EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges

Andrea Biondi, Giorgia Sangiuolo
Editors

LAwTTIP Working Papers
2019/2

Co-funded by the Erasmus+ Programme of the European Union

Acknowledgments

A debt of gratitude is owed to all the speakers and chairs, whom, with their impressive performance, made the III LAwTTIP Conference a success.
The Centre of European Law wishes to express its gratitude to its manger, Ms Christine Copping, for her key assistance in the organization and coordination of all the LAwTTIP events held by King's College and, most of all, for the patience shown throughout.

EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges

LAwTTIP Working Papers

2019/2

This Working Paper offers an overview of the topics discussed during the III LAwTTIP Conference 'EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges' (King's College London, 21-22 March 2019)

(This page was left intentionally blank)

Editorial policy

ISSN 2533-0942 (ONLINE)

Printed in Italy
International Research Centre on European Law
University of Bologna
via Andreatta 4
I – 40126 Bologna
Italy
http://www.lawttip.eu

Contents

Contributors to the Conference

Bernardus Smulders, Head of Cabinet to First Vice President Frans Timmermans, European Commission

Inge Govaere, Professor at Ghent University

Alan Hervé, Professor at SciencesPo Rennes

Takis Tridimas, Director of the Centre of European Law, King's College London

Steffen Hindelang, Professor at Syddansk Universitet

Sir Francis Jacobs, President of the Centre of European Law, King's College London

H.E. Mr. Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration

Fausto Pocar, Professor at University of Milan

Frank J. Büchel, Member of the EFTA College

David Brynmor Thomas QC, 39 Essex Chambers

Federico Ortino, King's College London

Koen Lenaerts, President of the European Court of Justice

Panos Koutrakos, Professor at City University

Philippa Webb, King's College London

Sonja Boelaert, Senior Legal Adviser, Council of the European Union

Johnny Veeder QC, Essex Court Chambers

Adam Lazowski, Professor at University of Westminster

Baroness Falkner of Margravine, Parliament of the United Kingdom

Rosana Garciandia Garmendia, Visiting Lecturer at Dickson Poon School of Law, King's College London

Susanna Villani, Postdoctoral Fellow at University of Bologna

Ewa Zelazna, Lecturer in Law, Leicester Law School

Quentin Declève, Associate at Van Bael & Bellis

Simon Weber, Ph.D. Researcher at Dickson Poon School of Law, King's College London

Francisco de Abreu Duarte, Parliamentary Assistant at the European Parliament

Urszula Jaremba, Assistant Professor at Europa Instituut, Utrecht

Giancarlo Piscitelli, Research Assistant at Europa Instituut, Utrecht

Szilárd Gáspár-Szilágyi, Postdoctoral Fellow at PluriCourts

Chiara Cellerino, Assistant Professor at University of Genoa

Raymundo Tullio Treves, International Max Plank Research School on Successful Dispute Resolution in International Law

Mini-Moot Court

Giorgia Sangiuolo, Ph.D. Researcher, Dickson Poon School of Law, King's College London

Raymundo Tullio Treves, International Max Plank Research School on Successful Dispute Resolution in International Law

Tribunal:

Ms. Sophie Lamb, QC, Latham & Watkins, LLP Mr. Iain Maxwell, Herbert Smith Freehills, LLP

Dr. Anthony Sinclair, Quinn Emanuel Urquhart & Sullivan UK, LLP

Counsel for the UK: Mr. Tom Stewart Coats, XXIV Old Buildings

Counsel for the Investor: Ms. Saadia Bhatty, Gide Loyrette Nouel

Introductory Remarks

Andrea Biondi, Giorgia Sangiuolo

This issue of the LAwTTIP working papers series provides for an overview of some of the presentations delivered during the III LAwTTIP conference of the Jean Monnet Network “LAwTTIP: Legal ambiguities withstanding the TTIP.”

