A PROMISE IS A PROMISE: INTERPRETING ARTICLE 50 TEU AS ALLOWING THE APPLICATION OF THE PRINCIPLE OF PROMISSORY ESTOPPEL IN THE ECJ'S *WIGHTMAN* CASE

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Abstract

On 10 December 2018, the European Court of Justice (ECJ) ruled that the United Kingdom (UK) could, on the grounds of Article 50 TEU, unilaterally revoke the notification of its decision to withdraw, transmitted to the European Council on 29 March 2017. Given the political and economic implications of Brexit for the UK, and considering the constitutional nature of the EU legal order, the ECJ's 'green light' for the potential 'changes of heart' of the withdrawing Member State seem understandable. Another reading of Article 50 TEU is, however, possible. If this Article was interpreted in light of the principles of legal certainty and legitimate expectations, one could argue that, although unilateral, the notification of a Member State's intention to leave the Union *does have* a certain binding force for both that State and for the Union institutions, in so far as the former commits to accomplish a future act and the latter rely on this commitment. Article 50 TEU can therefore be interpreted as providing grounds for a Member State to make a *promise* to withdraw and for the raising of a defensive shield aimed at preserving the effects of that promise *via* the application of the principle of promissory estoppel.

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1 Introduction

1. Silence, it seems, is one of the hardest arguments to refute.

2. Silence has certainly been, and continues to be, the shroud covering the right to withdraw from the European Union (hereafter EU). Prior to the entry into force of the Lisbon Treaty, the absence of Primary Law provisions recognizing this right left two questions open: whether such a right could be inferred from the wording of the treaties and which conditions should be met by a Member State desirous to put an end to its Union membership? A reasonable reading of the treaties suggested that, although instituting a *sui generis* legal order, they could not be viewed as 'will-traps'[2] the effect of which would be to bind the Member States *ad aeternam*.[3] The standing assumption was that, for the purpose of withdrawing from the EU, a Member State could rely on International Law principles, as codified in the Vienna Convention on the Law of Treaties (hereafter VCLT),[4] in particular Article 56(1) of the latter.[5]

3. The refuge to International law is presently unnecessary given that, since the entry into force of the Lisbon Treaty,[6] Article 50 TEU recognizes the existence of the right of voluntary loss of Union membership and sets out the conditions relative to its exercise.[7] The silence of Primary Law regarding the withdrawal from the EU was thought to be at last broken. However, recent developments relative to the case of Brexit show that silence lingers on one important aspect of the withdrawal process: there is no indication in Article 50 TEU on the possibility for a Member State having expressed its desire to leave the Union, to ultimately revoke its decision to withdraw.

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2 According to the expression used in Alain Pellet, 'Lotus que de sottises on profère en ton nom ! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale' *in* Edwige Beillard e.a. (ed.), L'Etat souverains dans le monde aujourd'hui : mélanges en l'honneur de Jean-Pierre Puissochet, Pedone (2008), 215, 218.

3 See Hannes Hofmeister, "Should I stay or should I go ?"- A cricital analysis of the right to withdraw from the EU *'*, ELJ, 16(5), (2010), 589.

4 Vienna Convention on the Law of Treaties, Treaty Series 1155 [1969] 331.

5 Pursuant Art. 56(1) VCLT, a treaty 'which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless, it is established that the parties intended to admit the possibility of denunciation or withdrawal (a); or a right of denunciation or withdrawal may be implied by the nature of the treaty (b).' This Article suggests a 'reasonable interpretation' of the right to withdraw from Treaties that do not expressly establish this right. International Practice seems to confirm this reading. Indeed, considering that the UN Charter does not expressly recognize the right to withdraw from the UN, there is the example of the - ultimately temporary - withdrawal of Indonesia from the UN in 1965. See, on this point, Lucien Nizard, 'Le retrait de l'Indonésie des Nations Unies', AFDI, vol. 11 (1965), 498.

6 Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

7 Art. 50 TEU: 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements (1). 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 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 (2). 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 (3).'

4. The background of Brexit is fairly well known. Since the referendum on 23 June 2016 resulted in 51.9% of the votes in favor for the United Kingdom's (UK) withdrawal from the Union, on 29 March 2017 the UK Prime Minister notified,[8] to the European Council, the country's intention to proceed with the withdrawal, in accordance with the requirements set out in Article 50(2) TEU. In April 2017, the European Council adopted the guidelines on the framework for the negotiations of the withdrawal agreement.[9] Following the recommendation from the European Commission in May 2017, the Council adopted a decision[10] authorizing the Commission to begin negotiations of said agreement. In November 2018, these negotiations resulted in a Draft Agreement endorsed by the European Council,[11] along with a Political Declaration setting out the framework for the future relationship between the EU and the UK.[12]

5. In this context, in December 2017, members of the Scottish Parliament, of the UK Parliament and of the European Parliament lodged a petition for judicial review before the Court of Session, Outer House. They inquired if the notification of the intention to withdraw may be revoked unilaterally prior to the expiration of the two-year period set out in Article 50 TEU. After an initial refusal of first instance Courts to lodge a preliminary ruling reference to the European Court of Justice (ECJ), the Court of Session, Inner House, First Division inquired the ECJ if, and under what conditions, EU law allows for a unilateral revocation of a Member State's notified intention to withdraw from the Union.

6. AG Campos Sánchez-Bordona in his Opinion[13] and the ECJ in its ruling[14] confirmed the existence of this right while essentially qualifying it as an act of sovereignty. At first glance, this somewhat surprising interpretation of Article 50 TEU seems to be at odds with the EU Membership status, given a constant ECJ case law by virtue of which, State discretion, when exercised under the Treaties, is usually interpreted in the narrowest way possible.[15]

7. If one sets aside the political and economic desirability of Brexit and proceeds to a more procedural analysis of the *Wightman* case, one is left to wonder why, in this case, emphasis is not put on the issue of *legal certainty* and the safeguard of legitimate expectations. Indeed, although the UK's notification of

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8 On 13 March 2017, the UK Parliament enacted the European Union (Notification of Withdrawal) Act 2017, by virtue of which, the Prime Minister was empowered to notify the submit the official notification to withdraw to the European Council.

9 23 March 2018, EUCO XT 20001/18.

10 COM(2018) 833 final.

11 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' levelon 14 November 2018, available on : https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf, accessed 25 February 2019.

12 22 November 2018, XT 21095/18.

13 Opinion, Case C-621/18, *Wightman* (2018), EU:C:2018:978.

14 Case C-621/18, *Wightman*, (2018), EU:C:2018:999.

15 Galetta Diana-Urania, Procedural autonomy of EU Member States : paradise lost ? A study on the *'functionalized procedural competence' of EU Member States*, Heidelberg, Springer (2010).

its intention to withdraw has not yet resulted in the creation of legally binding obligations - in the formal sense of the term 'legally binding' - it did produce some legal effect, as it triggered the preconventional phase of the withdrawal process. In other words - and this is one of the key arguments in the present study - the UK's notification, to the European Council, of its intention to withdraw from the EU did not create a *mere circumstance of fact*[16] and yet, the Court's ruling suggests that, under certain conditions,[17] the unilateral revocation of the notification to withdraw is possible, with little or no regard to the *existing* legal situations created on the grounds of Article 50 TEU.

8. The present study will focus on the possible existence of defensive shields that can be raised in view of safeguarding the legal situations that arise by virtue of a withdrawing Member State's unilateral declaration to withdraw. We shall examine if, when interpreted in light of legal certainty, Article 50 TEU allows for the application, in the EU legal order, of a principle well known in International Law, by virtue of which the withdrawing Member State would be precluded from altering a legal situation which it created through its own conduct. The principle at issue is estoppel.

9. In International legal scholarship, the principle of estoppel contributes to the upholding of a presumption in favor of the stability of a legal situation. Through the application of this principle, one contracting party is prevented (estopped) from unilateral variations of behavior, the effect of which would be the altering of a legal situation that party created though its own conduct.[18]

10. It should be noted that, by virtue of the relevant International case law, the principle of estoppel is applied in the context of *existing* conventional relations that run the risk of being altered due to a party's variations in conduct. In the ECJ's *Wightman* case, what is at issue is a variation of the UK's conduct (taking the form of a possible revocation of the notification to withdraw) that affects, not the existing, but the *future* conventional relationship between the EU and the UK. In this scenario, one could argue that the application of the principle of estoppel is superfluous: indeed, how can a party be precluded (estopped) from altering a conventional obligation if that obligation has not been formally contracted (through, say, the signing of a withdrawal agreement)? Although, in the context of the relevant International case law, this observation is quite valid, there is one exception that can be found in

[16] This point will be further examined in Section 3.1.1. of the present study.

