The Impact and Consequences of Brexit on ‘Vested’ Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27

Abstract

Upon request by the AFCO Committee, the Policy Department for Citizens’ Rights and Constitutional Affairs commissioned this study which examines the concept of ‘vested rights’ in public international law, analyses the gradual establishment and evolution of these rights and draws from case law as well as other precedents in order to establish the validity and force of vested rights in customary and conventional international law. It also analyses the protection of such rights within the EU legal order, and examines the citizenship rights that will have to be taken into account during the UK withdrawal negotiations as well as their potential permanence in the EU legal order after Brexit. It concludes with an assessment on the legal force of vested rights and recommendations on their treatment during and after the withdrawal negotiations.
ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and was commissioned, overseen and published by the Policy Department for Citizens’ Rights and Constitutional Affairs.

Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

To contact the Policy Department for Citizens’ Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Research Administrator Responsible

Ioannis Papageorgiou
Policy Department C: Citizens’ Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHORS

Antonio Fernández Tomás, Professor of Public International Law, University of Castilla-La Mancha
Diego López Garrido, Professor of Constitutional Law. University of Castilla-La Mancha
FUNDACIÓN ALTERNATIVAS

LINGUISTIC VERSIONS

Original: ES
Provisional version pending final editing and proofreading

Manuscript completed in March 2017
© European Union, 2017

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.
# CONTENTS

## LIST OF ABBREVIATIONS

## PART I: VESTED RIGHTS IN INTERNATIONAL LAW

1. **INTRODUCTION**

2. **VESTED RIGHTS: CONCEPT, CONTENT, AND HISTORICAL DEVELOPMENT**
   - 2.1. The rules of intertemporal law and the effectiveness of such rights
   - 2.2. Rules of international responsibility for violating foreigners’ right of ownership
     - 2.2.1. General reflections
     - 2.2.2. Expropriation of property belonging to foreigners. The case concerning *Certain German Interests in Polish Upper Silesia* before the Permanent Court of International Justice (PCIJ), 1925 to 1926. A critical commentary
     - 2.2.3. The failed attempt to codify the responsibility of the State for injuries caused to the person or property of aliens. “Acquired rights” in the reports of Special Rapporteur Garcia Amador (1956-1961)
     - 2.2.4. Nationalisations and permanent sovereignty over wealth and natural resources in the context of colonial succession. The major arbitration on oil. From lump-sum agreements to the treaties on protection of investments.

3. **THE INEXISTENCE OF “ACQUIRED RIGHTS” ON ECONOMIC FREEDOMS AND ACTIVITIES**
   - 3.1. Commercial freedoms, profit expectations and loss of customers

4. **THE PROVISIONS ON VESTED RIGHTS IN THE LAW OF TREATIES**
   - 4.1. The content of the Vienna Convention of 1969
   - 4.2. The distinction between similar concepts: invalidity, termination and denunciation or withdrawal
   - 4.3. Article 70 1 (b) of the Vienna Convention and its conception
   - 4.4. The interpretation of Article 70 1 (b) of the Vienna Convention and its application in EU law
   - 4.5. The territorial application of treaties: the withdrawal of Greenland
   - 4.6. The direct application of the treaties to individuals

5. **THE WITHDRAWAL OF A MEMBER STATE: THE CASE OF THE UNESCO**

6. **CONCLUSIONS OF PART I**
PART II. VESTED RIGHTS IN EUROPEAN LAW  

7. RIGHTS THAT STEM FROM EUROPEAN CITIZENSHIP  

8. THE RIGHTS INVOLVED IN THE WITHDRAWAL NEGOTIATIONS - IN PARTICULAR, FREE MOVEMENT AND RESIDENCE  

8.1. Permanent residence and “acquired rights”  

8.1.1. What is meant by “acquired right”?  

8.2. Other aspects related to the rights of citizens and the 1950 European Convention on Human Rights  

8.3. Legal treatment of the rights of European citizens in view of the United Kingdom’s withdrawal from the Union.  

9. CONCLUSIONS OF PART II
LIST OF ABBREVIATIONS

**CJEU**  Court of Justice of the European Union

**ECHR**  European Convention on Human Rights

**ECtHR**  European Court of Human Rights

**EP**  European Parliament

**EU**  European Union

**ILC**  International Law Commission

**ICJ**  International Court of Justice

**PCIJ**  Permanent Court of International Justice

**PIL**  Public International Law

**TEU**  Treaty on the European Union

**TFEU**  Treaty on the Functioning of the European Union

**UDHR**  Universal Declaration of Human Rights
PART I: VESTED RIGHTS IN INTERNATIONAL LAW

1. INTRODUCTION

With the exception of legal provisions that protect essential human rights – such as the right to privacy, family and home (Article 12 of the UDHR, Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights of the European Union) or the protection of private property (Article 17 of the UDHR, Article 1.1 of the Additional Protocol of the ECHR and Article 17 of the Charter of Fundamental Rights of the European Union) –, the legal regime existing under general international law and under European Union law on the subjective rights of persons is of a dispositive nature. It may be regulated by a treaty such as the TFEU and may be modified by specific agreements among the parties in the forthcoming negotiation between the European Union and the United Kingdom, on the basis of reciprocity.

However, with a view to the negotiation, it is important to examine whether one of the negotiating parties could start off with a positional advantage because they could argue in favour of their nationals retaining certain “vested rights” or “acquired rights”. In other words, whether subjective rights, legitimately generated over the long period of time that the United Kingdom (UK) has been a member of the European Union, may be maintained or continue after the UK’s withdrawal from the EU. The question of whether such vested rights exist has to be posed both under public international law (PIL) and under the European Union law. Firstly, under PIL because once the UK’s withdrawal is concluded, and barring what might exceptionally be agreed to in the withdrawal agreement itself, the EU law will cease to apply to the UK and the relations between the EU and the UK will be governed by PIL. Secondly, under EU law, insofar as a series of subjective rights that revolve around the basic right of the free choice of residence cannot be retained by nationals of EU Member States in the UK and vice versa unless stipulated in the withdrawal agreement, an issue that will be examined in the second part of this study.

In the first part of this study, an analysis will be made of the practice of the States, especially in the area of international responsibility as it was considered under classic international law: the aim is to assess to what extent such practice recognizes the existence of general principles of law or of state conduct in such a constant and uniform manner that they could constitute a material element of a customary norm. However, as stated under the case law of the International Court of Justice (ICJ), such practice should not only be constant, uniform and come from “especially interested” States, but also incorporate the subjective element of opinio juris in order for it to have regulatory value.

1 That is to say, the provisions governing them do not form part of jus cogens or compelling law, but jus dispositivum, or dispositive law, allowing an agreement to the contrary.

2 ICJ, North Sea Continental Shelf Cases, Judgment of 20 February 1969, paragraph 77. “The essential point in this connection -and it seems necessary to stress it- is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris- for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is performed almost invariably,
Moreover, even though precedents could be found to show respect for rights acquired by foreigners and from a prior legal framework, we would have to be especially careful when it comes to observing whether the precedents had taken place in comparable situations. The only comparable situation found by the authors of this study referred to the withdrawal of Member States from UNESCO (See section 5 of part I) and the issue that could arise the current negotiations on the status of EU bodies officials holding the nationality of the withdrawing State. However, these are exceptional situations that we must interpret with restrictive criteria.
2. VESTED RIGHTS: CONCEPT, CONTENT, AND HISTORICAL DEVELOPMENT

2.1. The rules of intertemporal law and the effectiveness of such rights

The expression “acquired rights” refers to subjective rights of a permanent nature. However, there is no agreement in doctrine when it comes to formulating a definition. We could define them as subjective rights that had their origin under a certain legal system and that intend to remain in force in a different legal system to the original one, be it in space or in time.

Thus, in private international law the term is used to describe the effectiveness of subjective rights generated by regulations of a certain national legislation when the legal situation created is incorporated into the legal system of another State (the spatial or territorial projection of an acquired right). In public international law, the concept is used to describe the subjective rights generated for a private individual by the regulations of one legal system – or rather by the contracts, acquisitions, investments or other acts undertaken under that initial legal framework – and which seek to remain in force in a different legal framework, such as the one created by a succession of States or governments after an armed conflict, a revolution or a coup d’état (projection in time after the change of the legal framework in force). The term, thus described, is linked to two general principles of law. On the one hand, the general principle of non-retroactivity; on the other, the principle of unjust enrichment or enrichment without cause, at least in relation to the right to private property.

However, two different conceptions of “acquired rights” are deliberately confused. The correct one refers to maintaining the validity of the act of creating the subjective right and the respect for the effects produced during the period prior to the change of legal framework in force, according to the general rule of non-retroactivity. To state the opposite would be to seek the invalidity (ex tunc) of the initial act and that – in both Civil Law and in International Law – can only be done by virtue of the theory of defect of consent. However, different to radical invalidity is another type of legal mechanism (invalidity in Civil Law, termination, denunciation or withdrawal in International Law) which has ex nunc effects, as of the moment it is declared or from the moment it enters into force, without affecting the legal effects legitimately produced previously. As a rule, once the act or legal situation from which the subjective rights stem is terminated, these rights expire. Which means that the conceptual shield (“acquired rights”) will not suffice to maintain respect beyond termination and they lack pro futuro effectiveness if they are negatively affected by the rules of the new applicable legal framework.

On the other hand, is there any true right (not just an expectation thereof) that is not an acquired right? That is precisely what Leon Duguit pointed ironically: “Jamais personne n’a su ce que c’était qu’un droit non acquis. Si l’on admet l’existence de droits subjectifs, ces

---

4 It is not unwarranted here to refer to the so-called “stabilisation clauses”, a design inserted into oil agreements after World War II to prevent a change of legal system in the State that granted the licence from affecting what was agreed in the contract. At the moment of truth, they did not serve to prevent new nationalisations, though
droits existent ou n’existent pas; telle personne est titulaire d’un droit ou non. Le droit non acquis est l’absence de droit”\(^5\).

In any case, in general terms, the maintenance of such rights over time would be regulated by the rules of intertemporal law. It seems an opportune moment to point to what Max Huber has said on the matter. He was the sole arbiter in the well-known Island of Palmas case\(^6\). On the question as to which one of a number of different legal systems at successive periods had to apply in a particular case, he said that a distinction had to be made between the creation of rights and the (continued) existence of rights. Therefore, “the same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”. We can see that two years earlier, Max Huber had in fact been the president of the Permanent Court of International Justice on the case concerning Certain German Interests in Polish Upper Silesia, which is often cited on matters of vested rights (see 2.2.2). Therefore, from the point of view of the application of law over time, the notion of “acquired rights” does not appear to be a solid argument to defend a future exercise of economic freedoms granted by the EU law if their legal framework is modified on termination of the applicability of those rules to the United Kingdom and vice versa.

### 2.2. Rules of international responsibility for violating foreigners’ right of ownership

#### 2.2.1. General reflections

In the past, this argument was used to defend certain rights of private individuals (private property), both in the context of the surrender of territories after an armed conflict (2.2.2) and in the context of colonial succession (2.2.4).

#### 2.2.2. Expropriation of property belonging to foreigners. The case concerning Certain German Interests in Polish Upper Silesia before the Permanent Court of International Justice (PCIJ), 1925 to 1926. A critical commentary

The PCIJ’s judgment on the merits (1926) in this dispute between Germany and Poland after World War I\(^7\) has been mentioned as a precedent for the general recognition of vested rights at international level\(^8\). However, putting it into context warrants interpretations less likely to give it such a wide value.

---


6 Reports of International Arbitral Awards. Recueil des Sentences Arbitrales, Nations Unies, Vol. II, Island of Palmas case, 4 April 1928, p. 845. “Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled”, and, “As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”.

7 The judgment on preliminary objections on the same subject is from 25 August 1925. PCIJ, series A, n° 6. The judgment on the merits is from series A n° 7, of 25 May 1926.

8 Brexit: some legal and constitutional issues and alternatives to EU membership, (By Paul Bowers et al.), House of Commons, BRIEFING PAPER Number 07214, 28 July 2016 (henceforth, British Parliament report).
The Bolshevik Revolution might have put an end to the czarist Russia in early November 1917, but Silesia had not even reached the bourgeois revolution at the end of the Great War. A good part of the "large rural estates" whose adjudication was the object of the litigation belonged to rich aristocrats. The signing of the Treaty of Versailles in 1918 put an end to the Great War. Under its provisions, Germany ceded Upper Silesia to Poland. Three-and-a-half years later, Germany and Poland signed the Geneva Convention of 15 May 1922 concerning Upper Silesia. Article 19 of this bilateral convention provided for the creation of an arbitral tribunal and also granted the PCIJ competence which was not coincident with that of the arbitral tribunal. Article 6 of the Geneva Convention is as follows:

"La Pologne peut exproprier en Haute-Silésie polonaise les entreprises appartenant à la grande industrie, y compris les gisements, et la grande propriété rurale, conformément aux dispositions des articles 7 à 23. Sous réserve de ces dispositions, les biens, droits et intérêts de ressortissants allemands ou de sociétés contrôlées par des ressortissants allemands ne peuvent pas être liquidés en Haute-Silésie polonaise".

