

# **„Brexit“ – what is it about and what could it mean for India?**

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Delhi, 5 April 2017

# Introduction

- Topic: „**Brexit**“ – presently one of the hottest issues of European law and politics, with effects also outside Europe, e.g. in **India**.
- What does „Brexit“ mean?  
The BBC explains (<http://www.bbc.com/news/uk-politics-32810887>):  
„It is a word that has become used as a shorthand way of saying the UK leaving the EU - merging the words **Britain and exit to get Brexit** [...].“
- Overview on the lecture:
  - Briefly introducing myself to my esteemed audience.
  - What is the EU and what about EU membership?
  - Why did the UK vote in favour of leaving?
  - What is the procedure for exiting the EU?
  - What might be the consequences for India, in particular economically and legally?



# Introducing myself



- Prof. Dr. Christa Tobler, LL.M.: a Swiss national.
- Working and living in two European countries:



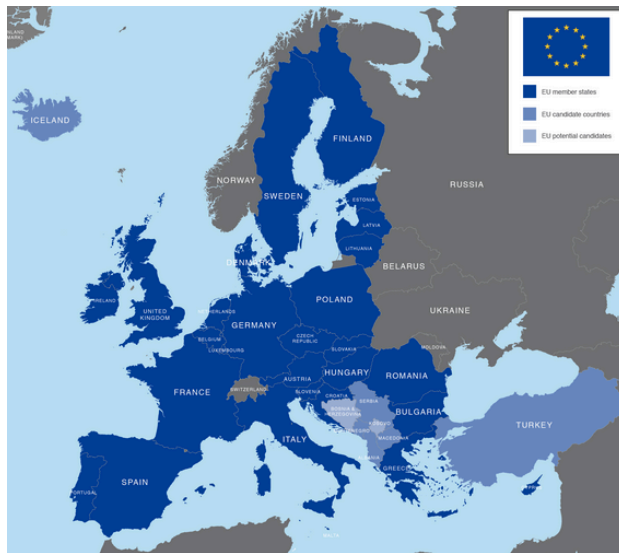
- Europa Institute (Institute for European Global Studies) of Basel University in **Switzerland**;
- Europa Institute of Leiden University in **the Netherlands**.
- Fields of specialisation:
  - **European Union (EU) law**;
  - Within that field in particular:
    - The special legal relationship between the **EU and Switzerland** (a non-Member State with an extensive web of agreements with the EU);
    - **Equality and non-discrimination** law, both in the economic and in the social field.

# What is the EU and what about membership? (1)



## Briefly: the EU

- Originally three European Communities, founded in the 1950s by 6 European states as a new (strong) type of international organisations; one of these still exists, i.e. the European Atomic Energy Community.
- Today a **grouping of 28 European States** hoping to be stronger together.



- Important fields of action:
  - Historical starting point: a common market in goods, persons, services and capital.
  - Today much more than that, e.g. also:
    - Common trade and investment agreements with third states;
    - Common rules on environmental protection;
    - Cooperation in the field of security;
    - Monetary union (at present 19 Member States).



# What is the EU and what about membership? (2)

## EU Member States

- So far only accessions, in several rounds, from 6 to at present 28 Member States (pictured: commemorative stamp on the occasion of 20 years of the popular vote in Austria on EU membership in 2014).



- In spite of crises in the EU: others still wish to join as well.
- Specifically, **United Kingdom of Great Britain and Northern Ireland (UK):**

