



BRIEFING PAPER

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Could the Withdrawal Agreement be terminated under international law?

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Summary

The Leigh amendment and the Vienna Convention on the Law of Treaties

An amendment from Sir Edward Leigh to the Government's motion on approving the Withdrawal Agreement in December 2018 called for an assurance from the Government that it would terminate the Withdrawal Agreement if the EU refused to agree to removing the backstop at the end of 2021.

But could the UK terminate the Withdrawal Agreement under provisions in the [Vienna Convention on the Law of Treaties](#) (VCLT)?

The VCLT sets out limited circumstances in which a treaty can be denounced when it lacks relevant clauses on denunciation and when the parties to the treaty cannot be brought into agreement. These circumstances include cases where:

- the parties clearly intended to admit the possibility of denunciation, or a right of denunciation is implied by the nature of the treaty;
- a further treaty covering the same subject matter is concluded by all the parties to the existing treaty and supersedes this treaty, or the two are incompatible;
- there is a material breach of a bilateral treaty by one party, or in certain circumstances by a party to a multilateral treaty;
- it is impossible for a party to observe a treaty because of an essential treaty objective disappearing;
- there has been a fundamental change in the circumstances under which the parties originally concluded the treaty, and that change in circumstances has not resulted from the actions of the state wishing to denounce;
- a new peremptory norm of general international law has emerged with which the treaty conflicts.

Does the Vienna Convention apply?

The [Withdrawal Agreement](#) is a treaty between the UK (a state) and the EU (an international organisation), whereas 'treaty' is defined in the VCLT as an agreement between states; and the Vienna Convention involving international organisations is not yet in force. Strictly speaking, the Leigh amendment does not claim that the Vienna Convention applies, but it implies that it does. At the very least, the Vienna Convention is a very strong guide to the international law rules - and it works as a guide even for the EU (which is not a party to it), as confirmed by the Court of Justice of the EU (CJEU) in its [Wightman judgment](#) on 10 December 2018.

'Material breach' and 'fundamental change of circumstances'

Some lawyers and commentators have suggested that either the 'material breach' (Article 60) or 'fundamental change of circumstances' (Article 62) provisions in the VCLT could allow the UK to unilaterally denounce or terminate the Withdrawal Agreement if the Irish backstop were to persist or become permanent. But there are difficulties with these suggestions. Proving a 'material breach' of "best endeavours" would be extremely difficult; and crucially, a continuation of the backstop would not be a "fundamental change of circumstances" within the meaning of the VCLT. Such a possibility is foreseen in the Withdrawal Agreement even though it is not the intention of either party that this should happen. The clarifications and interpretations the Prime Minister secured on 11 March 2019 do not appear to have changed this.

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Dispute resolution in the Withdrawal Agreement

Any dispute about the Withdrawal Agreement will have to be settled within the Withdrawal Agreement dispute settlement mechanisms (eg, Joint Committee settlement or arbitration) or by subsequent international agreements between the parties to it. Within those dispute settlement mechanisms, the parties are able to reference customary international law to justify their position, including that codified by Articles 60 and 62 of the VCLT.

1. Terminating the Withdrawal Agreement: Leigh amendment

Before the first scheduled (but then postponed) ‘meaningful vote’ on the negotiated Withdrawal Agreement and Political Declaration at the end of 2018, Sir Edward Leigh tabled an [amendment](#) (supported by 16 MPs).¹ to the Government’s motion on approving the two texts. It read:

At end, add “notes that the Northern Ireland backstop is intended to be temporary; notes that the Vienna Convention on the Law of Treaties makes it absolutely clear that a sovereign state can abrogate any part of a treaty with an international body in case of a fundamental change of circumstances since the Treaty was agreed; notes that making the Northern Ireland backstop permanent would constitute such a fundamental change of circumstances; and therefore calls for an assurance from the Government that, if it becomes clear by the end of 2021 that the European Union will not agree to remove the Northern Ireland backstop, the United Kingdom will treat the indefinite continuation of the backstop as a fundamental change of circumstances and will accordingly give notice on 1 January 2022 to terminate the Withdrawal Treaty so that the United Kingdom of Great Britain and Northern Ireland shall become an independent country once again”.

Sir Edward set out on his [website](#) (30 November 2018) why he thought this could be sustained in international law, concluding:

The backstop for Northern Ireland is a worst-case scenario not intended by either party to the draft Withdrawal Agreement to ever enter into effect. Nonetheless, it may do so without being desired by either party. The purpose of my amendment is to provide a helpful reassurance that we will not accidentally end up with an effectively permanent backstop in effect in the event that a transition cannot be agreed. This clarifies the position in international law and reaffirms that the democratically accountable Government’s ability to abrogate the backstop to prevent a semi-permanent customs subservience.

In the [debate](#) on the European Council meeting on 17 December 2018 Sir Edward again referred to a ‘right’ under international law to abrogate the Withdrawal Agreement or parts of it if the backstop ceased to be temporary:

I think that this matter is resolvable, and many of us who have been sceptical about the deal so far could be persuaded to vote for it if there were a legally binding protocol saying that, as is normal with international treaties, if a temporary arrangement ceases to be temporary, then either side can unilaterally withdraw, and in any event under international law we would have the right to abrogate those parts of the treaty if they prove not to be temporary.

