



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

**Oslo, 9 September 2015**

**Room Kjerka, Domus Media, Karl Johans Gate 47**

hrs 11:00 - 17:00

**h. 11:00 - 12:30**

### **Panel I: EU and WTO Dispute Settlement**

*Chair* Ole Kristian Fauchald (University of Oslo and Fridtjof Nansen Institute)

The WTO Influence on the Development of the EU's External Competences Julija Brsakoska Bazerkoska, (Ss. Cyril and Methodius University, Law Faculty, Skopje, Macedonia) 20'

The (Different) Legal Regimes of Subsidies in the EU PTAs: Economic Rationales and Legal Implications, Leonardo Borlini (Bocconi University), Claudio Dordi (Bocconi University and EU-Vietnam Multilateral Trade Assistance Project) 20'

*Discussant* Joanna Gomula (University of Cambridge) 20'

*Discussion* 10'

**h. 13:30 - 15:30**

### **Panel II: EU and International Investment Law**

*Chair* Holger Hestermeyer (King's College London)

Enhanced Dualism as A Solution for the Relationship between Investment Arbitration and the EU Legal Order, Emanuel Castellarin (Sorbonne Law School – Université Paris 1) 15'

The Micula Case: the “War” between EU Institutions and Member States over Investment Arbitration?, Maurizio Gambardella (Counsel at Grayston & Company, Brussels) 15'

Between Rock and Hard Place: Arbitrary Discretion in Investor-State Arbitrators and EU Commitments of Member-States, Ksenia Polonskaya (Queen’s University, Faculty of Law) 15'

*Discussant* Peter-Tobias Stoll (University of Göttingen - Faculty of Law) 20'

*Discussion* 10'

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

**Panel III: EU and PTAs**

*Chair* Klaus Blank (European Commission, tbc)

The European Union and Preferential Trade Agreements, or: the Rhetoric of Free Trade, Jaime Tijmes (Law & Business School Universidad de La Frontera, Chile) 20'

The Role of Civil Society in EU Preferential Trade Agreements, Jia Xu (Georg-August-Universität Göttingen) 20'

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

## ABSTRACTS & SHORT BIOS OF THE SPEAKERS

### **The WTO Influence on the Development of the EU's External Competences (Julija Brsakoska Bazerkoska)**

No other multilateral treaty has raised so much discussion as the 1994 WTO Treaty concluded as a mixed agreement by the EC and its Member States. Today the EU can use the mixed agreements formula every time when it appears that the subject matter of an agreement or contract falls in part within the competence of the Union and in part within that of the Member States.

The paper will argue that the conclusion of the Uruguay Round which afterwards led to a disagreement between the Commission, on the one hand, and the Council, or most Member States at least, on the other, had enormous impact of the definition of the EU external competences. Following the traces of the Court of Justice's opinion 1/94, the paper will analyze its impact on the development of the EU's competences in the issues connected with TRIPS. The Commission has played an important role within the GATT/WTO especially in those issues connected to the TRIPS. Furthermore, Article 133 TEC evolved throughout the years, and today it includes the conclusion of tariff and trade agreements relating to trade in services, the commercial aspects of intellectual property and foreign direct investments. The Commission has long argued for incorporating services and intellectual property rights into Art. 133 TEC. The Member States, as well as the ECJ in opinion 1/94, strongly opposed it.

The paper argues that the situation has changed substantially since the new WTO dispute settlement system became operational. The strengthened position of the Commission in the WTO dispute settlement system and the Member States' reliance on the Commission in this setting has paved the way for the evolution of Art. 133 TEC. The WTO's legal approach to dispute settlement influenced the position of the Commission in the internal division of competences within the EC/EU. The Member States, despite the preferences they might have and the central decision-making role they occupy within the EU, are sometimes overtaken by events on the ground, caused by their reliance on the Commission in the dispute settlement system.

The paper will argue that this position is strengthened by the fact that the dispute settlement system within the WTO is structured in a way that gives an advantage to the big countries. Therefore, it is the Commission as a representative of the EC/EU that benefits. The position of the Commission is further strengthened by the fact that it possesses the necessary expertise. As a result of the strengthened institutional framework of the WTO, the Commission has been able to gain competences that it otherwise might have not gained. Furthermore, the legalised dispute settlement system within the WTO favors the Commission. It changes the incentives by the Member States to be represented by the Commission and in this way it attributes greater importance to the skills that the Commission possesses. Finally, the paper will conclude that even though the Member States have obviously expressed their preference not to give the EC/EU exclusive competence in the field of TRIPS, the Commission succeeded in becoming the major European player in the WTO.