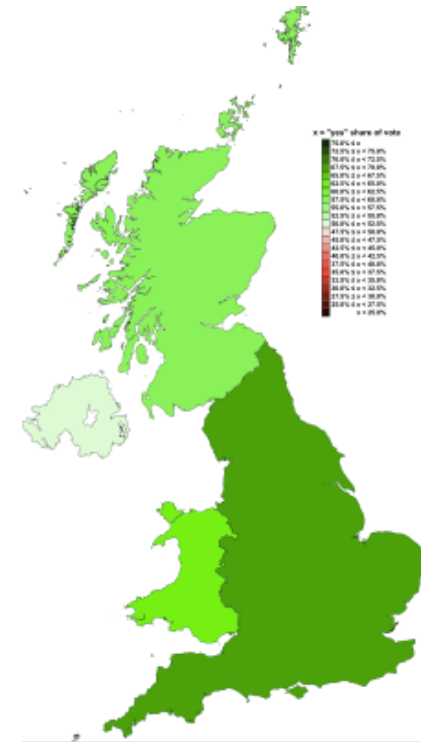


- Not a founding state of the European Communities.
- Accession wish from the 1960s.
- Accession in 1973 (before blocked by France).
- Since then a respected member, today with certain special deals (special position in certain policy fields).
- But now “**Brexit**” is looming ...

# What is the EU and what about membership? (3)

## So far not a single withdrawal from the EU ...

- In spite of discussions never a withdrawal.
- E.g. advisory referendum in the UK in 1975:
  - „Do you think the United Kingdom should stay in the European Community (Common Market)?”
  - 2/3 voted in favour of staying.
- Interesting legal question:
  - Legally speaking, would leaving have been possible at the time, given the fact that the European Community Treaties did not contain withdrawal clauses?
  - In my opinion yes, following the rules under public international law (see e.g. Wessel's editorial in the International Organizations Law Review 2016, no. 2).
- Today, the EU Treaty contains **a specific withdrawal clause**.



# The UK vote of 23 June 2016 (1)

## A vote with an unequal outcome

- 23 June 2016: advisory (!) vote in the UK:  
„Should the United Kingdom remain a member of the European Union or leave the European Union?“



- Narrow majority (51,9 %) in favour of leaving.



- With a rather unequal distribution of the votes in the different parts of the country (England, Scotland, Wales, Northern Ireland).
- Has led to political and legal difficulties within the country, including actions before courts and threats of secession.

# The UK vote of 23 June 2016 (2)

## Background: a vote proposed by the UK government

- Reason: party politics. Former Tory Prime Minister Cameron had promised a vote, hoping to:
  - Unite his party behind him and put this divisive issue to rest;
  - Get a „better deal“ for his country from the EU – but: the political deal of February 2016 did not do the trick of securing a „remain“ vote.
- One important argument of the PM: Unustainable level of immigration, pressure on infrastructure – i.e. the **same argument as that of nationalist parties elsewhere in Europe** (e.g. in Switzerland: vote on a constitutional initiative in favour of limiting immigration on 9 February 2014).



# The UK vote of 23 June 2016 (3)

## Why did the UK vote in favour of leaving?

- Attractive arguments of the „leave“ campaign:
  - Sovereignty: we will „take our country back“ and can then have our own laws and courts again (no EU law, no Court of Justice of the European Union);
  - Immigration: we will be able to limit it as we please;



- Money: it will cost a lot less; the money can be used elsewhere (e.g. for the national health care system);
- For the future relationship with the EU: we will „have our cake and eat it.“

- Ask yourselves: is the last point realistic?

# What is the procedure for exiting the EU? (1)

## A new provision of EU law – and a so far untested process

- So-called Lisbon revision of the EU Treaties, entered into force on 1 December 2009.
- New Art. 50 of the Treaty on European Union (TEU) on withdrawal:
  - Introduced in order to help some critical Member States agree with the revision, in the hope that it will never be used.
  - Provision refers to two distinct legal orders:
    - Para 1: „Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.“
    - Para. 2: „A Member State which decides to withdraw shall notify the European Council of its intention. [...]“
  - The remaining paragraphs provide further rules for the procedure on the EU level.
- **Untested process:**  
„Brexit“ is the first case of application of the new provision.

# What is the procedure for exiting the EU? (2)

## Legal issues concerning withdrawal

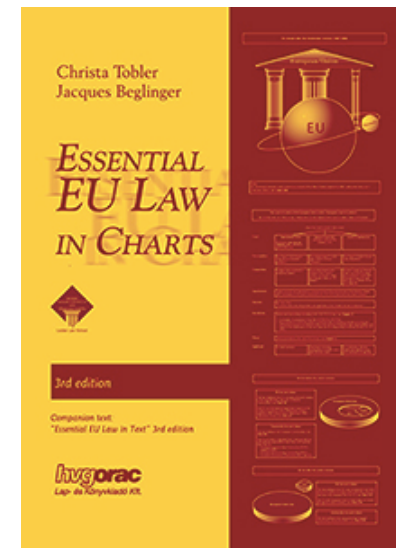
### – Three fundamental issues:

- How does a country decide internally on withdrawing from the EU?
- How does the withdrawal procedure on the level of the EU work?
- What about the future legal relationship between the withdrawing country and the EU?

