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Citation: Fahey, E. ORCID: 0000-0003-2603-5300, Mancini, I. ORCID: 0000-0001-7983-3360, Harrison, J., Suttle, O., Zelazna, E., Garcia, M., Gammage, C., Araujo, B. M., Kuner, C., Yakovleva, S., Ott, A., Moerland, A., Gehrke, T., Farrell, H., Newman, A., Kalypso, N. and Shleina, V. ORCID: 0000-0003-1762-1332 (2020). The EU as a Good Global Actor (City Law School (CLS) Research Paper No. 2020/04). London, UK: City Law School, City, University of London.

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Link to published version: City Law School (CLS) Research Paper No. 2020/04

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City Law School Research Paper 2020/04

The EU as a Good Global Actor

Elaine Fahey, Isabella Mancini, James Harrison,
Oisín Suttle, Ewa Żelazna, Maria Garcia, Claire Gammage,
Billy Melo Araujo, Christopher Kuner, Svetlana Yakovleva, Andrea Ott,
Anke Moerland, Tobias Gehrke, Henry Farrell, Abraham Newman,
Kalypso Nicolaïdis & Veronica Shleina

19 June 2020

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The City Law School

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The City Law School Working Paper Series are published by The City Law School, City University London, Northampton Square, London, EC1V 0HB.

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THE EU AS A GOOD GLOBAL ACTOR

Abstract

This paper outlines an exploratory workshop at City Law School, City, University of London funded by HEIF/ 'EUTIP' Marie Skłodowska-Curie Innovative Training Network (ITN) on understanding of the EU as a Good Global Actor.¹ The EU has as its mission to be a good global governance actor yet is continuously challenged in the world. As a global actor, the EU is both a weak and strong actor in a divergent range of global governance areas. It is not comparable to study the EU as a global trade actor for example to its efforts in human rights, data, cyber or the environment. EU international relations constitutes arguably a booming field of law where the EU appears often to be a victim of its own success. The range of the subjects and objects of EU law continues to expand and the EU is arguably increasingly a victim of its own success, increasingly taking decisions with impacts on third countries or parties, subjecting more entities to sanctions regimes, being bound to consult more entities and have more third countries, parties and entities such as lobbyists interested in the directions of EU law. The assessment of the EU as a global actor includes broad checks on normative action *ex ante* and *ex post facto*- yet it is no less harsh. *Ex ante* metrics of EU global action include court-centred ones such as an opinion from the CJEU on legality of an international agreement, often precluded in most constitutional systems on account of its conflict with *pacta sunt servanda*. The contours of the principle of the autonomy of EU law have the capacity to put more stringent parameters on EU institutionalised evolutions as to international engagement. How can we assess the EU as a global actor given these realities? The aim of the event was to explore informally the nexus between trade and security, trade and economics and trade and human rights as a future research agenda with input from a variety of scholars It reflected upon four major themes: 1) The EU's Contribution to the Democratisation of Global Governance 2) Deeper Trade Agreements and New Normative Foundations 3) The EU as a Global Actor in Trade and Fundamental Rights 4) EU's Trade in the Era of Global Data Flows.

Keywords: EU trade; global governance; EU external relations; fundamental rights; data flows; EU as a Good Actor; democratisation; gender; labour; international relations; personal data; normative power; GDPR; Brexit

¹ The European Union Trade and Investment (EUTIP) project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 721916.

Session 1. The EU and Democratisation of Global Governance

1. A Deep Agenda for Fundamental Rights in Trade Agreements Isabella Mancini, City Law School

Introduction

In a context of global backlash to globalisation and free trade, the EU strives to be a resilient “good global actor” pledging for a rules-based international order. Manifestation of this pursuit is its active engagement in a series of negotiations of trade agreements binding its trade partners to cooperation, good practices, institutionalisation and standards. The ensuing aim of deep integration with third countries forms the basis of what has been labelled the EU “deep” trade agenda. In this process of ambitious economic integration, it is shown that little is devoted to the protection of fundamental rights, with important implications for the emerging global economic governance. How does the EU, via its deep trade agreements, contribute to democratisation of international relations and global governance? What would “a deep agenda for fundamental rights in trade agreements” look like? Reflecting on these questions, Mancini provided a research agenda on the EU as a global actor in trade and fundamental rights, while shedding light on methodological and normative challenges.

Mancini started off with the question of how to understand the EU ‘as a good global actor’. She claimed that, in her research, the way she understands this is the possibility for the EU to be a global actor that can make two agendas converge, namely trade and fundamental rights. And it is this convergence that she called ‘a deep trade agenda for fundamental rights’. The language of fundamental rights is typically not used in the context of free trade agreements, but they still come through under different configurations and demands.

The discussions of fundamental rights have become the object of concrete concerns and a significant topic of public interest. Recently, in a joint proposal, France and the Netherlands demanded tougher enforcement of environmental and labour standards in new trade agreements.² They claim that the EU should police the activities of countries granted preferential access to its market. The Commissioner for Trade Phil Hogan has also recently emphasised in one of his speeches that EU will appoint a chief trade enforcement officer who will be expected, among other things, to strengthen the enforcement of sustainable development commitments on climate change and also labour rights.³ Labour rights have also been in the spotlight during the negotiation saga between the EU and the UK. The EU has so far demanded labour rights commitments while the UK has been reluctant for different reasons. Another aspect that has also gained prominence during the negotiations is the issue of data flows. The EU and the UK have realised that their trade relationship would also benefit from free flows of data, which the European Union yet conditions on the existence of adequate safeguards for the protection of personal data. This is just to show how fundamental rights enter into discussion when it comes to trade agreements. Most of the time the focus is really on enforcement. By contrast, Mancini believes that creating a sort of “harm-proof” environment for fundamental rights in trade agreements can be the way forward.⁴

EU Trade Agreements \cap Fundamental Rights

Mancini considered how fundamental rights evolved and ‘intersected’ over time, and the way they

² See Jim Brunsten and Victor Mallet, ‘France and Netherlands call for tougher EU trade conditions’ (Financial Times, 4 May 2020).

³ Speech by Commissioner Phil Hogan at Launch of Public Consultation for EU Trade Policy Review (16 June 2020), available at <https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/speech-commissioner-phil-hogan-launch-public-consultation-eu-trade-policy-review-hosted-eui-florence_en>.

⁴ Mancini referred to the webinar “EU Trade Policy after Covid-19” organised by Trade Experettes and the European Centre for International Political Economy. During the webinar, Sabine Weyand (DG Trade) stated that “if we have to maintain open trade, we need to show that it does not go to the detriment of social and sustainable development issues.” It is unclear whether task would remain limited to *showing* that this does not happen or whether it would mean to *embed* mechanisms to this end. Importantly, she did not seem to be necessarily referring to detrimental effects on social issues *abroad*. Weyand might have been thinking about the detrimental effect on the *domestic level*, within the EU, having in mind all the contestation that happened with TTIP and CETA. This really provides fertile ground to discuss how we can think about fundamental rights in trade agreements. See ‘EU Trade Policy after Covid-19’ (28 May 2020) co-hosted by the Trade Experettes, ECIPE and Women in Trade Network in Brussels (<<https://ecipe.org/events/eu-trade-policy-post-covid/>>).

could evolve in the future.

Past. Some may say that in the past the EU used to include human rights conditionality clauses in trade agreements. Yet, not all the agreements that the EU concluded with other countries contain conditionality clauses: these were especially opposed by developed countries. Even where they were included, they were not typically used. Mancini's main critique is that the human rights conditionality clauses hugely focus on the trade partner and on the fact that the trade agreement can be used as a tool to export human rights abroad. These clauses are not necessarily connected to the trade agreement but they are something additional that the agreement can help to achieve.

Present. Regarding the present, the new generation of EU trade agreements for the first time includes chapters on trade and sustainable development. When it comes to trade agreements between *developed* countries, however, these chapters are short sighted on a number of fronts, which go beyond issues of enforcement.⁵

Future. Mancini pledged for a state of play whereby trade agreements and fundamental rights converge and mutually sustain each other, especially in the context of trade agreements that go significantly beyond tariffs alone.

Given the latter potential scenario, Mancini turned to consider the new generation of EU trade agreements that the EU negotiated with developed countries. They are the result of the global Europe strategy. The strategy targeted developed advanced market economies in North America and Asia. These were the countries with which the EU wished to set the rules for globalisation and set global standards. The seeds of many trade agreements that have been concluded so far, such as the trade agreements with South Korea, Canada, Japan, Singapore (and also TTIP, had it been successful) can be found in this strategy. Over the time, these trade agreements have also been subject to other strategies, such as the 'Trade For All' strategy. Overall, the evolution of EU trade policy shows that the EU has been increasingly more ambitious in its trade agreements, especially in the degree of economic legal and institutional integration that it sought.

A 'Deep' Trade Agenda for Fundamental Rights?

In light of 'deep' trade agreements – which are more ambitious in their scope and wider in the reach – Mancini asks: what would 'a deep agenda for fundamental rights' mean and look like? She uses the term 'deep' and 'deepness' as a sort of methodological expedient, or device, to engage in an exploration of what would ensure that trade agreements do not adversely impact fundamental rights and the kind of safeguards that they could embed, as opposed to approaches that exclude any consideration on fundamental rights from the trade agreements. Starting from 'deep' trade agreements that go significantly beyond tariffs alone, her research intersects different levels and dimensions of the new generation EU trade agreements with fundamental rights. For each dimension, she performs a descriptive and normative exercise: she looks at 'what is there', and 'what should be there' for fundamental rights. These dimensions include the scope, the actors on the negotiation stage, regulatory cooperation mechanisms and the chapters that create the institutional structure for the implementation of the agreement.

Lastly, Mancini put some questions for further reflection:

- How can the cross-cuttingness and the relationship between *trade* and *fundamental rights* be understood? How are they relevant to each other?
- What goes/ can go into an FTA? What are the main limitations?
- What is the EU's contribution to democratisation of global governance?

2. Metrics of the EU as a Good Global Actor

Elaine Fahey, City Law School

⁵ Isabella Mancini, 'Fundamental Rights in the EU's External Trade Relations: From Promotion 'Through' Trade Agreements to Protection 'in' Trade Agreements' in Eva Kassoti and Ramses A Wessel (eds.), *EU Trade Agreements and the Duty to Respect Human Rights Abroad* (CLEER PAPERS 2020/1).

Introduction

The EU has as its mission to be a good global governance actor yet is continuously challenged in the world. As a global actor, the EU is both a weak and strong actor in a divergent range of global governance areas. It is not comparable to study the EU as a global trade actor for example to its efforts in human rights, data, cyber or the environment. EU international relations constitute arguably a booming field of law where the EU appears often to be a victim of its own success. The range of the subjects and objects of EU law continues to expand and the EU is arguably increasingly a victim of its own success, increasingly taking decisions with impacts on third countries or parties, subjecting more entities to sanctions regimes, being bound to consult more entities and have more third countries, parties and entities such as lobbyists interested in the directions of EU law. The assessment of the EU as a global actor includes broad checks on normative action *ex ante* and *ex post facto*- yet it is no less harsh. *Ex ante* metrics of EU global action include court-centred ones such as an opinion from the CJEU on legality of an international agreement, often precluded in most constitutional systems on account of its conflict with *pacta sunt servanda*. The contours of the principle of the autonomy of EU law have the capacity to put more stringent parameters on EU institutionalised evolutions as to international engagement. How can we assess the EU as a global actor given these realities?

