



**Workshop of the ESIL Interest Group on  
International Economic Law**

# **The New Frontiers of International Economic Law**

**Riga, 7 September 2016**

**Room W-42, 4th floor  
Riga Graduate School of Law  
Strēlnieku iela 4A, Riga**

**hrs 10:30 - 17:00**

**h. 10:30 - 11:00**

**Inpulse Speech**

***Professor Ernst-Ulrich Petersmann, EU Leadership for Reforming Trade and Investment Law and Adjudication? Need for Respecting Fundamental Rights (European University Institute)***

**h. 11:00 - 12:45**

**Panel I: The Future of World Economic Law: New Mega-Regional Trade and Investment Agreements and the Proposed International Investment Court**

***Chair Laurence Boisson de Chazournes (Université de Genève)***

A Battle of Giants: The Development of the US and the EU Free Trade Agreements' Networks, *Panayotis M. Protopsaltis (Centre for American Legal Studies, Birmingham City University)* 15'

Regulatory Harmonization In The Mega-Regional Trade Agreements, *David Zaring (The Wharton School)* 15'

Addressing Competitive Neutrality in the New Mega-Regional Agreements and other FTAs: Provisions on SOEs, Competition and Subsidies *Leonardo Borlini (Bocconi University), Claudio Dordi (Bocconi University and EU-Vietnam Multilateral Trade Assistance Project)* 15'

The EU Investment Architecture: Towards Legal Certainty in an Uneven International Investment System?, *Maria Laura Marceddu (King's College, London)* 15'

*Discussant* Luciana Maria de Oliveira Sá Pires (University of São Paulo Law School (USP)), Vivian Daniele Rocha Gabriel (University of São Paulo Law School (USP)) 20'  
*Discussion* 10'

**h. 13:45 - 15:15**

**Panel II: International Economic Law and Sustainable Development and Climate Change**

*Chair*

Private Standards, Developing and Obligations of Governments in Contemporary WTO Law, *Moshe Hirsch (Hebrew University of Jerusalem)* 15'

Environmental and Economic Interests, Sustainable Development and Global Problem of Climate Change: Cooperation or Antagonism?, *Daria Boklan, Ilya Lifshits (Russian Foreign Trade Academy, Moscow)* 15'

The Times They Are a-Changin'? EU International Investment Agreements, Environment and Climate Change, *Francesco Montanaro (Bocconi University and Panthéon-Assas University (Paris II))* 15'

*Discussant* Elisa Baroncini (Alma Mater Studiorum - Università di Bologna) 20'

*Discussion* 10'

**h. 15:30 - 17:00**

**Panel III: International Economic Law and Economic Sanctions**

*Chair*

Security Exceptions in International Economic Agreements: Carte Blanche of the States?  
The Need for a Standard of Review, *Viktoriia Lapa (Bocconi University)* 15'

Sanctions and Regulatory and Police Powers of State, *Sergey Usoskin (AFFILIATION ???)*  
15'

Russian Economic Aggression against Ukraine: What is an Appropriate Response?,  
*Oleksandr Zadorozhnii (Affiliation ???)* 15'

*Discussant* Marina Fedorova (*St. Petersburg State University*) 20'

*Discussion* 10'

## ABSTRACTS & SHORT BIOS OF THE SPEAKERS

### **EU Leadership for Reforming Trade and Investment Law and Adjudication? Need for Respecting Fundamental Rights (Ernst-Ulrich Petersmann)**

Civil society opposition against the EU negotiations of transatlantic free trade agreements (FTAs) is justified by the fact that CETA and TTIP risk undermining fundamental rights, rule of law, democratic and judicial accountability of governments vis-à-vis citizens. Even though the 2016 CETA text ‘reaffirms’ and ‘recognizes’ human rights in two Preamble paragraphs, it does not refer to the fundamental rights protected by the EU Charter of Fundamental Rights (EUCFR). In contrast to claims by some EU officials, the Charter rights and related ‘proportionality principles’ limit also EU trade policy measures; according to Article 21 TEU, they must guide also the EU’s *external market regulations* and implementation of trade agreements. For example, Articles 16 (‘freedom to conduct a business in accordance with Union law’), 17 (right to property), 47 (right to an effective remedy and to a fair trial) and 52 (necessity and proportionality of restrictions) protect fundamental rights of ‘everyone’; they risk being violated by discriminatory FTA violations without effective judicial remedies inside the EU, for instance when citizens can neither invoke FTA rules in domestic courts nor their fundamental rights in the proposed CETA investment tribunal. Arguably, the ‘disempowerment’ of EU citizens through Article 30.6 CETA (no conferral of private rights, no direct applicability of CETA in domestic legal systems) and the narrow definition of the ‘applicable law’ in CETA investment tribunals (cf. Art. 8.31 CETA) limit the ‘right to an effective remedy’ beyond what is ‘necessary’ and ‘proportionate’ in violation of Articles 47, 52 EUCFR. The broad definition of the ‘applicable law’ in Article 42 ICSID Convention illustrates that investor-state arbitration often involves all three dimensions of international investment law, i.e. national laws, investor-state contracts, and international law rules applicable in relations among the home and host states involved. The EU proposals for new FTA investment rules ‘re-fragment’ these complex interactions among the interdependent ‘three levels of investment law’ and related adjudication in ways that risk to harm investors, discriminate EU citizens and risk undermining multilevel rule of law. Neither EU trade negotiators nor investment tribunals should circumvent national and European constitutional law through FTAs, or contractual obligations of foreign investors under domestic legal systems, in order to limit their own judicial accountability.

In Opinions 1/2009 (European Patent Court) and 2/2013 (ECHR), the CJEU emphasized the constitutional prohibition of unnecessarily limiting EU guarantees of protecting fundamental rights within the particular structures and restraints of EU law (e.g. cooperation between national and EU Courts through preliminary rulings). A legal opinion by the German Association of Judges concluded in 2016 that CETA limitations of the jurisdiction of national and EU courts for investor-state disputes are neither necessary nor consistent with EU law in view of alternative, more effective and more comprehensive legal and judicial remedies in European courts. The CETA provisions on the ‘right to regulate’ and on ‘exceptions’ do not secure that national and EU investment measures remain consistent with EU law (e.g. fundamental rights). Nor does CETA secure that legally binding rulings of the investment tribunal do not adversely affect EU law; and that CETA arbitration procedures meet the standards of Articles 47 EUCF and 6(1), 13 ECHR. Legal

and 'judicial privileges' for foreign investors discriminate against domestic investors inside the EU and risk to violate EU constitutional law (e.g. Article 18 TFEU). Articles 3, 21 TEU and the EUCFR require EU trade negotiators to protect the fundamental rights of *all EU citizens* by - comparatively more effective - domestic and EU judicial remedies, even if foreign trading partners insists on maintaining their different legal traditions (e.g. of providing for ICSID procedures for investment disputes in NAFTA countries). Alleged judicial deficiencies in some EU member states must be corrected and brought into conformity with EU law; they cannot justify undermining fundamental rights and rule of law inside the EU through FTAs and foreign arbitrators that risk to ignore EU constitutional law.