¹ Sir John Hayes, Gordon Henderson, Daniel Kawczynski, Martin Vickers, Fiona Bruce, Bob Stewart, Sir Henry Bellingham, Sir David Amess, Dr Matthew Offord, Damien Moore, Mr John Baron, Neil Parish, Mrs Pauline Latham, Mr Nigel Evans, Sir Desmond Swayne, Robert Halfon. Sir Desmond Swayne’s name has now [been removed](#) (p 40).

2. What the Vienna Convention says about terminating treaties

2.1 Introduction

The 1969 [Vienna Convention on the Law of Treaties](#) (VCLT) entered into force in January 1980. The UK is a party to it but the EU is not. However, large parts of the VCLT reflect customary international law on treaties which does bind the EU (and is also part of the common law in the UK). Moreover, in his [opinion](#) on unilateral revocation of the Article 50 notice in *Wightman* in December 2018, the Advocate General at the Court of Justice of the EU (CJEU) discussed whether the VCLT applies to withdrawal from the EU, and concluded that it does not because the EU itself and some Member States are not parties to it. But the Advocate General argued that the VCLT may be useful when interpreting Article 50, referring to international practice and Article 68 of the VCLT to support his interpretation in favour of unilateral revocation.

There is a parallel 1986 [Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations](#), which again the UK has ratified but the EU has not, but that Convention is [not yet in force](#).

2.2 Grounds for terminating treaties

The VCLT restates the international law rule of *pacta sunt servanda*, which means that treaties are binding on the parties and must be performed **in good faith**. *Pacta sunt servanda* does not mean that treaties cannot be terminated, but the grounds for doing so are strictly limited.

The VCLT includes a section on the termination and suspension of the operation of treaties (Articles 54-64). This sets out the special circumstances in which a treaty can be denounced when it lacks relevant clauses on denunciation and when the parties cannot be brought to agreement.

Possible grounds for a termination under the VCLT are:

- **Termination by treaty provision or consent:** a treaty may be terminated or suspended in accordance with a specific provision in that treaty. Even if there is no such provision, it can be terminated if all the parties agree.
- **Intended or implied right to unilateral termination:** despite the principle of *pacta sunt servanda*, a state can unilaterally terminate a treaty either if it can be shown that the parties intended to allow termination, or if the right to terminate can be implied by the nature of the treaty.
- **Where the purposes and object of the treaty have been fulfilled** or it is clear from its provisions that it is limited in time and the required period has ended.

- **Material breach by the other state:** where one state violates an important provision and the other state (for bilateral treaties) ‘retaliates’ by regarding the whole agreement as ended.
- **Supervening impossibility of performance:** where the agreement cannot be carried out because of the ‘permanent disappearance or destruction of an object indispensable for the execution of the treaty’.
- **Fundamental change of circumstances:** the doctrine of *rebus sic stantibus* provides that where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may unilaterally withdraw from or terminate it. This is narrowly interpreted:
 - the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty;
 - the change must have been unforeseen by the parties; and
 - the effect of the change must be to transform radically the extent of obligations still to be performed under the treaty.

The text of Articles 60 and 62 VCLT

Article 60 (Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach) states:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
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 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

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(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 62 (Fundamental Change of Circumstances) states:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary; or

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

2.3 International and EU case law

Terminating or withdrawing from treaties due to a fundamental change of circumstances has been one of the most disputed issues of public international law. But international and EU case law have held that Article 60 and 62 VCLT largely codify existing customary international law.

In the 1973 *Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)* the International Court of Justice (ICJ) held that “Article 62 of the Vienna Convention on the Law of Treaties...may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances”.² It held similarly in its 1971 Advisory Opinion in the *Namibia* case that Article 60 VCLT “may in many respects be considered as a codification of existing customary law on the subject.”³

In a 1998 judgment the European Court of Justice [held](#) in the ‘Racke Case’ (para. 53) that it is “possible to contemplate the termination or suspension of an agreement by reason of a fundamental change of circumstances,

² [1973] ICJ Rep 3 para. 36; and ICJ Rep 49 para. 36

³ [1971] ICJ Rep 16 para 94.

customary international law, as codified in Article 62(1) of the Vienna Convention”.⁴

⁴ Case C-162/96, [A Racke GmbH & Co v Hauptzollamt Mainz](#), 16 June 1998

3. What the Protocol on Ireland/Northern Ireland says

3.1 The backstop is not intended to be permanent

The Protocol on Ireland/Northern Ireland which provides for the backstop is an integral part of the Withdrawal Agreement and legally binding on the parties. The Preamble to the Protocol,⁵ the Protocol itself⁶ and the Political Declaration on the framework for future EU-UK relations⁷ all make clear that the 'backstop' is intended to be temporary.

Article 1(4) of the Protocol states:

The objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1). The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement.

Article 2(1) states that the EU and the UK "shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part".

3.2 'Safeguard measures' if application of the Protocol results in difficulties

The Protocol envisages that its application might give rise to "serious economic, societal or environmental difficulties", in which case either the UK or the EU may unilaterally take "appropriate measures". [Article 18 of the Irish Protocol](#) provides:

1. If the application of this Protocol leads to serious economic, societal or environmental difficulties liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate measures. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.
2. If a safeguard measure taken by the Union or the United Kingdom, as the case may be, in accordance with paragraph 1 creates an imbalance between the rights and obligations under this Protocol, the Union or the United Kingdom, as the case may be, may take such proportionate rebalancing measures as are strictly necessary to

⁵ "RECALLING the Union's and the United Kingdom's intention to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing".

