REPORT TO THE BOARD OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW
INTEREST GROUP ON INTERNATIONAL ECONOMIC LAW
2018 - 2019

1. ACTIVITIES

A) INTERNATIONAL CONFERENCE "A COMMON EUROPEAN LAW ON INVESTMENT SCREENING", 7-8 MARCH 2019, GOTHENBURG

On 7-8 March 2019 the ESIL Interest Group on International Economic Law in cooperation with the University of Gothenburg and the University of Southern Denmark in Odense held an international conference "A Common European Law on Investment Screening".
The Conference was held at the University of Gothenburg. Its main topics included the regulation of investment screening mechanisms in different counties around the globe as well as the highly debated new EU Regulation establishing a framework for screening of foreign direct investments into the European Union. The conference programme covered both issues of investment law and European law in respect of investment screening, and it is attached to this Report as Annex 1.

B) WORKSHOP OF THE ESIL IEL IG AT THE 2019 ESIL GÖTTINGEN RESEARCH FORUM ON "TRADE AGREEMENTS AND THE RULE OF LAW", WEDNESDAY 3 APRIL 2019

On 3 April 2019, within the 2019 ESIL Research Forum, the ESIL IEL IG held in Göttingen a full day Workshop on "Trade Agreements and the Rule of Law". The event has been organized through an international call for papers, which had a significant success and allowed the setting up of four sessions -on Preferential ("Regional") Trade Agreements: Progress and Stability for the World Economic Order? (Part I and Part II); The Rule of Law and International Economic Law; and The Rule of Law and International Economic Law: The WTO System- defined through the consolidated formula of assigning a discussant to the selected speakers of each panel. Five selected papers have been proposed for publication in the ESIL SSRN Series. The Göttingen Workshop gathered both academics and practitioners, including also officials from EU and international institutions. The programme of the Göttingen Workshop is attached to this Report as Annex 2.

C) ATHENS ESIL IEL IG ANNUAL WORKSHOP ON "CHALLENGES TO THE GOVERNANCE OF THE GLOBAL ECONOMY: DISPUTE SETTLEMENT IN THE WTO AND INTERNATIONAL INVESTMENT LAW", 12 SEPTEMBER 2019

On 12 September 2019, the ESIL IEL IG held the traditional annual Workshop in Athens, within the events organized by the Athens 2019 ESIL Conference. The ESIL IEL IG Workshop, devoted to "Challenges to the Governance of the Global Economy: Dispute Settlement in the WTO and International Investment Law", has been organized through an international call for papers, which had a highly considerable success and imposed the organization of a very dense programme within the half day allowed. The Athens Workshop had two panels -the first one on "the Blocking of the WTO Appellate Body and the Need for Reform of the WTO Dispute Settlement Mechanism", and the second panel on "Reform of Investment Dispute Settlement"- and confirmed the ESIL IEL IG formula of accompanying the selected speakers with authoritative commentators, leaving the closing remarks to Professor Giorgio Sacerdoti. The programme of the Athens Workshop is attached to this Report as Annex 3.

C)

2. MEMBERSHIP

The current list of members is held by the ESIL Secretariat, and it counts 483 persons (as of October 2019).

3. GOVERNANCE

The International Economic Law Interest Group is governed by five Co-Chairs, Elisa Baroncini (University of Bologna), Holger Hestermeyer (King's College), Peter-Tobias Stoll (University of Göttingen), Catharine Titi (French National Centre for Scientific Research - University Paris II Panthéon-Assas), Marina Trunk- Fedorova (St. Petersburg State University). They run the Interest Group's day-to-day business, administer its web page and organise its regular events. The 5 Co-Chairs managed and manage to meet also during Conferences and Seminars of common interest.

4. FUTURE ACTIVITIES

The ESIL IEL IG will ask the organizers of the ESIL Catania Research Forum to guest a workshop on the topic of International Economic Law & Solidarity, which will be organized through the launch of an international call for papers. Another call for papers will be prepared for the annual Workshop on IEL at the ESIL 2020 Stockholm Conference. Other calls for papers are foreseen to organize ESIL IEL IG Conferences in St. Petersburg on BRICS, Bologna / Ravenna on the WTO Reform Process, and London on Brexit.

SDU
UNIVERSITY OF SOUTHERN DENMARK

UNIVERSITAS GOTHOBURGENSIS 1891

International Conference

on

"A Common European Law on Investment Screening"

Foreign Investment in Times of Change – Europe's Answer to China's "Belt and Road Initiative" and other Foreign State-backed Investment Strategies

hosted by

Steffen Hindelang, SDU, and Andreas Moberg, GU

Thursday, 07th and Friday, 08th March 2019

with a pre-conference evening on 06th March 2019

at the

University of Gothenburg / Sweden

UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

In collaboration with siel | esil sedi | International Economic Law Interest Group

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STIFTELSEN FÖR HUMANISTISK OCH SAMHÄLLSVETENSKAPLIG FORSKNING

UNIVERSITAS GOTHOBURGENSIS 1891

Conference Website and Registration : https://www.europeaninvestmentlaw.eu/home-celis/

Conference Hosts and Contacts

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Conference Venue

University of Gothenburg
Conference Centre Wallenberg
Lecture Hall "Europe"
Medicinaregatan 20

413 90 Gothenburg / Sweden

UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

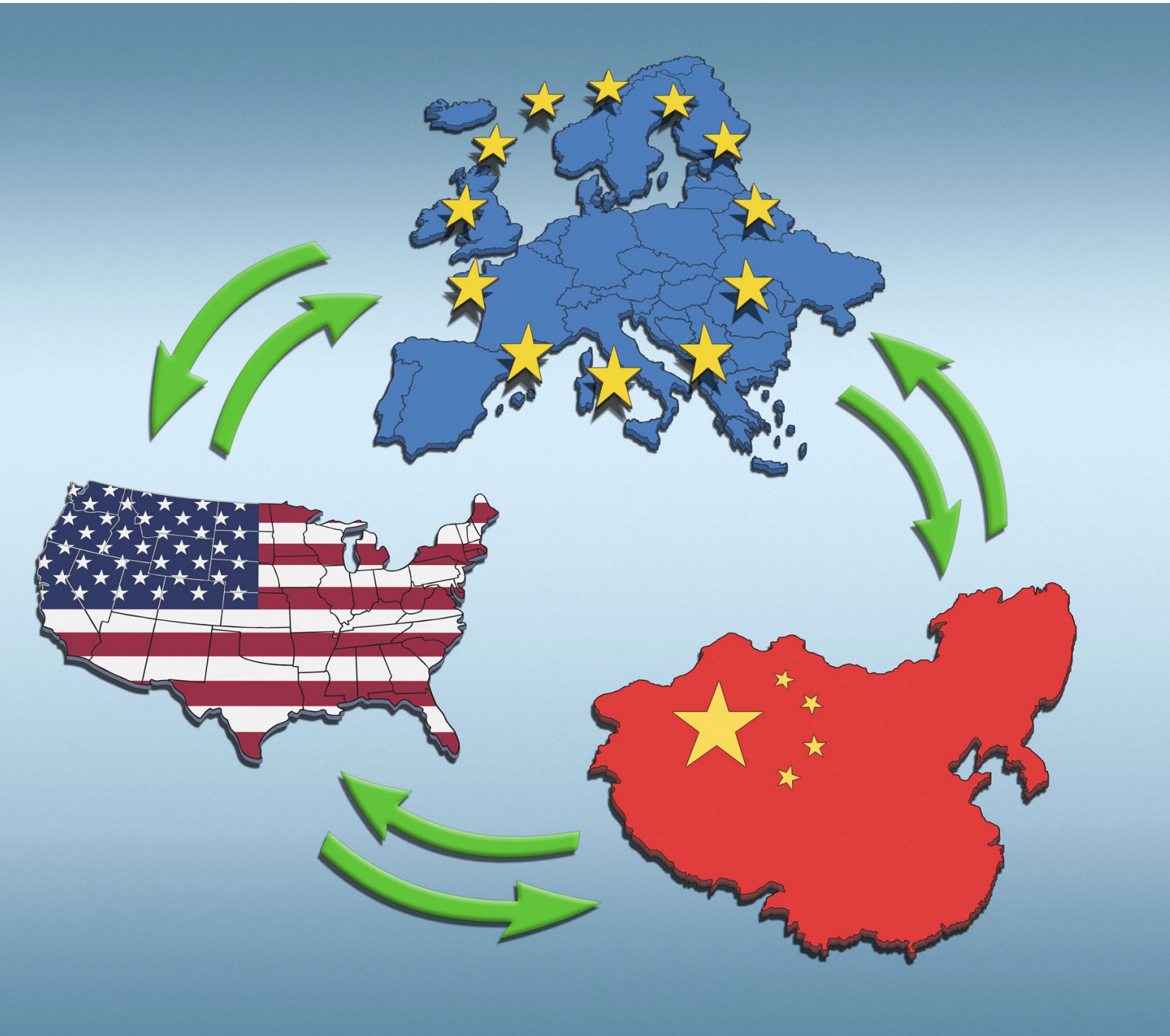
Overview

1. In a nutshell

Daimler, the harbour terminal in Zeebrugge, or Saxo Bank are only three recent examples of controversially discussed company takeovers in Europe. The "elephant in the room" is China and its "Belt and Road Initiative". The political will in Europe is growing to more actively control investments flowing into the EU. The current regulatory initiatives raise several fundamental, constitutional and regulatory issues. Surprisingly, they have not been addressed in any depth so far.

