the agreements.

Keywords: Brexit, United Kingdom, European Union, Association, Institutional Law.

[1] University of Belgrade, Faculty of Political Science, Full Professor, tanja.miscevic@fpn.bg.ac.rs, https://orcid.org/0009-0006-3230-262X.

[2] University of Belgrade, Faculty of Political Science, Research Associate, nemanja.puric@fpn.bg.ac.rs, https://orcid.org/0009-0000-6783-864X.

Introduction

Exiting from a typical International Organization is an integral part of its life cycle and relationship with its Member States. Undoubtedly, international organizing is based on respecting the sovereignty of states, and both membership and withdrawal are acts of sovereign will by the withdrawing state. The conditions for withdrawal are usually specified in the founding acts of international organizations. Through their analysis, we can conclude that, unlike other areas of International Institutional Law, withdrawal rules are not uniform. Different authors emphasize that different rules are "strongly determined by the size of the organization, the scope of its activities, institutional design, and the degree of institutional complexity, as well as different decision-making procedures" (Wessel 2016, 5). In addition to various limitations in founding treaties, the starting point of our research is the legal situation where the treaty is "silent" on withdrawal, meaning it does not contain any provisions governing this issue. The reason does not lie in overlooking this possibility, on the contrary, but in the intention to create a political and psychological barrier (Klabbers 2002, 21).

The European Union, a supranational IGOs *sui generis*, is a subject of International Institutional Law in terms of its institutional design and state interaction, as it continues to maintain procedures characteristic of typical international organizations, among which the withdrawal institute is certainly one of the most interesting. This relates to the series of judgments known as Solange I-IV from the Federal Constitutional Court of Germany, particularly the Solange III judgment or Bruner and others vs. The European Union Treaty. In this case, the Court gave an opinion on the legality of the ratification of the Maastricht Treaty by the Bundestag. For our research question, and for the question of the European integration process, the Court's stance that the European integration process implies the right, not the obligation, of states to *transfer* sovereign competences is of crucial importance (Solange III 1994, 12). Additionally, the Court described the Union as Staatenverbund, or a "compound of states", which, according to the author's interpretations, is an appropriate term for a sui generis international organization (Wiegandt 1995, 895). To contextualize, considering that the state is identified as the master of integration, that it involves a transfer rather than a loss of sovereign rights, and that the new form of that time (the European Union) is labeled as an *organization*, theoretically, the question of withdrawal could be equated with the question in typical international organizations, and up until that point, international institutional law had recognized the practice of withdrawal from international organizations whose founding treaties did not include provisions on withdrawal.

There is a generic question whether it was possible to withdraw from an International Organization whose founding treaty did not envisage such a possibility. Although the line of argumentation in favor of the possibility of withdrawal could be equated with the same question posed in typical International Organizations, the supranational dimension of the Community/Union was another important determinant that fueled debates on whether the process of European integration was irreversible for a state, i.e., could integration be interrupted by an act of withdrawal (Rosamond 2016)? As there was no explicit answer to this question, research focused on finding indirect evidence that such a legal act was possible and could be implemented in practice. The first referendum on the United Kingdom's membership in the Community held in 1975 served as an important example that withdrawal was possible. To be precise, the referendum did not result in withdrawal (in fact, the actual intention of the United Kingdom was of an internal political nature), but the fact that the legality of holding the referendum was not contested was argued in favor of the possibility of withdrawal. Another practical example often emphasized in support of the possibility of withdrawal is the case of Greenland, which, as part of the territory of the Kingdom of Denmark, withdrew from the Community in 1985. Even though it was implemented in practice, however, international institutional law treats the case as a partial withdrawal (in territorial terms) (Schermers, Blokker 2003). Additionally, considering Greenland's status in Danish domestic law, which is identical to the status of the Faroe Islands that did not become part of the Community at the time of Denmark's accession (based on the authority of the Home Rule Act), this is a special case that cannot be taken as conclusive evidence of the permissibility of withdrawing from a supranational organization.

In the case of typical International Organizations, the authors suggest that in situation when treaty does not mention possibility of withdrawal "that a right of withdrawal was customary in nature, others that it was merely an application of the *rebus sic stantibus*[3] doctrine, and yet others that it was rather best perceived as inherent, following from the sovereignty of states." (Klabbers 2002, 94). Also, guidance can be foud in Vienna Convention on the Law of Treaties. To be precise, article 56 suggest that withdrawal from a treaty containing no provision is possible in two cases: „1. it is established that the parties intended to admit the possibility of denunciation or withdrawal, or; 2. a right of denunciation or withdrawal may be implied by the nature of the treaty" (VCLT, art.56).

[3] Fundamental change of circumstances

These discussions, of course, became redundant with the entry into force of the Lisbon Treaty, which included Article 50 that regulates the withdrawal process according to which "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" (TEU, art. 50). Although the possibility of withdrawal is now explicit, and Article 50, in comparison to typical international organizations, thoroughly regulates this issue, it is essential to emphasize that until the initiation of the procedure by the United Kingdom, the question of consequences was relatively underexplored in theoretical discussions about institutional design of the Lisbon Treaty. More precisely, what follows the withdrawal negotiations remained a complete theoretical and practical unknown.