⁶ Article 1(4),

⁷ Paragraph 19: "The Parties recall their determination to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing".

remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of this Protocol.

3. Safeguard and rebalancing measures taken in accordance with paragraphs 1 and 2 shall be governed by the procedures set out in Annex 10 to this Protocol.

[Annex 10](#) specifies that these “safeguard measures” will be a matter for the Joint Committee and the subject of consultations in the Joint Committee every three months.

3.3 Clarification and interpretation of the backstop (the ‘Strasbourg package’)

The clarificatory and interpretative documents Theresa May negotiated with the EU in March 2019 included a legally binding [Joint Interpretative Instrument](#) on the Withdrawal Agreement. This set out how the parties intend the Withdrawal Agreement, and specifically the Protocol on Ireland/Northern Ireland, to be interpreted as it is set out in the Agreement. It follows on from the [exchange of letters](#) between Donald Tusk and Theresa May on 14 January 2019, and reiterates the interpretations set forth in those letters.

The ‘Strasbourg package’ includes a unilateral UK declaration concerning the Northern Ireland Protocol, setting out the sovereign action the UK would take to provide assurance that the backstop would only be applied temporarily, and joint EU-UK clarifications and interpretations. It states that where the EU or the UK find that ‘best endeavours’ or ‘good faith’ are not being observed by a party acting with the objective of applying the Protocol indefinitely, the dispute settlement as set out in the Withdrawal Agreement could be used.

The joint instrument says the new structure of governance for Northern Ireland contained in the backstop “does not affect or supersede the provisions of the 1998 Agreement in any way”. These areas will continue to be “matters for the Northern Ireland Executive and Government of Ireland to determine”.

The Instrument does not fundamentally change the nature of the Protocol: the ‘backstop’ can continue to come into force; there is no introduction of a ‘time limit’ on the backstop; nor does the Instrument introduce a unilateral right for the UK to terminate the backstop. The Instrument emphasises that if the UK finds that the EU is refusing to cooperate with replacing the backstop, or failing to act with what the Withdrawal Agreement calls ‘good faith’ in Article 5 of the Agreement itself and ‘best endeavours’ in Article 2(1) of the Protocol, the UK would be able to contest this.

The Joint Instrument and the rest of the package are discussed in detail in Commons Library Briefing Paper 8525, [The ‘Strasbourg package’](#), 13 March 2019.

3.4 Could a permanent backstop be contrary to EU law?

It could be argued that it was contrary to Article 50 of the Treaty on European Union (TEU) and EU law to make the backstop permanent, as the UK Attorney General pointed out in his December 2018 [legal advice](#) on the Withdrawal Agreement (paragraph 18):

There are numerous references in the Protocol to its temporary nature but there is no indication of how long such temporary arrangements could last. There may be, therefore, some doubt as to whether the proposed Protocol is consistent with EU law, and that uncertainty will increase the longer it subsists.

On the other hand, a time-limited backstop would be contrary to the aims of the Withdrawal Agreement, and, as Irish Foreign Minister Simon Coveney [tweeted](#) (4 November 2018), a “‘time-limited backstop’ or a backstop that could be ended by UK unilaterally would never be agreed to by IRE or EU. These ideas are not backstops at all + don’t deliver on previous UK commitments”.

4. What the Attorney General has said

In his [Legal position on the Withdrawal Agreement](#) (Cm 9747, 3 December 2018), the Attorney General, Geoffrey Cox, referred to the ‘good faith’ principle (paragraph 14):

A reciprocal legal obligation on the parties to act in good faith is a common feature of international agreements. The principle of good faith is a rule of customary international law, as has been recognised by the CJEU⁸ and the International Court of Justice.⁹ A dispute about compliance with this obligation could be raised under the applicable dispute resolution mechanism in the Agreement It is likely that there would only be a finding of breach where it was supported by clear evidence.

4.1 A legal risk exists

The Attorney General advised that the absence of a right of unilateral withdrawal did create a “legal” risk that the UK might find itself having to remain in the backstop indefinitely. He [told](#) the Commons on 3 December:

There is therefore no unilateral right for either party to terminate this arrangement. This means that if no superseding agreement can be reached within the implementation period, the protocol would be activated and in international law would subsist even if negotiations had broken down. How likely that is to happen is a political question, to which the answer will no doubt depend partly on the extent to which it is in either party’s interests to remain indefinitely within its arrangements.

Paragraph 16 of Mr Cox’s [advice on the legal effect of the Protocol](#) (dated 13 November, so not on the final Protocol text) stated:

It is difficult to conclude otherwise than that the Protocol is intended to subsist even when negotiations have clearly broken down. The ordinary meaning of the provisions [in Article 1(4)] and considered in their context allows no obvious room for the termination of the Protocol, save by the achievement of an agreement fulfilling the same objectives. **Therefore, despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in international law the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part, as set out therein.** Further, the Withdrawal Agreement cannot provide a legal means of compelling the EU to conclude such an agreement.