The use of two different terms - expropriation and liquidation - was not clear to the interpreter, but it did not stop the PCIJ from assuming jurisdiction over a matter other than that of vested rights, only in order to take position on vested rights later, in the judgement on the merits. In turn, the judgement on the merits dealt with whether the Polish expropriation law of 1920 was compatible with Articles 6 to 22 of the Geneva Convention of 1922. We have to bear in mind that the Geneva Convention was a special bilateral convention relative to the Versailles Peace Treaty. This treaty – in which the ironically termed *jus victoriae* prevailed – did [not even] expressly enunciate the principle according to which “in the event of a change of sovereignty, private rights must be respected”. In other words, we are looking at a doubly particular situation, framed within the law of war, and not at a situation which was not regulated conventionally, in which it is necessary to turn to customary norms and the general principles as law applicable by the court.

In favour of Poland, the Geneva Convention provided for a right to expropriation which – according to the Court, even if not expressly stated in the Convention – constituted "an exception to the general principle of respect for vested rights". Article 6, referred to above, was the lynchpin of the Convention, as it distinguishes what can be expropriated (major industry and large rural estates, in other words, the means of production) and what could not be expropriated without compensation (liquidate).

Therefore, the Convention provided for two blocs of rights for properties belonging to German nationals and companies controlled by them, those that could be expropriated and

---

9 Count Nikolaus Ballestrem, Prince Hohenlohe-Oehringen, Baroness Maria Ana Goldschmidt-Rothschild, Prince Lichnowsky.
10 Chaired by G. KAECKENBEECK, also the author of a much-cited article, "The protection of vested rights in international law", 17 British Yearbook of International Law, 1936, pp. 1-17.
11 We probably have to take liquidation to be a confiscation without any compensation whatsoever. Some paragraphs of the ruling (for example, p.22, para. 3 and p.24, para. 4) lead one to think that Polish law of 1920 did not provide for any compensation after expropriation.
12 Therefore, according to the Court, "Il a été dit du côté polonaise qu'il s'agissait ici d'une question de droits acquis, question réglée par les articles 4 et 5 de la Convention de Genève, pour lesquels la juridiction de la Cour n'est pas prévue. Le Gouvernement allemand, au contraire, avait soutenu que les dispositions applicables sont celles continues dans les articles 6 à 22. Ces allégations contradictoires, en soulignant que la divergence porte sur le champ d'application de ces derniers articles, confirmé la manière de voir de la Cour", PCIJ, judgment of 25 August 1925, series A, nº 6, pp. 16-17.
13 Although according to the court, it was "clairement admis" ("clearly recognized") by the treaty. Certain German Interests (the merits), p. 31, para. 3.
14 Certain German Interests (the merits), pp. 20-21.
those that could not. How did the property rights of the first bloc and the second bloc differ, from a doctrinal point of view? Why could those rights belonging to the second bloc be considered “vested” and why were those belonging to the first bloc “not vested” and could be lost to the detriment of their owner by means of an expropriation?

The only thing this precedent demonstrates is that, if a general principle of respect for vested rights is deemed to exist, it should accept exceptions formulated by means of a treaty; therefore, it would have a dispositive nature. Thus, two states sign a bilateral convention in which – because of economic policy considerations – they have a special set of rules, within which some property rights are going to be respected and others – which cover decisive assets for the economic and social transformation of the region – are not. Everybody is aware that “qui peut le plus, peut le moins”. Therefore, if the rights of the big rural and industrial owners were not sufficiently “vested” to have to put up with an expropriation, why should those belonging to small owners who, on the other hand, were left out of the expropriation measure, when they were of the same legal nature? Therefore, the idea of “vested rights” does not appear to be sufficient to account for the respect or lack thereof that, the new legal system has or does not have for private rights legitimately generated within the framework of a previous legal system.

2.2.3. The failed attempt to codify the responsibility of the State for injuries caused to the person or property of aliens. “Acquired rights” in the reports of Special Rapporteur Garcia Amador (1956-1961)

The question of nationalisations and expropriations should not be focused, then, on the viewpoint of the subjective rights of individuals, but on the point of view of a State’s capacity to manage its own political, economic and social system, for which it is going to use the rules of its Law. This is the modern approach to the issue, with international norms limited to outlining the guarantees that should accompany an expropriation. After World War II, there were nationalisations in many States, not only in communist countries, but also in others such as Austria, France or the United Kingdom itself.

The Cuban F. V. García Amador, the ILC’s first Special Rapporteur on State Responsibility (1956-1961), collected the precedents of the practice of States with a view to drawing conclusions on “the responsibility of the State for injuries caused in its territory to the person or property of aliens”. In his fourth report (1959) the rapporteur referred to the notion of acquired rights, closely linked to the notion of unjust enrichment, while aware of the need to revise “traditional conceptions,” insofar as the idea of “respect” (for such rights) is not equivalent to their “inviolability” and it is necessary to take into account the social function of property. In both cases, the aim of his project would be to protect private

18 "Responsibility of the State for injuries caused in its territory to the person or property of aliens – measures which affect acquired rights", fourth report (Doc. A/CN.4/119), 11th session, 26 February 1959 (henceforth, Garcia Amador Report).
19 "The protection extended to patrimonial rights is particularly ‘relative’ (...) respect for acquired rights is conditional upon the subordinate to the paramount needs and general interests of the State” (…), private interests and rights (...) must yield before the interests and rights of the community”. García Amador Report, cit., pp. 5-6, point 15. In a subsequent passage, “there is no denying the need for revising it, with a view to bringing the principle of respect for the acquired rights of aliens fully into line with the idea that private ownership and all other patrimonial rights – as sources of social obligations – require, regardless of the nationality of the person in whom they are vested, constantly increasing sacrifices in the interests of the community at large”. (p. 6, point 19).
property against “arbitrary” action of the State. Yet his construct is flimsy from a doctrinal point of view.

García Amador worked on the premise that norms relative to the acquisition of private rights of a patrimonial nature are found in domestic laws and, therefore, a State may lawfully prevent or restrict acquisition by foreigners of those rights in its territory. Therefore, the problem does not refer to acquisition, but to the protection of the private property (once acquired) of foreigners against “arbitrary” actions of the State and, in this respect, to the protection of the “acquired rights” of those persons. The notion of arbitrariness (not unlawfulness), then, constitutes the central point around which his construct revolves. However, he did not outline it clearly. Sometimes, he appeared to relate this to what was subsequently named “responsibility for the harmful consequences of unlawful acts”, while on other occasions arbitrariness is added to illegality. We must bear in mind that the basis of his conception lies in that there is (only) responsibility if there is injury. Therefore, agreement with or opposition to the legal system of the act causing injury is not decisive, unlike the constructs that have prevailed subsequently in the ILC.

The rapporteur associated the notion of arbitrary action with the terminology used in Article 17 (2) of the Universal Declaration of Human Rights (“No one shall be arbitrarily deprived of his property”) and asked what the elements constituting it would be, concluding that the most important criterion to avoid it is not to discriminate between nationals and aliens and identifying the idea of arbitrary action with the “doctrine of abuse of rights”. However, when he tried to differentiate between “illegal” expropriation and “arbitrary appropriation”, his construct failed to uphold the most basic legal logic. Thus, he claims, “According to a generally accepted principle, an expropriation is not necessarily ‘unlawful’ even when the action imputable to the State is contrary to international law (sic), [rather] an expropriation can only be termed ‘unlawful’ in cases where the State is expressly forbidden to take such action under a treaty or international convention. By analogy, acts of expropriation which do not satisfy the requirements of form or substance stipulated in an international instrument are deemed to fall within the same category.” In turn, “arbitrary” expropriations would be those that “are not in conformity with international conditions and limitations to which the exercise of the right of expropriation is subject and which, consequently, involve an ‘abuse of rights’.” Such abuse would occur if the requirements laid down in International Law on the motives, procedure and “above all, the compensation given for the expropriated property” were not fulfilled.

However, for the purposes concerning this study, it should be highlighted that even with the aim of constructing an international set of rules that respected “acquired rights”, from the precedents of international practice that the rapporteur had found it was inferred that “as a general rule, the freedoms relating to the employment of labour and to gainful activity, which rest on the general freedom of industry and trade, are not acquired rights.” Even with an archaic terminology, the reference to what in the EU have been

---

20 García Amador Report, pp. 4-5. The "notion of 'arbitrariness'" being "the basic notion on which international responsibility of the State on the subject lies" (p. 5).
21 The following sentence serves as an illustration of his confused theory: "'Arbitrary' acts or omissions, on the other hand, although they also involve conduct on the part of the State that is contrary to international law, occur in connection with acts that are intrinsically 'legal'", García Amador Report, p. 7, point 24.
22 García Amador Report, p. 9, point 29.
23 Ibidem, p. 14, point 50.
24 García Amador Report, p. 9, point 29.
called fundamental economic freedoms is very clear: there are no precedents in case law on acquired rights to what today we would call freedom of establishment, to provide services or of employed persons. And this affirmation will be a constant feature throughout this report.

2.2.4. Nationalisations and permanent sovereignty over wealth and natural resources in the context of colonial succession. The major arbitration on oil. From lump-sum agreements to the treaties on protection of investments.

As of 1961, the guidance advocated by García Amador on the codification of international responsibility was dropped. Since then, expressions of that position have been residual, confined to certain arbitral rulings following a nationalisation and to bilateral treaties promoting and protecting investments27, but there are no new expressions in general International Law, not even multilateral treaties on the subject, because of the general recognition of a State’s right to nationalise or expropriate. The agreements on reciprocal promotion and protection of investments agreed by the European states, the United States or Japan have no uniform model. Even if they did, these are bilateral agreements whose aim is precisely to establish an agreed set of rules contrary to general rules28. And not even the most representative authors of Western doctrine have ever expected their repetition to give rise to a new norm of general or customary law29.

The validity of vested rights was brought forward in the context of so-called "colonial succession" and of the nationalisations derived from the changes in ownership from the former colonial administrator of a territory to the new territorial sovereign. Yet the aim of maintaining them was not successful, generally speaking, as it came up against the recognition – in Article 1.2 of the United Nations Covenants on human rights30, as well as in several resolutions by the UN General Assembly31 – of the principle of permanent sovereignty of peoples over their wealth and natural resources. As a result of that notable change of perspective, nationalisation or expropriation is no longer considered an unlawful action, but a right of the State derived from its sovereignty or even a human right of a collective nature whose beneficiary would be the people as a whole. The consequences of this structural change in terms of international responsibility are clear. The criteria for calculating the compensation arising from a nationalisation cannot be the same if it is immediately before that he referred to the Oscar Chinn case (PCIJ, Series A/B, nº 63, 1934), in which the object of the litigation was an intangible asset, but one of unquestionable commercial interest, that of "loss of customers".

28 A claim has been made that the principle of permanent sovereignty forms part of jus cogens, as it a corollary of the principle of the free determination of peoples. It is an estimable argument in theory, but the practice of States is not consistent with that assertion. In fact, the agreements on reciprocal promotion and protection of investments are an alteration of the rules derived from permanent sovereignty and such an alteration could not be agreed if the principle formed part of jus cogens. Meanwhile, nor has the ICJ stated an opinion on the subject on the two occasions. (Phosphates from Nauru and East Timor).
29 SCHACHTER, O., op. cit., p. 299, is very clear on the subject: “We should bear in mind that these agreements are bargainended-for arrangements, often involving a variety of mutual concessions. For that reason, they cannot simply be considered as evidence of customary law that would favour the investor in the absence of such mutual concessions. Whether the protective provisions will be followed in general State practice outside out of the treaties remains to be seen. Until that occurs, they will not be regarded as general customary law”.
31 1863 (XVII) of 1962; 2158 (XXI), of 1966; 2386 (XXIII), of 1968; 3016 (XXVII), of 1972 on applying it to the sea; 3041 (XXVII) of 1972; 3171 (XXVIII), of 1973, the most radical; 3201 and 3202 (S-VI), of 1974 and 3281 (XXIX), so-called Charter of Economic Rights and Duties of States, of 12 December 1974.
considered an unlawful act as if it is considered a legitimate legal action in accordance with International Law.

Following this rapid historic development, what is the current situation? The traditional rule was applied again by some arbitrators when it came to justifying compensation. However, at the other extreme, in the practice of States we find numerous cases in which a nationalisation justified on the basis of the principle of permanent sovereignty ended up being belatedly settled through the acceptance – by both parties – of a lump-sum agreement. The minimal figures of these agreements were a long way from what would have resulted from the application of the traditional rule on the subject.

It is true that the traditional criteria regarding compensation for expropriation are reflected in Article 36.2 of the ILC articles on Responsibility of States for Internationally Wrongful Acts of 2001. Yet the article, which requires the confluence of an unlawful act and, moreover, of damage – a breach of subjective rights and not just of economic interests that are “financially assessable” – has a much broader scope than the one relating to foreigners’ right to private property, as it encompasses “both damage suffered by the State itself (to its property or personnel, or in respect of expenditures reasonably incurred to remedy damage flowing from an international wrongful act), as well as damage suffered by nationals of that State”.

Therefore, when the contemporary codifier of International Law systematises the criteria for calculating compensation, it is not talking about a comparable situation to the one dealt by the PCIJ 90 years ago. Nor would the current provisions be the same if today the action of a State that causes the damage to an individual were not considered wrongful. All that shows that the practice of States is very far from being general, constant and uniform, not even in the European States. On the other hand, as the ICJ stated on the hypothetical existence of a regional custom, the practice of the States “discloses so much uncertainty and contradiction, so much fluctuation and discrepancy… and it has been so much influenced by considerations of political expediency… that is not possible to discern in all this a constant and uniform custom accepted as law”.