The aim of this research is to analyze the institutional aspects of the withdrawal process divided into three parts. The starting hypothesis of the research is that the *differentia specifica* of withdrawal from the European Union as a supranational organization, in comparison to typical international organizations, necessitates the maintenance of future institutional relations between the withdrawing state and the Union. The case of the United Kingdom has made a significant contribution in terms of standardizing the negotiation process and building institutional post-withdrawal relations. In the first part of the research, we analyze the negotiation procedure itself, providing an assessment of its institutional design. In the second part, we analyze the Withdrawal Agreement with a specific focus on the bodies formed for its implementation and the dispute resolution mechanism. The reason for focusing on the dispute resolution mechanism is that it was the subject of lengthy negotiations between the two parties and reflects the supranational dimension of the European Union. The third part of the research focuses on the Trade and Cooperation Agreement between the United Kingdom as a third country, and the European Union. This Agreement has its peculiarities regarding negotiations and legal foundations, making it a crucial part of the research for our line of argumentation. The analysis of both agreements is based on comparison with other relevant agreements, allowing us to identify specificities that can be considered as standards for potential future withdrawals.

The United Kingdom's Withdrawal from the European Union – a lengthy negotiation process

After the referendum regarding the membership of the United Kingdom of Great Britain and Northern Ireland in the European Union, held on June 26 in 2016, many political statements and speculations about the outcome of this unique

process ensued and the activation of Article 50 of the Lisbon Treaty followed, marking the first step in placing the entire process within an institutional framework. The newly established institutional framework for the withdrawal negotiations can be assessed as relatively unstructured.

Given that this is an unprecedented institutional process, two main visions of the direction the process should take emerged at the outset. The first, a *Hard Brexit*, argued that the process or outcome should resemble the procedures for exiting typical international organizations, which would imply that from the moment of formal withdrawal, the United Kingdom becomes a third state for the EU without special institutional ties. The second possible outcome, a *Soft Brexit*, would involve withdrawal while retaining economic benefits and advantages in terms of freedom of movement (Antonello, 2020.) In other words, such an outcome would mean retaining many benefits for the United Kingdom with reduced obligations compared to the status of a Member State. Additionally, subjects of debate included possibilities such as British participation in the European Economic Area, which could potentially bring up the issue of the United Kingdom's membership in the European Free Trade Association (EFTA), as well as interesting solutions for institutional relations inspired by the Swiss model (Purić 2020, 88).

However, the EU and its member states demonstrated unity on this issue by prioritizing their own interests with a clear intention to institutionalize the withdrawal process. This initiative can be seen in the statement by Donald Tusk, who resolved the aforementioned dilemmas by stating that "there will be no withdrawal without a hard withdrawal" (CEU, 2016). The first institutional steps were taken at the meeting of 27 heads of state and government, treated as an informal meeting due to the absence of representatives from the United Kingdom (IMHSG, 2016). During this meeting, a procedure consisting of six steps was presented:

1. The state activates Article 50, officially informing the European Council of its intentions to withdraw.
2. The leaders of the 27 member states adopt "guidelines," including principles and the initial negotiating position. The guidelines can be changed during the negotiations if necessary.
3. At the proposal of the Commission, the General Affairs Council confirms the opening of negotiations.
4. The Council adopts guidelines on the substantive and institutional solutions of the draft Withdrawal Agreement. These can be changed and supplemented during the negotiations.

5. The Council will appoint the European Commission as the negotiator on behalf of the member states.[4] It will report to the European Council on the progress of the negotiations, and the European Parliament will also be "closely and regularly informed."
6. The Council and its preparatory bodies will ensure that the negotiations are conducted in line with the guidelines of the member states by providing guidance to the Commission.

All those envisaged steps are outlined in Article 50 of the Lisbon Treaty, and this approach can be characterized as consistent, primarily because it respects the original intention for the procedure to have a highly institutionalized form compared to typical international organizations while simultaneously allowing for political negotiations if necessary.

In addition to the fact that the procedure was used for the first time in practice, an important determinant was the political system of the United Kingdom, which implies the supremacy of the British Parliament. In the context of Brexit, the process was doubly determined. First, it should be noted that the institution of a referendum is not characteristic of the United Kingdom's political system, and only three referendums have been organized so far (two on membership in the Community/Union). The concept of parliamentary sovereignty allows Parliament to make decisions that no other body in the state can challenge, but it also enables the creation of other legal frameworks for decision-making (Gordon 2016, 338). Such a framework was created with the enactment of the *European Union Referendum Act* (EURA 2015), which defined that the referendum is of a consultative nature. Furthermore, Parliament has exclusive authority to approve the triggering of Article 50, as confirmed in the decision of the Supreme Court of the United Kingdom in *Miller v. Secretary of State for Exiting the European Union* (SCJ par. 171). In this way, Parliament positioned itself as an equal actor in the process of negotiating the withdrawal from the EU.

