



## ESIL International Economic Law Interest Group Workshop of the ESIL IEL IG at the 2019 ESIL Göttingen Research Forum

Wednesday 3 April 2019

# Trade Agreements and the Rule of Law

*University's Central Lecture Hall Building (Zentrales Hörsaalgebäude)  
Platz der Göttinger Sieben 5, 37073 Göttingen*

**h. 09:00 – 10:30**

**Panel 1: Preferential (“Regional”) Trade Agreements: Progress and Stability for the World Economic Order? (Part I)**

Chair: Klaus Blank – European Commission, Bruxelles

Speakers:

Gabriel Gari - Centre for Commercial Law Studies, Queen Mary, University of London, *My market for your market? Exploring the nature of American Preferential Trade Agreements from USA-Israel FTA to the United States, Mexico and Canada Agreement*

Marija Jovanovic - Centre for International Law, National University of Singapore, *Taking (Labour) Rights Seriously: Social Clauses in Free Trade Agreements*

Silvia Nuzzo - Université de Neuchâtel, Switzerland, *Provisions on Technical Barriers to Trade in Megaregional Trade Agreements*

Cédric Henet - UCLouvain Faculty of Law, *La coopération réglementaire dans le CETA. Application du cadre analytique du droit public international*

Discussant: Henri Culot - UCLouvain Faculty of Law

Discussion

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

**h. 11:00 – 13:00**

**Panel 1: Preferential (“Regional”) Trade Agreements: Progress and Stability for the World Economic Order? (Part II)**

Chair: Marina Trunk-Fedorova - St. Petersburg State University

Speakers:

Rhea Tamara Hoffmann, Friedrich-Alexander-University Erlangen-Nürnberg, *Rules on Trade in Services in GATS, NAFTA, USMCA – Same, Same, but Different?*

Ludovica Mulas – Alma Mater Studiorum - University of Bologna, *Mega-Regionals and Prudential Measures for Financial Services*

Jia XU - Institute of International Law, Wuhan University, *One Step Forward and Two Steps Back? - Evolution of Bilateral Safeguard Provisions in Preferential Trade Agreements*

Yilly Vanessa Pacheco Restrepo - Georg-August-Universität Göttingen, *Addressing Forest Governance and Sustainable Forest Management in Preferential Trade Agreements*

Discussant: Belen Olmos Giupponi - Kingston University, London

Discussion

**h. 14:00 - 16:00**

**Panel 2: The Rule of Law and International Economic Law**

Chair: Tetyana Payosova - Van Bael & Bellis

Speakers:

José Franco - Universität Augsburg, *Legal Philosophy and the Rule of Law to Save International Economy*

Ravindra Pratap - South Asian University, New Delhi, *The Rule of Law in the Economic Integration of the SAARC Region*

Inga Martinkutė - Faculty of Law, National University of Singapore, *The Rule of Law and Property Protection on International Level: Overlooked Implications for Development*

Bartosz Soloch - University of Łódź, *A Wolf in the Sheep's Clothing: International Investment Law and the Rule of Law in Europe*

Leonardo Borlini – Bocconi University, *The Rule of Law, Transparency and Modern State Capitalism: Inferences from Subsidies and SOEs Trade Disciplines*

Discussant: Tetyana Payosova - Van Bael & Bellis

Discussion

**h. 16:00 – 16:30 Coffee break**

**h. 16:30 – 18:00**

**Panel 3: The Rule of Law and International Economic Law: The WTO System**

Chair: Elisa Baroncini – Alma Mater Studiorum – *Università di Bologna*

Speakers:

Ana Peres - King's College London, Dickson Poon School of Law, *Legal Yet Political: Addressing the Dual Nature of the WTO Decision-making System Under a Democratic Approach*

Emily Reid - Southampton Law School, University of Southampton, *Securing the Future in Challenging Times: Reinforcing the Principles of the Rule of Law in WTO Dispute Settlement*

Furculita Cornelia - German University of Administrative Sciences, Speyer, *FTAs State-to-State Dispute Settlement Mechanisms – An Alternative in Times of AB Crisis*

Henok Birhanu Asmelash - Max Planck Institute Luxembourg for Procedural Law, *Lessons from the Demise of the SADC Tribunal to Save the Crown Jewel of the WTO*

Discussant: Geraldo Vidigal - University of Amsterdam (UvA)

Discussion

**h. 18:00 – 18:30**

**Closing Remarks:** Peter-Tobias Stoll – University of Göttingen

Convenors

Prof. Elisa Baroncini, Alma Mater Studiorum - Università di Bologna

Prof. Holger Hestermeyer, King's College

Prof. Catharine Titi, CNRS-CERSA, University Paris II Panthéon-Assas

Prof. Marina Trunk Fedorova, St. Petersburg University

Prof. Peter-Tobias Stoll, University of Göttingen

## ABSTRACTS AND SHORT BIOS OF CHAIRS, SPEAKERS AND DISCUSSANTS

### Panel 1: Preferential (“Regional”) Trade Agreements: Progress and Stability for the World Economic Order? (Part I)

#### *Chair*

**Klaus Blank** is an International Relations officer for the European Commission, specialized in Geographical Indications and WTO legal issues.

He holds a Law Degree from the University of Mannheim, Germany and his preparation includes the preparatory legal service in the Land Hessen with the focus on commercial and tax law, including stages in international law firm (Baker and MacKenzie) and in an international auditing company (Arthur Andersen).

#### *My market for your market? Exploring the nature of American Preferential Trade Agreements from USA-Israel FTA to the United States, Mexico and Canada Agreement (Gabriel Gari)*

The United States Trade Representative (USTR) recently referred to the nature of trade agreements as follows:

“The basic notion in a free-trade agreement is that one grants preferential treatment to a trading partner in return for an approximately equal amount of preferential treatment in their market... So what we’ve tended to see is that Americans look at the WTO or any of these trade agreements and we say, OK, this is a contract and these are my rights. Others – Europeans, but others also – tend to think they’re sort of evolving kinds of governance. And there’s a very different idea between these two things. And I think sorting that out is what have to do.”<sup>1</sup>

According to this view, trade agreements are, in essence, intergovernmental contracts for the removal of trade barriers consisting of an exchange of reciprocal trade commitments to lower import restrictions. It follows from this understanding that far from a win-win endeavour, the benefit of a trade agreement for a party is contingent to its trade balance account *vis a vis* its counter parties, i.e. positive when it records a trade surplus, negative when it records a trade deficit.

Does this view provide a fair account of what Preferential Trade Agreements (PTAs) are all about? The aim of this paper is to shed light on the nature of PTAs by comparing the first agreement signed by the United States back in April 1985 (US-Israel Free Trade Agreement) with the most recent one signed by the Trump administration in November 2018 (United States, Mexico and Canada Agreement (USMCA)). The comparison focuses on the PTAs’ trade disciplines, including their sources, scope and their subject matter, the institutional provisions and the dispute settlement /enforcement mechanism.

The paper argues that the nature of PTAs have changed to adjust to different trade patterns and trade barriers. Original PTAs were designed to discipline narrowly defined trade policy instruments applied at the border such as tariffs and quotas. To deal with them, PTAs relied on strictly intergovernmental legal mechanisms, i.e. reciprocal exchange of trade concessions binding on and enforced by States. But following the removal of “border barriers”, trade flows became subject to so-called, ‘within the border’ barriers, covering any type of domestic

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<sup>1</sup> Remarks at the Center for Strategic and International Studies “U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative”, 18 September 2017, available at <https://www.csis.org/analysis/us-trade-policy-priorities-robert-lighthizer-united-states-trade-representative> (accessed 16/01/18).

measure which has an impact on trade even when the aim pursued, the authority that adopts them or the people addressed by them are not even remotely connected to a country's trade policy.

To address this new type of barriers and secure deeper levels of market integration, changes affecting the trade disciplines and institutional framework of PTAs were introduced, whereas dispute settlement / enforcement mechanisms remained more or less unchanged. The subject matter of trade disciplines has now been extended well beyond strictly trade policy measures, covering a panoply of policy issues with only indirect connection with trade such as labour, environment, competitiveness, anti-corruption and good regulatory practices. An increasing number of trade disciplines confer self-executable rights to individuals and companies. Reference to non-state made law such as international standards is increasingly relied on to shape the rights and obligations of Parties to the agreement. A more detailed set of institutions is created to monitor and facilitate the implementation of the agreement. All these changes have moved PTAs away from a strictly intergovernmental contract between states to a complex trade governance framework that combines intergovernmental with supranational elements and confers a distinctive role to non-state actors including individuals, companies, standard setters and sub-national public authorities.

