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CAN ACQUIRED RIGHTS PROVIDE PROTECTION FOR INDIVIDUALS AND BUSINESSES POST-BREXIT?

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An important area of law requiring consideration in the context of the UK's planned withdrawal from the EU is the question of whether rights granted to individuals and businesses during the UK's membership of the EU will endure following its exit. The question is relevant for both EU Member State nationals exercising their rights in the UK and UK nationals exercising their rights in EU Member States, such nationals including individuals and businesses. In legal terms, this topic centres on the question of whether such rights constitute "acquired" or "vested" rights. In the specific context of Brexit, **the rights that are likely to be of key concern are free movement of workers, freedom of establishment and free movement of goods and services.**

We provided an overview of the concept of acquired rights in our e-briefing on the international law implications of Brexit (available here). This briefing will look at the issue in more detail, in particular, providing an overview of the concept as it has evolved from a legal standpoint and exploring the potential legal sources of acquired rights in the context of Brexit.

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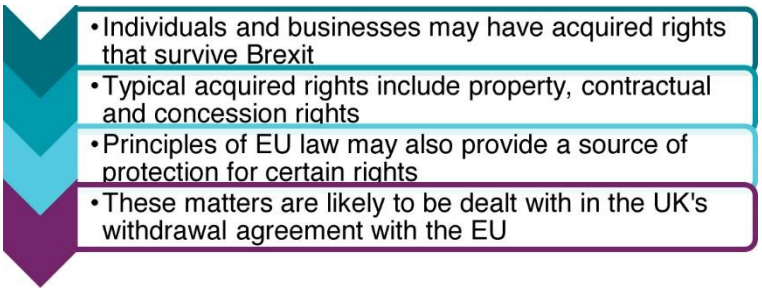
What has the UK Government said about acquired rights?

The UK Government is clearly alive to this issue. A House of Commons 2013 research paper on 'Leaving the EU' explores the possibility of individuals and businesses enjoying continuing rights following the UK's withdrawal, which it refers to as "vested rights", but draws no conclusions. It simply anticipates the complexity that will characterise the identification and enforcement of those rights.[1] The question of acquired rights also features in a House of Lords report on 'The process of withdrawing from the European Union'. Again, no conclusion is drawn, save to classify the notion as "[o]*ne of the most complex aspects of the negotiations*" for the UK's withdrawal.[1] More recently, the House of Lords EU Select Committee published a report on acquired rights (available here), in which it concludes that the doctrine of acquired rights is in its opinion "*highly unlikely to provide meaningful protection against the loss of EU rights upon Brexit"* and recommends that such rights must be protected in the withdrawal agreement concluded between the UK and the EU.

What does the High Court say about EU rights in its Article 50 judgment?

In its judgment of 3 November 2016 (available here), the High Court held that the UK Government cannot trigger Article 50 to commence the UK's withdrawal from the EU without the intervention of Parliament. The judgment does not expressly address the concept of "acquired" or "vested" rights. However, the High Court's conclusion is underpinned by its view that triggering Article 50 will in itself have direct effect on the rights of those in the UK or with British citizenship, as it will inevitably result in the complete withdrawal of the UK from the EU. For this reason, the Government cannot invoke the royal prerogative to trigger Article 50, as the resulting effect on individuals' rights can only be brought about by Parliament. In reaching its conclusion, the High Court did not consider whether EU rights are "vested" or whether this would make any difference to its opinion. Broadly, the High Court takes the view that unless such rights are preserved by way of existing or new domestic legislation, they will fall away upon the EU treaties ceasing to have effect in the UK. For example, the High Court states that those rights enjoyed by British citizens and companies in relation to their activities in other Member States, such as the rights of free movement and freedom of establishment, will be undone by withdrawal from the EU (see paragraph 66 of the judgment). It is worth noting, however, that the disintegration of such rights will be subject to their preservation or recognition post-Brexit by way of the withdrawal agreement, the approach of Member State courts or other treaties.

What are the key takeaways for those concerned?



What are "acquired rights" under public international law?

The doctrine of acquired rights is a well-established theory of public international law.[1] In basic terms, the doctrine starts from "*the premise that respect for private rights of a patrimonial nature constitutes one of the principles of international law governing the treatment of aliens*".[2] Such rights may be granted by treaty, by contract, under municipal law, or, as explained below, may exist by virtue of customary international law.