Therefore, the practice of States does not currently indicate the existence of a general – or regional – rule or principle as regards respect for “acquired rights”.

---

32 Especially clear was the Aramco case (president of the tribunal, Sauser-Hall) between Saudi Arabia and the Arabian American Oil Company, of 23 August 1958, which expressly mentioned “acquired rights” (comment in LALIVE, P., op. cit., p. 177 and ss.). On the other hand, the big Libyan arbitrations (BP, decision of 10 October 1973 [International Law Rep., 1979, p. 297 and ss., sole arbitrator, Lagergren] and Texaco Calasatice or TOPCO [International Legal Materials, 1978, pp. 1-37], sole arbitrator, R. J. Dupuy) made no express mention of the term. Perhaps the existence of stabilisation clauses agreed in a renegotiation enabled a more appropriate defence of the interests of the plaintiff, referring to them. Nor were they mentioned in Aminoil c. Kuwait (decision of 12 April 1977, [International Legal Materials, 1981, pp. 1 and ss., sole arbitrator, Mahmassani]).


34 As the commentary to Article 36 states: “Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ship, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred when responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as a result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States is not closed”. Draft articles on responsibility of States for internationally wrongful acts with commentaries. Report of the International Law Commission, 53rd session, 23 April to 1 June and 2 July to 10 August 2001, U. N., New York, 2001, (A.G., 56th session, Supl. no 10, A/56/10). Art. 36. Commentary, p. 262.

35 Paraphrasing what the ICJ said on the Right to asylum case (Colombia v. Peru, judgment of 20 November 1950, p. 15): “The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy (...) and in the official views expressed on various occasions, there has been so much inconsistency (...) and the practice has been so much influenced by considerations of political expediency in the various cases, that is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule”.

14
3. THE INEXISTENCE OF “ACQUIRED RIGHTS” ON ECONOMIC FREEDOMS AND ACTIVITIES

The right to property is a real right and that is why it can remain over time, attached to the thing with which it lies. On the other hand, the contractual obligations relative to providing a service are personal. If the contract (or the treaty) that gives rise to them ends, it is not possible to maintain them. In the context of economic freedoms (goods, establishment and services, workers and capital), the precedents found show that the maintenance of such rights, beyond the end of the legal act that creates them, is groundless.

3.1. Commercial freedoms, profit expectations and loss of customers

On 12 December 1934, the PCIJ passed judgement on the Oscar Chinn case (United Kingdom v. Belgium)36, which dealt with the interests of a British subject against those of the administrative power of the Congo. Mr Chinn had set up a transport services trading company on the River Congo. Subsequently, the colonial administrator increased its capital in the state firm Unatra and – arguing that the prices of raw materials had slumped after the crisis of 1929 – adopted a regulation slashing the rates of rail and river transport and undertaking to repay part of the losses that the measure caused Unatra, most of whose shares were the property of the colonial administrator. The action bankrupted the six companies of the competition and Unatra had a de facto monopoly on river transport along the Congo.

From the point of view of the British Government, that stopped Mr Chinn from carrying on his business and was a violation of the respect for his “vested rights, protected by the general principles of international law”37. Today, we would look at it as a case of dumping and abuse of a dominant position in the market, with the legal right being protected that of free competition. In that era, such ideas had not taken root yet and it is highly doubtful that they have ever formed part of general International Law38. The United Kingdom argued that the monopoly created prevented freedom of trade and that Mr Chinn lost his customers. Belgium, on the other hand, denied the existence of a monopoly and the intention to ruin the competition, arguing that its conduct was not contrary to the obligations imposed on it by conventional or customary International Law.

The PCIJ observed that the prohibition of monopolies appeared in the Act of Berlin of 1885, but not in the Convention of Saint Germain of 1918. It said that Mr Chinn could not ignore Unatra’s relationship with the colonial government and its power to set the river transport rates and that a government action aimed at lowering the prices of the services offered by a company in competition with Mr Chinn could not be described a de facto monopoly. Nor could a company be prevented from temporarily operating at a loss if it was the only way of keeping it going.

With regard to the argument of “vested rights”, the PCIJ said:

36 PCIJ, Series A/B, Fascicule n.º 63, 13 December de 1934.
37 PCIJ, Oscar Chinn, p. 82 and “a breach of the general principles of international law, and in particular of respect for vested rights”, p. 86 and ss.
38 A different thing, naturally, is its existence within the framework of international treaties, the most significant of which is the former TCE (Article 2), now Article102 of the TFEU.
“La Cour, sans méconnaître la changement de la situation économique de M. Chinn, (...) ne saurait apercevoir dans sa situation primitive, qui comportait la possession d’une clientèle et la possibilité d’en tirer profit, un véritable droit acquis. Une conjoncture économique favorable, ainsi que l’achandalage, sont des éléments temporaires susceptibles de modifications inévitables; les intérêts des entrepreneurs de transport ont pu subir des atteintes par suite de la crise générale et des moyens pris en vue de la combattre.

Aucune entreprise (...) dont le succès est lié au cours changeant des prix et des tarifs, ne peut échapper aux éventualités et aux risques qui sont le résultat des conditions économiques générales. Certaines industries peuvent faire de grands profits dans une époque de prospérité générale ou bien en profitant d’un traité de commerce ou d’une modification des droits de douane; mais elles sont aussi exposées à se ruiner et à s’éteindre à cause d’une situation différente. Aucun droit acquis n’est violé dans des cas semblables par l’État.”

For the doctrine, this leading case fixes “the possible limit of the domain of acquired rights”\(^40\), based on the distinction between the right to property and contractual rights that could be protected by the use of that idea and other rights or interests outside its domain. Thus, “this example illustrates the idea, indicated by the majority of writers, that individual liberties, such as freedom of trade or industry, although protected by the constitution in many countries, are not acquired rights”\(^41\). It goes without saying that the authors of this report agree with that doctrinal position. Whatever the value of the idea of “acquired rights” may be at present, we are looking at a clear negative precedent in relation to the possibility of referring it to the fundamental economic freedoms of the market, such as establishment, services and workers. We are not talking about subjective rights, derived from those and deserving of protection by the law, but about simple economic interests subject to the inherent risk of business activity, which sometimes yields profits and sometimes does not. Under no circumstances does it fall to the international legal system to protect what are nothing more than simple expectations of profit.

The absence of subjective rights that are permanent and independent from the treaties that create them. ICJ case concerning the rights of nationals of the United States of America in Morocco (France v. United States, 1952)

In its judgment of 27 August 1952, the ICJ settled a matter involving the import of goods from Morocco, the preferential trade treatment that benefitted to France (given its protectorate over the eastern zone of Morocco), the establishment of exchange controls (as a limit on economic liberty) and its maintenance through a Moroccan decree of 1948, the possibility of the United States benefiting from the privileged treatment given to France in an indirect way, through the application of the “most favoured nation clause” and even (using terminology typical of the LEU that obviously did not appear in the ICJ ruling), the legality of the use of “measures having equivalent effect” (in this case, the refund of consumption taxes on products imported from France). This was coupled with the application of successive treaties concerning the same (and other) matters, signed by Morocco with various States, namely the treaty signed between the United States and Morocco in 1856, the treaty between Spain and Morocco of 1861, the Convention of Madrid of 1880, the Act of Algeciras of 1906 and the treaty by which the Protectorate between France and Morocco was established in 1912.

\(^39\) PCIJ, Oscar Chinn, p. 88.
\(^40\) LALIVE, P., op. cit., p. 187.
\(^41\) Ibidem, p. 188.
In this complicated framework, the Court rejected the French claim that the United States could not invoke in its favour the most favoured nation clause. On the other hand, the ICJ rejected the US argument on the supposed right to "fiscal immunity". And it is there where we find an interesting paragraph for the purposes of our analysis. Notice that there is no literal use of the term “acquired rights”, but the line of argument is the same. In this context, the Court stated that:

“Il est prétendu, au nom des États Unis, que les clauses de la nation la plus favorisée dans les traités avec des pays comme Maroc avaient pour objet non de créer seulement des droits temporaires ou subordonnés, mais d’instaurer ces droits à titre permanent et de les rendre indépendants des traités qui les avait primitivement consentis. Il est soutenu en conséquence que le droit à l’immunité fiscal accordé par le traité général britannique de 1856 et par le traité espagnol de 1861 est incorporé dans les traités qui ont garanti aux États Unis le traitement de la nation la plus favorisée, le résultat étant que ce droit persistera même si les droits et privilèges reconnus par les traités de 1856 et de 1861 devaient prendre fin.

Pour les raisons exposées plus haut, à propos de la juridiction consulaire, la Cour n’est en mesure d’accepter cette thèse”42.

As we can see, the view that certain subjective rights originating from the application of a treaty would have an existence that was permanent and independent from the treaty that created them, surviving the termination of this treaty, was an argument that the Court did not accept, at least in the sphere of freedoms of the market.

---

42 "Were not intended to create merely temporary or dependent rights, but were intended to incorporate permanently these rights and render them independent of the treaties by which they were originally accorded (...). For the reasons stated above (...) the Court is unable to accept this contention". ICJ, Case concerning the rights of nationals of the United States of America in Morocco (France v. United States), judgment of 27 August 1952 (204-205), p. 32, para. 5 and 6.
4. THE PROVISIONS ON VESTED RIGHTS IN THE LAW OF TREATIES

4.1. The content of the Vienna Convention of 1969

The TEU and the TFEU are treaties agreed among the Members States (and not by the EU), as is any accession agreement (Article 49.2 TEU)\(^43\). On the other hand, the withdrawal agreement is an agreement signed by the Union with the Member State that withdraws. That statement derives from the fact that it is the Council that signs it in on behalf of the Union, according to the literal meaning of Article 50, paragraph 2 of the TEU.

Therefore, as it is not an international treaty signed between States, on the face of it – as such an agreement – the Vienna Convention on the law of treaties between States of 1969\(^44\) would not apply to it. Nor would the Vienna Convention of 1986 on treaties between States and international organisations or between international organisations. This is something that was expressly declared by the case law of the Court of Justice of the European Union in Luxembourg, in the Racke case.

“By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all of its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that ‘this principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respect be considered as a codification of existing customary law’ (...)”.

(...) It should be noted in that respect that (...) the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law (...)

It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order\(^45\).

Therefore, its customary content would be applicable to the situation created by the withdrawal agreement, constituting a more useful tool to spotlight customary international law on matters of international treaties, which is the regulatory framework of the situation raised.

\(^43\) We should distinguish the accession agreement from the Act of Accession, which appears as an annex to the accession agreement, the latter having a dual nature – community and interstate – and simultaneously forming part of the primary and secondary legislation of the European Union.


4.2. The distinction between similar concepts: invalidity, termination and denunciation or withdrawal

Within this customary content, we should analyse the possibility of the State that withdraws retaining certain rights (Article 70 1 (b) of the Convention of 1969) deriving from the situation prior to the treaty’s loss of applicability on that State. Therefore, the analysis should deal with the legal concept of the denunciation of or withdrawal from a treaty by one of its parties and with its effects, for the State that withdraws and for those that remain parties to the treaty in force.

In that respect, even when the provisions of Article 70 primarily apply to the concept of termination (among all the parties to the treaty), the provisions of the first paragraph also apply to cases of denunciation or withdrawal, between a State that ceases to be party to the treaty and "each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect". And the fact is that, while the Vienna Convention does not define withdrawal, we can take the definition provided by the Spanish Law of Treaties and Other International Agreements (LTOAI), Article 2 u), as the “action (...) [carried out by a State, through which] it terminates the obligations on it derived from a treaty”. Evidently, the rest of the States party to it will do the same with regard to said State. Hence it is only natural that Article 70.2 should stipulate that the provisions on termination of Article 70.1 should apply to withdrawal, in that this is nothing other than a termination of its obligations derived from that treaty.

Therefore, one thing is the radical invalidity (ex tunc) of a treaty and its termination is quite another. Invalidity would destroy the effects prior to its declaration (except “acts performed in good faith before the invalidity was invoked”, stipulated in Article 69. 2 (b), provided that the invalidity was not because of the concurrence of certain causes [those of Articles 49, 50 and 52]), since this concept results in the conclusion that the act of creating the treaty never existed in a legally valid way, as the initial consent was flawed. On the other hand, termination presupposes the validity of both the legal act of signing the treaty and all the effects produced by it during its validity. However, as a rule, said effects cease when termination is declared or when, at a later date fixed by the parties, the termination, denunciation, or withdrawal takes effect.