The paper examines the wider implications of the emergence of this new trade governance framework deployed by recent PTAs. From a functional perspective, how far beyond the removal of overt market access restrictions should PTAs go in their quest to liberalise trade? What are the benefits and risks of an ever expanding policy coverage? Where should the limit of PTAs' competence lie? From a constitutional perspective, this new trade governance framework raises fresh questions about the allocation of decision making power as between political and adjudicatory bodies and between domestic and international regulators; issues of accountability of international bureaucracies and tensions between a wider agenda covering individual rights without conferring individual remedies. Finally, from a welfare perspective, what are the implications of these new preferences for third parties, considering that many of these new preferences will be applied, *de iure* or *de facto*, on a most favoured nation basis?

**Gabriel Gari** is a Reader in International Economic Law at the Centre for Commercial Law Studies, Queen Mary, University of London and Academic Director of the LLM in International Economic Law, where he teaches modules on International Economic Law, WTO Law and Legal Aspects of Financing Development. Gabriel's main research interest lies in the regulation of trade in services. He has published extensively in this matter. He is a member of the E15 Initiative Expert Group on Services, an ICTSD and World Economic Forum initiative that convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development. He has consulted for various international organisations on trade matters including the Latin American Export Services Association, Inter-American Development Bank, European Commission and European Parliament. He also did consultancy work for UNDP and UNICEF on judicial reform in Central and South America. In 2013-14 Gabriel held a visiting scholar position at the Trade in Services Division of the World Trade Organization. Gabriel speaks regularly at trade conferences and teaches abroad. He has lectured at the University of Bern (World Trade Institute), Università degli Studi di Milano, Penn State University (summer programme), Universidad de Montevideo, Universidad Católica del Uruguay and Universidad de la República. Gabriel is a qualified Uruguayan solicitor. He practised Employment and Commercial Law and worked for the Uruguayan Supreme Court of Justice. Gabriel holds degrees in Law and in Sociology from the University of the Republic, an LLM in International Business Law (Merit) from LSE and a

PhD from Queen Mary, University of London. He is a member of the Latin American and Caribbean Research Network on Services, the Latin American Network on International Economic Law, the Society of International Economic Law, the European Society of International Law and the American Society of International Law.

***Taking (Labour) Rights Seriously: Social Clauses in Free Trade Agreements (Marija Jovanovic)***

The provisions on labour standards ('social clauses') in free trade agreements (FTAs) concluded so far have not had a measurable impact on labour conditions in trading partners of States that insist on their inclusion. What is their role, (why) do they matter, and what is the future of labour rights protection in the global economy? The paper articulates and critically assesses three dominant approaches to the trade-labour nexus within the existing FTAs: the US model, the EU model, and the model embodied in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It first examines the scope and operationalisation of social clauses in the agreements representative of each approach focusing on the three parameters: a) the type of labour standards included; b) the requirements placed on Parties to comply with such standards; and c) the enforcement mechanism and available sanctions for non-compliance. It then provides a critical assessment of each model for securing labour standards, before presenting a better regulatory approach that shifts the focus towards transnational corporations (TNCs). It is argued that social clauses in their current form diminish the fundamental prohibition of forced labour and modern slavery as the most extreme forms of labour rights violations, which arguably qualify as *jus cogens*. Moreover, the paper canvases a richer account of social clauses, which includes an understanding of the nature of labour rights, societal actors that shape such clauses, and the underlying interests that fuel them. This richer account of social clauses helps understand their inherent weaknesses and the limits of their possible improvement, which in turn, allows for developing a more effective strategy for securing labour standards in the global economy. It is thus argued that regulating TNCs domiciled in a State wishing to promote international labour standards has a greater prospect of securing such standards in trading partners than the strategy based on FTAs. Such a regulatory approach would be capable of producing a concrete impact on labour conditions in States unwilling or unable to afford the sufficient level of protection without interfering with their sovereignty. The paper ultimately argues that a coordinated global response must harness the potential of international trade law and human rights law, working in synergy to delimit the scope of the required and permitted regulatory action.

**Marija Jovanovic** is a Postdoctoral Fellow at the Centre for International Law, National University of Singapore (NUS). Her research at NUS is focused on migration and labour law and policy in South-East Asia. She received a doctorate from the University of Oxford in 2016 for the thesis examining the role of human rights law in addressing human trafficking. She had previously completed an MPhil in Law at Wolfson College, Oxford (2012) and Magister Juris at Linacre College, Oxford (2011) and she also holds an LLB from the University of Kragujevac, Serbia. Marija taught Human Rights Law, Criminal Law, and International Law at the University of Oxford and in Serbia. She has worked as an expert consultant for the UNODC, the Council of Europe, the AIRE Centre (London), the Singapore Institute of Foreign Affairs, the Canada-Serbia Judicial Reform Programme (Belgrade), and the National Legislative

Development Project (Hanoi) on matters concerning human rights, rule of law, and human trafficking.

### ***Provisions on Technical Barriers to Trade in Mega-Regional Trade Agreements (Silvia Nuzzo)***

After the General Agreement on Tariffs and Trade (GATT) entered into force in 1948, tariff barriers to trade have steadily dropped. Nonetheless, this has not led to trade integration, as non-tariff measures (NTBs) have gradually substituted tariffs, and now represent the main tool of market fragmentation. Among NTBs, technical barriers to trade (TBTs) play a major role in preventing global market integration. According to the 2012 World Trade Report, 37% of all non-tariff measures notified to the WTO were TBT measures. At the same time, with the multilateral trade talks reaching a substantial stalemate at the Doha Round, Regional Trade Agreements (RTAs) have become the main fora to discuss *inter alia* TBTs. During the last two decades, the number of RTAs concluded has been soaring, and so has the percentage of RTAs dealing with TBT issues. While in 1995 only 40% of RTAs in force laid down TBT provisions, they reached 72% in 2015.

Projects of economic integration have indeed become increasingly ambitious under several aspects. One of the latest and most relevant trend is the conclusion of Mega-regional Trade Agreements (MTAs), *i.e.* partnerships between countries with a major share of world trade and foreign direct investment. Since a few years ago, the two most significant MTAs under negotiations were 1) the Trans-Pacific Partnership (TPP), involving Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam; and 2) the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US. However, after the U-turn in US trade policy under the Trump administration, the TTIP negotiations have been stalling for almost two years by now, while the TPP lost one of its key players.

While the US thus abruptly decided to step aside (for the moment), mega-regional integration has not completely lost momentum. The remaining TPP members are currently concluding the drafting of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), whose text almost entirely mirrors the results of the TPP negotiations. It is expected to enter into force in 2019, and it will constitute the third largest free trade area in the world for GDP, after the one established by the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), and the EU single market. In 2019 also the EU will launch its trade partnership with Japan, and the two economies amount to almost a third of the global GDP. Therefore, the CPTPP and the EU-Japan FTA constitute the two most prominent examples of currently enforceable MTAs.

Even if several researches have already addressed the issue of TBT provisions in RTAs, none of them focuses on MTAs. This work aims at filling this gap. More precisely, it will inquire into what kind of TBT provisions MTAs include. To do so, the methodology will be the following. In the first place, given that a sample of only two agreements would have a limited statistical relevance, I will include in the analysis trade agreements of similar relevance with regard to 1) the amount of trade flows between the Parties; 2) the Parties' GDP (nominal); 3) the year of entry into force of the trade agreement.

To select these agreements, I will adopt an 'hub and spokes' model. The first hub will be the EU; the second one the US. Despite their current trade policy, the US are part or contributed to negotiate the two currently enforceable trade agreements with the most intense trade flows, *i.e.* respectively the USMCA and the CPTPP. The trade agreements in which they participate are, consequently, of major relevance for this study. Furthermore, the 'hub and spoke' model is

functional to put the data in a comparative perspective, as the EU's and the US' policy choices concerning RTAs TBT provisions have already been reported to show significant differences by previous studies. Consequently, the selected trade agreements are:

- 1) for the EU: EU-Japan Economic Partnership Agreement; EU-Canada Comprehensive Economic and Trade Agreement (CETA); EU-South Korea Free Trade Agreement;
- 2) for the US: the CPTPP; USMCA; US – South Korea FTA.

In the second place, I will rely on the template developed in Budetta and Piermartini, 'A Mapping of Regional Rules on Technical Barriers to Trade' (2009), as it is the most widely adopted tool to analyse RTAs TBT provisions in the literature.

**Silvia Nuzzo** is a PhD student and teaching assistant in WTO Law at the University of Neuchâtel, Switzerland. Her research focuses on the compatibility with WTO Law of TBT provisions included in Regional Trade Agreements. She holds a Master's degree in Law from the University of Pisa, Italy, and a Diploma in Law from the Sant'Anna School of Advanced Studies, Pisa, Italy.