In relations among constitutional democracies, non-discriminatory application to foreign investors of the more developed European legal and judicial remedies offers higher standards than the fragmented 'arbitration system' proposed by the EU Commission. The transnational 'aggregate public good' of a transatlantic market requires - as prescribed in Articles 3 and 21 TEU - republican 'protection of citizens', 'strict observance of international law' (Article 3 TEU), and FTAs 'guided by the principles which have inspired (the EU's) own creation, development and enlargement' (Article 21 TEU). EU leadership for reforming WTO and investment law must respect fundamental rights in order to make transatlantic FTAs an instrument for transforming the 'disconnected UN/WTO governance' (e.g. by promoting a new 'WTO II' based on mega-regional FTAs). ICSID arbitration should be replaced not only among EU member states (as suggested by the EU Commission), but also in transatlantic relations. As 'global democracy' remains a utopia, multilevel governance of transnational public good requires stronger legal and judicial accountability vis-à-vis citizens.

**Ernst-Ulrich Petersmann** is Emeritus Professor of international and European law and former head of the law department of the European University Institute at Florence. During his 40 years of legal practice in German, European, UN, GATT and WTO governance institutions, he continued teaching international and European law at numerous universities in Germany, Switzerland, Italy, the USA, South Africa, China and India. He published 30 books and about 300 contributions to books and journals and participated in numerous academic associations (eg as chairman of the International Trade Law Committee of the ILA 1999-2014) and international dispute settlement proceedings (eg as secretary, member or chairman of GATT and WTO panels). His latest monograph on MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS - METHODOLOGY PROBLEMS IN INTERNATIONAL LAW will be published by Hart Publishing (Oxford 2016). Prof. Petersmann can be reached under [ulrich.petersmann@eui.eu](mailto:ulrich.petersmann@eui.eu).

## **A Battle of Giants: The Development of the US and the EU Free Trade Agreements' Networks (Panayotis M. Protopsaltis)**

Neo-realists and complex interdependence theorists conceive differently the interaction between States. Neo-realists consider that power preponderance of a single or of a coalition of states is highly undesirable because the preponderant actor is likely to engage in aggressive behaviour. They see balance of power as an equilibrating process that maintains peace by counterbalancing any State seeking superiority, distributing global

power evenly through external or internal balancing. They stress the role of power and prestige as driving forces in the creation of alliances, including international institutions, created by the most powerful States to further those States power in the international system. Without entirely rejecting the balance-of-power theory, interdependence theorists see the international states' system as a world of complex interdependence where states focus on economic growth and social welfare rather than on military security. States, they claim, use multiple channels of trans-governmental and/or trans-national contact in order to cooperate and establish relationships of mutual dependence. The reality lies somewhere between realism and complex interdependence, exemplified by the United States (U.S.) relations with China. The relations between the European Union (E.U.) and the U.S. are another example of the intersection between the neo-realist and complex interdependence ideal types.

E.U. - U.S. relations have been analysed in terms of competitive -rather than symbiotic-interdependence. Indeed, within the global economy, the E.U. and the U.S. are engaged in a form of structural competition in which each uses bilateral, regional and multilateral agreements to protect and advance their respective interests. The development of the E.U. Economic Partnership Agreements (EPAs) and Association Agreements and the U.S. Free Trade Agreements (FTAs) can thus be seen in the context of the competition between the U.S. and the E.U. The U.S. trade policy traditionally relied exclusively on multilateral negotiations but, since the mid-1980s, the U.S. turned to bilateral and regional agreements. This change was due to the slow progress of the E.U. towards economic integration in the 1970s and early 1980s as well as to the increase of the European trade power and the lack of European support for a new GATT negotiating round, leading the U.S. to take regional initiatives. Concerns over U.S. expansion of FTAs led Europeans to agree to new multilateral negotiations while the stalemate of the Uruguay Round offered the U.S., Canada and Mexico the opportunity to conclude the North America Free Trade Agreement (NAFTA). After the establishment of the World Trade Organisation (WTO), adopting the strategy of managed globalisation, the E.U. supported multilateral trade negotiations and introduced a moratorium on bilateral negotiations. As a response to the E.U. strategy, the U.S. adopted a strategy of competitive liberalisation. Since the mid-2000 both the E.U. and the U.S., relying on power and prestige, begun to establish their own networks of bilateral or regional free trade agreements or other agreements with a trade component with a number of weaker or regional groups of weaker countries. The collapse of the Doha Round in 2011 marked the beginning of a new era of intensive bilateral and regional free trade agreement negotiations.

Interestingly enough, henceforth, both the E.U. and the U.S. follow an identical pattern that involves negotiation into global, regional, plurilateral and bilateral level. The U.S. and the E.U. used the stick of exclusion and the carrot of access to their respective markets in order to establish their networks of FTAs and EPAs (and Association Agreements) respectively with selected, weaker like-minded countries or groups of countries chosen on political rather than on economic grounds. In the first part we will examine the history of the establishment of the U.S. FTAs and E.U. EPAs (and Association Agreements) networks in order to explain how, relying on the asymmetrical bargaining with their partners, the U.S. and the E.U. managed to dictate the agenda of the negotiations and the subsequent content of the FTAs, EPAs and Association Agreements. In the second part, we will examine the outcomes of the establishment of these networks. For, apart from a number of political benefits they collected, the U.S. and the E.U. used numerous alternative *fora*, on the bilateral and the regional level, for the introduction of trade rules, thus marginalising the WTO as a privileged forum for international trade negotiations. We will explain that the U.S. and the E.U. are henceforth able to choose the most advantageous venue for the

negotiation of trade arrangements and to accomplish with economically or politically weaker trade partners what they could not accomplish through the WTO, namely, to ensure liberalisation of their partners' markets beyond the WTO requirements without offering in return liberalisation on sectors they traditionally protected. Furthermore, through the extended conclusion of bilateral and regional trade agreements with like-minded countries, the U.S. and the E.U. will be able to neutralise the objections of countries unsympathetic to further liberalisation and thus dictate the rules of international trade on a multilateral level.

**Panayotis M. Protopsaltis** is a research fellow at the Centre for American Legal Studies, Birmingham City University, UK. He read law at the National and Kapodistrian University of Athens, at the University of Paris II (Panthéon-Assas) and at the University of Paris I (Panthéon-Sorbonne) from where he holds a doctoral degree in public international law. He has conducted research, contributed to publications and taught at universities in France, Greece, India and in the U.K. In addition to his academic work, he is a qualified lawyer in Greece.