On 21-22 March 2019 the Centre of European Law of King’s College London, in collaboration with the International Research Centre on European Law of the University of Bologna and IODE - Institut de l'Ouest: Droit et Europe of the University of Rennes 1, hosted the III LAwTTIP Joint Conference. The Conference, titled "*EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges*", focused on the **dialogue** among international and regional institutions as a tool to overcome fragmentation and implement the rule of law in the international economic relations of the EU. Among others, the President of the CJEU, the Secretary-General of the Permanent Court of Arbitration, representatives of the EFTA Surveillance Authority, the European Commission and the European Council, and the most distinguished academic voices in the field of EU external relations participated as speakers. The conference closed on 22 March with a short intra-EU moot. The idea was to give a practical twist to the conference, allowing attendees to get a flavour of the difficulties investment tribunals are facing when dealing with intra-EU issues.

The recordings of the discussions held during the conference are available on the website of the conference’s media partner, TDM/OGEMID. The papers presented at the conference will also feature in one of the three volumes collection of the LAwTTIP conference books, to be published in the fall of 2019.

The conference was a great success with over 250 delegates. The attendees were rewarded with high-level speakers and interesting and in-depth discussions on a variety of topics relating to the EU external relations both during the session presentations and during the breaks. In short, a memorable event!

Introduction and Session I
Autonomy of EU law as a tool to Uphold the Rule of Law

The III LAwTTIP Conference opened on 21 March with a welcome address from the Dean of the Dickson Poon School of law, Prof. Gillian Douglas. Prof. Douglas put the accent on the importance of the concept of dialogue in the EU external relations to meet the challenges of globalization and face the raise of protectionist and populist movements. The Dean also reiterated how honoured the law school was to host such high-profile conference and to welcome the distinguished speakers who had accepted to participate in it.

Session I of the III LAwTTIP Conference was chaired by Judge Lucia Serena Rossi from the European Court of Justice, and focused on the *Autonomy of EU law as a tool to Uphold the Rule of Law*. The first speaker, Prof. Bernardus Smoulers from the European Commission, discussed *The Rule of Law in the EU: Challenges, Hopes and Perspectives*. After revisiting the CJEU's most recent cases on the rule of law and the Article 7 TEU procedures concerning Poland and Hungary, Prof. Smoulders compared the rule of law in the EU to a rose garden, which has to be continuously looked after and never taken for granted to prosper.

The following speaker, Prof. Inge Govaere, from Ghent University, introduced her paper on *The Autonomous EU Legal Order and Interconnecting Legal Systems: A Balloon Dynamic*, which compares the concept of autonomy of EU law to an empty balloon firmly slid in-between public international law and constitutional law. Prof. Govaere concluded that, in order to grasp the complexity, dynamics and current challenges facing this interconnecting process, it is crucial that the place of the **autonomous EU legal order** in the larger international legal setting is subjected to a dynamic reassessment on its own merits and, importantly, free from hindsight reasoning.

Prof. Alan Herve', from SciencesPo Rennes, discussed the topic of *State to state dispute settlement as the sole efficient way to resolve trade and investment conflicts? An advocacy against ISDS in EU trade agreements*. After comparing and analysing the procedural dispute resolution systems dealing with international trade and investment in EU agreements, Prof. Herve' defended state-to-state dispute settlement mechanisms as the sole efficient alternative to arbitration in international investment disputes. Specifically Prof. Herve' argued that state-to-state dispute settlement offers a valuable balance between **judicialisation of international trade law** and the necessity to provide **credible enforcement mechanisms**, on the one hand, and the preservation of an essential part of diplomacy and policy space in the resolution of international trade and investment conflicts, on the other.

The question discussed by Prof. Steffen Hindelang from Syddansk University in his presentation on *Autonomy of EU law: A Catalyzer of Dialogue in International Economic Relations?* was whether the principle of autonomy of EU law, as defined by the CJEU, allows sufficient policy space to the Union to enter into a result-driven debate on the design of a dispute settlement mechanisms in the area of **foreign investment law**. The

three possible outcomes to uphold such dialogue are for Prof. Hindelang, mandatory prior involvement mechanisms, return to local remedies, and State-to-State dispute settlement.

Session II
The Role of International Courts and Tribunals in upholding the Rule of Law

The second session of the III LAwTTIP Conference, on the topic of *The Role of International Courts and Tribunals in upholding the Rule of Law*, was chaired by Prof. Sir Francis Jacobs QC, President of the Centre of European Law of King's College London. Session II was designed to look beyond the EU borders at how other international courts and tribunals contribute to uphold the rule of law internationally.

