



# **Post-Brexit Britain in A World of Preferential Trade Agreements (PTAs)**

**University of Birmingham, School of Law**  
Muirhead Tower, Room 112

24th February 2017

## ***Rationale of the conference***

*This conference has two goals. The first is to explore the important legal and political questions about the new role of the UK in the international trade context, and in particular with respect to the need to enter into several Preferential Trade Agreements (PTAs), that a possible Brexit raises. The second objective is to broaden the view and discuss the state of the art in the PTAs world by considering both horizontal issues and specific issues.*

## *Programme*

09:30-11:30	<p><b>Part I: Britain, Brexit and Beyond</b></p> <ul style="list-style-type: none"> <li>• Lilja Ólafsdóttir (Reykjavik University, former Legal Council at the EFTA Secretariat and negotiator for Iceland on FTAs and the EEA Agreement)</li> <li>• Lorand Bartels (University of Cambridge)</li> <li>• Robert Howse (New York University)</li> </ul>
11:30-11:45	Coffee break
11:45-13:00	<p><b>Part II: PTAs: The State of the Art</b></p> <p><i>Horizontal issues: Legal Institutions, Disciplines, Political Economy</i></p> <ul style="list-style-type: none"> <li>• Rafael Lima Sakr (LSE) - <i>'Rethinking Development in WTO: A Law and Development Framework for South-North Regional Trade Regimes'</i></li> <li>• Rilka Dragneva-Lewers (Birmingham) – <i>'The EU and its Association Agreements with Ukraine, Moldova and Georgia'</i></li> <li>• Sohyun Lee (LSE) - <i>'Intra-Democratic Variations in Trade Policies: A Comparative Case Study of the Preferential Trade Agreements of Korea and Japan with ASEAN'</i></li> </ul>
13:00-14:00	Lunch
14:00-15:15	<p><i>Specific issues (I): Subsidies, Investment and Energy</i></p> <ul style="list-style-type: none"> <li>• Luca Rubini (Birmingham) – <i>'Controlling subsidies in PTAs'</i></li> <li>• Ira Ryk-Lakhman (UCL) - <i>'Post-Brexit Investor-State Dispute Resolution Mechanisms in UK IIAs'</i></li> <li>• Andrea Rocco (Birmingham) and Natasha Georgiou (Reading) - <i>'A Call for Energy Governance in EU-Russia Energy Relations: The Path Towards the Energy Union'</i></li> </ul>
15:15-15:30	Coffee break
15:30-17:30	<p><i>Specific issues (II): Labour and Environment</i></p> <ul style="list-style-type: none"> <li>• Maria Anna Corvaglia (Birmingham) – <i>'Labour Mobility and Labour Protection in Post-Brexit PTAs: Lessons from Swiss-China Free Trade Agreement'</i></li> <li>• Billy Melo Araujo (Queen's University Belfast) - <i>'Labour Protection Standards and Mega-Regionals: Innovative Rule-making or Sticking to the Boilerplate?'</i></li> <li>• I-Ju Chen (Birmingham) - <i>'A Critical Analysis of the Environmental Provisions in PTAs in Asia-Pacific'</i></li> <li>• June Namgoong (UCL) - <i>'The Legal Obligations relating to ILO Instruments referred to in the Labour Chapter of US FTAs'</i></li> </ul>
17:30-18:00	<b>Closing session</b>

*Abstracts and bios*

**Panel: *Britain, Brexit and Beyond***

**Lilja Ólafsdóttir** is Professor at the University of Reykjavik. She is former Legal Counsel at the EFTA Secretariat and negotiator for Iceland on FTAs and the EEA Agreement.

**Lorand Bartels** is Reader in International Law in the Faculty of Law and a Fellow of Trinity Hall at the University of Cambridge, where he teaches international law, WTO law and EU law. He recently authored ‘The UK Status in the WTO after Brexit’. He is a Specialist Advisor to the UK House of Commons Select Committee on International Trade, and advises Linklaters as Senior Counsel on trade law, particularly in the context of Brexit.

