Workshop of the ESIL Interest Group on
International Economic Law

GLOBAL PUBLIC GOODS, GLOBAL COMMONS, FUNDAMENTAL VALUES: THE RESPONSES OF INTERNATIONAL ECONOMIC LAW

Naples, 6 September 2017

Aula Pessina
Centrale – Main Building
Corso Umberto I, n. 40

hrs 11:00 - 18:00

h. 11:00 - 11:20
Opening Speech Pavel Sturma (Charles University of Prague, International Law Commission) 20'

h. 11:20 - 12:45

Panel I: The Value Chains and Fair Trade – Properly Accommodated in Contemporary International Economic Law?

Chair Peter-Tobias Stoll (University of Göttingen)

Is It too Soon to Bring Labour Standards back to the WTO Table?, *Maria Panezi (Center for International Governance Innovation, Waterloo, Ontario, Canada)* 15'

Voluntary Sustainability Standards and WTO Law: Assessing the Extent of Responsibility, *Enrico Partiti (T.M.C. Asser Instituut - Den Haag)* 15'

Implementation of Labour Standards, WTO and Regional Trade Agreements in the light of US-Guatemala Dispute, *Bipin Kumar (National Law University, Jodhpur, Rajasthan)* 15'

Discussant Elisa Baroncini (*Alma Mater Studiorum* - Università di Bologna) 10'

Discussion 20'

Lunch Break

h. 13:30 - 14:40

Panel II: International Economic Law and Commodities: the State-of-the-Art and the Need for Innovative Interpretative Approaches and Treaty-Making

Chair Holger Hestermeyer (King's College, London)

Harmful Practices in International Energy Commodities Trade: Exploring Avenues for Tackling Fossil Fuel Subsidies under WTO Law, *Anna-Alexandra Marhold (Tilburg Law and Economics Center - TILEC)* 15'

Regulating Global Public Goods at the WTO for the Paris Agreement: Positive Integration of Minimum Carbon Price Commitments, *Wei Zhuang (WTI Advisors, Geneva)* 15'

Ensuring Ocean Conservation through Trade Measures: WTO Jurisprudence and New Developments, *Geraldo Vidigal (University of Amsterdam)* 15'

Discussants Daria Boklan and Ilia Lifshits (University of Moscow) 10'

Discussion 15'

h. 14:45 - 16:10

Panel III: Investment Law and the Protection of Human Rights, Cultural Heritage – Collision and Co-existence

Chair Marina Trunk-Fedorova (St. Petersburg State University)

L'interaction du droit international des investissements et des biens publics mondiaux: les droits de l'homme dans le cadre de la protection substantielle et procédurale des investissements étrangers, *Carolina Olarte Bácares (Pontificia Universidad Javeriana, Bogota, Colombia)* 15'

Revisiting the Margin of Appreciation in relation to Novel Cigarette Packaging Investor-State Disputes from a Public Health Perspective, *Pei-Kan Yang (National Chengchi University, Taipei, Taiwan)* 15'

Protecting Cultural Heritage in International Investment Law: Tracing the Evolution and Treatment of Cultural Consideration in Recent FTAs and Investor-State Jurisprudence, *Elsa Sardinha (Centre for International Law · National University of Singapore)* 15'

Discussant Stephan Schill (University of Amsterdam) 10'

Discussion 15'

h. 16.20 - 17:40

Panel IV: Investment Law and Access to Water

Chair Catharine Titi (French National Centre for Scientific Research)

The Semantics of the Right to Water in International Investment Law, *Fernando Dias Simoes (University of Macau, China)* 15'

The Right to Water before Investment Tribunals, *Ursula Kriebaum (University of Vienna)* 15'

Urbaser v. Argentina: Private Actors and Public Goods in International Investment Law, *Edward Guntrip (University of Sussex)* 15'

International human rights obligations of investors in ICSID arbitration – The *Urbaser* award as an innovative but problematic approach to the protection of water as a public good in IIL, *Patrick Abel (University of Göttingen)* 15'

Discussant Attila Tanzi (*Alma Mater Studiorum* - Università di Bologna) 10'

Discussion 15'

h. 17.40 - 18.00

Closing Remarks Giorgio Sacerdoti (Università Bocconi, Milano) 20'

SHORT BIOS & ABSTRACTS OF SPEAKERS, CHAIRS AND DISCUSSANTS

Opening Speech

Prof. JUDr. **Pavel Šturma**, DrSc. - Professor and Head of the Department of International Law, Charles University (Prague), Faculty of Law, and coordinator of the Research Centre for Human Rights (UNCE). Senior Research Fellow of the Institute of Law, Czech Academy of Sciences. Professor at the Pan European University (Bratislava). Member of the UN International Law Commission. President of the Czech Society of International Law. Editor-in-Chief of the Czech Yearbook of Public & Private International Law. He is author or co-author of 16 books and more than 150 articles and studies in International Law. The main topics of his research include human rights, the codification of international law, international responsibility and international investment law.

Panel I: The Value Chains and Fair Trade – Properly Accommodated in Contemporary International Economic Law?

Chair
Peter-Tobias Stoll holds a chair for Public and Public International Law at the University of Göttingen Faculty of Law and is the acting Managing Director of the Institute for International Law and European Law, where he heads the Department for International Economic and Environmental Law. Since 2007, he is also the German Director of the Sino-German Institute for Legal Studies at Nanjing University. His research focus is on international law, trade, investment and the environment. Tobias has published extensively on international economic and environmental law. Inter alia, he is the co-editor of the Max-Planck Commentaries on World Trade Law. Tobias has been and is advisor to the German Federal Government, the UN and several civil society organizations. He has been visiting and teaching at a number of places, including Addis Abeba, Beijing, Berkeley, Cambridge, Kaliningrad, Minneapolis, Nanjing and Paris. He was a founder and co-chairs the ESIL's Interest Group on International Economic Law. Furthermore, he is a co-convenor of the Study Group on Preferential Trade Agreements of the International Law Association.