Secondly, the majority electoral system of the United Kingdom, combined with deep party divisions regarding membership in the Union, further complicated reaching an agreement on withdrawal. Let's recall that during the first referendum on at that time EEC Membership in 1975, the Labour Party had a strong vertical division where, despite the party leadership's campaign for remaining, only 55% of the party members supported staying in the Community, noting that the broader membership showed a negative sentiment towards the membership in Community (Pierce, Valen, Listhaug 1983, 53). During the second referendum campaign,

[4] The Commission appointed Michel Barnier as Chief negotiator.

although the main parties (Labour and Conservative) campaigned for remaining in the Union, a significant determinant was the center-periphery division, given that post-referendum analyses show that London, Scotland, and Northern Ireland predominantly supported remaining, while voters in the interior of England supported leaving (Electoral commission 2016). Party and social divisions on the issue of Union membership, as well as the political system in which loyalty to voters in their own constituency is the main determinant of MPs' actions in Parliament, resulted that Parliament was obstructive. Namely, in the bilateral relationship between the Union institutions vs. the UK Government, the Government's freedom in negotiations was limited by the views of Parliament members and the lively debate they conducted during the withdrawal process. Moreover, analyzing the negotiations from a time distance, we can conclude that the negotiations on withdrawal were tripartite in a political and institutional sense: the Government, the Parliament of the United Kingdom, and the institutions of the Union. This can be treated as another peculiarity of this withdrawal from membership.

Additionally, the Court of Justice of the European Union also played a role in institutionalizing the withdrawal process by answering the previous question in *the Wightman case* before the Court of Session (Supreme Civil Court of Scotland). Considering the issues in the negotiation process and the extension of the deadline for adopting the draft Withdrawal Agreement, the EJC responded to the question of whether it is possible to unilaterally interrupt the withdrawal procedure. After an extensive analysis of the *sui generis* nature of the Union, the Court answered that a state in the withdrawal process can " …revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements" (ECJ preliminary ruling 2018, para. 76). In the context of analyzing the institutional nature of this case, we can conclude that, just as states remain the *masters of integration,* they also remain the masters of the withdrawal process. In fact, the possibility for member states to reclaim their transferred competencies remains a priority in the European integration process, which is fully complementary to the Solange judgments. In this way, the institutional nature of the Union as an international organization is confirmed through the creation of withdrawal rules, where states, as in typical international organizations, can decide to terminate the withdrawal process.

The condition for a successful withdrawal was minimizing damage to the existing level of integration. The withdrawal process in a vertical sense, i.e., in the context of membership, certainly is disintegrative, considering the reduced number of member states. However, in a horizontal sense, it did not jeopardize the

integration process, i.e., the existence of supranational elements in the European Union. We could characterize such potential disintegration as systemic, but after the referendum, the withdrawal process, the regulated relations between the Union and the UK as a third country, and a certain amount of time, we cannot identify evidence of its existence.

The Institutional Aspects of the Withdrawal Agreement – end of the process or a new negotiating position?

Let's now focus on the Withdrawal Agreement (WA 2019.) itself and its institutional characteristics. Three questions were of crucial importance for the Agreement. First, considering the freedom of movement, the rights of UK citizens enjoying residency in other member states, and the rights of citizens of other member states in the UK were significant topics. Second, the historical determinant of the issue of Northern Ireland, particularly the rights of citizens of Ireland (now a member state compared to a non-member) and Northern Ireland, whose rights are guaranteed by the Good Friday Agreement. Third, the dispute resolution mechanism and the monitoring of the agreement's implementation.

Immediately after the withdrawal referendum, UK stakeholders defined a model for the best future contractual relationship with the EU, following the agreements the EU concluded with Canada (2017) and South Korea (2010), as presented in the White Paper in February 2017 in the UK Parliament (UKWBP 2017). The initial idea of the British side was to create a close partnership through a single agreement and establish an institutional framework that would minimize the role of EU law and the jurisdiction of the EJC in dispute resolution (Polak 2021, 4). The reason for this initial position is quite clear - the supranational component of the EU's functioning was one of the arguments in the longstanding debate on the UK's membership in the EU.

However, several obstacles exist for such an institutional solution. First, it is an agreement negotiated by activating Article 50 of the Treaty, so the subject of the Withdrawal Agreement can exclusively cover the regulation of the rights and obligations of the state exiting the membership during the withdrawal process, especially those related to the supranational functioning of the Union. In this sense, the Withdrawal Agreement cannot regulate the future economic relations between the Union and the UK. These can only be addressed the moment the Withdrawal Agreement enters into force, that is, from the moment the UK loses its rights and obligations stemming from the membership. Second, as emphasized earlier,

immediately after the referendum, the EU institutions and all member states showed unity in their stance that Brexit must be implemented. In that light, on April 29, 2017, the European Council adopted a document containing guidelines for the negotiation procedure after the activation of Article 50 by the United Kingdom. The content of the document once again confirmed the common position of all member states, with particular emphasis on the statement that "The withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms... This should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union" (EUCO 20004/17, para. 17). Therefore, one of the primary interests of the Union was to ensure the role of the EJC, which we will discuss further.