**Robert Howse** is the Lloyd C. Nelson Professor of International Law at NYU School of Law. He is one of the most eminent trade law experts in the world. Prof. Howse is the author, co-author, or co-editor of numerous books, including *Leo Strauss Man of Peace, Trade and Transitions; Economic Union, Social Justice, and Constitutional Reform; The Regulation of International Trade; Yugoslavia the Former and Future; The World Trading System; and The Federal Vision: Legitimacy and Levels of Governance in the EU and the U.S.* He is also the co-translator of Alexander Kojève’s *Outline for a Phenomenology of Right* and the principal author of the interpretative commentary in that volume.

**Panel: *Horizontal issues: Legal Institutions, Disciplines, Political Economy***

**Rilka Dragneva-Lewers - *'The EU and its Association Agreements with Ukraine, Moldova and Georgia'***

The Association Agreements (AAs) between the EU and its Eastern Partners are described as the most ambitious and far-reaching trade agreements the EU has ever offered to a non-member state. At the same time, the AAs are expected to perform a dual task: to provide a framework for economic integration as well as to promote the transformation of domestic institutions of the partner countries. EU's key instrument in achieving these objectives is the export of the EU acquis, which remains the cornerstone of EU's external agenda and its integration-oriented agreements. This paradigm, however, has been particularly problematic in the case of the AAs, raising up wider issues of implementation capacity and regional context. The presentation discussed the policy challenges faced by the EU and the way the EU has approached them.

\* \* \*

**Rilka Dragneva-Lewers** is Reader in Law, Development and Regional Integration at the School of Law of the University of Birmingham. Her recent research focuses on regional integration in the post-Soviet world and its overlap with EU's external policy frameworks. Currently, Rilka examines EU's Association Agreements with the Eastern Partners as part of a large collaborative Horizon 2020 project.

**Sohyun Lee (LSE) - *'Intra-Democratic Variations in Trade Policies: A Comparative Case Study of the Preferential Trade Agreements of Korea and Japan with ASEAN'***

South Korea (hereafter Korea) and Japan initiated trade negotiations with the Association of Southeast Asian Nations (ASEAN), which was prompted by Chinese Premier Zhu Rong Ji's surprise proposal of the free trade agreement (FTA) Framework Agreement with ASEAN in 2001. Although Japan was the second to propose the FTA with ASEAN, and Korea the last, their negotiation progresses were reversed. Korea concluded the FTA with ASEAN in a shorter timeframe. In this paper, I argue that the variations in the institutional structures, which distribute varying degrees of power to the decision-makers, had a significant influence on the degree of centralization and the efficiency in the two countries' FTA strategies. In order to examine this inquiry, I construct an analytical framework based on an atypical principal-agent literature that introduces the reciprocal mechanism between the executive and legislative branches of the government and the bureaucracy. Next, I examine the development of FTA institutions in Korea and Japan throughout the late 1990s to the early 2000s. I demonstrate how the differences in the executive and legislative branches and the bureaucracy relationships of these two countries have resulted in a divergence from the institutionalization of the FTA strategies, which is illustrated by their FTA strategies with ASEAN.

\* \* \*

**Sohyun** is a Ph.D. Candidate in the Department of International Relations at the London School of Economics and Political Science (LSE) since 2013. She specializes in international political economy and economic diplomacy under Dr. Steve Woolcock. More specifically, her research interests include foreign economic policy, preferential trade agreements, and regional integration in East Asia. Prior to her study at the LSE, Sohyun completed her Master's in Regional Studies – East Asia at Harvard University and her Bachelor's in International Studies at Korea University.

### **Rafael Lima Sakr (LSE) - 'Rethinking Development in WTO: A *Law and Development* Framework for South-North Regional Trade Regimes'**

Being part of the very specialized field of international trade law, I was intrigued how the debate around law, development and regional trade agreements within the global economic governance got locked up around two antagonistic debates. From an external viewpoint, there has been a debate on whether the explosion in the number of RTAs in recent years can be considered a violation of World Trade Organization's rules. From an internal perspective, there has been a debate on the compatibility of RTAs with Article XXIV of the General Agreement on Tariffs and Trade. These two challenges led me to investigate how law and development have shaped the WTO governance of South-North RTAs. More specifically, I have sought to understand how WTO law has constrained, instead of incentivizing, WTO members to replace the existing discriminatory system of WTO-inconsistent RTA for an alternative regime. In fact, countries everywhere, either being developed or developing, have been engaged over the last 20 years in negotiating and signing the failed dominant model of RTAs without genuinely conceiving other options. The reason seems insofar that experts in international trade law have thought and debated only through a singular pair of lens how to design, implement and argue about South-North RTA under the WTO governance. Consequently, new ideas and practices have been marginalized preventing the rise of heterodox views.