Is it too soon to bring labour standards back to the WTO table? (Maria Panezi)

The Seattle Ministerial was without any fruitful outcomes, partially due to the Clinton Administration's desire to introduce labour standards in trade negotiations. Countries that felt their comparative advantage was cheap labour were up in arms. The discussion since then has not progressed. However, since the early WTO years we have witnessed a significant change in the interpretation of the GATT and other Agreements: environmental standards, although classified as PPMs, are slowly becoming less controversial and pass the panel's and Appellate Body's scrutiny when their nature is clearly non-protectionist. Labour and the environment, one could argue have been two of the thorniest non-trade policy aspects in the GATT and the WTO. As we are moving towards an environmentally friendlier WTO, it is time to also introduce labour standards as one of the fundamental values in international trade law. This paper will pose two questions. First, is it time to revisit the discussion on labour rights, and most importantly, child labour, as part of

PPMs, and by consequence, regulate products that of cheap labour differently? If so, how is this discussion to be framed? Second, what lessons can be learned from the treatment of environmental regulations in the WTO? Are there plausible analogies that can be drawn between the increasing volume of environmental cases and the now dormant labour debate? In this context, I will first review the most seminal environmental cases and various policy justifications and then explore their application potential to labour standards. I will argue that as one door in the WTO begins to open, it may be time for lawyers and trade policy experts to start pushing for the next door to open as well in order to formally engage with labour standards as a trade-relevant public policy objective.

Maria Panezi is a post-doctoral fellow with CIGI's International Law Research Program. She holds a Ph.D. in Law from Osgoode Hall Law School at York University, where she was a Nathanson Fellow and a Comparative Law and Political Economy Fellow. Maria's doctoral dissertation is titled, Through the Looking Glass: Transparency in the WTO. She received her first law degree from Athens University in Greece, and was called to the Athens Bar. She has published articles on issues related to public international law and was a W. C. Langley Scholar of International Legal Studies at New York University School of Law, where she received her LL.M. Maria has been an adjunct professor at Osgoode Hall Law School and has taught ethical lawyering in a global community as well as law and economics, for which she received the Ian Greene Award for Teaching Excellence. She has also been a visiting scholar at Harvard Law School and the Fletcher School of Law and Diplomacy.

Voluntary sustainability standards and WTO law. Assessing the extent of responsibility of Members vis-à-vis private regimes for sustainability (Enrico Partiti)

Transnational standardisation in the area of sustainability raises fundamental questions about the role of international law towards private regulatory regimes and, closely connected, about the role of States in relation to private rules. The TBT Agreement recognises that private standards could conflict with principles of WTO law. This contribution attempts to set precise boundaries to a 'due diligence' obligation which requires Members to take measures to ensure that standardising bodies on their territories act in compliance with the provisions of the TBT Code of Good Practice, in light of evolving state practice towards private standards for sustainability. It does so by firstly depicting the general frame of due diligence towards private parties actions drawing from international environmental law. It then elaborates on the TBT provision in Art. 4 that Member i) must take measures to ensure private standards respect certain substantive obligations, and ii) must not take measures which have the effect of, directly or indirectly, requiring or encouraging standardising bodies to act in a WTO-inconsistent manner. This contribution illustrates in practice which measures of a Member may be considered as reasonably available to take. Subsequently, it discusses which acts and omissions of a Member, in particular in the domain of regulation and competition enforcement, may be considered as resulting, directly or indirectly, in WTO-inconsistent standard-setting for which the Member retains responsibility. The article finally discusses which Members may bear WTO responsibility for transnational standardising bodies, and how different extents of responsibility may stem *vis-à-vis* different types of standards.

Enrico Partiti is researcher in EU and international law at the T.M.C. Asser Institute in The Hague. His research interests lie at the intersection of transnational private regulation for sustainability on the one hand, and EU and international law on the other. His research focuses on the many interactions and reciprocal influence between transnational public and private norms, and how they impact on the pursuit of social and environmental sustainability in global value chains. He recently defended at the University of Amsterdam his PhD dissertation titled 'Public play upon private standards. How European and international economic law enter voluntary regimes for sustainability'.

Implementation of Labour Standards, WTO and Regional Trade Agreements in the light of US-Guatemala Dispute (Bipin Kumar)

International trade agreements have numerous but also sometimes conflicting effects on the ability of countries to protect social values, including labour and environmental standards and human rights. The preamble of the WTO Agreement claims as one of its primary objectives the 'raising of standards of living', and it is widely recognized that, as said by the World Commission on the Social Dimension of Globalisation, 'wisely managed, the global market economy can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty.'

Since its founding, then, social issues have been left to one side of the main WTO agenda, much to the relief no doubt of those who were at one stage concerned about its 'contamination' by 'non-trade issues'. These matters might have remained, but for the sudden increase in the number of regional trade agreements being negotiated and concluded, from the early 1990s to today, which gave an opportunity to those countries with an interest in linking trade and social issues for negotiating corresponding provisions in their new regional trade agreements.
Against this background, the phenomenon of regional trade agreements has offered countries an opportunity to experiment with different means of regulating the protection of social issues. Regional Trade Agreements have proliferated since the 1990s, particularly after the completion of the Uruguay Round. Nearly every country in the world now is either participating in or discussing participation in one or more regional agreements.

The relationship between trade agreements and labour standards is closely linked to the spectacular global changes in the means of production and the world of labour. Indeed, economic globalisation and technological revolution are developing at such speed, especially with respect to trade liberalisation and free movement of capital, but also with respect to transport and telecommunications, that they have transformed the economy and with it societies across the world. The process has a continuous and daily impact on the worlds of labour and employment.

At their first ministerial meeting (Singapore, 1996), WTO members reaffirmed their commitment to core labour standards. Ministers of WTO member countries decided in the **1996 Singapore Declaration** to "*renew [their] commitment to the observance of internationally recognized core labour standards"*. That Declaration stated that the ILO "*is the competent body to set and deal with these standards.*" The Declaration rejected the use of labour standards for "protectionist purposes."

However, this did not resolve what the WTO should do if a developed state contemplates trade measures, not for protectionist purposes, but as a response to the non-compliance by a developing state with fundamental human rights in labour. Of the 164 WTO members, 117 have ratified all eight International Labour Organization (ILO) core conventions, which seek to implement decent work conditions for all. However, only 31 per cent of all regional trade agreements contain this kind of social clause.

There has been a recent fruitful joint report by the WTO and ILO Secretariats on the links between trade and employment titled "WTO/ILO, Trade and Employment: Challenges for Policy Research"
The WTO's developing-country members resist including labour standards in WTO rules because:

- they see it as a guise for protectionism in developed-country markets, a smokescreen for undermining the comparative advantage of lower-wage developing countries; and
- they argue that better working conditions and improved labour rights arise through economic growth — sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards.

It has been argued that low labour standards are a necessary strategy for the economic development of poor countries. In a comprehensive study, however, the OECD found that respect for basic labour standards similar to those in the ILO Declaration supports rather than undermines open trade-oriented growth policies in developing countries.

In light of this, the labour rights dispute between the US and Guatemala under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) has revved up the present research aims to understand the working of regional trade agreements that provide for WTO plus provisions and specifically analyse the brewing dispute in terms of labour and trade.