[17] AG Campos Sánchez-Bordona and the ECJ considered that so long as the two-year period after the notification of the decision to withdraw (Art. 50(2) TEU) had not come to a close, a Member State can unilaterally revoke said notification.

[18] For more detailed studies of the principle of estoppels in International law and International practice, see Antoine Martin, L'estoppel en droit international public: précédé d'un aperçu de la théorie de l'estoppel en droit anglais, Pedone (1979); D. W. Bowett,, 'Estoppel before international tribunals and its relation to acquiescence', BYIL (1957), 176, 202.

traditional contract law doctrine. By virtue of this doctrine, estoppel can exceptionally[19] apply for the purpose of enforcing a promise. In this case, estoppel becomes promissory.

11. The enforcement of promises, and the principle of promissory estoppel, are historically well known in Common law, although much of legal scholarship has viewed them with some degree of reservation. The term 'promissory' is 'derived from the 15th century Middle English word *promissorye*, which means to contain, involve, or embody the nature of a promise or assurance. The term "estoppel" is an alteration of the 16thcentury Anglo-French word *estopere*, which means to stop or prevent from denying. Together these two terms define a doctrine of Common law that serves to stop a party (*promisor*) from retracting a promise to another party (*promisee*) that suffered detriment due to reliance upon the promise.'[20]

12. A reading of Article 50 TEU in light of the doctrine of promissory estoppel would imply that, in notifying its intention, to the European Council, to withdraw from the EU, the UK - or any Member State for that matter - unilaterally *commits* itself to a future act and provides sufficient grounds for the Union institutions and the Member States to *rely* on this commitment. One of key points of focus in the present study is, consequently, the *nature* of said notification, in particular within the meaning of Article 50(2) TEU: if it is established that it can qualify as a promise *i.e*. a unilateral commitment to enter into a conventional relationship, it is possible to argue the application of the principle of promissory estoppel for the purpose of upholding the effects of this commitment and for providing the necessary safeguard of the reliance it triggered amongst the EU institutions and the other Member States.

13. In view of determining if promises are made under Article 50 TEU and if these promises are actionable, we shall first provide an overview of the concept of promissory estoppel and the requirements that need to be met in order for this principle to apply (**Section 2**). This overview can, in our opinion, support the interpretation of Article 50 TEU as providing grounds for the application of the principle at issue (**Section 3**) if certain 'tests' establish the presence of a 'promissory representation' from the withdrawing Member State, and reliance on said representation, from the Union institutions and the other Member States (**Section 4**).

14. Two preliminary remarks should be made. First, in the analysis hereafter, we shall *inter alia* refer to International case law. These references should not to be understood as arguments in favor of the

[19] The reasons why the application of the principle of estoppel for the purpose of enforcing promises is viewed as exceptional will be outlined in Section 2 of the present study.

[20] Michael Ishibashi and Amarjit Singh, 'Evolution of Common Law: Promissory Estoppel', J. Leg. Aff. Dispute Resolut. Eng. Constr. (2011), 170, 170.

application of International law in *intra-Union* matters.[21] Since Article 50 TEU can be perceived as a European *lex specialis* in the context of general International rules and principles on the status of party to a treaty or member of an International Organization, International law will be used as providing guidance for the interpretation of Article 50 TEU in the context of the promissory estoppel doctrine.

15. Second, special focus will be put on the interpretation of Article 50(2) TEU as - possibly - giving rise to the application of promissory estoppel. In this sense, the present study aims at providing a procedural, purely legal analysis. No observations will be made on the economic and political desirability of the UK's withdrawal from the EU.

2 The Concept of Promissory Estoppel in Contract Law Scholarship

16. In traditional legal scholarship, promissory estoppel is raised when three conditions are met: 'the making of a promise which the promisor should reasonably expect to induce action of a definite and substantial character on the part of the promisee, action and forbearance of a definite and substantial character induced by the promise, and a determination that injustice can be avoided only by the enforcement of the promise.'[22]

17. Although the enforcement of promises can *prima facie* be understood, it has been the apple of discord amongst scholars.[23] There are those who consider that, unlike contracts, promises are not binding due to their unilateral nature. To admit that estoppel can arise in cases dealing with promises would be to blur the line that separates them from contracts the enforcement of which is, without a doubt, actionable.[24]As Feinman explained it, 'contractual liability was all or nothing: a person was either subject to contractual obligation (and therefore liable for expectation damages) because of an agreement supported by consideration, or subject to no contract liability at all. Contract law so conceived could not include a cause of action for promissory reliance in the absence of bargain and consideration.'[25]

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[21] On the status of International law in the EU's external relations and the references to International law in intra-Union matters, see, on this point, Paul Gragl, 'The Silence of the Treaties : General International Law and the European Union', GYIL, 57 (2014), 1.

[22] Benjamin F. Boyer, 'Promissory Estoppel: Principle for Precedent', Mich. L. Rev., (1951-1952), 639, 644.

[23] Randy E. Barnett, 'Foreward: Is reliance still dead?', S. D. L. Rev. 38(1) (2001), 1, p. 4 : 'promissory estoppel was not the 'substitute for consideration' (…) it was not merely a substitute for a nonexistent bargain in finding enforceability of a promise that otherwise met all the normal requirements of a contact. Rather, it was a different beast altogether and one that, if properly fed and nurtured, could grow to surplant the bargain theory of consideration entirely."

[24] This debate was lively with regard to Section 90 of the US Restatement (Second) of the Law of Contracts which recognizes the principle of promissory estoppel. For an analysis of this debate see *inter alia* Eric Alden, 'Rethinking Promissory Estoppel', Nev. L. J., 16(1), (2016), 659.

[25] Jay M. Feinman, 'Promissory Estoppel and Judicial Method', Harv. L. Rev., (1984), 678, 681-682.

18. Others considered that, in the name of equity,[26] at least *some* promises should induce a specific action. When it is shown that reliance on a promise is detrimental for one party, the author of this promise must be held liable to repair the damage suffered. For a promissor's liability to be *contractual*, it must be found that her promise produced effects similar to those associated with contracts, in so far as the promisee relied on the promise, much like one contracting party relies on the other contracting party's execution of her contractual obligations.

19. The compromise between the 'purists' ('promises *cannot* be actionable') and the equity scholars ('promises *should* be actionable') was found in the notion of *consideration*, instrumental for trust to function between two parties[27]: 'a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.'[28]

20. Consideration serves to provide evidence on the seriousness of a party's intent,[29] ultimately justifying the protection of another party against any alterations of the former's commitment to, say, enter into an agreement. Consequently, it was through the assimilation of promises to consideration, that the application of promissory estoppel was made 'tolerable' in the context of traditional contract law doctrine. Milles formulated four inquiries in view of showing that, far from being the bastard child of the doctrine on contract liability, promissory estoppel was, in fact, a *specific derivative* from estoppel from equity:

> '1. Is estoppel from equity the basis of promissory estoppel, as its name suggests? If so, is the doctrine a defensive shield used by American courts to estop another from raising a defense involving the statute of frauds, statute of limitations, lack of consideration, or the parole evidence rule?
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> 2. With its basis in promise and assent, is promissory estoppel a contract doctrine? If so, is the doctrine a consideration substitute used by courts to enforce definite and unambiguous promises in

[26] If promissory estoppel was to be admitted in contract law doctrine, it was to promote corrective rather than distributive justice, since promissory estoppel essentially aims at establishing a balance between the promisor and the promisee through compensating for a damage caused. See Gan Orit 'The Justice Element of Promissory Estoppel', St. John's L. Rev. 89(1) (2015), 55, 64. Some commentators of Section 90 of the Restatement (Second) of the American Law of Contracts indeed gave priority to the element relative to the avoidance of injustice. See, on this point, Gan Orit, 'Promissory Estoppel: A Call for a More Inclusive Contract Law', J. Gender Race & Just., 16 (2013), 47.

[27] See Daniel A. Farber and John H. Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake", U.C.L.Rev., 52 (1985), 903, 905. See also Jay M. Feinman., 'Promissory Estoppel and Judicial Method', cit. supra, note n° 25, 691: "promissory estoppel performs its traditional role as a consideration substitute that validates a gratuitous promise. (The promise is "gratuitous," of course, only in the sense that it lacks consideration; in most recent cases, clear promises are not donative, but are instead the products of exchange situations.).'

[28] *Currie* v. *Misa* (1875) LR 10 Ex 153 at 162 cit. *in* William Cornish et al., The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law, Oxford (2010), 359.

[29] *Ibidem*.

commercial transactions by awarding expectation damages, including lost profits in an appropriate case?

3. Is the root foundation of promissory estoppel grounded in the tort of detrimental reliance?If so, is the doctrine an independent claim for relief recognizing a duty to prevent (or not cause) foreseeable reliance, a right reasonably to rely on promises (including promissory representations and assurances), and a remedy for injurious reliance?