I intend to contribute to my field by destabilizing the orthodox consensus, with the purpose of opening opportunities for alternative views. To do this, I will draw on recent studies showing that neither the Doha mandate nor the failure of South-North RTAs in boosting economic development has encouraged WTO Members to review the dominant interpretation of WTO law in order to highlight potential institutional models for pro-development regional trade agreements. Thus, the fundamental question that animates my dissertation is: how legal ideas and practices used to enable and sustain the WTO regime has contributed to prevent developed and developing countries from discovering alternative paths to foster economic development?

I will address this question by making use of the idea of a *legal framework*, which will be developed based on social-legal constructivism. Inspired by this literature, a legal framework is conceived as an expert technique for governing lawmaking and legal interpretation. In other words, the term legal framework does not refer here to a system of rules and institutions. Instead, legal framework is understood as an expert technique devised to both organize and stabilize legal discourses and practices within legal expertise, and control lawmaking and legal interpretations in global governance.

To conclude, by destabilizing the consensus around the dominant framework, my purpose is to contribute to the project of reimagining WTO law. Through the discussion of alternative frameworks for WTO law and RTAs between UK and developing countries, I hope to broaden our

horizons of possibilities and the conscious of lawyers, experts and policy-makers in this Brexit moment with regard to institutional options and legal arguments available to foster economic development.

\* \* \*

**Rafael** is a Ph.D. candidate and part-time teacher at the London School of Economics and Political Science, with a specialty in International Economic Law and Governance. He holds a LLB and a MPhil in International Law from University of Sao Paulo Faculty of Law, and a LLM from Columbia University Law School.

Prior to coming to the LSE, Rafael was a visiting researcher at Harvard Law School, where he developed two research projects. In parallel to his academic life, he has practiced law, specializing in corporate law and capital markets and banking regulation.

His current research focussed on a number of themes around global economic law and governance, including the relationship between law and expert knowledge, international law and development economics, and sociological and critical approaches to the study of international economic law.

### ***Panel: Specific issues (I): Subsidies, Investment and Energy***

#### **Luca Rubini (Birmingham) - ‘Controlling subsidies in PTAs’**

This presentation will do three things. After briefly introducing the specific issues raised by subsidies, and the way through which they could in theory be regulated in trade agreements, I will make an overview of the actual regulation of subsidies in 281 PTAs included in a new World Bank dataset. This mapping will pave the way to some teachings about the ‘depth’ of PTAs with respect to subsidy disciplines and will finally offer some perspectives for the forthcoming re-negotiation of the trade relationship between the EU and the UK.

\* \* \*

**Luca** is Reader in International Economic Law at the School of Law of the University of Birmingham. Luca has a special expertise in the regulation of the state intervention in the market, and in particular of subsidies. He is currently mapping the provisions on subsidies and state-owned enterprises in PTAs in the context of the ‘deep integration’ project of the World Bank.

## **Ira Ryk-Lakhman (UCL) - ‘Post-Brexit Investor-State Dispute Resolution Mechanisms in UK IIAs’**

This paper/presentation focuses on post-Brexit investor-State dispute resolution mechanisms in UK investment instruments. To address the mechanisms the UK may use in any *future* trade and investment agreement, it is first necessary to understand the existing investment climate in the UK, and the thinking behind the existing ISDS provisions in UK BITs. Additionally and as pertinently, it is necessary to account for the concurrent worldwide reforms of IIAs, which have resulted in the replacement of ISDS with several distinct mechanisms. In particular, the EU and Canada have opted for an investment court system in lieu of ISDS; India puts forth a lengthy requirement to exhaust domestic litigation; Brazil proposed mandatory ADR and inter-State arbitration as last result; and, China, Australia, and New Zealand still consider ISDS, at least partially, as a valid option.

