

SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

BREXIT AND ACQUIRED RIGHTS

*Michael Waibel**

On March 29, 2017, the U.K. Government triggered Article 50 of the Treaty on European Union (TEU) on withdrawal from the European Union following a referendum on June 23, 2016 in which 51.89 percent voted for the United Kingdom to leave the European Union. As a hybrid provision, the much-discussed withdrawal provision in Article 50 TEU is part of EU law yet also anchored in public international law. Although the European Union is a unique, supranational organization that creates rights for individuals that are directly effective in national law, its member states created the European Union based on traditional treaties under international law.

Due to this anchoring of EU law, the U.K.'s withdrawal raises important questions of public international law that are the focus of this essay. First, this essay examines the relationship between the specialized withdrawal right in Article 50 TEU and the customary international law on withdrawal from treaties in Article 70 of the Vienna Convention on the Law of Treaties (VCLT), and explores its implications for the U.K.'s obligations vis-à-vis the European Union and its member states. Second, it looks at how Brexit affects the acquired rights of third parties to the EU treaties, namely those of citizens of the other twenty-seven EU member states—an issue that brings Brexit's most critical practical challenges into sharp focus.

The “Brexit Bill” and Article 70 of the VCLT

In its March 2017 report on “[Brexit and the EU budget](#),”¹ the U.K. House of Lords concluded that “Art 50 TEU allows the UK to leave the EU without being liable for outstanding financial obligations under the EU budget and related financial instruments, unless a withdrawal agreement is concluded which resolves this issue.”² After months of silence, the U.K. Government [acknowledged in July 2017](#) that it will meet its financial obligations to the European Union upon withdrawal.³ However, as of October 2017, [significant differences](#) remain between the European Union and the United Kingdom as to the [U.K.'s liability](#) in principle for outstanding financial obligations on its withdrawal from the European Union, as well as the content and volume of these financial obligations.⁴

** University Senior Lecturer; Co-Deputy Director Lauterpacht Centre for International Law, University of Cambridge. Thanks to Ryan Law for research assistance.*

¹ House of Lords, [Brexit and the EU Budget](#) (House of Lords Paper 125, Mar. 4, 2017).

² *Id.* at para. 153.

³ David Davis, [EU Exit Negotiations, Written Statement](#) (Jul. 13, 2017).

⁴ [Brexit: “Significant Differences” over Exit Bill Says Davis](#), BBC (Sept. 5, 2017). See generally Alex Barker, [The €60 Billion Brexit Bill: How to Disentangle Britain from the EU Budget](#) (Centre for European Reform, Feb. 2017).

Article 50 TEU is an example of a withdrawal clause, found in many treaties, that enables states to end their status as a party without breaching the treaty. Upon withdrawal, the treaty is no longer binding on the withdrawing state. Article 50 provides that:

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 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

In the view of the House of Lords, Article 50 contracts out of customary international law on withdrawal (the report referred specifically to Article 70 VCLT). Article 70(1) VCLT, which is widely regarded as reflecting customary international law, provides:

Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

- (a) Releases the parties from any obligation further to perform the treaty;
- (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

According to the House of Lords, Article 50 TEU was *lex specialis*, a possibility expressly mentioned in the first part of Article 70(1). According to this position, because the TEU contains a specific provision on withdrawal (Article 50), Article 70 VCLT is irrelevant when considering the U.K.'s financial obligations upon withdrawal from its EU membership.

The better view is that Article 50 TEU only partly contracts out of customary international law on treaty withdrawal as reflected in Article 70 VCLT. Article 50 lays down a specific *procedure* (timeline and notification requirements) for an EU member state to withdraw from the EU treaties. For example, it lengthens the notice period to two years (rather than the default period of one year in Article 56(2) VCLT). However, the House of Lords' report errs in taking these more specific procedural steps for withdrawal as evidence that Article 50 contracts out of all *other* rules of international law on treaty withdrawal—including financial obligations incurred by the United Kingdom.