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[1] The well-established nature of the doctrine is recognised by academic commentary on the subject. See for example, Pierre Lalive, 'The Doctrine of Acquired Rights', pages 145-146; particular reference is made to the cases of *Certain German Interests in Polish Upper Silesia* and *The Arbitration between Saudi Arabia and Aramco*.

[2] International Law Commission, Fourth report on State Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, Document A/CN.4/119.

At the State to State level, the doctrine of acquired rights finds some expression in the Vienna Convention on the Law of Treaties 1969 (the "**Vienna Convention**"), and specifically Article 70(1)(b). This provides that the termination of an international treaty "*does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*". Rather than being considered as one of the sources of the doctrine of acquired rights (as appears to have been suggested by some proponents of the Leave campaign), Article 70(1)(b) should instead be viewed as an example of how the doctrine has been codified in international law and how it may be applied in practice.

Article 70(1)(b) is subject to an important limitation. It is clear from its face that it is intended only to deal with the acquired rights of the States that are parties to an international treaty that is denounced or terminated. Put differently, it is of **no application to private individuals or businesses**. This interpretation finds support in the Commentary of the International Law Commission[3] on the identically worded draft Article 66(1)(b) (and which would become Article 70(1)(b) in the Vienna Convention), in which it was emphasised that the drafting evidenced an intention to "*make it clear that paragraph 1(b) relates only to the right, obligation or legal situation of States parties to the treaties… and is not in any way concerned with the question of the "vested interests" of individuals*".[4] Even so, it is important to bear in mind that Article 70(1)(b) does not negate the potential existence of vested or acquired rights held by individuals; it simply indicates that Article 70(1)(b) has no effect on any such rights.

The question therefore arises as to the legal basis upon which individuals and businesses may seek to assert their acquired rights following the UK's exit from the EU. Absent the provision for protection of acquired rights under the EU founding treaties (as discussed below) or under the withdrawal agreement to be negotiated between the UK and the EU, individuals and businesses will need to rely on the general doctrine of acquired rights as existing under customary international law. The difficulty here lies in the fact that, under customary international law, there is **no single accepted definition of what may constitute an acquired right**. Nonetheless, a review of the practical application of the doctrine does provide some guidance as to the broad categories of rights that may or may not be considered as rights that **are** protected under international law.[5]

Historically, the doctrine of acquired rights developed in the context of the enforcement of land ownership rights following a transfer of sovereignty or in the context of State succession. However, over time, the doctrine has evolved to incorporate other rights beyond land ownership. Although it is not possible to set out strict rules as to those interests that do fall within the scope of acquired rights, there are **three broad categories of rights** that are likely to do so, namely:

(1) **Property or ownership rights** (including in moveable property);

(2) **Contractual rights**; and

(3) **Concessionary rights**.

Property or ownership rights qualifying as acquired rights are not limited to those attached to immovable property.[6] Ownership in moveable property and other rights, such as mortgages and intangible property, may also fall within

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3 Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol.II.

4 Also see Aust, 'Modern Treaty Law and Practice', Third Edition, pages 266-267.

5 It is worth noting that the majority of the case law on the doctrine of acquired rights deals with the context of state succession or transfer of sovereignty. Although the scenario posed by Brexit is somewhat different, the key principles emerging from the cases as to the nature of an acquired right are nonetheless instructive.

6 In Professor Lowe's evidence before the House of Lords EU Select Committee for its report on acquired rights ("**Professor Lowe's Evidence**"; written evidence available here and here, and oral evidence available here), he suggested that the case law of the European

the scope of acquired rights. Contractual rights are also generally recognised as constituting property and therefore acquired rights. International practice and the application of the doctrine of acquired rights in previous cases demonstrate that concessions should be considered acquired rights by reason of their contractual character and economic value.[7]

While a relatively common understanding of acquired rights may be stated in the broad terms above, even on that basis, the doctrine is subject to a number of limitations.