### ***La coopération réglementaire dans le CETA. Application du cadre analytique du droit public international (Cédric Henet)***

Les dispositions qui visent à la réduction des obstacles non tarifaires et notamment des divergences réglementaires constituent la principale innovation du CETA et celle qui présente les gains économiques potentiels les plus importants. Afin de promouvoir la compatibilité et la convergence de leurs réglementations, l'UE et le Canada ont ainsi établi des mécanismes de coopération qui pour la première fois intègrent l'application d'instruments et de pratiques de bonne politique réglementaire au sein d'un traité commercial et créent un cadre institutionnel permanent, destiné à encadrer et promouvoir cette coopération. Bien qu'ils ne modifient pas directement les procédures législatives et réglementaires de l'UE et de ses Etats membres et sont présentés comme volontaires, ces mécanismes de coopération réglementaire figurant dans les accords commerciaux dits de nouvelle génération, tels que le CETA, inquiètent la société civile européenne. Celle-ci craint notamment que ces mécanismes ne portent atteinte aux principes démocratiques et notamment à l'autonomie réglementaire des Etats parties et à leur faculté de protéger, voire de rendre plus contraignantes, les normes de sécurité, de santé, sociales ou environnementales. La présente contribution prend ces craintes au sérieux et tend à fournir une analyse descriptive (I) et critique (II) des dispositions du CETA relatives à la coopération réglementaire. Cette analyse porte sur les textes légaux (droit primaire de l'UE et CETA) mais tient également compte des douze premiers mois d'application des chapitres du CETA sur la coopération réglementaire et notamment des premières réunions des comités spéciaux et forum de discussions. Elle procède d'un raisonnement inspiré du cadre analytique développé par le *Max Planck Institute for Comparative Public and International Law* dans le cadre de l'établissement de la théorie du droit public international. Une attention particulière est par conséquent accordée aux objectifs poursuivis par les différents acteurs impliqués dans la négociation et l'application des mécanismes de coopération réglementaire, à leur statut, à la transparence et aux enjeux des diverses procédures ainsi qu'à la nature des instruments qui en résultent.

**Cédric Henet:** I have studied Law and Politics in a few different universities and notably at the UCL in Belgium. For four years after that, I practiced as a Public Law lawyer in Brussels.



Since October 2018, I am working as PhD researcher at UCLouvain Faculty of Law, under the supervision of Prof. Henri Culot and Prof. Philippe Coppens. As a researcher, I focus on International Economic Law and more specifically on the «new generation» of Free Trade Agreements and their provisions concerning regulatory cooperation and harmonization.

#### *Discussant*

**Henri Culot** is professor of economic law at UCLouvain (Louvain-la-Neuve, Belgium). He teaches international economic law as well as Belgian commercial and company law. His research focusses on institutional aspects of WTO law and of regional trade agreements, and on the use of standards in international trade.

He is also a partner of the Brussels law firm “Prioux Culot + Partners”.

### **Panel 1: Preferential (“Regional”) Trade Agreements: Progress and Stability for the World Economic Order? (Part II)**

#### *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 has numerous publications on different issues of International Economic Law and she is also a member of the editorial board of the Russian law journal “International Justice”.

### ***Rules on Trade in Services in GATS, NAFTA, USMCA – Same, Same, but Different? (Rhea Tamara Hoffmann)***

Only recently, in November 2018, the United States, Mexico and Canada signed the successor agreement to North American Free Trade Agreement (NAFTA). The United States Mexico Canada Agreement (USMCA) is a preferential trade agreement which merits the question as to what are the new and innovative approaches in it. How does it deviate from NAFTA and the WTO? Is it in conformity with WTO rules? The paper will assess these questions with respect to chapter 15 on cross-border trade in services and with respect to separate chapters for modes of service supply and for selected sectors (chapters 14, 16-19). This analysis will contribute to the general question whether there is convergence or divergence of rules in trade in services compared to the legal framework established in the GATS in 1995. Do these rules support or undermine the rules enshrined in the GATS?

While the founding members of the WTO expected the GATS to become the basis of a coherent and unified legal framework, more than twenty years later the legal regime of trade in services is regulated in numerous bilateral and regional free trade agreements (FTAs) signed since 1995, which complement and override the liberalization of GATS-based trade in services. The paper

is based on the premise that both trends of coherence and trends of divergence can be found in existing international trade law on services. Coherence is evident when bilateral and regional FTAs build on and further develop the foundations of GATS. Divergence becomes apparent when the increasing regionalization and fragmentation of legal rules leads to different approaches to liberalization and regulation, or when further service liberalization is exposed to a crisis of legitimacy which, at any rate in sensitive sectors, faces demands to reduce the level of liberalization already achieved.

Therefore, the paper examines in which areas coherence becomes more apparent and in which areas divergences become more apparent, how the respective developments can be explained and which legal policy conclusions can be drawn from this. It will therefore look at the balance struck within the USMCA trade in services chapter between measures designed to facilitate international trade and/or investment and a host state's sovereign right to regulate to achieve legitimate policy objectives, such as the protection of human rights, health, the environment, public morals, and culture. Moreover, the paper will analyze the facilitation of market access for trade in services under the USMCA (compared to CETA and GATS).

With the NAFTA, which has existed since 1993, there is an alternative model for the liberalization of trade in services which deviates from the structure of the GATS and on which numerous bilateral and regional trade agreements are also based. The NAFTA model is characterized in particular by the so-called negative list approach, according to which liberalization obligations cover all sectors and regulations unless these are expressly excluded. The GATS, on the other hand, is based on the positive list approach, which requires liberalization commitments to be entered into explicitly and positively. The negative list approach typically develops a greater liberalization dynamic than the positive list approach. In recent times, trade agreements have also emerged whose service chapters are based on hybrid approaches and merge the GATS and NAFTA models. These agreements contain elements of both the negative list and positive list approaches. These include the Free Trade Agreement between the EU and Canada (CETA) signed in October 2016. The highly complex and hybrid models of liberalization obligations that are emerging in this respect are the result of trade and socio-political compromises.

The USMCA remains substantially similar to the original NAFTA in several respects and, like many modern FTAs, it is comprehensive in its scope, covering matters such as trade in goods and services, investment, intellectual property, technical barriers to trade, government procurement and competition. Unlike the NAFTA, but similar to the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP), the USMCA also contains provisions on digital trade and state-owned enterprises, as well as labor and environment chapters. Analyzing the USMCA, one of the most significant changes compared to NAFTA is the inclusion of a chapter on digital trade (chapter 19). The USMCA contains provisions on digital trade similar to those negotiated in CPTPP. One significant difference from CPTPP is a blanket ban on data localization requirements that does not provide an exception for financial services firms.

Against this background, the present paper explores the question as to which GATS structural principles have been incorporated into the USMCA and CETA. The reasons for the adaptation or transformation of the principles and the consequences for future agreements will also be examined.

**Dr. Rhea Tamara Hoffmann** studied law at the University of Trier and Prague focusing on public international law and the law of the European Union. After her first state examination in law she has been a PhD researcher at the cluster of excellence “Formation of Normative Orders”

at the University of Frankfurt am Main. The PhD project was part of the research project “The Change in Transnational Labour and Economic Law”. She has been a Visiting Researcher at Osgood Hall Law School, York University, Toronto, Canada from October 2011 until January 2012. Rhea completed her legal traineeship at the Higher Regional Court of Frankfurt am Main from 2013 until 2015. She has been working for the United Nations Conference on Trade and Development (UNCTAD) in Geneva until April 2015. Since April 2015, Rhea is a Research Assistant to the Chair for Public Law and Public International Law (Prof. Dr. Markus Krajewski). She earned her doctorate in February 2018 at Friedrich-Alexander-University Erlangen Nürnberg. Her PhD thesis analyses international investment law and constitutional property protection from a constitutional theory perspective. Since December 2017, Rhea is part of the research project “Coherence and Divergence in the International Law of Trade in Services” financed by the Fritz Thyssen Stiftung.

### ***Mega-Regionals and Prudential Measures for Financial Services (Ludovica Mulas)***

The Financial Services sector is crucial for the global economy and it has always been subjected to regulation by the States, which at the same time strive to ensure economic operators and financial services freedom of exchanges and access to funds and take prudential measures in order to ensure the stability and integrity of financial markets and to protect consumers.

Following the 2007 financial crisis, States have tightened up their legislation on financial services, introducing a series of very stringent and cautious prudential measures, aiming at the protection of the integrity of financial markets, the freedom and fairness of trades and investments, as well as the consumer and the community as a whole. However, this type of regulation is likely to limit the freedom of exchanges and to undermine the protection of foreign investment in the financial services sector. Within the World Trade Organization system, the issue is regulated in the Annex on Financial Services to GATS, which contains a prudential exception. However, the problem related to the interpretation of the concept of "prudential measure", is, for the moment, supported by a single decision on the matter, the case *Argentina - Financial Services*, in which States have been granted the right to adopt prudential measures, when they deem it necessary with respect to the protection of a non-trade value and proportionate to the achievement of the latter. Recently, the issue has been regulated through more precise contractual rules, in the form of the new generation of free trade agreements (Mega-Regionals): the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Free Trade Agreement between the European Union and the Republic of Korea (EU-Korea FTA), the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), the Trade in Services Agreement (TiSA), the Transatlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP). Such free trade agreements contain, in fact, clauses, which, along the lines of the GATS Annex, introduce prudential exceptions.