Financial obligations created prior to withdrawal under the EU treaties survive because withdrawal under Article 70(1)(b) VCLT “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.” The European Union itself is not a party to the EU treaties, and as a third party, Article 70(1)(b) VCLT is silent on the EU's rights and obligations. However, it does cover the UK's obligations created through the execution of the treaty prior to withdrawal. The EU treaties and acts of EU member states in the execution of the treaty have created a series of obligations of EU member states towards the

European Union, including member states' financial commitments. The intention of EU member states was to [confer rights](#) corresponding to these obligations on the European Union.⁵ Article 70(1)(b) preserves these legacy obligations of the United Kingdom to the European Union following withdrawal.

The House of Lords' erroneous view would not only have major implications for the U.K.'s financial obligations vis-à-vis the European Union (and vice versa), but also for the U.K.'s rights vis-à-vis the European Union and for the acquired rights of third parties to the EU treaties—the subject of the next section. Under the House of Lords' approach, neither the current twenty-eight member states nor their nationals appear to have any rights following withdrawal, acquired or otherwise. Most importantly, the next section considers rights of EU citizens who exercised free movement rights prior to the U.K.'s withdrawal from the European Union.

The Acquired Rights of EU Citizens

Can third parties to the EU treaties, such as EU citizens, rely on the doctrine of “[acquired rights](#)” under customary international law to protect their rights post-Brexit?⁶ This doctrine protects certain, crystallized rights of nonstate actors against executive or legislative impairment or nullification by the state. The rationale behind the doctrine is “a need for permanence and security in social relations”⁷ and the legitimate expectation of continued reliance on their duly acquired rights.

There is little direct precedent to draw on for ascertaining the impact of Brexit on acquired rights. This doctrine has developed in the specific case of state succession. Despite important differences between state succession and withdrawing from the EU, state succession is a relevant comparator. In state succession cases in the last several decades, the [maintenance of acquired rights](#) of individuals, defined broadly, has played an important role.⁸ If private rights are protected in the more disruptive scenario of state succession where sovereignty changes hand and new states emerge or old states disappear, acquired rights should be protected even more so in the less disruptive scenario of a state withdrawing from the European Union.

In the state succession context, the acquired rights doctrine does not maintain or continue the same legal relationship between the prior state and the individual. Rather, the principle recognizes the factual scenario and seeks to give effect to those facts. The doctrine of acquired rights in the state succession context “seeks to ensure that a change of sovereignty should not touch the interests of individuals more than necessary.”⁹ In two of the most

⁵ States are free to confer rights on nonstate actors such as international organizations. Article VCLT 36 VCLT is limited to protecting third states against rights without their assent due to their sovereignty; see Michael Waibel, *The Principle of Privity*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES (Dino Kritsiotis & Michael J. Bowman eds., forthcoming).

⁶ As in the previous section, the focus is on whether customary international law protects such acquired rights. It leaves aside the issue of whether EU or U.K. law protects acquired rights of EU citizens. See Sionaidh Douglas-Scott, *What Happens to “Acquired Rights” in the Event of a Brexit?*, U.K. CONST. L. ASS'N BLOG (May 16, 2016) (because Article 50 TEU does not mention acquired rights, EU law does not protect acquired rights). It also does not consider alternative bases for claims against the United Kingdom because of Brexit, such as investment treaties and the European Convention on Human Rights. See Holger Hestermeyer, *Can Investors Sue the UK over Brexit?*, U.K. IN A CHANGING EUROPE BLOG (July 4, 2017) (noting significant hurdles to successful investment treaty claims of the United Kingdom, but also cautioning that some tribunals might regard Brexit as a fundamental change of the regulatory regime in the United Kingdom). For example, Article 1 of the First Protocol to the European Convention on Human Rights protects the “peaceful enjoyment of possessions,” which under the European Court of Human Rights' jurisprudence can cover “legitimate expectations.” See Vaughan Lowe, [Written Evidence](#), EU Justice Sub-Committee, U.K. Parliament, (Sept. 2, 2016).

