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Exiting the Euro

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ABSTRACT

The Crisis in the Euro Zone threatens to break up the Euro and perhaps derail the European Union itself. Many argue that a Member State exiting the Euro would be not only unthinkable, but also a practical impossibility, given the status of the "constitutionality" of European law, the treaties forming the European Union and the Euro, and customary European law. Europeans have been, for centuries, very creative in forging economic and trading alliances—some that appeared to be political alliances and even elementary union. They have also, on more than one occasion, attempted to confect monetary stability. Some of these attempts were successful for long periods, while the monetary bits have often not been so successful. This article explores the proposition that a unilateral exit, an expulsion of a member, a breakup of the European Monetary Union (EMU), or even a breakup of the European Union itself is possible under international law. Indeed, some or a combination of the foregoing may transpire. Some consider such an action impossible inasmuch as Member States have relinquished their sovereignty. It can, however, be argued that a Member State can either withdraw or be ejected from the EMU under existing law.

INTRODUCTION

On October 12, 2012, the European Union won the Nobel Peace Prize.[1] At the time, the EMU was struggling to bail out a number of

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[1] Alan Cowell & Nicholas Kulish, *Nobel Committee Gives Prize to European Union*, N.Y. TIMES, Oct. 12, 2012, *available at* http://www.nytimes.com/2012/10/13/world/nobel-peace-prize.html.

Member States—Greece in particular—and some said the award symbolized "as much hope as achievement."[2] With the award, the Nobel committee seemed to be urging the EU not to allow its recent struggles to abort its grand mission of a unified Europe and "sounded at times like a plea to support the endangered institution at a difficult hour."[3] The committee thereby forcefully demonstrated the continuing strong appeal of European unity to the psyche of many Europeans.

Though it began as an economic exercise, the EU was clearly intended to serve as a mechanism to prevent another European war and would be "indispensable to peace."[4] Additionally, the Euro was intended to be the ultimate achievement of European solidarity and was designed to fortify the common market by "reducing transaction costs and removing the risks of competitive devaluation."[5] Now, some question whether the Euro will survive and, more importantly, whether it could destroy the EU.[6]

A breakup of the EU—or any feature of it—is supposed to be difficult. In many respects, its founders meant the EU to be permanent. Thus, when discussing a possible exit of a Member State, the rethinking by a Member State of its conditions of membership, a breakup of the EU, or the disintegration of the single European currency, one must be careful to analyze the legal foundations of the EU, custom and practice in the EU and international law, and the text of various treaties.

In 2009, Member States ratified the Treaty of Lisbon.[7] Among its provisions, the treaty included an article on "voluntary withdrawal of a Member State from the Union."[8] Article 50 of the Treaty of Lisbon allows a Member State to withdraw without any preconditions and

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[2] *Id.*

[3] *Id.*

[4] Harold Callender, *France Proposes a Coal-Steel Pool With Germans in it*, N.Y. TIMES, May 10, 1950, *available at* http://www.nytimes.com/packages/pdf/topics/eu/1950-05-10-NewsArticle.pdf.

[5] *Charlemagne: Coming off the Rails*, THE ECONOMIST, Oct. 20, 2012, *available at* http://www.economist.com/news/europe/21564851-euro-was-meant-underpin-single-market-it-may-end-up-undermining-it.

[6] *Id.*

[7] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon] (amending the Treaty on European Union and the Treaty Establishing the European Communities). The Treaty of Lisbon renamed the amended treaties the Treaty on the Functioning of the European Union (commonly referred to as the TFEU). In doing so, the Treaty of Lisbon diplomatically avoided referring to the document as a "constitution." *Id.*

[8] Press Release, European Union, Explaining the Treaty of Lisbon (Dec. 1, 2009), http://europa.eu/rapid/press-release_MEMO-09-531_en.htm.

provides that any such withdrawal will become effective upon the occurrence of either (1) negotiation of withdrawal arrangements with the other Member States, or (2) two years following the initial election of withdrawal.[9] Regardless of the reasons for inclusion of such a provision, it is now clear that there is a path by which a Member State can leave the EU in its entirety. Less clear, however, is whether a Member State can choose to stop using the Euro and return to using a national currency, without abandoning the European Union as a whole.

Some features of the European Union remain popular, such as elimination of trade barriers and freedom of movement. European citizens now take these essential features for granted.[10] However, it has become clear that the main challenge to preservation of the EU is managing the ongoing financial crisis within the structure of a single currency. If the EU cannot continue to exist in its current formulation and membership without a single currency, then this is more than a Greek, Italian, or Spanish problem alone. Instead, it is an existential challenge to the EU. It is therefore critical to carefully analyze how one or a number of Member States can exit the EMU, within the current legal framework of the EU and without destroying the EU in its entirety. This article will explore the proposition and make the argument that such an exit or modification of treaty obligations, while challenging, is legally possible.[11]

European Creativity

In order to understand the current state of the Euro, we must first explore the origins and evolution of the EMU and the EU. Since the Middle Ages, Europeans have been at the forefront in the area of legal and economic integration. Economists from the days of Adam Smith[12] to the modern day have argued for the benefits of free trade. The Charter of the United Nations calls for all nations to "employ international machinery for the promotion of the economic and social advancement of all peoples."[13] The famous twentieth Century economist, Paul Samuelson, in extolling the virtues of free trade stated:

> There is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one,

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[9] *Id*.

[10] Jack Ewing, *Despite Prize, European Union Loses Much of Its Appeal as Unity Eludes Continent*, N.Y. Times, Oct. 12, 2012, http://www.nytimes.com/2012/10/13/world/europe/despite-prize-unity-is-elusive-in-the-european-union.html.

[11] *See* Frederick V. Perry et al., *Is There A Way out of the Euro?*, 25 Int'l J. Fin. 1 (forthcoming 2013).

[12] Adam Smith, An Inquiry Into the Nature and the Cause of the Wealth of Nations bk. IV, at 414 (Modern Library ed. 1937) (1776).

[13] U.N. Charter pmbl.

> namely: Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product for all nations, and makes possible higher standards of living all over the globe.[14]

Europeans have waived the banner of free trade for centuries and have been among the world's innovators in cooperation in the legal, commercial, and economic spheres. The *Lex Rhodia*, or the Rhodian law, for example, provided a codification of merchant practices governing trade in the Mediterranean area.[15] In the thirteenth century, codified laws, thought to have originated in Barcelona, were carried by merchants throughout Europe.[16] Because "(t)hroughout the centuries, consensuality appears as the bastion of international commerce,"[17] these laws were adopted as custom and used throughout the trading area. Thus, from approximately 1340 AD, the *Consolato del Mare* became recognized as an "international body of mercantile custom."[18]

As a result of a growth in sea borne commerce, regulations arose in the twelfth and thirteenth centuries which formed a true international law governing commerce in the European area. This was not a codified law of any particular sovereign, but rather a customary law,[19] which later, when codified in various sovereign areas, was all similarly based on the universal law merchant, since:

> The socioeconomic features which typified this ancient law Merchant also constituted the reasons for its subsistence. There was the underlying need to promote trade based on freedom, subject to the need to pay a "just price" and subject to the need to avoid usurious interest rates. Law which mandated trade beyond this arena would generate economic loss, cause social disapproval and infringe upon public welfare. Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the marketplace—to the loss of both the foreign and the local merchant community.[20]

A demand for expanding trade and a mutual need for free trade and uniform laws or customs made Medieval Europe an ideal place for

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[14] PAUL A. SAMUELSON, ECONOMICS 692 (10th ed. 1976).

[15] Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage,* 12 J. MAR. L. & COM. 153, 156 (1981).

[16] *Id.*

[17] *Id.* at 153.

[18] *Id.* at 156.

[19] *Id.* at 157.

[20] *Id.*

such a generalized set of law and custom accepted by, if not all, at least most.[21]

A sort of precursor to the European Union was formed in the 12th century by a group of European cities wishing to trade among themselves and provide not only common rules for trade, but also security for such trade. This group became known as the Hanseatic League.[22] The league lasted for 300 years and came about because feudal overlords were generally weak and because people who lived in cities had different interests from those of such overlords. City dwellers wanted trade.[23] "The main activities of the groups of nobles involved marrying and feuding with one another and raising taxes from their subjects. They were rarely noted for their interest in trade, except as a source of taxation."[24] Trading cities in Germany, Belgium, the Baltic States,[25] Poland, the Netherlands, and Russia traded among themselves as members of this alliance. The rise of the nation-state around the time of the Peace of Westphalia led to the demise of the League. Prominent merchants from the cities banded together to form a loose alliance in order to protect themselves and share risks associated with trade, travel, and troublesome feudal lords.[26]

The Hanseatic League had a form of parliament that discussed common interests, such as common approaches to piracy, trading matters, and troublesome sovereigns. The league raised soldiers and fleets to protect themselves when necessary.[27] They even defeated King Valdemar of Denmark, who had attacked the Hansa city of Visby over trading disputes. Over 70 cities of the league contributed to that defeat.[28] The league, however, was never a coherent political organization, since its members' conflicting interests prevented any real political cohesion.[29] Even so, the league was successful in imposing its political and commercial will over the region and in defending itself and its interests for centuries.

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[21] *Id.* at 158.

[22] *See* Stephen Halliday, *The First Common Market?*, 59 HIST. TODAY 31 (July 2009), *available at* http://www.historytoday.com/stephen-halliday/first-common-market-hanseatic-league.