Knowing when the EU is a Good Global Actor? On 'Metrics' of EU International Relations Law

Fahey looked at the understanding the use of good global actor as well as the legal metrics problem. The EU is an extremely responsive legal actor, which makes it an interesting study from many perspectives questioning it as an entity 'trying to do good'. Importantly, from a legal perspective, is how this has been set by other disciplines and subjects. The time, manner, place, and metrics - the basic communication devices. It is also important to note that lawyers and political scientists have come together in more recent times as to EU international relations. In more recent times, politicisation has come to the forefront, and in particular institutionalisation. It can be argued that the actor metrics of the EU's actions and international relations have vastly opened up across subject areas. The metrics of international relations are extremely complex and extremely fluid and multifaceted.

Who Evaluates art. 21 TEU Ex Ante, Ex Post Facto

A slightly more refined way of consideration is just to bear in mind one of the extraordinary legal innovations of the EU Treaties is article 21 TEU. Here, the EU has a legal obligation to be a good global governance actor. There is an extraordinary range of *ex ante* and *ex post facto* entities who get to evaluate this and there is a range of entities that need to be considered. For example, the European Parliament has increasingly important powers in international relations, although rarely litigates. There is an increasingly large number of subjects and objects involved in international relations law, for example lobbyists, and also countries that intervene to set the agenda of the EU. For example, just a few weeks ago the US intervened in the GDPR. Many third countries are entitled to appear before the CJEU but rarely intervene. Citizens also have increasingly important capacities to intervene under art.21 TEU. For example, the TTIP and CETA litigation was a good example of this. The national Parliaments are also interesting characters to consider regarding the breadth of their capacity to intervene. We only need to look at CETA before the Dutch Parliament or Mercosur in Ireland.

Shifts in Subjects and Objects of EU IR Law Result in More Institutionalisation

The EU international relations have an increasingly massive range of subjects and objects, arguably, the EU has become a victim of its own success. There is an increasingly broad range of administrative decisions addressed to individuals and entities and third countries; an increasingly broad number of individuals entrusted subject to EU sanctions regimes; an increasingly large number of situations where the EU needs to consult with third countries and parties; and increasingly high number of lobbyists work in Brussels; as well as large law firms, often American. There is an increasingly broad range of civil society understood within each new trade agreement - the constituency is broadened. The EU is increasingly burdened by the administration, it institutionalises to develop its subjects and objects. It is interesting to see how it absorbs this extraordinary shift.

EU as a Global Convergence Actor: Leads Spirit; Leads Convergence

The EU as a global convergence actor is looked at in Fahey's book "Framing Convergence with a Global Legal Order."⁶ There are no normative claims rather a methodological way to reflect on the idea of cross-subjects and disciplines how the EU increasingly tries to lead the spirit of convergence, but always leaves through divergence. There is no shortage of examples as to finance financial services, labour, territoriality, unilateralism and generally global supply chains. The current status has to do with the WTO workarounds at the same time as the EU preaching the language of multilateralism respect for the WTO reform 'bringing the US back to the table.' But how is this dealt with as a matter of EU law? The methodology as a matter of international relations is fairly difficult: as a subject it is burdened by extreme positivism, hyper-legalisation and it has few constitutional moments. It can be said that this has few very critical points for reflection within it as a subject.

Problem is Methodology in EU IR Law? Always Court-Centric in EU Law

These are all very discrete challenges that the subject itself has had an enormous problem dealing with. In 2013 the CJEU celebrated its most activist decision with a 'birthday party' inviting the academics from all over the world. The CJEU has extraordinary powers in EU international relations law which are mostly unparalleled in national systems. Many systems do not provide in their constitutions for the *ex ante* opinion powers for example, because they violate *pacta sunt servanda*, and the principle of consent and agreement in international law. Unsurprisingly, the CJEU has largely thwarted all efforts as to institutionalisation in its use of its *ex ante* opinion powers. There were several decades of examples of this all falling under the rubric of the autonomy of EU law. The EU's accession to the ECHR has featured the Court of Justice itself as part of the negotiation team that gets to strike down an opportunity as it were to accede to the ECHR even though it was mandated by the Member States and the Treaties. This leads to the question of how we understand institutionalisation and what types of parameters are possible for analytical review. The irrational paradoxes of power here cannot be lost on anyone looking at any other institutions, for example, the European Parliament. The European Parliament does not litigate international relations. There are two or three cases on pirates and individual parliamentarians have taken the lead in a limited number of cases e.g. by Sophie In't Veld. The rise of national Parliaments in trade uprising over their last conferences, as evidence in the CETA, the Dutch Parliament are largely exceptional situations, completely unrelated to any alignment in the rise of the European Parliament. The incidents of institutionalisation in EU international relations were a very vibrant activity that needs more study, especially litigation of subjects and objects and their framing. More generally, the question of paradoxes and the bottom-up versus top-down actors are questions which are of enormous interest.

3. Free Trade Agreements and Global Labour Governance: The European Union's Trade Labour Linkage in a Value Chain World

James Harrison, University of Warwick

Introduction

Based on research to be published with Routledge in a co-authored inter-disciplinary book in September 2020,⁷ this presentation examined the issue of trade-labour linkage and how it can be made more effective in the future. Drawing on the global value chain literature, it focused on case studies of the European Union's free trade agreements with the CARIFORUM group, South Korea and Moldova and their respective export industries of sugar, automobiles and clothing. Based on hundreds of interviews, the research shows how labour standards provisions were of marginal importance in the negotiation and implementation of these agreements. It also reveals that for workers in key export industries, the labour provisions were mismatched with their most pressing workplace concerns. At the same time, these concerns are exacerbated by the agreement's commercial provisions. Harrison went on to explore how such agreements might in future be

⁶ Elaine Fahey, *Framing Convergence with the Global Legal Order* (Hart Publishing 2020)

⁷ Smith, Harrison, Campling, Richardson, Barbu, *Free Trade Agreements and Global Labour Governance: The European Union's Trade Labour Linkage in a Value Chain World* (Routledge 2020).

reconstituted to better address the issues raised in the first half of the presentation.

It was suggested that radical reform is needed to how labour provisions are conceptualised and implemented if they are to be fit for purpose in the 21st century, and that consideration of the differentiated issues raised by individual global value chains is central to this endeavour. It also suggested that lawyers need to take more seriously the idea of trade agreements as 'living instruments' whose legal provisions are reliant on the institutions and individuals charged with implementing them, if they are to understand the impacts of commitments in trade agreements in the real world.

Harrison focused on the trade-labour linkage in European Union free trade agreements. As set out in the "*Trade for All*" Strategy document: labour provisions in the EU's new generation trade agreements are vital to the Commission's conception of itself as a good actor through trade policy. They ensure that trade is not just about interests but also about values and that economic growth goes hand in hand with higher labour standards.⁸ The EU is a global actor because its labour standards agenda is based on global values, particularly the ILO Core Conventions, rather than specifically European ones. It can claim to be using its normative power (to use Ian Manners' term) to affect change by diffusing shared expectations through the international system. Yet, it is important to empirically test these claims. Often legal scholarship simply 'examines the text on the page' and on that basis comes to conclusions about the nature of legal obligations. A key contention of Harrison et al's book is that trade agreements are living instruments and that trade policy must be implemented in diverse national settings. It is that process of implementation which is critical to providing us with meaningful lessons about the importance or not of legal obligations.

Harrison asked three questions:

- Do labour provisions make trade 'not just about interests but also about values'?
- How has the EU's approach to conceptualising and organising civil society been externalised through its trade policy?
- How should fundamental rights be conceptualised in trade agreements in the future?

The book presents case studies of the European Union's free trade agreements with the CARIFORUM states, with South Korea and Moldova. Based on hundreds of interviews, it shows how labour standards provisions were of marginal importance in the negotiation and implementation of these agreements. It finds that government officials from trade saw labour provisions as externally imposed and not their responsibility. Their focus was on more pressing and immediate concerns, including adherence to commercial provisions of the agreement. At the same time, the EU officials had very limited conception of their role with regard to labour provisions and very limited understanding of domestic labour struggles in trade partners, making them largely powerless to push for changes to domestic labour law and practice. Secondly, drawing on the global value chain literature, key export industries of sugar in Guyana, automobiles in South Korea and clothing in Moldova are considered. It is assumed that it was these industries where the influence of EU trade policy would be likely to register. Each industry is examined as to the extent to which the labour provisions had meaningful purchase on labour standards issues. This analysis reveals that for workers in key export industries the labour provisions were mismatched with their most pressing workplace concerns. At the same time these concerns were exacerbated by the agreements' commercial provisions.

Guyanese Dependence on Sugar Exports

In Guyana, the closures of Sugar Estates, the country's single biggest employer, was significantly influenced by changing trade relations with the EU and the downturn in sugar exports. This led to economic dislocation and political discontent. The trade agreement with the EU, with its focus on niche export opportunities and appeals to social dialogue, was simply unable to mitigate such trade induced dynamics on this section of the Guyanese workforce.

⁸ 'Trade for all - Towards a more responsible trade and investment policy' (Luxembourg: Publications Office of the European Union, 2014) available at <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>

South Korea Export-Oriented Automobile Production and the EU

In South Korea, the commercial provisions of the agreement shifted competitive conditions in the Korean auto market, contributing to an influx of imports and the erosion of the Hyundai Motor Group, Korea's largest auto manufacturer's, profits. This threatened to create adverse impacts on workers in the more insecure and low paid jobs, especially those located in the lower-tier of production network.

Moldova, EU Production Network and the Clothing Value Chain

In Moldova, as tariff barriers were reduced, exports particularly to the UK and Italy, increased. This created more jobs for a workforce that consists of 90% women. There was a positive impact on female participation in the workforce. But pressure from lead firms in the UK and Italy, combined with weaknesses in labour protection system in Moldova, also led to the entrenchment of poverty wages and heavy reliance on piece-rate payments and other troubling overtime practices and production methods.

These empirical findings show the importance of studying the thicker multiplicity of connections which trade agreements produce, as a result of the cross-border activities of firms and other economic actors – what the book terms 'the trade-labour nexus'. Here, there were serious and sometimes negative impacts of trade agreements on workers in the sectors studied.

EU's Approach to Conceptualising and Organising Civil Society

The labour provisions discussed are contained within the Trade and Sustainable Development (TSD) Chapters. These are integrally linked to the civil society mechanisms of the trade agreements. In the book, Harrison et al. also investigate the role of civil society in relation to trade policy, reflecting on the consequences of the formal inscription of civil society actors into the TSD chapters of EU trade agreements. It is found that the claim that the EU here acts as a global actor is much weaker. Unlike, in relation to labour standards which are based on global values and ILO Core conventions, its approach to conceptualising and organising civil society is a European one: a tripartite structure composed of employers' representatives, employees' representatives and various other interest groups. When this model is mapped onto diverse trading settings, the 'our-size-fits-all' model creates serious problems. These are captured by considering the politics of representation: who is a representative entity in these diverse trading partner settings becomes problematic.

How should we think of fundamental rights in trade agreement and their addressees in the future?

