ESIL International Economic Law Interest Group

Workshop of the ESIL IEL IG at the 2021 ESIL Catania Research Forum

Thursday 15 April 2021

The Value of Solidarity in International Economic Law

Online Workshop

h. 09:15 – 11:00

Opening remarks Peter-Tobias Stoll (Georg-August-Universität Göttingen)

PANEL ONE - SOLIDARITY AND ADJUDICATORS IN INTERNATIONAL ECONOMIC LAW

Chair Marina Trunk Fedorova (St. Petersburg University)

Section A – International Investment Law

Solidarity in ICSID: An Exploration - Anuj Kumar Vaksha (Guru Gobind Singh Indraprastha University)

A New Frontier in International Investment Law: Adjudication of Host Citizen-Investor Disputes? - Martin Jarrett (Max Planck Institute for Comparative Public Law and International Law, Heidelberg)

Solidarity and Environmental Concerns in International Investment Law: Opportunities and Challenges - Hui Helen Pang (UNSW Sidney)

Discussion

h. 11:30 – 13:00

Section B – International Trade Law

Chair Klaus Blank (European Commission, Brussels)

Environmental Activism through Extraterritorial Trade Measures – 30 years after US – Tuna - Vinitika Vij (Jindal Global Law School)

The Solidarity of Contextual Interpretation of World Trade Organization Appellate Body (WTO-AB): Renewable Energy as Case Study - Tikumporn Rodkhunmuang (Guanghua Law School, Zhejiang University)

PANEL TWO - SOLIDARITY AND INTERNATIONAL FINANCIAL LAW

Non-Trade Values in Financial Services: the WTO Legal Framework and Jurisprudence. The Case Argentina – Financial Services - Ludovica Mulas (*Alma Mater Studiorum* – Università di Bologna, Georg-August-Universität Göttingen)

New Sources of Normativity and the Financial Markets: Is China Shifting from a Norm-Importer to a Norm-Exporter in the Global Initiatives on Sustainable Finance? - Kelly Chen (Stockholm University)

Discussion

Closing Remarks Elisa Baroncini (*Alma Mater Studiorum* – Università di Bologna)

Convenors
Prof. Elisa Baroncini, *Alma Mater Studiorum* - Università di Bologna
Dr. Federica Cristani, Institute of International Relations, Prague
Dr. Anna Marhold, Leiden University
Dr. Gustavo Prieto, Ghent University
Prof. Peter-Tobias Stoll, Georg-August-Universität Göttingen
Prof. Marina Trunk Fedorova, St. Petersburg University

ABSTRACTS AND SHORT BIOS OF CHAIRS AND SPEAKERS

OPENING REMARKS

Short Bio - Peter-Tobias Stoll

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.

CHAIR

SHORT BIO – Marina Trunk-Fedorova

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”.

A NEW FRONTIER IN INTERNATIONAL INVESTMENT LAW: ADJUDICATION OF HOST CITIZEN-INVESTOR DISPUTES? (Martin Jarrett)

For many host citizens in developing states, access to justice in respect of their disputes with investors does not exist or is difficult to obtain. This justice void has not gone unnoticed. Increasingly over the past years, a number of innovative proposals have been put forward to fill the void. Most of them involve international solutions and they would give host citizens ‘international adjudicative enfranchisement’.

This article examines these proposals. In respect of each of them, there are legal issues and practical difficulties that make them look like band-aid solutions to a much deeper problem, namely access-to-justice barriers in domestic courts. What this conclusion entails is that if adjudicative enfranchisement of host citizens is the goal, then it should be reached by fixing the domestic-level problem.

Short Bio - Martin Jarrett

Martin Jarrett is a Senior Research Fellow at the Max Planck Institute of Comparative Public Law and International Law and an adjunct lecturer at the University of Heidelberg. He was formerly a Senior Lecturer at the University of Mannheim.

His research mainly covers international investment law and the law of international responsibility. He has authored numerous publications on these areas of law, including the CUP-published Contributory Fault and Investor Misconduct in Investment Arbitration.