Mr. Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration, gave the perspective on the rule of law of the institution he heads, the Permanent Court of Arbitration, the very first intergovernmental organisation specifically created to deal with international disputes through arbitration, mediation, conciliation, and fact-finding. Mr Siblesz noted that in its 120-year history, the Permanent Court of Arbitration has offered support to tribunals upholding the rule of law for an evolving cast of actors. Traditionally, States, but today also many international or 'supranational' organisations, NGOs, companies, trade unions, and individuals. Mr. Siblesz concluded that it is its flexibility and capacity to adapt to new contexts that has allowed the Permanent Court of Arbitration to be involved in a variety of instruments relating to modern-day concerns, such as, most recently, the draft Withdrawal Agreement between the EU and the UK.

Prof. Fausto Pocar, *ad hoc* judge at the International Court of Justice, discussed *The role of UN Courts in Building the International Rule of Law*. Prof. Pocar looked at the history and volume of the cases decided by numerous UN courts, in particular the International Court of Justice and the International Criminal Court, seeking signs of a common understanding of the concept of **rule of law**. Prof. Pocar concluded his intervention questioning whether there is such thing as an "international" rule of law.

Dr David Brynmore Thomas QC, from 39 Essex Chambers, focused the topic of *Investor-State Tribunals as a Tool to Ensure the Judicial Protection of Individuals*. Dr Brynmore Thomas observed that the interest of local communities is often overlooked in **investor-State disputes**, which normally are more concerned with the interest of multinational companies and States. Yet, international law, for instance in the form of the UN Guiding Principles, is moving towards the definition of instruments able to confer not only rights, but also duties, on multinational enterprises operating internationally. This also touches upon relationships falling under the umbrella of international investment agreements. Dr. Brynmore Thomas pointed towards certain substantive developments in the area, such as the new Dutch model BIT, and some recent case-law, such as the annulment decision of the *ad hoc* committee *Tulip Real Estate and Development Netherlands B.V. v Turkey* and the dissenting opinion of Prof. Sands in the award in *Bear Creek v Peru*, which offer new perspectives on protection of human rights though international investment agreements.

Dr Federico Ortino, from King's College London, attempted to answer the difficult question put to him by the organizers of the conference on whether the WTO Dispute Settlement Understanding is *A Curse or a Bliss for International Trade Relations?* Dr Ortino looked at the changing role of the WTO Appellate Body system, from the "jewel in

the Crown" of the **WTO Dispute Settlement Understanding**, to a battlefield in international economic relations, currently on the brink of paralysis. Interestingly, Dr. Ortino pointed out that the issues that the WTO Dispute Settlement Understanding is currently experiencing may have nothing to do with the dispute settlement mechanism in itself, but rather with the difficulty to reform the underlying treaty obligations arising out the WTO agreements.

Keynote Speech

The after-lunch session featured the keynote speech given by President Koen Lenaerts, President of the Court of Justice of the European Union, on the topic of the Rule of Law in the EU. President Lenaerts was introduced by Lady Arden of Heswall, DBE, from the Supreme Court of the United Kingdom.

President Lenaerts highlighted how the European Union has transformed in a system governed by the **rule of law**, firmly founded on the protection of fundamental rights and freedoms, cultural plurality, democracy and the equality of all its citizens, of which the courts of the EU are the ultimate guardians. President Lenaerts defined the rule of law as the principle that, in any given legal system, a dispute is decided in accordance with the rules and fundamental principles of that legal systems. The rule of law is thus *condictio sine qua non* of justice and entails the logical consequence that neither the Institutions nor the Member States are immune from judicial review.

President Lenaerts opened its speech discussing the role of **mutual trust** in upholding the rule of law and protecting rights conferred under EU law. He highlighted how the key role played by Member States' courts in upholding the rule of law and implementing EU law makes the dialogue between EU and national courts through the preliminary reference procedure essential. Preliminary reference procedure appears indeed key to protect not only the homogeneous interpretation of EU law, but also the autonomy of EU law, and ensuring that national law complies with the higher constitutional principles of the EU. For that reason, President Lenaerts observed, it is of the essence that the independence and impartiality of Union judges is preserved from governmental interference. President Lenaerts defined the CJEU decision in *Associação Sindical dos Juízes Portugueses* of 27 February 2018 as a seminal decision to achieve this aim. President Lenaerts highlighted that the judgement has the same "constitutional" nature as seminal judgements such as *Van Gend en Loos*, or *Costa v Enel*, and has the ultimate aim to enhance mutual trust among Member States.