[23] *Id.*

[24] *Id.* at 32.

[25] The term "state" or "states" will be used throughout this Article. It is used in its international legal context to mean a sovereign nation state. To the extent that the term refers to a sovereign state, a member of the United States of America, such as the state of Ohio, it will be precisely so stated.

[26] Halliday, *supra* note 22.

[27] *Id.*

[28] *Id.*

[29] *Id.*

Stephen Halliday has suggested a comparison between the efforts of the League and the modern European Union because "(t)he EU started as a means of promoting peaceful trading relationships among its members, in particular the old enemies of France and Germany, and has attempted to develop a degree of ever greater political union among them. Like the Hansa, the EU has often promoted the trading interests of its own members at the expense of others."[30]

We know also that modern Public International Law is said to have been first created in Europe, and that it rose to prominence with the rise of the European nation-state.[31] The period between the Peace Treaty of Westphalia of 1648[32] and the Congress of Vienna of 1815,[33] very much a European phenomena, is generally considered the formation period of classical international law.[34] The Dutch writer Hugo Grotius (1583-1645) is widely considered the father of modern international law,[35] though it appears that the Spanish friar, Francisco de Vitoria (1492-1546), was the first to write on the subject.[36] Both writers were European, and their writings have had a great deal of influence on subsequent developments. In fact, international law was generally Eurocentric until after World War II.

In 1951, with the goal of preventing future wars, France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg formed the European Coal and Steel Community by pooling the region's coal and steel industries.[37] Six years later, those same six states created the European Economic Community, thereby removing tariff barriers among themselves.[38] In 1967, they become the European Community and, in 1991, after being joined by Britain, Greece, Spain, and Portugal, the Member States signed a treaty in Maastricht, the Netherlands, which laid the groundwork for a common currency.[39] The Maastricht Treaty was a major addition to the Treaty of Rome and created a common citizenship, a common defense and security policy,

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[30] *Id.*

[31] César Sepúlveda, Derecho Internacional Público 7 (5th ed. 1973).

[32] The Treaty of Westphalia ended the so-called Thirty Years War—a general European war arising partly as a result of the Protestant Reformation. *See* The Treaty of Westphalia, *available at* http://avalon.law.yale.edu/17th_century/westphal.xasp.

[33] The Congress of Vienna ended the Napoleonic Wars in Europe.

[34] Alina Kaczorowska, Public International Law 3 (4th ed. 2010).

[35] *Id.*

[36] Sepúlveda, *supra* note 31, at 13.

[37] *The March Toward Unity*, Scholastic Update, Mar. 22, 1999, at 4.

[38] *Id.*

[39] *Id.* at 4-5.

and economic and monetary union.[40] To symbolize this renewed commitment, the name was changed from European Community to European Union.[41]

Since the Treaty of Rome, the Member States have tried various methods to attain monetary stability, but not all have been successful.[42] The march toward a common currency was fraught with difficulties.[43] At first the Member States wished merely to be able to have stable exchange rates.[44] In the 1970's, the German Mark was buffeted by an unstable dollar.[45] This led to unstable exchange rates throughout the European Community, which gave rise to serious planning and coordination problems among the Member States, distorting intra-Community trade.[46] Then, in 1972, there was an effort to coordinate Community currencies by means of a "Snake" mechanism, whereby the currencies, linked together, were supposed to move together against outside currencies.[47] The British left the Snake a few weeks after it started; the French left twice and rejoined.[48] The Snake appeared to be neither popular, nor widely successful.[49]

In 1978, the Council of Ministers adopted a Resolution to create a European Monetary System ("EMS"). Thus, the EMS created the Exchange Rate Mechanism.[50] The Exchange Rate Mechanism served as a mini-Bretton Woods arrangement among the currencies of the Member States.[51] The Member States' currencies could float in tandem against the Dollar and the Yen, providing a counterweight against them, and, thereby, it was thought, provide for stable exchange rates and economic growth.[52]

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[40] Treaty Establishing the European Economic Community art. 1, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome], *available at* http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf ("By this Treaty, the high contracting parties establish among themselves a European Economic Community."); Maastricht Treaty, arts. 2, 8, 199, Feb. 7, 1992, 2002 O.J. (C 325) 5, *available at* http://www.eurotreaties.com/maastrichtec.pdf.

[41] *Id.*

[42] *See* Terence Fokas, *Economic and Monetary Union in Europe: The Legal Framework and Implications for Contractual Obligations*, 36 Tex. J. Bus. L. 2, 5-9 (1999).

[43] *Id.* at 5-13.

[44] *Id.* at 5-9.

[45] LOWENFIELD, INTERNATIONAL ECONOMIC Law 782 (2d ed. 2008).

[46] *Id.* at 772.

[47] *Id.*

[48] *Id.*

[49] *Id.*.

[50] LOWENFIELD, *supra* note 45, at 773.

[51] *Id.*

[52] *Id.* at 774.

Each of the Member States that participated in the Exchange Rate Mechanism was required to both establish a rate for its currency, denominated in terms of a European Currency Unit (ECU), and to maintain that rate with a prescribed margin.[53] If the currency approached either extreme of that margin, the issuing country of the currency, or its central bank, was required to intervene.[54] If it needed money to do that, it could borrow on a short-term basis from a central fund to which all Members had contributed.[55] The ECU was a precursor to the Euro, which was created twenty years later.[56] The ECU functioned as both a unit of account, based on a basket of currencies that had different values weighted in accordance with their relative economic importance, as well as an asset that could be used for intervention and settlement among the central banks of the Community.[57] This system depended not only upon the Member States following the foregoing mechanism, but also upon their economic performance.[58] If both operated smoothly, the system would work.[59] However, if the economic performance of the Member States was not sufficiently uniform, the system simply could not boost the weaker currencies.[60]

Though the EMS had many ups and downs in its brief history, it appeared to be working by the end of the 1980s.[61] That success led to the creation of the Maastricht Treaty, calling for the formation of an Economic and Monetary Union (EMU) with a common currency and a single European Central Bank.[62] After execution of the Maastricht Treaty in February 1992, and prior to its ratification and implementation, the EMU essentially collapsed.[63] The German Mark was adversely impacted, the Pound and the Lira were unable to maintain stability, and the French Franc was in turmoil.[64] The Maastricht Treaty was barely ratified.[65] Supporters achieved ratification with the backing of Denmark, which only ratified the treaty on the condition that it would not have to become a user of the Euro.[66]

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[53] *Id.*
[54] *Id.*
[55] LOWENFIELD, *supra* note 45, at 774.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 775.
[59] *Id.*
[60] LOWENFIELD, *supra* note 45, at 775.
[61] *Id.* at 776.
[62] *Id.* at 777.
[63] *Id.* at 782.
[64] *Id.* at 778-79.
[65] LOWENFIELD, *supra* note 45, at 785.
[66] *Id.*

The objective of the Euro was to do away with divergence of currency values and interest rates.[67] Members would no longer be able to devalue their currencies.[68] Moreover, although fiscal policies (decisions regarding expenditures and revenues) were to be controlled by each Member State, these decisions were to be subject to strict convergence criteria and under the supervision and control of authorities in Brussels.[69] Just as importantly, a single currency had a symbolic political value: unification.

The Maastricht Treaty requires that the Member States ensure that their governments do not manage their central banks or require the banks to report to them:

> ARTICLE 106
> 1. The ESCB shall be composed of the ECB and of the national central banks.
> 2. The ECB shall have legal personality.
> 3. The ESCB shall be governed by the decision-making bodies of the ECB which
> shall be the Governing Council and the Executive Board. . .
> ARTICLE 108
> Each Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is
> compatible with this Treaty and the Statute of the ESCB.[70]

Another requirement of the Maastricht Treaty is that Member States "regard their economic policies as a matter of common concern and shall co-ordinate them within the (European) Council . . ."[71] Surveillance by the European Commission must focus on two main issues: (1) the ratio of government deficit to gross domestic product, and (2) the ratio of government debt to gross domestic product.[72] During the transition stage, the performance of all Member States was closely monitored.[73] Once the Euro took effect, it was highly questionable as to whether Belgium and Italy would be able to comply with the new

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[67] *Id.* at 782.
[68] *Id.*
[69] *Id.*
[70] Maastricht Treaty, arts. 106, 108, Feb. 7, 1992, 2002 O.J. (C 325) 5, *available at* http://www.eurotreaties.com/maastrichtec.pdf.
[71] *Id.* at art. 103.
[72] LOWENFIELD, *supra* note 45, at 783-84.
[73] *Id.* at 784.

guidelines.[74] In the end, they were both permitted to enter the EMU, since it appeared that their trends were heading in the right direction.[75] Economists agreed that, at the moment of its formation, the Euro zone was not an optimum currency area, but many believed that over time it could become closer to being one.[76]

However, not all Member States followed the directives. As a result, economies diverged and the measures put in place by the Maastricht Treaty were not followed, and/or, arguably, did not work. For example, even after its first bailout, the Greek politicians failed to live up to their obligations for reform.[77] Thus, from the beginning of this crisis, the northern Europeans have resented funding what they see as the profligacy and low work ethic of their southern brethren.