SOLIDARITY AND ENVIRONMENTAL CONCERNS IN INTERNATIONAL INVESTMENT LAW: OPPORTUNITIES AND CHALLENGES THROUGH A THEORETICAL PERSPECTIVE (Hui Helen Pang)

Despite not being able to escape the ambiguity of its legal status, international solidarity is a principle often used in international law, as it reflects the existence of community interests (moral obligations) or even a legal obligation to assist others. In international investment law, the principle of solidarity has contributed to the growing concern for the protection of the public interests in the host state, particularly in environmental protection. It is demonstrated in three aspects: first, the definition of development has evolved from merely referring to economic development to include social development; second, the increasing inclusion of stand-alone provisions on environmental protection and labor standards in bilateral and multilateral investment treaties; and lastly, the rising number of cases that touch upon environmental concerns relating to the host state's right to regulate, particularly the newest development of allowing the host state to invoke counterclaims against the investor for environmental damages, as demonstrated in the Burlington v. Ecuador, as well as claims referring to the host state's obligation under international environmental agreements. These developments are either explicitly reasoned by the investment tribunal through treaty interpretation of solidarity or implied as common interests that should be protected by the international community.

Apart from the opportunities above, there are also challenges to the function of solidarity in protecting environmental concerns in international investment law. For instance, it is questionable whether the investor-state dispute settlement (ISDS) can provide adequate protection to sustainable energy investments, since the question remain unanswered whether the retraction of the subsidies from the host state constitutes as a breach of legitimate expectation under international investment agreements, as is the case with several EU member states and Canada. These renewable energy investment cases present a paradox. On one hand, the host state should enjoy regulatory autonomy over the energy sector and should not be required to compensate investors for the change of energy regulation in good faith; on the other hand, the protection and promotion of renewable energy and reducing greenhouse gas emission represents a global common interest reflected in international environmental agreements, UN declarations, the Energy Charter Treaty and several investment treaties, thus, renewable energy investments deserves a high level of protection under international investment law.

This paper intends to explore the opportunities and challenges of promoting environmental concerns in international investment law, through the theoretical lens of the solidarity principle and global constitutionalism. It will analyze rising investor-state arbitration cases in renewable energy investment, as well as cases that touches upon the applicability of multinational environmental agreements, such as Allard v Barbados and Burlington v. Ecuador case, and implore the theory can contribute to a more sustainable and systemic development of international law.

Short Bio - Hui Helen Pang

Hui Helen Pang is a Scientia PhD Scholar at the University of New South Wales, Sydney, Australia and she currently focuses on renewable energy investor-state dispute settlement. Her thesis looks into the rights and responsibilities of the investors and the state in renewable energy investment cases, with particular regards to international environmental obligations. Before joining UNSW, Hui was a Fox Fellow at Yale University Macmillan Center from 2017 to 2018, and researched sustainable development in international investment law from the developing countries perspective. Hui has published book chapters, policy briefs and articles in English and Chinese. Prior to her PhD, she worked in private practice on mergers and acquisitions and international securities.

SOLIDARITY IN THE ICSID: AN EXPLORATION (Anuj Kumar Vaksha)

The International Centre for Settlement of Investment Dispute (ICSID) is one of the key international organisation in the area of International Investment Law. The awards rendered by the ICSID are defining the jurisprudential development of the contemporary International Investment Law. The proposed paper titled "Solidarity in ICSID: An Exploration" seeks to examine the conceptual, thematic and the structural framework of ICSID from the perspective of solidarity. For the purposes of the proposed paper solidarity is considered to have following three constituent elements: mutual wellbeing, fairness and interdependence. The paper seeks to study in detail the objectives, the processes and the institutional structure of ICSID to discern the features exhibiting the elements of interdependence, fairness and mutual wellbeing for its stakeholders i.e. the signatory states to the ICSID Convention and their people. It is hypothesised that ICSID is thoroughly laced with the elements of solidarity, which in turn enhances the institutional credibility, efficacy and efficiency of ICSID as well as the jurisprudence of International Investment Law emanating out of ICSID processes. While assessing this hypothesis, the paper also seeks to examine the practices around ICSID, which may erode bit by bit, the delicate elements of solidarity instituted in the conceptual and institutional structure of ICSID.

