**PEOPLE'S VOTE CAMPAIGN**

**OUTCOME OF NEGOTIATIONS ON THE EU - UK WITHDRAWAL AGREEMENT**

# OPINION (No. 2)

**16 March 2019**

## EXECUTIVE SUMMARY

1. The Attorney General has put forward two new propositions as to how the UK might terminate the Northern Ireland backstop in the event of a failure of negotiations towards a subsequent agreement with the EU:

    a. That if there were clear evidence that the objectives of the backstop were no longer being proportionately served, the UK could seek termination of the backstop through the Joint Committee, and then through the ***arbitration*** mechanism, which are established by the Withdrawal Agreement, alternatively

    b. That if the EU's agreement to terminate the backstop were not forthcoming, and "*if the facts clearly warranted it*", the UK could ***unilaterally terminate*** the Withdrawal Agreement on grounds of unforeseen and fundamental change of circumstances, pursuant to the international law rule in Article 62 of the Vienna Convention on the Law of Treaties.

2. In our view, these propositions provide no basis for the Attorney General to revise his previous assessment of the legal risk of the UK being held in the backstop against its will.

3. The proposition on ***arbitration*** is plainly wrong and departs from the Attorney General's own previous legal advice. The arbitration mechanism under the Withdrawal Agreement does not provide a route for the UK to terminate the Protocol without the agreement of the EU:

    a. Were the UK to take the position that the Protocol is no longer necessary to achieve its objectives, the EU could not be compelled to accept that view, either within the Joint Committee, or through arbitration. An arbitral tribunal would only have the power to determine whether the EU had acted in breach of its legal obligations, in particular its obligation of good faith.

    b. The arbitral tribunal does not have the power to rule on a claim that the backstop is no longer necessary or to order termination of any part of the Withdrawal Agreement, including the backstop.

4. As to the proposition on ***unilateral termination***:

    a. Though unforeseen circumstances might in theory justify invocation of Article 62, the Attorney General's advice adds nothing of value: he merely recites a general principle of law which applies to any treaty.

    b. This is a wholly exceptional ground for termination of a treaty and the UK would be required to meet a very high threshold. What matters is not whether the rule exists but whether it could realistically be relied upon. So far as we are aware, it would be unprecedented for a State successfully to invoke this principle before an international court or tribunal to justify termination of a treaty.

    c. There is no scope for an argument that a breakdown in negotiations could amount to a fundamental change of circumstances, not least because this is not only foreseeable but has been foreseen by the UK and is provided for in the Protocol.

**THE ADVICE SOUGHT**

1. On 14 March 2019, *The Daily Telegraph* website published an extract from new legal advice provided by the Attorney General on the circumstances in which the UK could exercise a right to terminate the EU Withdrawal Agreement ("**the Withdrawal Agreement**") and its accompanying Protocol to the Withdrawal Agreement on Ireland and Northern Ireland ("**the "Protocol**").

2. The Attorney General has suggested two ways in which the UK might terminate the Northern Ireland backstop in the event that negotiations between the UK and the EU on an agreement to replace the Withdrawal Agreement and/or the Protocol were to become deadlocked. The Attorney General's advice is premised upon a hypothetical scenario in which the UK "*took the reasonable view, on clear evidence that the objectives of the Protocol were no longer being proportionately served by its provisions because, for example, it was not any longer 'protecting the 1998 Agreement in all its dimensions'*" but the EU did not agree that part or all of the backstop was no longer necessary.

3. The Attorney General advises that, in this scenario, the UK would have two options to secure the termination of the Protocol:

   (1) The UK could refer its dispute with the EU to the ***arbitration panel*** established under Article 170 of the Withdrawal Agreement "*on the basis of evidence that the Protocol was having the opposite effect of its whole purpose*"; or

   (2) The UK could "*respectably*" argue, "*if the facts clearly warranted it*", that it is entitled to ***terminate unilaterally*** the Withdrawal Agreement on the basis that "*there had been an unforeseen and fundamental change of circumstances affecting the essential basis of the treaty on which the United Kingdom's consent had been given…[such as] that the prolonged operation of the Backstop was having a socially destabilising effect in Northern Ireland, contrary to its objectives"*.

4. We have been instructed to advise on whether these two new propositions are legally correct and whether they provide any justification for the Attorney General to adjust his assessment of the legal risk posed by the "problem" that the UK cannot exit the backstop without the agreement of the EU.

5. It is our opinion that:

   (1) The first proposition is plainly wrong and departs from the Attorney General's own previous legal advice. The arbitration panel has no power to rule on the termination of the backstop.

The only way in which the Protocol may be terminated in accordance with its terms is by mutual consent of the UK and the EU.

(2) The second proposition – that unilateral termination might be justified by a fundamental change of circumstances – provides no basis for the Attorney General to adjust his assessment of the legal risk of the backstop "problem", since it amounts to nothing more than a statement of legal principle. The Attorney General states that Article 62 could be relied upon "*if the facts clearly warranted it*". That statement could be made with respect to any ground for terminating a treaty or indeed for invoking any legal right of any kind. Leaving self-fulfilling prophesies to one side, the conditions for invoking Article 62 are notoriously strict and, as far as we are aware, the argument has never succeeded before any international court or tribunal. It has been raised on numerous occasions and failed every time.