The research conference shall take stock of the current rather fragmented regulatory approaches and produce the very first, interdisciplinary grounded, comprehensive appraisal of a future "Common European Law on Investment Screening". Due to the conference's comprehensive approach, it is expected to influence the broader debate on the EU's upcoming regulation of this matter.

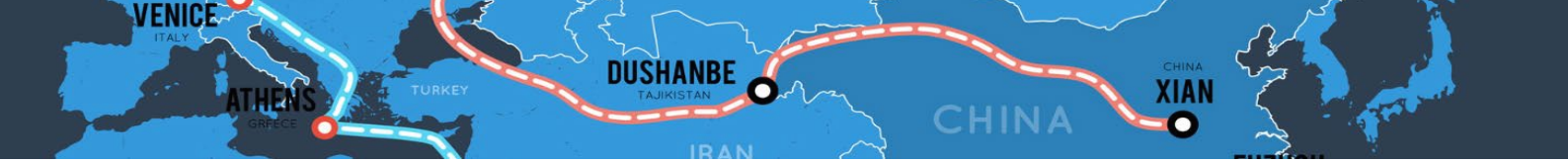
The research conference is addressed to participants from academia as well as to representatives from government, business, and civil society.



2. About the hosts

Steffen Hindelang is a professor (wsr) at the Department of Law of the University of Southern Denmark in Odense. He teaches and researches in the areas of international economic law, esp. international investment law, EU law and German public law. Previously he was a professor at Freie Universität Berlin (2011-2017), senior research associate and senior lecturer at Humboldt-Universität zu Berlin (2010-2011), and research associate and lecturer at the University of Tübingen (2004-2009). He is also senior fellow at the Walter Hallstein Institute of European Constitutional Law at Humboldt-Universität zu Berlin and academic advisor to the International Investment Law Centre Cologne (IILCC). He was guest professor, among others, at the Faculty of Law of the University of Uppsala as a Riksbankens Jubileumsfond – Alexander von Humboldt Stiftung Swedish Prize Laureate, at Nagoya University, Bocconi University Milan, the University of Lausanne, the Charles University Prague, the International Law School of the Moscow State Institute of International Relations (MGIMO), and the Turkish-German University Istanbul. Furthermore, he advised, inter alia, European governments in international investment disputes, overhauling national legislation on investment screening and international organisations, such as UNCTAD, on matters of reform of the current international investment law regime. He was repeatedly invited by the European Parliament's INTA Committee to prepare studies on the evolvement of the EU Common Commercial Policy in the area of investment.

Andreas Moberg is a senior lecturer and associate professor at the Department of Law of the University of Gothenburg. He teaches and researches both EU law and Public international law, but specializes in EU Constitutional law. He has lectured in EU law as a visiting professor at Bond University (Australia), San Pablo CEU Madrid and Háskóla Islands Reykjavík. His research has focused on EU external relations, both from a Public International Law perspective as well as from an EU-Law perspective, on the one hand, and the Court of Justice on the other. More specifically, he has written about how the EU has employed contractual clauses as instruments to spread human rights, democracy and the rule of law throughout the world, and on how Member State governments' written observations affect CJEU rulings in preliminary reference cases. Currently, he is working on a research project studying the application of article 7 TEU, and on another studying national rules for the appointment of judges to the CJEU. He is the assistant director of CERGU (Center for European Research at the University of Gothenburg).



3. Background

Volvo Personvagnar AB, Kuka, *Aixtron, OSRAM Licht,* or *Daimler, Saxo Bank*, the harbour terminal in *Zeebrugge*, Spain's *Noatum* Port, Italy's *Vado Ligure* Port, or the *Port of Piraeus* – the list of discussed controversial company takeovers and acquisitions of major stakes in Europe is getting longer and longer lately. The "elephant" or rather the "dragon in the room" is China with its somewhat nebulous "Belt and Road Initiative" and its industrial plan: "Made in China 2025". The political will in the European Union (EU) and its Member States is growing to more actively screen, control, or even prevent investments flowing into Europe, especially from the Middle Kingdom, but also from certain other countries, such as Russia.

Third country investments stirring controversies archetypically share three common characteristics:

(1) Target companies operate in "politically sensitive areas" such as transport or energy infrastructure, high-tech, research and innovation, software and cryptography, or manufacturing with some products not only eligible for civilian but possibly also military use.
(2) It is not always clear who controls the foreign company acting as immediate buyer, and whether such a "puppet master" operates according to market principles only. For example, the *Aixtron* potential buyer has been reported to be indirectly controlled by the Chinese State. This feeds the allegation of strategically oriented investment activities – in the case of China, for example, these allegations might not be a pure conjecture when looking at the "Made in China 2025" plan.
(3) The effective foreign purchaser attempts to circumvent rules for non-EU investors through an intermediary company resident in the EU.

Only 13 out of 28 Member States have an investment screening mechanism in place; some of them have tightened their grip on foreign investment lately. The instruments vary greatly in scope and function. The EU as a whole – in contrast to all G7 countries and China – is still without any common mechanism to review foreign investment. Responding to a political proposal by France, Germany, and Italy, and after the European Parliament requested a legislative initiative, the European Commission tabled a *Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union* in September 2017. In March 2018, the European Parliament produced its first Draft Report including amendments to the Commission's legal text. An EU institutional trialogue is to be expected in late 2018.

The regulatory proposals have received rather mixed responses: From cautious embraces or indifference by some Member States to outright rejection by others, like Sweden, the Netherlands, and Denmark. The apprehension of alienating foreign investment with an all too strict review mechanism is palpable. Among other stakeholders, such as businesses and trade unions, reception of the EU's proposal also varies. Some fear a gradual renunciation of a liberal, open-door economic policy and turn to protectionism. Others, in contrast, draw the picture of a slowly exsanguinating European economy, know-how and innovative power silently flowing to other parts of the world. The investments, particularly from China, would not be market driven, but strategically managed by the administration to aid technology theft. Indeed, the list of concerns is long. Foreign investment (not only) from China is viewed sceptically, as it would potentially allow foreign governments to wield political influence in Europe. Moreover, a sense of inherent unfairness is in the air since the Chinese investment climate for European investors is sometimes described as not overly welcoming. In a nutshell, the critics find fault with a lack of investment reciprocity: The EU market is—by virtue of the freedom of capital movement enshrined in the Treaties of the EU—open, while access to the Chinese market is limited in several ways.

4. Questions

Indeed, the current debate has many facets. In addition to the geopolitical, economic, and even ideological questions, the current European regulatory initiative raises several fundamental legal issues. Surprisingly, they have not been addressed in any depth so far. They can be broadly grouped into an issues-complex relating to *"Striking a Delicate Balance between Competing Interests in Light of the EU constitutional framework"* and *a "Best Regulatory Practice"* issues-complex.

The issues-complex relating to the *"Balancing contradictory interests in light of the EU constitutional framework"* addresses the question of why and which criteria to screen for in foreign investment. It goes on looking at the scope and nature of an EU competence for investment. Moreover, it addresses the value judgements contained in the EU fundamental freedoms and other primary law rules predetermining any political balancing process.

Building on the assessment of the EU constitutional law framework, within the complex on *Best Regulatory Practice,* the conference aims at providing an interdisciplinary, scientifically fortified foundation for a European administrative law framework for investment screening by setting out viable solutions and evaluating their pros and cons.