4.2 The risk is probably low

But Geoffrey Cox appeared to suggest the risk is low and worth taking for political and legal reasons. The political reasons were mainly that the EU

⁸ For example, *Opel Austria GmbH v Austria*, T-115/94, EU:T:1997:3 (paragraph 90); *Portugal v Council*, C149/96, EU:C:1999:574 (paragraph 41).

⁹ For example, *Nuclear Test cases (Australia v France)*, Judgment of 20 December 1994, ICJ Reports 1974, p. 253 (paragraph 46).

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does not want an indefinite backstop, and the legal reasons that Article 50 does not provide for permanency. He said the EU's position was that "while the NI-only backstop can be defended on the basis that it is necessary and proportionate to secure an orderly withdrawal, the addition of GB to the EU customs territory is only sustainable because it is a temporary 'bridge to the future', which will be superseded by a final agreement" (para. 17).

There would be ongoing legal uncertainty under EU law if the backstop continued indefinitely. "There are numerous references in the Protocol to its temporary nature but there is no indication of how long such temporary arrangements could last. There may be, therefore, some doubt as to whether the proposed Protocol is consistent with EU law, and that uncertainty will increase the longer it subsists" (para 18 legal advice).

Also, he did not think the EU would want to prolong a situation in which the enforcement of the EU's single market for goods and the customs union "is substantially in the hands of a Third Country". He said there was no precedent for this "and it is reasonable to suppose that it is not a position that it will wish to prolong under conditions of legal uncertainty".

Any fundamental change in circumstances under Article 62 VCLT **must be unforeseen**, whereas the Attorney General's advice *did* foresee a lack of agreement. If there were an unforeseen change in circumstances, this could justify abrogating the Withdrawal Agreement - which could lead to interesting consequences in terms of accrued obligations under the Agreement.

4.3 Does the 'Strasbourg package' reduce the risk?

The Attorney General issued a [legal opinion](#) on the Joint Instrument and the Unilateral Declaration on 12 March 2019. He concluded that "there is no doubt, in my view, that the clarifications and amplified obligations contained in the Joint Instrument and the Declaration provide a substantive and binding reinforcement of the legal rights available to the United Kingdom in the event that the EU were to fail in its duties of good faith and best endeavours". However, Geoffrey Cox's overall conclusions regarding the Protocol were unchanged:

[...] the legal risk remains unchanged that if through no such demonstrable failure of either party, but simply because of intractable differences, that situation does arise, the United Kingdom would have, at least while the fundamental circumstances remained the same, no internationally lawful means of exiting the Protocol's arrangements, save by agreement.

But the Attorney General referred both to the 'good faith' obligation and to the 'fundamental change of circumstances' provision in the VCLT in an oral statement to the Commons on 12 March 2019. Addressing his legal opinion on the Strasbourg package, Geoffrey Cox [spoke](#) of the legal force of the UK unilateral declaration on the Irish Protocol:

The unilateral declaration is not incompatible with international law. It reserves the United Kingdom's right to take all measures available to it in circumstances where the talks have broken down as a result

of a breach of article 5, which is the good faith duty. It reinforces and further stresses the United Kingdom's right to take measures to withdraw from the arrangements if there is a breach of good faith.¹⁰

He also referred to the "sovereign right" of the UK Government and House of Commons to determine whether there had been a "fundamental change of circumstance":

We have made a solemn pledge to the people of both Northern Ireland and the Republic of Ireland that the border will be guaranteed never to be a hard border. That required the United Kingdom to say that in all normal circumstances we will not depart from that pledge. I repeat the point that I made to my hon. Friend the Member for North East Somerset (Mr Rees-Mogg): in the case of a fundamental change of circumstance, which is ultimately the sovereign right of this House and the Government to determine, the United Kingdom could withdraw, pursuant to customary international law. So it is not true to say that there is not ultimately the right of this House and the Government of the country at the time to exercise their discretion to do so in those circumstances.¹¹

Mr Cox confirmed at the end of the debate (c 201) that "The only circumstance in which there would be an unconditional right to withdraw is if there were a fundamental change of circumstances pursuant to customary international law". However, he did stress that the change would indeed have to be fundamental and unforeseeable:

We are permitted, in a case of fundamental change of circumstances, to withdraw by the law. If such a change of circumstance came about—either because of some fundamental political change in Northern Ireland or some fundamental change of circumstance going to the essential basis of the agreement—then we would have the right to withdraw. But in all normal, envisageable and predictable circumstances, particularly while we are negotiating a subsequent agreement to the pace and accelerated timetable that this instrument now requires, we would not do so and it would be wrong to do so—wrong because it would be a breach of our obligations and wrong because this is a law-abiding country.¹²

Later that day, in the debate before the second 'meaningful vote', secretary of State for Exiting the EU, Stephen Barclay, [appears to say](#) that the Government has interpreted the Attorney General's statements as supporting recourse to Article 62 VCLT if the backstop lasted indefinitely:

[...] if the United Kingdom took the reasonable view, on clear evidence, that the objectives of the protocol were no longer being proportionately served by its provisions because, for example, it was no longer protecting the 1998 agreement in all its dimensions, the UK would first, obviously, attempt to resolve the issue in the Joint Committee and within the negotiations.