### **Regulatory Harmonization In The New Regional Trade Agreements (David Zaring)**

The dramatic slowing of progress in the so-called Doha Round has led to the pursuit of free trade through other means. The trade consensus represented by the WTO has been stymied over the prospect of further concessions in trade in agricultural products, which have been exempted from much of the trade pact's tariff discipline and disputes over special concessions that permit formerly poor, but now increasingly wealthy, developing countries to retain some tariffs on manufactured goods. These disputes have essentially ended progress on a broadly multilateral trade accord, and has led the United States to instead pursue its free trade goals through so-called the two so-called mega-regional efforts, the Trans-Pacific Partnership and Trans-Atlantic Trade and Investment Partnership (TTIP). That country has also tried to conclude bilateral negotiations like the various free-trade deals with Latin America. The European Union has responded cautiously, with efforts to conclude a similar trade agreement with Canada, with a view to approaching the terms of the TTIP in a manner to its own liking, established by agreement with Canada. In addition, the presumable exit from the European Union by Britain could also lead to more bilateral, rather than multilateral progress.

All of these agreements contain provisions promoting regulatory cooperation, which has become a centerpiece of the new trade policy, as a tool to pursue the reduction of regulatory barriers through no treaty at all, but through soft law negotiations and agreements with foreign agencies. Business interests in Europe, and in particular in the United States have suggested that without provisions for international regulatory cooperation, mega-regional agreements like the TTIP are not worth concluding.

To achieve this end, the type of cooperation pursued is important; Kal Raustiala has argued that harmonization has created an alternative to trade rules, which as a general matter facilitate mutual recognition. But much of the conflict over the terms of mega-regionals have come over a question of regulatory harmonization; in particular whether counterparties in these agreements are willing to adopt a form of American administrative procedure, in particular so-called "notice and comment" rulemaking. Regulators in both

Europe and the United States have resisted enshrining notice and comment in the mega-regional trade deals.

Nonetheless, the trade negotiators have tried to do more with regulatory harmonization. The TPP and the TTIP make international regulatory cooperation progress the centerpiece of the effort. As Simon Lester and Inu Barbee have observed of the TTIP, a “recent survey of trade experts indicated that regulatory issues are ‘the most important overall to the agreement’.” In the case of the TPP, it is “regulatory coherence” that the United States, Australia, and New Zealand have urged the parties located in Asia to adopt.

The development of the TPP and TTIP reflects a concern among American leaders, and particularly within the American business community, that the free trade principles encompassed by the WTO’s agreements have failed to reduce sufficiently the technical barriers and regulatory health and safety barriers to trade. Indeed, it is probably fair to say that, on this reading, the barriers unaddressed by WTO treaties on Technical Barriers to Trade (“TBT”) and Sanitary and Phytosanitary Standards (“SPSS”) remain the principal barriers to free trade that remain. After all, tariffs, especially those between developed world countries, have for the most part been reduced to something quite close to zero.

The remaining constraints on would-be exporters are often bureaucratic ones: the need to obtain licenses to operate in other countries or to meet various health and safety standards before products can be shipped into foreign markets. It is these sorts of measures instead of, say, a 20 percent duty on goods, that now slow international trade.

Having surveyed the state of trade negotiations, and placed them in context, this paper concludes by recommending two changes that would legitimize the regulatory cooperation at the core of the mega-regional trade deals without requiring the deals to adopt any jurisdiction’s particular administrative procedure.

The first would encourage the networks that perform much of the work of regulatory cooperation to themselves adopt better procedures, as well as enhanced political oversight, without forcing their members to take on new obligations. In international financial regulation, for example, the evolution of international regulatory cooperation has been promising, if not uniformly perfect. It used to be that banking regulators, for example, worked with their foreign counterparts in utter secrecy through nontransparent networks. Now there are the international equivalents of advanced notices of proposed rulemaking, made available on the websites of groups of regulators working to create an international financial oversight architecture (and it appears that their websites are regularly updated), while the G20 itself, comprised of the political leadership of heads of states and finance ministers, exerts altogether more supervision over the regulatory process.

A second, more challenging requirement for international regulatory cooperation if it is to be adopted in the mega-regional trade deals is that it be paired with legislation, making it more than a simply technocratic exercise. Regulatory cooperation should not only be embraced through the back door of a trade deal; it must have a degree of political involvement and supervision. In the United States, the President has come out in favor of international regulatory cooperation in trade agreements, and that is a good thing, but Congress has not also endorsed the practice. The involvement of the G20, which is, after all, a club of heads of state, even if participation in it is not enjoyed by all states or leaders, also assuages some concerns.

The EU, perhaps more than anyone, needs to adopt accountable and at least arguably democratic checks on the regulatory harmonization components of a regional free trade agreement. Europe should not sign onto TTIP-style regulatory cooperation unless its parliament, its members, or the Commission have embraced procedural harmonization in a politically accountable way.

**David Zaring** is Associate Professor in the Legal Studies and Business Ethics Department at the Wharton School. He writes at the intersection of financial regulation, international law, and domestic administration. He has written over thirty articles, including publications in the Cornell, Michigan, NYU, UCLA, and Virginia law reviews, and a number of international law journals. In addition to teaching at Wharton, he has previously taught at the Bucerius, Penn, Washington & Lee, and Vanderbilt law schools.

## **Addressing Competitive Neutrality in the New Mega-Regional Agreements and other FTAs: Provisions on SOEs, Competition and Subsidies (Claudio Dordi, Leonardo Borlini)**

State-owned enterprises (SOEs), have always been an important element of most economies, including the most advanced ones. Whereas, the state sector has traditionally been characterised by orientation towards domestic markets, today, some contemporary state-owned enterprises are among the largest and fastest expanding multinational companies. They increasingly compete with private firms for resources, ideas and consumers in both domestic and international markets.

While emerging countries (e.g. China, Russia, Indonesia and Malaysia) show the highest SOEs presence among their top firms,<sup>1</sup> this phenomenon is widespread also in highly developed economies, especially in activities related to energy, infrastructures, telecommunication and financial services. The main concern, from an international trade law perspective, is how to ensure that state ownership do not provide advantages to SOEs altering the so-called ‘competitive neutrality’, i.e. the necessary leveled playing field ‘essential to use resources effectively within the economy and thus achieve growth and development’<sup>2</sup>.

In that matter, the multilateral regulatory framework is insufficient: WTO contains only provisions limited to State-trading enterprises, monopolies and exclusive services suppliers. Further, domestic competition legislations fall short of addressing the international trade concerns raised by SOEs. Indeed, the ‘existing regulatory frameworks that discipline some forms of anti-competitive behavior of SOEs have been designed with domestic objectives in mind or were conceived at times when the state sector was oriented primarily towards domestic markets.’<sup>3</sup>

The issue has been dealt with by several regional agreements of new generations, such as, for instance, the Trans-Pacific-Partnership (TPP), the EU-Korea FTA, the EU-Vietnam FTA and, according to the recent leaks, also the TTIP under negotiation.<sup>4</sup> These agreements include a chapter applicable to SOEs principally engaged in commercial activity. The SOE chapters, besides important provisions on transparency, include commitments by members to ensure that their SOEs make commercial purchases and

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<sup>1</sup> P Kowalski, M Büge, M Sztajerowska, M Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade Paper No. 147, 2013, p.5

<sup>2</sup> OECD, ‘Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business’, OECD, 2012:<http://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm>

<sup>3</sup> Kowalsky et al, (n 1), p. 12.