There are four insights from Harrison's research in relation to this question. First, there is a need to conceptually label labour rights as an intrinsic aspect of trade policy-making. As the analysis has shown, trade agreements have profound impacts on workers. There is a need to move away from seeing labour rights as an agenda extrinsic to trade which policymakers have charitably agreed to take some action upon, and move towards an agenda that trade policy has a strong duty to address, if EU trade policymakers are to be considered good global actors. Second, we need to engage with real world trade issues in specific value chains. The EU's model has failed to connect with differentiated labour struggles in its trade partners. As a result, many issues – including those in relation to key export industries – have been unexplored as well as unaddressed. This needs to change for good global action to occur. Third, there is a need to consider rights issues within the EU. The trade linkage could be made more internationalist by recognising the universality of labour struggles. There are plenty of opportunities to do this, including by operationalising labour standards provision within the EU in ways that speak directly to the trade-labour nexus. For instance, examining labour standards in global value chains, led by firms and trade partner countries such as the Korean Hyundai Motor Group plants in Czechia, and Slovakia, or examining the treatment of workers who have migrated into the EU from places like Guyana and Moldova, or been unfairly denied the right to do so.

Most fundamentally and radically, there is a need to rethink the language and actors of trade policy. Harrison argues for a paradigm shift and the very idea of what trade agreements are. It is already recognised by the mainstream trade community that modern trade agreements are transitioning

from instruments of liberalisation to instruments of regulation, reflecting the changing basis of capitalist production. Building on the existing integration of economic space between states, they cover an ever-expanding array of regulatory issues from intellectual property rights and food standards to state subsidies and data privacy. There is merit in correcting the misapprehension created by applying the misnomer of trade agreements to such treaties. Referring to them under a different nomenclature, for instance 'international co-operation treaties', would then better reflect their breadth of coverage. It could also alter the terms of the debate and the actors involved in ways that make a significant difference to what such treaties seek to achieve. It could challenge the assumption that the increased movement of goods and services ought to be valued for its own sake and raise distributive questions about the costs and benefits of international exchange out of the ghetto of non-trade issues. It could also create a greater role for governments and departments or Directorate Generals (DGs) in the European context, focused on labour, development, social affairs and the environment, bringing different governance networks and outlooks to bear on policymaking. This shift could lead to a much richer concept of what it means to be a good global actor, and a far better chance that trade will work for all.

4. Doing Good vs Not Doing Bad: Duties and Baselines in Bilateral Trade Agreements Oisín Suttle, Maynooth University

Introduction

What are the appropriate normative criteria for assessing the EU's approach to Free Trade Agreements (FTAs) negotiations? Assuming negotiations are both morally and practically optional, on what basis can we identify whether a resulting agreement meets relevant normative criteria? And to what extent do disagreements about those criteria impede their practical political evaluation?

Note first that the premises of moral and practical optionality are potentially controversial. *Moral optionality* assumes that the 'no-FTA' baseline is itself morally unobjectionable (or at least, that any moral defects are not of a kind to be remedied by an FTA). In many cases, however, this will not be the case: defects in existing institutions may make some change morally required, and an FTA may be one way to effect this change. This raises difficult questions about the permissibility of protectionism that I won't try to answer here (see the final chapter of my *Distributive Justice and World Trade Law* (2017) for some initial reflections on this).⁹ *Practical optionality* assumes that the no-FTA baseline is reasonably acceptable to both parties, such that they can genuinely 'take it or leave it'. Again, this may not hold, particularly in cases (ACP EPAs, Brexit) where the no-FTA position is in fact significantly worse than the status quo, and various actors may have formed expectations (legitimate or otherwise) and implemented long term plans on the assumption that particular market access would continue.

Moral and practical optionality may both also be challenged by the multi-player nature of the FTA system. Morally, we might hold, for example, that a country was entitled to whatever unilateral trade policy it chose, but that entering into an FTA with one partner generated obligations (of fairness / impartiality / non-discrimination etc) to at least seek to find a similar agreement with willing others. Practically, we might recognize that concerns for trade diversion mean that entering into an FTA with one trade partner may have adverse impacts for others who do not do the same, rendering such agreements non-optional as a practical matter. We might also highlight how path-dependence and similar mechanisms, combined with the increasing emphasis of FTAs on regulatory and other 'behind-the-border' issues mean that FTAs will restrict the options subsequently open to both participants and non-participants. With those caveats, we might posit a number of approaches to normatively evaluating FTA negotiations and/or their results:

Anything Goes

FTAs are optional, if states do not like what is on offer they can decline to participate. To the extent they participate, their content is legitimized by state consent, and there is nothing more to be said

⁹ Oisín Suttle, *Distributive Justice and World Trade Law* (2017).

on the matter.

Process and Pressure

FTAs are objectionable to the extent that their negotiation involved the application of illicit pressures or incentives of various kinds. Bribing officials, threatening the withdrawal of (morally non-optional) development or military aid, etc. Concerns of transparency and effective democratic oversight may also fit here. The same substantive agreement may be objectionable or non-objectionable, depending on the manner of its negotiation.

Substantive Imbalance

FTAs are objectionable to the extent that they result in an uneven distribution of benefits and burdens (formal or substantive) between the states involved. The underlying concern here might be expressed in terms of exploitation, but that argument is likely to depend significantly on casting doubt on the two aspects of optionality noted above. Alternatively, it may be grounded in a substantive egalitarian view, but to the extent this is the case, it is likely to have implications significantly beyond the terms of FTAs (and as regards FTAs, may motivate a requirement that benefits and burdens be distributed unequally so as to benefit the less advantaged). Again, that may ultimately mean challenging the moral optionality of such agreements.

Protected Interests Side-Constraints

FTAs are objectionable to the extent that they adversely impact, or fail to protect / advance, particular protected interests, whether in participating states or non-participants. The relevant interests might include human rights, vulnerable groups, environment, self-determination and so on. The key distinction between this and the substantive balance view is that it is concerned with threshold / sufficientarian claims, rather than comparative / egalitarian ones. An agreement, for example, which undermined effective self-determination in both participating countries (perhaps because it incorporated ISDS provisions) would be objectionable on this ground, regardless of how the economic benefits of that agreement were distributed. An important question that views adopting this approach will need to answer relates to the distribution of responsibilities for these various protected interests, and the extent of responsibility for indirect effects / under- and overdetermined outcomes etc.

At this level of generality, it seems that our evaluation of any given FTA will depend significantly on our underlying normative commitments: those attracted by ideals of national responsibility and voluntarist obligation will ask very different questions to those endorsing a morality of human rights or a cosmopolitan egalitarianism. This will be troubling for anyone hoping to build a politically effective critique of such agreements. However, more optimistically, it seems likely that in many cases the concerns of these different perspectives will cluster: an agreement that undermines human rights will likely also disproportionately advantage the already more advantaged and emerge from a process that is power-based, exploitative and non-transparent – the upshot being that there may be scope for building wider coalitions around or against particular aspects of FTAs, without necessarily reaching agreement on these more contestable underlying questions. (The language of incompletely theorized agreement and overlapping consensus may be helpful here.)

Suttle discussed the criteria relevant and that are applied to the concepts of justice and fairness of trade agreements. His argument is motivated by a puzzling intuition of an unfair trade agreement. It is usually assumed that agreements are voluntarily entered into. In order to conclude that an agreement is unfair its terms are evaluated. He first looks at idea of voluntariness or optionality (a lot of intuitions are driven by doubts about the extent to which these are truly optional from either side); secondly, assuming that they are truly optional, he thinks about the criteria that notwithstanding the optionality might be applied.

When talking about trading especially international agreements more generally, voluntariness may be thought of in two ways. Suttle characterises this as moral and practical voluntariness. Moreover, moral boundary as being the sense that one is morally free to enter or to refrain from entering into agreement. And the assumption driving that is that the non-agreement *status quo* is in itself morally unobjectionable or at least to the extent it is objectionable, it is not objectionable in a way that can

be remedied through entering into an agreement of this kind. If there is an existing injustice that entering this field would remedy, then the agreement itself seems to be morally non-optional. Presumably, there is an obligation to do what can be done to address those injustices to the extent or responsible for them. These trade agreements may be characterised as morally non-optional that sense for various reasons. The most obvious ones being either that one has a substantive view around the injustice of particular trade policies that might be remedied through a trade agreement. Alternatively, some sort of compensatory claim according to which there are justice-related to what has happened in the past. This idea seems to fit quite well with something like the ACP relationship. Secondly, practical voluntariness which is just the sense that one is, in practical terms, free to agree or not to agree. Sometimes, there is simply no alternative, so there is no realistic option to walk away. This sort of language and analysis seems most plausible in cases of agreements where a non-agreement point is significantly worse than status quo, e.g. Brexit – post-Brexit trade agreement with the EU may be seen as non-optional to highlight the extent that no gains will be achieved; rather, more people will be ‘worse off’ in terms of their economic activities if such agreement is not entered into.

From moral optionality to practical optionality

Moral optionality and practical optionality may tie together in various ways. Looking at trade agreements to express concerns, driving our analysis is a sense that actually the agreements are not optional in other of those ways. Assuming that this is not hard to make it sensible, looking at non-optional agreements then evaluating those in fairness terms. What if we ground the assumption of voluntariness – the assumption that is probably one that is made by many of those who are directly/indirectly involved in negotiations. Even granting that there are some various different attitudes or criteria one might adopt, one characterises anything goes and picks up the idea that a lot of foreign relations law is characterised with the language of extreme positivism.

There are questions that we can ask about almost any account of laws based on voluntary obligation – the questions familiar to domestic contract lawyers, questions about the reasons for consent generating obligation, about the extent to which consent generates application across different legal subjects, questions about the types of obligations that can and cannot be endorsed and taken on through consent. Importantly, when consent is invoked to legitimise legal obligation, international economic legal obligation, to do so to the extent to which is implausible if you actually drill to the reasons why we think consent has that moral effects. One can think of the fairness of an agreement in terms of the process through which they are brought about. There are various distinctions that can be drawn in terms of the ways processes and concerns are invoked to problematize trade agreements. One can also think in terms of the dimensions along which pressure incentives are applied: whether it is too much pressure, the coerced agreement, but also on whom pressure is applied. Pressure applied to states as economic goals versus pressure applied to particular decision-makers and which undermines the extent to which we regard the endorsement by those decision-makers as binding the states concerned. Thirdly, what Suttle labels as benefits, burdens and balancing. This is actually the substantive balance of distributive effects of an agreement primarily between the states concerned and this is a matter of globally egalitarian language – the language that concerns exploitation. He suggests that it is hard to articulate a convincing argument for a fair distribution of the benefits and burdens of a trade agreement which is not either invoking some concern with practical voluntariness (with kind of exploitation type arguments) or expressing a substantive commitment to global equality. This as a result does not really have any say about trade agreements. Fourthly, essentially human rights sort of arguments. Their relevance is very straightforward to understand because these are characterised moral claims which bind the individual states in their activities and therefore it is clear why there might also be applicable to agreements between states.

5. The Democratisation of the Common Commercial Policy and the Role of the European Parliament in Shaping the EU as a Normative Power in International Economic Relations.

