International Economic Law
Interest Group

Workshop of the ESIL Interest Group on International Economic Law

Challenges to the Governance of the Global Economy: Dispute Settlement in the WTO and International Investment Law

12 September 2019

Economides Hall
Faculty of Law of the National and Kapodistrian University of Athens
57 Solonos Str.
h. 08.15-13.30

h. 08:15
Opening Speech: Peter Tobias Stoll (University of Göttingen)

h. 08:40 – 10:40
PANEL ONE - THE BLOCKING OF THE WTO APPELLATE BODY AND THE NEED FOR REFORM OF THE WTO DISPUTE SETTLEMENT MECHANISM

Chairs: Elisa Baroncini (*Alma Mater Studiorum* – Università di Bologna)
Marina Trunck-Fedorova (St. Petersburg State University)

Speakers:
Freya Baetens (University of Oslo)
High Jacking Anticipated, Prevented and Overcome: How to Safeguard the WTO Appellate System – and Beyond

Mariana Clara De Andrade (University of Milano-Bicocca)
Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism

Stefano Saluzzo (University of Piemonte Orientale)
Domestic Law Beyond Facts: The Scope of the WTO Appellate Body's Review Regarding Domestic Law

Kathleen E. Claussen (University of Miami School of Law)
Reimagining Trade "Enforcement"

Belen Olmos Giupponi (Kingston University, London)
Hybridisation of Dispute Settlement Mechanisms in International Economic Law? Exploring the Interactions between Different Systems in Mega-Regional Agreements

Discussant: Ulrich Petersmann (European University Institute)

Debate

h. 10:40 – 11:00
Break

h. 11:00 – 13:00
PANEL TWO - REFORM OF INVESTMENT DISPUTE SETTLEMENT

Chair: Catharine Titi (CNRS-CERSA, University Paris II Panthéon-Assas)

Speakers:
Stephan Schill and Geraldo Vidigal (University of Amsterdam)
Designing 'Dispute Settlement à la Carte' for Investment Law: Insight from International Courts and Tribunals

Yuka Fukunaga (Waseda University)
Precedent in Investment Arbitration: Comparison with Institutionalized International Courts and Tribunals

Esmé Shirlow (Australian National University)
The Promises and Pitfalls of Investor-State Mediation

Markus P. Beham (University of Passau)
Protection Against Developed States: The Case for Investment Dispute Settlement in the European Union

Annalisa Signorelli (LUISS University)
EU Investment Dispute Settlement after Achmea: Towards an Integrated Model of Justice

Discussant: Pavel Sturma (Charles University in Prague)

Debate

h. 13:00 – 13:30
Final Remarks: Giorgio Sacerdoti (Bocconi University)

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 State University
Prof. Peter-Tobias Stoll, University of Göttingen

ABSTRACTS & SHORT BIOS OF SPEAKERS, DISCUSSANTS AND CHAIRS

OPENING SPEECH

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.

PANEL ONE - THE BLOCKING OF THE WTO APPELLATE BODY AND THE NEED FOR REFORM OF THE WTO DISPUTE SETTLEMENT MECHANISM

CHAIRS

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 crisis of the WTO Appellate Body and the reform process of the dispute settlement mechanism; the relation between the WTO system and RTAs; the relation between free trade and non-trade values); 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.

Marina Trunk-Fedorova is associate professor at the Law Faculty of St. Petersburg State University and at the Ural State Law University, where she has been teaching courses on International Law and International Economic Law. She is also coordinator of the research area „WTO and EurAsEC law“ at KEEL – the Kiel Center for Eurasian Economic Law (Kiel University). She has a number of publications on different issues of international economic law. Marina Trunk-Fedorova holds a law degree from St. Petersburg State University, an LL.M. degree from the University of Connecticut School of Law, an LL.M. degree from the University of Barcelona (IELPO), and a Ph.D. degree from St. Petersburg State University.

She is a Co-Chair of the International Economic Law Interest Group of the European Society of International Law (ESIL). She is also a member of the editorial board of the Russian law journal "International Justice".

SPEAKERS

Freya Baetens (University of Oslo)

High Jacking Anticipated, Prevented and Overcome: How to Safeguard the WTO Appellate System – and Beyond

In recent years, domestic authorities, be it legislative, executive or judicial bodies, have increasingly questioned the competence of international courts and tribunals to exercise jurisdiction over a certain dispute, thereby rejecting the validity and legitimacy of the resulting judgments. In a WTO context, this has culminated in a US veto on the appointment of the Members of the WTO Appellate Body, potentially putting in peril the entire system for holding WTO Members accountable for breaches of their obligations under WTO covered agreements.

This paper examines the US veto from the particular angle of each Member's mandatory consent to the WTO's adjudicatory system: could the US veto be regarded as a modification, or even withdrawal, of its consent? Could (or should) this have implications for the good faith fulfilment of the US' obligations under the WTO agreements, or even its WTO membership? The paper looks at the historical development of the WTO Dispute Settlement Body and investigates whether such a situation was contemplated by the negotiating parties. The paper also scrutinizes the US' specific proposals for reform (presented as conditions for continued consent), evaluating in particular the US demands for reform of the dispute settlement procedure (Article 15 of the Working Procedures).