<sup>4</sup> See Consolidated Proposed SOE Text at: <https://www.ttip-leaks.org/>

sales on the basis of commercial considerations, with the exception of SOEs providing public services (or services of general interest, in the EU language). Moreover, Parties also agree to ensure that their SOEs or designated monopolies do not discriminate against the enterprises, goods, and services of other Parties.

The TPP provisions on SOEs, for instance, include obligations requiring TPP countries to provide their courts with jurisdiction over commercial activities of foreign SOEs, therefore impeding that a foreign SOE operating in a TPP country could evade legal actions regarding its commercial activities merely by claiming sovereign immunity. They also require Parties to ensure that administrative bodies regulating both SOEs and private companies do so in an impartial manner and do not use their regulatory authority to provide preferential treatment to national SOEs. Differently from the EU-model agreements, TPP specific provisions address governments' subsidy policy towards SOEs: the SOE chapter ensures that in providing any non-commercial assistance to SOEs, TPP Parties agree to not cause adverse effects to the interests of other TPP Parties, including a commitment from TPP Parties to not cause injury to another Party's domestic industry by providing non-commercial assistance to a SOE that produces and sells goods in the territory of another Party. Regarding enforceability, the provisions on SOEs included in such agreement are subject to the dispute settlement provisions, even if they are not subject to the chapters on investment and ISDS and on Government Procurement. On the contrary, the provisions on public enterprises and enterprises entrusted with exclusive or special rights of other PTAs, like the EU-Korea FTA, are not subject to the FTA dispute settlement system.

In analyzing in detail and in a comparative perspective the provisions of the mentioned agreements, the paper will answer to four main questions:

1. Are these provisions fit to improve competitive neutrality between private and SOIs within national jurisdictions and in international trade relations?
2. What is the impact of these provisions/chapters on the multilateral system of trade regulation, especially taking into consideration the exclusion, so far, of China (the leader in SOEs participation to the economy)?
3. How can the WTO+ provisions on subsidies and competition law contained in the same agreements contribute to address the issue of competitive neutrality?
4. To what extent are these provisions enforceable, considering their very formulation, whether or not they are subject to the dispute settlement mechanism set by the relevant agreements and, finally, the scarce utilization of State-to-State dispute settlement mechanisms in RTAs?

**Leonardo Borlini**, PhD, LL.M (Cantab.), Bocconi Department of Legal Studies, is Assistant Professor of EU Law and a qualified lawyer at the Bar of Milan. Dr. Borlini holds a BA cum laude in Economics and Business Administration from Bocconi University, a BA cum laude in Law from the University of Pavia, an LLM (Magister Legum) from the University of Cambridge, and a PhD in International Law and Economics from Bocconi University. He was visiting scholar at the Legal Department of the International Monetary Fund (Fall 2014), at the World Bank Institute (June 2011) and at Wolfson College, University of Cambridge, in 2008. He has been teaching in numerous academic institutions, including the State University of Milan, the Free University of Social Studies LUISS of Rome, the International Institute of Higher Studies in Criminal Science (ISISC), the Beijing Normal University, the Institute for Advanced Study of Pavia, (IUSS-University of Pavia), the Higher School of Public Administration of the Italian Council of Ministers, the Maxwell School of Public Affairs of Syracuse University and the Free University Institute "Luigi Cattaneo" of Castellanza. He has published nationally and internationally

on issues ranging from the international law and economics of corruption and anti-money laundering, to competition policy and antitrust law, international economic law, WTO and EU legal systems. Since November 2013 he is author for Lavoce.info. He is a member of the United Nations Expert Group working on Anti-Corruption Academic materials (Academic Initiative Against Corruption) and of the Wolfson College of the University of Cambridge (UK).

Besides his academic activity, Dr. Borlini exercises a number of consultancy work. In addition to the European Commission, the International Monetary Fund (IMF), the World Bank and the Inter-American Development Bank (IDB), he was a consultant for the Italian Competition Authority, KPMG, U4 -Anti-Corruption Resource Centre at Chr. Michelsen Institute, Transparency International and Grande Stevens Law Firm. He is currently a consultant, the Inter-American Development Bank (IDB), the Independent Committee for the reform of the anti-corruption prevention and compliance system of the Finmeccanica Group and for the European Union Commission and the Government of Vietnam in the context of the European Trade Policy and Investment Support Project (EU-MUTRAP).

At an international level, Dr. Borlini was part of the Italian delegation at both (i) the OECD Working Group on Bribery's meeting for the evaluation of the Italian implementing law of the 1997 OECD Anti-Bribery Convention and (ii) the V Conference of State Parties to the UNCAC in November 2013, (iii) to the UNCAC Implementation Review Group (IRG) on Prevention and Asset Recovery in September 2014, and (iv) as an expert invited to the OECD Working group on Bribery's on-site evaluation (phase three) of the national implementing law of the 1997 OECD Convention on corruption of foreign public officials in international business transactions and to on –site Third Mutual Evaluation of Italy by the Group of State Against Corruptions (GRECO; Council of Europe).

**Claudio Dordi** is Associate Professor of International Law at Bocconi University, Milan and Technical Assistance Team Leader of the EU-Vietnam Multilateral Trade Assistance Project.

### **Academic Achievements**

More than 60 publications in English and Italian. Books: besides the PhD thesis on “rules of origin in international trade”, a book on “trade discrimination in international law”, one on “EU rules of origin (co-authored), one on “the direct effect of WTO in selected countries and the EU”, one on WTO (ed.). In preparation: a book on “technical assistance in international law”. Articles published in main journals (Journal of International Economic Law, Journal of World Trade, and World Trade Review) and articles in book of the most prestigious publishers (Cambridge, Oxford, Kluwer and Palgrave). Teaching at all level (undergraduate, post-graduate and PhD), in Italian, English and French. Visiting in prestigious universities located in many different countries (Italy, France - Poitiers, Switzerland, WTI and SUPSI, US – Georgetown Law School and Columbia, China - Canton, Brazil – Ministry of Foreign Affairs, Nicaragua – Thomas More University, Vietnam – Foreign Trade University, National Economic University and Diplomatic Academy of Vietnam, Hong Kong – HK Chinese University, Solvay/Brussels Business School). Main subjects: International Public Law, International Trade Law, International Economic Law, EU law, WTO law, International Business Law, the Governance of International Organizations, the law of international development and technical cooperation, the law on investment, the international circulation of services. Director of the PhD Program in International Law and Economics. Speaker to more than 150 among academic conferences, technical workshops and seminars.