Ewa Żelazna, University of Leicester

Introduction

The Treaty of Lisbon has provided the EU with tools that enabled it to enhance environmental and human rights protection standards in its trade agreements. The development has inspired a revival of debates about the EU's normative power in international economic relations. The reformed provisions on the common commercial policy also strengthened the position of the European Parliament. Since their entry into force, the Parliament has played a proactive part in scrutinising negotiations on new generation FTAs and has supported further deepening of commitments to fundamental rights and environmental protection. While the influence of the European Parliament in international trade has increased, the expansion of the Union's competences has resulted in reduced role of national parliaments in conclusion of agreements that fall within the scope of the common commercial policy. Thus far, the European Parliament has voted in favour of all new generation FTAs negotiated by the EU, which can be contrasted with concerns voiced by national parliaments in Belgium and Netherlands to the conclusion of CETA. Against this background, the paper critically evaluates the contribution of the Treaty of Lisbon to the democratisation of the common commercial policy and the role of the European Parliament in shaping the EU's trade and sustainable development agenda.

The Impact of the Lisbon Treaty

Żelazna focused on the treaty-making procedure, particularly on the role of the European Parliament as well as the role of national parliaments in shaping the content of the EU's international economic policy. The Treaty of Lisbon has made two very important contributions to the EU's external economic action. First of all, it improved the effectiveness of the EU as an actor in the field by expanding the scope of the common commercial policy (art.207 TFEU), and consolidating the treaty-making procedure in art.218 TFEU. Secondly, the Treaty of Lisbon gave the Union's trade policy a new normative impetus by enhancing the role of the European Parliament, and imposing the requirement (art.21 TEU) that the EU's external action in all areas should be guided by its founding principles and pursue objectives, such as support for democracy respect for human rights, sustainable development, etc. There seems to be a broad consensus in the literature that since the European Parliament became an actor in the common commercial policy, it asserted a strong position and was able to effectively scrutinise the Commission in negotiations on the new generation FTAs (NGFTAs).¹⁰

The European Parliament in the CCP

Żelazna has analysed the contribution of the European Parliament to negotiations on the new generation FTAs, in the past 10 years.¹¹ She concluded that the European Parliament has proactively used its powers throughout the negotiating process. The Parliament consistently used available opportunities to state its position at key stages of negotiations. In its non-legislative resolutions, it promoted transparency by encouraging the Commission and the Council to make negotiating mandates publicly available, and improved legitimacy by insisting that the Council does not adopt negotiating directives before the European Parliament has had a chance to express its views. Moreover, the Parliament protected its own prerogatives by frequently reminding the Commission to keep it fully informed. Lastly, the Parliament expressed consent to a number of new generation FTAs, which since the entry into force of the Treaty of Lisbon is a formal requirement of the ratification procedure of treaties that fall within the scope of in the common commercial policy.

In general, the Parliament has developed a good cooperation with the Commission, as the DG Trade and the INTA Committee regularly engage in a constructive dialogue about the developments in the common commercial policy. In relation to the substance of the new generation FTAs, the Parliament has assumed the role of guardian of human rights, labour standards, sustainability and environmental protection. It frequently emphasised in its non-legislative resolutions that trade liberalisation should not be only a goal of the EU trade policy, but also a

¹⁰ See for example: Juan Santos Vara, 'The European Parliament in the Conclusion of International Agreements post-Lisbon: Entrenched between Values and Prerogatives' in Juan Santos Vara and Soledad Rodríguez Sánchez-Tabernero (eds), *The Democratisation of EU International Relations through EU Law* (Routledge 2019); Youri Devuyt, 'European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements' (2013) 12 J Int'l Bus & L 259, 290-290.

¹¹ Ewa Żelazna, 'The Participation of the European Parliament in the Conclusion of the New Generation Free Trade Agreements: A Ten-year Perspective' LAwTTIP Working Papers 2018/6.

mean to promote other values, in particular those enshrined in art.21 TEU. The Parliament made a valuable contribution through its non-legislative resolutions to the realisation of these objectives. Its participation in the EU international treaty-making practice has reinforced trade and sustainability commitments and human rights provisions, contributing to the shaping of the EU's character as a normative power through trade.

Opposition to NGFTAs at the National Level

Notwithstanding the European Parliament's efforts to improve the sustainability and human rights aspects of the new generation FTAs, the agreements, especially the high-profile ones, have been strongly contested by the civil society. There were a number of public protests in the European capitals against the TTIP and CETA. German citizens challenged the agreement before the German Federal Constitutional Court. Some of the concerns that were directly expressed by the citizens resonated in the parliaments of the Member States. The Parliament of Wallonia refused the signature of CETA and, recently, the agreement also barely passed through the Dutch House of Representatives. The members of the French Parliament challenged CETA before the Constitutional Council and, in November 2019, in a symbolic vote the Irish Parliament rejected the Mercosur Agreement. The national parliaments expressed similar concerns about the new generation free trade agreements, which include their negative impact on environmental protection and safety standards, the unwanted competition in the agricultural sector and investor- state dispute resolution system. The opposition from the civil society and the national parliaments to the new generation FTAs warrants the question whether the European Parliament sufficiently represents the voice of EU citizens. Želazna claims that while the Parliament is rather successful in this task, the diverse voices of national parliaments should not be dismissed too easily. The contestation from a large number of parties contributing to the discussion about the EU trade policy, if coordinated in an appropriate way, does not have to lead to undermining of the EU's position on the international scene, but can lead to a better policy-making.

The Current Practice of Concluding NGFTAs

However, the EU has adopted a different approach that is going in the direction of dispensing with the involvement of the national parliaments in conclusion of the new generation FTAs. Despite this trend, the national parliaments have used different avenues in order to have their voices heard. The recent conclusion of the EU-Vietnam FTA is an interesting example. The FTA is an EU-only agreement, its ratification thus requires only the decision of the Council and the consent of the European Parliament. Nevertheless, in this case, the decision of the Council contains two addenda, which include declarations from Spain, Netherlands and Belgium that emphasise the importance of trade and sustainable development chapters and encourage Vietnam to ratify ILO Conventions. It is a positive development that the national parliaments are trying to explore different options for being involved in the process of concluding trade agreements, but Želazna doubts whether these declarations will impact on the policymaking at the EU level and poses a question whether there is a more meaningful way to incorporate voices of national parliaments in the process.

6. Leverage in the negotiation of international trade agreements

Maria Garcia, University of Bath

Introduction

The EU's market size has been effectively used as a bargaining chip in negotiations with developing states. In PTAs, and especially through the GSP Plus scheme, the EU has made preferential access to the EU market conditional on accepting key human rights, labour and environmental standards. Although penalties under the GSP scheme have been rare and require a high burden of proof to be applied (Portela & Orbie 2014, Portela 2016), the scheme does include mechanisms for enforceability, that in the case of labour and environmental standards are absent from PTAs. The EU's 'essential clauses' on democracy and human rights, that have underpinned its trade agreements since the 1990s are also under increased pressure. Whilst they were included in the agreements with Singapore and Canada, the former included a side letter where the EU accepted that the present situation in Singapore complies with the essential clause. In the case of

Canada, EU officials reassured reluctant Canadian negotiators that the EU would not use that clause to contest issues relating to First Nations in Canada. This raises important questions as to how the EU can pursue its normative agenda through trade agreements, and its obligations under the Treaty of Lisbon, in cases where it lacks the tremendous asymmetric power and leverage that it has vis-à-vis developing states. Where can leverage be created? How can human/labour/environmental rights be mainstreamed into agreements in a scenario of weakening leverage?

Inherent Tension at Heart of EU Trade Policy

Garcia focuses on the challenges of gaining acquiescence from third parties to the use of normative aims and agendas in new generation trade agreements. She uses examples from the agreements with Asian and American partners, as these are the parts of the world where the EU's approach to linking trade to perceived non-trade norms (such as human rights, labour and environment) are more contested, and areas where the international relations literature tells us that the EU has less leverage or less power directly. Borrowing from the international relations and negotiations literature, and also to turn to the EU as an international power, we can identify a number of sources of the new power and leverage in trade agreement negotiations. Firstly, with all of its trade partners to date, with the notable exception of the United States, and especially with regards to developing partners, the EU has significant structural power over its partners derived from the partners' greater economic dependence on trade and investment from the EU. This derives from the EU Single Market: its size, its regulatory capacity and also its ability to export its standards as firms from other countries want to engage in the European market.

Sources of Leverage-Institutional

Moreover, the European Union also benefits from a number of other institutional sources of leverage in negotiations. They derive additional power from the fact that the EU has constraints. Sophie Meunier has demonstrated how the fact that the EU negotiators are bound by the Member States' mandate has been beneficial to the EU in negotiations with the US over issues of the WTO in the past. More recently, the threat of a veto from the European Parliament can also serve as increasing the use of leverage in negotiations. The European Parliament in the last decade has taken a very strong stance through its resolutions on human rights and trade agreements. In its resolutions on a number of negotiations, notably with Vietnam, Colombia or India, the Parliament has made it very clear that it requires a human rights linkage in order to approve a trade agreement. It supports, or would support, more legally-binding trade and sustainable development chapters and on the environment. Additionally, the EU has sufficient resources and capacity for negotiations, which gives it more leverage over partners. It has also made 'clever' use of issue-linkages not least to gain acquiescence for its demands in normative areas. Importantly, Clarke et al succinctly show that leverage in bargaining is enhanced when one is able to impose the cost of delay in negotiations on the other, whilst being insensitive to the cost yourself. Garcia argues that it is this last element of leverage that seems to be missing and will be missing more in the future. It dilutes some of the possibilities for the EU to impose stronger social and human rights linkages and conditionalities in its trade agreements.

Normative Linkages in Trade Policy

Looking at human rights conditionality, particularly in more recent years, the EU does not necessarily include it in trade agreements; rather, in framework agreements (or political cooperation agreements) that are negotiated and signed alongside trade agreements. Respect for human rights, rule of law and democracy are all part of the essential clause. There is a non-execution clause which enables appropriate measures to be taken should there be a breach of these human rights. However, in most agreements there is no definition of what appropriate measures would be, or what would constitute a breach of these rights. It is important to note that privileges under a trade agreement have never been cancelled on the basis of human rights. Worryingly, in the EU-Singapore Political Cooperation Agreement, Singapore convinced the European Union to agree to a side-letter whereby the EU accepts existing human rights and democracy practices in Singapore and that it will not use the PCA or trade agreement to contest that. More recently, in the Canada Strategic Partnership, for the first time it has been recorded that an appropriate measure in case of a breach of human rights would be to suspend trade preferences

under CETA. For the first time, the EU specifies what such a breach in human rights would be: it is specified as “a coup d’état or measures that threaten the peace and well-being of the international community.” It is a narrow understanding of a breach of human rights. (Meissner and McKenzie) The inclusion of this linkage to human rights, which Canada strongly opposed and saw as demeaning, is linked to the European Parliament and its insistence on having consistency across all trade agreements. Actually, the Canadian negotiators (at least in an informal interview) seem to be happy with the wording because it provides them with the reassurances that they wanted. The agreement would not be used by the EU or by other groups to contest Canadian indigenous rights, the clubbing of baby seals or other issues that are ‘a little thorny’. This shows how the position of the other is important in perhaps watering down more ambitious normative claims on the part of the EU.