German leaders believe there is a need to fix the problem.[78] It is not as if the Euro crisis is a matter that can be easily rectified, however, or even that it is simply a western European problem. The issues at hand are, and have been, so serious that *The Economist* proclaimed in 2011:

> So grave, so menacing, so unstoppable has the euro crisis become that even rescue talk only fuels ever-rising panic. Investors have sniffed out that Europe's leaders seem unwilling ever to do enough. Yet unless politicians act fast to persuade the world that their desire to preserve the euro is greater than the markets' ability to bet against it, the single currency faces ruin. As credit lines gum up and outsiders plead for action, it is not just the euro that is at risk, but the future of the European Union and the health of the world economy.[79]

Further still, some Europeans are losing faith in the "European Experiment."[80] They wonder if it is worth it to lose their sovereignty in both everyday and fiscal matters.[81]

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[74] *Id.* at 787.

[75] *Id.*

[76] Antonin Rusek, *The Nature of Shocks in Eurozone*, 36 ATL. ECON. J. 371 (2008).

[77] *The Euro Crisis: What to Do About Greece,* THE ECONOMIST, Jan. 28, 2012, http://www.economist.com/node/21543536.

[78] *See Europe's Currency Crisis: How to Save the Euro,* THE ECONOMIST, Sept. 17, 2011, http://www.economist.com/node/21529049.

[79] *Id.*

[80] *See Charlemagne: A Flawed Temple*, THE ECONOMIST, Mar. 16, 2013, http://www.economist.com/news/europe/21573553-loss-legitimacy-may-now-be-biggest-threat-european-project-flawed-temple.

[81] *See id.*

THE LAW OF TREATIES

Social and political groups, whether they are primitive tribes or modern states, commonly have rules by which they regulate their conduct.[82] At the modern state level, we typically call them laws. Of course in earlier, more primitive times, social groups governed themselves by custom, which was not written down anywhere, but was merely remembered and followed.[83] Such customs took on an "aura of historical legitimacy."[84] States have recognized this notion of historical legitimacy in the international arena for centuries,[85] and it has come to define customary international law today. The role it plays in international legal obligations,[86] as international custom, is evidence of a general practice accepted as law.[87]

Within those domestic systems of laws, modern states have rules governing relations, economic and otherwise, between individuals and entities. The documentation and the measure of those relations are generally referred to as "contracts." A contract is simply a set of promises that the law will recognize as worthy of being enforced.[88] Such law of contracts or, more generally, obligations as they are referred to in many civil law countries,[89] has rules defining when a contractual relationship arises, requirements for the formation of contractual obligations, the precise obligations, when such obligations arise, what constitutes a breach of the obligations, when the breach arises, and what the remedies are for such breach.

This principle of making enforceable promises has also existed at the state level, between states, for a very long time.[90] We often call such international arrangements "treaties."[91] Every state can enter

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[82] *See generally* Perry et al., *supra* note 11.

[83] MALCOLM S. SHAW, INTERNATIONAL LAW 72 (6th ed. 2008).

[84] *Id.*

[85] SEPÚLVEDA, *supra* note 31, at 93.

[86] For example, the Statute of the International Court of Justice, in defining the sources of international law, places treaties and customary international law as the as the primary source. *See* Statute of the International Court of Justice art. 38, Oct. 24, 1945, *available at* www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

[87] *Id.*

[88] *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 1 (4th ed. 1998).

[89] *See* MANUEL BEJARANO SÁNCHEZ, OBLIGACIONES CIVILES 26 (5th ed. 1999).

[90] The first international treaty of which we have written evidence occurred between the city-states of Ummah and Lagash in Mesopotamia around the year 3100 B.C. *See* CARLOS ARRELLANO GARCÍA, PRIMER CURSO DE DERECHO INTERNACIONAL PÚBLICO 3 (4th ed. 1999).

[91] SHAW, *supra* note 83, at 72.

into a treaty.[92] The law of treaties deals with many of the same issues as the domestic law of contract, but on an international level.[93] In international law, treaties are generally the source of written law,[94] as opposed to customary international law. Treaties are an important element of international law; they work as a tool for both recognition and creation of international legal obligations, and "have always been an indispensable tool of diplomacy."[95] We see that "states transact a vast amount of work using the device of the treaty; . . . wars [are] . . . terminated, disputes settled, territory acquired, special interests determined, alliances are established, international organizations are created,"[96] and private or individual rights and obligations are generated.[97]

Accordingly, "[r]ecognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,"[98] Member States of the United Nations created the Vienna Convention on the Law of Treaties, which codified prior customary international law on treaties and created some new norms.[99] The Vienna Convention applies to treaties completed after the Vienna Convention entered into effect as to its signatories.[100] The Treaties relating to the formation and continuation of the European Union and the EMU are multilateral treaties, and in the case of multilateral treaties, as to those Member States who ratified or acceded to the Vienna Convention prior to signing any such EU treaties, the Vienna Convention applies to their EU treaty signature and compliance.[101]

Where the Vienna Convention does not control matters, customary international law continues to apply.[102] Accordingly, despite the fact that the Vienna Convention itself does not apply retroactively, customary international law does apply to any such treaties entered into by contracting states. However, inasmuch as the Vienna Convention codifies existing customary international law, it is generally con-

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[92] Vienna Convention on the Law of Treaties art. 6, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
[93] *See* VALERIE EPPS, INTERNATIONAL LAW 55 (4th ed. 2009).
[94] CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW 67 (2010).
[95] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 1 (2d ed. 2007).
[96] SHAW, *supra* note 83, at 902-03.
[97] *See, e.g.*, United Nations Convention for the International Sale of Goods, April 11, 1980, 1498 U.N.T.S. 3.
[98] *Id*. pmbl.
[99] SHAW, *supra* note 83 at 903.
[100] Vienna Convention, *supra* note 92, art. 4.
[101] SHAW, *supra* note 83, at 903.
[102] Vienna Convention, *supra* note 92, pmbl., art. 38.

sidered by states to reflect the norms of treaty law for signatory states and non-signatory states alike.[103]

In other words, the Vienna Convention is considered a reflection of customary international law by both non-signatory states, who consider themselves bound by it,[104] and by international and domestic tribunals, who apply its terms even to treaties entered into decades before its creation.[105]

The famous legal writer, J. L. Brierly, writing in the 1920's, long before the creation of the Vienna Convention, stated that: "[c]ustom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one."[106] Customary international law binds states, so long as it is generally accepted. This is ascertained from the practice and behavior of states.[107] Nevertheless, what states generally do is half of the equation needed to determine the obligations provided by customary international law. States must act in a certain way out of the belief that such acts are legally required. They must act, in other words, under what is termed *opinion juris*.[108]

Customary international law has governed the law of treaties for thousands of years. By the time of the outbreak of World War I, there were around 8,000 international treaties in operation.[109] The League of Nations registered 4,822 treaties. Since 1945, the United Nations has registered over 54,000 treaties.[110] States have deposited over 500 multilateral treaties with the United Nations.[111] It is estimated that this figure accounts for only about 70% of treaties entered into force since the formation of the United Nations.[112] Customary international law governed treaties in the absence of any codification of treaty rules[113] as set forth in the Vienna Convention.

We will examine the matter of whether and to what extent a state may suspend obligations under a treaty, exit from certain obligations created by a treaty relationship—whether that exit be unilateral

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[103] NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW 13 (1994).
[104] AUST, *supra* note 95, at 12.
[105] *Id*. at 12-13.
[106] J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 59 (6th ed. 1963).
[107] SHAW, *supra* note 83, at 73.
[108] *Id*. at 75.
[109] Aust, *supra* note 95, at 1.
[110] *Id.*
[111] *Global Issues: International Law*, UN.ORG, http://www.un.org/en/globalissues/internationallaw/ (last visited July 2, 2013).
[112] AUST, *supra* note 95, at 1.
[113] *See, e.g.,* BRIERLY, *supra* note 106, at 337.

or multilateral, including the exiting state's agreement or request to exit, or agreed upon only by those opposing a contracting state's continued treaty relationship—or simply terminate the treaty. As set forth above, states' obligations respecting the treaties they have entered into are governed by either the Vienna Convention, customary international law, or both.

The United Nations espouses the proposition that all Member States are equal sovereigns under the law, inasmuch as its charter states: "The Organization is based on the principle of the sovereign equality of all its Members."[114] We can therefore start from the proposition that all states are considered sovereign, inasmuch as "[t]he sovereignty and equality of states represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having uniform legal personality."[115] The corollary of this notion is that "membership of international organizations is not obligatory; and the powers of the organs of such organizations to determine their own competence, to take decisions by majority vote, and to enforce decisions, depend on the consent of Member States."[116] Accordingly, the Member States of the European Union are sovereign states. As such, they are each free to enter into treaties, however denominated.[117] The corollary of such freedom is the freedom to amend or exit from a treaty.

Of course, states cannot exit from treaty obligations whenever they wish, since allowing such an activity would render treaties worthless.[118] The rule of *pacta sunt servanda* is still valid international law.[119] However, conditions do arise where suspension or termination of a treaty may be justified.[120]

All the members of the EMU, except France, have either ratified or acceded to the Vienna Convention and are thus bound by its terms.[121] Five of them have filed reservations to the convention.[122] All the members of the European Union, except France and Romania, have either ratified or acceded to the Vienna Convention and are thus

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[114] U.N. Charter art. 2, para. 1.

[115] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 280 (7th ed. 2008).

[116] *Id*. at 281.

[117] "'[T]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention, *supra* note 92, art. 2, para. 1(a).