**Julija Brsakoska Bazerkoska** has finished her PhD studies *magna cum laude* at Cologne University, Law Faculty in Germany. The title of her thesis was "The Political and Legal Aspects of the European Community's/European Union's Membership in International Organisations" under the supervision of Professor Angelika Nussberger. At

present she is working at Ss. Cyril and Methodius University, Law Faculty in Skopje, Macedonia, teaching External Relations Law, Common Foreign and Security Policy of the EU and International Relations. She was engaged as a researcher under the Curriculum Research Fellowship program at the Central European University in Budapest, Hungary. Moreover, she was part of several EU funded projects within the Albanian Ministry of European Integration, the Skopje's office of the Italian Ministry for Environment, Land and Sea, as well as on several projects within the domestic NGO sector.

## **The (Different) Legal Regimes of Subsidies in the EU PTAs: Economic Rationales and Legal Implications (Leonardo Borlini, Claudio Dordi)**

### *Background*

The scope and the enforcement of the WTO discipline on subsidies is limited, compared to that of the EU. Differently from the EU system, WTO law does not covers trade in services subsidies (even if WTO members committed to develop a specific discipline) and only subsidies contingent on export performance or on the use of domestic over imported goods are strictly prohibited. As to the enforcement, the “double track” WTO procedure (i.e. countervailing measures and/or dispute settlement) is less effective than the correspondent centralized EU's (eventually providing the recovery of illegal State Aid by Commission).

At the multilateral level, on the one hand, such double legal standard (intra and extra EU) might affect negatively the interests of EU members in countries with less stringent (WTO-level) subsidy discipline; on the other, it might promote an EU-members “subsidy re-direction” to support the commercial presence of national companies in other WTO members.

It is, therefore, not surprising that a number of recent bilateral agreements between EU and third countries mirror EU State aid provisions (e.g.: Albania, Croatia, Switzerland, Turkey, Israel, Jordan, Tunisia, Egypt, South Africa and Serbia) and that others (e.g. EU-Singapore Free Trade Agreement (FTA), EU-Korea FTA, Canada-EU Trade Agreements) contain only more limited chapters on competition and subsidies. While the provisions in the South Africa agreement are of minor relevance and others reflect the stricter relations EU developed with neighbors and mirror the EU subsidy legislation, those included in the FTAs with Singapore and Korea are particularly interesting: both refer to the subsidies provisions in the WTO GATT and SCM agreements, but also widen the range of prohibited subsidies. Moreover, the EU-Singapore FTA subsidy provisions might set a benchmark for other EU FTA negotiations as they constitute the only legal regime covering also subsidies to services. Among the EU FTA agreements of new generation (i.e. those negotiated and concluded after the “Global Europe” Communication of the Commission) only those with Korea and Singapore include relevant provisions on subsidies: others simply make reference to the WTO law (e.g. Canada, Peru' and Colombia), and others almost ignore the subject (e.g. Cariforum).

The different treatment of subsidies in the PTAs concluded and being negotiated by the EU questions the level of market integration the EU can pursue through those agreements and their very role as building or hindering blocks for global trade liberalization.

### *Main objectives of the paper*

Against such background, the present paper first investigates the reasons that conducted the EU and its partners to intensify, in a selective manner (i.e. in not all the FTA agreements), the scope of WTO SCM agreement. Second, it explores the legal implications of the different treatment of subsidies in the array of PTAs concluded and being currently negotiated by the EU. Third, pending the conclusion of the TTIP and of a number of other

EU-FTAs (i.e. with Vietnam and Japan), the authors, also through interviews to relevant trade negotiators of all the “new generation” FTAs, identify the economic determinants and the legal implications of the selective inclusion of the WTO+ chapter on subsidies only in the agreements with the two most advanced South-East Asian trading partners. For example, it has been argued<sup>1</sup> that the two categories of prohibited subsidies<sup>2</sup> provided by article 11.11 of the EU-Korea FTAs were included in the agreement to specifically target the subsidies granted by the Government of Korea to a Korean semiconductor company. The countervailing duties then applied by the EU were the object of the well-known DRAM WTO case (WT/DS299/R).