Garcia highlighted that there is evidence that where the EU has the greatest leverage, and when partners also have the greatest leverage, is during the negotiations; before the agreement is signed, hence before actual trade preferences are granted. Here there is some evidence of the EU leveraging. The European Parliament has used delays: for instance, it has delayed the ratification of the Vietnam Agreement and conditioned it on Vietnam engaging more with the EU, signing up to the ILO Conventions and making changes to their labour code (which Vietnam did do in November 2019). Having said that, Human Rights Watch complains that the treatment of journalists and political dissidence are still unacceptable and that there are changes to be made to the Penal Code in order for Vietnam to be able to adhere to core ILO Convention 87 (has not done yet). That has not stopped the European Parliament from ratifying the agreement. Similarly, in the ratification of the Peru-Colombia Trade Agreement, the European Parliament insisted on Peru and Colombia to decide on human rights roadmaps that would be monitored due to concerns over the treatment and murder of Trade Union representatives in Colombia. The agreement has come into place yet murders of Trade Unions representatives sadly continue. Although Colombia has formally accepted these issues and has changed its Labour Code, it does not necessarily have the capacity to monitor its proper implementation throughout the entirety of the Colombian territory. There are other complicating issues that make this more difficult to have an impact in practice.

The EU’s leverage is limited because it ‘has a cost to bear.’ All these trade agreements have been signed on the heels of US Trade agreements, with the exception of the Vietnam Agreement. However, participation in CPTPP does give Canadian and Japanese competitors extra access to the Vietnamese market. For the EU, there is a geo-economic component to making sure that its businesses can access other markets under the same circumstances as key competitors. Increasingly, the EU is also aware of its own power given in relative significance of emerging powers to other economies and other partners and with Brexit looming that will reduce the market size and appeal of the European market. The EU has also publicly positioned itself as a defender for liberal trading order. It makes approval of trade agreements and finalisation of negotiations, perhaps more-time sensitive than it would otherwise and limits the leverage that it has. This means that, going forward, it will be difficult for the EU to increase its leverage in trade negotiations. The focus needs to be more on the implementation. The EU has already taken steps to improve implementation. It has caught the first Dispute Settlement against Korea on issues of labour under a trade and sustainable development clause. But it will have to work more closely in the future with the private sector on issues of supply chains, certification of corporate social responsibility and also more careful drafting of other chapters like ISDS or intellectual property, which can impact social rights.

7. EU FTAs and Gender-Sensitive Trade Policies

Claire Gammage, University of Bristol

Introduction

This paper contributes to the ongoing debate about the normative foundations of the EU’s external action with a focus on the linkage between trade and gender in EU FTAs. Of the nearly 300 trade agreements in force, 75 trade agreements contain at least one clause referring to ‘gender’ or ‘women’ and 243 include a gender-related clause referring to issues such as human rights or

sustainable development. In this respect, the linkage of trade and gender is not new. However, following the implementation of the 2030 Agenda for Sustainable Development, which identifies the economic empowerment of women as integral to inclusive and sustainable growth, there has been a paradigmatic shift toward the inclusion of gender chapters in trade agreements. Gender intersects with many other issue-linkages in trade agreements including labour standards, investment, agriculture, environment and e-commerce. Furthermore, trade and gender raise complex questions about how to regulate and protect women working in both the formal and informal economies. This paper has three aims. First, the paper aims to critically interrogate whether the inclusion of gender clauses in EU-FTAs marks a novel and innovative turn in the EU's approach to trade policymaking. Second, the paper will examine the extent to which EU-FTAs recognise the interconnections between gender and other issue-linkages. It is argued that the EU adopts a 'silo-thinking' approach, wherein each chapter of the FTA is treated as conceptually distinct from other chapters. The failure to identify the intersections between trade and gender (and gender and other issue linkages) weakens the innovative potential of FTAs and undermines the EU's normative claims to promote the economic empowerment of women in its external trade policies. Finally, the paper identifies examples of good practice from intra-African regional economic communities to illustrate how FTAs might be harnessed as tools to promote the (economic) empowerment of women.

Gammage focused on the role of the EU as a normative actor, more specifically on EU FTAs and sustainable development as well as labour standards, and environmental provisions within those agreements. Her current work focuses on the inclusion of gender chapters or clauses within free trade agreement and the EU's push towards doing so within its own FTAs. The question is whether the EU is not only a normative actor, but could it also be a feminist normative actor or a gendered normative actor? In other words, is it appropriate that the EU is seeking to include gender provisions within its FTAs? Is the way in which it is seeking to do so the most appropriate? Is this just an attempt to pink-wash the FTAs - merely by including a commitment towards gender equality? Whilst there is a commitment to achieve gender equality in by 2030, it is probably unsurprising that no country in the world is on track to achieve it. The discussions about gender and trade, and the intersections between gender and trade, investment, services, intellectual property and all of these other aspects of FTAs, are generally not new. Still, it is perhaps surprising that not much has been done previously in terms of mainstreaming gender across the FTA itself. If the EU is thought about as a normative actor, it is useful to think why it might choose to act in a good way or in a normative manner. A part of that is shown through international relations scholarship and through legal scholarship. There is a significant role for creating hierarchies and sustaining hierarchies within the international global order by doing so.

Gammage is interested in whether the inclusion of gender is the next frontier. Is this another way to create and sustain hierarchies between countries. Now there is some discourse on feminist foreign policy. And this is outside of the context of FTAs but it's nevertheless important for grounding and understanding of what is being included in the external trade dimension of the EU's action. The feminist foreign policy is grounded in liberal politics and feminist identities and neoliberal feminism. As a lot of literature from international relations shows us, that is an empty norm signifier which is meaningless. It is a form of branding or marketing for the state to 'look really good' internationally. Sweden was the first country to admit that it has this type of policy and other five countries stated that they are also adopting it. The language of women and girls can be a really useful tool for promoting certain agendas. If you read the 2030 Agenda from the United Nations, women and girls are talked about as 'economic agents.' They are not talked about as intrinsic value, but merely in terms of their participation in the economy. This seems to imply that trade is not gender neutral.

Let us consider the recent evaluations of the EU's FTA with Korea and Mexico and the three reviews going on with Colombia, Peru and GSP. Two other FTAs explicitly state within their evaluation reports that the effect of the FTA on gender and on poverty is neutral. There is no evidence to suggest that the FTA has created either anything positive or anything negative in promoting women and their participation in the economy. Internationally, the women's economic empowerment agenda has been in traction. At the WTO, for example, we have the economic

empowerment declaration, not binding but with 122 signatory states. There is also the international human rights framework of the Convention on the Elimination of Discrimination Against Women. Earlier on, back in 1995, the 'Beijing Declaration and Platform for Action' came into existence. It is important to remember that they were signed decades ago. Within the Declaration, under para 165(k), the members and the contracting parties have committed to seek to ensure that national policies related to international and regional trade agreements do not have an adverse impact on women's new and traditional economic activities. This should have been envisaged by a normative actor.

Gammage looked at what she calls 'internal and external hypocrisies' – the way the EU operates internally and externally in a totally different way. Even with other aspects of the FTAs, as far as women and gender are concerned, there is hypocrisy within their approaches. Gender is included in FTAs elsewhere. This has started in Latin American countries and then Canada. Canada has already intimated that it may adopt feminist foreign policy and it has a strategy in place for this. But gender has been included within clauses or chapters elsewhere in the world. In Africa, the African regional economic communities have included gender plans since the 1980s and 90s – this is not a new phenomenon. Nevertheless, it can be an important branding or marketing tool. The African nations simply have not used this to market themselves in the same way that the EU or Canada are trying to do. Similarly, there is an interesting development post COVID-19 which Hawaii has set forth - a feminist economic recovery plan. It starts with the road to economic recovery it should not be 'across women's backs.'

Where the FTAs are contentious, they fail to address the complexities of both the formal and informal economies in which they are then being applied. This applies to the majority of women in the Global South. In South Korea, for example, about 70% of women are working in irregular employments in the informal economy. This raises the question as to what FTAs can actually do to create a better level playing field in terms of the industries that are working in the companies. What workers' rights do they have? We see different approaches to FTAs and the chapters within them. In general, these clauses are not binding. Even if they are, in a chapter, they may reiterate the express commitment to follow internationally binding obligations. Yet, beyond that, it is about cooperation as seen in Canada, Latin America and the EU. This creates a problem for the EU if it is claiming to be this normative actor and a feminist or gender normative actor because there seems to be no real 'teeth' to the commitment to promoting women and gender sensitive trade policy.

Within the sustainable development context, for example, there are domestic advisory groups which have not operated as they should have done. At the moment, it is expected that gender clauses will fall within this chapter. This raises the question how it is actually going to be enforceable. There are bigger issues relating to data management: how will data be collated in terms of FTA implementation to know whether the FTA is truly neutral in the way that the evaluation reports of Mexico and Korea say that they are? This is not just about the literal substantive meaning of the words in the text. It is about the institutional framework incorporated into FTAs. It is not just about bringing more women into trade negotiation – simply having women 'on board' does not necessarily mean that the result will be feminist policies. What is needed are inclusive and diverse institutional frameworks built into the FTA to ensure that there is proper management and collation of data to measure whether trade is gender sensitive and what the effects of the FTA are. Only then it will be possible to form gender responsive trade policies that can actually seek to remedy any wrongs that have been committed.

8. The EU Deep Trade Agenda Stalled: The Case of Regulatory Disciplines in Services **Billy Melo Araujo, Queen's University Belfast**

Introduction

This contribution examines the EU's "deep trade agenda" as materialised in the area of trade in services. By exploring the EU's FTA practice relating to horizontal and sector specific regulatory disciplines, the paper argues that despite presenting an opportunity to advance new international

rules, such FTAs have not in fact been used to innovate or develop new regulatory disciplines. On the contrary, these FTAs tend to merely consolidate support for existing international rules or standards. Its conclusion is that this approach, whilst presenting certain benefits, may also run the risk of promoting outdated regulatory frameworks.

EU Deep Trade Agenda Stalled

Melo Araujo discussed the promotion of positive integration in the area services and FTAs. He focused on substantive disciplines and standards that are typically included in the EU FTAs. This means any mechanism, any provision which would have the intention of having an immediate impact and effect on the substance on the content of domestic regulation, as opposed to process-based standards. The rules which would focus on the manner in which domestic regulation has been applied: transparency, reasonable application of domestic measures, and even the regulatory cooperation mechanisms are an increasingly prominent feature of recent EU FTAs. The reason of focus on substantive standards, as he explains, goes back to a few years from now. The Global Europe Strategy, which is a very big policy framework, which also essentially started the whole process of negotiating the new 'deep' and comprehensive FTAs, is addressing the regulatory dimension of trade and services. Addressing regulatory barriers to trade and services was identified as of crucial importance, the key priority. Looking at the literature that was published by the Commission back then, it is possible to see the references to the terms such as 'regulatory convergence' in their services, the promotion of international standards and where possible, 'EU standards' in the services - so grand ambitions, outlined at a time. If one looks at the subsequent EU FTA practice since then, it seems fair to say that they have fallen somewhere short of those initial ambitions. In fact, the rise of regulatory cooperation mechanisms, for example is, in some ways, a reflection and acknowledgement of the limitations of this 'deep' trade agenda as it was initially formulated.