The current international scenario has renewed a widespread need for common international rules that guarantee stability and fairly regulate the global financial assets: the existing regulatory insufficiency of international positive law and the high level of conflict that is expected before international tribunals create uncertainty among the economic actors operating in a major sector of the global economy, as its proper functioning requires an investment and financial services market healthy and efficient. The aim of the paper is to carry out an analysis to assess the scope of the existing legal instruments, with a focus on the adequacy of the new perspectives opened by the "Mega-Regionals" agreements, in order to evaluate from a comparative point of view whether their measure and their application can actually be able to guarantee stability at the international financial markets level.

**Ludovica Mulas** is a PhD candidate at the University of Bologna. Her research is focused on the financial services sector and relation between the implementation of prudential measures and the liberalization of international trade and global markets.

She is teaching assistant of International Law and of International Trade and Investment Law. She got her law degree in 2018 with a thesis in International Trade and Investment Law titled “The Comprehensive Economic and Trade Agreement (CETA) and its Problematic Implementation: A Legal Analysis”.

During her university career she has been Senior Associate Editor for the University of Bologna Law Review and she has been involved in different projects, such as the moot court organized within the International Law course, the Rome Model of United Nations, the National Negotiation Competition and she has followed the course of Transatlantic Relations taught at the Dickinson Centre for European Studies in Bologna.

She took part in the Erasmus project, studying in Paris, at the Sorbonne University, during the first semester of the 2016/2017 academic year.

Ludovica’ studies are focused on the multilateral trading system, and in particular on issues related to trade and investment and the financial services.

### ***One Step Forward and Two Steps Back? - Evolution of Bilateral Safeguard Provisions in Preferential Trade Agreements (Jia XU)***

There is an emergence of including bilateral safeguard provisions in preferential trade agreements (PTAs). Due to the additional market access commitments in PTAs, the tariffs in a customs union or a free trade area are reduced sharply below the Most-Favoured-Nation (MFN) tariffs, sometimes reaching zero tariff. During the period of liberalization, in order to buffer the possible risk of import ‘floods’ from its own PTA partner, and to assure that the domestic industry will not be heavily injured, parties of PTAs envisage bilateral safeguard provisions. These safeguard provisions are exclusively applied between the members of a PTA. Concerning the additional market access commitments in a PTA, the member of a PTA is entitled to raise the tariffs temporarily to the level of the MFN tariffs or suspend the further decrease of the tariffs as a bilateral safeguard measure.

**Jia XU** is a research fellow at the Institute of International Law of Wuhan University in China. She completes her earlier studies in China, where she obtained master degree of law at Wuhan University. She earned her doctor degree at University of Göttingen in Germany, where she was research assistant at the Institute of International Law and European Law. Previously, she served the ESIL Interest Group of International Economic Law (2013-2018), and ILA Study Group on Preferential Trade Agreements (2015-2016). Her doctoral thesis is entitled ‘Safeguard Provisions in Preferential Trade Agreements’. Her current research interests center on preferential trade agreements, and investor-state dispute settlement in the ‘One Belt One Road’ Initiative. She has published articles on issues related to the preferential trade agreements and non-trade value.

### ***Addressing Forest Governance and Sustainable Forest Management in Preferential Trade Agreements (Yilly Vanessa Pacheco Restrepo)***

The inclusion of environmental clauses in Preferential Trade Agreements (PTAs) has allowed to incorporate specific rules on forest governance and Sustainable Forest Management (SFM)

and to promote the implementation of forests-related Multilateral Environmental Agreements (MEAs). This tendency could be interpreted as a potential way to improve the protection of forests since would contribute to strengthening the international forest regime, especially through the definition of new commitments linked to bilateral cooperation, and the possibility of applying trade sanctions for non-compliance. Although any dispute regarding SFM has arisen so far in the context of PTAs, some recent requests to the Peruvian Government in the frame of the US – Peru PTA indicates that further developments might be expected in terms of sustainable development and environmental protection. Since the European Union and the United States are the parties with the highest number of this type of rules in PTAs, this paper aims to analyse how they have addressed SFM through environmental provisions in their PTAs. The article provides a general context of the emergence and development of the environmental provisions in PTAs, analyses the evolution of the provisions on forest governance and sustainable forest management in the EU and in the US PTAs and compares the confrontational and the cooperative approach adopted by the US and the EU respectively, in order to establish the options to promote compliance and enforcement of forest-related provisions through PTAs.

**Yilly Vanessa Pacheco** is a third year Ph.D. student in the Doctoral Programme on Public International Law of the Institut für Völkerrecht und Europarecht at the Georg-August University of Goettingen, Germany. In 2019, she joined to the Jean Monnet Chair for European and International Law of Sustainable Development (EILS) of the University of Goettingen as academic assistant. She studied Law and holds a Master’s degree in Law from the Universidad Santiago de Cali, Colombia. Yilly has been lecturer and junior researcher on environmental law, constitutional law, human rights, and international law in Colombia. Her current research focus is on international forest law. Yilly has published papers and book chapters on international regime, multilevel environmental governance, sustainable development, international legal protection of wetlands, international labor law, and international forest law.

#### *Discussant*

**Dr Belén Olmos Giupponi** is an Associate Professor and Head of Law at Kingston University London. Ph.D. in International Law; an LL.M in Human Rights and an MSc in International Relations. Throughout her career, Dr Olmos Giupponi has undertaken research in EU law, international economic law, human rights and environmental law. Dr Olmos Giupponi has authored several books such as *Trade Agreements, Investment Protection and Dispute Settlement in Latin America* (Wolters Kluwer 2019) and *Rethinking Free Trade and Human Rights in the Americas* (Hart/Bloomsbury, 2016). She has published more than fifteen articles in leading peer-reviewed journals, including the *Leiden Journal of International Law*, *Transnational Environmental Law*, *ICSID Review*, *European Union Journal*, *Journal of Business Law*, *Arbitration International*, *European Energy and Environmental Law Review*, *Journal of European Legal Studies*, and the *Spanish Yearbook of International Law*.

## **Panel 2: The Rule of Law and International Economic Law**

#### *Chair & Discussant*

**Tetyana Payosova** practises International Trade Law, with a particular emphasis on WTO law. Prior to joining Van Bael & Bellis, Tetyana advised private companies and governments on various aspects of WTO law in her capacity as research fellow at the University of Bern. Her

primary focus was on the nexus between trade and environment, climate change and energy. Tetyana also interned with the Peterson Institute for International Economics in Washington DC. Tetyana previously worked as legal adviser at the International Rail Transport Committee (CIT), an international association of railway and shipping companies, where she advised members on matters of international and European transport law and on various aspects of data protection. In addition, Tetyana has held various teaching and research posts in Brazil, Switzerland, Ukraine and the US, and extensively wrote on International economic law on various economic law subjects. Tetyana got her LL.M. at the Harvard Law School in 2018, winning the 2018 Salzburg Lloyd N. Cutler Fellow, Frank E.A. Sander Writing Prize, Dean's Community Leadership Award. She holds a Master's degree in European and International from the University of Bern, Switzerland, a Master of Law and a Diploma in Law from National University Odessa Law Academy, Ukraine.

### ***Legal Philopophy and the Rule of Law to Save International Economy (José Franco)***

Sometimes international economic relations appear depicted as a primitive, savage jungle in which the sole rules to be applied are dictated by a game of interests among both world powers and reckless multinationals. Though falling in this perspective is easy and somehow romantic this is far from being true. International economic relations are indeed guided by international laws. The sooner we accept it, the better we can understand how those norms are created and how do they work.

Then, why do we tend to elude the observance of certain basic norms for everybody in international commerce? Why are we afraid of a global organisation system yet we keep state-oriented model that prevents efficiency to work properly? Why do we feel betrayed or disloyal when we share the work, knowledge and responsibilities thorough international commerce to achieve a better result than we could ever dream of in our one-State, reduced perspective? The answer lies in our human nature<sup>2</sup>. Just to give an example, let us think about the Transatlantic Trade and Investment Partnership. Many Europeans automatically reject such idea. Little does it matter whether or not they have been properly informed, because the answer is much easier and sociological than it seems. When they are faced before such trade agreement, they reject products and services from the USA and opt for the European ones. They prefer something domestic, something from their own land. Yet, before the creation of the European scaffolding, the former State, individual markets of the European Union already observed with scepticism the arrival of products coming from their very own European neighbours. Nowadays, the creation of bigger free market areas (EFTA, TTIP, CETA, NAFTA and even TAFTA) is looked upon with the troubled prism as back in times of European unification. All of this has a perfectly scholarly explanation: Ingram's parable. James Ingram already tough us how certain social and political perceptions may distort purely economic data<sup>3</sup>. Objective observations and logical conclusions are then overwhelmed by subjective interpretation. Is not surprising that good or bad "feelings" about something often lead us to irrational outcomes. We may find that much of this phenomenon has a saying on this topic.