When considering WTO law, the above mentioned provision is a hybrid: indeed, differently from the WTO SCM prohibited subsidies, it requires the complainant to demonstrate the “adverse effect” to the trade interests of the other contracting party (which is one of the criteria of the so called SCM “actionable subsidies). Furthermore, the latter provision, represents also an innovation, as it targets subsidies based on the subjective condition of the beneficiary (i.e. insolvent enterprises), while WTO SCM provisions do not make any reference to recipients but only to the objective nature of subsidies.

Finally, the paper assesses the remedies and the procedures the agreements make available in case of illegal subsidies. In the absence of direct effect, only the State-State dispute settlement procedure is available to members that cannot end to a restitution of the subsidies illegally received, as it is the case in the EU.

**Leonardo S. Borlini** is Assistant Professor of EU Law and a Research Fellow at the Baffi Center on International Markets, Money and Regulation University Bocconi, where he is also responsible for the participation of Bocconi University in the Anti-Corruption Academic Initiative (ACAD) under the patronage and coordination of the United Nations Office on Drugs and Crimes. Dr. Borlini holds a BA cum laude in Economics and Business Administration from Bocconi University, a BA cum laude in Law from the University of Pavia, an LLM (Magister Legum) from the University of Cambridge, and a PhD in International Law and Economics from Bocconi University. He was visiting scholar at Wolfson College, University of Cambridge, in 2008. He has been teaching in numerous academic institutions, including the State University of Milan, the Free University of Social Studies LUISS of Rome, the International Institute of Higher Studies in Criminal Science, the Normal University of Beijing, the Institute for Advanced Study of Pavia, (IUSS-University of Pavia), Higher School of Public Administration of the Italian Council of Ministers, the Maxwell School of Public Affairs of Syracuse University and the Free University Institute “Luigi Cattaneo” of Castellanza. He has published nationally and internationally on issues ranging from the international law and economics of corruption and anti-money laundering, to competition policy and antitrust law, international economic law, WTO and EU legal systems. Since November 2013 he is author for Lavoce.info.

Besides his academic work, Dr. Borlini exercises a number of consultancy work. In addition to the International Monetary Fund (IMF), the World Bank and the Inter-American Development Bank (IDB), he was a consultant for the Italian Competition

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<sup>1</sup> See Dukgeun Ahn, Legal and Institutional Issues of Korea-EU FTA: New Model for Post-NAFTA FTAs? Sciences Po Policy Brief, October 2010.

<sup>2</sup> Article 11.11, added to the two categories of subsidies prohibited by article 3 of SCM agreement: (i) those “covering debts or liabilities of certain enterprises within the meaning of Article 2.1 of SCM agreement...” and, (ii) those “to insolvent or ailing enterprises, without a credible restructuring plan based on realistic assumptions with a view to ensuring the return of the insolvent or ailing enterprises within a reasonable period of time to long-term viability...”.

Authority, KPMG, U4 -Anti-Corruption Resource Centre at Chr. Michelsen Institute, Transparency International and Grande Stevens Law Firm. He is currently a consultant, the Inter-American Development Bank (IDB), the Independent Committee for the reform of the anti-corruption prevention and compliance system of the Finmeccanica Group and for the European Union Commission and the Government of Vietnam in the context of the European Trade Policy and Investment Support Project (EU-MUTRAP).

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

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

### **Academic Achievements**

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

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

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

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

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

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

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

### **Enhanced Dualism as A Solution for the Relationship between Investment Arbitration and the EU Legal Order (Emanuel Castellarin)**

Recent debates have raised the issue of the relationship between investment arbitration and the EU legal order. The ECJ is expected to intervene on the matter soon, as the Commission has requested a preliminary opinion on the EU/Singapore FTA. This issue is crucial, as Opinion 2/13 confirmed a well-established case-law on the Court's function in protecting the autonomy of the EU legal order and adopted a restrictive approach to judicial review of EU acts by international jurisdictions. As shown by the public consultation report on the TTIP released by the Commission in January 2015, the legal issue of the relationship between investment arbitration and the EU legal order corresponds to several concerns of the general public. Trade Commissioner Malmström acknowledged these challenges in her concept paper "Investment in TTIP and beyond" in May 2015. She defended an approach which can be referred to as dualist, which aims at separating international investment law and EU law as legal and jurisdictional orders to avoid unforeseen interferences between them.