The best way to understand what happens in EU FTA in terms of substantive standards and services is to look at the General Agreement on Trade and Services (the GATS) because the EU, as many trade powers, uses the regulatory framework of the GATS as a template, which then replicates into its own trading services chapters. Looking at the GATS, there are two main legal mechanisms which are intended to promote positive integration: horizontal disciplines on domestic regulation (art.6). Most of them are procedural in nature process-based standards, but there is para (4) which contains substantive disciplines, or a mandate to negotiate substantive disciplines, and sector specific disciplines. When it comes to art.6(4), there is a mandate for the WTO membership to develop substantive disciplines which apply to a subset of domestic regulatory measures relating to services. Measures which usually represent uptrend costs for service providers, for example qualification requirements and procedures, licencing requirements, technical standards, and a mandate to develop disciplined discipline which could preclude WTO members from adopting measures, which are more burdensome than necessary to ensure the quality of the surface. There is some sort of a necessity test, which of course would have to be fleshed out in WTO negotiations. The WTO members were able to negotiate necessity tests in the context of accountancy services sector, although those rules never entered into effect. The WTO membership has strived unsuccessfully over time to negotiate horizontal disciplines, with a number of reasons why these negotiations have not been successful. The most important one is that countries remain extremely reluctant to subject themselves to disciplines, which would undermine their regulatory autonomy in services which as you all know, characterised by extreme regulatory intensity and diversity. What do EU FTAs do with respect to these substantive sub standards envisaged in para (4)? Not much unless there is a *rendez-vous* clause where the countries agreed to revisit the issue once there is a successful conclusion to the WTO negotiation. This is extremely unlikely in the short, medium or long term.

In terms of the sector-specific disciplines there are a few minor disciplines at GATS level relating to financial services e.g. rules regulating monopoly rights. There is also an important one, which is the Reference Paper on telecommunications services, which is fairly unique in that it includes essentially a regulatory framework for the telecommunication services, a long list of regulatory principles, regulatory disciplines which are pro-competitive. The EU typically replicates the texts of these GATS instruments in its FTAs with a few deviations and some innovations. Broadly speaking,

it stays true to what's been negotiated at the GATS level. There are two trade agreements where the has agreed to include pro-competitive regulatory disciplines in other sectors - the EU-CARIFORUM EPA where you have some competitive disciplines in the tourism sector. There is also EU-Central America Trade Agreement, where there are some very minor disciplines which apply to the courier and postal services sector. So really, in terms of substantive disciplines new FTS do very little they certainly don't affect the content substance of domestic regulation of EU's FTA parties, partners, and they don't even reflect the applied the level of applied regulation in those countries in those jurisdictions.

The question then is, whether the inability to achieve those initial grand objectives is the problem at all? Beyond the question of whether it was ever realistic to pursue positive integration, through substantive disciplines, we can say with some level of confidence that the idea of developing horizontal disciplines that would apply across all service sectors was always very unrealistic in the context of the bilateral trade agreement. This is especially so when you consider the struggles that the EU had in developing in the past and developing horizontal disciplines in the context of the internal market. Beyond the question of whether it was a realistic, there is also the question whether it was desirable to pursue that type of positive integration. We have a significant body of political economy literature which clearly shows that pursuing positive integration along the lines of broad regulatory principles can be very problematic, especially when the developing countries are asked to implement them. They may have different levels of economic development, different social historical preferences and so forth. Potentially, this inability to pursue this 'deep' trade agenda in this way is a positive development.

Missed Opportunities?

Interestingly, the EU never sought to use of the FTAs as an opportunity to develop the necessity tests. The types of passage envisaged in art.6(4) for the GATS on a sectoral basis rather than horizontal basis by identifying countries which are like-minded and where there is already a certain level of regulatory convergence. For example, Canada with CETA, the telecommunications services sector and applying necessity tests in that particular context, where the emphasis would be not on creating common regulatory frameworks, but rather just setting aside burdensome or trade -restrictive regulation. And if, hypothetically, a country were to leave the EU, and already have the *acquis communautaire* fully integrated in its domestic system, a trade negotiation with said country might present the perfect opportunity to develop such disciplines.

Session 2. The EU, Global Data Flows and Challenges ahead

1. The EU as a Global Data Actor in the COVID Era Christopher Kuner, VUB Brussels

Introduction

In recent years the EU has launched many legal data protection initiatives, which have also influenced data protection law and policy around the world and have been motivated by the protection of fundamental rights, the globalization of the economy, and the desire to project the EU's values and interests externally. These initiatives have been realised through the anchoring of data-related values in EU constitutional instruments; the enactment of secondary legislation; and important judgments of the Court of Justice. However, the EU has tended to prioritise the assertion of its own values and interests at the expense of those of international law and of third countries. Its approach to data protection raises a number of important questions about the influence of EU law outside EU borders, which have become even more pressing in light of the COVID-19 pandemic.

Kuner discussed data protection and data protection rights more globally. Over the last few decades the EU has been involved in a project to spread its vision of data protection and data protection rights globally. This means not just data protection but fundamental rights in general. As the CJEU has emphasised, the Charter on Fundamental Rights is the basis for data protection which has implications on fundamental rights in general. This initiative has been based on both the

values and the interests of the EU. One of the main manifestations of this phenomenon has been the global influence of the GDPR as the kind of centrepiece of the EU's framework for data protection. In this regard the EU has certainly been on a 'civilising mission.' Commissioner Věra Jourová have said the GDPR is "our reference point at the global level on privacy." There are further quotes from the past Commissioner Reding who had said that "the GDPR is the gold standard for the world." The former rapporteur for the European Parliament Jan-Philipp Albrecht even said the GDPR will change "nothing less than the whole world as we know it". The question is, has the effect of the EU's global activities and data protection been benign and has it been effective? The answer would probably be a mix of successes and failures. Certainly, the GDPR has had a huge global influence, for example in Asia, countries like Japan, China, South Korea.

There is a significant interplay between the legal factors and the political factors. Second point for the discussion was COVID-19. COVID-19 does present some new challenges to the global influence of EU data protection law. Data gathering and data transfers have become viewed as central to combating COVID-19. Thus, Israel and South Korea have had success using a lot of data collection to fight the pandemic. There has been a lot of criticism of the GDPR by various countries saying that it is hindering the fight against COVID-19 and collection of data. Kuner does not share this criticism – in his view, the GDPR is flexible enough. At the same time, there has clearly been an uptake in the questioning of whether EU data protection laws are too strict and if this has the potential to undermine some of the GDPR's global influence. For instance, some of those from Asian countries or the APEC principles, may be found more appropriate to allow the collection of data to combat a pandemic than the GDPR. While it might not be necessarily true, there is the potential for it to happen.

The third point discussed the balance between EU fundamental rights and Member State fundamental rights which is seemingly changing and may also affect this area as well. In the last decade the EU has focused largely on strengthening the fundamental right of data protection at the EU level through judgments. However, there are some recent developments which give rise to speculation that the EU fundamental rights may be at risk of being weakened by Member State fundamental rights. This can be seen in the judgments of the CJEU and in some Member State judgments. The CJEU seems to be stepping back from exerting EU rights to data protection too far in a territorial sense. This may be seen, for example, in the *Google* case¹² where the court found that there is no obligation under EU data protection law for Google to extend the so-called 'right to be forgotten' globally. Advocate General Szpunar, in his previous opinion, made the statement that EU law applies "only extraterritorially in extreme situations of an exceptional nature." Kuner finds this a little too restrictive as Szpunar has not explained how he reached that conclusion. What can be seen, however, is that the Court stepping back a little bit from 'not wanting' to push the territorial scope of EU data protection law too far.

The upcoming *Schrems II* judgement may also apply to this issue. This may be contrasted with the judgment of the Bundesverfassungsgericht (German Federal Constitutional Court) of 19 May 2020 finding that constitutional limitations on German state power are bound by German constitution even outside of Germany, even with regard to foreigners. This was quite a remarkable conclusion. This raises the questions of whether the EU fundamental rights will become more limited in a territorial sense, and whether Member State fundamental rights or Member State constitutional courts will try to 'pick up the slack' in that regard? What does this mean for the already delicate balance between EU and Member State fundamental rights?

2. Reconciling data privacy and global data flows the EU way Svetlana Yakovleva, University of Amsterdam

Introduction

In 2018 the European Commission published model clauses on cross-border data flows and the

¹² C-507/17 *Google LLC, Successor in Law to Google Inc. v Commission Nationale de l'informatique et des Libertés (CNIL) Request for a Preliminary Ruling from the Conseil d'État* ECLI:EU:C:2019:772

protection of data privacy, which have been included in the EU's proposals for digital trade chapters ever since. In the recent European data strategy, the new European Commission pledged to continue addressing “unjustified obstacles to data flows in bilateral discussions and international fora ... while promoting and protecting European data processing rules and standards.” It follows that the approach taken in the model clauses still holds. Yakovleva’s presentation provided a critical assessment of the EU's model clauses and evaluated whether the proposed language is effective in reconciling data privacy and global data flows. She then examined possible better alternative ways of achieving the same result. Yakovleva also reflected on the idea that the EU's trade policy on global data flows is not only focused on safeguarding domestic autonomy to protect data privacy as a fundamental right, but also on protecting the particular design of the regulatory framework for data flows embedded in the General Data Protection Regulation. This framework itself, however, suffers from several deficiencies, improving which could make the protection of the fundamental right to data privacy more effective and would be more conducive to global data flows.

External Digital Trade Discourse and Internal Fundamental Rights Discourse

Yakovleva talked about the EU's trade policy on cross-border data flows and how privacy and data protection fit in that policy. She outlined two core discourses that happen on EU level. The first one is an external digital trade discourse and the second one is more inward-looking fundamental rights discourse. The discussion about cross-border data flows and data protection often depends on the venue. It could sound either ‘offensive’ in the sense that that EU wants to expand digital trade and wants to facilitate cross-border data flows because of their value for digital trade. On the other hand, the same discussion could happen from a different perspective: that digital trade threatens fundamental rights to data protection and privacy and that the EU has to protect its values from digital trade. In fact, in the recent European Strategy for Data,¹³ these two discourses co-exist. The EU has been very active in the last two years, including in provisions on cross-border data flows and the protection of personal data in its trade agreements. This also includes the negotiations on e-commerce among 80 WTO Member States and the negotiations with the UK.

The EU's Contorted Negotiation Position on Data Flows

How does this translate into the EU trade strategy and trade policy on data flows? First of all, the EU position is based on the model clauses published in 2018. It contains three articles: article A concerns with a prohibition of data localization measures. It contains an exhaustive list of measures that are prohibited by a trade agreement. This approach contrasts with a competing model that is adopted in already existing US- led trade agreements. Namely, that those agreements just contain an open prohibition of restrictions on cross-border data flows. In contrast, the above-mentioned article A of the model clauses outlines specifically which particular restrictions are banned.