However, as the Attorney General said in the House today, it could respectfully be argued, if the facts clearly warranted it, that there had been an unforeseen and fundamental change of circumstances affecting the essential basis of the treaty on which the United Kingdom's consent had been given. As my hon. Friend will know,

¹⁰ HC Deb 12 March 2019 c 192

¹¹ HC Deb 12 March 2019 c 198-9

¹² HC Deb 12 March 2019 c199.

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article 62 of the Vienna convention on the law of treaties, which is reflective of the customary international law, permits the termination of a treaty in such circumstances.

It would, in the Government's view, be clear in those exceptional circumstances that international law provides the United Kingdom with a right to terminate the withdrawal agreement. In the unlikely event that that were to happen, the United Kingdom would no doubt offer to continue to observe the unexhausted obligations in connection, for example, with citizens' rights. I hope that addresses the concern that was raised.¹³

4.4 What if the backstop has a “socially destabilising effect”?

There have been reports that the Attorney General is talking to DUP and pro-Brexit Conservatives about the possibility of withdrawing from the Withdrawal Agreement. *The Telegraph* reported on 14 March that Mr Cox had said the UK would be able to break out of the Irish backstop if it was having a “socially destabilising effect on Northern Ireland”, which would be considered a “fundamental change” of circumstances under Article 62 VCLT.

According to the *Belfast Telegraph*, he said:

Those facts might, for example, be that the prolonged operation of the Backstop was having a socially destabilising effect on Northern Ireland, contrary to its objective.

It is in my view clear and undoubted in those exceptional circumstances that international law provides the (UK) with the right to terminate the Withdrawal Agreement.¹⁴

But not only is the possible entry into force of the backstop expressly foreseen and envisaged in the Withdrawal Agreement, but any adverse economic or social effects of its use are also provided for in Article 18 of the Protocol (see section 3.2 above).

¹³ HC Deb, 12 March 2019, c289

¹⁴ Belfast Telegraph, [Northern Ireland disorder could help UK out of backstop, says Attorney General Cox](#), 15 March 2019

5. Comment

5.1 Does the Vienna Convention apply?

In a research note for Policy Exchange, [How to Exit the Backstop](#), and in an [article on 4 December](#), Professor Guglielmo Verdirame,¹⁵ Sir Stephen Laws¹⁶ and Professor Richard Ekins¹⁷ consider how the Withdrawal Agreement might be suspended or terminated under VCLT provisions. They did not comment on the possible consequences of terminating a treaty under [Article 70 VCLT](#) (Consequences of the termination of a treaty).

Verdirame, Laws and Ekins suggest that because of the various references to the backstop being temporary, “[a]rguably, a right of withdrawal – in the event that the backstop ceased to be temporary – may be implied from the nature of the treaty” (VCLT Article 56).

But does the VCLT even apply in this case? The Withdrawal Agreement is a treaty between the UK (a state) and the EU (an international organisation), whereas ‘treaty’ is defined in the VCLT as an agreement between states. The academic commentators take no issue with the VCLT being applicable and strictly speaking, the Leigh amendment did not claim that the VCLT applied. Verdirame et al seem to say that the provisions of the two Vienna Conventions are essentially the same. But they did not point out that the Vienna Convention involving international organisations is not yet in force, and they seemed to imply that all of the provisions are also customary international law norms without further discussion.

The Advocate General’s [opinion](#) in *Wightman* (4 December 2018) has interesting commentary on the extent to which the VCLT applies to EU law and the EU:

77. Are the rules of the VCLT on withdrawal from international treaties applicable to the withdrawal of a Member State from the European Union? If so, what might be the relationship between the VCLT and the provisions of Article 50 TEU?

78. The Treaty on European Union is an international treaty between States and, at the same time, the constituent instrument of an international organisation (the European Union). As such, it would be subject to the VCLT, in accordance with Article 5 thereof. (57)
However, it must be borne in mind that the European Union is not a party to the VCLT, nor are several of its Member States (France, Romania). Accordingly, the provisions of the VCLT on withdrawal from a treaty, and the possibility of revoking that withdrawal, in particular Article 68 of the VCLT, are not applicable in EU law as rules of international conventions.

By analogy, **Articles 60 and 62** of the VCLT would not apply to the EU *unless* they codified existing norms of customary international law.

¹⁵ Professor of International Law at King’s College London; Essex Street Chambers

¹⁶ Former First Parliamentary Counsel

¹⁷ Associate Professor, University of Oxford

5.2 Article 60: breach of ‘best endeavours’?

Article 60 VCLT has been treated as customary international law, and it is generally accepted that provisions of the VCLT that reflect customary international law are binding even on states and international governmental organisations that have not signed the VCLT.¹⁸

Verdirame et al believe it is “certainly plausible that, if it were faced with a material breach, the UK would in any event have a right to suspend or terminate the Protocol under the VCLT”. They assert that the UK could have a right to suspend or terminate the Withdrawal Agreement based on the material breach condition (VCLT Article 60(3)(b)):

There can be little doubt that the “best endeavours” obligation is essential to the accomplishment of the object and purpose of the Northern Ireland Protocol and the Withdrawal Agreement in general. EU conduct in breach of such an obligation and indefinitely prolonging the application of the Protocol could thus amount to a material breach of the Withdrawal Agreement and the Protocol. Faced with this situation, the UK would be entitled to invoke this material breach as a ground for the suspension or termination of the Withdrawal Agreement and the Protocol.¹⁹

The ‘material breach’ in question would be of Article 184 of the Withdrawal Agreement and/or Article 2(1) of the Protocol on Ireland and Northern Ireland, both of which commit the parties to use “best endeavours” to conclude further agreements that will supplant the backstop.