### **International Research and consultancy for Government and International Organizations**

EU: Ten-year experience in promoting Vietnam's integration into the global (WTO) and regional (ASEAN, ASEAN Economic Community, bilateral FTAs) trading systems, to enhance EU-Vietnam relations in the context of a project implemented in cooperation with the Government of Vietnam. Member of "eminent group of expert" appointed by former Commissioner Mandelson (2006-2007) in charge of the revision of the EU system on trade defense measures. Auditions at the European Parliament on Trade Defense Measures (2007-2008), to discuss about the impact of trade defense measures proposed revisions

World Bank: Experience and research aimed to promoting adequate WTO-consistent sanitary standards in developing countries (2007)

APEC: Settlement of international trade disputes, with special attention to trade defense measures (2008)

UNCTAD: Expert for the GSP section, developing new GSP rules of origin (1995-1997) and Observer at the Technical Committee on Rules of Origin at the World Customs Organization (1995-1997)

Italy: Support the relations of Italia-Vietnam through the implementation of a technical cooperation program (2005)

Vietnam: Support to trade negotiations for a number of international agreements (ASEAN+1, Trans Pacific Partnership and a number of bilateral agreements, including the EU-Vietnam FTA). Training for Government officials on a number of subjects: trade negotiations, World Trade Law, ASEAN integration, ASEAN Economic Community, EU law (external relations)

### **The EU Investment Architecture: Towards Legal Certainty in an Uneven International Investment System? (Maria Laura Marceddu)**

The Investment regime is currently under attack from multiple directions. Legal uncertainty is one of the most recurrent remark. Hefty scepticism has been raised against the lack of uniformity among arbitral tribunals' decisions – fuelled by different views on points of law and contradictory interpretations even on similar legal and factual situations. This has progressively led towards increased ambiguity and fragmentation, leaving States unsatisfied with treaties' interpretation, notwithstanding their voluntary delegation of authority to arbitral tribunals to do so. Therefore, the existing mechanisms seems to be no longer adequate. What if the EU will challenge these assumptions?

The EU is currently drafting up its international investment agreements, paving the way for ensuring the evolution of the constitutive, in many respect even standardised, features of investment treaties under different investment environments.

At the level of applying investment rules, the EU is designing a new investment architecture apt to provide greater predictability and consistency, as set in the 2016 CETA agreement; in the Free Trade Agreements with Vietnam and, to a less extent, with Singapore; as well as in the TTIP draft chapter on investment.

The EU advances the idea of a triadic dispute settlement structure, which comprises the Tribunal, an Appellate Tribunal and a centralised treaty interpretation mechanism: the Joint Committee.

The main thesis this paper aims to display is that legal certainty can be obtained through increased consistency, arguing that the EU is likely to be a suitable venue to best achieve that result. All these novelties are likely to make the EU investment approach irresistible to

other countries, because they hold the potential to considerably have economic and political influence, along with significant commercial leverage. However, before this happens, the Commission needs to further clarify some still controversial points. Nevertheless, it remains to be seen whether this model will be adopted even with China or other developing countries.

**Maria Laura Marceddu** (maria\_laura.marceddu@kcl.ac.uk) began her PhD at the Dickson Poon School of Law in October 2014. Her doctoral research examines the evolution of the emerging European investment policy.

She was recently visiting the department of International Law and Dispute Resolution of the Max Planck Institute Luxembourg for Procedural Law, as she has been awarded of a scholarship for foreign scholars.

Prior to this, she regularly collaborates as a research assistant on various projects at the AIA (Italian Association for Arbitration).

Maria Laura has been a member of the 2015 International Graduate Legal Research Conference committee. She is also one of the 20 worldwide ambassadors of the 2015 Paris Arbitration Academy.

She holds a BA (*Laurea Triennale*) in Political Sciences and an MA (*Laurea Specialistica*) in International Relations (*magna cum laude*) at LUISS University of Rome, where she has also been appointed as a teaching assistant. Whilst there she won numerous academic awards such as the ENI S.p.A Dissertation Research Abroad Fellowship.

## **Private Standards, Developing Countries and Obligations of Governments in Contemporary WTO Law (Moshe Hirsch)**

The rapid proliferation of private standard schemes has attracted the attention of numerous experts and policy-makers, and proved to be a sensitive issue for developing countries. On-going discussions in the WTO bodies raise significant questions regarding the proper interpretation of existing provisions included in the SPS and TBT agreements, as well as fundamental issues relating to the duties of the WTO member states with regard standards adopted by non-governmental actors (such as GlobalG.A.P.).

Private standards often aim to protect the environment (e.g., relating to climate change) or public health and they constitute a source of concern for developing countries. Though these standards are not legally binding, they occasionally constitute 'industry norms' and significantly constrain retailers and producers, thus influencing trade flows. Such impacts on international trade and the multiplication of schemes led some countries and economic operators, particularly of developing countries, to raise certain concerns; particularly those relating to questions regarding consistency of some private standards with the WTO legal rules (e.g., with respect to transparency and sufficient scientific basis) and corresponding obligations of the WTO members states. Since 2005, WTO bodies have discussed these and other issues which have proved to be controversial. Recent negotiations in the SPS Committee failed to produce an agreed definition for 'private standards for food safety'. The TBT committee has also discussed private standards, but the applicable legal rules remain a source of significant uncertainty.

The New Sustainable Development Goals of the 2030 Agenda adopted at the UN Sustainable Development Summit in September 2015 are likely to intensify the employment of private standards and similar non-governmental initiatives. This is

particularly prominent regarding Goal 7 (concerning sustainable energy), Goal 8 (concerning sustainable growth and decent work), Goal 12 (concerning sustainable consumption), and Goal 13 (concerning combatting climate change). In light of the impact of these measures on environmental protection and export opportunities of developing countries, the proposed paper aims to address several legal questions regarding private standards, particularly those relating to the scope of WTO member states' obligations. International economic legal doctrine has not yet developed a coherent doctrine regarding the duties of states regarding private economic operators and the extent to which relevant rules deriving from the ILC Articles on State Responsibility should be applied. Consequently, this paper would examine the WTO law and its interaction with the particular rules of public international law in this sphere. The paper will analyze **(1)** the particular WTO provisions (inter alia, Articles 1.1, 13 and Annex A(1) of the SPS Agreement, as well as Articles 1, 4 and Annexes 1 and 3 of the TBT Agreement) and discuss the proper interpretation of certain terms, such as 'standard' and 'reasonable measures' undertaken by the WTO Members designed to ensure compliance by non-governmental bodies with the relevant provisions of these Agreements; **(2)** the GATT/ WTO jurisprudence regarding member states' duties relating to acts undertaken by private actors, prominently *Japan - Semi-Conductors*, *Argentina – Hides and Leather*, *Japan - Film*, and standards and non-mandatory legislation, particularly in the *US – Tuna II (Mexico)*, and *US-Section 301 of the Trade Act*; **(3)** the relevant provisions of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (prominently Articles 4, 5, 8, 11) and the jurisprudence of international tribunals regarding these provisions. An initial examination of the GATT/WTO jurisprudence and international tribunals' interpretation of state obligations under international customary law reveals some divergent tendencies; the latter appear to be more amenable to imposing responsibility and certain obligations on states regarding acts of private parties. The paper would briefly discuss factors motivating these different approaches, and particularly with regard to private standards.