Subsequently, the paper seeks to identify potential ways forward, to anticipate, prevent and overcome similar vetoes. Such approach could find its basis in an audacious interpretation of the current WTO laws, such as the direct appointment of Appellate Body Members by majority vote in the General Council, instead of consensus. Or, it may seek to borrow from other international adjudicatory systems, such as the option to modify consent to the jurisdiction of the International Court of Justice. Finally, an entirely new solution may be called for – such as the 'back-up treaty', advocated by Pieter-Jan Kuijper, which would provide for an appellate system for WTO Members minus the US and be activated once the WTO Appellate Body ceases functioning.

In its final part, this paper broadens its analysis beyond the context of the WTO so as to include other treaty regimes that envisage the establishment an appellate mechanism, such as the Comprehensive Economic and Trade Agreement between the EU and Canada, or any form of adjudicatory mechanism that requires State Party cooperation for the appointment of adjudicators. Have the drafters of these treaties anticipated this problem and devised a workable strategy to prevent such 'high jacking' of their dispute settlement system? Ultimately, the paper aims to identify and develop 'best practices' to safeguard the integrity of treaty dispute settlement mechanisms, not merely at the appellate but also at the first instance level; not only in the context of the WTO dispute settlement system but across international courts and tribunals more widely.

This paper forms part of the author's research project, funded by the Research Council of Norway, "State consent to international jurisdiction: conferral, modification and termination" (project number 274946).

Freya Baetens (*Cand. Jur./Lic.Jur. (Ghent); LL.M. (Columbia); Ph.D. (Cambridge)*) is Professor of Public International Law at the PluriCourts Centre of Excellence (Faculty of Law, Oslo University), working on an interdisciplinary research project evaluating the legitimacy of international courts and tribunals. She has been a Visiting Professor at the World Trade Institute, Bern University (Switzerland), FHR Lim A Po Institute (Suriname), Xi'An Jiaotong Law School (China), Sydney Law School (Australia) and National University Singapore (Singapore). She is the co-editor-in-chief of the *Law and Practice of International Courts and Tribunals* journal, and serves on the Editorial Board of the *Leiden Journal of International Law* and the Academic Review Board of the *Cambridge Journal of International Law*.

As a Member of the Brussels Bar, she regularly acts as counsel or expert in international disputes. She is listed on the Panel of Arbitrators and Conciliators of the International Centre for the Settlement of Investment Disputes (ICSID), the South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration) and the Hong Kong International Arbitration Centre (HKIAC). She is specialised in the law of treaties, responsibility of states and international organisations, law of the sea, WTO and investment law, energy law and sustainable development.

Mariana Clara De Andrade (University of Milano-Bicocca)

Precedent in the WTO: Retrospective Reflections for a Prospective Dispute Settlement Mechanism

Several factors have triggered the current legitimacy crisis threatening the functioning of the WTO Appellate Body (AB). One of them is the criticism expressed by the United States that the 'Appellate Body claims its reports are entitled to be treated as precedent'. This research describes the normative background and the origins of the issue and examines the precedential value of adopted reports within WTO dispute settlement.

The article is divided into three parts. First, it describes the normative framework and the AB reports relevant to the examination of the value of adopted reports in WTO dispute settlement. The first part also describes the criticisms of the United States with respect to the 'doctrine of precedent' in the WTO. Second, the research assesses the perceptions of WTO Membership with respect to the judicial function of WTO adjudication in order to understand whether the United States' concerns are shared by other WTO Members. Third, it describes the current proposals presented by WTO Members to address the criticisms by the United States with respect to the value of past reports in WTO dispute settlement. These proposals focus on ways to draft a document which would textually limit the value and the reference to previous adopted reports.

With these considerations in mind, the paper develops three main arguments. First, it argues that part of the problem lays on the perception of what the judicial function of WTO adjudicators is. By examining the Members' public statements in DSB meetings, it is possible to conclude that the United States' criticisms are only partially shared by other Members. Second, it submits that the perception that past decisions have a precedential effect in WTO adjudication is, to a large extent, due to the way reports are drafted and to the choice of words by adjudicators. Consequently, the problem cannot be addressed through normative formulations, but rather only through the practice of adjudicators. Third, it is advanced that the precedential value of past reports in WTO dispute settlement is partially due to the inherent hierarchy ensuing from the existence of an appeals organ. It is argued that the current problem was a consequence of the institutional design and features of the WTO dispute settlement mechanism. As a consequence, it is suggested that, despite the existence of ways to

redress the problem, a solution to the problem may in fact come with the probable incoming demise of the AB.
Irrespective of the outcome of the stalemate in AB appointments, the current criticisms must be taken into account in whichever kind of dispute settlement envisaged by a system of multilateral trade. In this sense, the work concludes that, regardless of whether the Members adopt a text explicitly regulating the value of past reports in the settlement of disputes, legitimacy will only be regained if it is perceived by the unsatisfied parties (in this case, the United States). Regarding the issue of precedent, this would happen insofar as adjudicators implement actions addressing the concerns.