4. Is modern equity the 'mother mold' of promissory estoppel with the doctrine's basis grounded in the equitable principles of good faith and conscience? If so, does the doctrine grant the court discretion to enforce one's right to rely reasonably on promises, promissory representations, and assurances by using the equitable doctrine to fashion a personalized remedy to achieve corrective justice between the parties?'[30].

21. Depending on whether there is a declaration or a conduct, from the promisor, that is revealing of a commitment to fulfill a future obligation, or a detriment suffered by the promisee due to her reliance on this declaration or conduct, Holmes considered that promissory estoppel can arise from either *moral consideration* or *reliance consideration*: 'if that were the end of the story, then consideration would be described as consisting of two varieties: "moral consideration" (benefit to promisor) and "reliance consideration" (detriment to the promisee). Reliance consideration would then have evolved and matured under the general heading of consideration'[31]

22. From a practical point of view however, domestic as well as International Courts were confronted with difficulties concerning the object and the standard of proof required for establishing that: 1. a declaration made by one party qualifies as a promise and reasonably calls for reliance; and 2. it is due to this reliance, that another party had suffered a damage. For the purpose of the present study, these two elements will be examined in an 'Article 50' scenario. However, before examining the concrete application of promissory estoppel in cases dealing with withdrawal from the EU, it must be established that Article 50 TEU can be interpreted as allowing said application. This supposes that the notification of a decision to withdraw qualify as a promise and that EU law principles - such as that of legal certainty - provide sufficient motive for the enforcement of this promise *via* the application of the promissory estoppel principle.

[30] Eric M. Holmes, 'The Four Phases of Promissory Estoppel', S.U.L.Rev. 5 (1996), 45, 49-50.
[31] *Idem,* 54.

3 Article 50 TEU as Grounds for the Application of Promissory Estoppel

23. In view of discerning the presence of a promise to withdraw in the *Wightman* case, the key element is the *legal qualification* of the UK's notification, to the European Council, of its intention to withdraw. The analysis of this case through the prism of the doctrine of promises and promissory estoppel supposes that two points be distinguished: the nature of a Member State's intention to withdraw *as such* and the nature of the Member State's *notified intention* to withdraw. It will be argued that the former can, indeed, be viewed as an act of sovereignty, since the Treaties do not govern *per se* the Member States' intentions to withdraw from the Union. However, once a Member State officially triggers the withdrawal process pursuant Article 50(2) TEU, this process ceases to be a matter of State discretion. Given the purpose of this study *i.e.* the demonstration that the notified intention to withdraw can qualify as a promise and give rise to the application of promissory estoppel, it is necessary to analyse the nature of the unilateral declaration of intent with regard to the Union treaties (3.1.) and the possible binding effect of this declaration for both its author and the Union institutions and other Member States (3.2.).

3.1 The Nature of the Unilateral Expression of Intent to Leave the EU

24. The analysis hereafter will focus on two points: the *nature* (legal or factual) of the circumstance created by the expression of a Member State's intent to withdraw, on the one hand and the nature of the circumstance that *was intended* to be created through this expression, on the other hand. The first issue will be examined through the prism of International Legal Theory, namely on the point of the distinction between law and fact (3.1.1.). The second issue will be examined in the context of International Law of Treaties, on the point regarding the distinction between expressions of *intent* and expressions of *will* (3.1.2.)

3.1.1 The Unilateral Expression of Intent to withdraw, a legally qualified fact

25. From the perspective of International Legal Theory, a unilateral declaration or conduct is a *fact*.[32] In his interpretation of Article 50 TEU, AG Campos Sánchez-Bordona essentially considered that the UK's intention to withdraw is an *ordinary fact* susceptible, as such, to change and alteration. We disagree with this view, namely because a Member State desirous to leave the Union does not exercise absolute discretion when it expresses its intention to withdraw, but complies with the conditions and modalities, relative to this expression, set out in Article 50(2) TEU. The intention to withdraw is, therefore, an act to which the Treaties attach a legal effect. It is, in other words, a *legally qualified fact.*

26. Ordinary facts fall outside of the scope of application of legal norms. They can be altered (for e.g. a conduct can be changed, a declaration can be revoked…) without affecting the scope of application

[32] In Roman Procedural Law, the term *factum* refers to an overview of facts relevant for the application of legal and procedrual principles. In contract law and in International Law, unilateral declarations and conducts are usually viewed as *facti*.

and/or the effect of legal rules. Third parties can - in principle - neither *legally* nor *reasonably* nurture any expectations as regards unilateral declarations of intent expressed outside of the scope of application of legal rules. Alternatively, if a legal rule defines the effects produced in a given circumstance of fact, the occurrence of that circumstance triggers the application of said law. For e.g. legal majority (the legal consequence) is achieved - in most European States at least - at the age of eighteen (a circumstance of fact). Any unilateral alteration of a legally qualified fact would necessarily affect the application of the law that qualifies it: the revocation of a Member State's nationality affects Article 20 TFEU and the exercise of the rights inherent to the status of Union citizen.[33]

27. In International law, the law/fact distinction serves to draw a demarcation line between matters governed by International rules and those governed by domestic law.[34] In the *Case concerning certain German interests in Polish Upper Silesia*, the Permanent Court of International Justice (hereafter PCIJ) stated the following:[35]

> 'From the standpoint of International Law and of the Court which is its organ, municipal laws are *merely facts* which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.'[36]

28. Within the meaning of this case, the law/fact distinction allows for the drawing of three main conclusions. First, the point on *legal qualification*: in purely domestic areas, International law does not determine the conditions for the adoption and the effects of national laws. Second, the point on *States' discretion*: in areas not covered by International law, States are, in principle, free to exercise discretion and enact the legislation they desire. Third, the point on the *duty of compliance*: by virtue of the *pacta sunt servanda* principle, a domestic legislation should not violate already existing conventional obligations.[37] It follows that *absolute* State discretion is exercised in the enacting of purely domestic acts, viewed as ordinary facts from the perspective of International law. Any changes and alterations of such acts are without effect for the application of International rules.

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33 Case C-34/09, *Zambrano* (2011), EU:C:2011:124.

34 The distinction law/fact is relevant in the estoppels doctrine. The distinction between law and fact is reflected in the distinction - considered central - between Common law and equitable estoppel. See on this point Elizabeth Cooke, 'The Modern Law of Estoppel', A New Framework for Estoppel, Oxford (2000), 54, 58: 'only a statement of fact - not of law, and not a promise - can give rise to Common law estoppel; and it is a characteristic of equity that the court has a flexible jurisdiction with freedom to look at broad questions of unconscionability and a discretion in deciding both liability and response. Do these criteria enable us to distinguish between Common law and equitable estoppel? I suggest that they no longer reflect the way cases are decided. (…) The weakness is exposed once it is accepted that many of the representations or assurances upon which estoppel cases are based can be regarded as ones either of fact or of law.'

35 *Case concerning certain German interests in Polish UpperSilesia (Germany v. Poland)*, 25 May 1925, Serie A - n° 7.

36 *Idem*, para. 52, emphasis added.

37 On the interplay between State discretion and International Organizations' discretion, see Stevan Jovanović, Restrictions des compétences discrétionnaires des Etats en droit international, Pedone (1988), 239 p. On the possible 'abuses of sovereignty' see, namely, Nicholas Politis, 'Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux', Collected Courses, Hague Academy for International Law, 6 (1925), 1.

29. Alternatively, if the conditions for a State's expressions of intent and the effects thereof are defined by an International rule or principle, said expressions of intent are legally qualified facts: when States express their will in accordance with a rule such as the *bona fide* principle, this expression (a fact) is *subsumed* to that rule. The same reasoning can be applied in an 'Article 50' scenario. Through notifying its intention to leave the Union, a Member State acts *within the scope* of application of the Treaties, since it *complies* with an obligation set out in said Article. The *legal effect* the latter attaches to a Member State's notification of its intention to withdraw is the launching the preconventional phase of the withdrawal process, in the course of which the Member State concerned does not act alone but together with the Union institutions.[38] It follows that, from the perspective of the law/fact distinction, a Member State's notified intention to withdraw is a fact that is *legally qualified* under the Treaties; any alteration thereof would necessarily affect the scope of application of the latter's provisions, in particular of Article 50 TEU. This view was upheld by the Council in the *Wightman* case[39] but was not shared by AG Campos Sánchez-Bordona.[40] The AG further observed that the notified intention to withdraw is an *ordinary intention*, the alteration of which is without consequence as regards the procedure set out in Article 50 TEU:

> "Intentions are not definitive and may change - he wrote - whoever notifies his intention to a third party may create an expectation in that party, but does not assume an obligation to maintain that intention irrevocably. For that effect to be produced, the communication of that intention would have to refer expressly to its being irrevocable."[41]

30. This argument can be refuted, not only from the perspective of the conceptual distinction between law and fact in International Legal Theory, but from the perspective of International Law of Treaties as well. Indeed, when International rules and principle govern the expression and exchange of consent, the States, acting in accordance with these rules and principles, express official *acts of will*. By analogy, given that Article 50 TEU defines the modalities and effects of a Member State's notification of its intention to withdraw, through this notification, the Member State concerned expresses a will (*i.e*. a binding unilateral act), not a mere intention.

