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## EU Trade Policy and Brexit

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'Brexit' 15 months on – socio-legal perspectives  
for the EU & Europe, 23 September 2017



## Overview

- The Impact of Brexit on Trade
- The Broader Question: Brexit as an indication of discontent with EU Trade Policy?
- The Responsiveness of EU Trade Policy
  - The ISDS/ICS Debate
  - EU TDI Reform
  - New Free Trade Agreements
  - Investment Screening Mechanisms
- Conclusion

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## The Impact of Brexit on Trade

- Trade:
  - Departure from the Common Commercial Policy
  - Continued membership of the WTO
  - “Copy-pasting” EU Trade Deals
- Customs (“Future Customs Arrangements”, August 2017):
  - “A Highly Streamlined Customs Arrangement”
  - “A New Customs Partnership with the EU”
- The Bigger Picture: Global Value Chains in a time of (regional) disintegration
  - ➔ Not the topic of today’s presentation
  - See Lydgate and Winters (2017), Can a UK-EU Free Trade Area preserve the Benefits of the Single Market and the Customs Union in Some Sectors, UKTPO / Chatham House, September 2017

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## Brexit: discontent with EU trade policy?

- No, at least not directly
- In the 15 months after the Brexit vote, many theories have been put forward to explain the outcome of the referendum: sovereignty and a sense of Englishness, reaction to migration, the age of voters, and biased media coverage
- Trade generally not mentioned, although the free movement of persons as part of the EU single market forms part of trade in the broader sense
- Brexit also portrayed as an opportunity to have a more **liberal** trade policy (see Economists for Free Trade, “From Project Fear to Project Prosperity”, August 2017)

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## The Responsiveness of EU trade policy (I)

- Still, is there anything the EU's trade policy should learn from Brexit?
- Is EU trade policy responsive enough, and if so, to whom?
  - Member States?
  - Judicial Criticism?
    - Court of Justice of the European Union
    - International law: reports of WTO panels and the Appellate Body
  - Lobbyists in "the Brussels Bubble"?
    - Corporations?
    - NGOs?
  - Citizens?
- How responsive should EU Trade Policy be?

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## The Responsiveness of EU trade policy (I)

- 1) The Investor-State Dispute Settlement ("ISDS") Debate
  - February 2013, TTIP launch
  - Increased public attention for ISDS, prompting Commission to re-think its approach: public stakeholder consultation in March 2014
  - Massive protests in Berlin (10-2015) and Brussels (09-2016) against TTIP and CETA
  - September 2015: Commission proposal for Investor Court System (ICS) seeking to address criticisms:
    - First Instance Tribunal + Appeal Tribunal
    - Qualification requirements for judges
    - Clear definition of jurisdiction: no "frivolous" claims
    - Guarantee of the "right to regulate"

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## The Responsiveness of EU trade policy (II)

- 1) The Investor-State Dispute Settlement (“ISDS”) Debate
  - Introduction of ICS in CETA and EU-Vietnam
  - Opposition against ICS from Japan, however, Commission statement:
    - “We have been clear there will be no old-style investor state dispute resolution, the private courts which can affect the public interest; a system we are overhauling. This is something we still need to discuss with our Japanese friends.” (Malmström, 11 July 2017)
  - “The EU has put its reformed Investment Court System on the table and will reach out to all our partners, including Japan, to work towards the setting up of a Multilateral Investment Court. Other areas that require further work include regulatory cooperation and the general and institutional chapters.”
  - Immediate Commission and MS response against ISDS backlash: will it be enough?

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## The Responsiveness of EU trade policy (III)

- 2) Reform of EU Trade Defence Instruments (“TDIs”)
  - Reform of Basic Anti-Dumping Regulation and Basic Anti-Subsidy Regulation, *inter alia* in response to the expiry of Section 15(ii)(a) of China’s Protocol of Accession to the WTO
  - Provision had permitted the use of a special calculation methodology for dumping margins for imports from “Non-Market Economy” (“NME”) countries such as China
  - Clear position of the International Trade Committee (“INTA”) of the European Parliament in advocating strong trade defence instruments.
  - New Commission proposal should permit the taking into account of several clearly defined “market distortions”, such as:
    - “the lack of a transparent and effective functioning company law and a bankruptcy regime that prevents the exercise of property laws”;
    - “wage rates [that] are not the result of free bargaining between labour and management”, and the existence of “discriminatory effects with regard to joint-ventures and other foreign investment” as a result of “the absence of a transparent set of laws”.

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## The Responsiveness of EU trade policy (III)

- 3) New Free Trade Agreements
  - Trade union concerns with “cheap” imports from low-wage countries with weak labour and environmental protection standards
  - Clear input from European Parliament in respect of Trade and Sustainable Development chapters
    - Parliament as the main “democratic” control on EU trade policy after Opinion 2/15
  
- 4) Investment Screening Mechanism
  - Member state-driven: Commission proposal after joint call from Germany, France and Italy
  - Yet, opposition from smaller (Eastern European) MS, reliant upon Chinese/Russian investment in energy infrastructure.

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## Conclusion

- Brexit vote not motivated by discontent with EU trade policy
  - UK was, and continues to be, a nation tending towards an open and liberal trade policy
  - Seeks to continue existing agreements
    - EU-Korea FTA
    - CETA
  
- Will Brexit lead to a more inward-looking EU trade policy, focused more on trade defence rather than opening markets?

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## Conclusion

- EU Trade Policy relatively responsive to societal concerns, in particular
  - As a result of judicial involvement:
    - Opinion 2/15 (Investment)
    - Findings by the WTO (TDI reform)
  - As articulated by member states
    - Poland and Belgium (which requested an opinion on ICS in CETA)
    - Germany, France, Italy (investment screening)
  - As articulated by the European Parliament
    - Key "democratic guarantee" after Opinion 2/15 finding that all chapters of FTAs, except those relating to ISDS fall within exclusive competence.
  - As reflected by the European Commission in the State of the Union
- But do these institutions reflect the actual societal concerns?

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