The paper will be structured as follows. Part I deals with the interplay between regional trade agreements and labour issues, touching upon various aspects. Part II tried to understand and analyse the brewing US-Guatemala dispute. Part III ventures into the prospects of future regional trade agreements incorporation social issues. This is followed by the conclusion, where the researcher analyses the entire aspect in terms of the 21st century international trade regime.

Bipin Kumar is an Assistant Professor at National Law University, Jodhpur, Rajasthan. He holds an LLB and LLM Degree from University of Delhi, Delhi. He recently submitted his Doctoral thesis "Legal Framework of Regional Trade Agreement in WTO: A Case Studies of India's RTAs" to National Law University Jodhpur. He has twelve years of teaching experience. Prof Kumar had also worked with Centre for WTO Studies of Indian Institute of Foreign Trade, New Delhi. He holds the specialization of International Trade Law/ WTO, Commercial Transactions. He has keen interest in Competition Laws, Sports Laws and Human Rights Laws. He regularly writes and gives guest lectures on International trade, WTO and commercial law matters. At National Law University, Jodhpur he is an Executive Director of Distance Education Programme and Member of Institute of BRICS Laws. Earlier he was the Faculty-in Charge of *Trade, Law and Development* Journal.

Discussant

Elisa Baroncini is Associate Professor of International Law at the School of Law of the University of Bologna. She has been Visiting Fellow at the Law Department of the European University Institute in Fiesole, under the supervision of Professor Petros Mavroidis, she is Associate Research Fellow at the Leuven Centre for Global Governance Studies, and Visiting Professor in EU Trade Law at the China-EU School of Law in Beijing. Currently Co-Chair of the ESIL IG on International Economic Law, Elisa holds a cum laude Bologna Law Degree and a PhD in EU Law from *Alma Mater Studiorum* - Università di Bologna. She has been and is member and supervises various international research projects, writing extensively on International Economic Law and EU Law. She is associate editor of the China-EU Law Journal (Springer) and of the Brill Open Law - An International Journal (Brill). Her main fields of research include: WTO Law (the TBT Agreement in the WTO dispute settlement system; the consumers' right to information in the WTO system; the relation between the WTO system and RTAs; China in the WTO dispute settlement system; WTO and climate change issues); transparency in International Economic Law; and the law of EU external relations (EU/China relations; EU/China investment negotiations; the treaty-making power of the European Commission; the European Parliament and international agreements; the delegations of the European Union).

Panel II: International Economic Law and Commodities: the State-of-the-Art and the Need for Innovative Interpretative Approaches and Treaty-Making

Chair

Dr **Holger Hestermeyer** is the Shell Reader in International Dispute Resolution at King's College London. Dr. Hestermeyer has served as specialist advisor to the House of Lords EU External Affairs Sub-Committee for its reports on trade options and trade in goods after Brexit. In the past, he has, amongst others, worked as a legal consultant for the German Foreign Office and as expert for a constitution project for Sudan. Dr. Hestermeyer currently is a Co-Executive Vice President of the Society of International Economic Law, Co-Convenor of the Interest Group on International Courts and Tribunals of the European Society of International Law and of the Interest Group on International Economic Law of the same society. Before joining King's in 2014 Dr. Hestermeyer was a Référendaire at the CJEU for Advocate General Cruz Villalón, headed a research group and worked as a junior and senior research fellow at the Max Planck Institute for Comparative Public and International Law. He has worked as a Referendar for criminal and civil court judges in Hamburg, for the task force ICC of the German Foreign Office and an international law firm in Hamburg, Madrid and Alicante. He has taught and done research in London, Heidelberg, Berkeley, Florence, Münster, Mexico DF and Santiago de Chile. His research was awarded an Otto Hahn Medal, an Otto Hahn Award and the ISUS prize. Dr. Hestermeyer is a former Fulbright Fellow and German National Merit Foundation Fellow. He speaks German, Spanish, French and Italian.

Harmful Practices in International Energy Commodities Trade: Exploring Avenues for Tackling Fossil Fuel Subsidies under WTO Law (Anna Marhold)

Primary energy commodities such as petroleum and natural gas are some of the most traded products globally.[1] However, it is no secret that the consumption of energy in the form of fossil fuels contributes greatly to climate change through harmful CO_2 emissions. Many have acknowledged this problem, seeing the necessity to scale up clean energy production, while transitioning to a low-carbon economy. To this end, countries have, inter alia, undertaken binding commitments to reduce emissions under the UNFCCC Paris Agreement.[2]

Nevertheless, most global economies behave in a strikingly paradoxical manner when it comes to the continuous subsidization of the environmentally harmful exploration, production, consumption and international trade in fossil fuels. The global amount of fossil fuel subsidies is vast, yet ill documented.[3] The ways in which they are instituted remain opaque and unclear, not in the least because there is no international standardized system monitoring them. Nevertheless, it is paramount that fossil fuels subsidies are constrained at the international level to curb their harmful environmental externalities and comply with internationally undertaken climate change mitigation commitments. The World Trade Organization (WTO) could function as a valuable forum for this: For instance, a strong case can be made that fossil fuel subsidies constitute unfair trade practices under WTO law, that moreover hamper the energy transition.

This article strives to explore various manners for tackling fossil fuel subsidies under the WTO legal framework. While support schemes for renewable energy have been a target in WTO Dispute Settlement proceedings, fossil fuel subsidies have largely remained outside of the scope of the system.[4] There are various reasons for this, one of them being that harmful practices such as 'dual pricing' (i.e. selling energy commodities such as oil and gas at higher prices on foreign markets vis-à-vis much lower prices in the domestic market), are hard to fit into the 'specificity' requirement in the sense of Article 2 of the SCM Agreement.[5] Nevertheless, possibilities to tackle these harmful subsidies in the system do exist. This article will expose several legal avenues through which WTO Members can challenge fossil fuel subsidies in the multilateral trading system, by means of e.g. the SCM Agreement and/or the Anti-Dumping Agreement.[6]

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[1] Petroleum and fossil fuels are one of the largest primary commodities of international trade in terms of both volume and value, see WTO, International Trade Statistics 2016 (Geneva 2016).

[2] COP21 Paris Agreement: United Framework Convention on Climate Change (UNFCCC), UN Doc FCCC/CP/2015/L.9/Rev.1 'Adoption of the Paris Agreement' (12 December 2015).