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[38] See Christope Hillion, 'Withdrawal Under Article 50 TEU : An Integration-Friendly Process', CMLRev. 55(2018), 29, 33: 'The involvement of EU institutions, and the various procedural arrangements imported from the EU treaty-making procedure, confirm that the exit clause is firmly embedded in the EU legal order. As such, it is governed not only by the terms of Article 50 TEU, but also by the canons of EU constitutional law.'

[39] See Opinion, Case C-621/18, *Wightman*, cit. *supra*, note n° 13, para. 125.

[40] *Ibidem*: 'I consider, however, that the legal acts adopted by the European Union during the negotiation stage are not, strictly speaking, *effects* of the withdrawal notification, but measures concerned with the negotiation (hence the United Kingdom's absence from the formations of the European Council and the Council discussing the negotiation process or the guidelines to direct that process) or agreements adopted *with a view to* the future withdrawal (the relocation of the seats of certain agencies, in order to ensure continuity without disruption).'

[41] *Idem*, para. 100.

3.1.2 The Notified Expression of Intent to Withdraw, an Act of Will

31. AG Campos Sánchez-Bordona argued that the *wording* of paragraphs 1 and 2 Article 50 TEU supports the view that a Member State's intention to withdraw from the EU is an ordinary intention:

> '(…) Admittedly, that argument, rather focused on the text, is not as compelling as it at first sight appears, since Article 50(2) TEU also uses the term decision (the 'Member State which decides to withdraw shall notify … its intention'), as does paragraph 1 ('Any Member State may decide'). However, Article 50(2) TEU could have used the formula 'shall notify that decision' (or another similar formula), instead of 'shall notify its intention'. Some meaning must be attributable to that wording, which is undoubtedly not due to an oversight.'[42]

32. The difference in wording between paragraph 1 (the Member State *may*) and paragraph 2 (the Member State *shall*) of Article 50 TEU is, indeed, not due to an oversight and can be explained through a reading of this Article in the context of the International Law of Treaties, in particular the point on the conceptual distinction between the notions of *intention* and *will*. The concept of intention is a subjective *projection* of a future action.[43] The concept of will is a *representation* of a future action;[44] it implies an *act of will*[45] which, in International law, usually takes the form of expression of consent.[46] Intentions are associated with a party's *motives* to do or not to do something; a will is a *commitment* to a specific action and requires some form of official expression.

33. This distinction between intention and will is reflected in the wording of paragraphs 1 and 2 of Article 50 TEU. Article 50(1) TEU concerns the Member States' *intentions* as it refers to the inception and maturing of their decision to leave the Union. This phase *is not* governed by EU law, but by the Member State's constitutional law. Article 50(2) TEU however, defines the conditions for a formal expression of the *will* to withdraw thus triggering what essentially is the preparation phase for the future alteration of the Treaties' scope of application (be it through the signing of a withdrawal agreement or not). It can, thus, be considered that when acting under Article 50(2) TEU, a Member States expresses an *act of will* (a commitment), not an *intention* (a projection of a commitment).

34. A Devil's advocate would argue that, although the notification, to the European Council, of a Member State's intention to leave the Union can be viewed as an act of will, Article 50 TEU contains no

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42 *Idem*, para. 101.
43 On this distinction, see Gérard Cornu, *Vocabulaire juridique*, PUF (2005), 970, 529.
44 *Idem*, 932.
45 J. Barberis exclaims: a will is not a hidden, psychological fact, but an exteriorized expression, the foundational act of Treaty-making. Julio Barberis, 'Le concept de traité international et ses limites', AFDI, 30 (1984), 239, 250.
46 Maurice Kamto, 'La volonté de l'Etat en droit international', Collected Courses, Hague Academy of International Law (2004), 9, 57.

indication as regards the legal qualification of a State's *subsequent expressions of will*, including those that put a halt to the withdrawal process. Article 50(2) TEU would, consequently, govern the aspects of the withdrawal *other than* the revocation of the notification to withdraw. Such was the view expressed by AG Campos Sánchez-Bordona. Echoing rulings from the Permanent Court of International Justice (PCJI),[47] the AG interpreted the silence of the Treaties as regards the right to revoke a notified decision to withdraw in relation to the principle *in dubio pro libertate*:[48]

> "The unilateral nature of the decision to withdraw is conducive to the possibility of unilaterally revoking the notification of that decision, until the moment at which the latter's effects become final. From that perspective, unilateral revocation would also be a manifestation of the sovereignty of the departing Member State, which chooses to reverse its initial decision."[49]

35. The AG's observation would be convincing if the UK's withdrawal took place in a pre-Lisbon era and was performed according to the rules and principles of International Law. However, if Article 50(2) TEU is presumed - as we consider it should - to govern *the whole* of the withdrawal process, including the conditions under which this process can be stopped, interpreting said Article as allowing a discretionary revocation of an already notified intention to withdraw seems at odds with the specificity of the EU legal order and the consistent view of the ECJ on the Member States' discretion. Indeed, from the viewpoint of the law/fact distinction in International Legal Theory and from the perspective of the intention/will distinction in International Law of Treaties, it doesn't seem unreasonable to argue that when a Member State complies with the requirements of Article 50(2) TEU, its unilateral declaration of intent to withdraw from the EU is not legally inconsequential like an ordinary intention would be. Rather, said declaration of intent has a certain *binding force*, conferred by the Treaties. Two additional arguments can be brought forward in support to this conclusion: an argument of *procedural parallelism* and an argument of *consistency* of the withdrawing Member State's conduct.

36. By virtue of a requirement of *procedural parallelism*, given that Article 50(2) TEU establishes the procedure for the notifying of a Member State's intention to withdraw from the Union, the revocation of

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47 We allude to *Case of the S.S. Wimledon*, judgment, 17 August 1923, Serie A - n° 1, 24: 'like all restrictions or limitations upon the exercise of sovereignty [a] servitude must be construed as restrictively as possible and confined within its narrowest limit.'

48 On this point, AG Campos Sánchez-Bordona's Opinion echoes the principle set out in the *Lotus* case by virtue of which, should there be doubt on the extent of an International Organization's competence, the restriction of the sovereign right from which that competence derives should be interpreted narrowly. In other words, if an International Treaty does not explicitly recognize an Organization's competence in a given area, there is a presumption in favor of the States' discretion in that area. See *The case of the S.S. Lotus*, Judgment, Serie A - n° 10, at 18: 'International law governs relations between independent States.The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed*' (emphasis added).

49 Opinion, Case C-621/18, *Wightman*, cit. *supra*, note n° 13, para. 94.

this notification cannot be left entirely to the Member State's discretion. This would mean that Article 50(2) TEU governs the facts that trigger its application but not the facts that alter it. If said Article did not provide for procedures relative to the revocation of a Member State's notified intention to leave the Union, it should, in principle, be presumed that the Treaties' authors' intention was to exclude the possibility thereof.

37. Moreover, AG Campos Sánchez-Bordona's and the ECJ's interpretation of Article 50 TEU as being permissive to discretionary revocations of a Member State's notified intention to withdraw opens questions that, in its current wording, said Article does not answer: if a Member State is allowed to unilaterally revoke its intention to withdraw, what is the procedure it should follow? Which EU institutions should be involved? Which delays should be observed for the expression of these institutions' assent to the revocation?…

38. From the perspective of *consistency* of the withdrawing Member State's conduct, if it is accepted that, while acting in accordance with Article 50(2) TEU, said State expresses an act of will by which it commits to the accomplishment of future act, that State's subsequent formal as well as informal declarations and conduct must be consistent with the will thus expressed for the sake of safeguarding the trust amongst that State's partners in the course of the withdrawal process. In International law and in contract law, consistency is one of the key elements in the promissory estoppel doctrine since a conduct consistent with an initial, unilateral declaration is usually indicative that, albeit unilateral, this declaration was *meant* to be binding for its author as well as for any third parties that may have an interest in said declaration. In other words, consistency in a State's conduct is one of the factors that points toward the presence of a promise, within the meaning of both International law and contract law.