4.3. Article 70 1 (b) of the Vienna Convention and its conception

The rule formulated by Article 70.1 of the Convention begins by stating “unless the treaty otherwise provides or the parties otherwise agree”, indicating the dispositive nature of the rule. It is possible that the treaty itself has established certain regulations on the matter (as Article 50 TEU does). However, if there are no provisions in the treaty itself, termination and withdrawal – alternatively – will be governed by the Vienna Convention of 1969, thanks to the final sentence of Paragraph 1 of Article 70 ("under its provisions or in accordance with the present Convention"). The substantive content of the rule is quite simple. On the one hand (Article 70.1 a), termination or withdrawal “releases the parties from any obligation further to perform the treaty”. On the other (Article 70.1 b), "it does

---

46 For all, REMIRO BROTÎNS, A., *Derecho internacional público. 2. Derecho de los tratados*, Madrid, ed. Tecnos, 1987, p. 466, for which both terms refer to the same concept. [Denunciation] "is called withdrawal when it affects the constituent treaty of an international organisation". However, the denunciation may not be motivated (pp. 474-475), as there was no cause established for it in the treaty in question), while in withdrawal the treaty itself should have provided for that possibility.
not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination” 47.

A House of Commons report from the UK Parliament48 summarizes the opinion of Lord McNair49 on the maintenance of rights of States Parties after the termination of a treaty and the rule of Article 70.1 (b) of the Vienna Convention of 1969. Yet, while it suitably relates the assertion summarised in the report (“have acquired an existence independent of it; the termination cannot touch them”) to the examples set out on the following page (“a payment made under a treaty does not become repayable; a settlement of a dispute effected by a treaty does not become reopened because the treaty is denounced; demarcated frontiers are not rendered indeterminate; cessions of territory are not cancelled, etc.50), we shall see that Lord McNair projects the validity of those rights towards the period prior to the change of the applicable legal system, in accordance with the general rule of non-retroactivity. However, in none of the examples does he refer to the future exercise of those rights (he does not refer to subsequent payments, the demarcation of frontiers or cessions of territory pending materialisation in several connected acts, etc.), rather to situations originating in the treaty’s period of validity that would not be extinguished [from their origin] by the subsequent termination of the treaty. It is true that – in very few cases – the execution of a treaty can give rise to situations that remain beyond the treaty’s loss of validity. An example is that of the treaties that establish a border. In this respect, it is unquestionable that there is a customary rule, reflected in Article 11 of the Vienna Convention of 1978, according to which a succession of States in respect of treaties will not in itself affect “a boundary established by a treaty”, but nothing more.

The issue did not escape the notice of the delegations of the States. It is worth examining their observations and the respective responses of the Special Rapporteur to get a better sense of the text. The Special Rapporteur asked whether:

“it is completely sufficient to provide that the termination of a treaty ‘shall not affect the legality of any act done in conformity with the provisions of the treaty or that of any situation resulting from the application of the treaty‘ (…). The Commission certainly assumed that obligations already accrued and rights already vested under the treaty before its termination could not be affected by the latter event, unless the treaty otherwise provided or the parties otherwise agreed (…). However, the implication from that provision may not be so unambiguous as to exclude any possibility of misunderstanding” 51.

That is why he proposed a new wording in which part (b) of the article read:

“b) [It shall] not affect the legality of any act done in conformity with the treaty or that of a situation resulting from the application of the treaty.

c) [It shall] not affect any rights accrued or any obligations incurred prior to such termination, including any rights or obligations arising from a breach of the treaty”52.

In the following period of sessions, the Netherlands insisted that

47 “b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”.  
48 Brexit: some legal and constitutional issues and alternatives to EU membership, (By Paul Bowers et al.), House of Commons, BRIEFING PAPER Number 07214, 28 July 2016, pp. 22-23.  
50 Ibidem, p. 532.  
51 Ibidem, p. 56.  
52 Ibidem, p. 57.
"the very nature of the treaty may indicate that it is intended to have certain legal consequences even after its termination [which] ought not to be expressly excluded"53.

In reply to that and other observations, the Special Rapporteur held that:

"The paragraph must cover not only cases where a situation comes into existence after the treaty terminates but also cases where a situation which arose during the currency of the treaty continues to exist after the treaty ceases to be in force"54.

And, subsequently,

"The possibility of taking this view of the effect of stipulations which expressly provide for particular obligations to continue after the termination of the treaty was not overlooked by the Commission. However, that view was rejected because it scarcely seems admissible to disregard the expressed will of the parties in a case like article XIX of the Convention on the Liability of the Operators of Nuclear Ships that the treaty, as such, shall terminate although a particular provision is to continue to be applicable"55.

"The United States Government (...) suggests that account should be taken of 'acquired rights' resulting from the operation of a treaty when it was in force (...) The Special Rapporteur has proposed that a new clause should be added to paragraph 1 which would state that the termination of a treaty 'shall not affect the any rights accrued or any obligations incurred prior to such termination' (...). Paragraph 2 of the present article does not appear, on close examination, to touch the question of the survival of acquired rights, but to relate only to the further application of the treaty's provisions after its termination. Vested rights of a kind which will survive the termination of the treaty, although they may have their origin in provisions of the treaty, acquire an independent legal existence of their own. When the treaty terminates, it is the rights which are afterwards enforceable rather than the provisions of the treaty which gave them birth"56.

What has been cited so far might lead one to think that the possibility that rights like those established in the status of European citizenship had “an independent legal existence of their own” after the United Kingdom’s withdrawal from the Treaties. However, it is not like that at all. In the final draft of the text of the then Article 66, the ILC comment on the project – as well as mentioning the example of the Convention on the Liability of Operators of Nuclear Ships of 25 May 1962 again and that denunciation by a State of the ECHR 57 “shall not release the State from its obligations with respect to acts done during the

54 Ibidem, p. 63.
55 Ibidem, p. 63-64.
56 Ibidem. p. 64.
57 (The denunciation clause of the ECHR deserves a separate comment. Article 58 (formerly Article 65) establishes six months' notice in paragraph 1. In paragraph 2, it states that the denouncing State will remain bound by its obligations under the Convention until the denunciation becomes effective. That is to say, for the period of six months after notification of the denunciation, the ECHR will remain in effect for the denouncing State (in parallel with the provisions of Article 50.3 TEU for the period between notification of withdrawal and the withdrawal agreement taking effect). That means the denouncing State can be sued during that six-month period. ECHR practice illustrates it with the example of the Greek Case, as the chief commentators on the Convention have gathered. (VAN DIJK, P. and VAN HOOF, G.J.H., Theory and Practice of the European Convention on Human Rights, ed. Kluwer, 3ª ed., The Hague, 1998, p. 15; JACOBS, F.G. and WHITE, R.C.A., The European Convention on Human Rights, ed. Clarendon Press, 2ª ed., Oxford, 1996, p. 21, pp. 362-363 and 398-399). After the coup d'état by the colonels, Greece withdrew from the Council of Europe and denounced the ECHR on 12 December 1969. The denunciation was due to take effect on 13 June 1970. However, in April 1970 Denmark, Norway and Sweden sued Greece and the Commission admitted the lawsuit as it understood that it still had jurisdiction. (Apl. 4448/70, Denmark, Norway and Sweden v. Greece, Yearbook XIII [1970], p. 108).
currency of the Convention”58 – adds a clarifying paragraph on the nature of the rights, obligations and situations to which Article 70 of the convention refers.

“On the other hand, by the words ‘any right, obligation or legal situation of the parties created through the execution of the treaty before termination’, the Commission wished to make it clear that paragraph 1 (b) relates only to the rights, obligations or legal situations of the States parties to the treaties created through the execution and is not in any way concerned with the question of the ‘vested interests’ of individuals”59.

The paragraph is so clear that it warrants no further comment. The Vienna Convention of 1969 refers to the rights, obligation or situations created by a treaty between States and applicable to them and not to rights arising between States and individuals. It bears no relation to the problem of the “vested rights” of individuals. The text of the current Article 70 and its commentary was adopted by 101 votes to none against60 at the Vienna Conference on the Law of Treaties. That is the true interpretation of the rule that forms part of customary International Law. Anything else is groundless speculation about a sentence taken out of context.

4.4. The interpretation of Article 70 1 (b) of the Vienna Convention and its application in EU law

International Law must be interpreted in accordance with its own rules, as they are codify in the Vienna Convention. Following the case law of Racke (supra 4.1), the provisions of the Vienna Convention of 1969 are customary International Law and form part of the Law of the European Union. This statement applies to rules formulated in Articles 31 to 33 of the Convention regarding the interpretation of treaties. The general rule, formulated in Article 31, lays down the grammatical, systematic and final interpretation. Complementary rules to that general rule (Article 31, paragraphs 2 and 3) indicate what has to be taken as “context” in relation to the systematic interpretation and to what extent subsequent agreements and “subsequent practice” followed by the parties can be taken into account to interpret a treaty. With regard to this last aspect, the Court in Luxembourg has made important clarifications in the recent case of Polisario Front v. Council.

“86. It must be pointed out that, (…) the General Court was bound not only to observe the rules of good faith interpretation laid down in Article 31(1) of the Vienna Convention but also that laid down in Article 31(3)(c) of that convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties (…)).

120. In that regard, it should be noted that, under Article 31(3)(b) of the Vienna Convention, for the purposes of the interpretation of a treaty, account must be taken, inter alia and together with the context thereof, of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (…).

122. It must be held that, contrary to the requirements of Article 31(3) (b) of the Vienna Convention, the General Court did not pursue the question whether, in certain cases, that

---

59 Ibidem., p. 98 (point 3). The word States (Estados) appears in italics in the Spanish version.
60 The numbering was different and at the time of the vote during the Vienna Conference, it was Article 66. United Nations Conference on the Law of Treaties, Vienna, Second Session, 9 April-22 May 1969; Doc. A/CONF.39/SR.23, Twenty-third plenary meeting, p. 126.
The Impact and Consequences of Brexit on ‘Vested’ Rights

application reflected the existence of an agreement between the parties to amend the interpretation of Article 94 of the Association Agreement.

124. Such implementation would necessarily be incompatible with the principle that Treaty obligations must be performed in good faith, which nevertheless constitutes a binding principle of general international law applicable to subjects of that law who are contracting parties to a treaty”61.

As we can see, the Court in Luxembourg considers even the details of the content of the rules formulated in the Vienna Convention to be applicable in the Law of the Union. Therefore, the same assertion must be made regarding the rule of interpretation relating to “supplementary means of interpretation”, gathered in Article 32 of the Convention. Under it, “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable”.

The rules contained in the Vienna Convention of 1969 govern the treaties signed between subjects of International Law. No reference is made to the subjective rights of individuals. It has the nature of a subsidiary rule in relation to those that may exist in the actual treaty from which a State withdraws. The rule of Article 70.1 applies to the withdrawal of a State, by virtue of Article 70.2. The possibility that any right, obligation or situation between States parties may survive after the termination of the treaty is an exceptional hypothesis that can be subdivided into two. The first situation would arise when “a treaty shall terminate although a particular provision is to continue to be applicable”. The second would arise when “such rights could maintain an independent legal existence of their own, irrespective of the treaty that brought them about”. The preparatory work confirms the meaning of a systematic interpretation (the Convention [only] governs rights and obligations between States). And it determines the meaning of an ambiguous text (which lends itself to erroneous interpretations to the advantage of individuals). In any case, it does not support the maintenance of any subjective right whatsoever of United Kingdom nationals in the rest of the Member States of the Union – or vice versa – that the Treaties may have created before the United Kingdom’s withdrawal takes effect.

4.5. The territorial application of treaties: the withdrawal of Greenland

Greenland’s withdrawal from the EEC and the rules established by the Treaties could appear to be a precedent for the situation raised by the United Kingdom62. However, there is a fundamental difference. Greenland is only a region incorporated into a Member State. What stands outside the scope of EU law is only a part of the territory of that Member State. Therefore, from the point of view of International Law, we would be looking at a problem of applying the treaties in relation to its territorial scope63. In that respect, the rule contained in Article 29 of the Vienna Convention states that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”. Denmark did not express a different intention when it signed

61 CJEU, Grand Chamber, judgment of 21 December 2016, Case C-104/16 P.
63 In that vein (“reduction of the territorial jurisdiction of the Treaties”), European Parliament Briefing (Author: Eva-Maria Poptcheva), Article 50 TEU: Withdrawal of a Member State from the EU, February 2016, p. 3.
the accession agreement. However, the States Parties to the treaty amended it (Articles 39 and 40 of the Vienna Convention), in accordance with the procedure laid down in the Treaties. The Danish Government proposed an amendment so that Greenland would be given a status of Overseas Territory, in accordance with Part IV of the Treaty of Rome (currently Article 204 of the TFEU). The proposal was received favourably in the European Commission and European Parliament. The Council approved the proposal and the Member States unanimously approved the amendment, as well as a new agreement on fishing zones (currently Protocol 34 of the Treaties).

On the other hand, besides the small population of the territory, we must also take into account that Community law was at an incipient degree of development. The status of European citizenship did not exist. The problems linked to the freedoms of movement and residence that might arise today could not have arisen in that situation. It has been duly recalled that, in its opinion 1/83, the European Commission highlighted that the change of situation of the territory raised “certain transitional problems” and used the term “rights acquired” to refer to “those of Community nationals in Greenland and vice versa”. Therefore, the Commission was of the opinion that “the new arrangements” (in other words, the amendment agreement) had to contain a clause allowing the Council to adopt such transitional measures as may have been required, especially regarding consolidation of the rights relating to the pensions “acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community”. It came under the heading of “Retention of vested rights”, with the situation referring to an “extremely small number of persons”.