[3] See e.g. IMF, *Energy Subsidy Reform – Lessons and Implications* (International Monetary Fund, Washington DC 2013)

[4] See e.g. Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7; Panel Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector/ Canada – Measures Relating to the Feed-in Tariff Program, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, p. 237; and Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, as modified by Appellate Body Report WT/DS456/AB/R. 16 September 2016; one case in which fossil fuel subsidies are being address indirectly is EU – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia, Second Complaint, WT/DS494 (Request for Consultations received 19 May 2015); See on these issues more broadly S Charnovitz and C Fischer, 'Canada – Renewable Energy: Implications for WTO Law on Green and Not- So-Green Subsidies' (2014) EUI Working Papers, RSCAS 2014/09.

[5] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

[6] Agreement on Anti-Dumping: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201

Anna Marhold is Assistant Professor and Senior Researcher at the Tilburg Law and Economics Center (TILEC), a Centre of Excellence at Tilburg University in the Netherlands, where she researches and teaches on various topics of international and European law. Her main research interests lie at the intersection of international economic law, energy and environmental regulation. Anna is also a Fellow at the newly established Cambridge University-based C-EENRG Platform on Global Energy Governance and was invited 2017 Summer Faculty at Vermont Law School, the leading Environmental Law Programme in the United States. Her work has been published in various academic outlets and her monograph, titled *Energy in International Trade: Concepts, Regulation and Changing Markets,* is forthcoming with Cambridge University Press (2018). Anna regularly presents her work at international conferences and provides policy advice to international think tanks. Anna obtained her PhD in Law at the European University Institute (EUI) in Florence. During her PhD, she was an EU-US Fulbright Schuman Grantee and Visiting Scholar at NYU School of Law. Additionally, she was a Marie Curie Early Research Fellow in the Framework of DISSETTLE, Dispute Settlement in at the Graduate Institute in Geneva. Anna holds parallel degrees in Law (LLB, LLM) and Russian (BA, MA) from the University of Amsterdam.

Regulating global public goods at the WTO for the Paris Agreement: Positive integration of minimum carbon price commitments (Wei Zhuang)

The market's failure to internalize the positive externalities associated with renewable energy such as mitigating climate change and ensuring energy security may lead to adverse competitiveness of renewable energy vis-à-vis fossil fuels. Positive integration – defined as "the correction of negative externalities from liberalisation" – of minimum carbon price commitments into the multilateral trading system could play an essential role in dealing with such market failure. As a response to the entry into force of the Paris Climate Accord and a potential unilateral withdrawal by the U.S., States should pursue such a positive integration approach in good faith at the multilateral level.
This paper first seeks to examine the market failures associated with fossil fuels as well as renewable energy with a view to highlighting the need for policy intervention. Then, it analyses the importance of positive integration of minimum carbon price standards. Ultimately, drawing lessons from the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement), it studies the feasibility and political challenges of the positive integration of minimum carbon price standards into the world trading system.

Wei Zhuang is an international trade lawyer based in Geneva. She has assisted governments in WTO dispute settlement proceedings and advised governments and companies in trade remedy investigations. Previously, she worked at the World Trade Organization and the United Nations Conference on Trade and Development. She was also a Marie Curie Fellow with the DISSETTLE (Dispute Settlement in Trade: Training in Law and Economics) Programme, a Visiting Fellow at the University of Cambridge (Lauterpacht Centre for International Law), and a Research Fellow at the Max Planck Institute for Intellectual Property and Competition Law.

Ensuring Ocean Conservation through Trade Measures: WTO Jurisprudence and New Development (Geraldo Vidigal)

The traditional territory-based structure of international law makes protecting global public goods a major challenge. This is particularly true with respect to the ocean, an environment where overlapping areas under the jurisdiction of different states coexist with very mobile resources (fish) and a medium (water) in which pollution can spread quickly. This paper examines how WTO jurisprudence is reshaping this field. The reasoning applied by the Appellate Body in interpreting both GATT Article XX and the TBT Agreement sets aside the issue of extra-territoriality, allowing consumer states that are WTO Members to lawfully enact measures and impose requirements with respect to environmental conservation beyond their borders. As a result, consumer Members' measures may affect the law applicable *de facto* to fishermen and other vessels carrying out their economic activity in the territory of other Members, as well as on the high seas, and regardless of the flag state of the vessel. The paper examines is the jurisprudence of the GATT and WTO in this respect, discusses the sea change brought by the Appellate Body report in *US – Shrimp*, and considers the WTO-legality of initiatives and proposals for conservation measures, in the form of 'hard' product regulations or 'soft' labelling requirements, discussing the broader implications of the non-territory based tests for the law of the sea and for ocean governance more broadly.

Geraldo Vidigal is Assistant Professor of Public International Law and International Trade Law at the University of Amsterdam (UvA). Prior to Joining UvA, he was a Dispute Settlement Lawyer at the WTO Legal Affairs Division and a Senior Research Fellow at the Department of International Law and Dispute Resolution of the Max Planck Institute Luxembourg. He has held fellowships at the Graduate Institute, Geneva, the European University Institute, and Bocconi University in Milan. Geraldo holds a PhD in Law from the University of Cambridge, a Master's in International Law from the Sorbonne Law School and a Bachelor's in Law from the University of São Paulo. He publishes regularly on International Economic Law and International Dispute Settlement and is the Managing Editor of *Legal Issues of Economic Integration*.

Discussants

Daria Boklan, associate professor of International Public and Private Law, Faculty of Law, National Research University Higher School of Economics, Moscow, holds PhD from the Institute of State and Law of Russian Academy of Science in international law, holds academic degree of Doctor of Legal Science from Moscow State University of International Relations, member of the Russian Association of International Law and ESIL. Dr. Boklan has more than 50 scientific publications in general international law, international environmental law, law of the WTO and law of the Eurasian Economic Union. She lectures in international law, international environmental law and law of the WTO in the Higher School of Economics and Russian Foreign Trade Academy. Sphere of professional interests: international law, international environmental law, law of the WTO, law of the Eurasian Economic Union.

Ilya Lifshits, associate professor of the Russian Foreign Trade Academy, Moscow (RuFTA), holds PhD in International and European Law, member of the Russian Association of International Law, ESIL and IBA, member of expert committee of the Russian Federal Antimonopoly Service. He lectures courses in International Financial Law and WTO law in RuFTA and Lomonosov Moscow State University. Dr. Lifshits is an author of more than 20 publications on the EU Law, International Financial Law and Eurasian Integration. Being a practicing lawyer in position of the senior partner of EDAS - Moscow based law, Certified Auditor and a holder a professional certification from the Russian Securities Regulator, Dr. Lifshits practices law in such areas as capital markets, mergers & acquisitions, and corporate law.