The methodology for the proposed study is exploratory analysis of the provisions of the ICSID Convention and some of the awards delivered by the arbitral institutions constituted under the ICSID Convention. Through the modicum of the exploratory analysis it is intended to discern the elements of solidarity in the provisions of the ICSID Convention.

Key Words: ICSID, solidarity, mutual wellbeing, fairness, interdependence

Short Bio - Anuj Kumar Vaksha

I am a Professor of law at Guru Gobind Singh Indraprastha University, Delhi, India. I have been teaching law to undergraduate and post graduate students for around 18 years now. My area broad area of teaching and research are Jurisprudence, International Investment Law, International Humanitarian Law, Disaster Management Laws and Corporate Laws. I have published couple of research articles in national and international journals. I have recently authored a book titled "Governance of Foreign Investments in India: the Defining Perspectives". As a teacher and student of International Investment Law, I look forward to contribute meaningfully to its core, contents, principles and understandings so that its relevance and potential to serve the mankind across the globe increases.

CHAIR

Short bio - Klaus Blank

International Relations Officer in the WTO unit of the Directorate-General for Agriculture and Rural Development of the European Commission, dealing with analysis and coordination of WTO legal issues and disputes related to agriculture, as well as negotiations and matters related to geographical indications in WTO and WIPO.

Previous assignments 2001-2007 in the legal unit of EuropeAid Cooperation Office (AIDCO, now part of INTPA - Directorate-General for International Partnerships) of the European Commission, and 1992-2000 in the German Federal Ministry for Economics (competition policy and merger control; trade policy).

First State Exam in Law at the University of Mannheim 1988, Second State Exam in Law at the District Court (OLG) Frankfurt am Main 1991.

ENVIRONMENTAL ACTIVISM THROUGH EXTRATERRITORIAL TRADE MEASURES – 30 YEARS AFTER US – TUNA (Vinitika Vij)

This paper aims to expand the environmental cavity within General Agreement of Tariff and Trade to include limited extraterritoriality. The author poses an inquiry to ascertain whether the concept of common concern may be used for such inclusion, if one can import it into the WTO treaty. The current environmental cavity is unable to withstand the true pressure of global climate change. It leaves a WTO member with no defence against another country's actions harming the environment. Through purposive and evolutionary interpretation, we can align the reality of the current environmental crisis with a member's WTO obligations, without adding or diminishing their rights or obligations. The objective of sustainable development and the concept of common concern of humankind may be used to interpret 'conservation of exhaustible natural resources' in an evolved context. The author specifically enquires whether an importation of the latter principle, while relying on the former principle as mentioned in the preamble, into WTO law is a possibility, in order to expand the scope of conservation within the environmental cavity.

Short bio - Vinitika Vij

Vinitika Vij is a Lecturer at Jindal Global Law School. She secured her B.A. LL.B. (Hons.) from Jindal Global Law School (JGLS) in 2018 and her LL.M. in Public International Law from the University of Cambridge in 2019. She has been teaching and researching at JGLS in India ever since. At the law school, Vinitika has taught International Trade Law, Human Rights Law, and Legal Methods. Her research areas of interest are mainly International Trade Law, International Intellectual Property law, International Investment Law, International Environmental Law and International Criminal Law. Her research areas focus on the various linkages between these fields. Her previous publications have explored contemporary issues in international trade law and law of armed conflict. She has also published a report with the Geneva-Georgetown Trade Lab on India's trade facilitation woes.