⁷ Pierre Lalive, *The Doctrine of Acquired Rights*, in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 145, 165 (1965).

⁸ A. A. Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783, 802 (1964). On the rule of maintenance in earlier state succession cases, see ERNST FEILCHENFELD, [PUBLIC DEBT AND STATE SUCCESSION](#) (1931).

⁹ Daniel Patrick O'Connell, *The Doctrine of Acquired Rights and State Succession*, 27 BRIT. Y.B. INT'L L. 92 (1950).

important succession cases in the last thirty years, the dismemberment of the Soviet Union and the [Former Yugoslavia](#), the successor states [succeeded](#) to the debts of the predecessor states.¹⁰

When the United Kingdom joined the European Union, it consented to the creation of rights for individuals based on the EU treaties. These rights became part of “[their legal heritage](#).”¹¹ This reference to “heritage” already hints at possible acquired rights protection. The rights for individuals include the right for workers to take up employment in another member state, the right of establishment for companies, and the right for individuals and companies to provide and receive services. More generally, EU law grants an array of rights to EU citizens, including the right to move and reside as well as the right to vote and stand in local and European elections. These rights have provided considerable benefits to EU citizens. Millions of EU citizens have exercised these rights in the United Kingdom, and equally hundreds of thousands of Britons have exercised these rights in one of the other twenty-seven EU member states.

Under the VCLT, EU citizens are third parties with respect to the EU treaties. Article 70(1)(b), quoted previously, is immaterial to the protection of the rights of EU citizens. It only applies to the rights, obligations, or legal situations of the [state parties](#) to the TEU.¹² The [International Law Commission](#) confirmed this conclusion when it underscored that Article 70 is not “in any way concerned with ‘acquired rights.’”¹³

Instead, the relevant provision is Article 43 VCLT, which states that the withdrawal of a party from a treaty “shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.” The doctrine of acquired rights under customary international law is one such obligation. The United Kingdom is subject to this obligation independently of the EU treaties with respect to factual situations created under the treaties prior to the U.K.’s withdrawal.

The central question, however, is *which* rights are protected by customary international law as “acquired rights.”¹⁴ The scope of acquired rights protection is notoriously uncertain. To Pierre Lalive, the term “acquired rights” is “synonymous with that of ‘subjective right’ or, possibly, ‘individual right.’”¹⁵ At the same time, he cautions that subjective rights of a public or political character, as opposed to proprietary rights, are outside the scope of “acquired rights.”¹⁶ On this view, individual liberties—which could cover at least some rights of EU citizens, particularly citizenship rights—are not acquired rights.¹⁷

That said, the character of the right—public or private—offers a tenuous and anachronistic basis on which to decide whether a particular right falls within the scope of “acquired rights.” Such characterization is bound to vary across states and is notoriously difficult to draw.¹⁸ Each state defines for itself what counts as property and what counts as contract under its national law. For example, [concessions](#) are often said to be a public right, but equally

¹⁰ Ana Stanić, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 EUR. J. INT’L L. 751, 778 (2001); Martti Koskenniemi, *Report of the Director of Studies of the English-Speaking Section of the Centre*, in THE CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (2000), 90–96; AUGUST REINISCH & GERHARD HAFNER, STAATENSUKZESSION UND SCHULDENÜBERNAHME (1995).

¹¹ Case 26/62, [Van Gend en Loos](#), 1963 E.C.R. 13 (a leading case on the character of the EU’s legal order and the rights of individuals under it that predates the U.K.’s EU membership).

¹² House of Lords, [Brexit: Acquired Rights](#) para. 58 (House of Lords Paper 82, Dec. 14, 2016).

¹³ Int’l Law Comm’n, [Fifth Report on the Law of Treaties](#) art. 66, cmt. para. 3, II Y.B. INT’L L. COMM’N 265 (1966).