Panel III: Investment Law and the Protection of Human Rights, Cultural Heritage – Collision and Co-existence

Chair

Marina Trunk-Fedorova is associate professor at the Law Faculty of St. Petersburg State University and at the Ural State Law University, where she teaches courses on International Law and International Economic Law. She is also coordinator of the research area „WTO and EAEU law" at KEEL – the Kiel Center for Eurasian Economic Law (Kiel University, Germany). She holds a *summa cum laude* law degree from St. Petersburg State University, an LL.M. degree from the University of Connecticut School of Law and a Ph.D. degree from St. Petersburg State University. She is Co-Chair of the ESIL Interest Group on International Economic Law and a member of the International Law Association (ILA) Committee "Procedure of International Courts and Tribunals". Marina Trunk-Fedorova is also a member of the editorial board of the Russian law journal "International Justice".

L'interaction du droit international des investissements et des biens publics mondiaux: les droits de l'homme dans le cadre de la protection substantielle et procédurale des investissements étrangers (Carolina Olarte Bácares)

L'interaction entre le droit international des investissements et les droits de l'homme est une problématique récente, qui a commencé à attirer l'attention de la communauté internationale et a mit en évidence les avantages et les limites de leur articulation. En effet, les États sont tenus de protéger, respecter et garantir tous les droits de l'homme indépendamment des classifications dont ils font l'objet. Concomitamment, les États doivent aussi suivre les obligations relatives aux investissements étrangers déduites des accords en la matière. Le respect de ces deux types d'obligations peut opérer sans poser de problèmes de coordination, ou, au contraire, dans certaines hypothèses, une concurrence de ces deux types d'engagements peut apparaître.

La pratique témoigne des implications que les activités d'investissements ont de temps en temps vis-à-vis des droits de la personne, ce qui invite à analyser l'interaction entre ces deux régimes juridiques. C'est ainsi que quelques nouveaux modèles de traités d'investissements commencent à mentionner expressément la protection des droits de l'homme. De la même manière, l'arbitrage international est de plus en plus occupé par des questions concernant les points de rencontre et d'achoppement entre les deux régimes.

Ainsi, la jurisprudence arbitrale traite la question, mais souvent de façon timide et hétérogène, et la plupart du temps par le biais d'interprétations privilégiant la protection des droits de l'investisseur sur toute autre question relevant des droits des différentes personnes affectées par l'investissement.

Dans la mesure où le droit international des investissements est susceptible de présenter des obstacles pour la réalisation des droits de l'homme, il est nécessaire d'étudier ce domaine juridique afin d'identifier et d'analyser les moyens pour la prise en compte des droits de l'homme dans le cadre de la protection substantielle (I) ainsi que dans le cadre du contentieux arbitral (II).
La réception de droits de l'homme dans le cadre juridique international des investissements ne se fait pas sans contestations. En effet, les mesures prises par les États visant la protection des droits de l'homme, et qui vont à l'encontre des traités d'investissements, sont souvent soupçonnées de masquer des arrière-pensées protectionnistes. L'invocation des droits de l'homme par l'État comme fait justificatif de sa conduite est souvent perçue comme un alibi ou une stratégie pour justifier la violation des traités d'investissements. Par conséquent, l'étude du contenu substantiel du régime juridique international des investissements étrangers nous permettra de déterminer et d'évaluer la prise en compte des droits de l'homme par celui-ci et de définir en quoi ils lui servent d'assise. Partant de ce contexte, nous montrerons les différentes formes de l'interaction des droits de l'homme dans ce cadre juridique. En effet, les accords relatifs aux investissements contiennent des normes de traitement et de protection qui établissent le droit des investisseurs étrangers à un certain traitement. Ces dispositions interagissent souvent avec des obligations en matière de droits de l'homme, favorables à l'investisseur étranger ou à des tiers. En fonction de leur définition évolutive, ainsi que de leur interprétation, certains standards sont plus adaptés pour interagir avec les droits de l'homme, tandis que d'autres présentent quelques difficultés dans ce sens. Ainsi, nous aborderons dans un premier temps les particularités des dispositions relatives à l'expropriation dans leur interaction avec les droits de l'homme et l'intérêt général. Ensuite, nous étudierons les règles matérielles dont l'interaction avec les droits de l'homme est plus aisée, c'est le cas de la flexibilité du standard de traitement juste et équitable, la similarité de la protection pleine et entière et de la sécurité avec les droits de l'homme ainsi que l'utilité de la technique des dérogations pour la prise en compte des droits de l'homme de la population locale.

Finalement, nous aborderons les particularités de la procédure arbitrale qui représentent des difficultés pour l'articulation liées à la compétence ainsi qu'aux conditions de recevabilité. Néanmoins, nous mettrons aussi en évidence l'adaptation des règles du contentieux arbitral des investissements qui pourraient faciliter une meilleure interaction avec les droits de l'homme. En effet, des modifications des règles concernant la transparence dans l'arbitrage d'investissement viseraient à établir sa légitimité au-delà des parties aux litiges et l'un des effets produits serait la prise en considération de l'intérêt général lors de la mise en œuvre de la procédure. Les nouvelles règles reconnaissent davantage le besoin de rendre publique la procédure et certaines prescrivent la possibilité de laisser participer les tierces parties. Ils incluent ainsi des clauses encourageant la publicité des procédures et des documents et l'admission des amici curiae, qui s'avèreraient des moyens utiles pour la prise en compte des droits de l'homme et de l'intérêt général dans les procédures arbitrales. Nous aborderons cette ouverture de l'arbitrage d'investissement, tout en évaluant l'impact réel sur la prise en compte des droits de l'homme.

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Revisiting the Margin of Appreciation in relation to Novel Cigarette Packaging Investor-State Disputes from a Public Health Perspective (Pei-Kan Yang)

The theory of "margin of appreciation", developed by the European Court of Human Rights, generally refers to how much deference the Court decides to accord individual states in fulfilling their obligations under the European Convention on Human Rights. This concept has been borrowed by the arbitration Tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) in Philip Morris v. Uruguay, an investment dispute involved with novel cigarette packaging regulations, requiring single presentation for each cigarette brand. While Philip Morris claimed the single presentation requirements (SPR) infringed investors' rights to use its trademark, the Tribunal applied the concept of margin of appreciation to recognize Uruguay's rights to regulate by adopting such an innovative tobacco control measure.