Nevertheless, the terminology used by the Commission may cause certain confusion, since, in most cases, the initiated expectations or rights that it sought to protect had not yet become consolidated rights in the brief period of time (1973-1984) that the LEU applied in the territory of Greenland. And, in the case of services rendered in order to obtain a right that had not yet become consolidated when the amendment agreement took effect, the future rights of individuals to draw such a pension did not spring from the Community acquis prior to it, but from the amendment agreement itself or from the subsequent measures adopted by the Council according to its provisions. Without those provisions, the worker would have been unprotected, which means that the mere name “acquired right” would not have been enough to guarantee enjoying a pension. Mutatis mutandis, the same could be said of the United Kingdom and the withdrawal agreement, although the situation now is much more complex and the long period of time that it has been a member of the Union will have given rise to situations consolidated prior to the future withdrawal agreement, at least on matters of permanent residence, as we shall see in the second part of this report.

---


69 Ibidem, p. 21.
4.6. The direct application of the treaties to individuals

The withdrawal of the United Kingdom does not only mean that the Treaties “shall cease to apply [to it]” (Article 50.3 TEU), it also means that – any contrary provisions in the Great Repeal Bill notwithstanding – the Union’s acquis will also cease to apply. A good part of the acquis is made up of rules and decisions that apply directly to individuals. That will presumably be the main cause of the effect on British nationals in the EU and on nationals from the other Member States in the United Kingdom after the withdrawal agreement enters into force. However, one thing is that the CJEU, in the Van Gend & Loos judgment (1963), should recognise the existence of certain rights that “become part of the legal heritage [of individuals]”, and quite another to expect that the said legal heritage could outlast the termination of the instrument that created it– similar to a heritage (in another meaning of the term) that can be preserved and passed on –, which is simply wrong.

The famous judgment, which was a landmark case in direct application or direct effect of European Community law, means something else. The Dutch court requested a preliminary ruling on “whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the Article in question, lay claim to individual rights which the courts must protect”. The CJEU replied that,

“Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as on upon the Member States and upon the institutions of the Community”.

If in International Law rules are applicable to individuals only exceptionally, in the EU law, on the other hand, it is habitual, since “if the Common Market is to work, it is essential that individuals can be considered the direct targets of the rules that are adopted”. That is why the term directly applicable appears in Article 288 TFEU, describing a quality of the regulations: that of allowing the immediate application of their content to the subjects of the legal system “in each Member State”. In other words, its direct effectiveness “without intervention from the national regulatory power”. But that does not mean that the validity of such rights cannot be limited in time.

Subsequently, the Simmenthal judgment stated that direct applicability,

“Means that the rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in

---

70 The treaties signed by the Union with third States and applying to individuals in UK territory warrant a special mention. They would raise the complex question of changing the physical scope of the application of a treaty signed by the Union with a third State. The “continuity of identity” of the EU would not be affected by the loss of a Member State, but it would pose the problem of whether the individuals who were previously the beneficiaries of the treaty in UK territory could demand an equivalent benefit from the EU. It would be necessary to examine the matter in the circumstances of each case.


force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals.\(^{74}\)

There is, then, a double meaning to the term and a time limit (“for as long as they continue in force”). On the one hand, the fact that the regulation directed at the individual is applicable to them without further procedure, as it is complete, clear and assigned precisely to that end.\(^{75}\) On the other, the possibility that the target of the regulation invokes it, demanding its direct effectiveness before the national administration or the ordinary domestic judge. That is how the LEU regulation creates subjective rights for individuals that must be safeguarded by the competent authority.\(^{76}\) However, the Court in Luxembourg was not referring to a heritage of rights, but to tariffs charged on the import of chemical products (urea-formaldehyde). Once the period of validity of the European regulation for a State ends, the right created by it must end.\(^{77}\)

---

\(^{74}\) CJEU, case 106/77 (Simmenthal), judgment of 9 March 1978, p. 643.


\(^{76}\) CJEU, case 26/62, Van Gend & Loos, ruling of 5 February 1963, p. 1.

\(^{77}\) In the same sense, PIRIS, J-C, "Should the UK withdraw from the EU: legal aspects and effects of possible options", Fondation Robert Schuman, European Issues, nº 355, 5th May 2015, p. 010.

26
5. THE WITHDRAWAL OF A MEMBER STATE: THE CASE OF THE UNESCO

Status as a member of an international organisation (admission, suspension, expulsion, withdrawal) is governed primarily by the treaty constituting it – which is a treaty between States to which the content of the Vienna Convention of 1969 applies, under Article 5 – and its loopholes would be covered by the rules of the organisation or failing that, by its very practice.

The UN Charter does not provide for the withdrawal of a Member State of its own volition. In spite of that, in the practice of the organisation the case arose of Indonesia, which abandoned its seat in 1965 in protest at the election of Malaysia as a non-permanent member of the Security Council. Its return in the following period of sessions was not preceded by a new admission procedure, rather Indonesia resumed "full cooperation with [the organisation]... and its participation in the activities [of the organisation]". That is why doctrine considers it a case of an empty chair, in other words, a temporary suspension of its condition unilaterally decided by the Member State itself, rather than a true withdrawal from the treaty. In fact, the president of the General Assembly in 1966 said: "It would therefore appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of cooperation".

The organisation in the United Nations system that has witnessed the largest number of withdrawals (and returns) is UNESCO. Poland and Hungary withdrew in 1952 and Czechoslovakia did so in 1954, but all three countries returned in 1954. Indonesia also left UNESCO for the same period as it was outside the central organisation. Portugal, in turn, did so between 1971 and 1974. Without prejudice to examining these cases in more detail, they could provisionally be described as "empty chair" cases.

However, the most significant episode was in the mid-1980s when the United States and the United Kingdom withdrew from UNESCO in protest at the policy pursued by Mr M'Bow, the director-general. According to the official information from UNESCO, the United Kingdom was a member of the organisation between 4 November 1946 and 31 December 1985; it withdrew and then re-joined on 1 July 1997. In parallel, the United States of America was a member of UNESCO between 4 November 1946 and 31 December 1984; it withdrew from the organisation and re-joined on 1 October 2003.

Like most of the other specialised agencies of the United Nations, UNESCO provides for the possibility of withdrawing from its constituent treaty. The duration of the US and

82 http://es.unesco.org/countries/e.
British withdrawals (12 and 19 years, respectively) and the use of a new admission procedure for their return makes them true withdrawals and, therefore, similar episodes – mutatis mutandis – to the one raised now by the United Kingdom in the Union. The UNESCO Constitution has an interesting provision on the matter. The moment from which the withdrawal notice begins to take effect is 31 December of the year following notice. The explanation as to why it defers its effect for over a year is because UNESCO, like the UN, approves its budget biannually. In this way, the Member that withdraws has the privilege of continuing to make its economic contributions to the organisation’s budget throughout the budgetary period, since no such withdrawal “shall affect the financial obligations owed to the Organization on the date the withdrawal takes effect”. The taking effect of the notice determines the timeframe of those financial obligations, putting an end to the production of the parties’ rights and duties. There are no obligations on the State that withdraws beyond the closing date for that purpose. An attempt is made to ensure it coincides with the end of the budgetary period.

In the course of this analysis, the only stronghold in which it was possible to find anything resembling so-called “acquired rights” in Public International Law was that of UNESCO officials in the cases of withdrawal of a Member State. Doctrine shows how an attempt was made to protect officials from the States that withdrew, distinguishing between the impossibility of recruiting new officials of that nationality and keeping on the officials from the State that withdraws, either providing for early retirement or keeping them in the post that they held and for which they had been chosen because of their “high standards of ability, efficiency and integrity”, though accepting resignations from management posts in the organisation that an official of that nationality might hold.

It would exceed the scope of this report to conduct an investigation into whether a similar practice occurred in other international, universal and regional organisations. In any case, even if the results of that research were positive and we could establish the existence of a customary practice on the matter, we would come up against the Regulation laying down the staff regulations of officials and the conditions of employment of other servants of the European Union. According to a literal interpretation, officials from the United Kingdom would have to resign, although it has been said that the wording of Article 49 is permissive (“may be”) 91, not imperative (“must”), which is an additional element in favour of a flexible interpretation, more in line with the interests of the United Kingdom nationals working for Union institutions.

Now, if the practice seen in the specialised agencies had a general customary value, would it prevail over the Regulation? There is no hierarchy among the various sources of International Law. Therefore, the criterion that would determine the preferred application of one or other regulation would be that of speciality. And there is no doubt that the regulation laying down the staff regulations of officials of the EU would be a lex specialis in

---

86 The UNESCO Constitution states in Article 2.6: Any Member State or Associate Member of the Organization may withdraw from the Organization by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organization on the date the withdrawal takes effect. Notice of withdrawal by an Associate Member shall be given on its behalf by the Member State or other authority having responsibility for its international relations; http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.
87 In practice, the organisation has proceeded to approve a biannual budget, at least since 1956-57. However, the UNESCO General Conference of 2011 approved the decision that the budget would be every four years and that provision applies at present.
88 DOCK, M. Cl., op. cit., pp. 137-142.
89 Article 27 of the Regulation laying down the Staff Regulations of Officials of the EEC and the EAEC.
91 European Parliament Briefing (Article 50 TEU...), op. cit., p. 6.
relation to customary law, if that actually existed. That means that the British negotiators could not allege the existence of a true subjective law on the matter in this case either. However, the situation of British officials in the EU could be the object of special attention by the negotiators, with a view to preventing the sudden resignation of a large number of officials adversely affecting the work of the Union’s institutions and bodies. And we cannot rule out the idea of a special category of nationals of the State that withdraws emerging from the negotiations (those who have worked or are working for Union institutions), which could be the object of especially favourable treatment92.

---

92 DOCK, M. Cl., op. cit., pp. 137-142.
92 Article 27 of the Regulation laying down the Staff Regulations of Officials of the EEC and EAEC.
92 European Parliament Briefing (Article 50 TEU...), op. cit., p. 6.
92 Ibidem., p. 6.
6. CONCLUSIONS OF PART I

1. How to describe “vested rights”

They are subjective rights of individuals that originated in a certain legal system and seek to extend their effectiveness in a different legal system to the original one. That fundamental change in the regulations in force may occur because of a succession of States over a territory or a revolutionary change of government within the same State. In the past, they were cited in the face of expropriations following a succession with a view to obtaining compensation. In July and December 2016, two reports from the House of Commons and the House of Lords raised the question of whether it would be possible to cite them to protect the rights of United Kingdom nationals in the rest of the Member States of the European Union in the context of the British withdrawal from the Union. It raises the question of whether it would be possible to cite them in defence of rights other than the right to property, such as economic freedom or the rights inherent in European citizenship status. In this first part, we shall set out the conclusions of the report regarding this question in the sphere of International Law.

2. Acquired rights do not apply to economic freedoms

With regard to the right to private property, there is at least one precedent, dating from 1926, when the Permanent Court of International Justice (PCIJ) mentioned the existence of a general principle on the recognition of individuals’ “acquired rights”. However, the principle already had exceptions formulated through a treaty (Geneva Convention of 1922); thus, it appeared to have a dispositive nature. In any case, the principle has proven incapable of withstanding the onslaught of trends contrary to it in the evolution of law and it is reasonable to assume that it has lost all legal value today.

With regard to the freedoms of trade and establishment, customs or fiscal advantages, the precedents found in the case law of the PCIJ (Oscar Chinn, 1934) and the International Court of Justice (ICJ) (United States nationals in Morocco, 1952), as well as in the reports by Special Rapporteur Garcia Amador to the International Law Commission (ILC) (1956 to 1961) and in the works of doctrine, reveal that these freedoms always remained beyond the idea of acquired or vested rights. They do not exist autonomously and independently of the treaties that grant them to their beneficiaries and they are not maintained in the future once the treaties that give rise to them are terminated. To put it another way, the precedents on business freedoms in the case law of the PCIJ and ICJ are negative regarding the existence of acquired rights or the maintenance of other similar subjective rights of individuals with an existence that is permanent and independent from the treaty that created them.

3. The European Union bears no international responsibility for the violation of subjective rights of UK nationals

In the event that litigation may arise citing the possible responsibility of the European Union for the violation of hypothetical “acquired rights”, a basic fact is that – unlike the traditional approaches – the current premise of international responsibility is the existence of a wrongful act – and the premise does not arise in the United Kingdom’s withdrawal, as it is not committing a wrongful act at all by withdrawing from the Union. Nor is the EU by terminating the application of the Treaties and the Union acquis in the United Kingdom. Therefore, in the event of the termination of individuals’ subjective rights linked to their
national State’s membership of the Union – even if withdrawal resulted in injury to them – there would be no reason for compensation, as there has been no wrongful act, rather a voluntary action by the State that withdraws in accordance with International Law.

4. Absence of international responsibility for injuries to economic interests that do not constitute subjective rights

Therefore, there would be no “acquired rights” or other subjective rights of the individuals injured by the United Kingdom’s withdrawal, only injured economic interests that the United Kingdom would have had to assess before triggering the withdrawal process. The case law of the ICJ on the subject is constant in its affirmation that the mere harm of economic interests does not constitute damage that qualifies for compensation. In the Barcelona Traction case (1970), the Court said:

“Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected but, solely a right infringed involves responsibility”.

And, in another passage slightly before that,

“Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation”.