– In the following, discussion of these points using the „**Brexit Charts**“ 2/25a-d; see **Chart 2/25a** for an overview on the above issues.

– Source of these charts:

- **The EU Law in Charts Project**, [www.eur-charts.eu](http://www.eur-charts.eu) (free download of the **Brexit Charts**).
- The **Brexit Charts** complement previous publications on EU law.





# „Brexit“: the level of national law (1)

## Internal decision-making

- See *Chart 2/25b*.
- Remember Art. 50(1) TEU: „Any Member State may decide to withdraw from the Union **in accordance with its own constitutional requirements**.“
- UK:
  - Vote on the basis of the European Union Referendum Act 2015.
  - Particularly important: who decides on withdrawal? Difficult issue!
    - The referendum of 23 June 2016 was of an **advisory** nature.
    - Opinion of the UK Government (new Prime Minister May): „royal prerogative“, i.e. it is exclusively the government that decides on withdrawal and notifies the EU.
    - Heated political and public debate, especially in parts of the country opposed to withdrawal.
    - Issue went to the courts (see next sheet).

## „Brexit“: the level of national law (2)

### Supreme Court on internal decision-making



- Three cases were joined at the level of the Supreme Court: *Miller & Dos Santos*, *Agnew* and *McCord* (see <https://www.supremecourt.uk/news/article-50-brexit-appeal.html>).
- Supreme Court Decision of 24 January 2017:
  - „Where implementation of a referendum result **requires a change in the law** [...], and statute has not provided for that change, the change **must be made** [...] **through Parliamentary legislation.**“
  - Note: UK Parliament, not the devolved assemblies.
- „Change in the (national) law“ - important background:
  - The UK's dualist approach to international law.
  - Therefore: the **European Communities Act (1972)**, as amended, which brings EU law into national law (i.e. it creates a new source of law) and which is the basis for the primacy of EU law.

# „Brexit“: the level of national law (3)

## UK Parliament: the „Brexit Bill“

- Draft text submitted by the UK Government in January 2017.
- Debate in the two chambers of the UK Parliament (Commons and Lords), for details see <http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal/documents.html>.



- In the end, all proposed amendments were voted down.
- Adoption of the Brexit Bill in its original form on 13 March 2017.
- Last step in the procedure: royal consent obtained on 16 March 2017.

# „Brexit“: the level of national law (4)

## Text of the „Brexit Bill“

*A Bill to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU*

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

### **1 Power to notify withdrawal from the EU**

(1) **The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.**

(2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

### **2 Short title**

This Act may be cited as the **European Union (Notification of Withdrawal) Act 2017.**

# „Brexit“: the EU level (1)

## Withdrawal procedure: notification of the intention to withdraw

- See *Chart 2/25b*.
- Art. 50(2) TEU: „A Member State which decides to withdraw shall **notify the European Council** of its intention. [...]“
- European Council:
  - Top political institution of the EU (heads of state and government, European Council president and Commission President).
  - In practice, notification to the recently re-elected president, Donald Tusk.
- UK Prime Minister May announced that she would send the notification on 29 March 2017 (i.e. after the 60 years celebrations of the so-called Rome Treaties, i.e. the Treaties on the European Economic Community and on the European Atomic Energy Community).