5. Programme (as of 30. November 2018)

Pre-conference evening (Wednesday, 06. March 2019)
Venue: to be announced

19.30 – 22.30 Get-Together of organisers, speakers, commentators, and chairs (special invitation event)

First conference day (Thursday, 07. March 2019): Taking Stock
Venue: Conference Centre Wallenberg, Lecture Hall "Europe", Medicinaregatan 20, 413 90 Gothenburg

09.00 – 09.45 (45') Registration and Coffee

09.45 – 10.00 (15') ***Welcome address and opening remarks by organisers***

Andreas Moberg, University of Gothenburg, Assoc. Professor, Gothenburg

Steffen Hindelang, University of Southern Denmark, Professor (wsr), Odense

10.00 – 10.30 (30') ***Economic Foundations of Capital Controls and Unilateral Liberalisation of Capital Movements by the EU Treaties***

Age Bakker, Dutch State Council, State Councillor in Extraordinary Service, The Hague

10.30 – 11.00 (30') ***Investment Screening – The Return of Protectionism?***

A Political Account (15')

Christofer Fjellner, European Parliament, MEP, EPP Vice Coordinator INTA, Strasbourg/Brussels

Business Perspective (15')

Stephan Wernicke, Association of German Chambers of Commerce, Head of Legal, Berlin

11.00-12.00 (30') General Discussion

12.00 – 13.00 (60') Light lunch

13.00 – 15.00 (120') **First Panel:** ***"The European Origins" – the EU Member States Rules on Screening Foreign Investment***

Chair: Sylvia Baule, European Commission, Deputy Head of Unit, Brussels

Opening remarks by the Chair (5')

Country Report on Western EU Countries (esp. Germany, France, The Netherlands, Ireland, Luxembourg) (20')

Speaker: Philipp Stompfe, Attorney, Alexander & Partner, Berlin.

Country Report on Southern EU Countries (esp. Italy, Spain, Portugal, Greece) (20')

Speaker: Paolo Vargiu, Lecturer, University of Leicester, Leicester

Country Report on *Central and Eastern European and Baltic EU Countries (esp. Poland, Hungary, Slovenia, Romania, Croatia, Baltic States)* (20')

Speaker: Szymon Pawłowski, Senior Lecturer, Cardinal Stefan Wyszyński University, Warsaw and Marek Jeżewski, Partner, Kochański Zięba and Partners, Warsaw.

Country Report on Northern EU Countries (20')

Speaker: Jonas Hallberg, Kommerskollegium, Trade Policy Advisor, Stockholm

General discussion (30')

Concluding Remarks by the Chair (5')

15.00 – 15.30 (30') Coffee Break

15.30 – 17.30 (120') Second Panel: *"The Hidden European Investment Screening Mechanism Already in Place" – Existing EU Secondary Legislation on (Discriminatory) Treatment of Third Country Investments – A Plurality of Regulatory Approaches*

Chair: Jukka Snell, University of Turku, Professor, Turku

Opening remarks by the Chair (5')

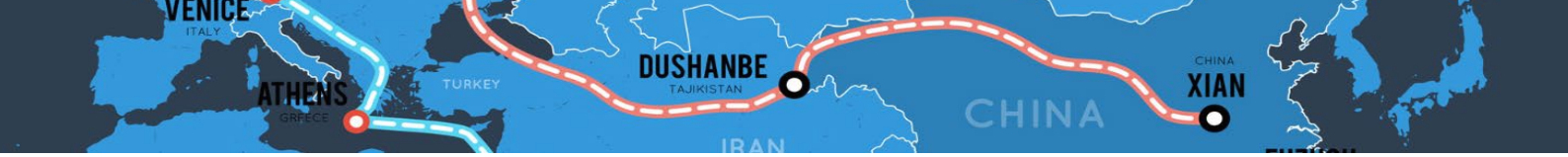
Banking and Insurance Sector (15')

Speaker: Henning Berger, White and Case, Partner, Berlin

Defence, Military, Dual-use Sector (15')

Speaker: Dominik Eisenhut, Airbus Defence, Senior Legal Counsel, Munich

Transport Sector (15')



Speaker: Henning Jessen, World Maritime University, Associate Professor, Malmö

Energy and Water Sector (15')

Speaker: Bent Ole Gram Mortensen, University of Southern Denmark, Professor, Odense

Telecommunications and IT Infrastructure Sector (15')

Speaker: Michael Fehling, Bucerius Law School, Professor, Hamburg

General Discussion (35')

Concluding Remarks by the Chair (5')

17.30 – 17.50 (20') Short Break; Coffee

17.50 – 19.00 (70') Third Panel: *Beyond Europe – The Screening Schemes of Major EU Trade Partners*

Chair: Vladimir Talanov, Egorov Puginsky Afanasiev & Partners, Advocate, Moscow

Opening remarks by the Chair (5')

Country Report for Northern America (esp. US and Canada) (20')

Speaker: Theodore W. Kassinger, O'Melveny & Myers LLP, Partner, Washington, D.C.

Country Report for Asia (esp. China and Japan) and Australia (20')

Speaker: Qingxiu Bu, McGill University, Professor, Montreal

General Discussions (20')

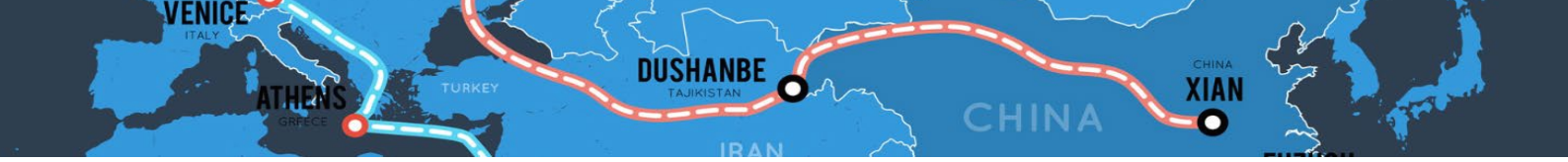
Concluding Remarks by the Chair (5')

19.00 End of 1. Conference Day

20.00 – open end Speakers' Dinner with dinner speech (special invitation event)
Venue: to be announced

<u>Second conference day (Friday, 08. March 2019): Towards a "Common European Law on Investment Screening"</u>
Venue: Conference Centre Wallenberg, Lecture Hall "Europe", Medicinaregatan 20, 413 90 Gothenburg

09.00-09.30 Arrival of participants; coffee is served.



9.30-11.00 (90') **Fourth Panel:** ***EU Constitutional Preconditions and Limits***

Chair: Tomoko Ishikawa, University of Nagoya, Assoc. Professor, Nagoya

Opening remarks by the Chair (5')

In search for an EU Competence to Establish an Investment Screening Mechanism and Restricting Effects Flowing from Fundamental Freedoms, Fundamental Rights, and other EU Primary Law

Speaker: Stefan Korte, Technical University Chemnitz, Professor, Chemnitz (30')

Comment: Bugge Thorbjørn Daniel, University of Southern Denmark, Associate Professor, Odense (10')

Comment: Erich Vranes, Wirtschaftsuniversität Wien, Professor, Vienna (10')

General Discussions (30')

Concluding Remarks by the Chair (5')

11.00-11.30 (30') Coffee Break (30')

11.30-13.00 (90') **Fifth Panel:** ***Possible Functions of a Common European law on investment screening***

Chair: Per Cramér, University of Gothenburg, Dean and Professor, Gothenburg

Opening remarks by the Chair (5')

Screening for What Threat – Preserving "Public Order and Security", Securing Reciprocity in International Trade, Supporting Certain Social, Environmental, or Industrial Policies?

Speaker: Martin Nettesheim, University of Tübingen, Professor, Tübingen (30')

Comment: Barbara Kaech, Nord Stream 2, General Counsel, Zug (10')

Comment: Helle Krunke, University of Copenhagen, Professor, Copenhagen (10')

General Discussion (30')

Concluding Remarks by the Chair (5')

13.00 – 14.30 (90') Lunch break

14.30 – 16.30 (120') **Sixth Panel:** ***A Possible Design of an EU Investment Screening Mechanism***

Chair: Joanna Warchol, European Parliament; Policy Advisor; Brussels

Opening remarks by the Chair (5')

What is a Third Country Investment? (15')

Speaker: Mavluda Sattorova, University of Liverpool, Senior Lecturer, Liverpool

What Powers at What Level? The Allocation of Information Collection, Surveillance, and Investment Restricting Powers between the EU and the EU Member States (15')

Speaker: Sven Simon, University of Marburg, Professor, Marburg

An EU Investment Screening Mechanism and Access to Legal Redress (15')

Speaker: Teoman Hagemeyer, Free University Berlin, Ph.D. Student and Social Welfare Court Berlin, Judge, Berlin

Policy Coherence (1) – What Role for EU Competition Law? (15')

Speaker: Jörg Philipp Terhechte, Leuphana University Lüneburg, Professor and Pro-Vice-Chancellor, Lüneburg

Policy Coherence (2) – What Role for EU Company Law? (15')

Speaker: Thomas Papadopoulos, Lecturer, University of Cyprus, Nicosia

General Discussion (35')

Concluding Remarks by the Chair (5')

16.30 - 17.00 Farewell by organisers

Andreas Moberg and Steffen Hindelang

17.00 – 17.30 Coffee

6. Contributors

Age Bakker

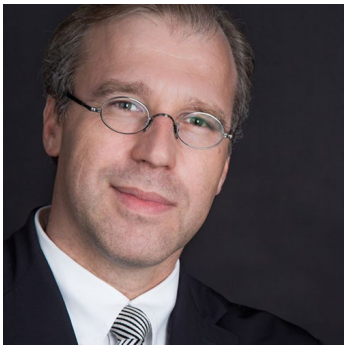
Age Bakker (1950) is Extraordinary Councilor at the Council of State of the Netherlands and Emeritus Professor of Financial Markets and Institutions at VU University Amsterdam.