Besides, up until there is no global commerce, economy is to remain imperfect. The effects of multilateral, open, free market economy are only noticeable when truly worldwide<sup>4</sup>. The new big trade agreements are nothing but a new form of protectionism between macro-regions. Despite the fact that the free market area is bigger, commerce goes on being not fully efficient.

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<sup>2</sup> Smith, Adam, *The Theory of the Moral Sentiments*, Oxford, Clarendon Press, 1976.

<sup>3</sup> Ingram, James C., *International Economics*, 1 ed., New York, John Wiley & Sons, 1993.

<sup>4</sup> Parkin, Michael, *Macroeconomics*, 13 ed., Toronto, Pearson, 2018.

In conclusion, one should never forget our tribal origins and our need to defend the group from “the other”. Understanding our philosophical basis is the only way to solve the deep crisis in which international commerce finds itself in.

**José Franco** was born in València (Spain) in 1994. He holds a degree in law (2012-2016) and a master degree in law (2017-2018), both obtained at the University of València. In the academic year 2013/2014 he served as elected students’ representative at the Constitutional Law Department and he has co-directed the University Forum on Social Analysis (2013-2015). He was granted several scholarships among outstanding: *Fondation Jean Monnet pour l’Europe* and two scholarships in the city hall of Madrid and Valencia. As a member of the *Grupo de Estudios Sociales e Interdisciplinares* (GESI) he published several articles in *Las Provincias* (one of the most important newspapers of the Autonomous Community of Valencia). He has been the website editor of the European Journal of Legal History – *Glossae* from 2013 to 2016. He enrolled in judicial studies for a year (2016-2017). Since 15.10.2018 he is a “wissenschaftliche Mitarbeiter” and PhD-student at the chair of Prof. Dr. Phillip Hellwege in a joint supervision of both the University of Augsburg (Germany) and the University of Valencia (Spain). He was granted a pre-doctoral contract and so he teaches two subjects at the University of Augsburg, namely “Spanish Legal History” and “Spanish Criminal Law”. In addition, he speaks Spanish, Catalan, English, French and a bit of German.

### ***The Rule of Law in the Economic Integration of the SAARC Region (Ravindra Pratap)***

The rule of law has been variedly inhibited in the economic integration of the South Asian Association for Regional Cooperation (SAARC) region, comprising Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. This is mainly attributable to a host of economic and political reasons. If the former is critically explicable in terms of a competitive character of the economies of the region, the latter may be significantly measured by the friction-laden India-Pakistan relations. Thus, even when the SAARC countries have been ultimately able to generate a normative will for a regional economic integration, law has not been optimally allowed to play a significant role. Specific consequences are: complex tariff structures and procedures, foreign exchange controls, transit and banking facilities, import financing, non-transparency in the imposition, administration and review of anti-dumping and countervailing duties, a non-discriminatory market access to India by Pakistan in lieu of a most-favoured-nation treatment (revoked on 15 February 2019 in the wake of the killing of about 40 Indian security forces in an Indian state bordering Pakistan) and a host of non-tariff barriers variedly imposed by countries of the SAARC region. Is the nature of law’s role in economic integration necessarily a regional phenomenon or is it also a reflection of its role at the multilateral level represented by the WTO, such as the one signified by the expression “substantially all trade” in GATT Article XXIV? This is not to suggest that the degree of regional political will for a required and possible role of law is all comparable to the extent of a multilateral political agreement. Thus, a rules-based dispute settlement system of the 2004 South Asian Free Trade Agreement (SAFTA) is without provision for non-violation claims, testifying to a higher degree of normative definitiveness at the SAARC level to measure the admissibility of claims of infraction of economic agreements. And yet SAFTA is without criterion or guidelines for selection of members of the Committee of Experts (COE) other than that the requirement that they hold the “Senior Economic Official” positions and have expertise in trade matters and is, consequently, not without the possibility of governmental bias in a purported rules-based adjudication of SAFTA disputes. Further, unlike WTO panels, the COE is without any procedures, rules or other guidance with respect to how to conduct its investigation, particularly on presentation of evidence, access to information by the public, presentation of arguments and

submissions. SAFTA does allow the COE to use its own rules of procedure but without providing any framework. A complete lack of guidance is a conspicuous derogation from the rule of law. Finally, there is no detail or scope for appellate review in the SAARC economic integration mechanism. The fact that the WTO appellate review is currently under stress and attack is no satisfactory reason for the continuing absence of any appellate role for law in resolving issues of law and legal interpretation developed by the COE. SAARC Agreement on Trade in Services (SATIS), signed six years after SAFTA, preferred to continue with the SAFTA mechanism rather than seized the opportunity to assign to law its useful role in the economic integration of South Asia. Thus, while an optimal role for law in the SAARC economic integration may well be a matter of further evolution, the imperative of a predictable dispute settlement mechanism may not be overstated for a region that exhibits an atmosphere of suspicion and trust deficit for critically overcoming by the rule of law the integrating reluctance of its member countries and preserving the balance of their integrated economic rights and obligations to contribute to the rule of law in international economic law.

**Ravindra Pratap** teaches at the Faculty of Legal Studies, South Asian University (A University of SAARC countries), New Delhi, India. He is a Member of the Editorial Board of the *Indian Journal of International Law*, ASIL, ESIL, SIEL and was a fellow of The Hague Academy of International Law in 1998, 2000, 2004 and 2005.

### ***The Rule of Law and Property Protection on International Level: Overlooked Implications for Development (Inga Martinkutė)***

The *Rechtsstaat* tradition in Germany and the rule of law principle in English speaking countries may imply a neo-liberal content that *inter alia* prohibits state interference with private property rights. This interpretation of the rule of law is geared towards the preservation of *status quo* and prohibits redistribution of wealth for social purposes or other reasons. There have been attempts to present the rule of law as the overarching idea behind international investment agreements that should bring good governance standards to host states globally. Besides the conventional wisdom that the rule of law should increase the foreign direct investment and prosperity of host states, there has been very limited attention paid to the question what are other implications of this rule of law for development. In such a context, this paper is asking to re-evaluate the relationship between the rule of law and property protection in domestic and international level. It is argued that the rule of law should not be interpreted as including the total prohibition of wealth redistribution for several reasons. First, even the Western developed world could not live-up to such a high standard, because Western legal systems have been redefining the property rights over time and tailoring them to respond to particular local needs or problems. It is likely that changing climate, technology, social and economic circumstances may require some experimental policies and the rule of law should be compatible with those changes even if they involve certain redistribution of wealth. Second, imposing an international prohibition on wealth redistribution through international investment treaties creates a serious limitation on the policy options for developing states. The prohibition of redistribution is geared towards the preservation of *status quo*, which is unacceptable in most developing states. On the contrary, evidence suggests that the most successful results were achieved in those developing states that embarked on certain experimental policies, including affecting property rights. National property regimes, be it individualistic or communitarian, are embedded in the compromises and values of a particular society. The negative externalities of the rule of law should not be overlooked when dispensing the advice for developing economies.



**Inga Martinkute** graduated from Vilnius University and University College London with a special focus on international law and legal aspects of foreign direct investment.

Before becoming PhD candidate at the National University of Singapore she was in private practice for more than ten years, where she had been involved in the biggest and most complex disputes and arbitrations of the Baltic region.

Her main research interest is the interplay between national property regimes and international investment protection. She is conceptualising the tensions in the investor-state dispute settlement as a conflict between the individualistic and communitarian understanding of property. For a number of years, she has been teaching legal subjects at the International Business School of Vilnius University and acting as a memorial judge and arbitrator at the FDI International Arbitration Moot. She is a member of the ICSID arbitrator's panel and a recommended arbitrator at the Vilnius Court of Commercial Arbitration.

### ***A Wolf in the Sheep's Clothing: International Investment Law and the Rule of Law in Europe (Bartosz Soloch)***

In the recent times issue of enhancing the widely understood rule of law in Europe has been one of the “hot topics” in both academic and professional discourses. Seemingly, the functioning of national judiciaries and checks-and-balances have been the focal points of the debate. In this context, it is worth noticing that the debate revolved about how international frameworks, i.e. EU Law and ECHR could contribute thereto. Somewhat on the margin, however, the question emerged, whether and to what extent the international investment agreements (IIAs) could be regarded as their ally. Although simply succumbing to the “the more, the better” approach would appear somewhat tempting, an in-depth scrutiny is needed. What merits particular attention is that such proposals come mainly, if not exclusively from within the investment law community, doing their best to (re-) gain the trust of the public and save as much of ISDS in Europe as possible in the aftermath of the Achmea judgment. Indeed, as I shall demonstrate, upon closer examination it becomes apparent that the investment agreements not only are incapable of contributing substantially to enhancing the rule of law in Europe, but, even more, they may even deteriorate it. In doing so, I shall highlight following elements.