The World Health Organization (WHO), through the conclusion of the Framework Convention on Tobacco Control (FCTC), has obliged Parties to adopt a series of tobacco control measures including strict restrictions on cigarette packaging and brand marketing, considered to be effective means of preventing the youth and first-time smokers from smoking. Nonetheless, the SPR, one of the contested measures adopted by Uruguay, is not clearly prescribed in the FCTC or its guidelines. Given the SPR is even stricter than the cigarette packaging measures suggested in the FCTC guidelines, Philip Morris believed the commercial value of its brand asset has been seriously damaged due to this unprecedented regulation. The legality of such measure largely depended on how much margin of appreciation the Tribunal was prepared to grant the Uruguayan health authority to implement the SPR particularly when insufficient scientific evidences were provided by the defendant state. The Tribunal split over this particular issue as one of the arbiters offered his dissenting opinion on the applicability of the concept of margin of appreciation to the investment dispute.

This paper tries to examine whether and how the margin of appreciation theory could be applied by the investment tribunal to evaluate the legality of a newly introduced tobacco control regulation devoid of supporting scientific evidences. This paper will address this issue through the lens of public health policy, and argue that such concept can be properly adjusted to accommodate the right to regulate for public health purpose. While the final decision lacked comprehensive reasoning on the causal connection between the SPR and the public health ends on reducing the smoking rate among the youth, this paper argues that the Tribunal in Philip Morris v. Uruguay had made a first step towards a healthier resolution in tobacco investment disputes arisen from traditional bilateral investment treaties, and would make a profound impact on future tobacco investment disputes.

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Professor Yang received his LL.B. and LL.M. from National Taiwan University, College of Law in 1996 and 2002, and his J.D. and from Duke University, School of Law in 2006. He serves as a member of editorial committee of the Contemporary Asia Arbitration Journal (CAA) and the Asian Journal of WTO & International Health Law and Policy (AJWH). He also serves as a board member to the Society of Law and Medicine in Taiwan and a commissioner of Advisory Council for GMO Food under Ministry of Health and Welfare (MOHW). Professor Yang has been recommended on the roster of legal experts on Framework Convention on Tobacco Control (FCTC) by MOHW to the World Health Organization (WHO), and commissioned to assist MOHW in participating many sessions of Conference of Parties to the WHO/FCTC or engaging in various international exchange activities.

Protecting Cultural Heritage in International Investment Law: Tracing the Evolution and Treatment of Cultural Consideration in Recent FTAs and Investor-State Jurisprudence (Elsa Sardinha)

Aside from providing a window into the past and a gateway to better understanding the present, the underlying object of cultural heritage shares considerable affinity with various legal systems. It has spawned its own specific cultural legal schemes, which intersect and sometimes conflict with other regimes, such as foreign direct investment (FDI). States are increasingly acknowledging the challenging, and sometimes contradictory, interplay between the protection of cultural heritage and the promotion of FDI in the context of resolving their disputes through investor-State arbitration. Recent investment treaties and a handful of arbitral awards show that States and tribunals are turning their minds to the crosscutting issues that arise when cultural heritage intersects with, and sometimes disrupts, investors' expectations. It is time for scholarship to follow suit and contribute to the debate. Just like archaeologists working tirelessly to unearth humanity's cultural treasures, the task of international investment law commentators is to dig deep into the law and policy underlying the interactions and contradictions between cultural heritage and international law, and identify the best ways forward to protect and harmonize the sometimes incompatible objectives in these fields. This paper undertakes a comparative exploration of the cultural heritage protections included in the preambles and investment chapters of four recent regional free trade agreements (FTAs): the EU and Canada's signed, but not yet ratified, Comprehensive Economic Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP), which appears to be forging ahead as 'TPP-11' after the US's withdrawal, and the draft EU-Singapore and EU-Vietnam FTAs. With a view to drawing broader conclusions about the future of investment law and disputes involving a cultural heritage element, and in assessing where treaty-drafting practice stands today, the paper also takes a retrospective look at NAFTA – one of the first treaties to include provisions aimed at protecting cultural industries. The cultural considerations embedded within the preambles and investment chapters of these FTAs, albeit somewhat aspirational and non-

binding, can assist arbitral tribunals in interpreting the substantive provisions of these treaties in light of their object and purpose. Whilst all four treaties reflect a notable shift towards more precision and detail in treaty-drafting practice in both the articulation of procedural and substantive investment provisions, and a further enshrining of States' inherent right to regulate in furtherance of legitimate public welfare objectives, they differ in the extent to which they include cultural heritage protections. For instance, only CETA includes an express reference to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. In so doing, CETA evinces the growing complexity of this field of law, where several different regimes of international regulation interact. These FTAs also reflect a desire by States to remove regulation enacted for legitimate public welfare objectives from the reach of investors' claims, and provide arbitral tribunals with interpretive guidance. The discussion also examines a selection of cultural heritage-related investor-State awards; namely, Parkerings-Compagniet v. Lithuania, Glamis Gold v. USA, Bilcon v. Canada, SPP v. Egypt, and Santa Elena v. Costa Rica. Whilst the new generation of FTAs represent a deliberate effort by States to negotiate the sort of exceptions that they expect to see arbitral tribunals apply, it is important to consider how these might play out in future cases with a cultural heritage element. Reviewing the available case law is one way of predicting how arbitral tribunals might balance cultural interests against those of investors. To this end, the paper assesses whether these cases have adequately dealt with the cultural values at stake, as well as what implications this emerging jurisprudence might have for future disputes situated at the intersection of international investment law and international cultural law.

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Discussant

Stephan Schill is Professor of International and Economic Law and Governance at the Faculty of Law of the University of Amsterdam. He is also Editor-in-Chief of The Journal of World Investment & Trade, one of the major journals in international economic law.

He has published extensively on international investment law and international dispute settlement, including his monograph The Multilateralization of International Investment Law (Cambridge University Press, 2009) and International Investment Law and Comparative Public Law (Oxford University Press, 2010), which he edited.

Stephan Schill's current research focuses on international investment law, investor-state arbitration, European Union law and comparative public law. These fields come together in his European Research Council-funded project on 'Private-Public Arbitration as Transnational Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica'.

He also has practical experience in international law and dispute resolution. Being admitted to the bar in Germany (Rechtsanwalt) and in the State of New York (Attorney-at-Law), he serves as expert and arbitrator in international arbitrations, has acted as counsel before the European Court of Human Rights, and advises governments and international organizations on international investment law and policy. Since 2013, he is a Member of the List of Conciliators of the International Centre for Settlement of Investment Disputes (ICSID).

