

## Safety Valves and Complete Exits in European Treaty Politics

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It is common to describe the European Union as “new,” “unique,” “*sui generis*,” and hard to fit into existing categories of institutional arrangements, national or international. Indeed, debates on how to describe the EU are often lively and sometimes illuminating. In concrete terms, however, one of the best ways to understand the EU’s distinction from other forms of treaty-based trade and integration regimes is the EU’s distinctive lack of unilateral safeguard and escape valve mechanisms available to policy-makers in the various Member States.

In international relations scholarship one of the growing research agendas of the last decades has been on the way that treaty systems provide “escape mechanisms” or “safety valves” to manage the *ex post* costs of demanding and intrusive treaty obligations. In the area of trade politics, for example, many trade treaties allow states to unilaterally reintroduce trade barriers under the guise of “anti-dumping” or “safeguards” as trade openness becomes politically difficult, even if such trade barriers damage trading conditions and have little in the way of a persuasive economic rationale.

The justification for such escape mechanisms was persuasively set out in a seminal 2001 article in *International Organization* by Rosendorff and Milner.<sup>1</sup> They argued that treaties provide these escape mechanisms, despite the damage they can impose on the reliability of the treaty regime for firms and investors, because state policy-makers need to have a way to respond to political demands from their constituents and lobby groups to reduce their treaty commitments without exiting from the treaty system as a whole. In other words, allowing policy-makers the flexibility to effectively and temporarily (or “temporarily”) break their treaty commitments *within* the treaty system increases the stability of the treaty system as a whole, by reducing the incentive to *completely exit* from it. As Rosendorff and Milner explain, the central dilemma associated with such escape mechanisms is therefore between the costs of making such escape mechanisms available

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<sup>1</sup> B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INTERNATIONAL ORGANIZATION 829 (2001).

and retaining an overall agreement, compared with not making them available and the increased possibility of a state abrogating that agreement.

Contrasting with many of these other treaty regimes, the European Union radically reduces the scope for state policy-makers within the Member States to unilaterally and *ex post* reduce their fulfillment of treaty obligations in response to intense domestic political pressures. In one of the European Court of Justice's early and foundational cases, the *Pork Products* decision of December 1961,<sup>2</sup> the Court stressed that the Member States could not unilaterally introduce safeguard measures, no matter what the crisis in the national pig-meat sector. Instead the Court insisted that Member States must apply to the European institutions in advance to request the introduction of any such mechanisms, where the Treaties allowed it. The principle announced by the Court in *Pork Products* is an essential feature of the European legal order, and, indeed, is intimately related to the environment of compulsory fulfillment of European obligations that the Court went on to develop in decisions such as *Van Gend en Loos* and others throughout the 1960s and 1970s.

Of course, traders, investors, people wishing to move across borders, and so on are the beneficiaries of the greater certainty of transactions that results from the European treaties' greater restrictions on the availability of unilateral "safety valves" by the policy-makers of the participating states. But, as Rosendorff's and Milner's arguments indicate, the lack of such unilateral escape mechanisms within the European system of treaties increases the likelihood of a different form of uncertainty instead: the risk that domestic lobby groups and policy-makers within a participating state become attracted to the option of leaving the treaty system completely. The Brexit temptation therefore has a certain affinity with the logic of the European legal order as a whole, as the Court has developed it since its *Pork Products* decision in late 1961.

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<sup>2</sup> ECJ Case 7/61 *Commission v Italy* [1961] ECR 317.