After graduating in economics from VU University Amsterdam in 1976 he joined the Nederlandsche Bank, the Dutch central bank. After a two-year secondment at the International Monetary Fund (1979-81) he became closely involved with the negotiations leading up to the establishment of the European Central Bank. From 1998 to 2006 he was a member of the ECB's Monetary Policy Committee and Market Operations Committee. In 2004 he became Director of the central bank's Financial Markets Department. In 2007 he was elected as Executive Director for the Netherlands constituency at the International Monetary Fund in Washington, a position he relinquished in October 2011. Upon return in the Netherlands he was awarded the title of Commander of the Order of Orange-Nassau. He chaired the Committee for Financial Supervision of the Caribbean countries in the Kingdom of the Netherlands from 2011 until 2017. Currently he is chairman of the Supervisory Board of NWB Bank and occupies board positions at three Dutch pension funds.

Age Bakker holds a PhD from the University of Amsterdam. His dissertation (1995) was on The liberalization of capital movements in Europe. He has written extensively on international financial issues. Recently he co-authored The State of the Euro, an advice by the Council of State issued at the request of the Dutch House of Representatives concerning the future of the Economic and Monetary Union.

Christofer Fjellner (tbc)

European Parliament
MEP, EPP Vice Coordinator INTA
Strasbourg/Brussels/EU



Stephan F. Wernicke

Stephan F. Wernicke is Chief Legal Officer of the Association of German Chambers of Industry and Commerce (DIHK, representing approx. 4 million commercial enterprises in Germany) and Honorary Professor (European Law, European Economic and Competition Law) at Humboldt-University Berlin. He holds a PhD in Law from Humboldt-University and lectures on European Law (Free University and Humboldt-University, Berlin). He advises on German Legal Policy, Competition and Arbitration law and a wide range on EUmatters, with a special focus on connecting business to EU institutions. Prior assignments include: Member of Cabinet of the Vice President of the

European Commission; DG Competition of the European Commission, Head of Cabinet, Chambers of the German Judge at the European Court of Justice, Luxemburg.

Sylvia Baule

Sylvia Baule is deputy Head of Unit in the investment Unit of DG Trade, European Commission. She joined the investment Unit in July 2017 and is, inter alia, leading the team responsible for the proposal on a framework for screening of FDI into the EU. In her previous job assignments, she was a legal officer in DG Trade, dealing with WTO dispute settlement and legal aspects of trade policy. She was the Co-lead negotiator of the TTIP State-to-State Dispute Settlement Chapter and represented the EU in the WTO negotiations of the review of the Dispute Settlement Understanding. Before, she was a trade negotiator in the area of trade in services and investment where she negotiated amongst others the plurilateral Trade in Services Agreement (TiSA). She also worked for five years in the area of trade defense instruments. In that context, she has contributed to a German legal commentary on EU external trade and customs law. In 2001, she was awarded her PhD in European law at the University of Göttingen, Germany, where she also worked as an assistant researcher in European law.

Philipp Stompfe

Dr. Philipp Stompfe is an attorney of Alexander & Partner. Within the team of Alexander & Partner, he is primarily involved in international litigation and arbitration. He is specialized in international investment and economic law and further advises on international contract, corporate and construction law and on the structuring and implementation of cross-border investment projects in the MENA-Region, especially in Libya and Qatar.
Dr. Stompfe is a visiting lecture in international investment law at the University of Cologne/Germany.
Philipp Stompfe studied law at the University of Marburg (Germany) and passed his first State Exam (J.D. equivalent) in 2010. He obtained his LL.M. (Master of Law) in International Business Law and International Dispute Resolution from Queen Mary University of London. In 2016, he received his doctor's degree with summa cum laude from the University of Cologne (Germany) for his doctoral dissertation on "The Formation and Protection of International Investment Agreements in the Arab World and Example of Libya and Qatar". He was awarded the Best Dissertation in International Law of 2016 by Osborne Clarke. Philipp Stompfe is licensed to practice law in Germany and qualified to hold the office of a judge in German state courts. Philipp Stompfe is bilingual in German and English and has good knowledge in Modern Standard Arabic. Prior to his law studies he studied Arabic at the Institute of Foreign Languages of the Ruhr-Universität Bochum (Germany) where he obtained a certified diploma in Arabic

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Paolo Vargiu

Paolo Vargiu is a Lecturer in International Law at the University of Leicester (UK). He holds a JD from the University of Cagliari, an LLM and a PhD from the University of Nottingham and a PGCHE from the University of Leicester. Paolo Vargiu has been admitted to the Italian Bar and is regularly consulted on matters of investment law and arbitration. He has published extensively in the

fields of investment law, investment arbitration and public international law and his current research explores the interactions between law, dispute resolution and semiotics. At Leicester, Paolo Vargiu teaches investment law, public international law, international commercial arbitration and jurisprudence.

Szymon Pawlowski

Szymon Pawłowski is a Deputy Head of the Institute of International Law, European Union Law and International Relations and Associate Professor at the Chair of Diplomatic Law and Public Diplomacy at the Law Faculty of University of Cardinal Stefan Wyszynski. He teaches and researches in the areas of international public law, constitutional law esp. european monetary union, central banks regulation, financial market supervision, investment dispute settelment. He was visiting Professor at Faculty of Law of the University of Osnabrueck (Germany; polnisches Recht: Teil Verfasssugsrecht 2015; 2016; Europäische Verfassungsvergleichung: Teil: Polen 2016); University of Cologne (Germany; polnische Rechtsterminologie; 2014, 2016); University of Yalova (Turkey, Polish Constitutional Law and EU-law; basic; 2015). Previously he was a Associate Professor at the Chair of Constitutional Law at the Faculty of Law of the Univestity Gdańsk. In 2008 he was awarded a Doctor's degree. For his dissertation 'The European System of Central Banks in the constitutional structure of public authority of the European Community, Poland and Germany' (dissertation supervisor: prof. Andrzej Szmyt, Reviewers: prof. Krzysztof Wójtowicz, prof. Marek Zubik) he received a prize in the competition "Polish Challenges: State – Identity – Development" for the best doctoral dissertation awarded by the President of the Republic of Poland. He also worked for a Chancelly of the Sejm (Parliament), where he drew up the opinions of the Sejm in the procedeedings before the Polish Constitutional Tribunal. At present time he works at the Polisch Financial Supervision Authority as an expert on banking regulation and supervision.

More information about Szymon Pawlowski at: https://www.linkedin.com/in/szymon-pawlowski-6a447876/

Marek Jezewski

Marek specializes in international arbitration, particularly investment and commercial arbitration. At KZP, he is responsible for the arbitration practice and the resolution of complex business disputes.

Marek has given lectures on International Economic Law, International Investment Law and EU Economic Law at Polish and foreign universities. He is the author of the leading Polish monograph on international investment arbitration ("Międzynarodowe prawo inwestycyjne"). Marek is also the author of numerous publications, published both in Poland and abroad. For several years he represented Poland in the work of the United Nations Commission on International Trade Law (UNCITRAL), participating in work, inter alia, on the rules of transparency in

international investment arbitration. In 2011, Marek was nominated as the Commission's Vice-Chairman.

Marek represents clients in investment arbitration disputes under different sets of rules, including ICSID, UNCITRAL, SCC, ICC, Swiss Rules of International Arbitration and others. He also has an ever-growing reputation as an arbitrator, having served as the presiding arbitrator or co-arbitrator in more than 10 arbitration cases.