The more relevant, however, is article B on safeguarding the EU's domestic autonomy to regulate the protection of privacy and personal data as fundamental rights and, in particular, to limit transfers of personal data outside the European Economic Area for that purpose. In contrast to the US model, neither the existing EU trade agreements nor the proposed model clauses regulate data protection or privacy directly; they do not contain an article that outlines certain principles of data protection that Parties to a trade agreement agreed to implement. Article B also provides that protection of personal data and privacy is a fundamental right. This is clearly a very EU-centric approach. Even though many countries have adopted a similar framework to the EU data protection framework, not all of them recognised this normative rationale for protecting privacy and personal data. The core of article B, however, is an exception for domestic rules on privacy and data protection, which sets the limits within which each party can restrict data flows in their domestic regulation. The main goal from the EU perspective is to ensure that the restrictions on transfers of personal data codified in Chapter V of the GDPR are not undermined and cannot be successfully challenged in international trade fora. The EU is channelling negotiations with its trading partners on transfers of personal data through the GDPR rather than through trade agreements. By doing so, the EU is trying to export its data protection framework as the “golden standard” of data protection: a phenomenon labelled by Anu Bradford as the “Brussels effect”.¹⁴ This provision also explicitly allows the Parties to adopt restrictions on cross-border data flows.

¹³ <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

¹⁴ Anu Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University Law Review* 1

The scope of the exception is very broad: the threshold at the heart of it is modelled after the “it considers necessary” test of the national security exception in existing trade agreements. In essence, it allows any party to restrict cross-border data flows if this party deems such restrictions appropriate for the protection of privacy and personal data. What this means in practice is that mere plausibility that these measures can contribute to the protection of privacy and personal data are sufficient. The breadth of this exception raises the question of how effective article A would be, on prohibiting data localisation if each member can restrict data flows on the grounds even vaguely related to the protection of privacy and personal data.

The third article, article X, prohibits regulatory cooperation on digital trade – which is a U-turn from the previous EU approach as in several recent trade agreements (e.g. with Singapore, Canada (CETA), and South Korea). E-commerce chapters of these agreements contain explicit provisions, encouraging parties to conduct regulatory cooperation on e-commerce issues, including data protection and privacy. Privacy and data protection, from the EU perspective, are not to be negotiated or discussed at all in the trade fora.

Critical Assessment

There are several weaknesses in the GDPR especially in Chapter V, which are not very effective in protecting fundamental rights in the EU and which actually do not allow, in the light of they are currently implemented and enforced, to maintain the high level of fundamental rights protection. The GDPR is a positive development, in the sense of protecting privacy and personal data domestically, however, the EU could also explore the possibilities for adjusting: to increase their effectiveness in preventing the circumvention of high level of privacy and personal data protection in the EU by transferring personal data to so-called “data heavens,” but also to make these rules more conducive for international trade.

The model clauses recognise that data protection and privacy are fundamental rights. The possibility to maintain this normative rationale in its domestic framework is important for the EU because fundamental rights protection leads to a higher level of protection than the level warranted on economic grounds. However, that provision could be framed in more flexible way, that is allowing on the one hand, the EU to maintain the high level of protection, and, on the other hand, allowing other parties to use other justifications for protection of privacy and personal data in their domestic frameworks, based on their legal and cultural traditions.

Using an extremely low threshold for domestic measures inconsistent with trade rules from the national security exception as a model for a privacy and data protection exception could be dangerous because this would create a precedent for other public policy objectives to replicate this low threshold. If this exception eventually becomes the norm for multiple public policy objectives, it would be questionable how much would be left of trade liberalisation commitments. And finally, by creating a specific exception for privacy and data protection in digital trade context, the EU strategy implicitly raises these policy objectives higher than others, such as public health, safety or environment. These other public policy objectives still fall under a different – general exception – with a much higher threshold. It is also important to focus on how these policy objectives relate to other fundamental rights protected in the EU and whether it is justifiable to rank privacy and data protection higher than other objectives.

3. Trade in non-personal data and e-commerce: The EU’s push for a global zone of free data flow?

Andrea Ott & Anke Moerland, University of Maastricht

Introduction

The regulation or non-regulation of cross-border data flows is mainly perceived through the lens of data protection. This paper, however, focuses on the flow of non-personal data. The need for ‘quality non-personal data’ for training, research and development is increasing for all businesses and institutions. That means data must be structured and bias-free. In particular, big data analytics, relevant for almost all economic activities, relies on huge amounts of quality data, also from abroad.

Consequently, the EU perceives the free flow of non-personal data as a prerequisite for the Digital Single Market. To that end, it has adopted a Regulation (the EU Non-personal data regulation, NPDR) to remove obstacles across Member States and IT systems in Europe. As a first step, data localisation requirements on the storing or processing of non-personal data have been limited. Together with the rules on personal data (GDPR), the EU is exporting its rules on trade in non-personal data (NPDR) through the WTO framework as well as bilateral and regional trade agreements in order to advance the EU market for non-personal data and create a zone of free data flow with other countries.

In their contribution, Andrea Ott and Anke Moerland focus on the rules relevant for the regulation of trade in non-personal data and analyse how the EU is pushing the exportation of its own rules and the development of new rules at the global level. They map and frame the different activities and players involved in the trade in nonpersonal data, while at the same time being mindful of situations where personal and non-personal data may be intertwined. This paper aims to pay special attention to the commercial activities particularly relevant to the Fourth Industrial Revolution, characterised by digital trade generally, and more specifically cloud computing, data processing services and computer and ICT services. The paper then proceeds to provide an overview in how far the new Regulation and other applicable EU Regulations (E-commerce, Digital Single Market) reduce restrictions in e-commerce, investment restrictions in digital sectors, data localization restrictions or intermediate liability measures that restrict the operations of platforms. The mapping of the existing EU regulatory approach determines the EU's external approach toward free flow of non-personal data. While bilateral agreements do not yet set out detailed rules regarding most of these matters and only touch upon data protection in a cursory fashion, the paper also analyses other initiatives that the EU is already undertaking, with the aim of developing a global zone of free data flow.

The May 2019 proposal by the EU on e-commerce rules at the WTO establishes net neutrality, free data flows and basic consumer protection. At the same time, it creates exceptions to limit the free flow of data to guarantee privacy. This initiative, however, has not received the support by important players such as the US. They support free flow of data for the benefit of cross-border e-commerce and digital business but push back EU's privacy concerns. Japan, on the other hand, is working towards a commitment to create a so-called data free-flow with trust and hence may be a strong ally regarding the safeguarding of privacy. Ott and Moerland analysed the norms that are likely to derive from such cooperation efforts, and how these will interact with 1) the current EU rules on trade in non-personal data and 2) rules of other countries, such as the US.

Research Questions and Framework for Assessment

Ott and Moerland focused on the non-personal data and e-commerce that use push for a global zone of free trade through free data flow. They asked two research questions: first of all, does the internal regulatory framework on non-personal data impact the external dimension? The EU set up certain 'golden standards,' which have also been reflected in EU trade negotiations and creates future active FTA or current FTA. Secondly, do the EU rules, facilitate or impede trade in non-personal data? Maybe there are conflicting interests or conflicting values, which stand each in each other's way. The framework Ott and Moerland relied upon is based on rules regarding trade in non-personal data (NPDR); rules regarding liability of online service providers for copyright-infringing content.

The rules regarding liability of online service providers for copyright infringing content could be very restrictive. Here the EU seems to contradict its action – there are some issues which could be difficult to reconcile.

Personal v. Non-Personal Data

There are different frameworks when we talk about personal data versus non-personal data and mixed datasets. Personal data is any kind of data that refers to an actual person. It can identify a person directly or indirectly, such as names or identity, identification numbers, localisation data and other types of information. Non-personal data, on the other hand, is defined *a contrario* – everything that is not personal is non-personal. That may also be the data which originally did not

relate to an identifiable subject, i.e. weather conditions. At the same time, it could also be such data that *did* refer to specific personal data but has been anonymised. In the majority of cases we see mixed datasets, where personal data is combined with non-personal data making it the non-personal data regulation. The preference from the EU for the GDPR regulation may be seen.

Internal Rules Facilitating Data Flows

The starting point on the internal rules facilitating data flows is the novel regulation which came into force in May 2019.¹⁵ There already was a prohibition of data localisation found in this novel regulation. It allowed companies and public administration, however, to store non-personal data wherever they choose it. There is a restriction regarding justifications on public security grounds. What is already highlighted as discussable exception, is how far it restricts, or how far it is actually limited. However, this kind of security exception has to comply with a principle of proportionality. Public authorities retain access to data, even if it is later collected in another Member States or stored in the cloud. Importantly, it encourages self-regulation by providers to develop codes of conducts, enabling users to pour data between cloud services. It provides data availability for competent authorities and the portability of data.

This is lined back to the external dimension and raises the question as to whether EU also extends this kind of fifth fundamental right regarding the single internal market and the digital internal market also needs in external spheres. Is there anything parallel happening as we see for data protection rights? There are some aspects and there is a whole chapter EU proposal on the current FTA negotiations with certain countries where they involve this kind of cross-border data flow (art.1 and art.2 address the data protection aspects). However, is this kind of an annex to data protection not a self-standing aspect? How far is the impact of this on the actual negotiations? The current state of play and the evolution of the norms in regard to the free flow of data, non-personal data is already being looked at. There is a set of developments that the EU tries to harmonise, its internal dimension with the external dimension. It is also trying to address the external FTAs.

State of Play and Evolution of Norms (FTAs and Negotiations)

The beginning is rather 'modest' if one looks at the EU-Japan Economic Partnership Agreement. There is only reference to the future discussions of the inclusion of positions on the free flow of data into the agreements. This is also repeated in the EU-Mexico Global Agreements where there is a finalised text and principle that has the same clause as the Japanese economic agreement. There are also some traces of non-data aspects being imprecise providing not yet finalised negotiations with third countries like the FTA with Indonesia. There is a new proposal in this regard on the table. The FTA with Australia, and also the modernised association agreement with Chile. These are the proposals where there is a digital trade chapter and where also the free flow of data is covered. Again, it has to be seen whether the partner countries will accept this.

Rules Impeding the Data Flows

The question is raised again, whether the EU is a global actor in terms of data flow? Looking at the rules, other than in the non-personal data regulation, namely the new directive for the Digital Single Market (DSM) - a new liability regime has been implemented within the EU for service providers. They are sharing copyright protected content, so all sorts of information that is shared and these types of full liability that now has been established. This means that service providers cannot just rely on right holders to inform them when they find copyright infringing content on their platform. They are fully primary liable from the beginning for sharing content that is copyright protected. They can rely on an exception here, so liability would be pre- accepted, when they receive an authorisation from the right holders, when they are filtering through the works by trying to identify which are the infringing content, and when they act speedy once the right holder informs them. This is new, since before there was the rule under the e-commerce directive where liability is a secondary. That meant that service providers will not be liable for any infringing IP content when they act expeditiously once they are notified of infringing content, and they play a neutral, merely technical and passive role. This was the rule before the DSM directive.

¹⁵ Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union, OJ L 303 (28.11.2018).

Looking at the external side, there are no such rules in free trade agreements. It is interesting to see the developments of the future FTA where such a rule may be included. This can be seen, for example in the EU-Indonesia Agreement proposal, (which is one of the recent) the old liability regime is included. There is secondary liability. But it will be a different approach and what will that mean for sharing data on service providers.