Mariana Clara de Andrade is a PhD researcher at the University of Milano-Bicocca (Italy). Her doctoral research focuses on the use of customary international law and general principles in the WTO dispute settlement system, and the relation between resort to these sources and the current legitimacy crisis of the Appellate Body. Mariana has been a guest researcher at Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, at the University of Geneva, and a doctoral research intern at PhD Support Programme in the WTO. She holds a Bachelor and LLM from the Federal University of Santa Catarina (Brazil). m.deandrade@campus.unimib.it

Stefano Saluzzo (University of Piemonte Orientale)
Domestic Law Beyond Facts: The Scope of the WTO Appellate Body's Review Regarding Domestic Law
One of the major concerns raised in recent years by the United States in the context of the WTO relates to the scope of the Appellate Body (AB) review of panels' findings. Under art. 17(6) of the Dispute Settlement Understanding (DSU), the appeal before the Appellate Body "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Questions of facts are generally excluded from the AB's competence.
The distinction between questions of law and questions of facts has become particularly troublesome in relation to the assessment and the interpretation of domestic law provisions. Critiques have focused on the tendency of the AB to review panels' findings as regards the contents and the interpretation of domestic law. According to these arguments, the latter should be considered as a question of facts, thus outside the scope of the AB's powers. Consequently, the AB is deemed to have acted frequently ultra vires, when treating ex novo issues of domestic law as a matter of WTO law. Moreover, no arguments would emerge from AB's decisions justifying a practice far from the letter of the DSU.
The proposed research aims at understanding whether US concerns regarding the treatment of domestic law in AB's review are founded and to what extent the practice followed by the AB is in contrast with the DSU. The issue at stake might also be relevant not only in the context of WTO law and of the tensions between the WTO and the United States, but also more generally in assessing the meaning of domestic law before international courts and dispute settlement bodies. Indeed, similar problems are currently debated in the context of international investment dispute settlement.
The paper will try to answer two main questions: firstly, whether it is true that the AB has often treated domestic law as a matter of WTO law and to what extent this depends from the concrete circumstances of a given case or is the expression of a more general approach; secondly, whether there are arguments in WTO law that may justify such an approach vis-à-vis US criticisms. In order to do so, the paper is divided into three main sections.

A first introductory section will be devoted to understand the concrete meaning of domestic law in WTO dispute settlement, by taking into account the practice of DSB panels. It will attempt to explain which are the consequences deriving from qualifying issues of domestic law as a matter of facts, especially in terms of responsibility of the respondent State. Indeed, the extent to which the AB can take into considerations questions relating to domestic law of the Member State also depends on how the panel has treated domestic law in the decision under review.
A second section will address the question regarding the treatment afforded by the AB to domestic law provisions. In this section, the practice of the AB will be analysed, also in the light of positions expressed in this regards by a number of WTO Member States. This section will also try to draw a distinction between the interpretation of domestic law as a matter of facts and the evaluation of its conformity with WTO obligations as a matter of law. Moreover, the research will evaluate the extent to which the outcome of AB's decisions has been determined by a certain qualification of domestic law matters.
The third and final section will focus on potential arguments justifying the review of the AB of questions regarding domestic law, in order to verify the merit of US criticisms and the concrete scope of the competences of the AB. This analysis will also attempt to present some solutions that might help in balancing the need to respect the limitations of the AB's powers with the exigencies of granting to the organ a certain margin of manoeuvre in addressing questions of responsibility submitted to it and in contributing to the development of WTO law.

Stefano Saluzzo is assistant professor of international law at the University of Piemonte Orientale. He obtnained his PhD in international law from the University of Palermo with a thesis on EU Member States' international agreements. His main areas of expertise include international economic law, EU external relations law, data protection and the law of international responsibility. Dr. Saluzzo has been visiting researcher at the Kent BSIS and at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. He is currently visiting lecturer at the Kent University School of International Studies in Brussels.

Kathleen Claussen (University of Miami School of Law)
Reimagining Trade "Enforcement"
Trade agreements today are omnibus instruments characterized by extensive commitments in areas referred to as 'trade-plus' because they expand the traditional notion of trade. This Article argues that the trade-plus commitments suffer from a mismatch between the obligations that they demand and their compliance mechanisms. This dissonance is the result at least in part of the absence of a coherent theory for linking these commitments to a liberalized trade agenda. The corresponding enforcement mechanisms do not reflect a meaningful understanding of the substantive obligations. I take up labor as a case study and highlight how the labor experience demonstrates the lack of shared concepts as to why enforceable labor commitments are part of international economic law. This Article offers an original challenge to the jumbled consensus that including trade-plus provisions in trade agreements is all positive. Nowhere was this more obvious than in the outcome of the U.S.-Guatemala labor case. This Article critically considers for the first time the broader implications of the U.S.-Guatemala case for the framing of the system and concludes that the trade dispute settlement system was not designed for these types of questions. In so doing, it seeks to draw attention to the disparity in theory and design in free trade agreements.