In the Sadio Diallo case (2010), the Court repeated what it had said in the case concerning Barcelona Traction. All the judges from Western States voted with the majority. Insofar as their vote may reflect the opinion juris of the respective national States, that means that – despite the many bilateral treaties promoting and protecting investment agreed to allow special rules to apply – general International Law has not varied on the subject in the last 50 years.

5. The right to private property and related faculties is not impaired by the UK’s withdrawal

The greatest concern expressed by the British institutions about the consequences of the withdrawal refer to the rights of free movement of persons and the right to residence, as well as the freedoms of establishment, to render services and the free movement of workers. But not to the right to private property, which is not usually placed in the field of European Union law, rather in the law of the Member States, although it could be affected by some action of the Institutions. As this is a right of property, it is not possible to transpose its regulation to other rights and economic freedoms of a personal nature derived from a treaty. The old precedents concerning “acquired rights” do not refer to economic freedoms but to foreigners’ rights to own property. There is no identity, not even similarity, between these rights and those whose impairment as a result of withdrawal are the main concern of the United Kingdom and the Union.

According to Article 70.1 (b) of the Vienna Convention of 1969, the withdrawal of a State party to a treaty will not affect the rights, obligations or legal situation created by the treaty prior to its termination. However, after examination of the preparatory work of the precept, including the (interpretative) comment of the ILC on the article at the time of its vote, the rights it refers to are rights of States, not of individuals, since it “is not in any way
concerned with the question of the ‘vested interests’ of individuals”. The precept was approved by 101 votes for and none against. The ILC’s special rapporteur was Sir Humphrey Waldock, a United Kingdom national.

6. Subjective rights granted by EU law, though incorporated into the legal heritage of individuals, shall end after withdrawal

The direct application to individuals of the content of treaties is rare in the field of International Law, while, on the other hand, it is the basis of the functioning of EU law. While the CJEU said that this legislation creates “rights that become part of the legal heritage of individuals” (Van Gend & Loos, 1963), thus describing the direct applicability or direct effect of the EU law, that only indicates that individuals are the direct targets of the European legislation, which is fully and uniformly applied. However, it does not apply forever, but only for so long as it continues in force (Simmenthal, 1978). That period will end for the United Kingdom the moment the withdrawal agreement takes effect.

7. The case of Greenland is not comparable to the withdrawal of the UK from the Union

There is a fundamental difference. Greenland is only a region forming part of a Member State. What stood outside the scope of the EU law was only a part of the territory of that Member State. Therefore, the only thing that occurred was a change concerning the territorial scope of the Community Treaties that, as the Commission would say (COM (83) 0006), “affected an extremely small number of people.” The chief problem to be solved was recognising the payments made by companies in which nationals from other Member States worked in Greenland for the future consolidation of those workers’ pension rights. For all these reasons, it is not a “comparable situation” to the present one, although the fact that the Institutions gave special attention to solving the “transitional problems” of those affected, through the Amendment Agreement and the subsequent provisions adopted by the Council, certainly can serve as a precedent.

8. The withdrawal of the UK and the US from UNESCO were done endeavouring to safeguard the posts of the organisation’s officials who held the nationality of the States that withdrew

In the context of UNESCO, the withdrawal of two Member States was carried out endeavouring to safeguard the interests of the organisation’s officials. Even if the goal appears to warrant flexible and generous consideration, to transpose that situation to the United Kingdom’s withdrawal from the European Union would require a detailed analysis of the diverse situations existing inside the Union’s bureaucracy, which exceeds the scope of this study.

9. Even if there are no “acquired rights” that will remain after the United Kingdom’s withdrawal, there is nothing in international law to prevent the withdrawal agreement from providing protection of the rights and freedoms granted by the EU law during a transitional period or even beyond that period

There is no protection under general International Law of the subjective rights and freedoms that may survive termination of membership of the treaty that created them by the State of which the holders of such rights are nationals. Therefore, there are no “vested
rights” and rights for individuals will not endure if there is no withdrawal agreement. However, the private International Law agreed between the EU and the United Kingdom in the moment of withdrawal (the withdrawal agreement) may protect the rights and freedom created so far for UK nationals in the rest of the EU and vice versa, as if the Law of the Union extended its effects over those people and rights. Yet those subjective rights would stem from the withdrawal agreement itself.

Thus, and on the basis of the principles of reciprocity and non-discrimination on the grounds of nationality, the parties in the withdrawal negotiations could extend enjoyment of those rights and freedoms for nationals of Member States of the Union in the United Kingdom and vice versa.
PART II. VESTED RIGHTS IN EUROPEAN LAW

7. RIGHTS THAT STEM FROM EUROPEAN CITIZENSHIP

The TFEU governs citizenship of the Union. Article 20, paragraph 1 of the TFEU provides that:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.

Citizenship of the Union as designed in the TFEU has a dimension of prohibition and one of recognition of rights. With regard to the former, Articles 18 and 19 emphasise the prohibition of “any discrimination on grounds of nationality” (Article 18), which is key in the European project, and combats any discrimination “based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation” (Article 19).

Continuing on the positive note, Article 20 TFEU highlights the following rights, inter alia: “to move and reside freely within the territory of the [Union]”; active and passive suffrage in the elections to the European Parliament and the municipal elections of the Member State of residence; diplomatic and consular protection by any Member State; and the right to petition and present initiatives to the European institutions in any of the Treaty languages and to obtain a reply in the same language. Article 21.3 adds the possibility for the Council, acting unanimously, to adopt “measures concerning social security or social protection”. Article 24 TFEU recognizes the right to organise, with other citizens, a so-called “citizens’ initiative” in demand of European legislation.

The content of citizenship is also reflected in a series of rights and duties laid down in the Charter of Fundamental Rights.

The European Union has considerable powers over immigration (Articles 77 to 80 TFEU). Article 79 allows it to adopt measures on conditions of entry and residence of third-country nationals; standards on long-term visas and residence permits, including those for the purpose of family reunification; rights of third-country nationals living in the Union; illegal immigration and unauthorised residence, including expulsion; and combating trafficking in persons.

Moreover, the Treaties confer on citizens of any Member States other rights of a labour, trade and economic nature which appear in Title IV of the TFEU, entitled “free movement of persons, services and capital”. These rights already formed part of the initial texts of the then European Economic Community, since the EEC’s goal was to establish a single market. With a view to that, it was necessary to ensure free movement of the factors of production: workers (Articles 45 and 46); self-employed professionals and companies (Articles 49 to 55); service providers (Articles 56 to 62) and capital (Articles 63 to 66). It should be noted that the concept of European citizenship, from which the free movement of “persons” (not just “workers”) derives, did not appear until Maastricht. Later, the Court of Justice of the European Union (CJEU) would assert the “fundamental” nature of that right.

There is no doubt that those freedoms will be affected by the United Kingdom’s departure from the European Union.
The Charter of Fundamental Rights adds to the rights of European citizens. It must be pointed out that the Charter does not contain the expression “of European Citizens” in its title. It is a “Charter of Fundamental Rights of the European Union”. It has “the same legal value as the Treaties” (Article 6.1 TEU). It is not intended to form part of the status of European citizenship, but as an expression of the values of the Union set out in Article 2 TEU (“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”).

The provisions of the Charter apply, in general terms, to any person in the European Union. There is just one exception: Title V “Citizens’ Rights” (Articles 39, 40, 45 and 46), which expands on European citizens’ rights already recognised in Article 20.2 TFEU mentioned previously and, more specifically, the right to vote and to stand as candidate in elections to the European Parliament and in municipal elections, freedom of movement and residence and diplomatic and consular protection.

The United Kingdom’s withdrawal from the European Union will not affect the protection of the rights recognised in the Charter. Firstly, because they are rights afforded not only to those persons who are considered as “citizens of the Union”, but also to any “person” (except those rights exclusive to the former, referred to in Article 20 TFEU and Articles 39, 40, 45 and 46 of the Charter). Secondly, because the provisions of the Charter “are addressed to the institutions, bodies, offices and agencies of the Union… and to the Member States only when they are implementing Union law” (Article 51 of the Charter). Thus, when the United Kingdom is outside the Union, the Charter will not apply to British citizens (except those who are in or reside in the EU), and the decisions of the European institutions, as well as the decisions of the governments of other EU Member States when implementing Union law will not be binding on them.

Therefore, the rights which must be examined more carefully in order to assess whether they constitute possible “vested rights” are those that specifically form part of the European citizenship (free movement and residence, active and passive suffrage in the elections to the European Parliament and municipal elections, consular protection and the right to petition), economic freedoms and other rights of a social nature. In this context, we must also take into account the abundant case law of the Court of Justice of the European Union, which gradually built new rights when the European Communities had not been sufficiently guaranteeing them, at the time that “European citizenship” did not yet exist.

The rights of citizens should occupy a special place in the Article 50 TEU withdrawal agreement with the United Kingdom, along with the budgetary aspects of the UK’s financial contribution to the EU. There will be two years from the United Kingdom’s notice for that initial agreement, which as the aforementioned rule states, “will set out the arrangement for its withdrawal, taking account of the framework for its future relationship with the Union” (Article 50.2). Both the Government of the UK (Theresa May’s speech of 17 January 2017) and the European institutions agree that the issue of citizens’ rights, based on reciprocity, must be addressed immediately at the start of the negotiations between them.
8. THE RIGHTS INVOLVED IN THE WITHDRAWAL NEGOTIATIONS - IN PARTICULAR, FREE MOVEMENT AND RESIDENCE

The right to reside and move freely in the territory of the Member States is undoubtedly the one that will give the parties negotiating Brexit most headaches. It is the core and most essential right of European citizenship. Approximately 14 million European citizens live in another Member State of the EU today. Around 1 million of them are British; and 3 million European citizens live in the United Kingdom.

The legislation that more forcefully and with the wider scope governs this right is Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004 “on the right of citizens of the Union and their families to move and reside freely within the territory of the Members States”.

Quoting some paragraphs of the introduction to the Directive will serve better than any comment in order to measure its transformative significance:

Whereas
(1) “Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States...”
(2) “The free movement of persons constitutes one of the fundamental freedoms of the internal market...”
(5) “The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.
(9) "Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice”.
(10) “Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence...”
(17) "...right of permanent residence... for all Union citizens... who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion order”.
(20) "In accordance with prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty...”
(24) "Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State...”

Thus Directive 2004/38 codifies the rights of a European citizen and their family: to leave the territory of a Member State without the need for a visa; to reside up to three months in a Member State different to their own; to exceed that limit by complying with certain conditions (employment, economic resources, study); and even obtain permanent residence if they have lived for a continuous period of five years in the host State. They
only lose that right if there is a period of absence of two continuous years. Expulsion is only possible on grounds of “public policy, public security or public health” (Article 27).

Thanks to the principle of equal treatment, a European citizen who resides in another EU Member State enjoys the same social rights that the host Member State guarantees its nationals: access to education, social assistance, health care and, of course, access to the labour market (Articles 23 and 24 of Directive 2004/38). Regulations 883/2004 and 987/2009 govern the coordination of the social security systems among Member States, aggregation of periods and the transfer of benefits across the EU.

For all these rights, there has to be equal treatment with nationals93.

Directive 2004/38 was incorporated into the domestic law of the United Kingdom through the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”), which also introduced into British law other rights of European citizenship recognised by the case law of the Court in Luxembourg. Thus, European citizens do not require a permit or visa to enter the United Kingdom, unlike other people from third countries. However, some control over them is maintained by the immigration services and they can be excluded from some social benefits94. The United Kingdom (and Ireland) are not in the Schengen Area.

Rights to residence can also be exercised in Iceland, Liechtenstein, Norway and, partially, in Switzerland. These countries and the majority of the EU Member States are in the Schengen Area95.

The right to residence, especially to permanent residence, is probably the most important fundamental right from among those that make up the status of European citizen, because it is from that right that stem all other rights that a person can enjoy in a country other than their own. They enjoy it on equal terms as the nationals of the host country – for example, the United Kingdom. The loss of that condition by a European citizen residing in another country is truly important, qualitatively greater than the loss of other rights. Hence the significance of clarifying whether it is an “acquired” right, which would be consolidated and shielded against a decision such as that made by the United Kingdom, both for the citizens of this country that reside in another EU Member State and for European citizens residing in the United Kingdom.

93 See House of Lords, European Union Committee; Brexit: acquired rights, 14 December 2016, p.48.
8.1. Permanent residence and “acquired rights”

8.1.1. What is meant by “acquired right”?

The concept has been dealt with in international law in the way set out in part one of this study. We concluded that, in the light of the precedents, best doctrine and the case law of the International Court of Justice, it does not exist. More exactly, according to international law, rights of a public nature (or of a mixed, public/private nature) do not outlast a change of sovereignty or a succession of States or the termination of an international treaty. We are referring to rights of public officials, rights of a political nature, constitutional rights, electoral rights or rights of an administrative nature, as pointed out by Barde96. Their “not acquired” nature appears clearly under international law.

However, the concept of “acquired rights” has a broader field of study. Doctrine has always found it difficult to define what acquired rights are, among other reasons because judges have been defining them over time. The French Conseil d’Etat rightly spoke of an “act creative of rights”, or an “act definitively acquired97”.

Constantin Yannakopoulos explains that doctrine has disregarded any conceptual definition in order to seek a purely functional definition, according to which an acquired right is a “right to the maintenance of the act considered as creative of rights”, or to maintain an acquired legal situation98.