President Lenaerts also addressed the recent CJEU's decision in *Achmea*, which, he noted, has been criticized by many as an attack to arbitration and as weakening judicial protection for European investors involved in investor-State disputes against EU Member States. President Lenaerts highlighted that the Court's judgment should not be read as being intended to undermine a system of protection parallel to the EU judicial system, investor-State arbitration. Rather, he explained, *Achmea* is a decision aimed at upholding the fundamental principle underlying the concept of rule of law in the EU of mutual trust among Member States and their courts. Indeed, President Lenaerts observed that the rule of law in the EU sits uncomfortably with international agreements among Member States that, in substance, deprive of jurisdiction some national courts, notably those of Eastern European States, showing a degree of mistrust towards them.

President Lenaerts concluded noting that the "rule of law" is far from being an abstract principle: it is the **essence of judicial protection** and of all the rights and obligations flowing from EU law. The rule of law is a combination of article 19 TEU and 47 of the Charter of Fundamental Rights of the EU. In particular, 19 TEU appears particularly important because it results in the fact that just the fact that the national court is operating

in fields covered by EU law, even abstractly, is enough to activate the preliminary reference procedure and the protection of the EU legal system.

Session III
Recomposing Fragmentation. Promoting Dialogue in the EU External Economic Relations

The III Session of the LAwTTIP Conference on *Recomposing Fragmentation. Promoting Dialogue in the EU External Economic Relations* was introduced by Prof. Andrea Biondi, Director of the Centre of European Law of King's College London. The keyword of the III session, as Prof. Biondi explained, was "reconciliation", bringing together the opposing voices from the EU and international law. That resulted to be not accurate.

The first speaker, V.V. Veeder QC from Essex Court Chambers, indeed compared EU lawyers and the international arbitration community to two ancient tribes living on two opposite side of a mountains, who speak different languages and occasionally acknowledge each other's existence. More specifically, Mr Veeder's presentation on *Investment Tribunals in Dialogue with National and International Courts and Tribunals* discussed the CJEU approach to international arbitration, identifying at the origin of the issues between the two "tribes" the European Court's judgement in *Nordsee*, which excluded that arbitration tribunals may refer preliminary questions to the CJEU. Mr Veeder also highlighted that the EU legal system has not served well the arbitration community: on the one hand, the *Hoffman* judgement imposed on arbitrators the duty to charge VAT considered that they apply "equity" rather than law, on the other, the exceptions of arbitration to the Brussels Convention and Regulation did not support the effectiveness of arbitration decisions. Mr Veeder highlighted the importance of academic exchanges, such as the III LAwTTIP conference, to allow discussion between two different worlds that may not always understand each other's language.

The second speaker, Prof. Panos Koutrakos, from City University, discussed the topical issue of *Judicial Protection under the Common Foreign and Security Policy*. Prof. Koutrakos opened his presentation highlighting the different application of the **principle of autonomy to the CFSP**: the essential element of the principle of autonomy of EU law of the broad jurisdiction of the CJEU as set out in article 19 TFEU does not fully apply to CFSP, by reason of the fact the CFSP impinges in States' sovereignty and sensitivity. The exclusion from the Court's jurisdiction is to be found, with exceptions, in article 24 TEU and 22(7)(5) TFEU. Prof. Koutrakos however observed that the Court has enhanced its jurisdiction on CFSP issues in formal (*Rosneft*) and substantive terms (*Elitaliana*). Prof. Koutrakos noted that this can be regarded as a process towards "normalization" of CSFP that brings the subject closer to the general principles in other areas, starting from the field of external relations. Nevertheless, Prof. Koutrakos observed that the EU judiciary remains somehow reluctant to interfere in substantive CFSP choices. Prof. Koutrakos concluded that, although the field of CFSP shows some "messiness", as many others fields of law also do (eg. concept of "sovereignty" as understood in national legal systems and by the CJEU), that does not necessarily lead to "mess" and undermines EU law.