Kathleen Claussen is Associate Professor at the University of Miami School of Law and Senior Fellow at the Institute of International Economic Law at Georgetown University Law Center. Prior to joining the Miami Law faculty in 2017, she was Associate General Counsel at the Office of the U.S. Trade Representative in the Executive Office of the President. There, she represented the United States in trade dispute proceedings and served as a legal advisor for the United States in international trade negotiations. She is co-chair of the ASIL International Economic Law Interest Group, and serves on the Academic Council of the Institute for Transnational Arbitration. Earlier in her career, Professor Claussen was Legal Counsel at the Permanent Court of Arbitration in The Hague where she advised on disputes between countries, and on investment and commercial arbitrations involving countries and international organizations. She is a graduate of the Yale Law School.

Belen Olmos Giupponi (Kingston University, London)
Hybridisation of Dispute Settlement Mechanisms in International Economic Law? Exploring the Interactions between Different Systems in Mega-Regional Agreements

The aim of the paper is to explore the phenomenon of hybridisation of dispute settlement mechanisms (DSM) in International Economic Law (IEL) as observed in the evolution of Free Trade Agreements (FTAs) concluded over the past years, particularly those defined as mega-regional agreements. Thus, it focuses on hybridisation of systems whereby hybridisation means combining different varieties of mechanisms from international trade and investment law to give rise to a new type of mechanisms or processes. Through the analysis of treaty provisions, negotiating history and case law, the paper throws light into the question of hybridisation contributing to the current debate surrounding both stagnation at the World Trade Organisation (WTO) and the reform of the international investment system.

The analysis put forward in the paper provides with new elements for the consideration of hybridisation of conflict resolution in IEL. A further categorisation used for the analysis differentiates between intended hybridisation, implemented through specific ad-hoc treaty provisions, and spontaneous hybridisation, referring to the processes in which elements of trade and investment law are combined in the practice of dispute settlement. Hybridisation has mainly taken place between elements of dispute settlement in international trade and international investment law. Traditionally, these two different arenas have operated separately in the treaties and in practice. However, hybridisation and cross-fertilisation (understood as the mutual references between legal systems with the aim of obtaining a better outcome) have already happened. This can be evidently observed with regard to trade-related investment measures, trade in services provisions and intellectual property provisions.

The new wave of trade and investment agreements has brought about new insights into the inter-relations between the two regimes. Although termed as “free trade agreements”, the design of the treaty provisions embodied therein has gone beyond the binary system thus devising new mechanisms and processes lying at the intersection between the two realms of IEL. Mega-regional agreements represent a clear example of this new trend, as they introduce various nuances of dispute settlement mechanisms. Conversely, the idea of hybridisation has been resisted through the inclusion of stand-alone investment chapters. Procedurally and substantially, hybridisation and interrelations have occurred outside and beyond the IEL “silos” through provisions comprising elements of both systems. Notably, the hybridisation phenomenon is concomitant with a proposed reform of the multilateral investment system (with the introduction of a multilateral investment court) and the stagnation in the dispute settlement system (dubbed “the jewel in the crown”) of the World Trade Organisation

(WTO).
The morphology of newly negotiated agreements provides with new elements for the discussion, such as the Transatlantic Trade and Investment Partnership (TTIP), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or Comprehensive Economic and Trade Agreement (CETA). To illustrate, the CPTPP) incorporates various chapters and inter-related provisions. This "mix-and-match" of provisions is also observed in other agreements such as the United States Mexico and Canada Agreement-USMCA (a sort of NAFTA "reloaded") reinforces the idea of sui generis systems. In turn, the ASEAN Dispute Settlement Mechanism (DSM) redefined in the framework of ASEAN plus (via the 2012 DS agreement signed with China) also embodies new combined provisions.
Bearing in mind the relevance for both international (trade and investment) dispute settlement systems, the paper examines these different aspects addressing the following issues (in a non-exhaustive list):

- Interaction between trade and investment dispute settlement in the new agreements (overlap, clash or convergence);
- The move from dispute settlement (more focused on arbitration and arbitral bodies) to conflict resolution (including other means to solve disputes such as negotiation, mediation and conciliation);
- Inter-connexion between the various chapters (from the idea of stand-alone chapters to hybrid chapters);
- Areas which are more prone to hybridisation (digital economy, financial services, etc.);
- Referral to the WTO system, investment provisions, international investment treaties and the ICSID system;
- The role of states and non-state actors in conflict resolution;
- Methods of interpretation as a way to bridge both IEL realms;
- Interpretation of principles and standards (such as pre-post admission, most-favoured-nation, national treatment, prohibition performance requirements, fair and equitable treatment);
- The legitimacy of the respective conflict resolution mechanisms;
- Reinforcing compliance through various mechanisms and other compliance-related aspects.