3.2 The Binding Effects of the Unilateral Expression of Intent to Leave the Union

39. If follows from the analysis pursued thus far that the notification, to the European Council, of a Member State's intention to withdraw can be considered as a legally qualified, official act of will expressing that State's commitment to leave the Union. If these observations were submitted to a contract lawyer, she would likely ask the following: can said notification to withdraw qualify as a promise? For the purpose of answering this question, it is necessary to determine if, when a Member State notifies its intention to leave the EU, it makes a commitment that is *self-binding*, creates *grounds for reliance* for the EU institutions and other Member States and, by reason of this reliance, can be *actionable*. It should, in other words, be determined if a promise is made under Article 50(2) TEU (3.2.1.) and if, in view of preserving the effects of this promise, the principle of promissory estoppels can arise on the grounds of said Article (3.2.2.).

3.2.1 The Presence of a Promise

40. It may be considered that the notification of a Member State's intention to leave the Union expresses 'an obligation that is held to a party that presents a commitment to another party in the future.'[50] It is, therefore, a promise, both in its substance and in its effect. From the perspective of its substance, said notification is *not a statement of belief* since 'promises [are] future oriented, [and] statements of belief (…) concern only the present'[51] Moreover, said notification is an *unconditional* and *definite* commitment to accomplish a future act. Given that a Member State's decision to withdraw from the Union does not depend on the occurrence of a specific prior event, it is *unconditional*. This unconditionality is confirmed by the wording of Article 50 TEU. Indeed, paragraph 2 of this Article does not provide that the notification of a State's intention to withdraw is valid *so long as* that State has not revoked it in the course of the two-year period following the notification.[52] Moreover, in so far as, pursuant Article 50(2) TEU, the notified intention to withdraw determines the future conduct of the Member State concerned, as well as that of the EU institutions and the other Member States, said notification is *definite*.[53]

41. As regards the binding force of a Member State's notification of its intention to withdraw for third parties (*i.e*. the EU institutions and the other Member States), a parallel can be drawn with contract law in view of arguing that, if it was made by a private party, said notification would probably not qualify as a *gratuitous* or *unbargainded-for* promise. Indeed, in contract law, it is the *bargained-for* promises that are actionable, since they imply exchange of consideration. These promises usually include charitable subscriptions, parole promises to give land, bailment, diversities as bonus and pension plans, waiver and rent reductions.[54]Alternatively, given that unbargained-for promises do not result from an exchange of consideration they cannot, in principle, be enforced.[55] If Article 50 TEU was interpreted in light of the distinction between gratuitous and bargained-for promises, a Member State's notification of its intention

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[50] Michael Ishibashi and Amarjit Singh, 'Evolution of Common Law: Promissory Estoppel', cit. *supra*, note n° 20, 172.

[51] Jay M. Feinman, 'Promissory Estoppel and Judicial Method', Harv. L. Rev., cit. *supra*, note 25, 691. In support of this argument, the author gives the example of franchise contracts. See *ibidem*: 'for example, in cases involving franchisors who have made representations about the business potential that franchisees may expect or about their own policies of support for franchisees, some courts have held that such representations may not reasonably be relied upon as indications of future conduct. Courts usually view these representations, unlike promises to grant franchises, as statements of "belief" (that is, predictions or statements of current company policy) rather than intention. The statements are, therefore, not promises.'

[52] In such a case, the promise would be conditional. See *ibidem*: 'When the intention manifested is conditional, the promissory ideal is not met unless the event constituting the condition occurs. This rule holds good even when the event is within the control of the promisor, as is a condition of approval by a home office or higher official or a condition of execution of a final written agreement.'

[53] Eric Alden, 'Rethinking Promissory Estoppel', cit. *supra*, note n° 24, 670: 'classical contract law requires that the promisor have offered to enter into a bargained-for exchange transaction with the promisee, *sufficiently definite* as to its material terms, which offer the promisee may through counter promise or performance accept.' (emphasis added).

[54] Benjamin F. Boyer, 'Promissory Estoppel: Principle for Precedent', cit. *supra*, note 22, 644.

[55] *Idem*, 643: 'If there has been no attempt to exchange an act, a forbearance, a change in legal relations, or a return promise for the promise for which enforcement is sought, there is no bargain. The promise has not been purchased; it is gratuitous.'

to withdraw would arguably provide what in Common law is known as sufficient consideration for the EU Institutions, encouraging the trust of the latter that the withdrawal *will* take place.

42. A Devil's advocate would raise two objections. First, it could be argued, following the parallel between contract law and EU law, that when acting under Article 50(2) TEU, a Member State in reality makes a gratuitous, unenforceable promise since the notification of its intention to withdraw does not define the material terms of the withdrawal. This is, indeed, a point on which EU law and contract law cannot be fully assimilated. Article 50 TEU does not set out an obligation to negotiate in detail the terms of the withdrawal: even in the absence of such negotiation - resulting in the signing of a withdrawal agreement - the Treaties cease to apply to the Member State concerned two years after the notification of its intention to withdraw has been transmitted to the European Council. Consequently, said Article defines the temporal terms of the withdrawal (the two year period) and the effect of the latter (the loss of Union Membership). The alteration of the conventional relationship between the withdrawing Member State and the Union being thus defined in Article 50(2) TEU, the promise made by said State cannot be considered as non-binding since the State concerned and the Union institutions dispose of sufficient 'bargaining' elements to allow the finalization of the withdrawal process.

43. Second, one could argue that there is nothing in the wording of Article 50 TEU to indicate that a Member State's notification of its intention to withdraw from the EU is *self-binding*. This argument could not be upheld, if said Article was interpreted in light of a relevant International case law. Let it be reminded that in International law, far less formal States' unilateral declarations were qualified as self-binding commitments. In the *Nuclear Tests* case[56] for e.g., the International Court of Justice (hereafter ICJ) assessed a series of declarations made by the French authorities in relation to nuclear tests performed in the South Pacific Ocean. Regarding the nature of these declarations, the ICJ stated the following:

> 'it is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.'[57]

[56] *Nuclear Tests Case (Australia v France)*, Judgment, 20 December 1974, ICJ Reports (1974), 253.
[57] *Idem*, 267.

44. The ICJ further observed that, the acceptance, by other parties, of a State's unilateral declaration or invitation is *irrelevant*, because that State already declared its willingness to be bound:

> 'An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.'[58]

45. It follows that, from the perspectives of both contract law and International law, it is not unreasonable to assume that a Member State's notification of its intention to withdraw constitutes a promise that is both a self-binding unilateral commitment to a future act and provides grounds for reliance, for third parties, as regards the accomplishment of this act. This conclusion would suggest that the *Wimbledon* model of sovereignty (essentially translating to a quasi-absolute State discretion) cannot - and, given the specificity of the EU legal order, should not - be the template used for the interpretation of Article 50 TEU. After all, what would be the use of inserting this Article in the Treaties, if a Member State desirous to leave the Union could proceed as if its withdrawal was not governed by EU law in *all of its aspects* (including the possible 'change of mind' of the withdrawing Member State)?

46. If one admits that the unfolding of the withdrawal from the Union should not depend on the whims - so to speak - of the withdrawing State, it is reasonable to assume that Article 50 TEU is to be interpreted in line with *procedural principles* that allow for the safeguard of the legal effects created by that State's promise to withdraw and protecting interpersonal trust with third parties[59]. Promissory estoppel serves precisely this purpose.

3.2.2 The Rise of Promissory Estoppel

47. Given that the Union Treaties establish a complete system of procedures,[60] one may argue that the principle of promissory estoppel could apply within a procedure set out in the Treaties that would allow for the sanctioning of the unilateral revocation of a Member State's notified intention to withdraw from the EU. For e.g. the European Commission or a Member State could bring infringement proceedings on the grounds of a *misrepresentation of the intention to withdraw*,[61] having induced the Union institutions and the Member States into error as regards a future alteration of the Treaties' scope of application. Such an act could, no doubt, qualify as an infringement as it constitutes a violation, not only of Article

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[58] *Ibidem*: 'An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.'

[59] See John J. Chung, 'Promissory Estoppel and the Protection of Interpersonal Trust', Clev. St. L. Rev., 56 (2008), 37.

[60] Case 294/83*, "Les Verts" v European Parliament* (1986), EU:C:1986:166.

[61] In the *Wightman* case, the Council and the Commission argued that an interpretation of Article 50 TEU in relation to Article 4(3) TEU is intended to prevent cases of *abuse of procedure*. See Opinion, Case C-621/18, *Wightman*, cit. *supra*, note n° 13, para. 145.

50(2) TEU, but of Article 4(3) TEU as well.[62] It is, indeed, through a combined reading of these provisions that Article 50(2) TEU can be interpreted as *allowing* the application of the principle of promissory estoppel.

