



ALMA MATER STUDIORUM
UNIVERSITA DI BOLOGNA
DIPARTIMENTO DI SCIENZE GIURIDICHE
CENTRO INTERNAZIONALE DI RICERCHE SUL DIRITTO EUROPEO

KING'S
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LAWTTIP Executive Summary

2018/1

The LAWTTIP Executive Summary series is intended to:

- take stock of the most relevant legal issues emerging from the negotiations and implementation of the EU trade agreements of new generation;
- summarise the main findings of the LAWTTIP Joint Conferences and ensure the follow-up of the LAWTTIP roundtables.



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The II LAWTTIP Joint Conference “Rights, Values and Trade: Is an Agreement between EU and US Still Possible?”

The **Jean Monnet Network LAWTTIP**, a partnership between the University of Bologna, King’s College London and University of Rennes1, held its II Joint Conference in Bologna on April 12th and 13th 2018. Organised by the International Research Centre on European Law (CIRDE) on behalf of the LAWTTIP Network, the Conference took place at Sala delle Armi, UNIBO Law School, Via Zamboni 22, Bologna.

Scientific objectives of the Conference

The aim of the II LAWTTIP Joint Conference was to solicit a reflection on the **interplay between the EU trade cooperation and the EU fundamental rights and values** as expression of the EU constitutional identity. The main question of the Conference concerned the relations between



the EU and the US, but it was also intended to deal with other third countries according to the practice emerging in this area.

After the entry into force of the Lisbon Treaty, human rights protection has become formally enshrined in primary law not only with reference to the EU internal dimension but also with reference to the external one as made clear by Article 21 TEU. As stressed

by the European Commission’s strategic document (*EU Trade for All*), human rights’ protection has become an integral part of the EU trade policy. However, this creates a series of challenges in terms of coherence and of the interplay between trade interests and fundamental rights. This is due, on the one side, to the different level of protection of human rights recognised by contracting parties and, on the other one, to a different understanding of the values that may be relevant in trade cooperation thereby producing clashes among the actors involved.

Against this general background, the first session of the Conference set the scene and introduced the **general legal framework** in relation to the protection of fundamental rights in trade cooperation. The second session was devoted to sectoral issues stressing the **interplay between trade cooperation and specific categories of rights**. The final session tried to consider, according to a *de lege ferenda* perspective, **the future of the EU trade policy** with specific regard to the protection of fundamental rights.

The Conference consisted of four macro-sessions:

I SESSION

SETTING THE SCENE: INTERNATIONAL, SUPRANATIONAL AND NATIONAL TOOLS TO SAFEGUARD EU FUNDAMENTAL RIGHTS AND VALUES IN TRADE COOPERATION

- 1.1 Is the EU a 'values-led' international actor?
- 1.2 The future of regulatory cooperation
- 1.3 Constitutional monitoring of mixed FTAs by MSs' courts

II SESSION

SECTORAL CHALLENGES TO THE EFFECTIVE PROTECTION OF EU FUNDAMENTAL RIGHTS AND VALUES: IPs, STATE AIDS, SUBSIDIES AND HEALTH SERVICES

- 2.1 Intellectual property rights: The EU FTAs Agenda and TTIP
- 2.2 State aid control and subsidies regulation in the EU FTAs (and a bit of Brexit...)
- 2.3 FTAs and healthcare services: Combining market access rules and reservations on public services

III SESSION

SECTORAL CHALLENGES TO THE EFFECTIVE PROTECTION OF EU FUNDAMENTAL RIGHTS AND VALUES: ENVIRONMENTAL PROTECTION, LABOUR STANDARDS, INVESTMENTS' PROTECTION, FOOD LAW AND DATA PROTECTION

- 3.1 The inclusion of the 'right to regulate' of the host State in the EU post-Lisbon international trade agreements. An answer to the quest for the legitimacy of international investment law through a 'rule of law' based on the safeguard of non-investment concerns
- 3.2 'Robust, comprehensive and binding'? A critical analysis of the substantive environmental provision in the chapters on trade and sustainable development of EU FTAs
- 3.3 Compliance mechanisms in EU FTAs. Challenges and hindrances for labour standards in TTIP
- 3.4 Food trade in the TTIP: The role of GIs and regulatory cooperation
- 3.5 'Personal data is not bananas'. Data protection across the Atlantic: TTIP, Privacy Shield and beyond

IV SESSION

THE FUTURE OF EU TRADE COOPERATION: TAKING EU FUNDAMENTAL RIGHTS AND VALUES SERIOUSLY?

- 4.1 Transparency as a tool for fundamental rights' protection: The EU as a global standards setter
- 4.2 The implications of the EU Charter of Fundamental Rights for the relationship between trade and traditional human rights: An application to the TTIP and Brexit
- 4.3 Human rights in future EU agreements: Lessons from past experience
- 4.4 The state of the art and the future of the EU-US trade relations

More info on the Conference are available at:

<http://www.lawttip.eu/news-and-events/ii-lawttip-joint-conference-rights-values-and-trade/>



The Lisbon Treaty signals a renewed approach to the Union's external relations. According to articles 3 and 21(1) TEU, in its external relations the Union has a duty to observe – and contribute to the development of – International law, orienting it towards its values and principles.