Finally, the paper concludes with remarks about the overall impact of hybridisation in mega-regional agreement on the different arenas/realms and on the multilateral reform of both, the investment and trade systems.

Dr Belén Olmos Giupponi is an Associate Professor and Head of Law at Kingston University London. Ph.D. in International Law - University Carlos III of Madrid (2004 – Suma Cum Laude); she holds an LL.M in Human Rights (University Carlos III) and an MSc in International Relations. Throughout her career, Dr Olmos Giupponi has undertaken research in EU law, general international law, international economic law, human rights and environmental law. 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.
Selected Publications
Books

2019. Trade Agreements, Investment Protection and Dispute Settlement in Latin America. Kluwer International Law.
2016. Rethinking Free Trade and Human Rights in the Americas. Hart/Bloomsbury.
Chapters in Books
2018. Human Rights before Regional Economic Integration Organizations in Latin America co-authored with M. Franca Filho and L. Lixinski, in International Law Association's Human Rights Committee Yearbook. Springer.
Articles
2018. "Free, Prior and Informed Consent (FPIC) of Indigenous Peoples before Human Rights Courts and International Investment Tribunals: Two Sides of the Same Coin?". International Journal on Minority and Group Rights.
2017. "Disentangling Human Rights and Investors' Rights in International Adjudication: The Legacy of the Yukos Cases". Volume 24.2. Willamette Journal of International Law & Dispute Resolution.
2016. Olmos Giupponi MB & Hofmeister H., "Britannia locuta, causa (non) finita – Verfassungs- und europarechtliche Aspekte eines britischen EU-Austritts", Die Öffentliche Verwaltung (DÖV) 24/2016, pp. 1013-1020.
2016. Yu H & Olmos Giupponi MB. "The Pandora Box Effects under the UNCITRAL Transparency Rules", Journal of Business Law, 2016 (5), pp. 347-372.
2016. "Squaring the Circle? Balancing Sustainable Development and Investment Protection in the EU Investment Policy". European Energy and Environmental Law Review, Vol. 25, Issue 2, pp. 44–55.
2015. "ICSID Tribunals and Sovereign Debt Restructuring-Related Litigation: Mapping the Further Implications of the Alemanni Decision". ICSID Review (Fall 2015) 30 (3), pp. 556-588.

DISCUSSANT

Prof. Dr. Ernst-U. Petersmann, European University Institute, Florence. Born on 26 August 1945 in Germany, Mr. Ernst Ulrich Petersmann studied law and economics at the Universities of Berlin, Heidelberg and Freiburg (Germany), Geneva and the London School of Economics before receiving his *doctor juris utriusque* from the Law Faculty of Heidelberg University (1976) and his admission to the bar in 1977. He taught constitutional law at the Universities of Hamburg and Heidelberg and was a Professor of international law and European law at the Universities of St. Gallen, Fribourg, Geneva, the Geneva Graduate Institute of International Relations, the European University Institute (EUI) at Florence and the EUI's Robert Schuman Centre for Advanced Studies. As a visiting professor, Dr. Petersmann taught international economic law at the Hague Academy of International Law, the EUI Academy of European Law, the Xiamen Academy of International Law, and at numerous Universities in Germany, Switzerland, Italy, Spain, the USA, Colombia, South-Africa, China, India and Singapore. He published more than 30 books and 340 contributions to books and journals in German, English, French and other languages focusing on international law, European law and comparative constitutional law. His most recent monograph is: MULTILEVEL CONSTITUTIONALISM FOR MULTILEVEL GOVERNANCE OF PUBLIC GOODS. METHODOLOGY PROBLEMS IN INTERNATIONAL LAW, Hart Publishing, Oxford 2017, 400 pages. In parallel to his academic career, Prof. Petersmann worked as legal counsel for the German government representing Germany in European and UN institutions (1978-1980), as well as legal counsel in GATT and legal consultant for the WTO (1981-2019). He was a secretary, member or chairman of GATT and WTO dispute settlement panels. He

served as Head of the Law Department of the EUI (2006-2009) and participated actively in numerous academic associations, for instance as rapporteur (1993-1999) and chairman of the International Trade Law Committee of the International Law Association (2000-2014).
Prof. Petersmann is married, has 8 children, and continues to live as *emeritus professor* at Florence (Italy). He continues to serve on the editorial boards of the *Journal of International Economic Law* (OUP) and the *Asian Journal of WTO & International Health Law and Policy* as well as on the Advisory Boards of other international law publications (e.g. *Chinese Yearbook of International Law and Affairs*, *European Yearbook of International Economic Law*, *Polish Yearbook of International Law*). He also served as expert for external academic assessments requested by foreign universities and academic research bodies (like the Norwegian Research Council, the German Fritz Thyssen Stiftung, the Swiss National Research Fund). In the field of international trade and economic law, Prof. Petersmann has published more than 30 books and 300 articles, including, *inter alia*,

- E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart, 2012, xxxiv + 539 pp);
- C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford: Hart, 2011, xvi + 599 pp)
- E.U.Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford: OUP, 2005, 569 pp).
- How Should the EU and other WTO Members React to their WTO Governance and WTO Appellate Body Crises? in: Robert Schuman Centre for Advanced Studies 2018/71, Global Governance Program 331 (a revised version has been accepted for publication in the World Trade Review 18/2019).