The first issue concerns the relationship between the international mechanisms and national judiciaries. Both, EU and ECHR rely heavily on the cooperation of national courts, at least in several ways. To begin with, the typical scenario is that cases are reviewed by national courts before making it to the European courts, which creates the space for the judicial dialogue. Secondly, in both EU and ECHR legal frameworks these are the national courts which are, in principle, responsible for ensuring the effectiveness of the supranational instruments and there are many mechanisms in place ensuring national judges' and decision makers' familiarity with the above laws. Thirdly, the enforcement of both CJEU and ECtHR judgements not rarely require introducing deep changes into the national legal systems, engaging not only the judiciary, but the legislative and executive branches as well. Last but not least, the above both, implies direct interest of both, CJEU and ECtHR in the state of rule of law on the national level and provides communication channels between supranational and domestic actors. All the above considerations are absent in case of IIAs, striving at providing an investor with the direct access to an international “neutral forum”, parallel to the national judicial framework. Indeed, if one was to analyse the case-law concerning intra-EU investment disputes one would find little evidence for either ATs conducting in-depth analysis of rule of law issues, or Member States introducing systemic reforms in the aftermath.

Moreover, most of IIAs binding European states, despite of some claims on the part of the arbitration community, do not serve the purpose of contributing to the host states' general legal development and improving its governance. Their main, not to say the only goal was to maximise the investor's protection, possibly with a view to increasing the capital inflows into the host state. Strengthening national judiciary was not in the agenda, creation of a parallel, neutral forum was chosen instead. This presents a stark contrast to both, ECHR and EU frameworks, concerned with balancing different, both economic and non-economic interests on the one hand and relying heavily on the national states' institutions in the attaining of this goal on the other.

Finally, it is clearly visible that there is a difference in the background and the degree of embedment in the European context between both aforesaid European frameworks and IIAs. Generally, investment arbitration is run by professionals operating in the global context, having interest either in developing the investment law as such or in deciding particular cases. This is neatly reflected by the personal composition of the ATs or the law firms representing the litigants. Consequently, most of the actors on the stage of investment arbitration are neither attached to the project of developing the European governance, nor have a substantial "European" or "national" background (or link) even comparable to this of the EU or ECtHR officials. Equally, arguably that Member States' officials are much less familiar with BITs than with EU law and ECHR.

Consequently, I shall try to prove that, for the reasons mentioned above, the investment law offers little if any contribution to enhancing the rule of law in Europe. It is alienated both from national legal systems and the "European Project". Additionally, being run by specialist operating in a global context and is driven by arguably one-sided values generated largely outside of the European legal space. The main concern of the intra-EU IIAs and the ECT is the protection of particular investments by creating a mechanism for awarding effective financial compensation, isolated from the host state, not creating systemic solutions to improve general investment climate. All this, coupled with the IIAs' structural problems that could be summarised under the concept of "ISDS legitimacy crisis" would strongly indicate that IIAs cannot be trusted as an ally in the quest for enhancing the rule of law in Europe and, consequently, its alleged role in upholding the rule of law would not redeem its sins identified by CJEU in the *Achmea* judgement.

**Bartosz Solocho** LL.M. (Bonn) – a Warsaw University Law Department graduate (2013), LL.M. in the Bonn University (2014). Currently a PhD Student in the Chair for European Constitutional Law of the University of Łódź. My research focuses on the issue of interactions between various legal systems and comparative law, in particular in the context of European integration. I am also interested in legal theory and legal history, in particular the intersections between the law and literature.

I am trying to match my academic interest with professional activities. Currently working for the International and European Law Department in the General Counsel to Republic of Poland, with previous positions in the ECHR Department in the Ministry of Foreign Affairs and an international law firm.

### ***The Rule of Law, Transparency and Modern State Capitalism: Inferences from Subsidies and SOEs Trade Disciplines (Leonardo Borlini)***

In seeming contrast with the mainstream literature on the rule of law and international economic law, we are not *directly* concerned with how international economic law – and, specifically, international trade law – may contribute to the rule of law within the international arena and, as a consequence, in (more or less) organized modern States; but are turning instead to the role of transparency in promoting an international trading order governed by a legal system whose design and operation yields formally sound, predictable and, as much as possible, effective rules. Put in other words, we investigate how rules on transparency contribute to the rule of law *in* the international trading system, no matter whether we understand it as a normative reality (as some scholars seem to imply), a political ideal (as I also tend to believe) or an evaluative notion (as submitted by Hachez and Wouters).<sup>5</sup>

In order to address such an issue in a viable way, the present study focuses on State capitalism and the related trade rules, particularly those regulating one of its thorniest indirect manifestations, subsidies, and those dealing with the direct form of State intervention in the market which is currently attracting passionate interest among trade scholars, the operation of State-owned enterprises (SOEs). This peculiar case study, indeed, represents a rather fertile soil for our analysis. The quantitative and qualitative transformations of modern state capitalism around the globe raise issues of increasing importance for the international trading system: it is no secret that State interventions in the market stand out among the stated and unstated causes of current trade tensions. Moreover, both the questions of subsidies and SOEs are essentially political and ideological: with the two instruments, what is ultimately involved is a confrontation between different philosophical, political, and social conceptions of the relations between the state, market, and society; *i.e.* the normative social ethos founding the role of law in the international trade system.

My thesis has, thus, three intertwined threads that may be stated simply. First, I suggest that uncontrolled subsidies and SOEs are essentially challenges to the political ideal behind the international trade regime. Secondly, I argue that rules on transparency (mainly, as disclosure) represent an indispensable element of any trade discipline on subsidies control and SOEs which aims to be ‘constitutionally complete’ and, at the same time, effective. Thirdly, I submit that a thorough analysis of the emerging trade rules on subsidies and SOEs reveals a rather fragmentary discipline which, ultimately, does not really contribute much new to the legal regime that governs international trade and, particularly, to the objective of securing non-arbitrariness in the exercise of State power in the economic sphere. I also maintain that this is *intar alia* due to the lack of robust rules on transparency.

The argument is developed in four main parts. By situating the analysis in the timeless debate about the divergent views of what the rule of law means in practice, the chapter starts by questioning the very existence of such thing as an international rule of law and, specifically, the relevance of the notion for the international trade system. In the second part of this paper, I discuss the logic of transparency in general and the motivation for its use in the trading system. By historicizing the contemporary trade agreements, the third part considers State capitalism in the form of uncontrolled subsidies and SOEs as main political challenges to the international trade regime, and, hence, analyses the normative rationales of the related trade disciplines. The final part analyses the rules on subsidies and the emerging trade discipline on SOEs in light of

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<sup>5</sup> N Hachez and J Wouters, *Promoting the Rule of Law: A Benchmarks Approach*, Leuven Centre for Global Governance Studies, Working Paper No 105, April 2013, <http://www.fp7-frame.eu/wpcontent/materiale/w-papers/WP105-Hachez-Wouters.pdf>.

the previous findings. The focus is above all on the novelties introduced by the modern PTAs: as I attempt to evidence, not all the novelties survive scrutiny. By elaborating on previous literature, this part develops a precise analytic framework for thinking about transparency trade rules. I apply this framework to the detailed case studies of the Agreement on Subsidies and Countervailing Measures and the emerging trade discipline on SOEs, also by comparing this experience to other domains within the WTO and major PTAs. The paper concludes with some recommendations for improving transparency tools within and outside the WTO.

**Leonardo Borlini:** Assistant Professor of International Law, Department of Law, University Bocconi (Italy, Milan)

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Degrees in Law and Business Administration from Bocconi University (*magna cum laude*) and in Law from University of Pavia (*magna cum laude*). LL.M from the University of Cambridge. Ph.D. in International Law and Economics from Bocconi University.

In spring 2018, Leonardo was awarded a Fulbright Research Scholar Grant by the US-Italy Commission to carry out a project on multi-level regulation of international public goods at the Fletcher School of Law and Diplomacy at Tufts University, where, since January 2019 he is Fulbright Research Scholar.

Since 2012 a member of the Department of Legal Studies of Bocconi University and Faculty Member of the PhD in Legal Studies. He is Resident fellow at the BAFFI CAREFIN (Centre for Applied Research on International Markets, Banking, Finance and Regulation). Leonardo Borlini held prior academic appointments at the Department of Legal Studies of Bocconi University and the Faculty of Political Sciences of LUISS – Guido Carli Free International University for Social Studies. He is part of the United Nations Expert Group working on Anti-Corruption Academic materials (Academic Initiative Against Corruption-UNODC); Researcher for the Research Centre on International Cooperation Regarding Persons Sought for Corruption and Asset Recovery established by the G20 at the Beijing Normal University and member of the Wolfson College (University of Cambridge, UK). He has held visiting research appointments at the Graduate Institute of International and Development Studies in Geneva; the Normal Beijing University, the Legal Department of the International Monetary Fund (IMF); the World Bank Group. He is Visiting Professor at the Normal Beijing University and was Visiting Scholar at the University of Cambridge, Faculty of Law/Wolfson College (Cambridge, United Kingdom). He is also member of the Bar of Milan.