Jonas Hallberg

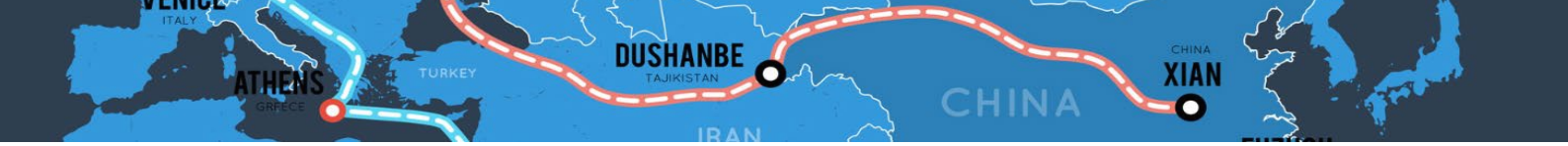
Jonas Hallberg is a legal adviser as well as policy adviser at Swedish National Board of Trade. He works primarily with international investment law and the intersection between investment law and EU law. He works closely with the Swedish Ministry for Foreign Affairs in all matters concerning international investment treaties as well as the negotiations of the investment screening regulation. On a regular basis, he represents Sweden at the OECD, UNCTAD, UNCITRAL as well as the council group TPCSI. He has for example written papers relating to the CETA-agreement between the EU and Canada, and the Most-Favoured Nation Clause in the Swedish bilateral investment treaties. During the year 2018, he published an article about the effects of the CJEU ruling Achmea and is currently conducting research on retroactivity in EU and investment arbitration law. Before working at the Board, he worked at the Upper Administrative Court of Appeal, at the Ministry of Justice and Ministry for Foreign Affairs.

Jukka Snell

Jukka Snell is Professor of European Law at University of Turku, Finland. He serves as an editor of European Law Review and chairs the Law panel for JuFo, which is a project set up by the Federation of Finnish Learned Societies to evaluate research quality. He has written widely on EU constitutional and economic law.

Henning Berger

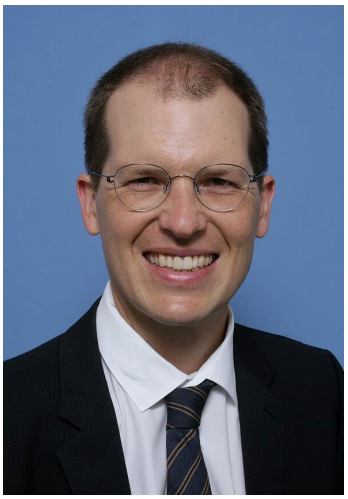
Dr. Henning Berger is a partner of international law firm White & Case LLP in Berlin. Henning is a member of the firm`s international financial advisory group and heads their German financial regulatory practice. A focus of Henning`s practice is on European and cross-border issues of banking and insurance supervision, including the supervision by the European Central Bank in the Single Supervisory Mechanism (SSM) and ownership control. His clients include national and international banking and insurance companies as well as government entities and institutions, such as the German Federal government. Henning represents his clients in leading regulatory cases before the German



administrative courts as well as before the German Constitutional Court and the Court of the European Union.

Henning Berger regularly speaks and publishes on current issues of European and German banking supervisory law. Recent publications: "Financial Services and Brexit: Navigating Towards Future Market Access", in: European Business Organization Law Review 2018 (with Badenhoop); "Bankenaufsicht" (Banking Supervision), in: Lieder/Wilk/Ghassemi-Tabar, Münchener Handbuch des Gesellschaftsrechts, Bd. 8 (Umwandlungsrecht), 2018, Chapt. 64; "Brexit – Folgen für Kreditinstitute" (Brexit – Consequences for Credit Institutions), Wertpapiermitteilungen 2018, 1078 (with Badenhoop); "Frage der Zuständigkeit der EZB zur Aufsicht über eine Landeskreditbank" (On the competence of the ECB to supervise a German development bank), Note on the decision of the General Court of 16 May 2018, WuB 2018, 60; "Stützung, Abwicklung und Entschädigung: Aktuelle Abgrenzungsfragen in der Bankenion" (Support, resolution and compensation: Current issues of the Banking Union), in: Kayser/Smid/Riedemann, Festschrift Pannen, 2017, 3; "Rechtsanwendung durch die EZB im Single Supervisory Mechanism" (Application of law by the ECB in the Single Supervisory Mechanism), Wertpapiermitteilungen 2016, 2325 (part I), 2361 (part 2).

Henning is a certified lawyer for administrative law ("Fachanwalt für Verwaltungsrecht"). After studying law at the Universities of Constance and Berlin, he received his PhD in law from the Freie Universität Berlin.

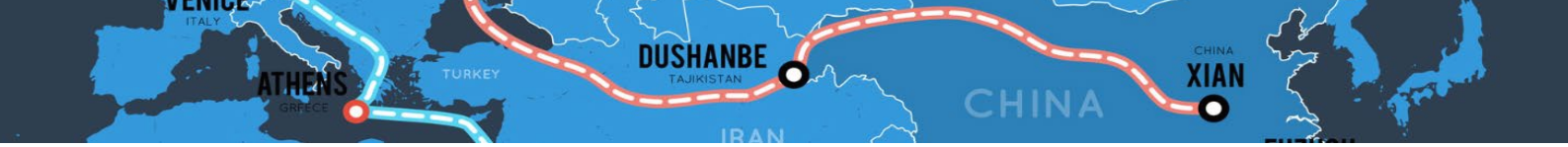


Dominik Eisenhut

Dominik Eisenhut is Senior Legal Counsel at Airbus Defence and Space's headquarters in Munich where he – inter alia – advises on EU law matters, notably regarding public procurement law, offset, and European defence funding. Prior to taking up his position at Airbus, he worked as a corporate attorney in Munich and at the Chair of International and European Law at the University of the Bundeswehr. Dominik holds a Ph.D. from Augsburg University on the applicability of EU law in the area of defence and security, and an LL.M. from University College London. He studied law in Freiburg, Grenoble, and Munich and was admitted to the Munich bar in 2007. Dominik is a lecturer in European Law at the Bundeswehr University. He is contributor to different TEU/TFEU commentaries and author of several articles on Article 346 TFEU and on other aspects of EU law in the field of security and defence.

Henning Jessen

Henning Jessen is a fully qualified lawyer in his German home jurisdiction. He graduated from the University of Kiel in 2001. Supported by a Fulbright Scholarship, he has undertaken postgraduate studies in Admiralty and Maritime Law in the United States (Tulane Law School, New Orleans) from 2003-2004. He started his legal career as a WTO lawyer in 2006 in the German Ministry for Economic Cooperation & Development. Since 2008, he has been working as a professor in the areas of Maritime Law and the Law of the Sea, at two universities in the German maritime hubs of Bremen (2008-2012) and Hamburg (2012-2016). Since 2016, Henning Jessen is an Associate Professor for Maritime Law & Policy at the World Maritime University (WMU) in Malmö, Sweden. His main teaching



and research areas are - the Law of the Sea (UNCLOS), in particular deep sea mining and maritime security; - Environmental Aspects of Human Activities at Sea; - Carriage of Goods by Sea Law / International Aspects of Transport Law / Trade Facilitation;

Henning Jessen has co-edited the book EU Maritime Transport Law and contributed several chapters to this extensive commentary.

Bent Ole Gram Mortensen

Prof., Ph.D. Bent Ole Gram Mortensen holds a chair in "Commercial Law, including especially Environmental and Energy Law" at the University of Southern Denmark. For the last 28 years, Gram Mortensen has been engaged in the legal aspects of environmental and energy issues. He has written and contributed to a large number of articles and books in English, Danish and German, having dealt with legal matters on upstream and downstream energy in Denmark, Greenland and EU. Among others he has been writing about Chinese investment in Greenland.

Prof. Gram Mortensen has in the past worked for The Danish Ministry of Justice, as a solicitor in private law firms and as a legal manager for Maersk Drilling. At present, he is Vice Chairman of the Danish Energy Board of Appeal and Chairman of the Valuation Authorities in the Region of Southern Denmark in compliance with the Renewable Energy Act.

Michael Fehling

Prof. Dr. Michael Fehling, LL.M. (Berkeley) is Professor at Bucerius Law School in Hamburg, where he has held the Chair of Public Law and Comparative Law since 2001. From 2009 - 2010 he served as Vice President of the Bucerius Law School. Previously he taught Public Law at the University of Freiburg im Breisgau. His research interests include Economic Regulation Law and Administrative Law from a European perspective (particularly the reform of public services and the regulation of network-industries), Environmental Law, Media Law, academic freedom and university organisation, Comparative Public Law (USA), and the Economic Analysis of Administrative Law. Together with Matthias Ruffert he edited a comprehensive work on the legal perspectives on regulation. He is co-editor of the series "Studien zum Regulierungsrecht" published by Mohr Siebeck and of the law journal "Die Verwaltung". Since 2014 he has been acting as Academic Director of the Energy Law Initiative at Bucerius Law School.