However, as the Attorney General noted in December 2018, it would be very difficult to *prove* that the EU had not used ‘best endeavours’. If it participated fully in negotiations and was willing to accept new solutions that would in practice preclude a hard border, the UK would struggle to find ‘evidence’ that the EU was not showing ‘best endeavours’. Likewise, the EU’s rejection of a ‘solution’ that did not in practice prevent a hard border as agreed by the parties would also not be ‘evidence’ of it failing to use ‘best endeavours’. So an allegation of failure to use best endeavours is difficult to prove and has a relatively high threshold. It would need to be manifest, but if proven it would trigger the enforcement/sanctions mechanisms set out in the Withdrawal Agreement, which are intended to be temporary.

5.3 Background to Article 62

Article 62 may be an expression of customary international law, but it was not a given at the time the Vienna Convention was being negotiated. In [*Commentaries on the Law of Treaties: A Review Essay Reflecting on the*](#)

¹⁸ In 1971 the ICJ held that the rules of the VCLT concerning termination of a treaty for breach “may in many respects be considered as codification of existing customary law” ([Legal Consequences for States of the Continued Presence of South Africa in Namibia \[South West Africa\] \[1971\] ICJ Rep 3 para. 94](#)) and applied Art. 60.

¹⁹ [How to Exit the Backstop](#), Professor Guglielmo Verdirame, Sir Stephen Laws and Professor Richard Ekins, Policy Exchange, December 2018

[Genre of Commentaries](#),²⁰ Christian Djefal looked at its complexity and the reservations of the VCLT drafters:

All commentaries agree that the requirements for the application of Article 62 VCLT are very restrictive. Malcolm Shaw and Caroline Fournet (Corten and Klein) show that the customary status of the provision is unclear (at 1416–1418). The compromise achieved in Vienna was drafted in such a complex manner that Villiger developed a questionnaire with the aim of restructuring the different parts of the provision into logical order (at 779). This questionnaire provides the reader with a new structure that helps him to check whether Article 62 VCLT applies. This is a good example of how commentaries rearrange the law in a way to make it better comprehensible. Giegerich (Dörr and Schmalenbach) attributes only minor practical relevance to the provision, but mentions one important function of Article 62 VCLT that it shares with other rights to termination and withdrawal: it can be used as a threat to bring about a renegotiation of the treaty (at 1070). Thus, the mere possibility of exit may stabilize treaty relations. Yet, the high threshold established by Article 62 VCLT will render the possibility for exit very small. The fact that Article 62 VCLT has rarely been applied, may also be interpreted as a success of the VCLT. As the states ratified the VCLT, they accepted that treaty relations are to remain mostly stable. It remains to be seen whether a public law concept of international law will make grounds for termination superfluous and redundant. In order to examine whether the grounds for termination and withdrawal have become outdated, one would have to look at the bigger picture of which the grounds for termination and withdrawal are only one part.

The bar is set very high for the successful use of Article 62 VCLT to withdraw from a treaty. Several commentators have pointed out that in a [judgment on 25 September 1997](#) in the *Gabcikovo-Nagymaros case*, the ICJ did not accept that the collapse of the Soviet Union and the dissolution of Czechoslovakia (among other things) were sufficient changes of circumstances for Hungary to withdraw from a 1977 treaty with the former Czechoslovakia. Commenting on this ruling, Philippe Sands (Professor of law at University College London), who had argued at the ICJ for Hungary's right to terminate the 1977 treaty under Article 62 VCLT, said in a [Guardian Opinion](#) on 18 March 2019:

Article 62 cannot be invoked where the circumstance that arises – the indefinite or extended application of the backstop – has been foreseen by the withdrawal agreement. Accordingly, it can offer no assistance. The argument that it could be invoked if negotiations broke down and the backstop pertained indefinitely is hopeless. It is not even arguable. Nor is the idea that the UK could somehow adopt its own interpretation, or laws, to get around the problem. The withdrawal agreement is an [international obligation](#) which trumps domestic law.

Moreover, it cannot even be said that article 62 really provides for a unilateral right of termination, as it is likely that the matter would come before the arbitral panel established under the withdrawal agreement. The arbitral panel would have to be persuaded that the extended (or even indefinite) application of the backstop was an unforeseen fundamental change of circumstance.

²⁰ European Journal of International Law, Volume 24, Issue 4, November 2013

5.4 'Material Breach' or 'Fundamental Change'?