The envisaged analysis would enable us to present our conclusions on the proper interpretation of the SPS and the TBT provisions relating to possible obligations of WTO members concerning private standards and their scope. These conclusions are also likely to be relevant for the interpretation of some provisions included in new and forthcoming major 'mega regional agreements', such as Transatlantic Trade and Investment Partnership (TTIP).

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## **Environmental and Economic Interests, Sustainable Development and Global Problem of Climate Change: Cooperation or Antagonism? (Daria Boklan, Ilya Lifshits)**

Environmental aspect of the sustainable development concept (SDC) has various economic implications in the context of global climate change and from international legal standpoint. Authors analyze how the SDC environmental aspect affects the international economic law in particular in trade, in investment and in financial relations with regard to climate change.

The objective of the United Nations Framework Convention on Climate Change (UNFCCC) is an environmental protection; however this objective shall be reached in a way that would not lead to economic discrimination and would not impose trade restrictions. Furthermore all states-parties to the UNFCCC are also members of the WTO. Trade in GHG emissions quotas set forth in Kyoto Protocol to the UNFCCC constitutes international trade subject to WTO rules.

It was noted by Pascal Lamy that the “issue of Climate Change intersects with international trade in a multitude of different ways. While the WTO does not have norms that are specific to climate change per se, there is no doubt that the rules of the multilateral trading system as a whole — the WTO “rule book” — are indeed relevant to climate change”. The application of latest 2015 Paris Climate Agreement as well as application of WTO Environmental Goods Agreement (EGA) is of high importance from that perspective. The interrelation between direct foreign investments and sustainable development has two sides. On the one side, direct foreign investments support sustainable development. On the other side, sustainable development itself encourage cooperation between the states and foreign investors. So called “green investments” – are investments designated for implementation of environmental technologies all over the world and in developing countries first of all.

Flexible Mechanisms set forth in Kyoto Protocol, namely Joint Implementation Projects and Clean Development Mechanism connected with international investment relations faced serious difficulties in the process of implementation. Paris Climate Agreement is supposed to be the next step on the hard way of solving global climate change problem inter alia by international exchange of the new technologies.

The SDC has been affecting international financial relations over last decades. The World Bank created Global Environmental Fund (GEF) for efficient achievement of sustainable development. According to the Environmental Strategy of the World Bank “the Bank has accepted the mandate to help client countries address the objectives of the international environmental conventions and their associated protocols, including the conventions on climate change”. UNFCCC is the one of such environmental conventions. GEF works as a financial mechanism of the UNFCCC implementation as well as of the Paris Climate Agreement. Creation of such kind of financing mechanisms may help in the sphere of environmental protection on the one hand and sustainable economic development on the other hand.

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### **The Times They Are a-Changin'? EU International Investment Agreements, Environment and Climate Change (Francesco Montanaro)**

Traditionally, International Economic law has had little to say about environment and climate change. Environmental concerns have often been regarded as an expedient to disguise States' protectionist and statist stances. And yet (transnational) business activities contribute to the process of "anthropization" of nature and to climate change. This attitude is all the more present in International Investment law (IIL). With roots in the aftermath of the decolonization process, IIL has generally been aligned with the interests of developed capital-exporting countries. Not surprisingly, it has prioritized investment protection, whilst overlooking non-economic interests, such as environment protection. The broad substantive investors' guarantees and the lack of rules governing the knotty relationship between foreign investment and environment in the International Investment Agreements (IIAs) epitomize the "mono-dimensional" attitude that has characterized IIL for long. However, since the beginning of the 2000s a number of factors, not least the new trends in global capital flows and the reaction of civil societies across the world, prompted a gradual change in Investment treaty making. A number of States and, most notably Canada and the US, framed new and "more balanced" international investment policies, which could better accommodate investment protection and other interests, including environmental protection and climate change.

Against this backdrop, the EU has recently stepped into the International Investment law-making arena. In fact, its competence in the field of foreign investment underwent substantial modifications with the entry into force of the Lisbon Treaty. The "new" Article 207 of the TFEU confers on the Union the power to enter into international treaties concerning foreign direct investment. Although the scope of the EU's competence in this field is still a matter of debate, the EU has embarked on an ambitious treaty programme, with the Investment Chapters contained in the Comprehensive Economic and Trade Agreement (CETA) with Canada, the EU-Singapore Free Trade Agreement and the EU-Vietnam Free Trade Agreement.

This study looks into these treaties to assess the extent to which they incorporate environmental concerns in their investment protection framework. Notably, it ascertains whether these treaties further the "rebalancing" initiated by most recent investment treaty practice by looking into the key substantive investors' guarantees and the rules protecting environmental interests.

In terms of the former, it examines the fair and equitable treatment (FET) and the expropriation clauses set out in these treaties in light of the clauses adopted in less recent

treaties and, notably, the EU Member States' bilateral investment treaties. The analysis of the FET clause appraises the degree of precision in which the constitutive sub-elements of this standard are defined. The examination of the expropriation clauses, instead, focuses on the distinction between indirect expropriation and legitimate exercise of the regulatory power. In both cases, the main question is whether EU IIAs curbed the degree of protection afforded to investments thereby creating more regulatory space to pursue environmental policies.

Subsequently, it turns to consider the rules aimed at integrating environmental interests into the protection of foreign investments. To begin with, it appraises how the agreements under consideration reconcile their own obligations with those stemming from environmental agreements. Then, it looks into the dispositions modelled after the WTO Article XX (general exception clause) and assesses how they interact with the main investors' protection rule.

With this in mind, it attempts to evaluate whether these new rules could bar investors from challenging measures adopted to tackle climate change. In this respect, it will conduct a case study on the EU emission trading system. After outlining the content of this scheme, it seeks to assess whether the latter could violate some of the investment protection rules set out in the EU IIAs; and whether this could be justified under the provisions safeguarding non-investment interests contained therein.

On the basis of these findings, this study argues that the EU IIAs does not bring even further the "more balanced" approach characterizing the most recent IIAs by fully encapsulating environmental concerns. Finally, it seeks to suggest some possible improvements that could enable future EU IIAs to fully absorb the environmentalist *ethos*.