(1) Requirement of assessable monetary value

First, there is the theory put forward by O'Connell that "[a]*cquired rights…as understood in international law, are any rights, corporeal or incorporeal, properly vested in a natural or juristic person, and of assessable monetary value*" (emphasis added).[8] If that is right, then conversely, "[c]*ommercial privileges which do not embody interests capable of financial valuation are not acquired rights*".[9] In practice, this limitation has been demonstrated by findings that goodwill cannot qualify as an acquired right, as it does not possess the requisite pecuniary value.[10] In light of this limitation, it is arguable that broad individual liberties, such as freedom of trade or industry, may not qualify as acquired rights.

(2) Rights of a private nature v. rights of a public nature

Second, a distinction may be drawn between rights that are fundamentally private and those that are public in nature. Those interests rooted more in the private sphere, rather than the public sphere, are more likely to qualify as acquired rights. Consistent with the International Law Commission's notion of "patrimonial rights", it has been suggested that "*the principle covers only certain rights, mainly individual private rights … As for subjective rights of a public or political character, they usually do not enjoy the protection granted to acquired rights*".[11] However, it is worth noting that this distinction is not clear-cut. Indeed, concessionary rights, which have been interpreted as rights of a "mixed nature", partly private and partly public, have been recognised as constituting acquired rights.[12]

(3) No absolute guarantees

Third, although the doctrine as under international law provides that a State must respect acquired rights, in practice such respect does not amount to an absolute guarantee. For example, it has been recognised that in certain circumstances a State may rely on public policy or superior considerations of national interest to justify interference with existing rights or situations. The doctrine of acquired rights should not therefore be interpreted as requiring the indefinite and absolute maintenance of existing rights or situations.

In the Brexit context, the potential application of the international law doctrine of acquired rights will very much depend on the nature of the specific right that an individual or a business may seek to enforce. In some instances, a view as to whether the doctrine will apply will be easier to reach, for example, in the case of property rights. However, given the vast web of rights granted to UK and EU Member State nationals by EU law and the varied nature of those rights, a broader view as to whether the doctrine will apply following the UK's withdrawal cannot be stated in certain terms – not least because of the uncertainties and ambiguities of the doctrine and the potential cross-over between moral rights, such as the right of abode, and patrimonial rights, such as ownership of a home.[13]

Court of Human Rights on the scope of Article 1 of the First Protocol of the European Convention on Human Rights could become a template for the type of property protected by the principle of acquired rights.

7 For an overview of the nature of acquired rights, see Pierre Lalive, 'The Doctrine of Acquired Rights', pages183-192; International Law Commission, 'Fourth Report on State Responsibility', Yearbook of the International Law Commission, 1966, vol.II, paragraphs 30-38.

8 D. P. O'Connell, 'State Succession in Municipal and International Law', page 245.

9 D. P. O'Connell, 'State Succession in Municipal and International Law', page 246.

10 See the leading case on this point, the *Oscar Chinn* case between the UK and Belgium, Permanent Court of International Justice, Series A/B, No.63, page 88.

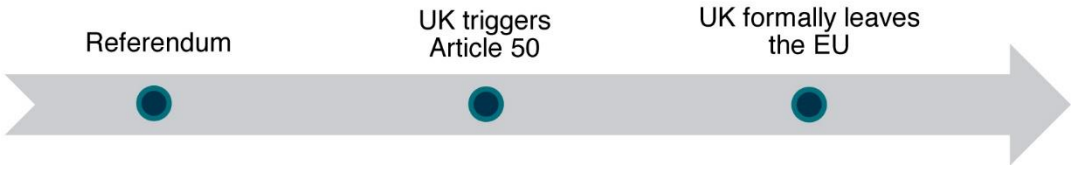
11 Pierre Lalive, 'The Doctrine of Acquired Rights', page 166.

12 In Professor Lowe's Evidence, he took the view that public or civic rights, such as the right to vote or to reside in an EU Member State, would not constitute acquired rights in the Brexit context.

13 In Professor Lowe's Evidence, he expressed in relatively strong terms his view that broad rights flowing from membership of the EU, such as the right of establishment, would not be protected as acquired rights following the UK's withdrawal from the EU. Professor Lowe also highlighted the challenges an individual or a business might face in trying to enforce an acquired right post-Brexit.