Verdirame et al think 'material breach' of Article 184 of the Withdrawal Agreement and Article 2(1) of the Protocol on Ireland and Northern Ireland, which both commit the parties to use 'best endeavours' to conclude a future agreement that will supplant the backstop, is a more plausible possible exit from the Withdrawal Agreement than a basis of 'fundamental change of circumstances', for the following reasons:

In international law, a fundamental change of circumstances is normally understood as relating to something external to the treaty. Moreover, the party invoking fundamental change of circumstances must also show that the change "was not foreseen by the parties" (Article 62(1), VCLT). In this case, the possibility of the backstop becoming permanent is already foreseen and is indeed already causing concern. On the other hand, this foresight is also in tension with the stated intention that the Protocol is to apply only temporarily.

Others, including Martin Howe QC, agree. Mr Howe has refuted the 'fundamental change' argument here because the backstop is expressly provided for in the Withdrawal Agreement:

Article 62 of the Vienna Convention makes it absolutely clear that a fundamental change of circumstances cannot be used to excuse a State from complying with its treaty obligations, except in the most limited and extreme circumstances which certainly do not apply here. If the negotiations between the UK and the EU deadlock in the way envisaged in the Attorney General's advice, that doesn't even count as "a change of circumstances": it is just one possible way in which the terms of the treaty pan out, not a change in circumstances external to the treaty. Even if you call it a change of circumstances, it cannot be relied upon to excuse non-compliance with the treaty because it is "foreseen by the parties" at the time of conclusion of the treaty.²¹

In the Lords debate on the Withdrawal Agreement and Political Declaration - Motion to Take Note (1st Day) on 5 December 2018, Baroness Deech asked the Government to assure the House:

... that the Vienna Convention on the Law of Treaties will enable us unilaterally to withdraw from the withdrawal agreement, as I believe it does, because, as that treaty specifies, withdrawal is possible unilaterally when it is contemplated and when there is, as there probably will be, a profound change of circumstances.²²

The Government did not offer this reassurance. But the Attorney General's March 2019 legal advice and pronouncements on the possibility of terminating the Withdrawal Agreement have put the spotlight back on the Vienna Convention. In a [letter to The Times](#) on 15 March 2019 Lord Pannick QC of Blackstone Chambers (who represented Gina Miller successfully before the Supreme Court) supported the view that Article 62 VCLT could be grounds for withdrawing from the Withdrawal Agreement:

²¹ Martin Howe, [Exposed: the legal myths being promoted about the backstop and the Withdrawal Agreement](#), Brexit Central, 9 December 2018

²² HL Deb, 5 December 2018, c1005

Article 1 (4) of the Protocol on Ireland/Northern Ireland states that the objective of the withdrawal agreement “is not to establish a permanent relationship between the Union and the UK”.

If, therefore, the UK and the EU were unable to reach an agreement on Northern Ireland/Ireland, despite good faith negotiations and despite the arbitration procedures, and if the UK were therefore to be faced (against its will) with a permanent backstop arrangement, the UK would be entitled to terminate the withdrawal agreement under Article 62 of the Vienna convention on the Law of Treaties. There would have been “a fundamental change of circumstances” in relation to “an essential basis of the consent of the parties to be bound by the treaty”. As a matter of law, the UK would not be bound to remain permanently in a backstop arrangement.

He questioned whether “it would be wise politically to invoke Article 62” but appeared to be in little doubt that Article 62 could be invoked. His position was immediately countered by others - David Wolfson QC and Lord Thomas of Gresford QC - in letters to *The Times*, [Brexit, and why Article 62 is not an option](#), 16 March 2019.

In a Policy Exchange study published on 15 March 2019, [A Second Look at the UK’s Legal Position in Relation to the Backstop](#), Professor Verdirame, Sir Stephen Laws and Professor Richard Ekins argue somewhat more tentatively than Lord Pannick:

21. It is theoretically possible that, notwithstanding best efforts and good faith on each side as well as compliance with the various operational aspects of their obligations and agreements, this belief might change and both sides come to the bona fide realisation that there is no viable solution. In those circumstances, it would be very difficult and unattractive for the EU to resort to the argument that the UK has no choice but to remain in the backstop indefinitely. Even if that situation were to arise, depending on the specific circumstances, the UK may have a number of prima facie credible arguments, including for example the argument that the parties’ realisation, tested over time, that no solution exists is itself a fundamental change of circumstances and that such change meets the two key requirements in Article 62 of the VCLT, in that a) the circumstances constituted an essential basis for UK consent to be bound by the treaty and b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

However, the lawyers conclude that this scenario is theoretical:

... not least because, in the reality of such disputes, both sides are likely to insist that solutions do exist but cannot be agreed due to the other party’s failure to make compromises that are reasonable in light of the obligations they have assumed.

In the debate on Brexit on 14 March 2019 Dominic Grieve MP called the Article 62 position a “unicorn”, [continuing](#):

... it cannot happen unless so seismic a failure were to take place with the other party that it could be justified. The idea that, simply because the backstop is still in place, it could justify bringing down the whole treaty under article 62 is so far-fetched that there can be

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no doubt, if it was ever contemplated, that that is why it was left out, because it is an unsustainable argument.²³

The European Research Group's so-called 'Star Chamber' of lawyers²⁴ also believes it is unrealistic, calling it "badly misconceived". They say in a study of the AG's legal advice:

Art. 62 VCLT, given the high burden that a State must meet to use it, and given the extreme reluctance of international courts and tribunals to accept it, supplies no assurance whatsoever that the UK could terminate the Withdrawal Agreement in a lawful manner.²⁵

Martin Howe QC [told](#) the *Financial Times* that the argument was "a non-starter". Philippe Sands QC has said this view is "utterly hopeless" and that Mr Cox would "shred his reputation" with the international legal community if he were to adopt such an approach.²⁶ On 18 March 2019, Professor Marko Milanovich (University of Nottingham, School of Law) wrote a detailed [blog](#) on Article 62 of the VCLT, concluding that "the fundamental change of circumstances rule is virtually certain not to have any practical applicability to the Northern Irish backstop."