These different strands of reform are of particular significance, for the UK identified these States as potential partners for future trade and investment agreements. Naturally, these distinct reforms will prove challenging and will require the UK to demonstrate flexibility in its future negotiations. Nevertheless, it is suggested that although these reforms represent, at least professedly, distinct views, they are predicated on similar concerns. It is therefore suggested that these reforms may be construed to represent different answers to the same questions: First, what is the purpose of investment instruments, and what are they designated to achieve for the individual State (promotion, facilitation, and/or protection of foreign investments)? Second, and depending on the answer to the former, how would any such instrument, through its provisions, best reflect the balance between the State’s sovereignty and right to regulate on the one hand, and the desire to attract foreign investments on the other?

It is argued that the UK ought to pay close attention to the manner in which different countries have answered these questions. First, the UK is about to ask these same questions as it re-emerges as an independent actor. Second, these IIA reforms inform the UK of the practice and position of its potential partners at the negotiations table. Third, these nudge the UK policy makers towards the more modern, and perhaps more sustainable, way of thinking over investor-State dispute resolution. And, finally, the answers to these two questions (why do we need IIAs and how would their provisions reflect our desired balance between the relevant conflicting interests and stakeholders) naturally yield the response to some other pertinent issues, such as the form of the instrument (i.e., bilateral/regional, FTA/IIA), the identity of the parties to the instrument, and its provisions.

Accordingly, the argument is made in three steps. First, I will describe the existing investment climate and ISDS provisions in UK BITs. At the second step I will focus on the EU/Canadian strand of reform as inter alia incorporated in CETA, on the 2016 Indian Model BIT, and on the Brazilian CIFAs. Third, I will suggest contextualizing the inferences from the former two steps so as to inform of the possible post-Brexit thinking over investor-State dispute resolution mechanisms. Overall, it is argued that apart from the problems and challenges Brexit poses, it may also present an opportunity for long-overdue reform of UK IIAs and the UK thinking over ISDS.

\* \* \*

**Ira** is a PhD candidate at UCL. My PhD thesis focuses on the protection and regulation of foreign investments in times of hostilities. I am a teaching fellow at UCL, teaching international law of foreign investments and international arbitration. I serve as the managing editor of the UCL Journal of Law and Jurisprudence and as the editor-in-chief of the UCL law & jurisprudence blog. I am member of the association for promotion of international humanitarian law (ALMA) and the ASIL women in international law mentoring program. Before my PhD I worked as an associate at the private sector (corporate and petroleum litigation) and clerked for NY, Israel, and London (EWHC) courts.

### **Andrea Rocco (Birmingham) and Natasha A. Georgiou (Reading) - 'A Call for Energy Governance in EU-Russia Energy Relations: The Path Towards the Energy Union'**

EU-Russia relations are in desperate need of legislative and institutional reform given the fragmented legal infrastructure regulating energy trade between these two powers. The paper will argue that the energy partnership is a highly strategic relationship that has profound implications for the international arena as far as energy security and stability are concerned, for which a solid over-arching legal framework is required. Other simmering issues include the absence of reciprocity in energy market access and the lack of coherence in external EU energy relations which has resulted in bilateralism emerging as the default approach of engagement. These issues are interrelated and closely affiliated to the need for a revised bilateral and international legal framework, as diverse positions and a lack of cooperation amongst Member States undermine collective EU actions and legislative initiatives. In this respect the paper advocates that the Energy Union may be a comprehensive solution to these challenges, by implementing a cohesive and fully functioning energy policy that will strengthen EU solidarity and coherence in the Union's external relations, thereby bolstering EU energy security.

\* \* \*

**Andrea** is a third-year PhD Candidate in law at the University of Birmingham, where he focuses on international trade of energy between the European Union and third countries. Andrea has worked in the project financing department of one of the leading law-firms in Italy and as teaching assistant at Bocconi University, where he graduated with top scores in 2012.