Acquired rights in practice:
For a UK business with a workforce consisting of EU Member State nationals, which rights of those employees might be considered acquired rights under international law?

Timing:
There is no clear cut-off date before which a right must have been vested in order for it to constitute an acquired right. However, an individual or a business is likely to have a weaker argument if the right has vested after the Referendum, which will be weaker still if it is vested post-invocation of Article 50.



What is the role of investment treaties?

From an international law perspective, **an alternative potential source of protection for existing rights following the UK's exit may be found in bilateral and multilateral investment treaties that are currently in force between the UK and other EU Member States**. There are currently 11 bilateral investment treaties ("**BITs**") in force between the UK and other EU Member States, such as those in force between the UK and each of Bulgaria, Estonia and Romania.[14] UK nationals – whether individuals or companies – could potentially rely upon the terms of those BITs (including in particular any most favoured nation or "MFN" provisions), for so long as they remain in force, to ensure that any EU rights within the scope of the BIT and lost by reason of Brexit remain enforceable against the relevant EU Member State. Where a relevant BIT is not in force, for example, in the case of investments in France, Germany or the Netherlands, an investor, whether an individual or a company, with an "Investment"[15] associated with an "Economic Activity in the Energy Sector"[16] could alternatively seek to rely on the Energy Charter Treaty as a source of protection.

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[14] The 11 Member States with which the UK has BITs in force are: Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

[15] "Investment" is defined broadly in the Energy Charter Treaty and includes: tangible and intangible, movable and immovable property; other property rights, such as mortgages; a company or business enterprise; claims to money / performance pursuant to a contract with economic value and associated with an investment; intellectual property; returns; and rights under licences / permits.

[16] "Economic Activity in the Energy Sector" is defined as an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products, subject to certain exceptions.

Could the European Convention on Human Rights offer protection?

It may be possible for individuals or businesses to rely on the rights enshrined in the European Convention on Human Rights (the "**ECHR**") in the post-Brexit context, to enforce certain rights lost as a result of the UK's withdrawal from the EU. For example, the expert evidence provided to the House of Lords EU Select Committee for its report on acquired rights (available here) highlighted (amongst other ECHR sources) Article 1 of the First Protocol of the ECHR as having "*considerable potential for flexible and innovative application post-Brexit*" in the context of protecting tangible and intangible property rights, including legitimate expectations (such as expectations relating to the duration of a particular licence).[17] The enforceability post-Brexit of rights deriving from the ECHR, before the European Court of Human Rights, is likely to be more straightforward than an attempt to enforce acquired rights deriving from customary international law.

Does EU law offer any protection?

As mentioned above, one way in which acquired rights may be granted to individuals and businesses is through express provision in a treaty. Where such provision is made, it is not necessary to rely solely on the customary international law principle of acquired rights. In this sense, provision for acquired rights under a treaty constitutes a form of codification of the doctrine. **Some international treaties provide specifically for the continuation of the acquired rights of individuals following termination of the relevant treaty**, with varying modalities, such as the specification of a finite period during which such rights shall continue to be enforceable. For example, Article 47(3) of the Energy Charter Treaty provides that in the case of a State withdrawing from the treaty, its provisions will continue to apply in respect of existing investments in that State territory or investments of nationals of that State in territories of other State parties to the treaty, for a period of 20 years from withdrawal. Many BITs include similar provisions, which are known as "sunset clauses".

The EU founding treaties

In the context of Brexit, it therefore falls to be considered whether the EU founding treaties provide for any continuation of the rights of former EU Member State nationals in the event of withdrawal from the EU and thus termination of those treaties in the case of the withdrawing State. **The EU founding treaties are silent on the subject of acquired or continuing rights**. There is no express provision that the rights of individuals and businesses will continue following termination, nor do the EU treaties explicitly state that such rights will cease upon termination. On this basis, it appears that the EU treaties cannot in themselves be considered a conclusive legal source upon which an individual or a business may rely in asserting its rights following the UK's withdrawal from the EU.