The following speaker, Prof. Adam Lazowski, from the University of Westminster, discussed the draft EU-Switzerland agreement during a presentation titled *How many Layers in this Box of Chocolates? Towards an upgraded Institutional Framework for EU-*

Swiss Relations. Prof. Lazowski introduced the scope of the existing cooperation and broader overarching coordination between the two trading partners, which includes a number of subjects, from free movement of goods, to CFSP and Schengen. Yet, such framework remains fragmented and entrusted to a variety of legal agreements. Such fragmentation, Prof. Lazowski noted, makes it very difficult to bring together the existing EU-Switzerland agreements under one broad legal framework. This has resulted in legal uncertainty, which results in what he defined "organized chaos." A result, Prof. Lazowski noted, which will be only be resolved through the conclusion of a broader agreement providing for institutional cooperation.

The last speaker on the III panel, Prof. Philippa Webb, moved to discuss fragmentation in international law, with a presentation on *The EU: Unifying or Fragmenting Force in International Law?* Prof. Webb introduced the discussion with the concept of "fragmentation", explaining that cases of "genuine" fragmentation, in which judicial interpretation does not achieve the aim of rendering apparently conflicting norms compatible, are rare, and belong mostly to private tribunals which operate outside the judicial mainstream. Relying on citations to international tribunals, which, she clarified, remain a somehow imperfect metrics, Prof. Webb defined the CJEU as a robust judicial system which wishes to avoid fragmentation with international law, but also has little incentive to promote **integration with international law**. The result is apparent fragmentation, due to a lack of engagement with international law. Prof. Webb identified three main reasons for this approach: (i) the institutional features of the CJEU, which, for instance, does not issue separate opinions and makes it very difficult to ascertain whether the Court considered international law in its reasoning; (ii) the Court's sense of identity, which can be summarised in the fact that the CJEU sees itself not as an international court—but rather as the supreme court of the EU; (iii) and the CJEU's understanding of the relationship between jurisdiction and applicable law: the CJEU's awareness of its exclusive jurisdiction has led to keep of tight rein of what is consider applicable law, negatively impacting on the use of international law.

Session IV
Dialogue by Treaty Drafting

Session IV, Dialogue by Treaty Drafting, was chaired by Prof. Cécile Rapoport, from the University of Rennes I. The session focused on the idea of dialogue between the European Union and the international community by means of treaty drafting. The first speaker, Dr. Rosana Garciandia Garmendia, from King's College London, discussed the topic of *Human Rights Impact Assessment and Monitoring under the EU Generalised Scheme of Preferences: the Uzbek Cotton Industry as a Case Study*. Dr. Garciandia Garmendia explained that Uzbekistan is one of the countries benefiting from the EU **Generalised Scheme of Preferences** (GSP), which provides preferential tariffs for various sectors of the Uzbek economy, including the State-managed cotton industry accused for years of deploying forced and child labour. As negotiations are underway for an agreement more beneficial to Uzbekistan (GSP+), special attention needs to be paid to the human rights impact assessment and monitoring of the GSP+ trade agreement currently under consideration. By analysing the human rights dimension of the ongoing EU-Uzbek negotiations for the GSP+, Dr. Garciandia Garmendia's presentation explored the connections of the EU system with the International Labour Organisation, the World Trade Organisation and the UN human rights framework, illustrating that the EU does not operate in a vacuum concerning preferential tariff agreements with third countries.

The presentation of Dr. Susanna Villani, from the University of Bologna, focused on *Settling Disputes on TSD Chapters of EU FTAs: Some Recent Trends and Future Opportunities*. Building on the data of an increase in number of trade agreements to achieve closer economic integration and benefits from trade liberalization, Dr Villani focused on the regime of protection set in the so-called **Trade and Sustainable Development (TSD) Chapters** included in the more recent EU FTAs to ensure compliance with labour and environmental standards. Dr. Villani also looked at the impact of the CJEU's position in *Opinion 2/15* on the provisions enshrined in the TSD Chapters, and, in a broader perspective, at its potential consequences for the EU action in the multilateral context.

Building on the CJEU's decision in Achmea, Dr. Ewa Zelazna's presentation on *Dialogue between the CJEU and Investor-State Tribunals: Is It Possible and Necessary?* assessed whether the EU strategy for the creation of an **Investment Court System**—and, in the future, a multilateral investment Court—should foresee setting up a preliminary ruling procedure between the CJEU and investor-State tribunals.