**THE FIRST NEW PROPOSITION: ARBITRATION**

6. In previous legal advice, the Attorney General has stated that:

(1) "*The Protocol … contains specific provisions on when and in what circumstances it ceases to apply*" (Legal position on the Withdrawal Agreement, December 2018, §82).

(2) "*The current drafting of the Protocol, including Article [20], does not provide for a mechanism that is likely to enable the UK lawfully to exit the UK wide customs union without a subsequent agreement*" (Letter of 13 November 2018, §30).

7. He specifically advised that arbitration would be unlikely to lead to termination of the backstop because the arbitral panel would not be willing to rule on whether the backstop was no longer necessary (Letter of 13 November 2018, §27). His view was that the arbitral panel could rule on the separate question of whether the parties had complied with their legal obligations, including in particular their obligation of good faith, in adopting their respective positions in the negotiations. He said that in the absence of a "*clear basis*" for a finding that a party had breached its duty of good faith, an arbitration panel "*would be unlikely to find that a party had acted unlawfully in reaching its view under Article 20 about whether the Protocol continued to be necessary"* (Legal position on the Withdrawal Agreement, December 2018, Annex, §11).

8. In an Opinion dated 12 March 2019, the three of us then instructed agreed with the Attorney General's previous advice that the arbitration mechanism in the Withdrawal Agreement was unlikely to provide a means for securing the termination of the backstop (§6).[1] We went further and explained that this would indeed be impossible because:

[1] Sam Wordsworth Q.C., who was not then instructed, agrees with that Opinion.

(1) The arbitration panel has no power to decide on whether the backstop should be terminated, which is a matter solely for the Joint Committee which makes its decisions by mutual consent (Article 20 of the Protocol; Article 166 of the Withdrawal Agreement).

(2) In principle, the arbitration panel could be asked to rule on the separate question of whether one party or another had breached its obligations to negotiate in good faith. It is very unlikely, however, that disagreement as to whether the backstop was no longer necessary, including within the Joint Committee to which disputes are to be referred pursuant to Article 169, would constitute bad faith on the part of the EU.

(3) Even if an arbitration panel were to find that the EU had breached its obligations to negotiate in good faith and had failed to remedy that breach then, as a last resort, it would have the power to approve the *temporary and proportionate suspension* of certain obligations under the Withdrawal Agreement or the Protocol (Article 178 of the Withdrawal Agreement) pending compliance with the good faith obligation. It could not terminate the backstop or order that the parties agree to its termination.

9. It follows that we do not agree with the Attorney General's new position that the question of the whether the Backstop is "*no longer necessary … could be referred to the arbitration tribunal*" for its ruling, and that this could provide a basis for termination of the backstop. We have seen no legal justification for the Attorney General's change of position.

**THE SECOND NEW PROPOSITION: FUNDAMENTAL CHANGE OF CIRCUMSTANCES**

10. In previous legal advice, the Attorney General stated that: "*Since the Agreement does not contain any provision on its termination … it is not possible under international law for a party to withdraw from the Agreement unilaterally*" (Legal position on the Withdrawal Agreement, December 2018, §82). This reflects the established position under international law (Article 56, Vienna Convention on the Law of Treaties 1969 ("**VCLT**")).

11. The Attorney General first expressly raised the issue of fundamental change of circumstances on 12 March 2019. He stated if there was "*some fundamental political change in Northern Ireland or some fundamental change of circumstances going to the essential basis of the agreement – then we would have a right to withdraw*" from the Withdrawal Agreement.[2]

[2] Hansard, Withdrawal Agreement: Legal Opinion, 12 March 2019, Vol. 656.

12. The Attorney General's new advice amounts to nothing more than a reference to Article 62(1) of the VCLT, which applies to all treaties. That provision contains a number of stringent conditions, as follows:

> *"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:*
> *(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and*
> *(b) The effect of the change is radically to transform the extent of the obligations still to be performed under the treaty."*

13. Although the VCLT does not apply directly to the Withdrawal Agreement,[3] the International Court of Justice ("**ICJ**") has held that Article 62 reflects a rule of customary international law "in many respects".[4]

14. It is essentially meaningless to say that Article 62 could be invoked "*if the facts clearly warranted it*". That statement is logically true for any legal right, but says nothing about the prospects of satisfying the necessary conditions, which in the case of Article 62 are remarkably strict. For any given treaty it would be possible to think of a seemingly unlikely scenario (for example, in this case, the prolonged operation of the Backstop having "*a socially destabilising effect*") and suggest that, if that unlikely scenario were in fact to happen, it could amount to a fundamental change of circumstances.

15. What matters (and what is absent from the extract of the Attorney General's advice that we have seen) is an assessment of whether reference to Article 62 VCLT in any way removes or reduces the legal risk of the backstop "problem".