Withdrawal Agreement stipulates for the establishment of a Joint Committee composed of representatives from the United Kingdom and the European Union. The Committee meets as needed, with the stipulation that it must meet at least once a year (WA 2019, art. 164). According to Article 164 of the Withdrawal Agreement, the Joint Committee has the authority to supervise and facilitate the implementation of the Agreement; seek appropriate means and methods to resolve issues arising from the interpretation and application of the Agreement; discuss all matters of interest in the areas covered by the Agreement and make amendments to the Agreement in areas where it is authorized to do so. Additionally, the Joint Committee is authorized to create its subsidiary bodies or special committees to assist in carrying out its tasks. We can characterize these as ad hoc special committees. This distinction is important because Article 165 of the Agreement envisions the establishment of special committees dealing with specific matters of interest to the relations between the United Kingdom and the Union: the Committee on citizens' rights; the Committee on the other separation provisions; the Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland; the Sovereign Base Areas in Cyprus Protocol Committee; the Gibraltar Protocol Committee, and the Financial Provisions Committee (WA 2019, art. 165). Although special committees submit reports to the Joint Committee, the United Kingdom and the Union can directly raise issues with the Joint Committee even when they fall within the remit of a special committee (WA 2019, art. 165). We can note that the focus of establishing special committees is on issues characterized as institutional features of withdrawal from the Union – the issue of citizens' rights, as well as the specificities of the United Kingdom as a member – issues related to its territories that have special relationships with other member states (Cyprus, Spain, and Ireland). However, we can characterize the institutional framework created by this Agreement as a standard for agreements in which the

Union is a signatory party (Dashwood 2020, 188).The strategy of the United Kingdom during negotiations on withdrawal was to eliminate the role of the Court of Justice, while the Union's interest was to protect its role. The Withdrawal Agreement designates the Joint Committee as the forum for cooperation in the interpretation and implementation of the Agreement. If either party believes that there is a dispute, "...The Union and the United Kingdom shall endeavour to resolve any dispute regarding the interpretation and application of the provisions of this Agreement by entering into consultations in the Joint Committee in good faith, with the aim of reaching a mutually agreed solution " (WA 2019, art. 169). If no mutually agreed upon solution is reached within three months, both parties have the right to request the establishment of an arbitration panel by sending a written request to the other party and to the International Bureau of the Permanent Court of Arbitration (WA, art. 170). The procedure outlined in this Agreement does not differ from a standard arbitration process, and the decisions made in arbitration are binding for both contracting parties (WA, art. 145).

The arbitration procedure is the result of lengthy negotiations and was treated as one of the more significant issues. In the draft Agreement the Commission presented on March 19, 2018, the originally proposed Article 162, which pertains to dispute resolution, envisaged that, in case the Joint Committee couldn't reach an appropriate solution within three months, the case would be referred to the Court of Justice. If the Joint Committee fails to do so, the United Kingdom or the Union have the right to bring the case before the Court as a party to the dispute (DWA 2018, art. 162). Additionally, if the case is not brought before the Court, the party to the dispute has the right to suspend the Agreement or part of the Agreement (except Part 2 – "Citizens' Rights") after informing the other party. The suspension will be subject to review by the Court (art. 163). Therefore, we can see that the jurisdiction of the Court in all cases where the matter is not resolved before the Joint Committee was unacceptable to the United Kingdom.

Some authors agree that such an outcome would be unprecedented, as a sovereign state agreeing to allow the jurisdiction of the court of another contracting party in an international treaty; they claim that imposing such an obligation on a non-member state would be unjust and unreasonable (Polak according to Fahey and Ahmed 2019). A withdrawal agreement based on the dispute resolution model proposed by the European Union could be characterized as a continuity agreement (between a state and an International Organization) with significantly reduced rights for the United Kingdom compared to its membership, which would bring about negative consequences, given the political context of the United Kingdom's membership and the referendum itself.

However, even though the role of the Court is diminished compared to the initial Union position, it is not entirely eliminated in the Withdrawal Agreement. It would have been unrealistic to expect as the protection of Union rights was of paramount importance during the negotiations. In line with this, Article 174 of the Withdrawal Agreement emphasizes that the arbitration tribunal cannot decide on "…a question of interpretation of a concept of Union law or a question of interpretation of a provision of Union law referred to in this Agreement" (WA art. 174). If such a question is raised, the arbitration tribunal is obliged to refer the matter to the Court, which will decide on the issue, and its decision will be binding for the contracting parties. Thus, considering this provision, the Union's intention to prioritize the protection of the Court of Justice as the exclusive interpreter of Union law is entirely clear.