48. An ECJ case law shows that the principle of estoppels is not entirely unknown in the EU legal order. In light of said case law, this principle finds its roots in the principle of sincere cooperation. In the *Moormann* case[63] for e.g., AG Darmon stated that :

> '[the principle of estoppel] *constitutes* (...) *a manifestation of the obligations contained in Article 5.* Their role consists in extending and strengthening other provisions.'[64]

49. Also, in a *Luxembourg vs Parliament* case,[65] the ECJ confirmed that when a Member State or an EU institution has contributed to the creation of a legal situation:

> '*the situation gives rise to a particular form of bar to action based on the attitude and conduct of the applicant.* The bar is founded on the rule of estoppel which prevails in ordinary international law and is incorporated into the Community system by Article 5 of the EEC Treaty.'[66]

50. The fact that the principle of estoppel is a 'procedural emanation' from the principle of sincere cooperation is not surprising, given that the purpose of the former is to safeguard the principles of legal certainty and legitimate expectations, also rooted in Article 4(3) TEU.[67] Indeed, this Article has been considered as the source of namely two specific procedural barriers that are akin to promissory estoppel, in so far as they act as defenses against discretionary and/or unjustified alterations of legal situations created under the Treaties.

51. First, once the Article 50(2) TEU procedure has been triggered, the Member States would be precluded from altering their decision to withdraw by virtue of the principle *nemini licet venire contra factum proprium* (to come against one's own fact is not allowed):[68] 'the essence of an estoppel is that a party is not allowed to deny a state of facts which he has alleged to be true, either expressly in words or

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62 See Diana Urania Galetta, Procedural autonomy of EU Member States: paradise lost? A study on the "functionalized procedural competence" of EU Member States, cit *supra*, note n° 15.
63 Case C-190/87, *Moormann* (1988), EU:C:1988:424.
64 *Idem*, AG Opinion (1988), EU:C:1988:303, at para. 27.
65 Case C-230/81, *Luxembourg v European Parliament* (1983), EU:C:1983:32.
66 *Idem*, emphasis added.
67 See for e.g. Paolo Mengozzi, 'Evolution de la méthode suivie par la jurisprudence communautaire en *matière de protection de la confiance légitime: De la mise en balance des intérêts, cas par cas, à l'analyse en deux phases',* RMCUE, 4 (1997), 13.
68 Case C-102/02, *Beuttenmüller* (2004), EU:C:2004:264, para. 18.

impliedly by conduct, on some previous occasion (…) The person concerned may not perform acts at variance with his earlier behavior.'[69]

52. Second, for the EU institutions and Member States, one may argue the application of the principle *patere legem quam ipsem facisti* (suffer the law that you yourself have created). In a *Commission vs Council* case,[70]AG Warner interpreted this principle as meaning that 'when public authority has adopted a rule for dealing with a particular category of cases, it may not, so long as the rule stands, depart from it in any individual case falling within that category. But this does not preclude the authority from changing the rule.'[71] In other words, so long as a discretionary revocation of the notified intention to withdraw is not inserted in Article 50 TEU through a revision of the Treaties, this Article cannot be interpreted as implying such discretion.

53. Taking into account the arguments presented at this stage of the study, and given the suggested readings of Article 50 TEU in the relation to contract law and International law, three intermediary conclusions can be drawn. First, a Member State's notification of its intention to withdraw can qualify as a promise, since it is a binding, unilateral commitment, the effect of which is ultimately the loss of Union Membership. Second, this promise can be considered as equivalent to a bargained-for consideration in contract law, since the 'terms of agreement' are sufficiently defined by Article 50 TEU and are known by the parties concerned *i.e*. the withdrawing Member States and the Union institutions involved in the withdrawal process. Third, as regards the possibility to revoke said notification (qualifying as a breach of promise), Article 50 TEU, interpreted in relation to the principles of legal certainty and sincere cooperation, can be considered as allowing for the application of promissory estoppel in view of safeguarding the legal effects created by a Member State's notification of its intention to withdraw.

54. Should it be accepted that the principle of promissory estoppel can indeed arise under Article 50 TEU, it remains to be seen what requirements should be met for the practical application of this principle.

4 The test: Applying Promissory Estoppel in the *Wightman* case

55. Contract law doctrine and the relevant International case law teach us that, for promissory estoppel to apply, two sets of requirements should be met. First, it should be shown that, through her conduct, a promisor gave a *clear* and *unequivocal representation* of her intention to commit (4.1.). Second, it should be established that the promisee relied on this representation and, having been induced into error by an alteration thereof, has suffered a damage (4.2.).

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69 Opinion, Case 41/59 et 50/59 (1960), EU:C:1960:46, p. 520, emphasis added.
70 Case C-81/72, *Commission v Council* (1973), EU:C:1973:60.
71 *Idem*, AG Opinion (1973), EU:C:1973:34, p. 593.

4.1 Requirement for the Promisor: A Clear Representation to Withdraw

56. In International Law, the requirement is that a State's conduct be unequivocal and consistent with the other declarations of that State. From an evidentiary point of view, the consistency of a State's conduct is usually a matter of indirect evidence: the relevant fact or *factum probandum* (the promissor's clear and unequivocal intention to commit) is inferred - rather than directly established - through various concurring *indicia* that render the presence or the occurrence of the relevant fact probable.

57. International case law, essentially dealing with territorial sovereignty disputes, provides some guidance on the types of conduct that reveal the presence of clear and unequivocal representations of intention. It should be noted that this case law concerns, for the most part, the application of estoppel from equity, not promissory estoppel. However, from an evidentiary point of view, the *relevant fact* in both cases is the same *i.e.* that a party's conduct be consistent and revealing of a clear and unequivocal intention to do or not to do something (be it the execution of an already existing conventional obligation or the accomplishment of a future act).

58. A classical example in International law is that of *acquiescence*: if, after a period of being a silent party to an Agreement, a State suddenly expresses its refusal to execute that Agreement arguing that - for whatever reason - it cannot be bound by it, that State is estopped since its silence as regards it status of contracting party constitutes a clear and consistent representation of its intention to be bound. This is, essentially, the *Temple of Preah Vihear* scenario.[72] Over fifty years after the signing of a Treaty establishing the frontier between Thailand and Cambodia, Thailand argued that its only motive for accepting said Treaty was its belief that the Preah Vihear Temple would fall under its sovereignty. This argument could, of course, not prosper, since Thailand's - alas belated - territorial claim over said Temple was contrary to its continued silence as regards the provisions of the Treaty signed in 1904.[73] Similarly, in the *North Sea Continental Shelf* case,[74] Germany signed but did not ratify a Convention on the delimitation of its North Sea frontier with Denmark and the Netherlands, thus raising the issue on

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[72] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, 15 June 1962, ICJ Reports (1962), 6. Similarly, in the *Arbitral Award Made by the King of Spain* case, dealing with the effect of an arbitral award on the frontier between Honduras and Nicaragua, the Honduras authorities argued that by accepting the appointment of the arbiter, Nicaragua was estopped from questioning his competency: 'Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award.' In the presence of a clear declaration of acceptance of the quality of arbiter of the King of Spain, Nicaragua was estopped from questioning the validity of the Award given by him. See *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment, 18 November 1960, ICJ Reports (1960), 25.

[73] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, cit. *supra*, note n° 72, 33: 'it is evident that such a contention would be quite inconsistent with Thailand's equally strongly advanced contention that these acts in the concrete exercise of sovereignty evidenced her belief that she had sovereignty over the Temple area: for if Thailand was truly under misapprehension about Annex I line - if she really believed that it indicated the correct watershed line - then she must have believed that (…) the Temple area lay rightfully in Cambodia.'

[74] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), 3.

whether the absence of ratification could affect a State's status of party to an Agreement. On this point, the ICJ established the conditions under which Germany would be precluded from arguing the non-binding nature of said Convention:

> 'the Federal Republic [would be] precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only *clearly* and *consistently evidenced acceptance* of that regime, but also had caused Denmark or the Netherlands, *in reliance* on such conduct, *detrimentally* to change position or suffer some prejudice.'[75]

59. There was no evidence to support such conduct in the case brought before the ICJ. However, the Court's observations reveal the two key dimensions to a State's representation of intention: a *unilateral dimension* (a State's own conduct) and a *relational dimension* (the belief that said conduct generates amongst third parties).

60. These two aspects seem to provide the lens through which a State's representation (an aggregate of verifiable declarations and behaviors) is usually assessed in International law, as can be seen in cases dealing with the interpretation of State officials' public declarations. For e.g. in the ICJ's *Legal Status of Eastern Greenland* case,[76] a statement made by the Norwegian Minister of Foreign Affairs was interpreted as recognizing that Greenland fell under Danish sovereignty, thus confirming prior statements made by Norwegian officials to third parties and revealing - with no ambiguity at all - the official position of Norway as regards the territorial sovereignty over Greenland.