## „Brexit“: the EU level (2)

### Withdrawal procedure: the UK's notification letter

- A document of several pages addressed to „Dear President Tusk“ (e.g. [http://uk.reuters.com/article/uk-britain-eu-letter-text-idUKKBN1701JH?il=0&utm\\_source=twitter&utm\\_medium=Social](http://uk.reuters.com/article/uk-britain-eu-letter-text-idUKKBN1701JH?il=0&utm_source=twitter&utm_medium=Social)).
- Core elements of the letter:
  - „I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union. In addition, in accordance with the same Article 50(2) as applied by Article 106a of the Treaty Establishing the European Atomic Energy Community, I hereby notify the European Council of the United Kingdom's intention to withdraw from the European Atomic Energy Community.“
  - Further, the letter sets out the UK Government's approach to the discussions about the UK's departure from the EU and about „the deep and special partnership“ the UK hopes to enjoy with the EU once it will leave.

# „Brexit“: the EU level (3)

## Is the withdrawal notification reversible?

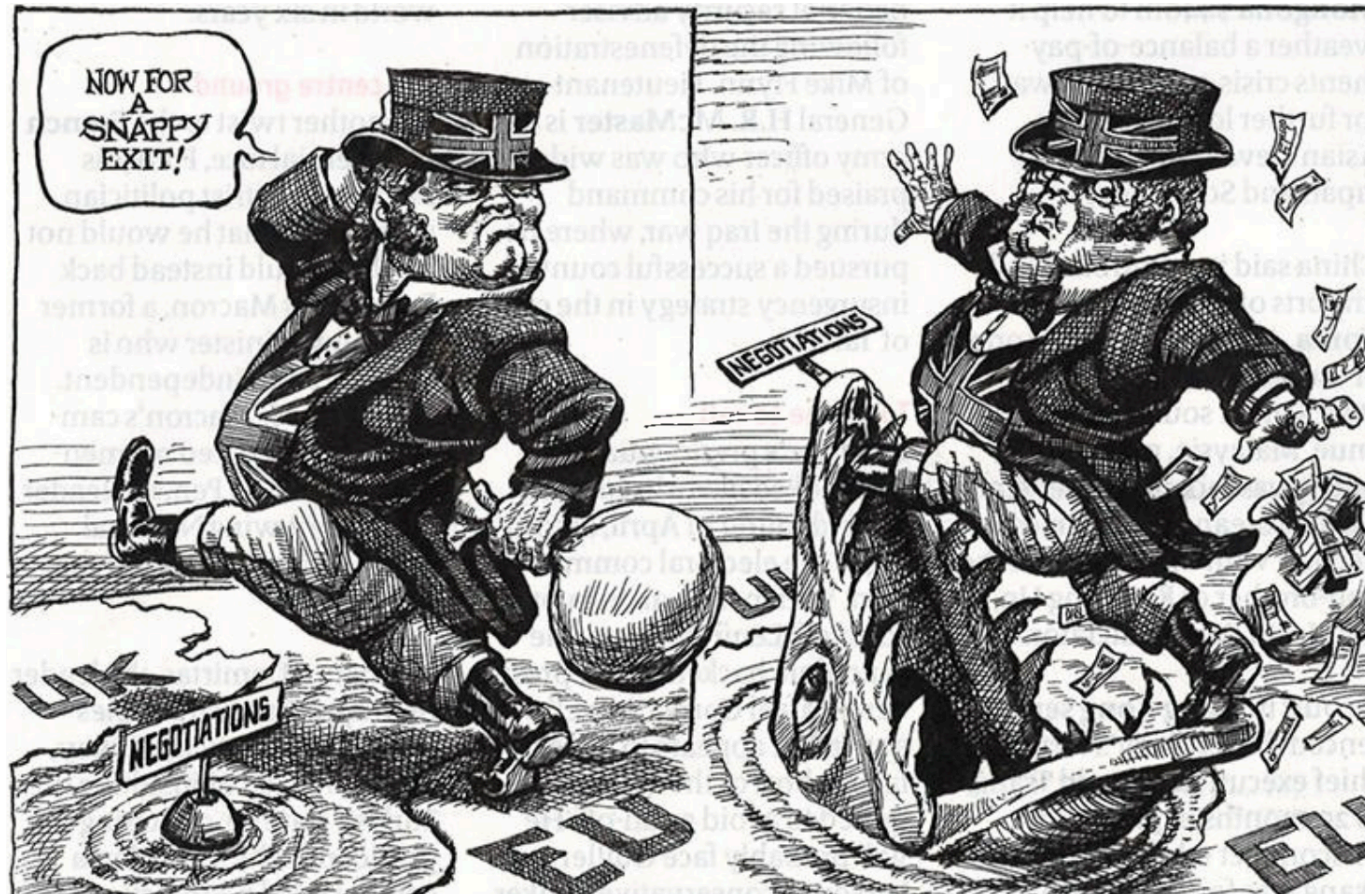
- Important legal issue: can the notification, once given, be **revoked**?
- Has different aspects / can be asked on different levels:
  - National law (i.e. internally);
  - EU law, as a matter of Art. 50 TEU (i.e. internationally).
- **A much debated and so far unresolved issue**, see e.g.:
  - Academic writing;
  - The „Three Knights Opinion“ ([https://www.bindmans.com/uploads/files/documents/Final\\_Article\\_50\\_Opinion\\_10.2.17.pdf](https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf));
  - The „Dublin case“:
    - Brought by tax lawyer Jolyon Maugham.
    - Aiming at a reference to the Court of Justice of the European Union (though: based on what could that Court decide on this matter??).