This paper claims that this dualist approach is praiseworthy, but that it should be pursued more boldly to ensure the compatibility of investment arbitration and EU law. So far, dualism is embodied by three sets of provisions of the leaked CETA and EU/Singapore FTA drafts. They deal with applicable law, avoidance of parallel proceedings and the arbitral tribunals' power to enjoin specific measures respectively. These provisions are largely preferable to other suggested mechanisms to ensure a smooth relationship between legal orders, such as the establishment of a preliminary ruling by the ECJ on EU law issues pending before arbitral tribunals. However, current drafts are still insufficient to protect the autonomy of the EU legal order and to avoid practical shortcomings, such as the breach of the ECJ's monopoly over the authoritative interpretation of EU law, inconsistent outcomes of EU and arbitration proceedings, potential enforcement difficulties, and the lack of legal security.

Concerning applicable law, article X.27 of the CETA draft and article 9.22 of the EU/Singapore FTA draft only refer to the agreements themselves and international law. According to commissioner Malmström, these provisions mean that EU law will not be interpreted and applied by arbitral tribunals, as it is not applicable to the investment dispute. However, according to potentially applicable arbitration conventions and rules (ICSID, UNCITRAL or others), EU law could be applied as law (and not as mere fact), as some arbitral tribunal have already stated implicitly (*AES v. Hungary*) or explicitly (*Electrabel v. Hungary* and *Eureko v. Slovakia*). As they are currently drafted, the CETA

and the EU/Singapore FTA do not inactivate the arbitral tribunals' power to interpret authoritatively EU law without consulting the ECJ. To solve this problem, especially in the TTIP, EU negotiators could be inspired by the US BIT model, which curtails more clearly the function of arbitral tribunal as (merely) international jurisdictions.

The CETA and EU/Singapore FTA drafts also regulate interferences between international investment law and EU law by the “U-turn approach”, whose aim is to avoid parallel domestic (or EU) and arbitral proceedings. According to article X.21.1.f of the CETA draft and to article 9.20.1.f of the EU/Singapore FTA draft, investors must withdraw from any domestic (or EU) proceedings they have started before submitting a claim to the arbitral tribunal. However, in light of arbitral case-law, these clauses (and even more restrictive fork-in-the-road clauses taken into consideration in TTIP negotiations) are easy to bypass, unless they specify stricter conditions of *lis alibi pendens*.

Moreover, the arbitral tribunals' power to enjoin specific measures as *restitutio in integrum* may contravene the ECJ's powers, especially concerning the annulment of EU acts. Unlike the US model BIT and article 9.27 of the EU/Singapore FTA draft, article X.31 of the CETA draft only limits the power of issuing interim measures.

These three sets of provisions show that the Commission has adopted a dualist approach to conciliate investors' protection and the autonomy of the EU legal order. However, to achieve this goal, dualism should be enhanced by a more accurate drafting of the concerned provisions. Although it is often criticised in relations between EU law and WTO law (e.g., concerning direct effect of WTO law), a bold dualist approach is an appropriate solution for the current investment jurisdictional system, which cannot count on a centralised jurisdictional body. From this point of view, the Commission's approach is coherent as it puts the relationship between investment arbitration and the EU legal order in the broader context of the reform of investment arbitration, including the institution of a global investment court.

**Emanuel Castellarin** is senior lecturer (*maître de conférences*) at the Sorbonne Law School (Université Paris 1). He holds law degrees from the University of Pisa and the Sorbonne Law School, and diplomas of the Scuola Superiore Sant'Anna (Pisa), the Ecole Normale Supérieure (Paris), and The Hague Academy of International Law. In December 2014, he defended his PhD thesis on the participation of the European Union in international economic institutions at the Sorbonne Law School. His other publications include articles and book chapters about investment chapters in recent economic agreements negotiated by the EU, the relation between international investment law and competition law, the IMF institutional reform, and State immunities.