PANEL TWO - REFORM OF INVESTMENT DISPUTE SETTLEMENT

CHAIR

Catharine Titi is a Research Associate Professor (tenured) at the French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas, France. She is Co-Chair of the ESIL Interest Group on International Economic Law, Member of the Steering Committee of the Academic Forum on ISDS, Member of the International Law Association (ILA) Committee on Rule of Law and International Investment Law and she serves on the Editorial Board of the Yearbook on International Investment Law & Policy (Columbia/OUP). She co-directs the research project The impact of international investment agreements on FDI flows funded by the French Ministry of Justice (2017-2019). Catharine holds a PhD from the University of Siegen in Germany (Summa cum laude) and has previously been a consultant at the United Nations Conference on Trade and Development (UNCTAD). In 2016, Catharine was awarded the prestigious Smit-Lowenfeld Prize of the International Arbitration Club of New York for the best article published in the field of international arbitration.

Stephan Schill and Geraldo Vidigal (University of Amsterdam)
Designing 'Dispute Settlement à la Carte' for Investment Law: Insight from International Courts and Tribunals

The multilateral consensus around reforming international investment law is likely to conflict with states' divergent preferred models for dispute settlement on investment. In order to

ensure its broad acceptability, the reformed system for dispute settlement on investment could be designed as 'dispute settlement à la carte', with a Multilateral Investment Court coexisting with different modes of dispute settlement, operating on the basis of the specific undertakings of each state. With a view to informing the debate on the possibilities for such a system, this paper examines the functions performed by adjudicators in various international fields of international law. The multilateral regime for dispute settlement on investment may draw inspiration from these regimes in order to ensure a balance between the preservation of the ability of states to choose their preferences means of adjudication and the objective of securing higher legal certainty and coherence among decisions.

Stephan W. Schill is Professor of International and Economic Law and Governance at the Faculty of Law of the University of Amsterdam. He is also Co-Editor-in-Chief of The Journal of World Investment & Trade, one of the major journals in international economic law, and General Editor of ICCA Publications. He has published extensively on international investment law and international dispute settlement, including his monograph The Multilateralization of International Investment Law (Cambridge University Press, 2009) and International Investment Law and Comparative Public Law (Oxford University Press, 2010), which he edited.

Geraldo Vidigal is Assistant Professor at the University of Amsterdam, where he lectures International Trade Law and Public International Law and coordinates the LL.M. in International Trade and Investment Law. He has 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 publishes regularly in international economic law and international dispute settlement and is the Managing Editor of Legal Issues of Economic Integration (Kluwer).

Yuka Fukunaga (Waseda University)

Precedent in Investment Arbitration: Comparison with Institutionalized International Courts and Tribunals

The creation of a multilateral investment court system has been the focus of discussion in recent years. Unlike *ad hoc* arbitral tribunals that have been used predominantly to settle investment disputes, the multilateral investment court is an *institutionalized* court system in the sense that it is constituted by standing judges, equipped with an appeal mechanism, and hears cases in accordance with uniform procedural rules. One of the principal objectives to create the multilateral investment court is to rectify the (alleged) lack of consistency in investment arbitration decisions.

Needless to say, the multilateral court system is not the first attempt to institutionalize investment dispute settlement to address the lack of consistency in investment arbitration decisions. The earlier (unsuccessful) attempts include a proposal of an appellate mechanism discussed under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)[1] and provisions in free trade agreements ratified by the United States that presuppose the possibility of establishing an appellate mechanism.[2] The proposed appellate mechanism

[1] ICSID Secretariat, Discussion Paper, Possible Improvements of the Framework for ICSID Arbitration, October 22, 2004, paras.20-23.

[2] The Dominican Republic-Central America FTA (CAFTA-DR), Art.10.20(10) & Annex 10-F (Appellate Body or Similar Mechanism).

was expected to "foster coherence and consistency in the case law emerging under investment treaties."[3]

These past and current initiatives appear to assume that an institutionalized court system is more desirable than *ad hoc* arbitral tribunals because the former respects and follows its own previous statements as precedent thereby ensuring the consistency of its decisions while *ad hoc* arbitral tribunals do not. However, is this assumption correct?

This paper addresses three questions related to precedent in investment arbitration through a comparative analysis between *ad hoc* investment arbitral tribunals and the existing institutionalized international courts and tribunals, particularly the International Court of Justice, International Criminal Court, and the World Trade Organization (WTO) dispute settlement system.