Panel IV: Investment Law and Access to Water

Chair

Catharine Titi is a tenured Research Scientist at the French National Centre for Scientific Research (CNRS) and Member of the CREDIMI, Law Faculty of the University of Burgundy. She is Co-Chair of the ESIL Interest Group on International Economic Law and Member of the International Law Association (ILA) Committee on the Rule of Law and International Investment Law. She co-directs the research project *The impact of international investment agreements on FDI flows* financed by the French Ministry of Justice (2017-2019). Catharine holds a PhD from the University of Siegen in Germany (*Summa cum laude*) and she has previously worked as a consultant at the United Nations Conference on Trade and Development (UNCTAD). In 2016, Catharine became the only woman to receive the prestigious Smit-Lowenfeld Prize of the International Arbitration Club of New York for the best article published in the field of international arbitration.

The Semantics of the Right to Water in International Investment Law (Fernando Dias Simoes)

The provision of water services has historically been considered a 'public service'. Since they serve key public interests, both ownership and operation of these services remained strictly within the public sector. However, for different reasons, a new paradigm emerged over the last decades, with private entities participating in the provision of water services by means of different instruments known as Public-Private Partnerships.

This process of transformation was accelerated by the wave of globalisation, increasing the importance of foreign investment. International legal frameworks governing foreign

investment – namely Bilateral Investment Treaties – frequently cover foreign investors who make an investment in the water sector. Disagreements over the performance of more than a dozen of such contracts have so far been submitted to investment arbitration. Foreign investors basically allege that certain acts or omissions of organs of the central government or local authorities, which resulted in damages to their investments, violate the host state's obligations under investment law.

These cases provide an eloquent illustration of how the semantics of citizens' right to water has been impacted by the internationalisation of water markets. Private involvement in this sector created a new dimension to how positive and negative duties in respect of citizens' right to water were traditionally perceived. Investment treaties accord foreign investors special substantive protections that also cover companies investing in foreign water markets. The problem is that international law did not adjust to these developments appropriately, leading to fragmentation of the international legal order. The relationship between investment law and the regulation of water services is tense and can become increasingly relevant in the future.

Both the rhetoric of 'water as a human right' and 'water as a public service' are commonly used to explain the intrinsic connection between water services and public interests. These argumentative tools are based on different legal and political considerations. However, they converge in the sense that they are used as regulatory safeguards that impose limitations to the commodification of water services so as to protect citizens' right to water. The use of the lexicon of human rights in investment arbitration replicates some of the arguments put forward by social movements that oppose private participation in water services, turning investment arbitration into a floor for heated legal and ideological discussions. The case may be framed as a breach not only of contractual provisions but of human rights obligations. Furthermore, it can be presented as a symbol of the failure of the Public-Private Partnership model and reinforce calls for a return to publicly-managed systems. Despite it evident connection to these disputes, the concept of 'public service' seems to be lost in the combat between investors and host states or, at least, when it makes a short appearance, it is disguised – wrapped in 'human rights' or 'public interests' considerations. The marketisation of water services eroded the concept of 'public service' and neglected its most importance consequence – the existence of 'public services obligations' borne by the service provider. The concept of public service has been absent from investment arbitration because it is stranded on domestic legislation, which has been consistently overlooked in favour of international law. An analysis of the existent case law illustrates the existent asymmetry between the legitimate expectations of the investor – which are grounded not only on the investment treaty but also on national law and contractual instruments – and the legitimate expectations of the host state, which find no protection on investment treaties and are frequently overlooked in arbitration proceedings because of the predominance of international law.

The importance of citizens' right to water has been acknowledged within the two different normative and analytical frameworks. While the human rights discourse has been gaining traction over the years, the lexicon of public services lacks a sound international dimension. However, both the human rights and the public services approach are crucial as they serve as regulatory safeguards against the untamed marketization of water services. Several authors have emphasised the need to assess the interaction between human rights and investment law when discussing water disputes. This paper argues that another assessment is necessary, focusing on the possible conflict between investor rights and

public service obligations. This exercise identifies several common points between the language of human rights and the narrative of public service obligations. What is more, it helps to clarify the unique nature of water services, which are regulated in different dimensions, both at the national (public service obligations) and international level (human rights obligations). This allows to reframe how citizens' right to water is structured and operated, both politically and legally, hopefully also contributing for a more assertive defence of citizens' right to water in future disputes.

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The Right to Water before Investment Tribunals (Ursula Kriebaum)

Investment and water are in a delicate relationship. Water is at the source of life and therefore not just a commodity, but also a scarce resource. Furthermore, water evokes strong emotions. Access to safe drinking water and potential degradation of water have played a role in many of the water-related investment arbitrations.

Into the 1980s, provision of water was often a state activity, carried out by governments through public utilities. During the 1990s, however, a trend towards infrastructure privatization in the developing world emerged. This was a result of the poor performance of the publicly owned water utilities in combination with economic crises, which led to a privatization of existing facilities.

In such circumstances, governments often turned to foreign investors to privatize formerly public services. The idea behind this process was that the private sector, mainly multinational water companies, would not only take over public water companies, but the expectation was that they would turn the formerly inefficient state entities into profitable enterprises that would invest in and expand the network. In this way, foreign investment was meant to serve as an instrument to further the implementation of development policy and human rights. This led to a situation where foreign investors were operating in fields where human rights obligations are incumbent on host States.

Two different types of investment cases have emerged that have an impact on water. One form of investment dispute that has arisen from privatisations in the water sector mainly concerns problems connected with physical access to water and affordability. Another set of cases concerns investments in different industries that have a potential to degrade water quality or have a negative impact on the maritime environment.

In water-related cases, investment tribunals have had to deal with disputes arising out of:

- disagreements between investors and authorities concerning tariff regimes and their effect on the affordability of water, especially, but not only, in times of economic crises,
- failures to establish the agreed number of connections due to non-compliance of an investor with an investment contract, as well as with
- threats of pollution to ground and drinking water resources and of risks of harm to the marine environment.

The purpose of my contribution is first, to assess how questions related to the right to water have been brought to the attention of
investment tribunals, second, how investment tribunals have dealt with water-related cases and third, whether the question of a human right to water had an impact on the findings of the investment tribunals. For that purpose I will look into three groups of cases: first, cases that deal with issues of access to water in terms of affordability; second, cases that deal with problems of physical access to water and third, cases that deal with the protection of the quality of the water.

The aim of the analyses is to identify patterns:

- who raised the human rights issue,
- what type of interference with investor's rights occurred (legal, administrative, interference with contract),
- how did tribunals deal with tensions between water related problems and investor rights.