[118] *See* KACZOROWSKA, *supra* note 34, at 127

[119] Vienna Convention, *supra* note 92, art. 26.

[120] KACZOROWSKA, *supra* note 34, at 127.

[121] *See* Vienna Convention, *supra* note 92.

[122] They are Belgium, Finland, Germany, the Netherlands and Portugal. *Id*.

bound by its terms.[123] None of those reservations have anything to do with treaty formation, treaty abrogation, unilateral or multilateral withdrawal from a treaty or its obligations, or expulsion from a multilateral treaty.[124]

It follows, therefore, that those provisions of the Vienna Convention that deal with the issues of treaty formation, treaty abrogation, unilateral or multilateral withdrawal from a treaty or its obligations, or expulsion from a multilateral treaty are binding on both the Member States of the E.U. and the Member States of the E.M.U. Of course, all members of the E.M.U. are members of the E.U., but the converse is not true.[125]

The treaties that form the E.U. and the E.M.U. are not subject to interpretation under international law in exactly the same way as other treaties. Rather, they give rise to a new and different kind of regime, whereby rather than having the domestic courts of the Member States provide interpretations of the treaty obligations of such states, the E.U. courts are responsible for the interpretation.[126]

Contracts and treaties require respect. Otherwise, relations governed thereby would be unpredictable, and no one would use either instrument. Accordingly, similar to obligations under the general law of contracts, with which most people in the modern world are familiar, a state cannot relieve itself of the obligation to adhere to and perform pursuant to the terms of a treaty to whose terms that state has agreed.

As mentioned above, any state entering into a treaty can expect to be bound by it because, under the long valued norm of interna-

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[123] *Id*.

[124] *Id.*

[125] The E.U is composed of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *See Member Countries of the European Union*, EUROPEAN UNION, http://europa.eu/about-eu/countries/member-countries/ (last visited July 15, 2013). The E.M.U. is composed of Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. *See The Euro*, EUROPEAN COMMISSION, http://ec.europa.eu/economy_finance/euro/ (last visited July 15, 2013).

[126] Treaty of Lisbon, *supra* note 7, art. 19(1) ("The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."); *see also The Court of Justice and the Court of First Instance*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/factsheets/1_3_9_en.htm (last visited July 15, 2013).

tional law, *pacta sunt servanda*, the agreement must be respected.[127] Initially, this principle was merely a matter of customary international law,[128] simply respected by states. By the 19th century, however, it was set forth in writing as an international legal obligation: first in the 1871 Declaration of London[129] and later in the Covenant of the League of Nations, calling for "a scrupulous respect for all treaty obligations,"[130] and the Charter of the United Nations, providing: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."[131] Further, Article 26 of the Vienna Convention, entitled *Pacta Sunt Servana*, states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[132] Article 5 of the Vienna Convention provides that it "applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization . . ."[133]

Even so, there are times when suspension or termination of a treaty is necessary and justified[134] under the doctrine of *rebus sic stantibus*.[135] In the case of suspension, a treaty is still valid, but its operation has been suspended, while in the case of treaty termination, the treaty no longer exists.[136] The Vienna Convention recognizes this notion and provides for both suspension[137] and termination of treaties.[138] A treaty may be terminated or denounced, or a party may withdraw from it only under the provisions of the treaty or under the terms of the Vienna Convention.[139]

The situations under which a treaty may be suspended are set forth in Articles 57 and 58 of the Vienna Convention. Under Article 57(a), treaties can be suspended by resorting to the mechanisms set forth in the treaty. Most other treaties do not provide such language or mechanisms. In that event, all the contracting parties may agree to

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[127] *Pact Sunt Servana,* INTERNATIONAL JUDICIAL MONITOR, September 2008, judicialmonitor.org/archive_0908/generalprinciples.html.
[128] *Id.*
[129] *Id.*
[130] League of Nations Covenant pmbl.
[131] U.N. Charter art. 2, para. 2.
[132] Vienna Convention, *supra* note 92, art. 26.
[133] *Id.*, art. 5.
[134] KACZOROWSKA, *supra* note 34, at 127.
[135] BRIERLY, *supra* note 106, at 335.
[136] *Id.*
[137] Vienna Convention, *supra* note 92, art. 72.
[138] *Id.* art. 42(2).
[139] *Id.*

suspend the treaty.[140] In the case of a multilateral treaty, parties can resort to any suspension mechanism mentioned in the treaty.[141] In the absence of such a clause, and provided the treaty does not specifically prohibit it, a suspension as to one or more parties may be allowed if it would not deprive the other remaining contracting parties of the benefits of the treaty, would not adversely affect the performance of their treaty obligations, and would not be deemed incompatible with the object and purpose of the treaty.[142]

Additionally "(a) treaty may be amended by agreement between the parties."[143] As such, the Member States can change the obligations of any or all Member States. If the treaty does not have language regarding amendment, the Vienna Convention provides for notification and negotiations for the effect of any amendment.[144] A treaty and or any of its terms may be suspended, despite the fact that there may be no clause allowing for such suspension in the treaty itself.[145] A treaty may be terminated or a party may withdraw at any time, provided all the contracting parties consent.[146]

If a party to a bilateral treaty commits a material breach of its obligations under the treaty, the non-breaching party is entitled to either terminate the treaty or suspend its operation in whole or in part.[147] In the case of multilateral treaties, however, there are a variety of treaty rights and obligations to contend with: the rights of the parties as a group and the rights of individual states.[148]

With respect to multilateral treaties, The Vienna Convention provides:

> 2. A material breach of a multilateral treaty by one of the parties entitles:
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
> (i) in the relations between themselves and the defaulting State; or
> (ii) as between all the parties;
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in

[140] *Id.* art. 57(b).
[141] *Id.* art. 58.
[142] *Id.* art. 58(1)(b)(i)-(ii).
[143] Vienna Convention, *supra* note 92, art. 39.
[144] *Id.* art. 40.
[145] *Id.* art. 72.
[146] *Id.* art. 54(b).
[147] *Id.* art. 60(1).
[148] KACZOROWSKA, *supra* note 34, at 131.

> whole or in part in the relations between itself and the defaulting State;
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
> 3. A material breach of a treaty, for the purposes of this article, consists in:
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[149]

As is evident, non-breaching Member States have a variety of actions at their disposal *vis à vis* the defaulting Member States, either by virtue of such default, or by virtue of the defaulting Member State having misrepresented its fiscal and monetary performance prior to such defaults. If a contracting party to a treaty finds it impossible to perform its obligations under a treaty, such party may invoke such impossibility for either terminating or withdrawing if that impossibility arises because of the permanent disappearance or destruction of something necessary for the execution of the treaty itself.[150] However, if the impossibility is temporary, such impossibility can only be invoked for suspending the operation of the treaty.[151] Under international law, if the impossibility is a result of a breach by the party invoking impossibility, such impossibility may not be invoked for breaching either a treaty obligation or some other obligation owed to the another contracting party.[152]

In general, the parts of a treaty are not separable and a party may not withdraw from or denounce a particular clause of a treaty unless the treaty so provides.[153] It is generally all or nothing,[154] unless

> (a) the said clauses are separable from the remainder of the treaty with regard to their application;
> (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be

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[149] Vienna Convention, *supra* note 92, art. 60(2)-(3).
[150] *Id.* art. 61(1).
[151] *Id.*
[152] *Id.* art. 61(2).
[153] *Id.* art. 44.
[154] Vienna Convention, *supra* note 92.

> bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust.[155]

It is suggested that, inasmuch as the EU existed for some years prior to the birth of the Euro, and since there are a number of Member States who are not currently using the Euro, those portions of the EU treaties—particularly the Lisbon Treaty—which deal with the Euro, may be "separable from the remainder of the treaty."[156]

The proposition that *sovereign states* are those who traditionally have entered into treaties is an important one in this analysis. Under international law, states have the ability to make all manner of agreements, but particular principles have evolved to ensure that persons representing states have the necessary power to enter into a treaty.[157] Where exactly the power to enter into treaties is vested is generally a matter of each state's internal laws.[158] As an example, in the United States, the President, with the advice and consent of the Senate, has the power to enter into treaties.[159] Likewise in Mexico, the President has the power to enter into treaties that then must be ratified by the Senate.[160]

Sovereignty

Some influential commentators have suggested that the Member States have relinquished sovereignty to a substantial degree.[161] In fact, so much so that the treaties that make up the European Union, on the one hand, and the European Court of Justice (ECJ) on the other, work in tandem, to create a constitutional framework, much like that of the United States Constitution, so that withdrawal is not an option.[162] The argument continues that, for one to believe that the Member States have retained sovereignty to the extent that they can withdraw, one would have to believe in "an extreme and largely obsolete concept of sovereignty" under public international law.[163] The ECJ itself has said that "the transfer by the States from their domestic

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[155] *Id.* art. 44(3).
[156] *Id.* art. 44(3)(a).
[157] Shaw, *supra* note 83, at 908.
[158] *Id.*
[159] U.S. Const. art. II, § 2.
[160] Constitución Política de los Estados Unidos Mexicanos [C.P.], art. 89, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).
[161] Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections* 1, 5 (European Central Bank, Working Paper No. 10, 2009) *available at* http://www.ecb.int/pub/pdf/scplps/ecblwp10.pdf.
[162] *Id.* at 15.
[163] *Id.*

legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights."[164]

Can this notion of a permanent relinquishment of sovereignty be plausible? Can it be accurate, especially in light of the Lisbon Treaty? Could it have been the case even before the construction of the Treaty of Lisbon? We suggest that, however much certain actors within the European Union may argue otherwise, there is evidence to uphold the argument that the Member States retain their sovereignty. We suggest, therefore, that such a proposition is not based on an obsolete notion of sovereignty.