The practical effect of the changes brought about by the Treaty of Lisbon is that the Union has today arguably not only a duty to engage in a dialogic relationship with the international community, but also to do so on the basis of, and with the aim of exporting, its values and constitutional principles.

On the basis of the papers presented and the debate that took place in Bologna the following policy tips would be suggested. The relevant sources and documents can be found in the corresponding sections of the LAWTTIP website.

1. International, supranational and national tools to safeguard EU fundamental rights and values in trade cooperation

The way the EU affirms and applies the values embodied in the Lisbon Treaty reflects the kind of actor the EU intends to be and the modalities it carries out business in practice. In terms of values, it is obvious that at the basis of the EU construction, as well as of the EU as global actor, there are those essential values enshrined in Article 2 TEU that are human dignity, freedom, equality, democracy, rule of law and respect of human rights. Furthermore, these values, as constitutional elements of the EU, also structure the external dimension of the EU. Talking about values means to note the contradictions emerging from their applications. Therefore, can we say that the EU action is led by specific values? Yes, we can, but it is highly differentiated not only in relation to the distinction between the rhetoric and what really happens, but also between external and internal dimension. It is thus not easy to map a coherent framework on the application of the EU values. Against this background, the TTIP is a fascinating case because it demonstrates the potential of the EU in the external field of trade, but also what are the main challenges for the EU values at internal level. The Commission has tried to tie the EU values and the trade dimension by means of its 2015 Paper 'Trade for All', but the risk is that those values are renounced in favour of Treaty obligations. Over the next years, the EU will have to continue to search its values and to show whether it is a coherent actor or not in terms of value-promoter also at external level.

2. The EU Charter of Fundamental Rights: the relationship between trade and traditional human within the context of the TTIP and Brexit

Fundamental rights within the EU have to be understood not as something that equal national constitutional values but as something that is fitted in the framework of the internal market which is treated as having a fundamental structure itself. This evaluation on the interplay between internal market and fundamental rights is also apparent in the Brexit process where the European Commission insists a lot on the special status to be given to the free movement and to the limited scope of its exemptions with regard to the access to internal market. Such a rhetorical insistence on the integrity of the internal market could be seen to some extent as a negotiating tactic of the Commission especially if compared to the degree of flexibility of others EU trade agreements, but it is actually something more than a "all of nothing" position. It truly reflects the notion of the constitutional primacy of the internal market. Looking at the documents released by the European Commission on the TTIP, a certain tendency of the EU to export its norms and standards within the TTIP

negotiating process can also be observed. In the final report filed after the 15th round of negotiations in October 2016, the European Commission refers to the possibility of an involvement of US representatives in the development of EU standards in the area of trade. It would be interesting to understand to what extent each party may be successful in exporting its own norms for influencing the other. In conclusion, both in the TTIP and in the Brexit process, the EU is coming with a very strong ideological commitment to its own internal market, but the reality is that there will be a compromise as already reflected in other agreements with third countries.

3. The state of the art and the future of the EU-US trade relations

The European Parliament is handling a number of legislative files concerning trade, human rights protection and anti-dumping measures in order to take major steps in the discussions on EU international trade negotiations. As for the latest developments in the EU-US relations, it is clear the contrast between the most ambitious trade agenda ever in bilateral pattern, started in 2013 with the Council directive and in 2014 with the publication of the TTIP negotiating mandate, and the most offensive trade move that the EU ever faced, five years later. This notwithstanding, it is worth to mention the Joint Statement following the 81st Transatlantic Legislators' Dialogue that has gathered representatives from the EU and the US to address issues of common interest including trade. In a very brief paragraph of this statement, the parties confirmed their "belief in a rules-based, open, and non-discriminatory multilateral trading system", and "also agreed to intensify our efforts to work together to address trade barriers imposed by other countries, particularly China". Such a common vision could represent the new common ground for resumption of negotiations. In this respect, it has to be noted that currently there are no FTAs between the EU and US, nor preferential trade relations and therefore the EU-US trade relations are based on the WTO rules. There are, however, several ongoing disputes further fuelled by the presidential proclamations of March 2018 concerning the imposition of tariffs on the import of steel and aluminium also from the EU, even though with a temporary exemption. The EU reaction to the US decision has been centred in three different strands. The first of these envisages the possibility to launch WTO consultations. The second consists of a set of rebalancing measures linked to the releasing of a list of US products to be decided in agreement with the EU stakeholders. Finally, on the 26 of March, the Commission has launched all the safeguard procedures on diverted imports to the EU. Over the last few months a number of improvements and changes in EU trade policy have been brought and therefore some questions are bound to rise also about the procedural steps for resuming the TTIP negotiation with the US. In particular, Article 218 TFEU envisages the conclusion of an agreement and does not mention the possibility

to resume frozen negotiations: it is thus not evident whether any formal step of the Council or the proposal from the Commission is needed. Finally, another open question concerns the negotiation directives: should they be reformulated and broadened? In this respect, it seems that negotiations could continue with the same mandate without any reformulation. Clearly, all these issues will depend on the political choices made by the EU institutions.