EU law principles

EU law does, however, recognise a number of key principles that could form the basis of an acquired rights principle, namely the principles of protection of legitimate expectations, non-retroactivity and rights such as the right to property and the freedom to conduct a business in the Charter of Fundamental Rights.[18] None of these principles are linked to EU nationality. In combination with the rules on freedom of establishment and the free movement of capital, these principles also form the basis of investment protection within the EU. Importantly, the European Commission has even formally asked Member States to terminate BITs between EU Member States, on the basis that these relationships are governed by EU law.[19] The Commission's request is backed by its view that the extra assurances provided by these BITs "*should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital)*."[20] The Commission's view, therefore, appears to be that protection offered to investments by the EU treaties is at least as good, and most likely better, than that provided by a BIT.

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17 The House of Lords EU Select Committee report on acquired rights (available here) also highlights: Article 8 of the ECHR (the right to private and family life), in the context of preventing deportations of EU nationals in the UK or UK nationals in other EU Member States, and the possible protection of EU citizenship for UK nationals; and Article 14 of the ECHR (the prohibition against discrimination), in the context of the possible protection of EU citizenship for UK nationals.

18 Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.

19 European Commission press release dated 18 June 2015 'Commission asks Member States to terminate their intra-EU bilateral investment treaties'.

20 Ibid.

Furthermore, **it is a well-established principle of EU law that the EU treaties confer rights directly upon nationals of EU Member States**. This principle was stated by the Court of Justice of the European Union (the "**CJEU**") (then the European Court of Justice) in the leading case of *van Gend en Loos*, in the following terms: "*Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage*" (emphasis added).[21] It has been argued by some that the principle established in *van Gend en Loos* could be relied upon to assert that those rights directly granted to individuals and businesses during the UK's membership of the EU will continue to be enforceable following the UK's withdrawal. Whatever the merits of such an argument, the principle of direct effect as expressed in *van Gend en Loos* does confirm that the EU treaties have created rights that are now vested specifically in individuals and businesses and are enforceable by them, which could form the basis for an assertion that the customary international law principle of acquired rights should apply to those rights following the UK's withdrawal. As set out above, the success of any such assertion would depend upon the precise nature of the rights in question and would be subject to the limitations of the doctrine.

It seems likely that at least some EU law rights of UK nationals will be protected, even when the UK is no longer an EU Member State. As a starting point, the extent of any such protection will depend upon the terms of the exit deal the UK negotiates with the EU (as discussed below). However, **EU principles and the vesting of EU rights directly in Member State nationals should offer some protection against measures that are discriminatory to UK nationals following the UK's exit from the EU**.

Discrimination against UK investors

In practice, discrimination against UK nationals could arise in a number of scenarios, particularly in the sphere of trade and investment. An EU Member State may, for instance, impose nationality requirements in strategic sectors. Pursuant to EU law, these measures cannot discriminate against EEA investors. However, such measures may discriminate against investors from other countries. Furthermore, in the gas and electricity sector, EU law itself provides for the possibility to discriminate against non-EU ownership of transmission networks.[1] What might happen (in the absence of a sufficient exit agreement) to a UK investor who invested in such assets five years ago? Could they be forced into a fire-sale when the UK's membership of the EU ends? The abovementioned principles of EU law, including direct effect, should provide some basis for protection against such measures. The protection provided by these principles could also be extended to individuals who have moved to other Member States to work or live there, in accordance with EU law.

It is important to note, however, that **the concepts of legitimate expectations and acquired rights cannot be stretched so far as to render the UK's decision to leave the EU meaningless**. These concepts would only offer protection to existing investments and pre-existing rights and obligations and may be subject to certain restrictions. Furthermore, these principles would probably provide only limited protection for those who have relied on other types of EU law rights, such as the right to sell goods and services from the UK to other EU Member States on a cross-border basis. Individuals and businesses in that position could seek to invoke principles such as the protection of legitimate expectations to protect the execution of existing contracts for services and/or goods agreed before Brexit. It would be more difficult, however, to invoke these principles to protect a right to continue trading as before more generally.

The English High Court in its Article 50 judgment held that EU law rights will cease upon Brexit, absent some form of preservation, for example, under the withdrawal agreement. However, **it is not certain what approach the English Supreme Court will take to the effect of international law on existing EU law rights enjoyed by those in the UK or British citizens when it considers the UK Government's appeal, or what approach an EU Member State court may take in the context of reliance on EU law post-Brexit**. It is not expected that the Supreme Court will expressly consider the specific question of "acquired" or "vested" rights in the Article 50 proceedings, as this is not argued by the UK Government. Notably, some of the other parties to the proceedings have argued that international law would not be likely to protect EU law rights.