### **The Micula Case: the “War” between EU Institutions and Member States over Investment Arbitration? (Maurizio Gambardella)**

Since the entry into force of the Lisbon Treaty, EU member States have transferred their exclusive competence over foreign direct investment, from a national to a EU level. Article 207 of the Treaty on the Functioning of the European Union (TFEU) clearly includes “foreign direct investment” as part of the post Lisbon Common Commercial Policy (CCP).

Today the EU Institutions are still facing some outstanding issues as to “foreign direct investment” which need to be urgently solved; we are referring to, among the others: (i) the coexistence of existing Intra EU BITs with EU law; (ii) the definition of a clear and

agreed facing out procedure from the existing Intra EU BITs which will be compatible with the BITs and will not generate further litigation.

The compatibility of the existing intra EU BITs with EU Law, is not a new one, it has first become apparent with the preparations of the accession of the Central and Eastern European countries to the European Community. At that time, most of the accessing countries have in place BITs with existing EU member states and at the time of their accession such BIT have become an issue. Still today there is an array of Intra EU BITs concluded with the Central and Eastern European countries which, based on the European Commission, keep in jeopardy the ordinary functioning of the EU legal system as a whole by offering to parties an alternative avenue to solve disputes which may reach conclusion in conflict with EU law. Under this context, the Micula Brothers litigation (Micula case) constitutes the quintessential case in the field of intra EU BITs.

The beginning of this case dated back to 1998. Namely, on 2 October 1998, when Romania granted certain investors in disfavored regions a series of incentives with the aim to developed such territories. Once the incentives were in force, two Swedish citizens, Ioan Micula, Viorel Micula (Micula Brothers) also by means of three companies made use of said incentives.

Subsequently, in February 2000, Romania began accession talks to the European Union, and soon after, it revoked the above incentives, including the one to Micula Brothers, based on the position of the Romanian Competition Authority, which found that several of the incentives distorted competition.

In 2005, the Micula Brothers and three companies requested the establishment of an Arbitration Tribunal pursuant to the dispute settlement provisions of the BIT in existence between Romania and Sweden, which entered into force in 2003. The Micula brothers requested to the arbitration panel damage compensation on the assumption that Romania violated its obligation of fair and equitable treatment owed to Swedish investors under the BIT.

In its Award of 11 December 2013, the ICSID Arbitration Tribunal found that Romania violated the fair and equitable treatment clause and therefore had to pay the claimants damages. Right after, the European Commission in a State Aid decision recommended Romania not to execute the ICSID Award by paying damages to the Micula Brothers, otherwise this would breach EU law being new and incompatible State Aid.

In reaction to the European Commission position, the Micula Brothers initiated court proceedings in Romania for the enforcement of the ICSID Award by means of a domestic litigation, which is still pending and in which the European Commission has intervened.

Yet, the Micula Brothers have brought an action for annulment before the General Court of the European Union (case T-646/14) against the European Commission. Interestingly, one of their Micula Brothers claims is to contest the lack of competence of the European Commission since Romania's international law obligations take primacy over EU law.

The litigation before the General Court is still pending, however it is easy to predict that the Court will not loose such change to rebut Micula Brothers' claim and strongly affirm the supremacy of EU law over Intra EU BIT's. It is of fundamental importance to remember that throughout its history, the Court of Justice of the European Union has promoted itself not only as the ultimate guardian of the Treaties but also as the ultimate

gatekeeper who decides whether, and if so, to what extent and under which conditions and limitations, international law may enter the European legal order<sup>3</sup>.

The Micula case is, therefore, an outstanding example of the conflict still present between the EU Institutions and some EU member States, which are attempting in various ways to establish the supremacy of Investment Arbitration law over the EU law.

This paper will look into such conflict and it will try to bring some light into the role played by the European Commission in Investment arbitration post Lisbon Treaty. Namely, the aim of this paper will be to verify, using the Micula case as a test case, the role of member States and the European Commission in the context of intra EU BITs in light of the EU Treaties, namely under Article 351 of the TFEU and Article 4 (3) of the TEU.