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## **Security Exceptions in International Economic Agreements: Carte Blanche to the States? The Need for a Standard of Review (Viktoriiia Lapa)**

Recent economic sanctions imposed by the EU and the US on Russia over its actions in Ukraine revived a discussion on security exceptions in international law. By security exceptions, I mean the clauses that exempt states from respecting their treaty obligations in cases where they need to protect their security interests. In international economic agreements the most prominent example is Article XXI of GATT that provides:

"Nothing in this Agreement shall be construed

... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ...

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligation under the United Nations Charter for the maintenance of international peace and security."

Security exceptions are used to justify the application of sanctions. However, given the ambiguity of such provisions, states could use the sanctions not only to restore peace, but also to protect their own economies in times of international conflict. In order to ensure that the adoption of sanctions is genuinely justified by security exceptions and to limit the abusive uses of sanctions, a more precise standard of review is in urgent need of elaboration. The standards of reviews discussed by the paper will be three: (i) total discretion (ii) margin of appreciation and (iii) no discretion. After an overview of these three standards of review which are often encountered in international law, the research will try to propose the most appropriate standard of review to ensure that states don't abuse their right to adopt sanctions under the umbrella of security exceptions.

In order to do so, I will first survey the various security exceptions provided under different international agreements and then proceed with an analysis of the relevant case law. Since there is no WTO case law on the matter, the study will analyse decisions coming from other international adjudicatory bodies. In particular, international investment arbitration awards, ICJ and ECtHR decisions could provide a guidance on the possible standard of review. I will look, for example, into investment arbitration awards such as *LG&E v. Argentina*, *CMS v. Argentina*; relevant ICJ decisions such as *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* and finally ECtHR decisions on Art.8-11 of the ECHR (with regard to the national margin of appreciation).

Following the analysis of the case law the study will delve into the different standards of review adopted in these cases. Preliminary evidence suggests the emergence of three main standards of review: "total discretion standard" - when the state could decide which sanctions to apply and no international tribunal could review the actions of the state; the so-called "national margin of appreciation standard" - when the state could adopt the sanctions within established boundaries (the standard is similar to one that is used in ECHR case law); and lastly the "no discretion standard" - when the state could adopt the sanctions under the umbrella of security exceptions only when it complies with precise requirements prescribed by the standard.

The last part of research will try to propose a right standard of review by picking up elements from the different standards of review discussed above.

To date, none of the countries involved in the Ukrainian conflict brought a case concerning the adopted sanctions. Nonetheless, Russia, during the 10<sup>th</sup> WTO Ministerial Conference in Nairobi asked to clarify Article XXI of the GATT (concerning Security Exceptions). This action might allow to predict that Russia is preparing to bring a claim under the auspices of the WTO. Whether it is the case or not, the security exceptions provisions remain an important unsolved issue in international economic law. It thus might be the right time for opening the Pandora's box of Article XXI of the GATT and try to propose mechanisms that would limit the abusive use of sanctions.

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## **Sanctions and Regulatory and Police Powers of State (Sergey Usoskin)**

Interaction between unilateral sanctions and investment treaty law has not attracted significant academic attention until recently [but e.g. A. van Aaken (2015), P.-E. Dupont (2015) F. Ghodoosi (2014)]. No investment claims by targeted individuals or businesses against countries that had imposed the sanctions have been reported so far. Yet the situation appears likely to change. Sanctions increasingly target not terrorist organizations and their leaders, but businessmen and companies coming from countries, such as Belarus, Egypt, Syria, Russia or Ukraine (that have entered into bilateral investment treaties (BITs) with the EU countries). Representatives of latter group are more likely to own protected investments in the respective countries. Russia in turn imposed sanctions on Turkish businesses and there is a BIT in force between Russia and Turkey.

Existing discussion focused on whether sanctions can be justified as countermeasures against the states of nationality of the respective individuals or companies [van Aaken] or substantively excluded from BIT protection by non-precluded measures / 'security exception' clauses in [van Aaken, Ghodoosi]. In their discussion authors almost assume that if States are unable to rely on these defences sanctions would amount to violation of the BIT guarantees, including expropriation and fair and equitable treatment [in particular Dupont (2015)].

The paper will look at the compatibility of sanctions with the imposing States' obligations under BITs on a different level. It will explore whether temporary freezing of their assets in the respective states coupled with the ban on performance of contracts with sanctioned parties violate substantive provisions of the BITs. In particular, it will consider whether such actions amount to expropriation or breach of fair and equitable treatment standard. To answer this question it will explore whether sanctions fall within normal police or regulatory powers of States that according to consistent jurisprudence of investment tribunals do not constitute expropriation.

The paper will use sanctions imposed by the EU against Russian and Ukrainian businessmen and Russian sanctions against Turkish businesses as case studies. There are three reasons for choosing these examples. First, there are BITs in place between most of the EU States and Russia and Ukraine and between Russia and Turkey, which places them in a different situation from the US that does not have a BIT in force with Russia. Secondly, particularly the EU sanctions allow considering more nuanced questions concerning the different grounds for imposition of sanctions. For instance, sanctions against Russian businessmen are based on their alleged closeness to the Russian President (e.g. Kovalchuk, Rotenberg), whereas some sanctions against Ukrainian businessmen are based on their alleged involvement in criminal activity (e.g. Kurchenko). Thirdly, the Russian sanctions against Turkish businesses do not involve freezing of their assets in Russia, but rather restrict their operations in Russia and in this respect are arguably less likely to constitute indirect expropriation of investments.

In considering whether sanctions comply with the substantive BIT standards the paper will argue that certain limited restrictive measures against individuals and businesses may well fall within the scope of the regulatory power of the State and as such do not amount to indirect expropriation. This will be the case in particular where these measures are based on reasonable allegations of the targeted person's involvement in illegal or criminal conduct. However, for the sanctions to be compatible fall within the regulatory powers exception and be compatible with the State's obligation to accord fair and equitable treatment the measures should not be arbitrary and be imposed in accordance with due process of law.

In considering whether the EU sanctions in particular are compatible with the fair and equitable treatment standard the paper will look at the remedies available to the

sanctioned individuals and businesses. It will argue that the current system does not comply with this standard. This is because the General Court's power to review the sanctions and particular the grounds the EU Council chooses to impose sanctions on is severely limited and the review itself is ineffective since the Council may 'reimpose' the sanctions for essentially the same reasons after they had been annulled by the court.

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### **Russian Economic Aggression against Ukraine: What is an Appropriate Response? (Oleksandr Zadorozhnii)**

The Russian Federation has become subject to economic sanctions of the European Union and the United States as a consequence of its unlawful annexation of Crimea and military intervention in the east of Ukraine. However, the Russian aggression is not limited solely to the use of armed force. The economic aspect of the aggression is also damaging to the national security of Ukraine. Russia has long resorted to economic coercion as a tool in its relations with Ukraine betting on the economic potential and influence to discourage Ukraine from signing the Association Agreement with the EU. Head of the EU Delegation to Ukraine Yan Tombinskiy fairly noted, Russia had been limiting the access of Ukrainian goods to its markets since 2012.<sup>5</sup> Russian economic aggression became salient following the commencement of the free trade area between Ukraine and the EU.