It has been settled law for some time that "(t)here is a presumption against derogation from sovereign freedom of action,"[165] and "(if) the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted."[166] This presumption disappears only if there is a clear, express intention to restrict sovereignty.[167] The oft cited international jurists, Charles Rousseau and Hans Kelsen, both believe that any notion of limited sovereignty is simply a contradiction in terms, as they believe sovereignty, by its very nature, is absolute.[168] Of course, this view admits that a sovereign state is still subject to what they then called the "law of nations," or what is today "international law."[169] It is a general principle that being subject to international law does not diminish a state's independence or sovereignty.[170]

By looking at what has actually happened "on the ground" in Europe, it is evident that the Member States have relinquished only so much sovereignty as to make the system work. Member States who have joined the Euro Zone have "surrender(ed) their monetary sovereignty to the Community."[171] However, those Member States with

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[164] Case 6/64 Costa v ENEL, 1964 E.C.R. 585, 594.

[165] D.P. O'Connel, International Law 256 (2d ed. 1970).

[166] Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier Between Turkey and Iraq), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, at 12 (Nov. 21).

[167] O'Connel, *supra* note 165, at 257; *see also* S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A) No. 1, at 114 (Aug. 17).

[168] Carlos Arrellano García, Primer Curso de Derecho Internacional Público 143 (4th. ed. 1999).

[169] *Id.* at 153.

[170] Shaw, *supra* note 83, at 181.

[171] Erich Vranes, *The "Internal" External Relations of EMU on the Legal Framework of the Relationship of "In" and "Out" States,* 6 Colum. J. Eur. L. 361, 365 (2000).

derogation "retain their monetary policy powers according to national law."[172]

Commentators believe that one of the primary reasons for the failure to ratify the Draft Treaty Establishing a Constitution for Europe was a concern on the part of many Member States that it would require them to relinquish too much sovereignty.[173] That was the reason for the negotiation and drafting of the Treaty of Lisbon, which eliminated many of the trappings of statehood that the draft constitution seemed to give the European Union, and thus allayed many fears.[174]

Some even say a "British exit from the European Union looks increasingly possible."[175] Pressure is mounting in the United Kingdom for the government to call a referendum on continued membership.[176] The British Prime Minister appears ready to warn the world of that clear possibility.[177] That is hardly the position of a state that believes that it has relinquished sovereignty or that it has no options, having signed the various treaties creating the European Union.

At least one commentator has suggested that a reason behind, or secondary result of the creation by the Lisbon Treaty of the position of High Representative and Vice President of the European Commission in one person and then the election/appointment of a person to the post considered a light weight or "weak" player, was so that the person in the position would not overshadow the discreet Member States.[178] It seems that the EU Member States want the "high representative to be their servant, not their rival."[179] Despite the creation of the foreign policy mechanisms of the Lisbon Treaty, Member States are left to set and implement their own foreign policy agendas.[180] Whether this has

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[172] *Id.* at 366.

[173] *See* Georgio Maganza, *The Lisbon Treaty: A Brief Outline,* 31 FORDHAM INT'L L.J. 1603 (2007-08); *see also* Anthony Luzzatto Gardner & Stuart E. Eizenstat, *New Treaty, New Influence?* 89 FOREIGN AFF. 104 (2010).

[174] Maganza, *supra* note 173, at 1610-13

[175] *Britain's Future: Goodbye Europe,* THE ECONOMIST, Dec. 8, 2012, *available at* http://www.economist.com/news/leaders/21567940-british-exit-european-union-looks-increasingly-possible-it-would-be-reckless.

[176] *Britain and Europe: Making the Break,* THE ECONOMIST, Dec. 8, 2012, *available at* http://www.economist.com/news/briefing/21567914-how-britain-could-fall-out-european-union-and-what-it-would-mean-making-break.

[177] John F. Burns & Alan Cowell, *Cameron Warns that Britain Could Leave European Union,* N.Y. TIMES, Jan. 19, 2013, *available at* http://www.nytimes.com/2013/01/19/world/europe/david-cameron-delays-talk-on-new-role-in-europe.html?_r=0.

[178] Desmond Divan, *Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis,* 49 J. COMMON MARKET STUD. 103, 112 (2011).

[179] Gardner & Eizenstat, *supra* note 173, at 104.

[180] *Id.* at 110.

come about because of the election and appointment of individuals or because of the terms of the Treaty itself is a matter of conjecture.

The Treaty on European Union, known as the Maastricht Treaty, states that:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[181]

Thus, domestic constitutional courts—high courts within the Member States—are permitted to set limits on the primacy of the law of the European Union as to themselves;[182] in other words, such courts and their States retain legal sovereignty. So that this multi-level constitutional structure[183] does not provide for a wholly subordinated set of Member States, they are considered sovereign states, even though they are members of a union, which provides for substantial benefits. Accordingly, it can be cogently argued that there are ways out of or around treaty obligations respecting either continued membership in the European Union, the EMU, or both.

Treaty of Lisbon Modifications

A. Background

On November 3, 2009, President Vaclav Havel of the Czech Republic signed the Treaty of Lisbon. With that signature, the Treaty of Lisbon cleared the last procedural hurdle to its effectiveness.[184] Ratification of the treaty by a sufficient number of Member States marked the end of a long and arduous process. However, initial intentions differed.

This process first began in 2001, with negotiations for the adoption of a constitution for the European Union.[185] This constitu-

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[181] See Maastricht Treaty, *supra* note 40, art. 4(2).

[182] Armin von Bogdandy & Stephan Schill, *Overcoming the Absolute Primacy: Respect for National Identity Under the Lisbon Treaty,* 48 Common Mkt. L. Rev. 1417, 1417 (2011).

[183] *See id*.

[184] Dan Bilefsky & Stephen Castle, *European Union Reform Moves Ahead*, N.Y. Times, Nov. 3, 2009, http://www.nytimes.com/2009/11/04/world/europe/04europe.html.

[185] *Id*.

tion was intended to give the European Union many of the trappings of statehood—a president, a foreign minister, and even a public prosecutor (akin to an attorney general), as well as a flag and national anthem.[186] In addition, the Constitutional Treaty would replace the complex web of international agreements, which form the legal basis for the European Union.[187] Though executed by representatives of each of the Member States with great fanfare, the Constitutional Treaty was far from complete, since it required ratification by the national legislatures of each of the then twenty-five Member States.[188] In the end, only eighteen of the Member states ratified the Constitutional Treaty.[189]

The constitution was never implemented. In the years following the adoption of the treaty, public sentiment in a number of Member States turned against the treaty, with skeptics fearing that the constitution would unduly impinge upon national sovereignty.[190] Ultimately, efforts to implement the Constitutional Treaty collapsed when France and the Netherlands rejected the treaty in national referenda.[191] Following this event, European leaders went back to the drawing board, began deliberations on a replacement treaty, and produced the Treaty of Lisbon.[192]

Rather than replacing the prior European Union documents in their entirety, the Treaty of Lisbon took a more modest approach by amending the existing European Union treaty documents but otherwise leaving those treaties in place.[193] Though it included many of the same concepts that were included in the Constitutional Treaty, most importantly, the Treaty of Lisbon did not call itself a "constitution," as proponents sought to avoid the same political upheaval that doomed the Constitutional Treaty.[194] It also dropped all references to the symbols of the EU—the flag, the national anthem, and the motto—all matters closely associated with the relinquishment of Member States'

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[186] Thomas Fuller & Katrin Bennhold, *Leaders Reach Agreement on a European Constitution*, N.Y. TIMES, June 14, 2004, http://www.nytimes.com/2004/06/19/world/leaders-reach-agreement-on-a-european-constitution.html.

[187] *Id.*

[188] *Id.*

[189] Maganza, *supra* note 173, at 1603-04 (discussing adoption and ratification process).

[190] *Id*. at 1604.

[191] Marlise Simmons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005, http://travel.nytimes.com/2005/06/02/international/europe/02dutch.html.

[192] Maganza, *supra* note 173, at 1603.

[193] *Id.* at 1609.

[194] *Id.* at 1608-09.

individual identity and sovereignty to a higher authority, issues thought to be political hot buttons.[195]

B. Article I-60 of the Constitutional Treaty – A Path to Withdrawal

During the deliberations for the Constitutional Treaty, the Member States negotiated the provision for voluntary withdrawal of a Member State. As stated above, prior to efforts to implement the Constitution, it was generally accepted wisdom that there was no unlimited right of a Member State to withdraw from the EU.[196] The Constitutional Treaty negotiations sought to clarify this matter, and if it were ever true, to change it. There was extensive discussion and debate regarding the final language of the withdrawal provision.[197] Ultimately, the final text of Article I-60 of the Constitution Treaty stated:

> *Voluntary withdrawal from the Union*
> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
> *2. A Member State which decides to withdraw shall notify the*
> *European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.*
> *That agreement shall be negotiated in accordance with Article III-325(3). It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
> *3. The Constitution 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 no-*

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[195] *Q&A: The Treaty of Lisbon*, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/6901353.stm (last visited Oct. 23, 2012).