Although Union law confirms this, it is necessary to comment on the Union's earlier activity that can serve as an example for finding the answer on dispute settlement issue - the European Economic Area (EEA). The authors presented its negotiation process as one of the possible models for Brexit negotiations. Of course, it is necessary to emphasize that the outcome of the negotiations is by no means the same, on the contrary, we are talking about the process of withdrawing from an international organization that, in practice, results in the termination of relations between states and the international organization. Still, the EEA is taken as an example of the closest possible institutional relationship with the Union that does not imply membership. The comparison, however, is in line with the initial hypothesis of this paper that, unlike the withdrawal from typical international organizations, the withdrawal from a supranational organization is a process that necessarily results in the creation of new institutional connections as a result of negotiations.

During negotiations on EEA there was an intention to create a judicial body responsible for resolving disputes, consisting of judges from the EFTA Court and judges from the Court of Justice. The court would have a role solely in resolving disputes arising from the European Economic Area agreements, but due to the risk of different interpretations, there would be no preliminary ruling procedure. National courts of EFTA member states would have the right to request the Court of Justice to "give its opinion" on the interpretation of the rules of the EEA agreement (Schermers 1992, 993). It is important to emphasize that this is a right, not an obligation, and nowhere is the phrase "preliminary ruling" mentioned. However, considering several legal uncertainties regarding compatibility with the founding treaty of the Community, the Court of Justice, at the request of the Commission, gave an opinion on the legality of the EEA Agreement. In the analysis, the Court states that situations in which an international agreement envisages a

judicial system competent to settle disputes between the contracting parties, decisions of such a court are binding on the Community's institutions, which also includes the Community's judicial body. Consequently, that means that when the court `decides on the interpretation of the agreement in a preliminary ruling or in a direct action, such decisions are binding (Opinion 1/91, para. 39). Furthermore, the Court concludes that such an agreement is generally in line with law of the Community. However, in the specific case of the EEA, the main problem, according to the Court, is that "the agreement at issue takes over an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order. Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law". (Ibid. para. 41 and 42.). Given that the same provisions can be interpreted differently in different contexts (Schermers 1992, according to the Polydor Case), the existence of the EEA Court in this context would jeopardize the homogeneity in the interpretation of Community law (now Union law). Therefore, the existence of the EEA Court, in the Court's opinion, is contrary to Article 164 of the EEC Treaty (Opinion 1/91, para. 46).

In accordance with the Court's opinion, the proposal was abandoned, and the primary dispute resolution mechanism is in line with typical practices of international agreements – through the Joint Committee (EEA Agreement art. 111). The issue of interest for this research is the role of the Court of Justice, as stated in Article 111, paragraph 3: "If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules" (Ibid.).

We can notice that the Court's opinion in the EEA case provides arguments for future cases of institutional relations of the highest intensity that do not involve membership. Consequently, it serves as an argument for further rule-building in the creation of new institutional relations in the case of the withdrawal process. However, it is important to note one difference. Article 174 of the Withdrawal Agreement uses the formulation that the Joint Committee "shall request" a decision from the Court of Justice, while Article 111 of the EEA Agreement uses the formulation that the parties to the dispute, after the expiry of the deadline for

resolving the dispute by the Joint Committee, "may agree to request the Court of Justice..." Therefore, we observe that the degree of obligation of the Court of Justice's role in interpretation in the case of withdrawal is "higher." More precisely, it is not higher in a quantitative sense; the Court is the exclusive interpreter of Community/Union law in both cases, but the role is more symbolically emphasized in the agreement itself. There are several reasons for such linguistic formulation. Firstly, we have emphasized that this outcome is a result of negotiations, and the United Kingdom's goal was to eliminate the role of the Court of Justice, while the Union's goal was to maximize that role. Secondly, this was the first time the withdrawal procedure had been implemented in practice, accompanied by theoretical and practical discussions about its consequences for both parties. Therefore, the interest of the Union and its member states was to standardize this process but also to make it more difficult in practice, considering the demotivation of future withdrawals. Thirdly, the Union's ultimate interest was to protect its own legal order, meaning that the withdrawal process from the Union does not become a process of *European disintegration*, and this intention necessarily involves promoting the role of the Court of Justice.

Trade and Cooperation Agreement – Reverse Enlargement

In addition to the withdrawal procedure, the Withdrawal Agreement defined a transitional period in the relations between the United Kingdom and the Union, lasting from the entry into force of the Agreement until December 31, 2020. During this period, the Agreement regulated the rights and obligations of both parties and simultaneously created a timeframe for negotiating an economic-political agreement, with the aim of this agreement being to institutionalize the relations between the two parties, following the models of cooperation that the Union has with non-member states. In the event that an agreement was not reached, the United Kingdom would have become a third country in relation to the Union, bringing the withdrawal process closer to the typical mode of exit from international organizations that involves the cessation of all relations with the withdrawing state. However, such a straightforward break was not possible in the context of leaving the EU membership.