**Natasha** is a PhD Candidate at the University of Reading, School of Law where she is undertaking her research on energy regulation in international trade with a specific focus on EU-Russia energy relations. Natasha holds a University of Reading School of Law Studentship and comes to the School of Law with several years of experience as a Senior Legal Consultant/Associate at a top-tier firm in Cyprus where she predominantly worked on cross-border finance transactions with Russia and the CIS.

## **Panel: *Specific issues (II): Labour and Environment***

### **Maria Anna Corvaglia (Birmingham) - ‘Labour Mobility and Labour Protection in Post-Brexit PTAs: Lessons from Swiss-China Free Trade Agreement’**

The paper aims at contributing to the topical discussion on the post-Brexit scenarios of future UK preferential trade agreements. The paper’s aim is twofold.

On one hand, the paper sheds some light on recent PTA activism in Asia, with an emphasis on China’s trade strategy. In various occasions, China and other Asian countries have been described as priorities in the identification of future trading parties in the “Global Britain” communication. On the other hand, the paper addresses the controversial aspect of labour mobility and labour protection, inherently part of preferential negotiations of trade in services. The control over immigration and the movement of workers were undeniably major concerns for people voting in favour of Brexit and are key pillars of the February White Paper on “*The United Kingdom’s exit from and new partnership with the European Union*”.

Starting with the analysis of the White Paper of February 2017, the paper addresses the following central question: how would it be possible to frame labour mobility (allowed under liberalisation of GATS Mode 4) and labour protection in the framework of post- Brexit preferential negotiations? To reply to this question, the paper will provide an analysis of the Free Trade Agreement between Switzerland and China, signed in 2013 and entered into force in 2014. The Swiss-China FTA, and particularly the bilateral agreement on labour and employment simultaneously signed, will provide some valuable insights for the design of the future UK trade deals, particularly in relations to the crucial topics of labour mobility and protection.

\* \* \*

**Maria Anna** is a Lecturer at the Birmingham Law School. Previously she was a post-doctoral researcher at the Durham law School in the context of the ERC grant “NeoFederalism” led by Prof Robert Schuetze. She holds a PhD in Law from the University of Zurich and Master in International Law and Economic from the World Trade Institute – University of Bern.

### **Billy Melo Araujo (Queen’s University Belfast, School of Law) - ‘Labour Protection Standards and Mega-Regionals: Innovative Rule-making or Sticking to the Boilerplate?’**

The requirement to adopt minimum labour standards is now standard practice in free trade agreements negotiated by major trading powers such as the EU and US. However, such practice has historically been contested by developing countries, who contend that the requirement to increase labour and social protection standards is designed to remove one of the few competitive advantages that developing countries have over developed countries in attracting foreign investment. More recently, the EU and the US have also sought to use so-called ‘mega-regionals’

to promote labour standards. This was a significant development in that their proponents were keen to stress that these agreements would set the benchmark for labour protection provisions in FTAs, readily admitting that one of the central aims pursued by such agreements was to redefine the rules of the global trading system. The paper aims to assess the labour standards provisions included in EU and US FTAs, determine the rationale behind the inclusion of such provisions, and examine the extent to which mega-regionals such as the TTIP and the TPP marked a significant departure from past practice.

\* \* \*

**Billy** is a lecturer at the School of Law of the Queen's University Belfast where he teaches and researches on EU and International Trade Law. Prior to entering academia he worked as a solicitor in Brussels advising clients on corporate law and EU law. He is the author of a monograph entitled the 'The EU Deep Trade Agenda – Law and Policy' (OUP, 2016).