Vladimir Talanov

Vladimir is the Head of International Trade Group of Egorov, Puginsky, Afanasiev & partners, the largest Russian national law firm, with its headquarters in Moscow. Vladimir represents clients in complex international arbitration and litigation disputes and advises on international trade law, WTO law, investment protection, investment arbitration as well as public international law. He is experienced in arbitration proceedings under the rules of the ICC, LCIA, SCC, ICAC and UNCITRAL, as well as in the coordination of multijurisdictional cases before the courts of the

USA, various EU jurisdictions, England and Wales, Turkey, India, Russia, Serbia, Singapore and other countries.

Vladimir holds a Bachelor of Law (cum laude) and a Master's degree from St. Petersburg State University School of Law. He also earned a Master of International Law and Economics degree (magna cum laude) from the World Trade Institute, Universities of Bern, Fribourg, and Neuchatel (Switzerland). He also graduated from the Linguistics Department of St. Petersburg State University in 2006 (cum laude), with qualification of a Russian – English interpreter in the professional field. He has been a member of the St. Petersburg Bar Association since 2012. Vladimir is a faculty member at the St. Petersburg State University Law Faculty and Faculty of Law of the National Research University – the Higher School of Economics. He was awarded the title of the Best Teacher of the Higher School of Economics in 2014, 2015 and 2018. He teaches courses on international trade, cross-border dispute resolution and regional economic integration.

Theodore W. Kassinge

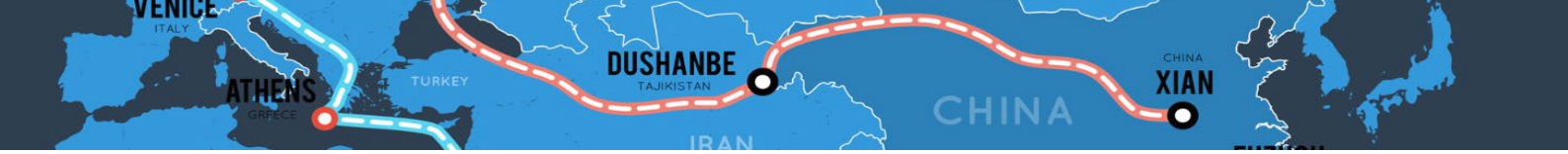
Theodore W. ("Ted") Kassinger is a partner in the Washington office of O'Melveny & Myers LLP, a U.S.-based firm of approximately 700 lawyers practicing in seven U.S. and eight foreign offices. Ted joined O'Melveny after serving from 2001 to 2005 in the U.S. Department of Commerce, first as the General Counsel and then as the Deputy Secretary. Prior to joining the Commerce Department, Ted was engaged in private law practice for 16 years. Earlier in his career, Ted also served in government, including as a lawyer with the U.S. Department of State.
Calling on his 40 years of private practice and government experience, Ted provides regulatory, public affairs advocacy, and strategic counseling advice involving diverse issues of national security and international economic policy, including reviews of foreign investments for national security reasons, compliance with export control and economic sanctions regimes, industrial security rules administered by the Defense Security Service, trade policy, and international trade and investment agreements. Ted also regularly advises clients who are appointed to senior government positions regarding the requirements of government ethics rules.

Ted is a member of the Council on Foreign Relations and of the U.S. Department of State's Advisory Committee on International Economic Policy (which he formerly chaired). Ted regularly has been recognized by such publications as Chambers USA, Chambers Global, Super Lawyers, Law360, Euromoney, and Washingtonian as a leading practitioner in the field of international trade, investment, and national security law.

A native of Georgia, Ted received his B.L.A. (1975) and J.D. (1978) degrees from the University of Georgia.

Qinqxiu Bu

Professor
McGill University
Montreal/Canada



Tomoko Ishikawa

Tomoko Ishikawa is Associate Professor at Nagoya University in Japan. She is a member of the ICSID Panel of Conciliators, appointed by the Chairman of the ICSID Administrative Council, a member of the Legal Advisory Committee of the Energy Charter Treaty and a member of Investment Treaty Forum of the British Institute of International and Comparative Law. Her professional experiences include serving as a Judge at Tokyo District Court and holding the position of Deputy Director at the International Legal Affairs Bureau of the Ministry of Foreign Affairs of Japan, where she worked on bilateral/trilateral investment treaties, Free Trade Agreements and WTO dispute settlement. Her recent publications include: Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration (Springer 2017, co-edited with Julien Chaisse and Sufian Jusoh); The Protection of Energy Investments under the ECT: an extra-EU country's perspective, 2 European Investment Law and Arbitration Review (2017); Case Comment: Marco Gavazzi and Stefano Gavazzi v. Romania - A New Approach to Determining Jurisdiction over Counterclaims in ICSID Arbitration? ICSID Review (2017); Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options, 3 McGill Journal of Dispute Resolution (2016-2017) and Provisional Application of Treaties at the Crossroads between International and Domestic Law, 31(2) ICSID Review (2016).

Stefan Korte

Stefan Korte (*1975 in Walsrode, Germany) is a professor of law at the University of Technology in Chemnitz. He holds a Chair in German Public Law at the faculty of economics since 2015. Korte is married and has got four children.

Korte studied law at the University of Göttingen and was supported with a scholarship from the Konrad Adenauer Foundation. He graduated in 2001 with his first state examination and 2006 with his second state examination in law. Korte received a doctor's degree in 2004 from the University of Hamburg for his thesis on the state's gambling regime. In 2013 he received his venia legendi for his habilitation thesis on public law as a location factor. Parallel to his activities in the field of law, Korte was studying at the Universities of Göttingen and Hamburg in order to receive additionally a degree in business administration. He graduated in 2008.

As an academic, Korte was awarded several prizes for both excellence in teaching (f.e. the Teaching Award by the faculty of law of the Freie Universität Berlin, 2009) and research (f.e. the Interdisciplinary Jean Monnet Award for habilitation by the Friedrich Schiller University of Jena, 2015). He holds several memberships and fellowships to national as well as international associations such as the "Vereinigung Deutscher Staatsrechtslehrer", "the German-Taiwanese Working Group on Administrative Law" or the "Gesellschaft für das gesamte Regulierungsrecht".

On the one hand, Korte's research is focused on European economic law, especially on the European Single Market with its four freedoms as well as the state aid law. On the other, he takes part in the legal discussion on national administrative economic law, where he is a leading

expert on the topics of the German gambling law and the Trade, Commerce and Industry Regulation Act.

Bugge Thorbjørn Daniel

Bugge Thorbjørn Daniel is Associate Professor in International Law at University of Southern Denmark and is currently leader of the research Group on EU Law and International Law. Bugge holds a Ph.D. in WTO law from University of Copenhagen. In 2018 he ended a 8 year membership of the board of the Danish Institute for International Studies (DIIS).

He teaches in the fields of WTO law, EU law and public international law. He also coaches SDU teams participating in the Moot court competition on WTO law and before that he participated as a judge in that competition. At University of Southern Denmark he has been deeply involved in the establishment of the interdisciplinary master degree Master of International Security and Law as well as the Center for War Studies.

His research interests in relation to the WTO are focused on institutional issues as well as the balancing of trade and environment. In relation to the EU the focus is also on constitutional and institutional matters, currently centered on rule of law. He has also contributed several chapters to the currently only Danish textbook on public international law.

Erich Vranes

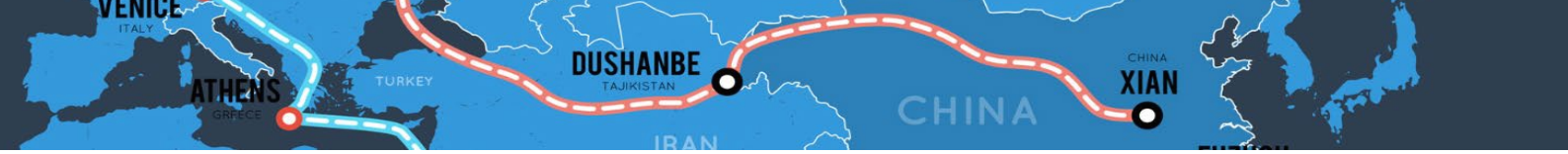
Erich Vranes is professor of European Law, International Law, Public Law and International Economic Law at the Vienna University of Economics and Business (WU Vienna). He also takes a keen interest in legal theory and methodology.