4. Sectoral challenges to the effective protection of EU fundamental rights: Intellectual Property Rights

The chapter on Intellectual Property Rights (IPR) of the TTIP does not seem to be the most complicated one in the transatlantic negotiation: both the EU and the US promote common standards in IPR. The EU standard agenda in negotiating FTAs focuses on a strong protection and enforcement of IP rights similar to that of the US and promotes the inclusion of specific IP chapters in the FTAs. The EU has also a specific agenda on the protection of Geographic Indications that, however, clashes with the US agenda. The most important FTAs for intellectual property are about twenty and include those concluded with Asian countries such as Korea and Singapore that can be considered as models for the negotiations of the TTIP. The specific EU agenda shows important differences from that of the US also with regard to some technical issues, that are patents; enforcement; grace period; geographical indications; pharmaceuticals; genetic resources and traditional knowledge. At the same time, similarities are more numerous than divergences and therefore these divergences may be sorted out. It was suggested that possible broad structure of the IP chapter covering largely agreed points and issues to be agreed upon could be proposed by the EU in the following way: common objectives; compliance with international treaties; preambular narrative; high-standard agreed principles; geographical indications; copyright and related rights; cooperation with third countries on IP; and trade secrets.

5. State aid control and subsidies regulation in the EU FTAs and (a bit of) Brexit

In the UK view, State aid control is considered in a negative way and as an obstacle in pursuing public policies both by the government and the opposition embodied by Mr. Corbyn. On the contrary, on the EU side, it is strong the idea that State aid control is essential also with regard to FTAs, as underlined by the Council and the Commission. In this vein, the Commission specifies the need for the inclusion, in the future EU-UK agreement, of a robust provision on State aid to insure a level playing field with the Member States.

This means that a new and robust model, including a form of *ex ante* control, a joint committee for the application of these rules, a dispute settlement mechanism for eventual divergences and, finally, some kind of remedies, is necessary. In this vision, a potential new model could comprise an Independent State Authority useful also as to guarantee regional solidarity and transparency and a Joint Committee for dealing with the ongoing management and the supervision of future divergences. However, doubts rise about the composition of the dispute settlement body and its relations with the ECJ as well as about potential sanctions and remedies.

6. The importance of data protection across the Atlantic

Data protection in Europe is a very sensitive issue not only because it represents a fundamental right, but also because, after the Lisbon Treaty, it has become a core policy of the EU with the inclusion of Article 16 TFUE. For a variety of legal, political and pragmatic reasons data protection clauses are excluded from TTIP. Indeed, since the debate around TTIP and the debate around data are very much polarised and sensitive, it is necessary to separate trade and data protection in order not to jeopardize the possibility of successful negotiations of these sensitive legal instruments. Hence, if data protection has to remain in the TTIP, it will be dealt with ordinary regime comprising the GDPR and Privacy Shield, that has replaced the Safe Harbour scheme. After *Schrems judgement*, the recent evaluations on privacy shields set some important criticalities that the Commission tries to tackle in a more positive way while the Article 29 Working Group indicates many aspects to improve. This notwithstanding and albeit the fact that the current US administration has frozen many of the engagements taken by President Obama, Privacy Shield can be considered a step forward and a way to keep the US-EU dialogue open and to have an enhancement of standards of protection by playing a kind of carrot and stick game.

7. The importance of transparency in investment arbitration

Transparency is viewed as a key principle of effective governance, and its different nuances have an impact in both the domestic and the international arena. While promoters of transparency urge for the broadest scope of its application, advocating ample access to documents and narrowly interpreted derogations, opponents emphasise the risks for national security, and that *amicus curiae* intervention can lead to higher procedural costs. The emphasis on transparency placed by the EU is also in its internal procedures and this policy applies also in external relations. From this viewpoint, the EU made procedural transparency omnipresent in its

negotiations. The UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration are referred to in the EU-Vietnam FTA, CETA and TTIP. The UNCITRAL Transparency Rules regulate a range of ISDS-related transparency issues, including public access to hearings, publication of documents and the award, and amicus curiae briefs. The EU-Vietnam FTA and the CETA enforce stringent transparency provisions, since they comprise the UNCITRAL Transparency Rules, publication of laws, and acceptance of third-party funding, if they are made known during the preliminary stage of the dispute.



Jean Monnet Network LAwTTIP

Based on a consortium among the **International Research Centre on European Law of the University of Bologna**, the **Centre of European Law of the King's College London** and the **Institut de l'Ouest Droit et Europe of the University of Rennes 1**, the Jean Monnet Network LAwTTIP – **Legal Ambiguities withstanding TTIP** intends to promote a large-scale legal reflection of both the existing EU Free Trade Agreements of new generation and the ongoing negotiations on the Transatlantic Trade Investment Partnership (TTIP).

<http://www.lawttip.eu>

info@lawttip.eu

https://twitter.com/JMN_LAwTTIP

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