In 2018 he obtained the National Scientific Qualification as Associate Professor of International Law (ASN-II Fascia) by unanimous decision of the Commission.

Leonardo has published several articles in law reviews, including the Columbia Journal of European Law, the Yearbook of European Law and the Georgetown Journal of International law as well as several chapters in books. His book *Corruption. Economic Analysis and International Law* (with M. Arnone) was published and his book on the UN Security Council and Individuals was published last year. He has been invited to present his ideas in Italy, the United States, France, the United Kingdom, Sweden, Switzerland, Japan, China, and before the IMF and the World Bank. The complete list of his publication is available at: <http://faculty.unibocconi.eu/leonardoborlini/>

Apart from his academic appointments, he has served the IMF as a Technical Assistance Specialist in 2011-12 and is presently listed in the Fund's Roster of Technical Assistance Experts; worked as Associate lawyer of Grande Stevens Law Firm (Milan-Turin-Rome, Italy) and consulted the European Union, the Council of Europe, the Inter-American Development Bank (IADB), the World Bank (Public Accountability Mechanism), and the United Nations Office on Drugs and Crime (UNODC).

### **Panel 3: The Rule of Law and International Economic Law: The WTO System**

#### *Chair*

**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, is Associate Research Fellow at the Leuven Centre for Global Governance Studies, and has been 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 (in particular the reform process of the dispute settlement mechanism; 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 (the treaty-making power of the European Commission; the European Parliament and international agreements; the new generation of free trade agreements). On 9 August 2018, Elisa got the abilitation as Full Professor of International Law from the Italian Ministry for University.

#### ***Legal Yet Political: Addressing the Dual Nature of the WTO Decision-making System Under a Democratic Approach (Ana Peres)***

WTO takes pride in being a rule-oriented organisation, which means that rules have a central position in its negotiation, decision-making, and dispute settlement processes. Such principle bestows more technical and legal rigor to the WTO functioning, contributing to enhancing its legitimacy and credibility. An arrangement based on the application of rules gives stability and predictability to the multilateral trading system, inasmuch as states trust the framework to negotiate new topics and settle possible trade disputes. The rule of law and its limits to the exercise of power in the decision-making process, however, do not mean the absence of a political aspect in the WTO. Accordingly, the primacy of legality should offer space for including political elements in the WTO procedures. The legal and political features are directly related to the extent that, to accept the current degree of legalisation, Members claim more politics and participation. Assuring participation of the WTO membership in all its activities would be, thus, a central goal in reconciling rule of law and political influence. The political side of the WTO would be stronger in its decision-making system, underpinned by the rule of consensus and the principle of the single undertaking. The debate becomes all the more important because WTO is a Members-driven organisation. Members should enjoy a multilateral forum where they could express their opinions and protect their interests. To that end, WTO should ensure efficient and legitimate procedures to enable effective participation of all its Members. The WTO decision-making system, however, is marked by a divide between developing and developed Members. Albeit being the central forum for negotiating multilateral trade, no significant progress has been made in recent years regarding advancing multilateral trade issues. Developing countries supported the adoption of a rule of law system in the WTO, for they believed that such an approach would allow a level playing field. Nonetheless, developing countries account for the vast majority of Members and still find it difficult to

influence the decision-making system. The current decision-making system would exclude developing countries and LDCs from the negotiation tables, following a biased process that perpetuates the power and influence of a small group of countries. Such a framework would shed light on the need to review the WTO decision-making system, balancing the Members' different interests to deliver trade agreements. The WTO decision-making system should rely on three pillars – inclusiveness, legitimacy, and efficiency. The combination of these principles highlights the need to reconcile the participation of all Members, the adoption of a fair and representative process following the rule of law, and the advancement of multilateral trade rules. This paper assesses the WTO decision-making process, examining whether it is able to reflect the diversity in the membership. We argue that reforming the WTO decision-making system according to a democratic approach would be a way of strengthening the rule of law within the organisation, balancing its political and legal features to advance multilateral trade agreements. Our goal is to analyse what would be the relationship, if any, between greater democratic procedures and the diversity of Members and agendas, amidst claims for more transparency, dialogue, and cooperation. The paper first assesses the WTO decision-making system and the participation of developing Members therein. We will focus our analysis on the creation of the G20 and on how coalitions of developing countries have been shifting the balance of negotiations, stressing the need to discuss development-related issues. We will then examine the dual nature of the WTO system: its political and legal aspects. The political feature, concerning participation and vocalisation, is essential in ensuring a deeper legalisation of the multilateral trading system. Thereafter, we will consider the issue under a democratic debate, investigating ways of ensuring greater participation in and legitimacy of the negotiations. For that purpose, we will apply the doctrine of discursive democracy to the WTO decision-making system. We will address, hence, the procedural aspect of decision-making, studying negotiating methods that promote rational argumentation, in a process of communicative action towards the adoption of a reasoned decision. Such a decision would be the most appropriate to the situation one seeks to regulate since it would take into account the arguments of all stakeholders. In this regard, WTO Members should have the same chances to participate in the negotiations, following a transparent process so that all the stakeholders could have access to the relevant information to construct a rational negotiating stance. We conclude that a more democratic process would strengthen the legitimacy and representativeness of the WTO decision-making process, which would still be the best alternative for ensuring a fairer, opener, and more inclusive trade.

**Ana Peres** is a PhD candidate and a visiting lecturer at King's College London, holding a CAPES scholarship. She has a law degree and an MPhil in International Law, both from UFMG, Brazil, with a period of academic exchange at Baylor Law School, USA. Ana has been involved in different projects concerning International Law, such as reading groups, research partnerships, and moot courts on WTO law – the ELSA MOOT COURT, in which her team was granted the best overall memorial award in the Latin American round, and the CUFTA (Customs Union or Free Trade Area), organised by ILSA, in which her team received both the best team and best memorials awards. Author of several papers on International Economic Law, Ana is enthusiastic about the study of the multilateral trading system, particularly interested in issues related to trade and investment, the new economy, global governance, empowerment of developing countries, and the global South.

## ***Securing the Future in Challenging Times: Reinforcing the Principles of the Rule of Law in WTO Dispute Settlement (Emily Reid)***

This paper reflects upon how the WTO should, and indeed must, respond to the cumulative impact of: first, changing priorities in the international community, specifically the emergence of popular non-economic concerns including environmental protection and climate change; and secondly, the WTO's potential vulnerability in the face of growing scepticism relating to economic liberalisation and globalisation. Each of these developments compounds longstanding questions relating to the WTO's democratic accountability and legitimacy, questions which have traditionally arisen with particular force regarding the WTO's engagement with national regulatory measures. This issue is the more pressing in the light of Sustainable Development Goal 16 *to Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels*. Fundamentally, this concerns the future shape and role of the WTO, and what it must do to secure that future.

It is argued in this paper that as 'input' legitimacy is key to securing 'output' legitimacy, WTO Dispute Settlement Body rulings, whether of the Panel or Appellate Body, must be compliant with the principles of the rule of law. While the inherent contestability of interpretations of the rule of law is acknowledged, this paper highlights the need for transparency, certainty, consistency and accountability to mitigate the current political challenges facing non-state, supra-state, actors. It evaluates the potential contribution that a clearly articulated application of these principles by the DSB, for example at the trade-environment interface, can make to secure the ongoing legitimacy of the WTO. Recognising that in this context the WTO exemplifies the need for transparent accountable institutions at the supra-state level, without which the sustainability of such institutions must be in question, the analysis is linked to, and considered in the light of, SDG 16.

The questions addressed in this paper are of crucial contemporary significance. Since the middle of the twentieth century the international legal order has undergone a number of radical changes. New international and legal priorities and objectives have emerged, exemplified in the adoption of the UN Sustainable Development Goals. These new objectives, including in particular SDG 16, increase both the pressure upon, and scrutiny of the WTO, in particular its dispute settlement body and specifically with regard to its legitimacy. In addition, there has been a radical change in the international legal architecture. At the time of the negotiation of the GATT it could still be said that states were the key actors in international law. Yet since then an ever increasing number and diversity of non-state actors have emerged, among them the WTO. The emergence of such actors, some of which, including the WTO, are endowed with significant power and competence, is one factor which has brought with it a consequent diminishment in the role of the state in the international legal order. Unsurprisingly in this context, the emergence of the WTO has been accompanied by significant questions relating to both its democratic accountability, and the legitimacy of its decision-making, particularly where that decision-making extends beyond the traditional 'trade' context. The WTO has, thus, long been the subject of scrutiny regarding its engagement with national regulatory measures pursuing non-economic objectives such as environmental protection and climate change. That the WTO is the only multilateral international organisation which can rule on the balance to be struck between trade liberalisation and non-economic interests, has proved contentious, giving rise to questions relating to both its mandate and legitimacy.