As mentioned earlier, at the beginning of the negotiations, there were various ideas about the different modalities of future relations between the two parties. The Trade and Cooperation Agreement falls under *association agreements* Article 1. of The Trade and Cooperationa Agreement refers that „Agreement establishes

the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty" (TCA art1.), which is the wording from Article 217 TFEU on association agreements. Namely, as international institutional law recognizes several degrees of cooperation between a state and an international organization, and association implies the creation of the closest institutional ties that do not entail membership. Regarding the nature of institutional ties, association can be achieved through participation in the work of the organization's permanent bodies or by establishing special associated bodies (Miščević 2009, 24). The European Union has a well-established practice of signing association agreements with various countries on the basis of Article 217 TFEU, involving the creation of specific bodies tailored to different states and their specific interests. However, these agreements can be categorized as association agreements with or without the prospect of membership, depending on whether further steps in the contractual relationship involve the possibility (and actual intention) of negotiating accession to the Union under the rules established by the EU Enlargement Policy.

After the negotiations were concluded, the Council made a decision with which it's adopting the proposed Agreement and explaining its nature and legal basis. In this regard, it referred to Article 217 of the Treaty on the Functioning of the European Union, which provides the Union with the possibility to "conclude with one or more third countries or international organisations agreements establishing an association..." (TFEU, art. 217).

However, when analyzing the practice of various association agreements with the EU, it is essential to emphasize that, despite sharing the same legal basis, this agreement is atypical, as it has specific features determined by the fact that the contracting party is a country that has withdrawn. Firstly, it was not communicated as an association agreement by either the EU or the UK. The authors highlight that this was driven by political interests, especially those of the UK government, which did not want to present the Agreement as a document creating the closest institutional ties before membership in the post-Brexit atmosphere (Phinnemore 2022, 9). On the other hand, EU institutions which mention the legal basis in Article 217, did not insist on the term *association* in official documents. Considering the previous insistence on the term in the case of Ukraine, which is undoubtedly a politically sensitive issue, the EU's interest could be interpreted as a lack of time for negotiations and a negative sentiment in the UK towards institutionalizing relations with the EU.

Another important characteristic of the association agreement is the fact that it was signed as an "EU-only" agreement, meaning that it was signed by the United

Kingdom and the European Union as an international organization. Association agreements can be divided into EU-only and mixed agreements, depending on whether they are signed by the Union and the state associating (EU-only agreements) or by the Union, Member States, and the state joining (mixed agreements). It is important to note that it is common practice for association agreements to be signed as mixed, given that the areas covered by such agreements fall partly under the exclusive competence of the Union, and partly under shared competence between the Union and its Member States. EU-only association agreements are signed in cases where there is an objective obstacle, as in the case of Kosovo*, which five Member States do not recognize as a sovereign state (Van Elsuwege 2017, 395). A political argument in favor of signing an EU-only association agreement is the legal condition for the ratification of a mixed agreement in all Member States. This involves a lengthy ratification process and the objective risk of blocking ratification by one or more states due to particular political interests or the sensitivity of the political issue within those states, as seen in the case of the advisory referendum in the Netherlands on the Association Agreement with Ukraine in 2016 (Conconi, Hergheleigu, Puccio 2021, 242-244).

If EU-only agreements are not common, the question arises as to why the United Kingdom signed such an agreement and whether it affects the legality and content of the agreement. In terms of the level of obligation for member states, there is no difference between EU-only and mixed agreements as, according to Article 216 of the Treaty, they are binding on member states and Union institutions (TFEU art. 216). The question arises as to whether it is possible for an agreement, which includes areas of exclusive Union competence and areas of shared competence between the Union and member states, like in the case of the Trade and Cooperation Agreement is, to be signed only by the Union. Examining the practice of agreements, our case is not unique. According to the institution of facultative mixity, even agreements that contain areas of shared competence can be signed as EU-only agreements by the political decision of member states (Conconi, Hergheleigu, Puccio 2021, 241). Emphasizing the political dimension of this decision, we can conclude that it is in line with the initial decision of member states to maintain a unified stance towards the UK's withdrawal process. In this way, we remain in line with the argument that the Union, with the support of member states, is fully completing the withdrawal process while actively building institutional law.

Although we emphasize the intention to build consistent withdrawal rules, we must highlight that this argument is a consequence of the actual state of negotiations. The negotiations were conducted without publicly disclosing details and with very limited access to information. In this sense, even before the end of

the negotiations, their democratic legitimacy was called into question. The negotiations took place within Union institutions, and the Council, in its decision to approve the clean agreement, relied on the interpretation of its legal service, the opinion of which was not publicly released. The unofficially leaked version of the opinion was deemed superficial, lacking a vertical analysis of the legal nature of the Agreement (Eckes, Leino-Sanberg 2022, 167). Consequently, the role of national parliaments in the negotiation process was minimized compared to the potential mixed nature of the agreement, and therefore the negotiation time was minimized as well, enabling the Agreement to be signed within the planned timeframe without delays, as was the case with the Withdrawal Agreement. In addition to the timeframe for signing, the ratification process of mixed agreements is often lengthy, as seen in the example of the Free Trade Agreement with South Korea, where the ratification process took almost five years (Cygan, Zelazna 2021, 23). In its justification for the clean nature of the agreement, the Council did not mention a practical approach determined by a limited timeframe, but argued that the decision is in line with the "exceptional and unique character of the agreement... signed with a state that has withdrawn from the Union" (CEU 2020, par. 6). This brings us back to the previous argument regarding adjustment for the conclusion of the withdrawal process.