## „Brexit“: the EU level (4)

### Negotiations: sanguine expectations



The Economist  
of 25 February  
2017

# „Brexit“: the EU level (5)

## Withdrawal procedure: negotiation of withdrawal agreement

- Art. 50(2) TEU:

„[...] In the light of the guidelines provided by the European Council, the Union shall **negotiate** and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with **Article 218(3) of the Treaty on the Functioning of the European Union**. [...]“

- Art. 218(3) of the Treaty on the Functioning of the European Union (TFEU, revised and renamed former E(E)C Treaty):

„The Commission [...] shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.“

# „Brexit“: the EU level (6)

## Practical steps in the negotiation process: the EU side

### – Negotiation guidelines:

- EU Council President Tusk drafts negotiation guidelines; he announced that this would be within 48 hours of the UK notification.
- Special Brexit summit some weeks later: Member States must formally approve the guidelines in the European Council.

### – Mandate:

- Commission puts forward recommendations for the negotiating directives.
- EU Council of Ministers hands the Commission the formal mandate.

### – Negotiations:

- Begin: possible once the mandate has been given.
- End: Commission says this should be by October 2018.

### – [Brexit: in principle at the end of March 2019.]

# „Brexit“: the EU level (7)

## State of affairs within the European Union (beginning of April 2017)

– See for an overview:

<http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/>

– Issue and priorities:

– Issue: to determine the negotiation guidelines. Draft was sent to the Member States on 31 March 2017.

– Priorities (see e.g. <https://euobserver.com/uk-referendum/137464>):

– To create **certainty for the EU citizens caught up in Brexit** on both sides;

– To settle the **financial bill** for the UK to honour its previous obligations and commitments (certainty for e.g. authorities, businesses and universities);

– To preserve the peace settlement in **Northern Ireland** and to avoid hard borders.

– Two phases:

– 1) Divorce settlement on the rights and obligations of the UK;

– 2) Once there is „sufficient progress“ on that, talks about a future framework;

– In between: transitional arrangements.

## „Brexit“: the EU level (8)



### Withdrawal procedure: conclusion of withdrawal agreement

- Art. 50(2) and 4 TEU:
  - „2. [...] In the light of the guidelines provided by the European Council, the Union shall negotiate and **conclude an agreement** with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. [...] It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.“
  - „4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.“
- Note: there is **no guarantee** that political agreement can be reached!

# „Brexit“: the EU level (9)

## Content of the withdrawal agreement

– Art. 50(2) TEU:

„[...] the Union shall negotiate and conclude an agreement with that State, **setting out the arrangements for its withdrawal**, taking account of the framework for its future relationship with the Union. [...].“

– Elements that might be dealt with in such an agreement:

- Transitional rules in the various policy areas;
- Maintenance of certain rights (e.g. of people who already have made use of EU rights);
- Position of EU officials with the UK nationality;
- EU embassy in London / UK embassy in Brussels;
- Exit bill;
- ...