In December 2015, Russia unilaterally suspended the FTA concluded under the aegis of the CIS with respect to Ukraine.<sup>6</sup> On 1 January 2016, Russia completely ceased the transit of Ukrainian goods through its territory.<sup>7</sup> Furthermore, a list of Ukrainian goods is subject to rigid import ban<sup>8</sup>. These actions constitute violations of Russia's international

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<sup>5</sup> Zahidna informaciyna korporatsia [Western information corporation], *Tombinskiy: Sanktsiyyi Rosiyyi proty Ukrayiny pochalyisia shche v 2012* [Tombinskiy: Russia's sanctions against Ukraine had commenced as early as in 2012], available online at [http://zmiya.com.ua/page/56602f067f794b4dc6438d1b/news/2015/12/03/tombinskyy\\_sanktsii\\_rosii\\_protly\\_650677](http://zmiya.com.ua/page/56602f067f794b4dc6438d1b/news/2015/12/03/tombinskyy_sanktsii_rosii_protly_650677) [in Ukrainian].

<sup>6</sup> O priostanovlenii Rossiyskoy Federatsiyyey deystviya Dogovora o zone svobodnoy trgovli v otnoshenii Ukrainy: Ukaz Prezidenta RF ot 16 dekabria 2015 goda №628 [On the suspensions by the Russian Federation of the operation of the Agreement on Free Trade Zone with respect to Ukraine: Decree of the President of the RF of 16 December 2015 No. 628, available online at <http://issuu.com/tradedefence/docs/stop-zona-site-dok> [in Russian].

<sup>7</sup> Press-služba Minekonomrozvytku [Ministry of Economic Development Press Office], *Shchodo sytuatsiyyi z peretynom ukrayinskymy tovaramy kordonu Ukrayina-Rosiyska Federatsiya stanom na 4 sichnia 2016 r.* [On the situation with Ukrainian goods crossing the Ukrainian-Russian border as of 4 January 2016], available online at: [www.me.gov.ua/News/Detail?lang=uk-UA&id=bfa95df4-7f32-432e-9a2f-721451f4ade1&title=SCodoSituatsiyyiZPeretinomUkrainskimiTovaramiKordonuUkrainaRosiiskaFederatsiiaStanomNa4-Sichnia2016-R-](http://www.me.gov.ua/News/Detail?lang=uk-UA&id=bfa95df4-7f32-432e-9a2f-721451f4ade1&title=SCodoSituatsiyyiZPeretinomUkrainskimiTovaramiKordonuUkrainaRosiiskaFederatsiiaStanomNa4-Sichnia2016-R-) [in Ukrainian].

<sup>8</sup> On 13 August 2015, the Government of the Russian Federation adopted the Resolution No. 842 by which Russia introduced a ban (embargo) on import of certain kinds of agricultural products, raw materials and food to the Russian Federation from Ukraine. The ban came into force on 1 January 2016 and will be effective at least until 5 August 2016.

obligations, elaborated on below, thus giving rise to its international responsibility and entitling Ukraine to take appropriate countermeasures.

Russia suspended the operation of the FTA contrary to the provisions of the FTA and the Vienna Convention on the Law of Treaties ('VCLT'). The FTA does not provide the possibility to suspend its operation between parties - Article 25 thereof only allows for withdrawal.<sup>9</sup> Neither does the suspension of the FTA comply with the provisions of the VCLT, particularly, Article 57, which prescribes that treaties be suspended '... in conformity with the provisions of the treaty, or... by consent of all the parties after consultation with the other contracting States'.<sup>10</sup> Since the FTA does not contain rules on suspension, consent of the parties should have been obtained, which was never requested though.

In addition, the law enacting the suspension was accompanied by the government's explanatory note, invoking *rebus sic stantibus* doctrine. However, the invocation is untenable, as a change in circumstances – the entry into force of the EU-Ukraine Association Agreement – could have been foreseen at the time of the conclusion of the treaty: when the FTA was signed, Ukraine had already started negotiations on the Association Agreement. Moreover, Article 18 of the FTA stipulates that parties are not precluded from participation in customs unions or free trade agreements, therefore, Russia cannot claim that the absence of such agreements constituted 'essential basis' of its consent to be bound by the treaty. Thus, there was no fundamental change of circumstances to justify the suspension. The subsequent ban on the transit of Ukrainian goods constitutes an even more serious violation: the FTA suspension being unlawful, transit ban violated that treaty, and most importantly, Russia's obligation under Article V of the GATT. Finally, import ban, introduced by Russia, is a quantitative restriction prohibited by GATT Article XI.

In such circumstances, the Ukrainian government set the most favored nation tariff rates on Russian goods and prohibited import of some of them. Such actions constitute countermeasures, permitted by the general international law and - in this instance – by the WTO rules as well (presumably, Ukraine relies on GATT Article XXI protecting its national security interests). Customary international law rules on state responsibility, reflected in the Articles on Responsibility of States for Internationally Wrongful Acts, expressly allow non-performance of treaty obligations by an injured state to induce the compliance of a responsible state (Article 49) and preclude the wrongfulness of this conduct (Article 22).<sup>11</sup> Additionally, non-performance practically amounting to trade restrictions, the WTO rules should also be adhered to. Generally speaking, the WTO members should restrain from unilateral measures in response to violations.<sup>12</sup> However, Article XXI of the GATT permits '... any action which [the contracting state] considers necessary for the protection of its essential security interests ... taken in time of war or other emergency in international

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<sup>9</sup> Internet-portal SNG [CID web-portal], *Dogovor o zone svobodnoy trgovli* [Agreement on the Free Trade Zone], available online at <http://www.e-cis.info/page.php?id=20062> [in Russian]

<sup>10</sup> *Vienna Convention on the Law of Treaties*, UNTS 1155 (1969): 331.

<sup>11</sup> The United Nations, *Responsibility of States for Internationally Wrongful Acts*, 2005, available online at: [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)

<sup>12</sup> Article 23, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)

relations'.<sup>13</sup> The exception is undeniably applicable in the present situation. Firstly, the transit ban and denial of free trade regime by Russia should be set against the background of the Russia's aggressive war against Ukraine, so the reciprocal restrictions by Ukraine are '...taken in time of war or other emergency in international relations'. Secondly, given the economic hardships that Ukraine faces as a result of Russia's economic and military aggression, this transit ban is not a mere trade restriction but a serious threat to economic stability and security of Ukraine.

While the lawfulness of Ukraine's countermeasures is self-evident, one should further note that Russia's aggression undermines the very basis of global peace and security, thus, it is a global community's security interests that are threatened, and economic sanctions are among few tools to protect these interests.

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<sup>13</sup> GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

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## **SHORT BIOS OF CHAIRS AND DISCUSSANT**

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