NON-TRADE VALUES IN FINANCIAL SERVICES: THE WTO LEGAL FRAMEWORK AND JURISPRUDENCE. THE CASE *ARGENTINA – FINANCIAL SERVICES* (Ludovica Mulas)

The relationship between trade and non-trade values is a major theme within the international economic debate. Mostly, it has been focused on trade in goods and intellectual property rights; however, the tensions between trade and non-trade issues equally occur in the field of trade in services because of the structure itself of many services sectors, where a strict connection between supply and consumption – and, as consequence, the necessity to protect consumers' rights - is found. Moreover, the tensions arose between the protection of non-trade values, on the one hand, and the world trading system and its economic and financial policies, on the other one, undermine the stability and integrity of financial markets. Within the financial services sector prudential measures, being public policy regulation tools, can also be considered as pursuing non-trade policy objectives, especially aiming at the protection of the integrity of the financial markets, the freedom and fairness of trade and investment, as well as consumers and the community as a whole.

Following the financial crisis of 2007, caused by the Lehman Brothers crack, States have significantly tightened their financial services regulations, introducing a series of very severe and stringent prudential measures, in order to pursue these objectives, however this type of regulation is likely to limit the freedom of trade in the sector and jeopardize the protection of foreign investments in financial services and products.

Within the World Trade Organization system, the issue is regulated in the Annex on Financial Services to GATS, which contains a prudential exception. The generic language of such Annex is, for the moment, supported only by the reports delivered in the case *Argentina - Financial Services*, where the Appellate Body clarified inter alia that WTO Members have 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.

The aim of the paper is to carry out an analysis of the current international scenario concerning the relationship between trade and non-trade values in the sector of financial services. First, it will be examined the meaning of non-trade values within the financial services field; therefore, an analysis of the existing legal instruments will be developed, with a focus on the tools and methods employed by the WTO, in order to evaluate whether such measures and their application can actually be able to guarantee stability at the international financial markets level and promote a sustainable financial system; and, finally, the dispute Argentina – Financial Services will be put under scrutiny, highlighting how the Appellate Body dealt with the difficult task of balancing the protection of the Argentinian financial system with the liberalization of trade in services.

Short bio – Ludovica Mulas

Ludovica Mulas is a PhD candidate at the University of Bologna and the University of Göttingen, and she is currently doing a research internship at the University of Geneva. She is also teaching assistant of International Law and of International Trade and Investment Law at the University of Bologna and she did her traineeship as lawyer at the Lexjus Sinacta law firm in Bologna. 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. 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.

NEW SOURCES OF NORMATIVITY AND THE FINANCIAL MARKETS: IS CHINA SHIFTING FROM A NORM-IMPORTER TO A NORM-EXPORTER IN THE GLOBAL INITIATIVES ON SUSTAINABLE FINANCE? (Kelly Chen)

This paper aims to add to the debate on how to build frameworks that can effectively finance the development of an inclusive and green economy. The purpose is to promote the financial sector to contribute to sustainable development, generally known as sustainable finance. In particular, it explicates China's role in the initiatives taken at the global level and analyzes whether it has shifted from a norm-importer, i.e., merely implementing global financial regulatory standards, to a norm-exporter, i.e., taking an active role in shaping the standards.

The paper is part of a two-year research project dedicated to new sources of normativity in the financial markets. The project seeks to contribute to the discussion on how to conduct legal studies in pluralistic legal landscapes. It argues that the methodological challenges posed by legal pluralism are particularly visible in the field of financial regulation. Due to the forces of globalization, a number of new sources of normativity have emerged and given rise to a highly diversified series of norm-making processes in global finance, which in turn, can have significant impact on the laws at the local level. The sources of normativity include supranational ones such as the European Union, transnational ones such as the Basel Committee on Banking Supervision, and global ones such as multinational banks. In terms of China, it is now home to four global systematically important banks, thus holding an increasingly important role in global finance. In the project, China serves as a new non-Western source of normativity in global finance as well as the governance and regulation thereof.

In this regard, it should be noted that the shift from an importer of global norms to actively developing them is of particular importance to emerging and developing countries. Generally referred to as the Global South, these countries have become increasingly significant stakeholders in global finance. However, while the Global South is often subject to financial regulatory standards deriving from global sources, it has played a limited, if any, role in the shaping thereof. This raises important issues such as inclusiveness and fair representation of emerging and developing countries in global governance. The question at hand is thus whether China's role in the global regulatory frameworks on sustainable finance could be viewed as a step towards the rise of the Global South in global financial regulation.