In the last section of this paper, it will be discussed the fundamental questions which are still pending from Micula litigation and needs an urgent solution. Namely: (i) the relationship between existing intra-EU BITs and the EU law after the new competence allocation of the Lisbon Treaty and (ii) the power of the European Commission over member States as to existing intra EU BITs; and (iii) the approach of the Court of Justice of the European Union (CJEU) toward awards delivered by ISDS arbitral panels, particularly as to the normative conflicts arising between the relevant EU law and the BITs involved. In this context, reference will be made to the relevant CJEU case law as well as the very recent CJEU Opinion 2/2013 on the accession of the EU to the European Convention of Human Rights.

**Maurizio Gambardella** (Dr. Avv.) earned in 1999 his law degree from the Catholic University of Milano, Italy. He also holds a PhD from the University of Bologna. At present, Maurizio is of Counsel at the law firm Grayston & Company in Brussels. He earned a wide experience-advising clients on Investment arbitration and trade related matters. Maurizio regularly publishes in the area of EU Customs and Trade law, in International Law Journals. Early 2015, he has being appointed in the Editorial Board of Global Trade and Customs Journal edited by Kluwer law International. He was admitted to the Italian B in 2003 and to the Brussels bar in 2013.

### **Between Rock and Hard Place: Arbitrary Discretion in Investor-State Arbitration and EU Commitments of Member-States (Ksenia Polonskaya)**

The arbitral discretion has become an issue of a long-term debate among scholars, practitioners and governmental representatives. In the context of expansive proliferation of the *ad hoc* arbitral Tribunals, this paper considers how the arbitral discretion co-exists with multiple commitments of states. I argue that the multiple arbitral panels function within the broader scope of international law, where all processes and actors are interrelated and interdependent. Hence, the arbitral discretion should not be *arbitrary* but take into consideration a broader account of international regime.

Many authors question the legitimacy of the investor-state arbitration. The core of this criticism has a foundation on the arbitrary nature of the decision-making in the process of adjudication. Generally, within the contemporary regime of investor-state arbitration, arbitrators have an unlimited scope of discretion. In principle, arbitrators have a right to establish and develop any line of legal reasoning in the dispute. Professor Michael Reisman considers that arbitrators have such a freedom of discretion because

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<sup>3</sup> The recent Opinion 2/2013 on the accession of the EU to the European Convention of Human Rights offers a clear example of this.

investment agreements include rather evaluative than verification provisions.<sup>4</sup> Thus, the problem of discretionary judgments is rather substantial than institutional. According Reisman's theory, verification provisions include strict rules that encompass particular examples of permitted behavior whereas evaluative provisions presume a high level of discretion that arbitrators could exercise in their judgment.<sup>5</sup>

The current architecture of investor-state arbitrators produces legal uncertainties with respect to international obligations undertaken by states. For instance, in *Micula v. Romania*, arbitrators awarded Romania to pay compensation to the investor.<sup>6</sup> However, Romania could not perform this award because it has commitments towards EU as a state in transition in the process of joining the EU.<sup>7</sup>

The modern international regime is highly fragmented and complex. The regime encompasses the multiple legal frameworks, areas of practices and international commitments. The tendency of expansive proliferation of *ad hoc* Tribunals that have an arbitrary unlimited discretion could pose an imminent threat to the coherence and consistency of the regime. In order to prevent these consequences, it is essential to question the arbitral discretion and call for the accountability in the decision-making.

Short bio; Ksenia Polonskaya

**Ksenia Polonskaya** is a PhD candidate at Queen's University, Faculty of Law. Having completed her LLM at the University of Toronto with a thesis focused on investor-state arbitration, Ksenia is now examining dispute settlement systems in international investment law and international trade law. Ksenia is a recipient of the Graduate Scholarship in International Law with the Center of International Governance and Innovation (CIGI) to undertake the research on convergence between international trade & investment law. In addition, Ksenia served as an Associate Editor in the University of Toronto Law Review.