Also on the topic of the EU strategy on investor-State Dispute Settlement, Mr Simon Weber, affiliated to King's College London, presentation on *Unleash the Liger: Consequences of the EU Investment Court System's Hybrid Nature*. Mr Weber performed a comparative normative analysis of the Investment Court System included in the EU's investment Agreements. Mr Weber argued that the Investment Court System combines features of classic international arbitration and international adjudication. This very innovation makes the new system of dispute settlement a new category of tribunal: a "**hybrid tribunal**". Mr Weber concluded that, ultimately, the Investment Court System introduces promising changes in the landscape of international dispute settlement

mechanisms which will ultimately most likely make the system of investor-state dispute resolution more accessible and strengthen the rule of law. Yet, Mr. Weber noted that there are still weaknesses that need to be addressed such as the appointment mechanism of the members of the Court and the enforcement mechanism.

Session V
Upholding the Rule of Law through Judicial Dialogue

The last session of the LAwTTIP conference, titled *Upholding the Rule of Law through Judicial Dialogue*, was chaired by Prof. Isabelle Bosse-Platière from the University Rennes I. The session explored how the EU interacts with international law by means of judicial dialogue. Along this line, resorting to Joseph H. H. Weiler's construction of an equilibrium between European institutions and member states, Mr. Francisco de Abreu Duarte, Parliamentary Assistant at the EU Parliament, explored the concept of the autonomy of the EU as a power tool, analysing how the **classic Weilerian equilibrium** has now shifted into a struggle between the judicial legitimacy (CJEU) and the broader political legitimacy (Member States but also European Parliament and Commission). The speaker ultimately highlighted how this will provide a stronger framework for further analysis of the meaning and legitimacy of the principle of the autonomy of the EU.

The paper presented by Dr. Szilárd Gáspár-Szilágyi from PluriCourts looked at *The Uneasy Relationship between Intra-EU Investment Tribunals and the CJEU's Achmea Ruling*. Dr. Gáspár-Szilágyi's presentation focused on the international perspective of the relationship between EU law and international arbitration and discussed in details the legal status of investment tribunals set up under **intra-EU investment agreements** and how they reacted to the *Achmea* ruling. To this aim the speaker discussed the existing intra-EU arbitrations in which *Achmea* appears in one form or another, taking a critical look at how the disputing parties used the CJEU's decision in their argumentation and at the reaction of investment tribunals.

In their presentation on *The Dialectics of Power and Cooperation. A Comparative Study of Judicial Dialogue. Relationship of International Courts and Tribunals in International Economic Law vis-à-vis the Preliminary Ruling Procedure*, Dr. Urszula Jaremba and Mr. Giancarlo Piscitelli from the University of Utrecht reconceptualised the basis of the constitutional relationship between investor-state tribunals and domestic courts on the basis of a conceptual common ground their functional aim to achieve the rule of law.

Finally, Dr Chiara Cellerino's presentation on *International Investment Jurisdictions and the Achmea Ruling: the Road Towards…(Isolation or) 'Enhanced Cooperation' between Courts?*" looked at a possible "cooperative" dimension of the CJEU judgement in *Achmea*, based in particular on its constitutional justification of mutual trust in view of the creation of the future systems of the international governance of foreign investments, such as the proposed Investment Court System.

Mini-Moot Question

Les Ailes de Mercure is a company incorporated under the laws of France, which has been operating in the UK transport sector for 10 years. Les Ailes de Mercure's headquarters consist of a 2,000 sq. parking space in Portsmouth.

Following the notification of the Article 50 TEU notice by the UK Government to the EU of 29 March 2017, on 6 April 2017, the UK Secretary of State for Transport notified all EU companies operating in the transport sector that the continuation of their operations in the UK after "Brexit Day", ie. 29 March 2019, will depend on the agreement reached between the UK and the EU.