The first question is concerned with the *normative value of precedent*. This paper analyzes whether and how investment arbitral tribunals and institutionalized international courts and tribunals follow precedent, and points out that, similar to institutionalized international courts and tribunals, *ad hoc* investment arbitral tribunals do follow previous statements of other investment arbitral tribunals as precedent when these statements constitute consistent jurisprudence. In fact, consistent jurisprudence has been developed through decisions of *ad hoc* investment arbitral tribunals on a number of important interpretative issues such as key elements of the fair and equitable treatment obligation. The paper concludes that there is no significant difference in the normative value of precedent between institutionalized and non-institutionalized international courts and tribunals.

The second question addresses the *formation of precedent*. It is an undeniable fact that there are some critical inconsistencies in investment arbitration decisions despite the recognized normative value of precedent in investment arbitration. This paper attributes the lack of consistency to the difficulty in the formation of precedent in investment arbitration. The difficulty in turn arises partly from the lack of an institutional framework. More specifically, while an institutionalized international court makes a careful selection from its own past statements and deliberately repeats a selected statement to form a precedent, investment arbitral tribunals tend to make a random and occasionally even conflicting selection of which statements of other investment arbitral tribunals to follow. That said, the difficulty in the formation of precedent is also caused by other factors such as inconsistencies in the substantive rules under investment treaties. This paper discusses to what extent institutionalization of investment dispute settlement could facilitate the formation of precedent.

The third and last question is related to the ongoing debate on the improvements of the WTO dispute settlement. In the WTO dispute settlement, the Appellate Body, an institutionalized appeal body, has been enormously contributing to developing consistent jurisprudence in the WTO law. The current initiative to create the multilateral investment court has been at least partly inspired by the success of the Appellate Body. Nevertheless, the Appellate Body is now facing harsh criticism by the United States, which claims that the Appellate Body has been "making law" by ignoring the intention of the WTO Members as to the meaning of the WTO Agreements. In response, some WTO Members have made proposals to create a mechanism to allow WTO Members to weigh in and counterbalance the authority of the Appellate Body in developing consistent jurisprudence. The debate in the WTO law cautions against *overconfidence in precedent* developed by an international court. This paper examines the risk of law-making by the multilateral investment court and considers how it can be mitigated.

[3] *Id*., para.21.

(763 words)

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Esmé Shirlow (Australian National University)
The Promises and Pitfalls of Investor-State Mediation

States and institutions are increasingly exploring the potential for mediation to work in tandem with, or even as a replacement for, investment arbitration. Recent proposed reforms to ICSID's Rules, for instance, include a new set of rules for ICSID-administered investor-State mediations. Similarly, the Energy Charter Conference in 2016 adopted a "Guide on Investment Mediation" to encourage consideration of mediation for investor-State disputes under the Energy Charter Treaty ('ECT'). States, too, have recently negotiated treaties incorporating investor-State mediation. The Comprehensive Economic and Trade Agreement ('CETA'), for example, provides for the mediation of investor-State disputes. The presentation will consider these developments, as well as the links between investor-State mediation and arbitration, to set the stage for a consideration of their relative strengths and weaknesses.
The mediation of investor-State disputes offers a number of potential advantages over other forms of dispute settlement. Mediation is typically an "interests-based" rather than a "rights-based" process. This makes mediation particularly appropriate for disputes involving long-term investments, because it offers parties the possibility of retaining or even improving their relationships. Mediation may also facilitate more creative dispute settlement outcomes. In *Achmea*, for example, the tribunal noted that "the aims of both sides seem to be approximately aligned" such that a "black and white solution" via an arbitral award might not provide the "optimum outcome" when compared to a mediated settlement. Mediation may also be more inclusive of a broader range of participants than investor-State arbitration.
There is, however, reason to be cautious about investor-State mediation. Depending on the applicable rules, parties may be precluded from disclosing documents exchanged during mediation, the settlement terms, or even the fact that mediation occurred. Diverting investor-State disputes to mediation may thus undercut procedural reforms of investor-State arbitration. The ECT Guide specifically recognises that non-transparent use of investor-State mediation may have implications for the legitimacy of settlement agreements. Confidentiality

also makes it difficult to establish when and how mediation works to resolve investor-State disputes. Moreover, open questions remain about whether the Singapore Convention would apply to investor-State mediation settlements. That Convention refers to international "commercial" settlement agreements, and the ICSID reforms assume that ICSID-mediated agreements would fall within the Convention's scope. This is yet, however, to be tested. The presentation will explore these promises and pitfalls of investor-State mediation to consider its likely future as an alternative form of investor-State dispute settlement.

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Markus P. Beham (University of Passau)
Protection Against Developed States: The Case for Investment Dispute Settlement in the European Union

The argument that international investment protection is only justified in relation to developing States is as self-righteous as it is neo-colonial and has rightly been called out as European legal hegemony. It also ignores the deficiencies in the rule of law present in many EU Member States. The paper proposes that investments within the EU – including from other EU Member States – put investors in front of equal, if not greater challenges than in developing States. In their own home states, they are confronted by state immunity.