[196] Jochen Herbst, *Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties?"*, 6 GERMAN L. J. (SPECIAL ISSUE) 1755-59, 1755 (2005), *available at* http://www.germanlawjournal.com/pdfs/Vol06No11/PDF_Vol_06_No_11_1755-1760_Special%20Issue_Herbst.pdf (discussing right to withdraw under Constitutional Treaty).

[197] *Id.* at 1756 (referencing the numerous proposed amendments to the proposed Constitution and related documentation which are available at http://european-convention.eu.int/EN/amendments/amendmentsdfd1.html?content=46&lang=EN).

> *tification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
>
> *4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in European decisions concerning it.*
>
> *A qualified majority shall be defined as at least 72% of the members of the Council, representing the participating Member States, comprising at least 65% of the population of these States.*
>
> *5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article I-58.*[198]

Member States seemed concerned about relinquishing sovereignty, and it is apparent that the exit provision was a critical aspect of the Constitutional Treaty. Inserting an exit clause in a constitutive document is not a novel idea. For example, Joseph Stalin's 1936 constitution for the Soviet Union established an exit right for its Member States.[199] Similarly, Canada's Supreme Court concluded that a province could secede from the Canadian Confederation, subject to negotiation of the terms of secession by way of an amendment to the Canadian Constitution.[200] Contrast this with the United States Constitution, which provides no such express right, though this did not prevent the U.S. from fighting a bloody civil war to resolve the debate about whether an implied right of withdrawal existed.[201] Nevertheless, when considering the enhanced federal powers for the EU contemplated by the Constitutional Treaty, it is not surprising that Member States would be hesitant about committing to this new structure without reserving a way to pull out if circumstances change.

In general, withdrawal mechanisms in international federations fall into three broad categories: (1) state primacy; (2) federal pri-

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[198] Treaty Establishing a Constitution for Europe art. I-60, June 14, 2004, 2004 O.J. (C310) 1, *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_01_05_constitution.pdf.

[199] WHAT THE EU CONSTITUTION DOES: A 14 POINT CRITICAL SUMMARY, NATIONAL PLATFORM EU RESEARCH & INFORMATION CENTRE (Mar. 2005), *available at* http://www.europarl.europa.eu/inddem/docs/papers/14%20point%20summary.pdf.

[200] Anthony DePalma, *Canadian Court Rules Quebec Cannot Secede on its Own*, N.Y. TIMES, Aug. 21, 1998, *available at* http://www.nytimes.com/1998/08/21/world/canadian-court-rules-quebec-cannot-secede-on-its-own.html.

[201] U.S. CONST.

macy; and (3) federal control.[202] First, state primacy would provide "an absolute, immediate and unilateral right for a Member State to withdraw from the federation."[203] Second, a federal primacy model would conversely absolutely prohibit any Member State from withdrawing, "effectively making membership a one-way valve."[204] Lastly, a federal control approach, on the one hand, would recognize the sovereign right of the Member State to withdraw but, on the other hand, would condition such withdrawal upon a mutual agreement between the departing Member and those remaining, establishing the terms for such withdrawal along the lines of the Canadian system.[205]

Article 50 adopts a federal control approach. A Member State can decide to withdraw unilaterally in accordance with the provisions of its state constitution.[206] Once this decision is made, the Member State notifies the European Council. The EU then must negotiate an agreement with the seceding Member, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."[207] However, the negotiation period is not open ended. The withdrawal automatically becomes effective two years following the date of notification of the decision of the Member State to withdraw, regardless of whether the agreement on the terms of withdrawal has been finalized, with such two-year period only subject to extension if the withdrawing Member and the European Council unanimously agree.[208] Ultimately, the agreement requires the approval of a so-called "qualified majority" of the European Council (i.e. 72% of the members of the European Council, representing Member States comprising at least 65% of the population of the voting Members), after obtaining the consent of the European Parliament.

C. Article 50 of the Treaty of Lisbon

Article 50 of the Treaty of Lisbon carried forward the withdrawal provisions of the Constitutional Treaty, with insignificant modifications, virtually leaving the Constitution's escape clause intact. The following is a comparison between the text of Article 50 of the Treaty of Lisbon with its predecessor, Article I-60 of the Constitutional

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[202] Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 407, 422 (2004) (discussing framework for withdrawal mechanism).

[203] *Id.*

[204] *Id.*

[205] *Id.* at 423.

[206] Treaty of Lisbon, *supra* note 7, art. 50(1).

[207] *Id.* art. 50(2).

[208] *Id.* art. 50(3).

Treaty (note that deletions are shown by ~~strikethrough~~ and additions are shown by underlining):[209]

> ~~Constitutional~~ Treaty of Lisbon
>
> Article ~~I-60~~50
>
> ~~Voluntary withdrawal from the Union~~
>
> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article ~~III-325(3)~~218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Constitution *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 notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in European decisions concerning it.
>
> A Qualified majority shall be defined ~~as at least 72% of the members of the Council representing the participating Member States,~~ comprising at least 65% of the population of these States, in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

[209] While these markings may appear to be Track Changes that have not been accepted, they actually amount to purposeful changes that are still marked in order to show the changes that the Treaty drafters made.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article ~~I-58.~~49.

Note that the definitions of "qualified majority" in each provision function essentially in the same manner. Though the definition of "qualified majority" in the TFEU[210] has a number of meanings, in the case of a withdrawing Member, the voting process on the European Council would be identical to the Constitutional Treaty, which requires approval by 72% of the members of the European Council, representing Member States comprising at least 65% of the population of the voting Members.[211]

Understanding the Withdrawal Mechanism

A. Withdrawl Under International Law

What exactly do we mean by the term "withdraw"? There are thirteen references to the word "withdraw" (or variations thereof) in the Treaty of Lisbon, the TFEU.[212] Six of these thirteen references appear in Article 50; references to the word "withdraw" in other parts of the documents are related to other issues.[213] However, nowhere in either document, or in the Constitutional Treaty, is the term "withdraw" defined. Even though the Vienna Convention on the Law of Treaties mentions the term more than 30 times, it does not define the term with any exactitude either. When the Vienna Convention uses the term, however, it is normally in conjunction with the terms terminating and suspending.[214]

The Vienna Convention does say that a party must give at least 12 months' notice prior to denunciation or withdrawal.[215] *Black's Law Dictionary* defines "withdrawal" as "the act of taking back or away; withdrawal of consent; the act of retreating from a place, position or situation; . . . Renunciation."[216] Therefore, the common legal usage of

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[210] *See generally* Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU].

[211] *Id.* art. 15.

[212] *See generally id.*

[213] *E.g.*, Article 7(2) of the TFEU refers to withdrawal of proposed legislation in the European Parliament, while Article 78(2)(d) of the TFEU refers to "common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status." *Id.* art. 7(2); *id.* art. 78(2)(d).

[214] See, *e.g.*, Vienna Convention, *supra* note 92, art. 61.

[215] *Id*. art. 56, para. 2.

[216] Black's Law Dictionary 712 (9th ed. 2009). Note that other related definitions in the dictionary refer to removing funds from a banking institution, exiting from a criminal conspiracy, and other irrelevant usages of the term.

the term, except perhaps for the idea of "renunciation," is unhelpful to our analysis.

B. Meaning of Article 50

The question then is what did the framers of the Treaty of Lisbon (and the Constitutional Treaty) intend in Article 50? Did they mean that the electing Member State may decide to leave the EU in its entirety? Or, did they intend to allow for a partial withdrawal, such as removing the Member State from certain aspects of the EU, but remaining part of the EU for other purposes? This article addresses the proposition or the possibility of whether the withdrawing Member State can elect to withdraw solely from the EMU and remain part of the EU for all other purposes. After all, the language does provide, in the case of withdrawal negotiation, that an agreement is to be reached regarding the withdrawing state's "future relationship with the Union."

C. Consensus Among Commentators

One commentator has concluded that Article 50 is intended to be an "all or nothing" proposition.[217] Under this theory, when a Member State seeks to "withdraw" under Article 50, that Member State is electing to leave the EU in its entirety, including all of the EU's associated organizations and subsets, including the Euro. The arguments against permitting an interpretation which would allow selective withdrawal from aspects of the EU fall into three general categories: textual, procedural, and practical.

The textual critics take a "strict constructionist" approach towards the text of Article 50. They argue that the text is clear; the phrase "withdraw from the Union" in Article 50(1) means secession from the entire Union. Their argument continues, that had the drafters intended to allow the electing Member State to withdraw from only aspects of the EU, such as the EMU, they would have specifically provided for that inside the text of the provision.[218] Supporting this view is the language of Article 50(3), which provides that "[t]he *Treaties* shall cease to apply to the State in question . . ." (Emphasis added). This provision implies that *all* of the EU treaties will cease to apply to the withdrawing state, not *some* of them. Textual commentators argue that any other interpretation of the text would "amount to a very ex-

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[217] Hans Hofmeister, *Goodbye Euro: Legal Aspects from Withdrawal from the Euro Zone*, 18 COLUM. J. EUR. L. 111, 131 (Fall 2011) (discussing interpretation of Article 50 text).