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21 Case C-26/62, *van Gend en Loos*.

Following Brexit, if an EU Member State national were to seek to rely on a right originally derived from EU law and incorporated into domestic legislation pre-Brexit, but not preserved by domestic legislation or some other means upon the UK's withdrawal, in theory, a UK court would not be bound to recognise EU law precedents or principles and there would exist no option for referral to the CJEU. Conversely, it is also unclear whether a UK national could seek to rely on EU law before an EU Member State court, given that EU law would, in theory, no longer apply to the rights or situation of that UK national. This question would indeed be at the centre of a case brought by a UK national in this context and an EU Member State court would most likely refer the question to the CJEU, which in turn would need to consider EU law and broader principles of public international law to determine whether such UK national could still assert rights deriving from EU law.

The practical solution

Although, as outlined above, there may be potential legal sources of protection for rights acquired during the UK's membership of the EU following Brexit, in reality the enduring nature of those rights is more likely to be dealt with from a political, rather than a strictly legal, standpoint. The question of whether UK and EU Member State nationals will be able to assert certain rights after the UK's withdrawal will need to form a central part of the Government's negotiations with the EU and will primarily depend on the rules governing those rights as concretised in the withdrawal agreement to be finalised between the UK and the EU.

As pointed out in the introduction to this briefing, **the question of acquired rights is clearly on the Government's agenda and should feature amongst the issues on which it seeks clarification and certainty in the course of the withdrawal negotiations**. In the case of the EU's negotiating stance, the example of Greenland's exit from the EU evidences the European Commission's awareness of the issue and its potential willingness to concede the enduring exercise of certain rights in spite of withdrawal from the EU. For example, in its opinion on the withdrawal of Greenland and its future status, the European Commission provided for the continuation of the rights of free movement and freedom of establishment of EU Member State citizens already in Greenland.[22] However, it should be noted that the Greenland example should not be considered as setting a general precedent for the terms of the UK's withdrawal. The European Commission emphasised that the terms applicable to Greenland were attached to the specific circumstances of that territory, including its status as a constituent part of the territory of Denmark, a continuing EU Member State.

In the case of the UK's exit, although the EU may be open to considering provision for the continuation of certain rights, the specifics of any such continuation will be based upon the particular circumstances of the UK, and importantly, will most likely be subject to any concessions being made by the EU applying on a reciprocal basis to Member State nationals in the UK. It is also worth noting that the nature of any continuation granted may vary according to the right in question. In this vein, **the withdrawal agreement to be negotiated is also likely to include transitional provisions**, allowing for the on-going exercise of certain rights following the UK's withdrawal, but only for a specific limited period thereafter.[23] A further interesting point for consideration is how rights protected in the withdrawal agreement might be enforced post-Brexit, in the event that such protection is not respected. One option would be the creation of a special enforcement mechanism, whereby the UK Government could have recourse to an EU body to address any failure by an EU Member State to adequately respect the rights of UK citizens enshrined in the withdrawal agreement.[24]

As in the case of many aspects of the UK's withdrawal from the EU, the question of acquired rights is an area of uncertainty. The availability and appropriateness of potential sources of protection for rights in existence as a result of the UK's EU membership will become clearer as the specific terms of the UK's withdrawal come to light, primarily in the form of the Government's negotiating position and the details of the withdrawal agreement reached with the EU. The terms of the UK's withdrawal will determine, in particular, which rights are of particular concern to individuals and businesses and the role to be played by extra-EU protection mechanisms, such as customary international law and investment treaties.

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22 Bulletin of the European Commission, Supplement 1/83, Status of Greenland, Commission opinion, 2 February 1983, Annex A, page 21.

23 In Professor Lowe's Evidence, he suggested that the "*safer and more sensible way*" to safeguard EU rights in the withdrawal agreement was to freeze the relevant rights as existing at the time of Brexit, with provisions in the agreement specifying that particular rights would not be phased out or would be phased out over a certain period of time.

24 This option is suggested in Professor Lowe's Evidence.

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