Ursula Kriebaum is Professor for Public International Law at the University of Vienna, Department of European, International and Comparative Law. Ursula Kriebaum received her legal education at the University of Vienna (Austria) and the University of Bourgogne (Dijon, France). She received the Diploma of the International Human Rights Institute - Strasbourg in 1995, her Dr. jur (JD) with distinction in 1999, and her Dr. jur. habil. in 2008 (both University Vienna). She is the author of Eigentumsschutz im Völkerrecht. Eine vergleichende Untersuchung zum Internationalen Investitionsrecht sowie zum Menschenrechtsschutz (property protection in international law, a comparative study of international investment law and human rights law - "habilitation" thesis - Duncker & Humblot, 2008). Member of the Permanent Court of Arbitration, Alternate Member of the Court of Conciliation and Arbitration within the OSCE, Expert for the Human Dimension Mechanism of the OSCE appointed by Austria, Member of the Arbitration panel for the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States and the Republic of Korea. She is the author of several publications in the fields of international investment law as well as human rights law. She has also published on Austrian holocaust restitution issues. Her primary research interests lies in the areas of international investment protection law and arbitration and in international and European human rights law. She teaches International Law, investment la w and human rights law at the University of Vienna, acts as legal expert in international investment law and human rights law cases and as consultant for law firms and advisor to governments on investment law and arbitration
issues.

Urbaser v. Argentina: Private Actors and Public Goods in International Investment Law (Edward Guntrip)

Urbaser v. Argentina was the first investment award to comprehensively integrate principles sourced from international human rights law into international investment law. The award is particularly significant given that it addressed Argentina's counterclaim based on the human right to water. Although the counterclaim failed on the merits, the tribunal was able to analyse the specific interactions that arose from the intersection between the right to water and international investment law.

The tribunal in Urbaser v. Argentina found that foreign investors cannot engage in activities aimed at the destruction of human rights. In doing so, the tribunal generated obligations for 'private' non-state actors based on human rights instruments and soft law. Based on previous investment awards, the merging of human rights and foreign investors in this manner reveals a breakdown in the traditional distinction drawn between 'public' and 'private' in international investment law. However, in rejecting the counterclaim on the merits, the tribunal re-established this distinction. The tribunal used this classification to find that, as a 'private' non-state actor, the foreign investor was not directly bound by the 'public' state-based obligations associated with the right to water.

The public role of the state and the private actions of the foreign investor were not as clearly defined in this dispute as their legal status in public international law would indicate. The privatisation of the water supply service resulted in a non-state actor providing a public good. Further, it was the intersection of public and private that resulted in the tribunal generating the obligation on foreign investors not to destroy human rights. Given these intersections, it seems anomalous that the public/private dichotomy was determinative when the tribunal in Urbaser v. Argentina rejected the counterclaim. This paper examines the approach taken by the tribunal by considering the distinction drawn between 'public' and 'private' in international law and how these concepts are applied to states and non-state actors in international investment law. It is argued that these classifications must be revisited in order to reflect that private actors perform public functions and that states privatise public services. It is suggested that when the intersection of international human rights and international investment law is addressed, the public/private distinction must be relaxed so as to provide a legal framework that more accurately reflects the realities of the conduct being regulated. To enable this process to commence, the paper presents the concept of transnational jurisdiction. The underlying premise of this idea is that the status of actors in international law should not be the sole consideration that determines the legal outcome of a dispute. Before the applicable legal obligations are identified, reference should additionally be made to the function being performed by the relevant actor. Thus, transnational jurisdiction permits the intersection of international investment law and international human rights law to be addressed in a more holistic manner. In turn, this permits investment tribunals to take into account that private non-state actors provide public goods.

To develop these ideas, the paper first analyses the award in Urbaser v. Argentina with a particular focus on Argentina's counterclaim. It then draws out the dichotomies relied upon by the tribunal before considering their applicability to the dispute before the tribunal. The paper then suggests how to reform the current framework so that the use of the concepts of 'public' and 'private' and the standing of state and non-state actors more accurately mirrors investment disputes that involve the privatisation of public goods. It

does this by setting out the notion of transnational jurisdiction and explaining how its operation could have enabled the tribunal in Urbaser v. Argentina to accommodate the right to water as a public good in its award. The wider implications of adopting this approach are considered before conclusions are drawn.

Edward Guntrip is a Lecturer in Law at the University of Sussex. He completed his PhD at Brunel University in 2014. Edward's research focuses on how public international law governs economic activities in foreign jurisdictions and in areas beyond state jurisdiction. His recent publications address the intersection of international human rights law and international investment law. Edward has written blogs for *EJIL Talk!*, published in the *International and Comparative Law Quarterly* and is currently undertaking research for the United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.

International human rights obligations of investors in ICSID arbitration – The *Urbaser* award as an innovative but problematic approach to the protection of water as a public good in IIL (Patrick Abel)

This paper investigates the potential of investor obligations in ICSID arbitration for the protection of human rights, using the example of the 2016 ICSID award in *Urbaser v. Argentina*. The *Urbaser* case relates to the international human right to access to water in an unprecedented manner. On a principal level, the award serves as an example that IIL can play a role in giving greater weight to human rights, notably social, economic and cultural rights which are sometimes questioned to be justiciable. However, the Tribunal's argumentation on the inclusion of investor human rights obligations is not convincing. In contrast, the interpretative approach taken might endanger the effectiveness of both binding and non-binding human rights norms. Therefore, it is submitted that whereas, in general, the reference to human rights instruments is a welcome development towards a more balanced IIL, the Tribunal's specific doctrinal approach and reasoning should not be followed. Instead, other mechanisms for the imposition of investor obligations should be considered which have been applied in investment arbitration before.

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Discussant

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arbitrators for environmental disputes, Conciliator at the OSCE Court of Conciliation and Arbitration and Chairman of the Compliance Committee of the UNECE 1992 Water Convention.

Closing Remarks

Giorgio Sacerdoti is Emeritus Professor at Bocconi University, Milan, where he has taught since 1986 international law and European Law (Jean Monnet Chair 2004) and presently teaches advanced courses on International Trade and Investment Law, and seminars at the PhD program in International Economic Law which he established more than 25 years ago.
Besides having been Visiting Professor at a number of universities (such as Paris, Amsterdam, Jerusalem, Melbourne) he was Senior Braudel Fellow at the EUI in 2012 and has lectured at the Hague Academy.
From 2001 to 2009 Professor Sacerdoti was a Member of the Appellate Body of the WTO (selected among the candidates submitted by the European Union) which he chaired in 2006-2007. Previously he has been Vice-President of the OECD Working Group on Bribery in international business transactions (1995-2001) and was chairman of the drafting committee of the OECD Anti-bribery Convention of 1997. He has been often appointed as an arbitrator in interstate , investment and commercial disputes and is on the ICSID Panel of Arbitrators.
The author of more than 200 publications in his fields of interest, he is also on the editorial and advisory boards of international law journals.