On the other hand, the Union's practice has shown that the argument of time constraints significantly determines this process. In this sense, unintentional spillover of the positive example occurred in the case of negotiating the so-called "Post-Cotonou" agreement, or negotiations for a new agreement after the expiration of the Cotonou Agreement with African, Caribbean, and Pacific countries. The negotiations were also determined by a limited timeframe, and the positive practice of a clean Trade and Cooperation Agreement with the United Kingdom has already been proposed by the Commission (COM 2021/312). However, all parties in the Bundestag expressed opposition to the proposal (Eckes, Leino-Sanberg 2022, 187). This example shows us that the Brexit case, or certain institutional solutions, is not only in the service of standardizing the withdrawal process, but can also influence the process of vertical integration. If this case were to serve as an example for a larger number of association agreements in the future, we could discuss the process of transferring competencies from Member States to the Union to deepen integration. However, the question is theoretical in nature because the current practice only shows the intention of restrictive use of the facultative mixity institute. Nevertheless, this practice shows us that, in a qualitative sense, Brexit cannot be solely linked to initial suspicions that it represents a process of European disintegration, but that it also has positive consequences for the development of institutional law.

The EU Enlargement Policy since the early 1990s and the initial steps of institutionalization of previous experiences represent a unique set of accession rules adapted to the supranational nature of the Union. One of the characteristics is the developed two-step process – association, i.e., signing association agreements[5] precedes negotiations for accession to the Union. In this sense, the practice of withdrawal, in which the association agreement is considered an adequate legal instrument for future relations, suggests the possibility of treating withdrawal as something we tend to name "reverse enlargement." Withdrawal from the European Union is also a two-step process, and now, association represents the second step. Additionally, the previously analyzed accession process shows us that the role of various interests, Union institutions, and member states is represented in the same way as in the case of accession negotiations. In the end, enlargement and withdrawal from the Union are two outcomes of the process of horizontal integration, so the institutional and political parallel between the two processes is clearly visible.

The institutional framework established by the Trade and Cooperation Agreement is typical for association agreements that EU concludes with third countries. Some authors emphasize that, in terms of competencies, the Agreement does not provide evidence of the privileged status of the United Kingdom as a state that has withdrawn from the European Union or as one of the Union's most important trading partners (Phinnemore 2022, 9). This primarily concerns the absence of a political forum to address important international issues in which both parties are interested. The central body formed by this agreement is the Partnership Council, composed of representatives from the United Kingdom and the European Union, which can convene in different formats depending on the issue under discussion (TCA 2021, art. 7). In addition to the Cooperation Council, the Agreement envisages the formation of various committees and working groups for technical areas covered by the Agreement. Furthermore, the establishment of a Parliamentary Partnership Assembly is foreseen for parliamentary cooperation, comprising of representatives from the Parliament of the United Kingdom and the European Parliament (TCA 2021, art. 11). Lastly, civil society cooperation is anticipated through the creation of the Civil Society Forum.

The question arises about the composition of the bodies created by this Agreement, determined by its legal nature as a pure agreement. More precisely, do member states have a role, and in what capacity can they act in the implementation of the Trade and Cooperation Agreement? Representatives of the

[5] These are the "Europe agreements" in the case of the states of Central and Eastern Europe and the "Stabilization and Association Agreements" for the Western Balkans region.

member states do not have a direct role in the bodies of association, as they are exclusively in the capacity of representatives of the Union, and the position of the Union has been previously determined at the Council meetings, which, based on Article 218 of the Treaty on the Functioning of the European Union, makes decisions by a qualified majority. As we previously emphasized, although there are areas of shared competence, the absence of representatives of the member states does not jeopardize the legality of the Agreement itself.

On the other hand, the Comprehensive Economic and Trade Agreement with Canada (CETA), which serves as a reference point in theoretical debates for the Agreement with the United Kingdom, belongs to the category of mixed agreements but has the same provision regarding the composition of the Joint Committee (CETA 2017, Article 26), which has sparked additional debates. The Federal Constitutional Court of Germany, in its opinion, emphasized that such an institutional design means that the opinion of states on areas of shared competence can only be represented indirectly through Council meetings, which is certainly still in line with Article 217 of the Treaty on the Functioning of the European Union, but still compromises the democratic legitimacy of the decision-making process (BvR 1368/16, 64). Subsequently, the European Parliament, on behalf of the Commission, responded to the question of representation in joint bodies and emphasized that representatives of the states will be present in joint bodies on issues related to areas of shared competence (EP answer P-009059/2016). In our case, the institutions' response to theoretical and practical debates on the democratic legitimacy of the pure association agreement is always closely related to the unique case of the United Kingdom as a state that has withdrawn from the membership.