¹⁴ Lalive, [supra note 7](#), at 183 calls this the “delicate question”; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 533 (4th ed. 1990).

¹⁵ Lalive, [supra note 7](#), at 152.

¹⁶ *Id.* at 166.

¹⁷ *Id.* at 188 (the rationale for the exclusion of individual liberties is that these can be modified by domestic law).

¹⁸ *Id.* at 166; Fatouros, [supra note 8](#), at 802.

said to be a private right given that they are based on contract and have a monetary value.¹⁹ There is little doubt that concessions fall within the core of what the doctrine of acquired rights protects.

Moreover, the scope of acquired rights protection under customary international law evolves over time. That “public rights” were not covered by the doctrine several decades ago does not necessarily mean that they are not protected today, especially in the unique setting of EU law that made economic freedoms and citizenship rights part of the heritage of EU citizens according to the *Van Gend en Loos* formula. The economic freedoms under the EU treaties and the permanent right to live and reside in the host member country following five years of residency has considerable monetary value to the individuals concerned, and on that basis, their qualification as “acquired rights” appears justified.

In his leading work on state succession, Daniel Patrick O’Connell distinguished between liquidated claims (which constitute acquired rights) and unliquidated claims (which do not qualify as such) without elaborating further on the factors relevant for this classification.²⁰ The idea is to distinguish between the concrete “factual scenarios” which the new sovereign is bound recognize on equitable grounds, and the expectations which only possess the possibility of realization, and are hence unliquidated.

Accordingly, EU citizens who have exercised these rights prior to the termination of the EU treaties in respect of the United Kingdom have crystallized their rights. The “liquidation” of their rights prior to the U.K.’s withdrawal gives rise to a legal situation that the doctrine of acquired rights should protect. EU citizens have thus acquired rights that exist as a matter of fact. This is particularly the case for EU citizens who have the status of permanent residents in another member state—which entitles them to remain indefinitely in the host country on virtually the same terms as host country nationals (with very limited exceptions such as the right to vote). The doctrine of acquired rights protects their status in the same conditions as prior to Brexit. [For example](#), permanent residents of the United Kingdom can leave the United Kingdom for less than two consecutive years after Brexit and retain their permanent residence, even if U.K. law in the future were to contain more stringent conditions.²¹

What is left outside of the notion of acquired rights is also important. An individual’s nationality and the rights of individuals to participate in the political process are not protected. The result is that even those individuals who have acquired permanent residence under EU law in the United Kingdom or in the other twenty-seven member states are not entitled under customary international law to exercise the right to vote or to stand in municipal and European elections following the U.K.’s withdrawal from the European Union.

Conclusion

As an exit from a comprehensive supranational organization founded on treaties, the U.K.’s decision to withdraw from the European Union raises not only complex questions of U.K. constitutional and of EU law, but also questions of public international law. This essay focused on two. It concluded first that Article 50 TEU—the specialized withdrawal right that has been part of EU law since 2009—does not exhaustively regulate the question of withdrawal. Customary international law, as reflected in Article 70 VCLT, also applies. One important implication is that the U.K.’s financial obligations created prior to withdrawal under the EU treaties survive. Second and relatedly, it found that the doctrine of acquired rights under customary international law protects factual situations created under the EU treaties prior to the U.K.’s withdrawal, similar to scenarios of state succession. While there is little precedent to draw on and considerable uncertainty about the scope of this doctrine, the right of permanent residence is a protected acquired right.

¹⁹ Lalive, [supra note 7](#), at 167 (a “mixed” right protected because of its contractual basis and monetary value); Georges Kaeckenbeeck, *La Protection Internationale des Droits Acquis*, 59 RECUEIL DES COURS 317, 352 (1937).

²⁰ DANIEL PATRICK O’CONNELL, *THE LAW OF STATE SUCCESSION* 207 (1956).

²¹ Article 16(4) [Directive 2004/38](#), art 16(4), 2004 O.J. (L 158) 77 (EC).