Such questions are compounded in the present global political context: the UK Brexit vote, Trump's election in the US, Le Pen's relative success in France (and challenges currently facing

Macron) are among events all underpinned by a growing nationalism, popular dissatisfaction with a system under which sectors of the population are perceived to have been left behind, and a perhaps resultant globalisation scepticism. It is all the more striking that these developments have occurred within the EU, and in the United States, and thus have involved some of the architects of the global economic order. This ‘globalisation scepticism’ can be seen to reflect the contested nature of, and historic legitimacy questions which have faced the WTO concerning its mandate and jurisprudence in this area.

To address these pressing issues, the paper is structured in 3 parts. Part 1 is concerned with the evolving legal context in which the WTO is located: the emergence of non-economic interests, including environmental and social is briefly outlined, highlighting sustainable development. Attention then turns to the evolving architecture of international law, examining the impact this has had both upon the role of states and non-state actors, and on the governance of emerging branches of international law. Examination of these two developments leads into an analysis of how these cumulatively relate to and impact upon the WTO, specifically with regard to its dispute settlement process, and in particular in the light of the longstanding legitimacy questions which have faced it. The final section of this part introduces SDG 16, examining its objective and status, and evaluating its potential significance for the WTO, particularly in the light of the highlighted questions concerning WTO legitimacy. In Part 2, understandings of ‘legitimacy’ are themselves unpacked, with a particular focus upon ‘input legitimacy’ as a means of contributing to ‘output legitimacy’ in WTO Dispute Settlement decision making. It is argued that despite the inherent contestability of interpretations of the rule of law and its key principles, adherence to particular principles of the rule of law makes a key contribution to securing input legitimacy and that this is crucial for the WTO in the face of its contemporary challenge. Part 3 provides conclusions.

**Emily Reid** undertook her LLB at the University of Edinburgh before completing an LLM in International and European Legal Studies at the University of Durham. Following a period as Research Assistant in the Durham European Law Institute, Emily’s doctoral work was undertaken at the University of Southampton, supervised by Takis Tridimas.

Emily’s primary research interest lies in International Economic Law and Sustainable Development. Her monograph, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the European Union* was originally published by Hart in January 2015, and in paperback in January 2017. Having published significantly in EU and international economic law, with a growing focus upon the trade/environment/climate change interface, Emily’s current work is centred upon a long term project, *Trade governance and regulation in an evolving global context*.

Emily has taught predominantly EU Law, Public Law, WTO Law and Globalisation and Law at the Universities of Sussex and Southampton. She is currently Professor of International Economic Law and Sustainable Development at the University of Southampton.

### ***FTAs State-to-State Dispute Settlement Mechanisms – An Alternative in Times of AB Crisis*** **(Furculita Cornelia)**

The WTO Dispute Settlement Mechanism (‘DSM’) has been the main mechanism for solving disputes between states in the area of international trade law. It has been often called the ‘jewel of the crown’ because of its success. Despite its accomplishments, it is currently facing an unprecedented crisis. Due to the US blockage of the appointment and reappointment of the



Appellate Body ('AB') Members, the WTO DSM might become dysfunctional by the end of 2019. Almost all FTAs concluded since 2000 contain state-to-state DSMs. Most of these mechanisms were inspired from the WTO DSM and establish similar procedures.

However, while the WTO DSM is known for being actively used by its Member States, the FTA DSMs are mostly known for being inactive and remaining only on the paper. This scarce use of FTA DSMs could be attributed to the success of the WTO dispute settlement. However, in the wake of the AB crisis, we could witness a surge in the use of the FTA DSMs that slowly emerge as potential alternatives to the WTO dispute settlement.

This paper will analyze whether FTA DSMs could become viable alternatives. It will perform an analysis of the DSMs contained, particularly, in CETA and EU-Japan EPA ('JEEPA'). These two FTAs were chosen as case studies, since they are ambitious trade agreements concluded between major trading partners. There is a high probability that the EU, Canada, and Japan, that are also top users of the WTO DSM, will have to search for new venues to enforce their rights. Therefore, this paper anticipates that they can find such new venues in CETA and JEEPA.

The paper will perform a comparison between the DSMs contained in CETA, JEEPA, and the WTO DSMs. It will first compare the scope of these DSMs. Since, there are substantive FTA chapters that are not covered by the DSMs provided therein, it will see with respect to which substantive areas CETA and JEEPA DSMs could be potential alternatives for the WTO DSM. The paper will further perform a comparison of the procedures described in the FTAs Dispute Settlement Chapters and the WTO Dispute Settlement Understanding and will assess whether, from a procedural perspective, CETA and JEEPA DSMs provide its parties with similar levels of guarantees. It will look into such procedural aspects as the selection of panelists and will analyze whether there are mechanisms that ensure that the process cannot be blocked by one of the parties. The paper will further look into the timeframes for dispute settlement established in CETA, JEEPA and the WTO DSMs. Other important aspects that will be considered in the paper will be the lack of the appeal stage at the FTA level and the enforcement of the rulings issued by CETA, JEEPA and the WTO DSMs. The possibility to submit *amicus curiae* briefs and the level of transparency will be examined as the last criteria for comparison.

Since, the decision of states to bring proceedings against a trading partner in a particular forum is influenced not only by legal aspects, but also by the political ones, the paper will continue with an analysis of the political considerations that could play a role in shaping the DSMs contained in CETA and JEEPA as alternatives for the WTO DSM. It will look into such political considerations as the value of precedents set at the bilateral level versus the one set at the multilateral level. It will also assess the chances to reach a mutually agreed solution between disputing parties within the WTO and FTAs. Other considerations that could be decisive for whether or not states will turn to FTA DSMs is the pressure put on the other party at the bilateral and multilateral levels and the possibility to create a common front with other Members.

The paper will finalize by concluding whether or not in the scenario of an inoperable WTO DSM, the FTA DSMs could become viable alternatives, using the case of CETA and JEEPA as examples.

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she focused on jurisdictional issues in investment arbitration and gained useful practical knowledge on international dispute settlement.

Cornelia Furculita holds a Bachelor Degree in Law from Moldova State University and a Cum Laude Master Degree in International Trade and Investment Law from the University of Amsterdam. Before being a PhD candidate in Speyer she worked for an international law firm, interned at UN Women Moldova, ABA ROLI, and the Parliament of the Republic of Moldova. She also benefitted from an internship in the United States and a research visit at the University of Bonn.

### ***Lessons from the Demise of the SADC Tribunal to Save the Crown Jewel of the WTO (Henok Birhanu Asmelash)***

The United States is threatening to dismantle the WTO dispute settlement system by blocking the appointment of new Appellate Body Members. While this threat predates the Trump administration, it has become more serious ever since. The absence of a strong reaction from the rest of the WTO Membership to quell this threat means that the ‘crown jewel’ of the WTO is at the brink of being no more. However, the WTO dispute settlement system is not the first international economic tribunal to face such a threat. In fact, the unfolding events at the WTO have much in common with what happened to the now defunct Tribunal of the Southern African Development Community (SADC). Much in the same vein as the United States’ current threat to the WTO dispute settlement system, the eventual dismantling of the SADC Tribunal started with a disagreement over the mandate of the Tribunal and executed by blocking the reappointment of the SADC Tribunal Members.

The purpose of this paper is to compare and contrast the actions of Zimbabwe and the United States in voicing their concerns about the functioning of the respective international economic tribunals, on one side, and how other Members within those particular institutional contexts responded to these concerns, on the other. In particular, the paper examines how the reactions (or lack of) of other Members determines the impact of threats to the effective functioning of an international tribunal from a disgruntled Member State. In doing so, the paper will attempt to set the actions of the United States and Zimbabwe against the WTO and the SADC Tribunal in light of the exit, voice and loyalty framework first developed by Hirschman (1970) and applied by many other scholars to different contexts.

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### *Discussant*

**Geraldo Vidigal** is Assistant Professor at the University of Amsterdam (UvA), where he lectures International Trade Law and Public International Law and coordinates the LL.M. in International Trade and Investment Law. Prior to joining UvA, he worked as a Dispute Settlement Lawyer at the World Trade Organization (Legal Affairs Division) and was a Senior Research Fellow at the Department of International Law and Dispute Resolution of the Max Planck Institute in Luxembourg. He is the Managing Editor of *Legal Issues of Economic Integration* (Kluwer) and, since early 2018, integrates the WTO's indicative roster of dispute settlement panelists.

### *Closing Remarks*

**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.