# „Brexit“: legal consequences of withdrawal (1)

## Principle: EU law no longer applies

– See *Chart 2/25c*.

– Art. 50(3) TEU:

„**The Treaties shall cease to apply** to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.“

– „Treaties“: also includes everything based on them, i.e. **all EU law**.

– Raises **numerous questions and concerns**, including in particular: what will happen to persons and companies who so far have exercised rights under EU law?



# „Brexit“: legal consequences of withdrawal (2)

## Legal consequences: examples

- Legal consequences can usually be viewed from two sides, positive and negative.
- E.g. the **free movement persons** (internal market):
  - Positive: the UK can make its own choices in the field of immigration.
  - Negative:
    - Other EU nationals and indeed also nationals of third countries (e.g. India) might find it more difficult to enter the UK;
    - Will the UK find enough qualified workers, e.g. in the field of health care?
- E.g. **treaties concluded by the EU with third states** (external relations):
  - Positive: the UK can conclude its own trade and investment treaties.
  - Negative: threat of trade barriers and lots of work, as the UK will lose many treaties (e.g. with Switzerland).

# „Brexit“: legal consequences of withdrawal (3)

## The internal UK perspective

- According to a study by the library of the Commons, at present some 19'000 EU legal acts are in force – what to do with them following withdrawal?
- Prime Minister May: there will be a **Great Repeal Bill**:



- Will repeal EU law in the UK.
- At the same time, it will transform most of the previous EU rules into national UK law.

# „Brexit“: addressing the challenges

## Legal avenues for mitigating the consequences of withdrawal

– See *Chart 2/25d*.

– In principle three avenues, all of which raise difficult political and legal issues:

- Withdrawal agreement.
- New, alternative arrangement.
- Re-entry (accession).

– Remember, any agreement will require consent; e.g. a future arrangement:

- UK: a „**bespoke agreement**“ (tailor-made deal), with as much market access as possible but without the free movement of persons and without any role for the Court of Justice of the European Union.
- EU: the **four freedoms are indivisible** (though: are they really?)

# „Brexit“: the UK government's hopes

## „Have your cake and eat it“ in more concrete terms

- 12 point plan of the UK government: White Paper of February 2017.
- E.g. no. 8, Ensuring free trade with European markets:
  - “We will **not be seeking membership of the Single Market**, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement.”
  - Critique: leaving the single/internal market was not on the ballot paper, it is a political choice made by Ms May ...
- E.g. no. 5, **Controlling immigration**:
  - „As we leave the EU and embrace the world, openness to international talent will remain one of our most distinctive assets.“
  - Critique: compare the message to India in this respect ... (see later).



# And what will be the result?

Time will tell ...



- Many interesting and challenging legal and political issues, both on the national and on the EU level!
- A German saying is:  
*„Abwarten und Tee trinken“*  
(wait and drink tea).
- However, that will not do for us!
- While waiting for political decisions of others, those in academia can engage in research and debate on Brexit-related issues, in particular from a comparative perspective (e.g. that of EU association law with third countries such as Switzerland).

# Brexit – what could it mean for India?

## Overview

– The issue: what Brexit could mean for India depends on the relations of India with the EU and with the UK.

- Overview:
  - Background:
    - India and the EU.
    - India and the UK.
  - Brexit: a threat or an opportunity for India?
    - Economically.
    - Legally.



# India and the EU (1)



## An important relationship

- Factsheet of the Indian Government „EU – India relations“:
  - In the 1960s, India was one of the first countries to establish diplomatic relations with the then European Communities.
  - Since the 1970s: Conclusion of Cooperation Agreements plus a number of more specific agreements (e.g. on research) – see later in this presentation.
  - Since 2000: Indian-EU summits.
  - 2005: adoption of a Joint Action Plan (subsequently revised).
  - Also since 2005: **a strategic partnership**.
- Website of the EU Commission  
(<http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/>):  
„India is currently the fastest growing economy in the world and **a strategic partner for the EU**.“



# India and the EU (2)

## More specifically: trade relations

- The **EU is India's number one trading partner** (13 % of India's overall trade with the world in 2014-2015).
- **India is the EU's number 9 trading partner** (2,2 % of the EU's overall trade with the world in 2014-2015).
- Remarkable increases:
  - EU exports to India and vice versa have been growing strongly;
  - Trade in services almost tripled in the past decade;
  - EU investment stocks in India also increased.