61. It should, however, be noted that the declarations taken into account for the purpose of applying the principle of estoppel are those made by officials *authorised* to express a State's position. For e.g. in the *Legal Status of Eastern Greenland* case, the PCIJ considered that a reply, given by the Norwegian Minister of Foreign Affairs in response to a request by a diplomatic representative of another country, is binding for Norway. Alternatively, in the *Nottebohm* case,[77] the ICJ concluded that a consulate was not an organ with the necessary power to internationally bind a State. Similarly, in the *Gulf of Maine* case,[78] the ICJ considered that a certain government official had no authority to take a position on behalf of his Government.

62. If one analyses the UK's representation of its intention to withdraw in light of the cited International case law, there is no shortage of officials' declarations that clearly and consistently show the absence of

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75 *Idem*, 26, emphasis added.
76 *Legal Status of Eastern Greenland* Case *(Denmark v Norway)*, Judgment, 5 September 1933, Series A/B n° 53.
77 *Nottebohm case*, Preliminary Objections, 18 November181953, I.C.J. Reports (1953), 111.
78 *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports (1984), 246.

hesitation as regards the UK's commitment to actually leave the EU.[79] International law facilitates the application of 'Ockham's razor' to the plethora of a State's unilateral declarations and behaviors in order to separate those that are *legally relevant i.e*. that express a formal position, from those that are 'mere' political rhetoric. It follows, namely from the requirements in the *Legal Status of Eastern Greenland* case, that the only relevant *indicia* for the assessment of the UK's intention to leave the Union are declarations made by UK officials who are *empowered* to bind the UK (such as the UK Prime Minister) and who are able to provide sufficient grounds for reliance for the EU Institutions and the other Member States.

63. Taking into account the overall conduct of the UK government as regards its intention and endeavors to push forward with the Brexit, it seems apparent that, for the purpose of applying promissory estoppel, the requirements relative to the promisor's representation are met, without much difficulty.

4.2 Requirement for the Promisee(s): Reliance on the Representation to Withdraw

64. In traditional contract law as well as in International case law, the evidence of a promisee's reliance consists of two relevant facts (*facti probandi*): the *existence* of reliance and the *effects* of the latter.

65. The evidence of the existence of reliance[80] is produced through an evaluation of the promisee's motives to reasonably rely on the promisor's declarations and conduct in view of adjusting her behavior accordingly. The evidence regarding the effects of this reliance aims at establishing that, when the promisee was induced into error due to the promisor's misrepresentation, she suffered a damage.

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[79] In *Wightman* case, the UK confirmed this point. Opinion, Case C-621/18, *Wightman*, cit. *supra*, note n° 13, para. 47: 'The United Kingdom Government also states that a consultative opinion is being sought from the Court on a hypothetical revocation, which that government is not itself willing to effect. In its view, the Treaties establishing the European Union do not allow preliminary ruling proceedings to be used in that context, since Article 50 TEU does not envisage the possibility of seeking an opinion from the Court, unlike the provisions of Article 218(11) TFEU. It adds that the legality of that (possible) revocation should be challenged by means of a direct action, for failure to fulfil an obligation or for annulment, once revocation takes place. An advisory opinion from the Court in such a politically sensitive case as Brexit would, according to that government, entail interfering in the adoption of decisions still being negotiated, which must be taken by the United Kingdom's executive and legislature.'

[80] In Common law, a distinction is made between reliance and expectation. The justification to this distinction lies in the damage that promissory estoppel is to help repair. A part of legal scholarship considers that promissory estoppel should protect the reliance interest of the promisee *only*. Other scholars consider that the courts should fulfill the expectation triggered by the promise and not limit themselves only to the reliance loss suffered by the promisee. For an overview of this doctrine, see David W. Rankin, 'Concerning An Expectancy Based Remedial Theory of Promissory Estoppel', U.T. Fac. L. Rev., 69 (2011), 116, 124-125. This distinction is relevant if the promisee had suffered a damage. This distinction will, however, not be operative for the purpose of the present study because - as will be shown - unlike domestic law, there is no longer the requirement in International law for the promisee's reliance to be detrimental. For further reading on the concept of reliance, see Aaron R. Petty, 'The Reliance Interest in Restitution', S. Ill. U. L. J., 32 (2008), 365; Davies JD, 'Promises in Equity', Sing. J. L.S., (2000), p162.

66. From the perspective of contract law, reliance of the promisee is the element that truly gives rise to the application of promissory estoppel.[81] Historically, reliance on promises was a widespread practice until, in the XIXth century, a more black-and-white contract law doctrine began requiring that there be a clearer distinction between contractual obligations, that can legitimately and always inspire reliance, from promissory declarations, that can but exceptionally provide grounds for reliance:[82] 'as a logical matter, it was argued, reliance on a promise in a bargain context could never be reasonable - and therefore could never be actionable - unless the promisee had actually concluded a bargain with the promisor by giving or promising something in exchange for the promise. If such an exchange had occurred, the parties had formed a contract with consideration, and reliance recovery was unnecessary.'[83]

67. In order to pinpoint those exceptional cases in which promises provide consideration and are therefore actionable, Common Law scholars suggested several tests, one of them being the s.c. *Speidel test* or the '*reasons-to-know test*' which consists in answering the following five questions:

'(1) Did A understand in fact that B had made a promise? If not, there is no manifestation of assent.

(2) If so, did B know (that is, have actual knowledge) at the time of his conduct of A's understanding? If so, a promise is made.

(3**)**If B did not know, of what facts in the 'total situation' did B have actual knowledge?

(4)Given this knowledge, and taking B's level of intelligence into account, would B infer that if he acted or spoke in a certain way, A would understand that a commitment was made? If so, B has 'reason to know' of that understanding.

(5)If not, would B infer that there was a substantial chance thatA would understand that a commitment was made? If so, B does have a duty to act with reasonable care to avoid

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[81] See Charles L. Knapp, 'Rescuing Reliance: The Perils of Promisory Estoppel', Hast. L. J. 49(5-6), (1998), 1191, 1218 : 'if the promisor apparently intends to perform, and the promisee relies substantially on that intention, is the reliance that follows necessarily unreasonable merely because it took no account of the promisor's intention to be (or not to be) legally bound ? To so assert is simply ignroe the reality of daily life. We constantly trust others to do what they commit themselves to do, not because we think the law would compel them to, but because if doesn't occur to us that the law might have to. We expect performance because a commitment has been made, by someone whom we trust to keep her word.'

[82] Jay M. Feinman, 'Promissory Estoppel and Judicial Method', Harv. L. Rev., cit. *supra*, note n° 25, 681: 'the reliance principle of the eighteenth century did not fit within the structure of the classical jurisprudence of the nineteenth century. Classical law comprised a series of dichotomies, the most fundamental of which was that between the individual and the community **-** in political terms, the dichotomy between personal freedom and government coercion.'

[83] *Idem*, 685, emphasis added.

misunderstanding; a failure to proceed with reasonable care is, apparently, tantamount to(reason to know).'[84]

68. The 'reasons to know' test was tailored for disputes between private parties brought before domestic Courts. If one adjusts the wording of the questions in this test and, in lieu of private parties, applies it to the EU and the Member States, it is likely that the answers to these questions be affirmative:

Q. n° 1: Did the EU Institutions and Member States understand in fact that the UK had made a promise to withdraw? If not, there is no manifestation of assent.

Yes, after the notification of the declaration to withdraw, there is sufficient proof that the Union institutions adjusted their conduct in accordance with the intention expressed in this notification. Pursuant the requirements set out in Article 50(2), TEU, the European Council drafted the guidelines, the European Commission pursued and concluded the negotiations of the withdrawal agreement.

Q. n° 2: If so, did the UK know (that is, have actual knowledge) at the time of his conduct of the EU's understanding? If so, a promise is made.

Yes. The unfolding of the procedure set out in Article 50(2) TEU clearly indicates that the Union institutions were not left to guess the UK's true intentions as regards its withdrawal from the EU.

Q. n° 3**:** If the UK did not know, of what facts in the 'total situation' did the UK have actual knowledge?

Both the UK and the Union institutions and Member States had, at all times, full knowledge of all the relevant facts relative to the UK's withdrawal from the Union.

Q. n° 4: Given this knowledge, would the UK infer that if its officials acted or spoke in a certain way, the Union institutions and other Member States would understand that a commitment was made? If so, the UK has 'reason to know' of that understanding.

There wasn't and isn't a misrepresentation from the UK's officials whose official declarations (i.e. the only ones that are legally relevant for the application of the principle of promissory estoppel) were always clear and consistent. Moreover, the UK's compliance with the requirements set out in Article 50(2) TEU shows that the UK contributed to the understanding of its intention to leave the Union.

[84] *Idem*, 713-714.