The paper is organized as follows. First, it introduces the subject of sustainable finance. Since it is a broad and complex topic, the introduction at hand will only focus on the main regulatory efforts at the global level. Second, the paper takes a closer look at the global regulatory framework that emerged in the aftermath of the financial crisis of 2008. In particular, it explicates how the framework can function as a source of nom-exportation, in which regulatory standards and principles can migrate around the world, horizontally as well as vertically, downwards as well as upwards.

Lastly, the paper seeks to contribute to the discussion on more inclusiveness in global governance. It explicates the initiatives that China has taken to promote sustainable and green finance. In recent years, China's avid support has ignited debates on whether it has become a

"rule-maker" and "global leader" in the field. it analyzes if China's active role could be viewed as an enhancement of the Global South in the governance and regulation of the international financial markets. The paper emphasizes however that the question that should be raised is whether China could serve as a just representation of the Global South in global financial regulation, which is a matter that is perhaps less straightforward than it first appears.

Short Bio - Kelly Chen

Dr. Kelly Chen is a Senior Lecturer in Private Law at the Faculty of Law, Stockholm University. She obtained her LL.D. from Stockholm University in June 2018. Dr. Chen is the Head of the Research Panel for Chinese Law at Stockholm Centre for Commercial Law (SCCL), Stockholm University.

Her primary research interests include EU and Chinese financial law, global financial regulation and comparative law. The paper presented at the workshop is part of her postdoctoral research project conducted during 2019–2020 at Faculty of Law, Stockholm University. She is currently working on a monograph in comparative financial law.

She is the co-director of the course in financial law at the Law Program, Stockholm University. In addition, she teaches Swedish law, Chinese law, comparative law, and supervises master's theses.

During spring 2015, she was a visiting researcher at the School of Law, Tsinghua University, China. She has been a member of ESIL since October 2015. Dr. Chen was the co-editor of the Stockholm Centre for Commercial Law Yearbook during 2017–2019. In 2019, she was awarded the Högskoleföreningen i Stockholm Award for Outstanding Scientific Achievement for writing the best doctoral dissertation in law at the Faculty of Law of Stockholm University during 2013–2018. Dr. Chen is bilingual in Swedish and Chinese, and is fluent in English and French.

Publications and Presentations of Relevance

Presentation: *New Sources of Normativity: EU, China and the Financial Markets, Advanced Seminar in Jurisprudence*, Stockholm University, November 2020

Monograph: *Comparative Financial Law: A Methodological Inquiry, ongoing book project, Faculty of Law,* Stockholm University, 2019 –

Book Chapter: *The "Global" in Global Financial Regulation*, in Wrange, P. et al. (eds.), Global Law, Local Lives, ongoing book project, Faculty of Law, Stockholm University, 2019 –

Presentation and Conference Paper: *The Chinese Financial Markets in A New Era: Challenges and Opportunities from an EU Perspective*, 2018 Asian Law and Society Annual Conference, Bond University, Australia, December 2018

Monograph: *Legal Aspects of Conflicts of Interest in the Financial Services Sector in the EU and China – The XYZ of Norm-making,* Doctoral Dissertation, Faculty of Law, Stockholm University, June 2018

CLOSING REMARKS

Short Bio – Elisa Baroncini

Elisa Baroncini, PhD in EU Law, is Full Professor of International Law at the University of Bologna. Co-Chair of the ESIL IG on International Economic Law, and Coordinator of the IEL Interest Group of the Italian Society, Elisa teaches at the Bologna School of Law International Law and International Trade and Investment Law. She has been Visiting Professor at the China-EU School of Law, speaker at and organizer of many international conferences, Visiting

Researcher at the European University Institute. Elisa manages and participates in international and national research projects. Her main fields of research include: the reform process of the WTO dispute settlement mechanism; the relation between free trade and non-trade values; transparency in IEL; the new generation of EU FTAs and their enforcement; the participation of the European Parliament and the Commission in the EU treaty-making power.