The previous practice of association agreements as an instrument for the closest institutional cooperation with third states indicates that this instrument is widely used due to its flexibility (Van Elsuwege 2021, 791). In the context of membership, i.e., horizontal integration, these agreements could be divided into those with and without the perspective of membership. The first case of withdrawal has shown us that in the case of the European Union, withdrawal with the outcome of treating the withdrawing state as a third state without institutional ties is not possible. It is precisely the flexibility that has promoted association as an adequate framework for cooperation. It is important to emphasize that association, as the second stage in the withdrawal process, is a product of practice, and further development of withdrawal rules has taken place.

Conclusion – a new institute of institutional law?

The process of withdrawal, which initially seemed like a process of (systemic) European disintegration, has come to an end, and unexpectedly, it had positive consequences for the development of institutional law. The structure of our research followed three levels of the process itself. Firstly, although promoted by the Lisbon Treaty, or to be more precise, by the draft Constitution that was not adopted, Article 50 did not have adequate qualitative standards to provide a starting point for negotiations. Consequently, the negotiation rules were further regulated by the institutions of the Union and the member states. The timeframe was additionally modified to adapt to the peculiarities of the United Kingdom's case. After the changes, the procedure itself met the requirements of the supranational dimension of the Union, meaning that it can now be treated as a standard.

We also pointed out the peculiarities of the withdrawal agreement from a supranational international organization, primarily reflected in the Union's priority to protect its own law. The indispensable role of the Court of Justice in interpreting Union law provisions showed us that it is not possible to simply sever all ties, as in the case of withdrawing from typical international organizations. Additionally, the transitional period secured by the Withdrawal Agreement represents the first step in the continuation of building the institute of withdrawal in relation to the institutional provisions found in the Lisbon Treaty. To us, it is clear that the institutional relations between the Union and the now third country continues. The format itself was subject to prediction, listing positive examples of institutional relations between the Union and third countries.

Precisely, the third part of the research showed us that the association institute, with certain modifications, is an adequate form for future relations. These modifications are in the service of building the institute of withdrawal. In that context, it is not communicated as such, considering that it is often promoted as a step towards joining the Union or as an instrument of the closest link between the Union and the third state. On the other hand, its legal nature as a pure agreement gives the Union the opportunity to implement the entire (three-step) process independently and consistently. Potentially, this positive practice, as mentioned, can have a spill-over effect, which is certainly an unintended consequence of building Union law.

In conclusion, withdrawal of the UK from EU Membership is not a systemic disintegration that would call into question the existence of the Union as a supranational organization. Also, all newly established legal procedures certainly influences horizontal integration and can thus be related to certain aspects of the Enlargement Policy but in the opposite direction. Therefore, we can promote the term "reverse enlargement" as an adequate descriptive term.

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Tanja MIŠČEVIĆ, Nemanja PURIĆ

INSTITUCIONALNI ASPEKTI PROCESA ISTUPANJA IZ EVROPSKE UNIJE TOKOM I NAKON BREGZITA

Apstrakt: Međuzavisnost u globalizovanom svetu podrazumeva upravljanje procesima u mnogim oblastima koje se regulišu na međunarodnom nivou – to je mesto koje su tokom veka svog postojanja zauzele međunarodne vladine organizacije. Njihov rad i uspešnost je uzročno posledično povezan za nadležnostima i procesima odlučivanja, ali i sa širinom i agilnosti država članica. To je razlog zbog koga veliki broj međunarodnih organizacija ne poznaje mogućnosti istupanja i isključenja iz članstva. Proces istupanja iz Evropske unije kao nadnacionalne međunarodne organizacije jedinstven je u svetu međunarodnog organizovanja. Imajući u vidu da je Ugovor iz Lisabona prvi osnivački ugovor koji u članu 50. spominje institut istupanja, ta mogućnost bila je predmet brojnih teorijskih debata. Sporazum o istupanju UK iz EU označio je početak novih pregovora o budućim odnosima Ujedinjenog Kraljevstva i Unije koji su rezultirali Sporazumom o trgovini i saradnji. Rad analizira tri insitucionalna aspekta procesa istupanja. Prvo, sama procedura koju predviđa član 50. Ugovora je, u poređenju sa tipičnim međunarodnim organizacijama, dodatno institucionalizovana, a slučaj Ujedinjenog Kraljevstva dodatno determinisan njegovim političkim sistemom. Drugo, pregovori o istupanju završeni su potpisivanjem Sporazuma koji je uspostavio standarde za potencijalna buduća istupanja, a čije institucionalne aspekte u pogledu rešavanja sporova ovaj rad ispituje. Treće, rad analizira institucionalne aspekte Sporazuma o trgovini i saradnji koji uspostavlja novu formu pridruživanja kao legalistički okvir za buduće odnose države koja istupa i Evropske unije. Autori koriste uporednu metodu prilikom utvrđivanja isntitucionalnih osobenosti prethodno pomenutih sporazuma.

Ključne reči: Bregzit, Ujedinjeno Kraljevstvo, Evropska unija, pridruživanje, institucionalno pravo.