The *Achmea* decision of the Court of Justice emphasises the current friction between an established framework of BITs among Member States of the EU and what the Union envisions for an EU investment *acquis*. While the reasoning of the Court of Justice seems to aim at securing the autonomy and integrity of the EU legal system, it creates legal uncertainty. Striking down intra-EU investment proceedings leaves Union nationals in a legally less fortunate position than investors from outside the Union. Only by establishing an investment protection mechanism that integrates the concerns of both the EU itself and its Member States as well as investors, can there be a level playing field for each and every foreign investor in a globalised economy.

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Annalisa Signorelli (LUISS University)
Intra-EU Investment Dispute Settlement after Achmea: Towards an Integrated Model of

Justice

This paper discusses the consequences of the Achmea judgment on the relationship between international and European legal order in the so-called intra-EU investment dispute settlement.

The fundamental principle of primauté of European law seems to reserve to the European Court of Justice the role of final authoritative institution for the interpretation and application of all EU law.

So, if EU law is a "municipal legal order of transnational dimension" – as stated in the Advocate General Maduro's Opinion in Kadi case –, having a sui generis character, and the ECJ is recognized as the ultimate gatekeeper who decides whether, and if so, to what extend and under which conditions international law may enter the European legal order, which is the role of the arbitral tribunals in the intra-EU investment disputes? Does an international agreement concluded by EU Member States, that provides for an offer for intra-EU investment arbitration, violate the general principles of autonomy and effectiveness of the Union law? How the relation between EU and international legal order influences the relation between supranational judicial orders?

The above-mentioned questions foster in-depth analysis of different topics.

After a general overview of the substantial and procedural framework of investors' protection, the paper deals with jurisdictional issues in ISDS system pre and post Achmea. The issue also involves, on one hand, national sovereignty and the independent legislative powers of Member States in investment field, and, on the other hand, the investors' legitimate expectation according to fair and equitable treatment standard.

It reviews all possible scenarios of Achmea decision on arbitration proceedings by analyzing the past and the future of arbitrators' potestas iudicandi in the European legal order. The focus is on the ubi consistam of EU law in international legal system and on how the courts could cooperate for an integrated model of justice in investment disputes.

Then, the present paper examines the possible future implications of the Declarations on the legal consequences of the Achmea judgment signed by three groups of Member States on 15 and 16 January 2019. By stating that arbitration tribunal established on the basis of an investor-State arbitration clause included intra-EU BITs lacks jurisdiction, due to a lack of valid offer to arbitrate by the Member State, the Declarations challenged if the defense of "intra-EU investment", due to EU protectionism and mistrust of international dispute settlement could comply with the international legal order.

The analysis of the current status quo of the ISDS system shows that the crucial point is the absence of a mechanism for the coordination between international courts and especially of such a mechanism which would ensure the review of arbitral decisions in accordance with CJEU's jurisprudence. In addiction, a lot of problems have been identified as stemming from ISDS, which is based on the principles of arbitration: among others, the lack of or limited legitimacy, consistency and coherence of ISDS as well as the absence of a possibility of awards' review.

The final part of the paper would like to explore the attempt to reconcile the dispute resolution system provided by bilateral or multilateral investment treaties with the European jurisdictional framework, despite it was defined by the ECJ as "a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions".

With these considerations in mind, proposals for reforms of investor-State dispute settlement system could follow three different approaches: systemic, based on cross-fertilization communication techniques and integralist.

At the end, we have to admit the birth of a new dialogue (or a fight?) between arbitration tribunal and CJEU in order to restate the relationship between private and public justice:

which future for investment dispute settlement system after Achmea?

Annalisa Signorelli is teaching assistant for Civil Procedural Law at LUISS Guido Carli in Rome, where she enrolled in Ph.D. program in Law and Business at LUISS with full scholarship. Her doctoral research focuses on the procedural framework of international investment arbitration. As Academic Expert of Civil Procedure in LUISS since 2018, she analyses the use of arbitration as an ADR mechanism to ensure effectiveness of substantial and judicial protection of stakeholder's rights., dealing also with illegal fiscal State aid in the EU and European consumer law.
She attended ICSID arbitration proceedings at World Bank in Paris and she attended several conferences as speaker.
Among her last works, she wrote about the opposition to State aid recovery measures and about the implementation of State aid policy through multilevel cooperation and the effectiveness of parties' protection in the Italian process for the opposition to State aid recovery measures. Lastly, on 4-5 July 2019 she presented her work on "Judicial activism and protection of human rights" at the 2e Edition du séminaire doctoral en droit public, international et européen - 4e Edition du séminaire doctoral de l'École européenne de droit de l'Université Toulouse 1 Capitole on "État de droit", at University of Milan.
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FINAL REMARKS

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Dispute Settlement System, Cambridge 2006 (co-editor), *General Interests of Host States in International Investment Law* (editor), Cambridge 2014, *Brexit and WTO Law* (JIEL 2018). He is a frequent speaker at international conferences and a contributor to journals and magazines.