## **The European Union and Preferential Trade Agreements, or: the Rhetoric of Free Trade (Jaime Tijmes)**

In times where in Europe some members of the European Parliament, certain NGOs and in general a number of people are vocal in publicly expressing their skepticism regarding preferential trade agreements (PTAs), it seems reasonable to ask once again about the sources of that dissatisfaction. Among the multiple possible reasons, probably one relates to communication. Where metaphysical statements are hurled at one another, communication is only possible among fellow believers; thus, people who do not share a certain basic interpretation of reality, will not be able to effectively communicate, exchange and weigh arguments and counterarguments. Instead, one person's arguments will be incommensurable with respect to another person's counterarguments. To put it in a few words, metaphysical claims (or statements) assume a certain previous understanding of the world and it is not possible to prove if they are true or false. As a consequence, their

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<sup>4</sup> Reisman, W. Michael, "Control Mechanisms in International Dispute Resolution" (1994). *Faculty Scholarship Series*. Paper 887, online: [http://digitalcommons.law.yale.edu/fss\\_papers/887](http://digitalcommons.law.yale.edu/fss_papers/887)

<sup>5</sup> *Ibid.*

<sup>6</sup> Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, Final Award of 11 December 2013.

<sup>7</sup> European Commission, State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania* of 11 December, ICSID Case No. ARB/05/20 2013, online: [http://ec.europa.eu/competition/state\\_aid/cases/254586/254586\\_1595781\\_31\\_11.pdf](http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf)

validity is not accessible to scientific analysis. In contrast, descriptive (or empirical) claims (or statements) refer to observable facts and it is possible to verify if they are true or false.

Regarding PTAs, both European proponents and opponents tend to argue at least to some extent recurring to metaphysical statements. For example, the EU Commission's Centre for Economic Policy Research "predicts that an ambitious TTIP deal would increase the size of the EU economy around €120 billion (or 0.5% of GDP) and the US by €95 billion (or 0.4% of GDP)".<sup>8</sup> In contrast, detractors' arguments can be classified into five broad categories: democratic concerns (for instance, PTAs undercut human rights), economic concerns (for example, PTAs have a negative economic impact on consumers), social concerns (such as, PTAs foster animal experiments), concerns relating to economic, social and environmental dumping, and conspiracy-related concerns. (These categories will be further developed in my article).

What I contend is that both proponents and opponents do not always argument using descriptive claims, but instead they frequently use metaphysical claims and, in addition, they refer to different metaphysical discursive spheres. Hence, a dialogue is virtually impossible (and prejudice is hard to challenge<sup>9</sup>). If proponents and opponents do not only want their message to reach fellow believers, but instead want to engage in a dialogue about the benefits and disadvantages of PTAs, they should either communicate at the descriptive level, or they should at least refer to the same metaphysical sphere.

For instance, some opponents from industrialized countries may argue that local products are better in social and environmental terms than imported products. I seriously doubt that arguing that big (not necessarily organic) farms reach better ecologies of scale<sup>10</sup> than small organic farms would convince those opponents. Since the ecological value of foodstuff seems to be a highly emotional issue<sup>11</sup>, it is quite probable that they will argue in a discursive emotional sphere. Thus, it would arguably make sense if the free trade supporter tried to engage in a dialogue in that same metaphysical sphere. For instance, I suggest the free trade supporter should argue that buying local foodstuff means that the customer's money stays in the industrialized world, that poor farmers in the third world have no chance whatsoever of producing highly complex goods such as automobiles, that the only thing that poor farmer can do to feed his family is to produce food, and that buying the poor farmer's products is a way to fight worldwide income inequality, etc. Of course, the free trade opponent may say that poor farmers are exploited by big multinational companies and that the farmer would only receive a minuscule amount of money. Then again, one could answer without leaving that metaphysical sphere, for example arguing that what is an insignificant amount of money for a rich world customer may make the difference between life and death for a poor third world farmer. It is plain to see that the accuracy and falsifiability of the arguments for and against free trade is not relevant. What does matter is that both the free trade opponent and the supporter communicate in the same metaphysical sphere. If one will convince the other is an open question. But at least a dialogue may take place.

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<sup>8</sup> European Commission: "Transatlantic Trade and Investment Partnership: The Economic Analysis Explained", 2013, page 2.

<sup>9</sup> Hewstone and Swart: "Fifty-odd years of inter-group contact: From hypothesis to integrated theory", *British Journal of Social Psychology*, 2011, 50, pp 374-386.