### **I-Ju Chen (Birmingham) - 'A Critical Analysis of the Environmental Provisions in Preferential Trade Agreements (PTAs) in the Asia-Pacific'**

This paper aims to evaluate legal questions arising from the links between PTAs and environmental protection in the Asia-Pacific. The legal questions are identified based on the analysis of environmental provisions in the existing PTAs, from the perspectives of substance, institutional arrangement and enforcement. In the Asia-Pacific, the economies have generated twenty-six PTAs that incorporate environmental provisions from 1994 to 2015. This proliferation indicates that the PTAs have upgraded to a higher level addressing the environmental concern while liberalizing trade. However, the author of this paper argues that there are a number of issues absent that need to be considered in the negotiation of environmental provisions. They include how strong the PTAs parties' commitments to complying with international environmental law are and an action of establishing solid cooperative mechanisms while dealing with transboundary environmental matters. Apart from the existing PTAs, there is a mega-regional trade agreement signed yet not enforced in the Asia-Pacific, i.e. the Trans-Pacific Partnership (TPP). Although the future of the TPP is uncertain, its environmental chapter is still advanced due to the broad and deep scope. It is also considered as a greener PTA, as opposed to the previous PTAs. Having regard to this evolution of the PTAs, this paper critically analyses the environmental provisions and explores to what extent the PTAs can protect the environment. In this paper, section 2 delineates a chronological overview of the PTAs with environmental provisions. Section 3 and 4 focus on a critical analysis of the existing PTAs, and the assessment of the TPP's environmental chapter follows in the section 5. The conclusion highlights that the gap of environmental standards between the developed and developing countries is likely to result in the tension of political economy in the Asia-Pacific. Moreover, the parties of the TPP may have to re-think about the specific environmental provisions of fisheries subsidies and legal regime of climate change.

\* \* \*

**I-Ju** is a doctoral researcher in international economic law. Her major research interests lie in WTO law and international environmental law. Before studying in the UK, I-Ju undertook degrees of LL.B. and LL.M. in Taiwan. She furthermore completed an LL.M. awarded in Merit at UCL in 2014. With her continuous academic enthusiasm and research grants, she started a Ph.D. at the University of Birmingham in January 2015.

**June Namgoong (UCL, Faculty of Laws) - ‘The Legal Obligations relating to ILO Instruments referred to in the Labour Chapter of US FTAs’**

This paper seeks to offer a legal analysis of labour provisions in free trade agreements (FTA) signed by the European Union (EU) and the United States (US) with their respective trading partners, focusing on the latter and those in the Trans-Pacific Partnership (TPP). The paper particularly examines the legal nature and role of International Labour Organization (ILO) instruments referred to therein, namely the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up 1998 (1998 ILO Declaration) and the eight core ILO Conventions, the latter referenced only in EU FTAs. To this end, this paper first recognises the pattern of increasing references to ILO instruments in US and EU FTAs as well as the differences between them. It then identifies the legal and practical issues of referencing the ILO Declaration and draws out its implication by comparing it to the Conventions. To address these issues, this analysis explores the unique legal status and content of the ILO Declaration, focusing on its relationship with ILO Conventions. In light of two key notions, principles and rights, that the Declaration deploys throughout its text, the paper examines the text and context of the Declaration, and the usage of those notions in the sphere of general international law. In particular, the analysis looks closely at the debate over this issue between prominent commentators such as Philip Alston, Francis Maupain, and Brian Langille. To add theoretical depth to this analysis, the paper then goes on to draw on the discourse as to the differences between rules and principles in jurisprudence, particularly putting it in the context of ILO norm-setting. Finally, relying on the principles theory and proportionality test, it attempts, in an abstract manner, to develop a legal interpretation specifically of the labour provisions in the TPP. From a practical and consequential point of view, the paper is committed to striking a balance between two possible ways of interpretation: one completely disregarding the intent of the parties not to be bound by the specific ILO labour standards; and the other making the labour provisions referring to the Declaration virtually useless.

\* \* \*

**June** joined the Faculty of Laws, University College London (UCL) in September 2013 as an MPhil/PhD Candidate. Prior to joining UCL, he served as a senior lecturer in law (first lieutenant) at Korea Army Academy at Yeongcheon in South Korea and participated as a co-researcher in a number of research projects for the development of labour and public policy commissioned by South Korean Government agencies such as The Ministry of Employment and Labor, The National Labor Relation Commission and The Ministry of National Defense. His primary research interests are in the interaction between employment and labour law, and international trade and investment law. He has also taught a course on linkages between labour and trade in the context of European trading arrangements as part of the LLM programme at the UCL and King’s College London.