In any case, the concept of “acquired rights” has to be examined from a dynamic perspective, or ‘in real time’ law, “law in movement, the legal process by which law is created and applied”, as Hans Kelsen has defined it, in opposition to the “static theory of law”99.

The concept of “acquired rights”, whatever its origin or formation over time, is linked to the irreversible and binding nature of these rights in the face of new laws and new political and administrative powers. That is what we understand by “derechos adquiridos”, “droits acquis” or “vollерworbenе Rechte”, an expression that is used in various countries and legal cultures to define rights that protect settled and consolidated situations or interests that warrant legal protection. It is a stronger interest than so-called “legitimate expectations” (a concept used by the Court of Justice of the European Union), or “expectations of rights” a concept very often used in civil law. By virtue of its strength, the concept of “acquired right” claims the non-retroactivity of legislation subsequent to the supposed consolidated acquisition of that right or, where appropriate, reparation or compensation (responsibility of the State) for the injury suffered by those hypothetically acquired rights. Vested rights, then, are rights protected against changes in the law.

One might go on to ask whether the rights of the European citizens who reside permanently in a Member State of which they are not nationals – for instance, British citizens now living

---

96 Jacques Barde, La notion de droits acquis en droit international public, Les publications universitaires de Paris.
98 Constantin Yannakopoulos, La Notion de Droits acquis en Droit Administratif Français, Librairie Générale de Droit et de Jurisprudence, Paris, 1997, p. 7. See also p.3 on the old idea of “acquired rights” (jus quaesitum) as opposed to the idea of innate right (jura connata): an innate right, resulting from the nature of man, is original, universal and absolute; an acquired right is a right that springs from a particular action of man and can be modified or renounced.
in another country of the Union and the non-British EU citizens living in the United Kingdom – really are “acquired rights” and, therefore, unassailable by the United Kingdom’s departure from the European Union through the procedure of Article 50 of the Treaty on European Union.

We selected to analyse in depth the right to permanent residence because, for the purpose of this study (which is to clarify whether there are vested rights in citizens of the Union), the right to permanent residence after five continuous years, as provided for in Directive 2004/38, is the most powerful and advantageous right of a public nature for European citizens. In other words, it is the one whose loss would cause most injury to the citizens affected by Brexit. So if we came to the conclusion that permanent residence in another Member State does not constitute a vested right that can forego the repeal of the Treaties and European law in the United Kingdom, then there would be no reason to continue analysing the remaining rights that form part of so-called European citizenship or other rights created by the law of the Union. If the consolidated right of a citizen of another EU Member State to reside in the United Kingdom, or of a British citizen in an EU State other than their own is not an acquired right that will remain unaffected by the United Kingdom’s departure from the Union, then no other right created by the Union as inherent in European citizenship has the nature of an acquired right.

In the light of European law and, in particular, of Article 50 TEU our conclusions are as follows:

1. The Treaties of the EU and secondary legislation (such as Directive 2004/38) will be in full effect until the conclusion of the withdrawal of the United Kingdom from the EU or, in any case, two years after the United Kingdom notifies its decision to withdraw – something that it has not done at the moment of the conclusion of this study.

In this respect, Article 50.3 stipulates that:

“The Treaties will 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”.

2. Until the European Treaties cease to apply in the United Kingdom, Article 50 TEU does not provide for any transitory situation for the rights of EU citizens residing in the United Kingdom or of British nationals residing in the European Union.

We must understand, therefore, that until that precise moment, the right to residence set in Article 21 TFEU and in Directive 2004/38 – and the rest of the political, social or economic rights stemming from the EU legal system – cannot be revoked or cancelled by the United Kingdom or any other Member State of the Union.

A different issue resides in the possibility that the withdrawal agreement between the United Kingdom and the EU establish a transitional phase for the rights of citizens during the legal “disconnection” between the two parties. In any case, if this eventuality arises, it will happen as of the moment laid down in Article 50.3 of the TEU, not before – and it will be the product of a political negotiation.
3. The political negotiation provided for in Article 50 TEU cannot be conditioned by a supposedly unalterable right of European citizens with permanent residence in the United Kingdom or British nationals within Union territory always to retain that situation as supposedly “vested” rights\(^{100}\).

The reason for this is that the status of European citizen with the right to free movement and residence in any EU Member State emanates from the EU legal order rather than from national law. If the Treaties cease to apply in the United Kingdom (Article 50.3 TEU), rights such as residence, which exist today under the protection of these Treaties for European citizens in the United Kingdom and for British citizens in every State of the Union, shall disappear. The legal grounds for such a right to residence cease to be valid at the moment the United Kingdom ceases to be a member of the Union.

The argument above is confirmed by the fact that the goal of the current government of the United Kingdom is precisely to control migratory flows into the United Kingdom and not be obliged to accept the freedom of movement and residence guaranteed by the Treaties, European legislation and the CJEU (speech by Theresa May on 17 January 2017, mentioned previously).

Therefore, in compliance with the provisions of Article 50 TEU, the right to residence and other rights – as well as the important principle of equal treatment and non-discrimination on the grounds of nationality – will cease to be guaranteed – as European rights – in the United Kingdom and for British nationals outside their country.

The fate of these rights created by the EU, as far as the United Kingdom is concerned, will depend on the British legal order and judges, within the framework of the foreseeable (and desirable) agreement between the EU and the United Kingdom, because this latter will no longer be a member of the EU but a third country.

Case law from the highest-ranking courts in the United Kingdom corroborate this approach. The High Court judgment of 3 November 2016 – which ruled that triggering Article 50 required the approval of Parliament – did not address the issue of “acquired rights” directly. However, it did state that the rights arising from the legal system of the EU will be undone as soon as the Treaties cease to be in effect in the United Kingdom (paragraph 66 of the judgment).

The same will apply to British nationals in any country of the Union.

4. When a Directive mentions “acquired rights”, it does not mean that such rules are immune to the United Kingdom’s departure from the Union.

For example, Council Directive 2001/86 of 8 October 2001 completing the Statute for a European Company stipulates in its recital 18: “It is a fundamental principle and stated aim of this Directive to secure employees’ acquired rights as regards involvement in company decisions”. This means that a regression in those rights is not possible (the “before and

---

\(^{100}\) According to Tim Eicke, the only exception could be those people who have lived in the United Kingdom long enough to possess a "residence permit or residence document endorsed to show permission to remain in the United Kingdom indefinitely", granted under old paragraph 255 of the Immigration Rules (cancelled as of 30 April 2006). According to Eicke, the reason for is that "indefinite leave to remain" was not a creation of European law but of British law (Immigration Rules). See in: "Could EU citizens living in the UK claim acquired rights if there is a full Brexit?" Lexis PSL, 11/04/2016.
after” principle). Does this mean that the so-called “acquired rights” stemming from that Directive are inviolable? Does it mean that those rights would stand above the withdrawal of the United Kingdom from the European Union? Clearly not, in our view. As that Directive forms part of domestic British law, it may be modified at the will of the UK Parliament after the United Kingdom ceases to be part of the Union. The recognition of “acquired rights” of workers operates within the EU legal order, but it does not have any effect outside the European Union, nor does it condition a State that is no longer a Member of the Union.

5. In short, European citizenship, as a status that affords a series of rights, starting with free movement and permanent residence in any State of the Union, is inevitably tied to a country’s membership of the Union. If, as there is every indication, the United Kingdom withdraws from the Union, the rights that come with EU citizenship, starting with the most powerful – permanent residence – will cease to exist under law, in the sense that they would cease to be binding under United Kingdom law. In that country, EU citizens would be considered, from a legal point of view, in the same manner as those of any other third country. The same would happen to British nationals living in the Union.

This does not mean that citizens of the EU in the United Kingdom (or British former citizens of the Union) are going to be immediately dispossessed of the rights that today make up European citizenship, but that will depend:

Firstly, on the agreement that the United Kingdom and the EU reach (Article 50) and on the agreement on the framework for their future relationship and

Secondly, on the subsequent legal reforms in the United Kingdom and in the EU and the interpretations of the courts in both legal orders.

Accordingly, at least theoretically, the situation of EU citizens in the United Kingdom and those of the United Kingdom in the EU may be different once Brexit is complete. The former may be subject to stricter immigration rules than the latter.

As Gordon and Moffatt point out, European citizens in the United Kingdom would have to defend their current status once the United Kingdom’s withdrawal is complete, using only British domestic law and nothing else. However, British citizens in the EU, even if they are no longer European citizens, would enjoy the EU legislation on immigration matters which is partly harmonised at EU level, and invoke its general principles as nationals of a third country; they could also invoke the very favourable provisions of the Charter of Fundamental Rights of the EU – something an EU citizen in the United Kingdom could not do when the UK leaves the Union.

For example, British laws do not recognise the indexation of pensions and social subsidies and European law does. Would it be necessary to legislate so that European legislation excludes it from British nationals?

---


102 Brexit: The Immediate Legal Consequences, cit., p.67.
Another example of the possible imbalance are the directives for highly specialised workers (Blue Card Directive), seasonal workers and other nationals of third countries with long-term residence.

Hence the importance for European citizens of the agreement on withdrawal and the framework for the United Kingdom’s future relationship with the Union (Article 50.2 TEU).

8.2. Other aspects related to the rights of citizens and the 1950 European Convention on Human Rights

A hypothetical loss of the right to residence and other rights of European citizenship because of Brexit – without these rights being replaced by an agreement pursuant to Article 50 between the United Kingdom and the EU – would not mean a total lack of legal protection for British nationals living outside their country and EU citizens living in the United Kingdom. It would not mean, more precisely, the total renunciation of the right to move, reside and work as they do at present, for two reasons primarily. First, because the respective national law on migration would immediately apply, putting these persons on the same level as citizens of other third countries. It is true that the level of protection of rights in qualitative terms would decline substantially, but there would not be a total disappearance of rights. The level of these rights would depend on the legislation of country of residence.

More importantly, because all European citizens live in States that are parties to the European Convention on Human Rights (ECHR), which in the last instance is interpreted and implemented by the European Court of Human Rights in Strasbourg.¹⁰³

We must refer in particular to the rights that are especially relevant for our purposes: the right to respect for private and family life and one’s home (Article 8 ECHR) and the right to property (Article 1 of the Additional Protocol 1 of the ECHR).

It seems quite reasonable to consider that those European citizens living in the United Kingdom who have not found protection in British law to continue living in the UK may use, with foreseeable success, the channel of Article 8 of the ECHR before the British courts, or, failing that, appeal to the ECTHR in Strasbourg.¹⁰⁴ Naturally, the chances of continuing to reside in the United Kingdom (or conversely in another country of the Union) after Brexit will increase in proportion to the length of residence and the family and professional ties of the person affected by the United Kingdom’s departure from the Union.

In Douglas Scott’s view, Article 8 of the ECHR would make it possible to stop deportations of European nationals from the United Kingdom, or of British nationals from other States of the Union, who no longer enjoy the right to residence because of Brexit.¹⁰⁵ Nevertheless, the case law of the ECTHR is flexible according to each case. It accepts that States control immigration and will only condemn a State if the case requires it and according to the circumstances of the State itself.

¹⁰³ The United Kingdom incorporated the ECHR into its domestic law through the Human Rights Act 1988.
¹⁰⁴ T. Eicke, "Could EU citizens ...", cit., p. 3.
In any case, the ECtHR cannot be called upon to preserve European citizenship for British citizens once the United Kingdom no longer belongs to the Union.

With regard to Article 1 of the additional Protocol of the ECHR, the expansive case law of the ECtHR allows one to think that the concept of the “right to respect of one’s possessions” or “property” used by Article 1 of the Protocol will be applied flexibly and broadly.

Lowe considers that the ECtHR has established a very broad interpretation of the concepts of “possessions” and “property” from the Additional Protocol to include pensions or other related matters. Therefore, the Convention protects economic rights beyond what we understand by the term “assets”. The ECtHR broadens the concept to movable and immovable things, including intangible assets such as intellectual property, contracts, judgments, licences and public benefits. Lowe extends it to “legitimate expectations”106. As we can see, it would be possible to include a part of the economic rights that the Treaties afford to European citizens in Article 1 of the additional Protocol.

Naturally, the protection of the rights will vary according to the circumstances of the case, which introduces an element of uncertainty – uncertainty that does not exist today thanks to the clarity and strength of the guarantees of the Treaties and European law. In fact, the ECtHR in Strasbourg has accepted that the EU legal order makes it admissible that, under the ECHR, European citizens should be treated more favourably than other “foreigners” from third countries. Once the United Kingdom has withdrawn from the EU, in view of Article 14 of the ECHR (prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the Convention), it will be more difficult to justify treating a certain category of foreigners (for example, citizens of the EU) differently to others (Eicke). This is another reason to champion the advisability of a negotiated agreement on the withdrawal of the United Kingdom from the EU that guarantees the rights that disappear with withdrawal. We must take into account that the equality (“prohibition of discrimination”) referred to in Article 14 of the ECHR is not guaranteed in absolute and general term, but always associated with the “enjoyment of the rights and freedoms set forth in this Convention”.