# India-EU agreements

## From cooperation agreements to a Free Trade Agreement?

- Conclusion of Cooperation Agreements in 1973 and 1981.
- Since 2007 negotiations on **a comprehensive Free Trade Agreement (FTA)** – would be one of the most significant trade agreements. The negotiations cover mainly, but not exclusively:
  - Access to each other's markets (goods, services, public procurement);
  - The framework for investment, including investment protection;
  - Rules that frame trade, such as intellectual property and competition;
  - Sustainable development, to ensure growth in trade is in tandem with the environment, social and labour rights.
- [In the meantime, India continues enjoying unilateral trade preferences when accessing the EU market under the EU Generalised Scheme of Preferences.]

# India and the UK



## A difficult past ... and a promising future?

- The colonial system of the past – an unpardonable European sin.
- Today still a special relationship, though now on a different level, between two sovereign states; among others, through the Commonwealth.



- Trade relations:
  - Surprising: in 2015-2016, the UK was **India's 12<sup>th</sup> largest trading partner only** (India trades more with e.g. Germany).
  - But: the UK is the third largest investor in India and the **UK attracts more Indian investments than the rest of the EU together.**
  - Over 800 Indian companies have offices in the UK (gateway to the EU).

# Brexit: a threat or an opportunity for India?

## Lively public debate on the economic side



- Some examples of specific issues:
  - Potential threats:
    - There might be higher tariffs and more burdensome regulations for exports by Indian companies from the UK to the EU.
    - As a consequence, companies might have to reconsider their place of establishment (e.g. move from London to Amsterdam or Paris?).
  - Potential benefits:
    - A lower value of the UK Pound relative to the Indian Rupee makes it less expensive for Indians to travel and study in the UK;
    - Uncertainty in Europe could make the Indian stock market more attractive:
    - Should the UK could face a lack of high-skilled workers, India might benefit.
- More generally, there appears to be **a hope that, in the longer run at least, Brexit could help strengthen the India – UK economic relationship** as the UK seeks to compensate for loss of EU market access.

# And what about the legal perspective? (1)

## A legal framework for the cooperation with the UK

- As a consequence of Brexit, the UK will no longer:
  - Fall within the framework of the common EU trade and investment policy;
  - Be part of the strategic partnership India – EU or any potential future FTA between India and the EU.
- Therefore, **India can / must / will want to negotiate its own bilateral trade agreement directly with the UK**, rather than going through the EU as before Brexit.
- Or, as an Indian business man (and former student of mine) put it rather poetically:

„Now unencumbered by the rest of the EU, the UK will aim to boost trade ties with India and other similarly situated countries. With India's economy outperforming all of its counterparts, the erstwhile crown jewel of the British Empire appears to be shimmering brightly once again from London's view.“

## And what about the legal perspective? (2)

### An India-UK agreement: political pitfalls and problems ...

- Here, too: an agreement requires consent, but there appear to be **rather great differences**, as evidenced e.g. during UK Prime Minister May's visit to India in November 2016.
- E.g. **students**:
  - India would like good possibilities for its students to study in the UK.
  - The UK under then Home Secretary May introduced a policy that foreign students must leave as soon as their studies are completed. As a result, 50 % less Indian students enrol in the UK.
- E.g. **economic immigration**:
  - India demands that, as part of a future trade deal, more Indian citizens must be allowed to work in the UK.
  - Prime Minister May wants to limit immigration and change the rules on visa.



## Again: what will be the result?

And again: time will tell ...

- Many interesting and challenging legal and political issues!



- *Abwarten und Tee trinken*  
(wait and drink tea)?
- Rather:  
An interesting task for Indian  
and UK scholarship ...
- ... I for one will be **curious to  
learn more about the Indian  
perspective during this visit!**





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**Thank you very much  
for your attention!**

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