5.5 Could Government and Parliament mitigate the risk?

Verdirame et al explained how Parliament and Government might jointly mitigate the legal risk described by the Attorney General by possibly securing "some strengthening of the UK's position about the termination of the backstop":

... the Government could make a unilateral interpretative declaration to clarify and strengthen UK rights, under the VCLT, to suspend or terminate the Protocol in certain circumstances. The interpretative declaration could be that the UK will regard a breach by the EU of the "best endeavours" obligation, such that it would render the backstop more than temporary, as a material breach of the Withdrawal Agreement, and perhaps also include a statement that the UK would also regard itself as entitled to suspend or terminate the Protocol if other circumstances indicated that it could no longer be regarded as temporary.

Verdirame et al proposed in their December 2018 analysis that the Bill to implement the Withdrawal Agreement might include "provision imposing an obligation on the Government to take steps to protect its rights under the VCLT" and also "to make the implementing provisions subject to a sunset provision, perhaps with an annual renewal mechanism by affirmative order, which would give Parliament a regular opportunity to consider if the time had come to exercise the UK's withdrawal rights". But a unilateral provision in UK legislation could not override or alter the terms of

²³ HC Deb, 14 March 2019 c 576

²⁴ The 'Star Chamber' comprises: Sir William Cash MP, Suella Braverman MP, Robert Courts MP, Nigel Dodds MP, David Jones MP, Dominic Raab MP, Michael Tomlinson MP, Dr TD Grant and Martin Howe QC

²⁵ Published in *The Telegraph*, [Exclusive: The Geoffrey Cox legal advice that Theresa May hopes will save her Brexit deal](#), 14 March 2019

²⁶ The Times, [UK warned against invoking Vienna Convention on Brexit](#), 14 March 2019; The Guardian, [Geoffrey Cox has no grounds to change his mind on the Northern Ireland backstop](#), 18 March 2019

the Withdrawal Agreement or Protocol under which the UK has no 'withdrawal rights' and could leave the UK in breach of its obligations under the Agreement and international law.

5.6 Disputes about the Withdrawal Agreement

The proposals outlined above reflect the reality that Parliament could instruct the Government to abrogate the Protocol at any time; but if it did so, this would be treated as a violation of the Withdrawal Agreement by the EU, which would subject that action to dispute settlement under the Withdrawal Agreement.²⁷ Under Article 168 of the Withdrawal Agreement, the Joint Committee and arbitration panels set up under the Withdrawal Agreement have exclusive jurisdiction over disputes regarding the Withdrawal Agreement – and that includes disputes regarding the abrogation of (part of) the Agreement.

This would result in a situation where the EU argument would be that terminating the backstop was a breach of the Withdrawal Agreement's provisions; and the UK argument would be that failing to conclude a superseding agreement was itself a breach of the Withdrawal Agreement. One of the arbitration panels set out in Article 164 of the Withdrawal Agreement would be asked to uphold either the UK's claim of a material breach or the EU's claim of a material breach, with references to the customary international law on these subjects set out in the Vienna Convention on the Law of Treaties. If it were to uphold the UK's claim, the EU would owe the UK compensation and the UK might be entitled to suspend obligations under the Withdrawal Agreement, as set out in Part Six of the Agreement ([Institutional and Final Provisions](#)). If it upheld the EU's claim, on the other hand, the UK would owe the EU compensation and the EU might be entitled to suspend obligations under the Withdrawal Agreement.

5.7 Further reading on 'fundamental change'

- Lord Anderson of Ipswich K.B.E Q.C., Sam Wordsworth Q.C., Jason Coppel Q.C. and Sean Aughey, *People's Vote Campaign. Outcome of Negotiations on the EU-UK Withdrawal Agreement: - [Opinion](#), 12 March 2019 - [Opinion \(No 2\)](#), 16 March 2019*
- Marko Milanovic, [Brexit, the Northern Irish Backstop, and Fundamental Change of Circumstances](#), *European Journal of International Law*, 18 March 2019

²⁷ Unless specified otherwise within a treaty itself, where one party materially breaches a treaty, the other party is entitled to reparations (in addition to or instead of suspending/terminating the Treaty); and any dispute about such a 'material breach' would go before the International Court of Justice. However, the EU does not have standing before the ICJ, and Article 168 in any event gives the Joint Committee and arbitral tribunals exclusive jurisdiction over disputes regarding the Withdrawal Agreement.

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- Wolff Heintschel von Heinegg, [Treaties, Fundamental Change of Circumstances](#), Oxford Public International Law, last updated August 2006
- Heribert Franz Koeck, [The “Changed Circumstances” Clause after the United Nations Conference on the Law of Treaties \(1968-69\)](#), GA. Journal of International and Comparative Law, Vol. 4: 93, 1974

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