[218] *Id.* at 132.

tensive reading of this provision and exceed the limits of jurisprudential interpretation."[219]

The procedural arguments focus on the language in Article 50(2). This language provides for the negotiation of "an agreement with the [withdrawing] State setting out the arrangements for its withdrawal" and the requirement of Article 50(3), which mandates that such an agreement be finalized within "two years" after the Member State initially notifies the European Council of its decision to withdraw.[220] The two-year deadline provided for in the text, these critics argue, would prevent an interpretation that the provision was meant to intend for the negotiated agreement to provide for partial or selective membership in the EU. The reasoning is that the agreement is not mandatory: if it is never signed, the withdrawal takes place anyway. Thus, the withdrawing Member State could not reasonably expect to utilize Article 50 to exit only the EMU, because if an agreement is never finalized, the withdrawal would take place and the only conclusion is that the withdrawal would be comprehensive.[221] Supporting this conclusion is the language in Article 50(5), which provides that a Member State that elects withdrawal, but later changes its mind, must reapply for membership in the EU as if it were a new applicant.[222]

Those who take a practical approach fear the "slippery slope" that selective withdrawal from the EU could allow. One commentator points to the nebulous "agreement" that must be negotiated following an election to withdraw and responds to suggestions that the negotiation phase of the agreement is intended to allow the departing state to choose which EU institutions to keep and which to discard.[223] The argument continues that this approach is "questionable, not least from a public policy perspective,"[224] in that allowing a departing nation to "pick and choose" among which treaty obligations to retain and which to ignore would "effectively encourage an *à la carte* approach to EU participation" in general.[225] This would work against the philosophical underpinnings of the EU in the sense that, by joining the EU, the Member States were making an irreversible commitment to European unity and discarding the outdated prejudices of nationalism.[226] Moreover, this "would pose a qualitatively different and arguably intolerable

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[219] *Id.*

[220] Treaty of Lisbon, *supra* note 7, art. 50(2)-(3).

[221] Hofmeister, *supra* note 217, at 125-26.

[222] Treaty of Lisbon, *supra* note 7, art. 50(5).

[223] *See* Athanassiou, *supra* note 161, at 39.

[224] *Id.*

[225] *Id.*

[226] *See generally* Callender, *supra* note 4.

challenge to the EU's integrity and sustainability,"[227] in that it may encourage Member States to seek selective participation in the EU in other areas as well.

The Argument for Selective Withdrawal

A. *Answering the Critics*

Nevertheless, there are ample arguments to refute each of the concerns raised by those skeptical about interpreting Article 50 to allow selective withdrawal from the EU. There is considerable textual evidence that selective withdrawal may have been contemplated in the adoption of Article 50.[228] Similarly, one may raise procedural arguments in support of a selective withdrawal mechanism.[229] Lastly, there are significant practical reasons for why a selective withdrawal framework may benefit the EU and contribute to the survival of the EMU.[230]

B. *The Textual Argument*

Regarding the negotiation of the agreement for withdrawal, Section 2 of Article 50 provides that:

> 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* (emphasis added).[231]

By including the phrase "framework for its future relationship," the drafters "thus assume that some kind of (legal) relationship will still remain between the Union and the withdrawing member state even after the withdrawal has come into effect."[232] Therefore, if the drafters contemplated some future association, it seems logical to explore whether the Member State could remain part of some EU institutions following its election to secede from the EU—all of which would be specified in the withdrawal agreement. Moreover, if some form of continuing involvement is in fact contemplated, it is not much of a leap to contend that continued participation by the withdrawing Member State in many EU institutions, with the exception of the EMU, would

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[227] Athanassiou, *supra* note 161, at 40.
[228] *See generally* Herbst, *supra* note 196.
[229] *Id.*
[230] *Id.*
[231] Treaty of Lisbon, *supra* note 7, art. 50.
[232] Herbst, *supra* note 196, at 1757.

be considered during the negotiation of any such withdrawal agreement. As stated above, there are currently Member States who do not use the Euro.[233] The terms of the agreement are not limited in the text and could be far reaching to include creative and expansive provisions implementing a strong and multi-faceted relationship between the EU and the withdrawing member.

C. The Procedural Argument

Unfortunately, Section 3 provides specifically that "[t]he Treaties shall cease to apply" to the withdrawing member state.[234] The use of this phrase seems to foreclose the possibility of selective application of some of the EU treaties following withdrawal, therefore prohibiting partial "membership" pursuant to the existing Treaties. Section 5 of Article 50 supports this interpretation, in that it requires that if a withdrawing member changes its position on withdrawal, it must reapply to the EU as if it were a brand new applicant for membership.[235]

However, though the withdrawing Member cannot retain its status as a Member state pursuant to the treaties within the framework of Article 50, by providing for a "future relationship," the framers of the Article left open the possibility of continued involvement by the withdrawing Member with some EU institutions. Since the terms of the agreement are not delineated in Article 50, there is no reason that such an agreement cannot take the form of a new treaty between the EU and its remaining Members, on the one hand, and the withdrawing Member State on the other hand, thus replacing the "Treaties" referenced in Section 3. A new treaty could, therefore, effectively allow for the continuation of some of the EU institutions for the benefit of the withdrawing Member State and its citizens.

In addition, Section 3, which provides that "[t]he Treaties shall cease to apply,"[236] and Section 2, which provides for a "future relationship"[237] between the withdrawing Member and the EU, can be harmonized. One can argue that by not providing that *all* of the Treaties shall cease to apply, the drafters allowed for the possibility that *some* of the Treaties could continue to apply. In this vein, the agreement contemplated by Section 2 would then establish which of the Treaties or treaty provisions would continue to apply to the withdrawing Member State. However, "such an interpretation would amount to a very

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[233] *See supra* notes 125, 156 and accompanying text.

[234] Herbst, *supra* note 196, at 1757.

[235] Treaty of Lisbon, *supra* note 7, art. 50(5).

[236] *Id.* art. 50(3).

[237] *Id.* art. 50(2).

extensive reading of this provision and exceed the limits of jurisprudential interpretation."[238]

Lastly, some commentators point to the two-year deadline imposed by Section 3 as support for their argument against selective withdrawal.[239] Section 3 provides that if the withdrawal agreement is not concluded within two-years following the withdrawing Member State's election to withdraw, the withdrawal becomes effective automatically.[240] This deadline, they argue, effectively makes the withdrawal agreement optional, rather than mandatory and, because it is optional, withdrawal from some (but not all) of the EU institutions was never contemplated. Departing a "highly complex institution such as the EMU," one scholar writes, "*requires* a detailed agreement, specifying the legal consequences for the parties concerned."[241] In essence, reconfiguring the European monetary system is too dangerous a task to be left to an optional agreement.

The deadline argument, however, does not appear to be persuasive. The drafters needed some deadline, if only to be an incentive to the negotiators to conclude their deliberations on the withdrawal terms. Instituting a deadline should not be interpreted to mean that the agreement is itself insignificant or that the scope of such an agreement was meant to be limited in any way. In fact, Section 3 of Article 50 allows the European Council, albeit unanimously, and the withdrawing Member to extend the deadline if needed.[242]

D. The Practical Argument

An exit from the European Union is not unprecedented. Greenland, formerly a colony of Denmark and then a part of Denmark, was allowed to exit the European Union.[243] Greenland submitted a formal request for withdrawal and then negotiated that withdrawal and its subsequent status.[244] In fact, due to the monetary crisis in

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[238] Hofmeister, *supra* note 217, at 132.
[239] *See generally id.*
[240] *Id.* at 125-26.
[241] *Id.* at 133.
[242] Treaty of Lisbon, *supra* note 7, art. 50(3).
[243] *See* The Greenland Treaty of 1985, Jan. 1, 1985, 1985 O.J. (I 29) 1, *available at* http://eu.nanoq.gl/Emner/EuGl/~/media/419EF30F356645048639049D197273D3.ashx.
[244] *Id.* ("A referendum was held in 1982 and a majority voted in favour of withdrawal. Between 1982 and 1984 the terms were negotiated and on February 1, 1985 Greenland formally withdrew from the Community. A Treaty on Greenland's withdrawal from the Community was made – the Greenland Treaty – declaring Greenland as a "special case. This special case provided a fisheries agreement between the parties, in which the EU kept its fishing rights and Greenland kept its financial contribution as before withdrawal. It also gave Greenland tariff free

Cyprus, Cyprus nearly left the Euro.[245] *The Wall Street Journal* recently stated that, absent a viable bailout scheme, Cyprus "could find itself with little choice but to leave the Euro zone."[246] Cyprus negotiated a memorandum of understanding with the European Commission, the European Central Bank, and the IMF in November of 2012, requiring cost cutting measures. That has not worked.[247] The negotiations to secure a bailout deal have been rancorous,[248] and a deal was again reached on March 24, 2013.[249] All are hopeful that the bailout will work. The larger Euro Zone countries, such as Germany, have been willing to take a hard line approach with Cyprus.[250] A potential exit from the Euro, whether forced or voluntary on the part of Cyprus, points to neither an iron clad treaty (with no potential for being forced out in the event such a forced exit were to occur) nor a loss of sovereignty in the latter case of a voluntary exit. There is now pressure mounting on Malta and Slovenia to put their economic and monetary houses in order and there has even been talk of expulsion from the EMU if they do not.[251]

Article 50 has textual shortcomings, including problems relating to timing, lack of specificity, and provisions that appear internally inconsistent. However, despite the assertions of other commentators to the contrary, there is sufficient ambiguity in the text and mechanics of Article 50 to contend that a Member can effectively accomplish a

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access of fisheries products to the EU as long as there exists a satisfactory fisheries agreement.").