<sup>10</sup> Schlich and Fleissner: "The Ecology of Scale: Assessment of Regional Energy Turnover and Comparison with Global Food", *The International Journal of Life Cycle Assessment*, May 2005, Volume 10, Issue 3, pp 219-223.

<sup>11</sup> Schlich: "Zur Energieeffizienz regionaler und globaler Prozessketten: das Beispiel Wein aus Erzeugerabfüllung", *Journal für Verbraucherschutz und Lebensmittelsicherheit*, February 2009, Volume 4, Issue 1, p 69.

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### **The Role of Civil Society in EU Preferential Trade Agreements (Jia Xu)**

Individuals are increasingly not only affected by decisions made on the national level from their elected governments, but also on international levels from the international organizations and regional arrangements; and this scenario has broken the symmetry of the governed and the governments<sup>12</sup> and caused legitimacy problem. A similar tension can be observed in EU related PTAs at large. Although in EU-PTAs, civil societies were expected to provide EU-PTAs with democratic legitimacy by being involved in the implementation process, requiring transparency and cooperating with the parties; this paper argues that the current practice does not suffice and the mechanism of civil society involvement in EU-PTAs often treated civil society as an object of cooperation between the states parties rather than as an active subject in the PTA partnership, and this deviates from the initial purpose of the civil society involvement. Therefore, to rebalance this unsymmetrical scenario and achieve more democratic governance, sufficient participation of civil society in EU-PTAs' governance is essential.

The paper will firstly introduce and analyse important aspects of consultative mechanism of civil society in EU-PTAs. Commerce from the EU-Mexico FTA in 1995, which firstly includes the civil society provision; until the most recently negotiated text such as CETA, step-by-step, major EU-PTAs have established a consultative mechanism of civil society involvement. The analysis distinguishes between institutional mechanism and non-institutional mechanism: namely, 1. The institutional mechanism, which includes the joint consultative committee between the civil societies of two parties; the domestic advisory group which comprises civil society as independent representative; as well as the civil society forum that allows dialogue and cooperation between EU-PTA parties and civil society. 2. Non-institutional mechanism that aims to enhance the cooperation of civil society and EU-PTA partners.

The second part of this paper highlights problems concerning the implementation of civil society consultative system in EU-PTAs. A number of these problems create the impression that under EU-PTAs, civil society is treated as an object of cooperation between parties rather than an active subject in the partnership. The problem has deviated from the original purpose of their involvement and diminished the legitimacy of the governance by EU-PTAs. A critical analysis reveals many problems and points of concerns regarding the current mechanism, including, but not limited to the following:

1. Lack of independency: The current funding practice raises concerns as to the independence of civil society. For instance, EU supports civil society of its PTA counterparts with direct funding;

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<sup>12</sup> James Crawford, *Chance, Order, Change: The Course of International Law*, The Hague Academy of International Law, 2014. P.399

2. Insufficiency and inequality of participation of civil society in civil society forum; for instance, in the EU-Mexico biannual civil society forum, there is an insufficiency representation of Mexican civil society;<sup>13</sup>

3. Problematic enforcement: for instance, 7 years after ratification of the EU-Mexico FTA, there has been no substantial consultation of Mexican and European civil society organization;

4. Lack of mandate of the involvement that the governments seldom consider the advise from civil society, and the forum remains a venue merely for dialogue.

These problems raise the question that whether the consultative mechanism of civil society is able to accomplish the purpose of promoting legitimate governance in EU-PTA based economies; or whether it has been used to merely mask EU and its partner's commercial interests?

Deep trade liberalization cannot be separated from the sufficient involvement of civil society; nor should it. Therefore, the unsymmetrical scenario of the EU-PTA partners and civil society must be rebalanced. The last part of this article will conclude by making recommendations for feasible solutions of the current problem. It will seek inspiration from the experience of the practice of other PTAs, for instance, the North American-PTAs; as well as from lessons of WTO concerning the involvement of civil society. For instance, private parties could bring disputes against governments under NAFTA. In doing so, this paper also wishes to make contribution to the future EU-PTA negotiations concerning civil society regulation and to strengthen the legitimacy of EU-PTAs' treaty practice.

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<sup>13</sup> The Modernization of European Union-Mexico 'Global Agreement', EU Parliament, 2015.

## SHORT BIOS OF CHAIRS AND DISCUSSANTS

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