Q. n° 5: If not, would the UK infer that there was a substantial chance that the Union institutions and Member States would understand that a commitment was made? If so, the UK does have a duty to act with reasonable care to avoid misunderstanding; a failure to proceed with reasonable care is, apparently, tantamount to (reason to know).

Considering that the UK complied with the requirements set out in Article 50(2) TEU and given the subsequent declarations and conduct of UK officials, there was no need to infer *the understanding that the Union Institutions and Member States would have had of its intention to withdraw*.

69. Indeed, unlike some instances where promises can stem from acquiescence, the case of Brexit seems to leave very little room for inferences as it passes the tests of *clarity* and *consistency* of the promisor's (the UK government's) conduct and the reliance of the promisee (the EU institutions), on this conduct. From an evidentiary point of view, Brexit seems to be a positive case of *res ipsa loquitur* (the facts speak for themselves). This observation seems to be confirmed by the Conclusions of the European Council's Special Meeting of 13 December 2018[85] in which the following is stated:

> 'The European Council reconfirms its conclusions of 25 November 2018, in which it endorsed the Withdrawal Agreement and approved the Political Declaration. The Union stands by this agreement and intends to proceed with its ratification. *It is not open for renegotiation*.'[86]

70. The cited passage can be interpreted as confirming the European Council's firm reliance ('…*not open for renegotiation…*') on the UK's notification to withdraw from the Union and the succession of acts and declarations made thereafter.

71. Only one aspect of the traditional promissory estoppel doctrine can cast some doubt as regards the possibility to apply this principle in view of enforcing the UK's promise to withdraw from the Union: in contract law, it is required that the promisee suffer a damage. This is a fairly 'classical' requirement in cases dealing with liability arising from breach of consideration: 'the reason for enforcing a contract was typically described as consideration. Based on the elements of the writ of debt (benefit to promisor) and of the writ of assumpsit (detriment to the promisee), consideration came to be generally defined as either a benefit to the promisor or a detriment to the promisee.'[87]

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85 European Council Special Meeting Conclusions, 13-14 December 2018, EUCO 17/18.

86 *Idem*, para. 1.

87 Eric M. Holmes, 'The Four Phases of Promissory Estoppel', cit. *supra* note n° 31, 54. Both in English and American definitions of consideration 'required that a plaintiff prove only one element in order to succeed on a contract theory: a benefit to the defendant or a detriment to the plaintiff. To this preclassical element of consideration - namely benefit to the promisor or detriment to the promisee - Classical Legal Though (CLT) sought to add a second element. This was the element of bargain. According to CLT, it is not merely sufficient that the promisor had benefited or that the promisee had suffered some detriment: CLT insisted that the benefit or the detriment must have been conferred, or suffered as the case maybe, as an inducement for

72. While, in the case of Brexit, the greater damage would arguably be suffered by the promisor (*i.e.* the UK), it should be noted that, in International case law, the requirement for a promisee's detrimental reliance on a promise was gradually abandoned. The distancing, on this point, of International law from contract law happened gradually. Initially, the ICJ did require that a reliance on a promise be the cause for damage. In the *North Sea Continental Shelf* case for e.g.,[88] the Court considered that there should be a direct causal link between the advantage in favor of one party and the loss suffered by another party. Subsequently however, the ICJ began to dissociate the promisor's advantage from the promisee's loss. This shift from the cumulative view of the effects of reliance (benefit *and* damage) to an alternative one (benefit *or* damage) was confirmed, by the ICJ, in its ruling in the *Land, Island and Maritime Frontier Dispute.*[89]

73. Finally, the requirement for detriment was altogether abandoned. In the *Arbitral Award Made by the King of Spain* case,[90] Nicaragua was estopped from arguing the invalidity of the Award of the King of Spain on the demarcation of its frontier with Honduras, even though Honduras suffered no detriment from its reliance on Nicaragua's prior - implicit - acknowledgment of said Award's authority. Similarly, in the *Nuclear Tests* case,[91] the ICJ considered that a State's the *binding character* of a State's unilateral declaration did not depend on any subsequent acceptance of the declaration, not even any reply or reaction from other States.[92]

74. If it is established that Article 50 TEU allows for the application of the promissory estoppel principle and that the requirements for said application are the same as those found in International case law, the condition that a damage be suffered due to the EU institutions' and Member States' reliance on a State's notification to withdraw from the Union is irrelevant. For the purpose of applying promissory estoppel, the preponderant element seems to be the *existence* of reliance; the requirement of a damage being somewhat obsolete, at least from the perspective of International law.

75. It follows that, a reading of Article 50 TEU in light with the International law on estoppel, the case of Brexit seems to fit the bill as regards the requirements that should be met for the application of the promissory estoppel test. The EU institutions' conduct and engagement in the negotiations of the Brexit

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the promise - *i.e.*, the action conferring benefit or inflicting detriment must have been bargained for in exchange for the promise.' See Joel M. Ngugi, 'Promissory Estoppel : The Life History of an Ideal LEgal Transplant', U. Rich. L. Rev., 41 (2007), 425, 430.

88 *North Sea Continental Shelf cases*, cit. note n° 77.

89 ICJ, judgment of 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening*), I.C.J. Reports 1990, p. 92, p. 30: "*so far as Nicaragua relies on estoppels, the Chamber will only say that it sees no evidence of some essential elements required by estoppels: a statement or representation made by one party to another and* reliance upon it by that other party to his detriment or to the advantage of the party making it." (emphasis added).

90 *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, cit *supra*, note n° 72.

91 *Nuclear Tests Case (Australia v France)*, Judgment, 20 December 1974, ICJ Reports (1974), 253.

92 *Idem*, para. 43.

deal shows, with little doubt, that there was reliance on the UK's notification to withdraw and that this notification was viewed as a serious, *binding commitment*, calling for a concerted effort toward the finalizing of a s.c. 'orderly Brexit'. If the ECJ was to apply the principle of promissory estoppel under Article 50 TEU, there would be little difficulty - in our opinion - in meeting the requirements that the application of this principle calls for.

5 Concluding Remarks

76. What is ultimately at stake in this study is the attitude of the EU that Article 50 TEU allows or encourages. Using a - somewhat inappropriate but nonetheless illustrative - parent-child metaphor, the question is if the Union should behave as a principled parent (a given word is a given word) or as a forgiving parent (welcoming the return of the prodigal child). To answer this question is not as easy as it may *prima facie* seem, since it presents a choice amongst the multitude of the EU's identity attributes. If the EU should be principally viewed as a constitutional order,[93] common values should prevail and a certain level of 'axiological pragmatism' should be adopted: the abandoning of decades-long sharing of values seems a task more colossal than the adherence to those values (*i.e.* the requirement for adhering Member States).

77. If the EU is viewed as a Union of law however, some attention should be given to the procedural aspects of things since procedures are, in essence, the practical means through which shared values are protected. In this sense, principles like promissory estoppel - as undesirable as they may be in practice - must at least be taken into consideration.

78. The present study is not to be viewed as arguing in favor of setting out an expulsion procedure on the grounds of Article 50 TEU. This point was raised by AG Campos Sánchez-Bordona:

> 'Indeed, that refusal would be tantamount to an indirect expulsion from the European Union, when nothing in Article 50 TEU suggests that the withdrawal procedure may be converted into a means of expelling a Member State. Moreover, the Convention on the Future of Europe did not agree an amendment which proposed supplementing the Member States' voluntary right of withdrawal with a right of expulsion from the European Union with regard to Member States that persistently infringed the Union's values.'[94]

79. The present study aims at showing that an interpretation of Article 50 TEU different from that of the ECJ in the *Wightman* case is possible, if this Article is analysed more through the prism of equity and

[93] On the need for a 'constitutional reading' of Article 50 TEU, see Piet Eeckhut and Eleni Frantziou, 'Brexit and Article 40: A Constitutionalist Reading', CMLRev, 54 (2017), 695.

[94] Opinion, Case C-621/18, *Wightman*, cit. *supra*, note n° 13, para. 112.

legal certainty and less through that of the legal and political implications of a State's voluntary loss of its EU Membership status.

80. Such an approach may appear overly formal. We consider, however, that the principle of legal certainty should apply in a consistent way both to the unilateral expressions of will of the EU institutions (in the adoption of Secondary law acts), to the internal expressions of will of the Member States (when exercising discretion in an area covered by the Treaties) and in the exchange of consent in the EU-Member States relations. For this reason, Article 50 TEU can be interpreted as allowing the application of the principle of promissory estoppel, although it may appear more desirable that, however justified, this principle be, indeed, discarded in the case of Brexit and in possible future withdrawal cases.

81. Ultimately, the 'shroud of silence' covering the right to withdraw from the EU appears to be more difficult to remove than one would have hoped. If anything, this study confirms that silence is, indeed, one of the hardest arguments to refute.