

Progressive Economics Group (PEG)
Policy Brief
Cancelling Brexit via the Vienna Convention
on the Law of Treaties

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Policy Issue

It is argued both in Britain and on the continent that the Brexit process has advanced so far that it is irreversible. This conclusion comes from an interpretation of the two basic EU Treaties, [On European Union](#) (TEU) and [On the Functioning of the European Union](#) (TFEU), whereby. It is claimed, a British government would need to obtain the unanimous consent of the European Council to reverse Brexit. But others argue that the Article 50 notice of the intention to leave the EU can be unilaterally withdrawn, drawing inter alia on the provisions of the Vienna Convention on the Law of Treaties.

If a Labour government wished to reverse Brexit, and cancel the Article 50 process, can it lawfully do so, and if so how?

Analysis

The ‘irreversibility’ interpretation of the Brexit process derives from the historically unprecedented aspects of events over the last two years. Voters in several countries have rejected EU treaties, agreements on enhanced cooperation and/or joining the eurozone. However, in no country but Britain have voters explicitly rejected membership of the EU. No other government of an EU country has begun the Article 50 withdrawal procedure.

Since early 2016, British Conservative governments have taken three apparently definitive steps towards leaving the Union: 1) scheduling a referendum in which voters rejected membership, though by a narrow margin; 2) unnecessarily introducing and obtaining approval for national legislation of intent to withdraw under Article 50; and 3) achieving agreement in the first phase of withdrawal negotiations between chief-negotiator Barnier (on behalf of the European Commission) and the British government.

Having taken these steps, the first two with the support of the Opposition, a British government might not receive a sympathetic response from European Commission negotiators for a return to the pre-referendum status quo. This is especially the case because past British governments have negotiated several beneficial arrangements (“opt-outs”) not enjoyed by other EU members.

EC officials and national politicians on the continent might accept a “U-turn” on Brexit, but without the special arrangements (e.g. a UK rebate and non-participation in the Euro zone). That form of Brexit reversal would be politically unacceptable to both the Conservative and Labour parties. The ‘irreversibility’ interpretation

compounds its pessimism by interpreting the Treaties to require unanimous consent of the European Council to any withdrawal of the Article 50 notice.

The irreversibility interpretation is a serious argument based on defensible legal reasoning and not “Brexit propaganda”. However, it is incomplete, perhaps even fallacious, because of its myopic treatment of Brexit as governed by EU treaties. The UK and the European Union are parties to other treaties that affect the Brexit process. Constraints imposed by extra-EU treaties have already played a role in the Brexit negotiations. Obvious examples are International Labour Organization conventions that EU governments have adopted and human rights provisions of the Council of Europe (which is not an EU institution).

Perhaps the international agreement most relevant to Brexit is the [Vienna Convention on the Law of Treaties](#), adopted in 1969 and ratified by governments of 115 countries including EU members. Articles 65-68 of the Vienna Convention include the definitive provision that any notification of intended exit from a treaty can be revoked at any time before it becomes legally effective.

By enacting Article 50 legislation the British government *gave notice of intention* to exit the EU; the legislation is not a legal commitment to exit. Article 50 allows for re-entry but does not mention the possibility of its revoking (“is silent” to use a legal phrase). Therefore, it and other TEU provisions such as Article 49 cannot justifiably be treated as over-riding the Vienna Convention (in legal terms, if Article 50 a *lex specialis* it still does not take precedence over the Vienna Convention).

When an event occurs relevant to a treaty but is not mentioned by that treaty, standard legal procedure is to refer to other legal commitments of the treaty partners to interpret the unanticipated event. This is the legal status of a unilateral decision by a British government to reverse Brexit. Moreover, reversing Brexit would adhere to the fundamental principle in international law of *pacta sunt servanda* (“agreements must be kept”).

A counter-argument to our interpretation alleges that allowing unilateral withdrawal by a British government would give incentive if not actively encourage irresponsible negotiating tactics by national governments. For example, the Polish government, currently [subject to EU sanctions](#) for its changes to the court system, might invoke Article 50 as a negotiating tactic and after negotiations with the Commission reverse it; then, if successful repeat the tactic over subsequent issues.

However, the EU treaties have established methods for dealing with such disruptive behaviour. In the event of pernicious use of Article 50, the EU high court, the European Court of Justice, could rule that repeated exercise of Article 50 TEU represented negotiating in bad faith.

If the citizens of a current member state or their governments change opinion before exit takes effect, they should be allowed unilaterally to reverse their decision. Otherwise, they would be forced to wait for a year before exit takes effect and then re-apply for membership. This approach to Article 50 fails to recognize that member states are made up of classes and regions with diverse and shifting interests.

Such a “right to rethink”, by its nature unilateral, also meets the principle that continuation of treaties takes precedence over their termination. This principle, *[favor contractus](#)*, appears in Article 68 of the Vienna Convention.

On the basis of the reasons given above, derivative from common sense and the Vienna Convention, the [German Confederation of Trade Unions takes the position](#) (p.12) that Article 50 of the TEU allows unilateral withdrawal of any exit application. The DGB communicated this opinion to British Trade Unions Council, and expressed its hope that the Labour Party reverses Brexit.

Policy Framework

The Vienna Convention approach to Brexit has two extremely important implications. First, because it concludes that reversal can occur unilaterally, a second British referendum is not required, though it may be politically necessary. Second, the unilateral decision by the British government would be simple reversal, not re-entry. Reversal implies no negotiations and an immediate return to the *status quo ex ante*. The British government would retain all its “opt-outs”, including no obligation to join the euro, financial rebate, and non-participation in the so-called Fiscal Pact and all its draconian austerity clauses.

EU Treaties are the primary law establishing the governance and functioning of the Union. They do not stand alone apart from other international laws. The European Union is bound by the Vienna Convention, which implies that the British government can unilaterally reverse Brexit by the following steps.

1. **Parliamentary repeal** or cancelling of the 2017 [Article 50 Act](#) followed by a statement that the British government remains a member of the European Union with all arrangements that were in place prior to the enactment of that legislation.
2. If the European Commission or another relevant institution challenges the British government’s interpretation, the **British government refers the dispute to the European Court of Justice** on the basis of Articles 65-68 of the Vienna Convention on the Law of Treaties.

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