Erich Vranes has studied law at the Universities of Graz, Lausanne and Geneva, specialising in EU and international economic law. Erich Vranes was awarded his venia docendi at WU Wien in 2007, and has been serving as head of the Institute for European and International Law at WU Wien since 2012.

Erich Vranes is a regular legal consultant of national and EU institutions and acts as a reviewer for leading international journals and publishing houses.

Per Cramér

Per Cramér is full Professor of International Law and holds the Jean Monnet Chair in European Integration Law at the School of Business Economics and Law at the University of Gothenburg. Since 2010 he is Dean for the School of Business, Economics and Law. Ongoing research projects by professor Cramér focus on the legal effects of treaties concluded by the European Union and the functions of the preliminary ruling procedure before the CJEU. He has furthermore recently published an analysis of Brexit, Trumpism and the changing structure of international trade regulation.



Martin Nettesheim

Professor
University of Tübingen
Tübingen/Germany

Barbara Kaech

Swiss lawyer (Rechtsanwältin lic. Iur., M.B.L.-HSG). Admission to the bar. 1990 – 1997 studies of law at the universities of Berne (CH), Lausanne (CH) and Nijmegen (NL). 2008 Executive Master of European and International Business Law (University of St. Gallen).

Between 1998 and 2004 Consultant/Legal Counsel at PwC in Berne, Zurich and London handling litigation as well as various commercial and corporate legal issues. From 2005 to 2008 Senior Manager at PwC PR China/Hongkong based in Shanghai advising on Chinese and HK commercial law as well as training staff in compliance/risk management. Deputy General Counsel at Nord Stream AG (Zug/Switzerland) from 2009 to 2015. Since 2015 General Counsel and Corporate Secretary at the project company Nord Stream 2 AG (Zug/Switzerland) heading the Legal Department and managing all legal issues in relation to setting up a gas pipeline in the Baltic Sea from Russia to Germany.

Main areas of expertise are dealing with cross-border legal matters, commercial and corporate law as well as public law in various jurisdictions and project finance as well as setting up and managing an international legal department.

Helle Krunke

Helle Krunke is Professor of Constitutional Law and Head of PhD School at the Faculty of Law, University of Copenhagen. She is First Vice President of the International Association of Constitutional Law (IACL). Her research covers (Comparative) Constitutional Law and EU Constitutional Law including the interplay between EU law and national law, trends of direct democracy, constitutional identity and solidarity. Next book publication: Helle Krunke, Hanne Petersen and Ian Manners (eds.), Transnational Solidarity. Concept, Challenges and Opportunities, Cambridge University Press, 2019 (forthcoming).

Joanna Warchol

Joanna Warchol is legal and political adviser at the Committee on International Trade (INTA) at the European Parliament since 2010. She has been responsible for legislative acts on investment protections, the EU - WTO or OECD relations, better law making as well as proceedings on the conclusion of international free trade agreements aligning to the post-Lisbon decision-making procedures. In 2018 she was a member of the EPs Inter-Institutional negotiation in the team of EP Rapporteur, Franc Proust during trialogue negotiations on the *Proposal for a regulation establishing a framework for screening of foreign direct investment into the EU* (Screening of the FDI into the EU). Prior to working in INTA, she was working as a coordinating adviser between the German and Polish Delegation within the EPP Group starting from the German Presidency of the EU in 2007 with Prof. H-G. Poettering until the Polish Presidency working together with Prof. Jerzy Buzek, the first Polish President of the EP. Before joining the Parliament, she has obtained PhD in European Commercial Law at the University of Heidelberg in Germany. She was guest speaker among others: at the German University of Heidelberg, Hamburg and Bonn, in Italy at the Bocconi University in Milan, in Ferrara and in Bologna, in Austria at Vienna University of Economics and Business, as well as at University Louvain-la-Neuve in Belgium, University of Luxembourg and in Poland at Jagiellonian University in Krakow. She was as well senior fellow in frame of the DFG, Deutsche Forschungsgemeinschaft at the Ruperto Carola Heidelberg University and in Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

Mavluda Sattorava

Dr Sattorova's research primarily focuses on international economic law broadly defined. Her most recent work examines the impact of investment treaty law on national policy-making and governance. She works closely with international organisations and government agencies involved in the design and reform of international investment treaties and national investment policies. Dr Sattorova has published extensively on international investment law and worked in an expert capacity with the UNCTAD Investment Division and the World Health Organisation. Lately she has been exploring an empirically-driven approach to investigating the interaction between investment treaty rules with national law and policy, in particular in developing countries. Dr Sattorova's monograph 'The Impact of Investment Treaty Law on Host States: Enabling Good Governance?' has been published by Hart Publishing in 2018. She is currently a senior lecturer at the School of Law and Social Justice and Director of Liverpool Economic Governance Unit, University of Liverpool.

Sven Simon

Sven Simon was educated at the Justus Liebig University of Giessen (Germany) and the University of Warwick (United Kingdom). He was graduated in 2005 and holds a law degree (state exam, J.D. equivalent). In 2009 he earned his Doctor juris (S.J.D. equivalent) with a doctoral thesis on the 'Liberalization of Public Services in WTO- and EU-Law'. Following his legal traineeship in Frankfurt, Berlin, Tel Aviv and New York, Sven Simon has been working as an Assistant Professor at the Franz von Liszt Institute for International and Comparative Law, at the University of Giessen. In 2015 he completed his habilitation with the title 'Limits of the German Constitutional Court in the European Integration Process'. In the academic year 2015/2016 he taught as Guest Professor in Public Law, European and International Law at Freie Universitaet Berlin. In 2016 Sven Simon was appointed full professor at the Philipps University Marburg, and since then holds the Chair in International Law and European Law with Public Law. In 2011 and 2014 he served as a visiting professor at the Law School of the University of Wisconsin in Madison (USA). His current research interests focus on national, international and regional trade law, legal approaches to regional economic integration, the role and future of national constitutions in European and Global governance, Dynamics of Security (Collaborative Research Centre 138), and peacebuilding processes within the United Nations System. Professor Simon advises international governmental and non-governmental organisations on different levels and acts as trial observer and consultant in different projects on development cooperation. He is Head of the European Academy Hessen and vice President of the United Nations Association of Germany.

Teoman M. Hagemeyer

Teoman M. Hagemeyr graduated from the Friedrich-Alexander-University Erlangen-Nuremberg in 2012 and 2014. He obtained a diploma in International Economic Law (major in International Economics) in 2012 with the diploma thesis "Tied Aid in International Economic Law", supervised by Prof. Dr. Markus Krajewski. In 2014, he graduated in law, taking the first bar examination at the Higher Regional Court of Nuremberg. From 2012 to 2015, Mr. Hagemeyer worked as a research assistant for Prof. Dr. Robert Freitag, who is chairing a professorship for German, European and International Private and Economic Law. From 2014 to 2016, he served as a legal clerk at the Higher Regional Court of Berlin with stages at the German Federal Ministry of Finance (Berlin), Gleiss Lutz (Stuttgart) and Oh Ebashi (Tokyo). Having taken the second bar examination in 2016, Mr. Hagemeyer worked as a research assistant for Pöllath + Partners' Berlin office until 2018. Since 2017, he is a PhD student in international economic law at the Free University Berlin, under supervision of Prof. Dr. Steffen Hindelang. In 2018, he was appointed as a judge serving in the Berlin judiciary.