[245] *See* Mark Memmott, *Cypriots Are Suspicious, but Bailout Deal Seems Set*, NPR, March 25, 2013.

[246] *See* Charles Forelle, Matina Stevis & David Enrich, *Clock Ticks on Cyprus*, WALL. ST. J., Mar. 22, 2013, at A1.

[247] *See* Nikolas Kulish, *conservative is Elected President in Cyprus,* N.Y. TIMES Feb. 24, 2013, *available at* http://www.nytimes.com/2013/02/25/world/europe/conservative-candidate-elected-president-in-cyprus.html?_r=0.

[248] *See A Bungled Bank Raid,* THE ECONOMIST, Mar. 23, 2013, at 75; *see also* Liz Alderman, *Rejection of Deposit Tax Scuttles Deal on Bailout for Cyprus,* N.Y. TIMES, Mar. 19, 2013, http://www.nytimes.com/2013/03/20/business/global/cyprus-rejects-tax-on-bank-deposits.html?_r=0; *see also* Von Sebastian Jost, Karsten Seibel & Dorothea Siems*, Large investors Lose up to 90 percent in Cyprus*, DIE WELT, Mar. 23, 2013, *available at* http://www.welt.de/wirtschaft/article114760715/Grossanleger-verlieren-auf-Zypern-bis-zu-90-Prozent.html.

[249] James Kanter, Liz Alderman & Andrew Higgens, *E.U. Officials Agree to a Deal Rescuing Cyprus,* N.Y. TIMES, Mar. 24, 2013, *available at* http://www.nytimes.com/2013/03/25/business/global/cyprus-and-europe-officials-agree-on-outlines-of-a-bailout.html?pagewanted=all.

[250] *See* Thomas Straubhaar, *Why the Hard Line Against Cyprus Is Proper*, DIE WELT, Mar. 26, 2013, http://www.welt.de/wirtschaft/article114767497/Warum-die-harte-Linie-gegen-Zypern-richtig-ist.html.

[251] *See* NPR News, Apr. 4, 2013.

partial withdrawal from the EU. This withdrawal may take the form of a new agreement or treaty between the EU and the departing Member, which would establish the terms and obligations for a revised relationship. That being said, if the current crisis revolves around the Euro, it behooves European leaders to explore legal avenues which would solve the source of the problem rather than resorting to legal formalities to support an all or nothing approach to EU membership.

Also, something must be said for the nature of the EMU as opposed to other EU institutions. Certain Members, such as England and Denmark, opted out from adopting the Euro.[252] These two States negotiated separate arrangements for the right to remain outside the EMU,[253] which demonstrated that the Euro was never intended to be a "one size fits all" solution. Similarly, though the EU treaties envision that all Member States will eventually become part of the EMU, the treaties require the fulfillment of four so-called "convergence criteria" before these states can become part of the Euro.[254] Currently, there are 10 Member States which have either opted out, or are considered Member States "with a derogation," meaning that they have not yet achieved the convergence criteria.[255] This is an interesting, yet problematic matter. Sweden, for example, despite clear requirements and textual exhortations otherwise,[256] appears not to be willing to adopt the Euro.[257] This appears to be a clear breach of the treaty, not simply a situation where a Member State has taken advantage of a legal loophole.[258] It seems, therefore, that the decision making process respecting EMU membership is ether flawed or lenient. It has been argued, as mentioned above, that neither Italy nor Belgium met the convergence criteria, yet were still admitted.[259] Would they or should they be equally lenient with those Member States who might wish to renegotiate either their EU or EMU member status, or end their EMU member status altogether? Therefore, if certain Members elected to stay out of the Euro, while other Members may never achieve the criteria required to join the Euro, it seems unfair and impractical to now require that a Member must completely abandon the EU structure in order to change their currency—a right which other Member States effectively retain.

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[252] Hofmeister, *supra* note 217, at 119.
[253] *Id.*
[254] *Id.* at 115 (discussing the criteria which include price stability, sustainable financial position, currency exchange standards, and the ability of the Member State to maintain the other standards).
[255] *Id.* at 118.
[256] *See generally* TFEU, *supra* note 210, art. 98.
[257] Vranes, *supra* note 171, at 373.
[258] *See id.* at 369.
[259] *See id.* at 374.

As can be seen from the foregoing, despite what cheerleaders for the European Union and the EMU might say about either the impossibility of withdrawal or the notion that withdrawal is unthinkable, there are ways out. Under customary international law and modern treaty law, the way that the European Union has dealt with Member States who either do not wish to or do not qualify for EMU membership (or do not fulfill their obligations under such membership) and the words of the Lisbon Treaty itself, a variety of avenues of escape are open to Member States. If a Member State has problems complying with the needs of monetary union, that state is not doomed to remain a member. Indeed, the easiest approach for a Member State might be simply to become a Member with derogation status like Romania, or become a Member State that has opted out, like the United Kingdom or Denmark. The United Kingdom and Denmark have opted out by means of Protocols to the Treaty of Lisbon. Such Protocols have the same legal significance as the treaty itself.[260] Certainly the United Kingdom, Romania, and Denmark are not second-class citizens within the European Union.

Loan Commitments

One might ask what happens if a Member State, like Greece for example, defaults on its loan payment obligations, either as a continuing member of the EU and the EMU, or if Greece were to exit either the EU or the EMU and then default thereafter? What are the loan terms and to whom is it to be repaid? Indeed, does an exit from the Euro Zone or the EU amount to a default under the terms of the loan? The loan facilities to Greece are both through the European Central Bank[261] and through the IMF.[262] Each loan facility is extended to Greece as a sovereign state, and must be repaid by Greece alone; in the case of the IMF facility, to the IMF, and in the case of the European Central Bank facility, to the discrete Member States who have contributed to the facility in the amounts and proportions they have contributed.[263] Regardless of the status of Greece as either a Member State of

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[260] *See* Vranes, *supra* note 171, at 368.

[261] *See ECB Saves Greece from Bankruptcy by Securing Emergency Loans-paper*, Chicago Tribune, Aug. 3, 2012, http://articles.chicagotribune.com/2012-08-03/business/sns-rt-us-ecb-greecebre87302p-20120803_1_ecb-emergency-liquidity-assistance-greece.

[262] *See* Press Release No. 12/85, Int'l Monetary Fund, IMF Executive Board Approves €28 Billion Arrangement under Extended Fund Facility for Greece (Mar. 15, 2012), *available at* http://www.imf.org/external/np/sec/pr/2012/pr1285.htm; *see also* Press Release No. 10/187, Int'l Monetary Fund, IMF Executive Board Approves €30 Billion Stand-By Arrangement for Greece (May 9, 2010), *available at* http://www.imf.org/external/np/sec/pr/2010/pr10187.htm.

[263] *See generally Euro Area Loan Facility Act 2010* (Nov. 7, 2010).

the EU or of the EMU, or not a member of either, Greece must repay the loans in any event. There is no default escape clause or reduction in obligations for a change in any such status.

However, the ECB loan facility agreement states that it can be cancelled as to a lender (State) if "a constitutional court of a Lender or other court with competent jurisdiction in relation to such Lender decides in a final judgment that this Agreement or a Loan is violating the constitution of the Lender and such violation cannot be remedied,"[264] the loan commitment of that lender will be cancelled.[265] It is clear, therefore, that both the lender states and Greece entered into the facility as sovereign states. EU directives or any other mechanism, other than perhaps a perceived need, did not force them into it.

CONCLUSION

The Europeans have for centuries been very creative in forging economic and trade alliances, some that smacked of political alliances and even elementary union. They have also, on more than one occasion, attempted to confect monetary stability. Some of these attempts were successful for long periods, but the monetary bits have often not been so successful. Will this current attempt at monetary union be ultimately successful?

The March 2013 elections in Italy have once again jolted confidence in the Euro. Not only do politicians seem unable to effectively deal with the Euro crisis, but voters do not want to implement reforms of any sort.[266] What will happen? Whether Greece, Cyprus, Slovenia, Portugal, or any other Member State will exit either the Euro Zone or the European Union, or be ejected by its fellow Member States is a matter of current, ongoing debate. Will the EMU end up being another sputtering, failed experiment, or will it survive? This is a matter that continues to ebb and flow, with the leaders of the region unable or unwilling to take a politically difficult stand to fix the problem once and for all. They resort to temporary bandages that do not really have a long-term salutary effect. As Desmond Dinan, the Irish professor and expert on the Euro problems has stated:

> Apart from its implications for the stability of the Eurozone and economic governance in the EU, the euro crisis therefore revealed serious divergences among Member States and rifts among national governments that are bound to make the conduct of EU institutions

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[264] *See id.* par. 6(6)(b).

[265] *Id.*

[266] *See Send in the Clowns: How Beppe Grillo and Silvio Berlusconi Threaten the Future of Italy and the Euro*, THE ECONOMIST, Mar. 2, 2013.

> and governance even more challenging in the years ahead.[267]

This issue is far from resolved. New currency crises are certain to crop up. Whether these crises force European leaders to reexamine whether it is advisable to maintain the EMU in its current membership configuration remains to be seen. Nevertheless, it is clear that reconfiguration of the EMU is legally possible and must be one of the tools which leadership considers in charting any new course.

[267] Desmond Dinan, *Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis*, 49 J. COMMON MARKET STUD. 103, 119 (2011).