16. Fundamental change of circumstances is a wholly exceptional ground for the termination of treaties, and international case law shows that it is notoriously difficult for the ground to be made out. That is because international law views the stability of treaties as of the highest importance for the security of international relations. Indeed, the UK itself has argued before the ICJ that:

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[3] The VCLT 1969 only applies to treaties between states, and the Withdrawal Agreement is a treaty between the UK, the EU and Euratom. The VCLT 1986 specifically concerns treaties between states and international organisations but is not in force.

[4] *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p 3, at p. 18, §62; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 7, at p. 38, §46.

"*The rigorous standards which tribunals have applied to the concept of 'fundamental' change cannot be over-emphasised. Indeed, the history of international adjudication does not contain one example in which the [argument] has been successful*."[5]

17. So far as we are aware, that statement remains correct. The argument has been raised before the ICJ in a number of cases and rejected each time. In its leading case on the subject, the ICJ held that the dissolution of the USSR, the disintegration of the Warsaw Pact and the fact that the other party to the treaty (Czechoslovakia) no longer existed was not enough to change radically the nature of a treaty obligation to build a dam on the Danube river.[6]

18. If the UK wished to invoke Article 62 it would have to satisfy five cumulative conditions: (i) the change must be to circumstances existing at the time of the conclusion of the treaty; (ii) the change must be one not foreseen by the parties; (iii) the change must be fundamental; (iv) the existence of the circumstances which have changed must have constituted an essential basis of the consent of the parties to be bound by the treaty; and (v) the effect of the change must be radically to transform the scope of the obligations still to be performed under the treaty.

19. Those conditions have been interpreted very restrictively by international courts and tribunals.

20. All international law practice would suggest that it would be very difficult to identify exceptional, unforeseen circumstances arising in the future which could satisfy the Article 62 VCLT conditions. In particular, it is clear that a failure to reach agreement on alternative arrangements to replace the backstop could not amount to a fundamental change of circumstances for the purposes of Article 62.

21. We therefore respectfully disagree with the view expressed by Lord Pannick QC (letter to *The Times*, 15 March 2019) that there would be a fundamental change of circumstances, justifying invocation of Article 62 VCLT, if "*the UK and the EU were unable to reach an agreement on Northern Ireland, despite good faith negotiations and despite the arbitration procedures, and if the UK were therefore to be faced (against its will) with a permanent backstop arrangement*". In our view, that could not constitute a fundamental change of circumstances because:

    (1) The possibility of the backstop becoming permanent if negotiations are unsuccessful is not only clear on the face of the Withdrawal Agreement itself, but has been emphasised by the Attorney General in his advice to the Government. Hence it is not merely foreseeable

[5] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Memorial on Jurisdiction submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, p. 146, §62.

[6] *Gabčikovo-Nagymaros Project*.

(contrary to the second condition of Article 62), but has been foreseen and expressly provided for.

(2) Nor could it plausibly be argued that such a change would radically transform the scope of the obligations still to be performed under the treaty (the fifth condition of Article 62). The Withdrawal Agreement provides, in the Protocol, for a mechanism which is intended to be temporary but which, the agreement makes perfectly clear, "shall apply unless and until" it is replaced (Article 1(4)). If it did become permanent, that would not transform or even change the scope of the obligations still to be performed; all that will have happened is that a possibility expressly provided for by the agreement will have come to pass.

22. It follows that we also respectfully disagree with the view expressed by Verdirame, Laws and Ekins that, depending on the specific circumstances, the UK may have a "*prima facie credible argument … that the parties' realisation over time, that no solution [to the backstop "problem"] exists is itself a fundamental change of circumstances and that such change meets the two key requirements of Article 62 of the VCLT*" (*A Second Look at the UK's Legal Position in Relation to the Backstop*, §21). We note that the authors do not refer to, or justify departing from, their more sustainable view, expressed in a previous paper, that fundamental change of circumstances "*seems to be a less easily arguable basis for termination*" because "*the possibility of the backstop becoming permanent is already foreseen and is indeed already causing concern*" (*How to Exit the Backstop*, p. 9).

23. Finally, we would note that it is the longstanding position of the UK that the rule reflected in Article 62 VCLT cannot lead to the termination of a treaty without the agreement of the other party or without being put to an international tribunal for its adjudication.[7] The fact that the UK has taken this position before the ICJ presents a further complication on the route out of the backstop now proposed by the Attorney General.

[7] *Fisheries Jurisdiction*, Memorial on Jurisdiction submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, p. 146, paras. 67-68, quoting Second Report on the Law of Treaties, in 1963 *Yearbook of the I.L.C.,* Vol. II, para. 18.

**CONCLUSION**

24. In summary, it Is our view that the new propositions put forward by the Attorney General do not provide any justification for adjusting his previous assessment of the legal risk that the UK will be held in the backstop against its will.

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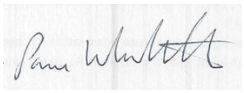

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