Jörg Philipp Terlechte

Professor Terhechte studied law and philosophy at the University of Bielefed. After the first state exam in law (2000) he obtained his Dr. iur. (summa cum laude) in 2003. During his legal clerkship he worked at, among others, the German Federal Competition Authority, Coudert Brothers LLP (Trade & Competition Group) in Brussels and the U.S. Federal Trade Commission in Washington D.C. (International Antitrust Division). He passed the second state exam (bar exam) in 2005. His main fields of research are European law (especially competition law, common trade policy, customs law as well as European constitutional & administrative law) and international economic law (especially WTO law, international competition law, law of investment protection). He published more than 20 books and approximately 250 articles, book chapters, commentaries and shorter notes on a wide range of international and European legal questions. Some of his German and English publications have been translated into Korean, Chinese, Czech, Russian and Mongolian. He is co-editor of the 'European Yearbook of International Economic Law' and assistant editor of the leading German journal 'Europarecht'. He works on numerous commentaries on the law of the European Union and international law. Besides that, he is editor of the 'Enzyklopädie des Europarechts' (Encyclopaedia of European Law), a 10 volumes publication. Since 2017 he is one of the three senior editors of the 'von der Groeben Commentary on EU law' the leading publication in European law in Germany (four volumes with approximately 8.500 pages and 175 authors). In addition to his academic work, Professor Terhechte works as a Judge at the Administrative Court Lüneburg (Disciplinary Court) and frequently advises institutes, organizations and other actors on questions of European and international law. He represented clients before many institutions including the European Commission, the German Constitutional Court and civil courts. He is, among others, a member of the German Society of European Law (since 2016 elected member of the steering committee), the International Law Association (German branch), the Chartered Institute for Arbitration (MCIArb), the German National Committee of Comparative Law, the Academic Society for Competition Law (ASCOLA) & the Scientific Advisory Board of the Federal Competition Authority of Germany ('Bundeskartellamt'). He has held visiting positions at universities and institutions in the United States (George Washington University Law School, Georgetown Law Center – Institute for International Economic Law, Fordham Law School – Institute for Competition Law & U.S. Federal Trade Commission), the United Kingdom (University of Oxford – Institute for European and Comparative, University of Glasgow), the Netherlands (University of Utrecht, Radboud University Nijmegen), Indonesia (University of Bandung) and Mongolia (State University of Mongolia and University of the Humanities). In 2016, he was a visiting professor at the University of West Indies, Cave Hill, Barbados. Furthermore, he is working as an adjunct professor of law at the Charles University, Prague (since 2006), at the Europa-Kolleg Hamburg (since 2006), at the China-Europe School of Law, Bejing (since 2008) and at the St. Petersburg State University, Faculty of Law (since 2009).

Thomas Papadopoulos

Thomas Papadopoulos is a Lecturer in Business Law at the Department of Law of the University of Cyprus. He received a degree of DPhil in Law (2010), a degree of MPhil in Law (2007) and a degree of Magister Juris-MJur (2006) from the Faculty of Law, University of Oxford, UK. He also received his LLB with Distinction (ranked 1st) from the Department of Law, Aristotle University of Thessaloniki, Greece (2005). Previously, he was a

visiting researcher at Harvard Law School (2009-10). He is also a Visiting Professor at International Hellenic University (Greece) and at Lund University (Sweden) and an Attorney at law (Greece). Moreover, he is an Editorial Secretary of European Company Law (ECL) Journal. He was awarded the "Cyprus Research Award-Young Researcher (2014)" of the Research Promotion Foundation of the Republic of Cyprus (category of 'Social Sciences & Humanities'). This distinction was awarded on the basis of his research on Takeovers and Mergers and was accompanied by a research grant. He is the Project Coordinator of the Research Project "Takeovers and Mergers in European, Cypriot and Greek Company Law", which is financed by the Research Promotion Foundation of the Republic of Cyprus. His articles were published in many top international law journals.

International Economic Law Interest Group

EILS European and International Law of Sustainable Development
Jean Monnet Chair for European Union and Global Sustainable Development Through Law
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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 Philopophy 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 Europena Commission, specialized in Geographical Indications and WTO legal issues.

He hold 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." [1]

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

[1] 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 lead 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 TTP 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 particularly 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. Theses 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.
The bilateral safeguard provisions have been envisaged in most PTAs. These provisions appear to be similar, yet not identical. This article aims to explore the dynamic of bilateral safeguard provisions in different period of time. By means of examining the bilateral safeguard provisions in PTAs from the major world trade partners and the trade hubs, this article firstly systemizes the bilateral safeguard provisions in PTAs. This article observes that these bilateral safeguard provisions reveal 'evolving' features and have experienced three different generations. Afterwards, this article evaluates these bilateral safeguard provisions. Since most of them were concluded after the WTO Agreement on Safeguards, this article seeks to answer two questions: have they further developed the jurisprudence of safeguard as a contingent measure? If so, what kind of progresses or drawbacks have they revealed? Finally, this article reflects on these deviations and provides suggestions for improvements.

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[2]. 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

[2] Smith, Adam, The Theory of the Moral Sentiments, Oxford, Claredon Press, 1976.

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[3]. 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[4]. 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. 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 founds 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

[3] Ingram, James C., International Economics, 1 ed., New York, John Wiley & Sons, 1993.
[4] Parkin, Michael, Macroeconomics, 13 ed., Toronto, Pearson, 2018.

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 undress 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 *Rechstaat* 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 uncapable 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 Soloch 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).[5]
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 subsides 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

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[5] 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.

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 subsides 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 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.

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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 oft he 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.

Cornelia Furculita is a Marie Curie Early Stage Researcher and PhD candidate in the framework of Horizon 2020 Marie Curie EUTIP-ITN at the German University of Administrative Sciences Speyer. Her PhD project is provisionally entitled „The Relationship between State-to-State Dispute Settlement Mechanisms in the new generation EU FTAs and the WTO". She has recently completed two research stays at the University of Passau (Germany) and T.M.C. Asser Instituut (the Netherlands) during which she researched relevant question for her thesis and received feedback from the local research staff. Cornelia also had a practice oriented stay at the international law firm NautaDutilh (the Netherlands) during which 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.

Henok Asmelash is a Research Fellow at the Max Planck Institute Luxembourg for Procedural Law and a PhD Candidate in International Law and Economics at Bocconi University. Henok

holds LL.M Degrees in International Economic Law and Policy from the University of Barcelona and in Business Law from Addis Ababa University. He was a Marie Curie Fellow of the DISSETTLE Project at the University of St. Gallen and held Visiting Researcher positions at the University of Barcelona and at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Henok has also conducted research and consultancy work for the World Institute for Development Economics Research and the International Centre for Trade and Sustainable Development (ICTSD). His current research focuses on international economic courts and tribunals and issues at the intersection of trade, energy and the environment with a particular emphasis on the regulation of energy subsidies in the multilateral trading system.

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.

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.

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Books

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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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Professor Fukunaga was an assistant legal counsel at the Permanent Court of Arbitration (PCA) (The Hague, 2012-2013) and an intern at the Appellate Body Secretariat, World Trade Organization (WTO) (Geneva, 2002). She was also a government-appointed assistant to Mr. Shinya Murase, a Japanese member of the International Law Commission (ILC) during the ILC 68th session (Geneva, 2016).
Professor Fukunaga holds an LL.D. (2013) and an LL.M. (1999) from the Graduate Schools for Law and Politics, University of Tokyo, and an LL.M. (2000) from the School of Law, University of California, Berkeley.
Professor Fukunaga has published a number of articles and chapters in the field of international trade and investment law, including "Securing Compliance with International Economic Agreements and Dispute Settlement: The Role and Limits of the WTO Dispute Settlement and Investment Arbitration" (Yuhikaku, 2013).

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.

Dr. Esmé Shirlow is a Senior Lecturer at the Australian National University. Her research focusses on public international law, international dispute settlement, and international investment law and arbitration. Esmé is an Assistant Editor (Australia/New Zealand Region) with Kluwer Arbitration Blog, and previously worked in the Australian Government's Office of International Law. Esmé completed her PhD at King's College London, an LL.M. at the University of Cambridge, and a Graduate Diploma of Legal Practice (with Merit), an LL.B. (Hons) and a B.A. at the Australian National University. She is admitted as a Solicitor in the Australian Capital Territory.

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.

Markus P. Beham is currently an Assistant Professor at the University of Passau, Germany, and an adjunct lecturer in international law at the University of Vienna, Austria. Prior to that, he worked as an Associate at Freshfields Bruckhaus Deringer LLP, resident in the firm's Vienna office and as a fellow at the Department of Legal Philosophy of the University of Vienna. The author holds a joint doctoral degree from the Université Paris Ouest – Nanterre la Défense and the University of Vienna and a doctoral degree in history from the latter as well as an LL.M. degree from Columbia Law School in New York. He is an ESIL member since 2015.

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.
She collaborates with Italian Law Journal Rivista dell'arbitrato, Giustizia civile, Il processo civile and Novaitinera and with Cahiers Jean Monnet.

DISCUSSANT

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FINAL REMARKS

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From 2001 to 2009 he was a Member of the WTO Appellate Body, selected among the candidates of the European Union, and its chairman in 2006-2007. Previously he had been Vice-Chairman of the OECD Working Group on Bribery in International Business Transactions from 1995 to 2001, where he chaired the drafting committee of the *OECD Anticorruption Convention* of 1997. He acts as an Independent Arbitrator in international investment and commercial disputes and advisor in international trade law. He has been on the ICSID Roster of arbitrators since 1978.
He has *published more than 150 works* in public international law, trade, international contracts, investment law and arbitration such as *The WTO at Ten: The Contribution of the*

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.