On 30 September 2018, the UK Secretary of State for Transport published on ukgov.co.uk a note addressed to all EU operators in the transport industry carrying out operations in the UK, warning them that, in case of no-deal, "the continuation of their operations in the UK cannot be guaranteed". On 10 December 2018 the UK Parliament rejected the UK Prime Minister's draft Withdrawal Agreement with the EU. In the subsequent days, negotiations stalled, and no majority could be reached in the UK Parliament on the way forward for EU-UK relations. On 2 January 2019, the UK Secretary of State for Transport notified Les Ailes de Mercure that the company shall vacate its premises in Portsmouth by 29 March 2019, 9.00 am. The note stated that, in view of the high chances that the UK will exit the EU without a deal, the company's premises will be allocated to UK Border Authorities to station lorries awaiting border checks in Portsmouth. In the same letter, the UK Secretary of State for Transport states that the Les Ailes de Mercure will receive a compensation of 50,000 GBP for its premises considered that "given the circumstances, it is clear that Les Ailes de Mercure would in any case cease its activity in the UK". On 3, 5, 15 and 25 January, Les Ailes de Mercure communicated to the UK Secretary of State for Transport that it does not intend to proceed to vacate its premises and that, in any case, the 50,000 GBP compensation foreseen in the letter of 2 January 2019 is inferior to the normal market price of its premises. On 27 January, the UK Secretary of State for Transport replied that enforcement officials will be sent to Les Ailes de Mercure's premises at the agreed date and time of 29 March 2019, 9.00 am to ensure the orderly vacation of the Portsmouth premises. The compensation of 50,000 GBP is further described as "fair, given the circumstances." On 2 February 2019, Les Ailes de Mercure filed a notice of arbitration against the UK Government under the 1964 UK-France BIT [fictitious].

Article 6 of the 1964 UK-France BIT reads: "Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation, except for a purpose which is in the public interest, on a nondiscriminatory basis, in accordance with due process of law, and against prompt, adequate and effective compensation."

Article 8 of the 1964 UK-France BIT reads: "(1) Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be submitted to an arbitration tribunal. Such arbitration tribunal shall be constituted ad hoc as follows […]. (3) A state party, an investor, or an affected third party must not exhaust local

administrative and judicial remedies before it may submit a claim seeking damages for an alleged breach of the Agreement before the tribunal established under Article 8(1) above."

Article 9 of the 1964 UK-France BIT reads: "(1) The arbitral tribunal shall decide on the basis of the law, taking into account exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and the general principles of international law."

Les Ailes de Mercure requests that a) The Tribunal finds that the UK Government's measure violates article 6 of the France-UK BIT; c) Subordinately, the UK Government shall pay an appropriate price for Les Ailes de Mercure's premises in Portsmouth, quantified in no less than 800,000 GBP; d) In any case, the UK Government shall bear all costs arising out of the procedure.

The UK Government requests that: a) The Tribunal declares that it lacks jurisdiction on the grounds that, on the basis of the ECJ decision in Achmea, the UK-France BIT is valid or applicable between the state parties to the investment agreement; b) Subordinately, that it rejects all claims on the basis of the merit; c) In any case, the Les Ailes de Mercure shall bear all costs arising out of this procedure.

The Tribunal is constituted on 2 March 2019. The first hearing on jurisdiction, focussed on the preliminary issue of the impact of Achmea on the jurisdiction of the Tribunal, is set for 22 March 2019.

Procedural Order No. 1 stipulates that the seat of arbitration shall be London, United Kingdom. Procedural Order No. 1, further stipulates: In view of the hearing of 22 March 2019, the Tribunal orders that, in submitting their comments on the impact of the ECJ Achmea decision ("Achmea decision") on the present arbitration, the parties specifically address the following issues: 1. Whether EU law is to be considered national or international law according to the VCLT; 2. Whether the fact that the UK will have left the EU at the time when the award is delivered has an impact on the application of the Achmea decision to this arbitration. The discussion shall take into account both the Achmea decision and the subsequent case-law of European courts and international tribunals.

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 and Investment Partnership (TTIP).

http://www.lawttip.eu
info@lawttip.eu
https://twitter.com/JMN_LAwTTIP

LAwTTIP Working Papers Series

http://www.lawttip.eu/lawttip-working-papers/

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

KING'S College LONDON

UNIVERSITÉ DE RENNES 1

IODE Institut de l'Ouest Droit et Europe UMR CNRS 6262

Co-funded by the Erasmus+ Programme of the European Union