In conclusion, once the United Kingdom’s departure from the European Union is complete, we agree with the Report of the House of Lords of 14 December 2016 that, in the absence of an agreement established between the two parties (Article 50 TEU), the European Convention on Human Rights provides an effective means of defending the right to residence and other rights inherent in European citizenship. It is more effective than international law or the (ambiguous and fragile) doctrine of “acquired rights”. A large number of – but not all – the rights created by the EU match the rights and freedoms of the ECHR, which forms part of the United Kingdom’s domestic law by virtue of the Human Rights Act 1998107.

The most significant rights for that purpose are, as we said, Article 8 (right to private and family life) and Article 1 of the first Protocol (additional Protocol) of the Convention, which recognises the right to the peaceful enjoyment of possessions.

However, that protection from the ECHR, interpreted by the Court in Strasbourg, cannot replace the rights derived from the Treaties, the EU’s legal system and, to be precise, those

106 Ibidem, pp. 20.
inherent in European citizenship. This will disappear with Brexit. The ECtHR will interpret and apply the ECHR to nationals of a country as such, not as European citizens.

Moreover, the ECHR does not contain rights that are highly important in a person’s everyday life and which are largely covered by EU legislation: the right to work, to study, to a pension, to access to health services and social assistance and equal treatment.

Therefore, the support of the ECHR in a post-Brexit scenario is very valuable, for the reasons set out above. However, it is not comparable with European citizenship – which will disappear in the United Kingdom for Europeans and in the EU for British nationals – and the content of which in terms of rights is extraordinarily important for the lives of 14 million people in Europe today.

**8.3. Legal treatment of the rights of European citizens in view of the United Kingdom’s withdrawal from the Union.**

From the previous considerations of this report, we can gather that the United Kingdom’s withdrawal from the Union will have severe negative effects on the rights of European citizens, whatever their situation. Losing the status of a European citizen is undoubtedly set to inflict severe damage on the rights of those who have enjoyed the benefits derived from that status until now.

British nationals in the Union will no longer enjoy the right to free movement, residence, work and other rights derived from the status of European citizenship; and vice versa, the same will happen to non-British citizens in the territory of the United Kingdom.

It is difficult to know who will come off worse, the British or the non-British. The truth is that, as far as the latter are concerned, the loss of rights that are so vital, so essential to their lives, will take place in one country alone, the United Kingdom. However, British nationals will lose the (European) right to residence, permanent or not, in all 27 Member States of the European Union.

The citizens currently affected – obviously, we cannot talk about future hypotheses – are, according to British Government figures from 2011, 2.8 million EU nationals living in the United Kingdom (the majority, 900,000, from Poland) and 1 million British nationals who are long-term residents in countries of the Union, most of them in Spain, over 300,000; in France, over 50,000; and in Germany, almost 100,000)\(^\text{108}\).\[^{108}\]

It is quite understandable that many of these citizens, and others with expectations of rights, are not simply going to settle for the sudden loss of the status of European citizen and, consequently, the right to move, reside, work with rights, set up companies, provide services, have access to health and social services, etc. In the absence of a reasonable agreement between the United Kingdom and the Union, we can expect the level of litigation to be high.

For those reasons, there can be no doubt that best recommendation we can make to facilitate a suitable transition to the situation governed by Article 50 TEU – in this case, the withdrawal from the Union by the United Kingdom – is to reach a good agreement between

\[^{108}\] The United Kingdom’s exit from and new partnership with the European Union, Presented to Parliament by the Prime Minister by Command of Her Majesty, February 217, p. 29.
The Impact and Consequences of Brexit on ‘Vested’ Rights

the parties, an agreement, as Article 50.2 says, on “the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”, and which will be negotiated in accordance with paragraph 3 of Article 218 TFEU. It is the procedure for negotiating and signing agreements between the EU and third countries, only in this case the United Kingdom will not be a third country yet. That is why it should be made clear that in this report we always speak about the agreement stipulated in Article 50 TEU, which is the United Kingdom’s withdrawal agreement, not about the agreement between the Union and the United Kingdom once the country is a third country, which will establish the “future relationship” of the two parties. We have to make a distinction, then, between two agreements whose goals and content are not identical, though they are not contradictory either:

First, the agreement of Article 50 TEU, to be negotiated as of the United Kingdom’s notification (which is expected in March 2017). This agreement may be concluded or not. In the latter case, the United Kingdom will leave the Union two years after the notification of withdrawal, save a European Council decision to extend the period. The agreement does not require ratification by each one of the Member States. According to Article 50.2 TEU, the Council will conclude the agreement on behalf of the Union, acting by a qualified majority “after obtaining the consent of the European Parliament”.

Second, the agreement (or agreements) on the “future relationship” between the EU and the United Kingdom, which will probably be negotiated when the country no longer forms part of the Union and under the procedure of Articles 216 to 218 and Article 207 TFEU. This agreement does need to be ratified by all the Member States (“mixed” agreement).

Between the two agreements, a provisional situation could be brokered to avoid a sudden break in relations and a disorderly and chaotic process of uncoupling, politically and legally speaking.

The European Parliament made it clear in its Resolution of 28 June 2016 that “any new relationship between the United Kingdom and the European Union may not be agreed before the conclusion of the withdrawal agreement”.

The fact that the United Kingdom will end up out of the Union does not require the citizens affected to be treated as if they belonged to a third country from the outset. The negotiation of the first agreement will be governed, in its broad outlines, by the “criteria” mentioned in the Declaration of 15 December 2016, approved by the 27 Heads of State and Government and by the presidents of the European Council and Commission.

The Statement says that “the first step following the notification by the United Kingdom will be the adoption by the European Council of guidelines that will define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the EU will pursue throughout the negotiation”. Those European Council guidelines can be completed by recommendations from the Commission to the Council, which is the body that authorises the opening of negotiations (Article 218.3), and, if required, by European Parliament resolutions.

In our view:

1º. Those political guidelines should be as close as possible to an agreement by which the European Union and the United Kingdom maintain over an extensive period the enjoyment of the rights that European citizens have possessed until now. Therefore, the
safeguarding of these rights should form part of the United Kingdom’s withdrawal agreement, without prejudice to their being repeated in the agreement on the framework for the future relationship between the Union and the United Kingdom, once its withdrawal from the EU has taken place.

To give the agreement on the rights of citizens the maximum legal substance, it should be subsequently written into an international treaty between the EU and the United Kingdom, once it is formally a third country. The treaty in question will have to be incorporated into the legal framework of the United Kingdom and the 27 other countries that make up the Union today.

Only this procedure would give all European citizens the level of confidence and legal certainty befitting a democracy (which they are already demanding) and the social and economic stability that the European Union needs. That also goes for the United Kingdom, in such important fields as the British labour market, so in need of foreign workers in highly specialised sectors (health, finance) or seasonal workers.

2º. The agreement should be founded on the principle of reciprocity in the guarantee of rights whose maintenance is agreed following the negotiation that will begin when the Government of the United Kingdom notifies the European Council of its decision to withdraw from the Union. It is the only way of protecting the status of the British citizens living in the Union, as appears to be the United Kingdom Government’s aim.

However, so far, the British Government has set out in its White Paper “The process of withdrawing from the European Union” a series of rights that would have to be ensured for British citizens, with no word about reciprocity. They are rights such as: living, working, owning property, retiring to another EU country, receiving health care (using the European Health Insurance Card), voting in local elections in other EU countries, mutual recognition of decisions on the custody of children across the EU, use of the European Small Claims Procedure to claim up to 2,000 euros from citizens of other EU States, use of public services in other countries of the Union, etc. In addition, we must add that the freedom of movement of capital and payments is declared in Article 63 TFEU for relations between EU Member States and “third countries”, so the United Kingdom would not be affected in this field by leaving the EU.

It is clear that the demand for these rights for British citizens in EU countries will trigger an equivalent reciprocal demand for a guarantee of the same rights for nationals of countries of the Union.

3º. The core of the rights whose permanence is agreed for current British and Union citizens should be free movement and residence, the so-called four freedoms, and equal access to public services and social protection, as well as the right to vote in the municipal elections of the country of permanent residence.

The House of Lords Report of 14 December 2016 contains an interesting and lucid reflection: “In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement”\(^\text{109}\).

\(^{109}\) House of Lords, cit., p. 40 (paragraph 121).
We agree with that recommendation, which implies accepting the status quo at the time of the United Kingdom’s formal withdrawal with regard to the citizens who enjoy today, and to the date of the United Kingdom’s withdrawal, European citizenship rights in the United Kingdom and in the EU (the British). In other words, as if they were “vested rights”, even if they are not.

As we know, this proposal does not coincide with the British Government’s current position of abolishing free movement and residence for EU citizens, but accepting access to the internal market of goods, services and capital for the United Kingdom.

However, it is not easy to find an alternative to that other than the absence of any agreement at all in two years, the worst-case scenario.

4º. We do not think it appropriate that the negotiations on citizens’ right should be hived off and different from the first agreement as a whole. The House of Lords Report appears to take that approach so as not to have to wait until the end of the negotiations110. However, that is not the sense of Article 50 TEU. It speaks of “an agreement”, in other words, the negotiation forms a whole and until it concludes in a single and global agreement, there is no agreement at all111. The second agreement will come later, when the United Kingdom is out of the Union.

5º. This second agreement between the EU and the United Kingdom (when it is a third country) should be a “mixed agreement”, which will require ratification by all the Member States of the Union.

6º. It is important that the EU-United Kingdom agreement on its withdrawal from the Union should be broad, detailed and binding enough not leave room for bilateral negotiation by the United Kingdom with each member of the EU. That could be the United Kingdom’s intention, though with little chance of success on migratory issues, given EU power over external borders on the matter.

110 Ibidem, p. 47 (paragraph 148) and p. 52 (par. 31).
9. CONCLUSIONS OF PART II

1. The EU Treaties and secondary Union legislation (such as Directive 2004/38) will be in full effect until the negotiations for the withdrawal of the United Kingdom from the Union are completed or for two years after the United Kingdom announces that it has decided to withdraw.

2. Until the European Treaties cease to have effect in the United Kingdom, Article 50 TEU does not provide for any transitory situation.

3. The political negotiation provided for in Article 50 TEU cannot be conditioned by a supposedly unchangeable right of European citizens with permanent residence in the United Kingdom, or British nationals within Union territory, always to retain that situation as supposedly “acquired” rights. The reason is that the status of European citizen with the right to free movement and residence in any State of the EU emanates from the legal order of the EU, not national law. If the Treaties cease to apply in the United Kingdom (Article 50.3 TEU), rights such as residence, which exist today under the protection of said Treaties for European citizens in the United Kingdom and for British citizens in every State of the Union, disappear.

4. The United Kingdom’s withdrawal from the Union will have a severe negative impact on the rights of European citizens, whatever their situation. It is quite understandable that many of these citizens, and others with expectations of rights, are not simply going to settle for the sudden loss of the status of European citizen and, consequently, the right to move, reside, work with rights, set up companies, provide services, have access to health and social services, etc. In the absence of a reasonable agreement between the United Kingdom and the Union, we can expect the level of relevant litigation to increase substantially.

For those reasons, there can be no doubt that the best means to facilitate a suitable transition to the situation governed by Article 50 TEU – in this case, the United Kingdom’s withdrawal from the Union – is to reach a good agreement between the parties, an agreement, as Article 50.2 says, on “the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”.

5. It should be made clear that in this study we always speak about the agreement stipulated in Article 50 TEU, which is the United Kingdom’s withdrawal agreement. It should come as close as possible to an agreement by which the European Union and the United Kingdom maintain over an extensive period the enjoyment of the rights that European citizens have possessed until now.

6. The agreement should be founded on the principle of reciprocity in the guarantee of rights whose maintenance is agreed following the negotiation that begins when the Government of the United Kingdom notifies the European Council of its decision to withdraw from the Union. It is the only way of protecting the status of the British citizens living in the Union, as appears to be the United Kingdom Government’s aim.

7. The core of the rights whose permanence is agreed for current British and Union citizens should be free movement and residence, the so-called four freedoms, and equal access to
public services and social protection, as well as the right to vote in the municipal elections of the country of permanent residence.

8. We do not think it appropriate that the negotiations on citizens’ right should be hived off and different from the first agreement as a whole. The House of Lords Report appears to take that approach so as not to have to wait until the end of the negotiations. However, that is not the sense of Article 50 TEU. It speaks of “an agreement”, in other words, the negotiation forms a whole and until it concludes in a single and global agreement, there is no agreement at all. The Union acquis is indeed indivisible.

9. It is important that the EU-United Kingdom agreement on its withdrawal from the Union should be broad, detailed and binding enough not leave room for bilateral negotiation by the United Kingdom with each member of the EU.

10°. Once the United Kingdom’s departure from the European Union is completed, we agree with the Report of the House of Lords of 14 December 2016 that, in the absence of an agreement established between the two parties (Article 50 TEU), the European Convention on Human Rights provides an effective means of defending the right to residence and other rights inherent in European citizenship. It is more effective than international law or the (ambiguous and fragile) doctrine of “vested rights”. A large number of – but not all – the rights created by the EU match the rights and freedoms of the ECHR, which forms part of the United Kingdom’s domestic law by virtue of the Human Rights Act 1998. The considerations we make in this report are naturally subject to the ECHR continuing to form part of British law. This is not assured in the face of certain political statements in the United Kingdom.