4. The Geoeconomics of the Data-Trade Nexus the Geoeconomics of the Data-Trade Nexus

Tobias Gehrke, Egmont Institute/University of Ghent

Introduction

Data is a crucial input in the development of emerging technologies which blur the lines between civil and military application (e.g., AI). A growing number of states seem to determine that a technological advantage – much of which may be dependent on data – can alter the balance of power and security competition in the international order. The unilateral regulation of data, for example by restricting its uninhibited flow across borders, is therefore increasingly linked to the pursuit of ‘security’ objectives – particularly in China and India. An expanding notion of ‘security’, which bridges economic security and national security concerns, pose major challenges to trade governance. In the absence of definitive established multilateral rules on data and trade and the return of great power competition, different ‘models’ of data regulation (China-vs-US-vs-EU) are competing for regulatory spheres of influence. Is a multilateral compromise reconcilable at all? How much discretion should trade policy (multilateral, bilateral) grant states over their data regulation activity? How do we reconcile the trade-security nexus when the ‘security state’ is on the rise? How can we find trade rules which allow to preserve most of the benefits of data trade, while being realistic about the nature of today’s security and power competition? These are just a few questions of importance for lawyers and political scientists alike. As this seminar is going to explore the global role of the EU in trade and data privacy, this contribution would seek to broaden the discussion on the data-trade nexus beyond privacy. As recent initiatives, including the European Digital Strategy, the EU 5G Toolbox, the EU Industrial Strategy, or the European Cloud Initiative indicate, the EU is increasingly willing to more actively manage technological interdependencies for ‘security’ purposes. This more integrated understanding could help us address questions of EU actorness in the data-trade realm in the coming years.

Techno-Nationalism: a Geoeconomic Challenge

Gehrke discussed the geoeconomic challenge to data trade and the concept of techno-nationalism. A technology edge over competitors in international system is directly linked to national security, economic prosperity, and social stability. There is a competition over technology among states, especially the United States and China but also increasingly in most other states. As a response the states seek more interventionist tools to intervene into tech markets and particularly with economic regulatory instruments to either: a) protect against opportunistic or hostile foreign actors (for instance there is a lot of developments and debate on investment screening or export controls in OECD countries) or b) to promote national tech development and innovation at home (for instance, industrial policy or to promote the adoption of technologies, standards or national tech standards abroad – e.g. for the Digital Silk Road). The innovating, shaping and controlling technology is really one of the key aspects of great power competition today. Some would call the policies that are being adopted as ‘neo-mercantilist,’ though Gehrke argued that this frame is too narrow to classify policies, as it does not elude to the security motivations which drive economic policy.

It is observed that the constituents that argue for more interventionist policies are gaining ground. The question is, whether data is captured by this logic. Restrictions to data flows are proliferating globally for decades. Already, e.g. in China and India as well as other emerging economies, more and more data flow restrictions can be seen. In the literature, the question is asked as to why do states restrict data. Often, the policy motivations are categorised along neat dividing lines, e.g. protectionism, cyber security, law enforcement and the ominous national security category. One of the key challenges of the emerging tech nationalist logic is that it significantly blurs the lines

between economic and security motivations behind restrictive interventions into data flows. This co-existence of motivations to intervene and/or restrict data (and other economic) flows is thus best captured by adopting a broader frame: geoeconomic competition.

Data is the main input into machine learning and artificial intelligence, which the strategic technology fits perfectly into the geoeconomic logic because its adoption has immense spill over effects not only in the commercial economic sphere, but also in the military sphere. We observe a gradual manifestation of the logic that being able to scale technology innovation and adoption as a result of a data advantage may provide an edge over other powers in the global geoeconomic competition. The clearest example of this logic manifestation is China. A study by Henrique Moraes of KU Leuven showed how data localization policy in China is framed along this logic in the past couple of years. In its domestic law and policy, data (both personal and important data – two categories which are highly ambivalent in scope) is framed as a strategic variable that is supporting China's grand strategy ambitions of technological autonomy and influence, as laid out in various documents. It is important for researchers and policymakers to understand this international angle to Chinese data flow restrictions and not only consider them as a protectionist domestic trade barrier. The geoeconomic challenge, Gehrke argued, is turning this technical issue into one of geopolitical relevance. This observation might bring different insights into how we seek to regulate data flows globally.

EU Data: From Privacy to Sovereignty

EU data flow restrictions, to date, have focused primarily on privacy issues – as regulated strictly by the GDPR. For all other non-personal data flows, the EU has reiterated across various strategy papers and communications its commitment to ensure unrestricted global flows. Especially within the single market, EU regulatory reform proposals seek to combat restrictions with the aim of advancing a digital single market as a motor for growth.

However, beyond the single market, a call for 'sovereignty' (digital/data/technology) has recently entered European discourse. At this point, different narratives over what sovereignty of data implies in practice are still contesting. Different constituencies argue over culture, control, competitiveness or security. In the view of Gehrke, this debate shows that the EU is not exempt from the emerging geoeconomic logic which is capturing data and technology regulation more generally. What kind of regulatory requirements the EU might adopt for third countries to access the non-personal data of the single market remains undecided. Experiences we have made in recent market access regulations in Europe (and other OECD countries) suggest, however, that factors of economic security and national security (broadly captured by the emerging European concept of 'sovereignty') will play an increasing role in the policy deliberation. This merging of economic and technical regulation with a geoeconomic logic is thus a crucial factor for the future of EU data studies.

Some might argue that this is just 'charades' of policymakers, to really disguise the classic protectionism as industrial sectors. While this might be true at times, as security arguments always offer a protective shelter for protection-seeking lobbies, Gehrke argued it would be dangerous not to engage more thoroughly with the geoeconomic logic which is fuelling these perceived security vulnerabilities. This is particularly true for international trade regulation. There is a new wave of legal scholarship, for example, looking into national security exceptions in multilateral and bilateral trade agreements, which consider to what degree these exceptions might be up-to-date to the new geoeconomic logic of state competition. Gehrke argued that the debate in the trade law field, which concerns the scope of data flow rules (e.g. exemption to trade under what conditions?), must be more open to engage with the IPE and political science scholarship, which offers growing insights into the geoeconomic competition on which international economic affairs are built. For the research community, therefore, more inter-disciplinary research will seek to address big questions of international economic order and its rules and norms anew. Which economic/technology sectors will allow us to further integrate globally without infringing on the growing security interests of states? Should we focus rather on bilateral or plurilateral integration among like-minded countries to avoid the growing conflict of the national security state with trade law?

5. Geopolitics, multilateralism and the coronavirus pandemic

Henry Farrell, George Washington University and Abraham Newman, Georgetown University

Introduction

Before she took office, Ursula von der Leyen was already insisting that the European Union (EU) needed to change. On the one hand, she promised a new “geopolitical Commission,” but on the other, she wanted the EU “to be the guardian of multilateralism.” The difficult question was left unstated: How exactly is the EU supposed to reconcile the great power manoeuvring of geopolitics with the more level playing pitch of multilateralism? Geopolitics is the ruthless pursuit of self-interest by powerful states, no matter the cost to others. Multilateralism involves mutual agreements among states, pursuing their collective welfare. At a minimum, the two sit awkwardly with each other; at the worst, they are radically incompatible. In their presentation, Farrell and Newman examined how these two imperatives are coming into conflict because of the coronavirus pandemic. Both internally and externally, the EU faces difficult trade-offs between multilateral solidarity and national self-interest. They argued that the EU needs to understand how to use challenges such as coronavirus to become the basis for a new means of reconciling internal and external demands in similar ways to how the “four freedoms” of open exchange and the global multilateral trading system provided mutually supporting structures in a previous era.

Farrell and Newman situated the conversation about the EU as a global actor in the broader international context. The literature on the EU as a global actor starts from the idea of the EU's resources. It asks whether it has a big market? Does it have institutions? What are its internal capabilities? Although these are important questions, they do not mean much if the EU is not situated in a larger international context. The second talking point was about the new strategic environment that the EU is facing right now. The question here is what does the EU do in terms of internal reform to meet this new geostrategic environment? If the EU's ability to be a global actor depends on the context in which it finds itself, and that context is changing, there is a need to think about that context.

The EU in a new geostrategic environment

Farrell and Newman elaborated on three points about the new geostrategic environment. First of all, globalisation is generating new vulnerabilities for states. This is seen in ‘stark relief’ in the wake of the coronavirus. The first one is the drive towards efficiency. As globalisation and economic exchange increased the demand by firms to create efficiency, then what is tending in some sectors to happen is that firms become so specialised in the supply chain networks that they create these kinds of choke points within those supply chain. An example is the PPE or ventilator production, where just a few firms in Germany control a disproportionate amount of the market. That is something that was not supposed to happen. That was not Thomas Friedman's version of globalisation. Also, it is not the version of globalisation that the EU functions on. The whole idea behind the internal market and the external policy is a very liberalisation-focused agenda, in which free trade is supposed to reduce conflict. It is supposed to prevent these types of choke points. Instead, globalisation, first through this channel of efficiency-drive really leads to specialisation, extreme specialisation. It is so specialised that it ‘bites’ people in the end because they become so dependent on a few firms that have this very specialised production profile.

The second vulnerability that globalisation generates is irreplaceability. A few firms have the incentive to make themselves so important to a sector that people have to use them. It is only necessary to look through the main information technology companies – Google, Facebook, Amazon – to see that this is a different dynamic. This is not so much about efficiency, but about agglomeration. They become monopoly, duopoly players in these markets so that it is impossible to conduct global economic exchange without going through a few of these firms. These two processes of efficiency and irreplaceability mean that globalisation is not a story of simple a flat decentralised world where states become neutered by firms that are across the globe. But in fact, everybody is being channelled through these few choke points that globalisation is creating.

The economic-security linkage

Those vulnerabilities that globalisation is creating are increasing weight to security issues. It is not just about Amazon using market power for their own abilities, but states realise this structural transformation. They are using those to get their own geostrategic ends. This is what Farrell and Newman labelled as “weaponized interdependence.” In the new context, in data flows, this is seen in the *Schrems*¹⁶ decision where the court questioned what Snowden was telling. Snowden is telling us is that data flows are not just about trade relations, they are about security relations. This is the crux of the *Schrems* decision and then the conflict over the privacy shield. Those linkages between the economic realm and the security realm really create a new challenge for the EU as a global actor. Traditionally, its internal institutions have been separated, e.g. DG trade etc. They are not integrated with this larger security conversation.

The EU and the ‘bicycle theory’

There is a standard argument of European integration which says that it is the ‘bicycle theory.’ The European integration needs to keep on moving forward, or else it stops. This is somewhat a penny farthing period of integration in the middle. Looking at XIX century bicycles, there are one really small wheel with a big wheel. It is the external environment that the EU finds itself in. On the small wheel, there are the tools that it uses to build its own internal market, its own internal way of doing things. The EU is able to move forward, but those two wheels are connected together by some kind of a gear train, and they are moving in the same direction and affect those two wheels. If they start moving in different directions, things start fall apart for the EU.

This is the current situation where we see Ursula Van der Leyen. The impression is that neither her, nor anyone else realise what that means in practice. In practice, if the EU could find itself in a ‘tricky’ world, it is because it is used to a world in which its internal market, processes, the four freedoms, the single market, all of those went hand in hand with a broader globalisation based on open free markets. We are in the world where the outside environment is not about free markets. Instead, it is about geopolitical manoeuvring, in which both China and the United States are much more ruthless in their willingness to use power protection than they have been in the past.

Dilemmas facing the EU

And this presents the EU with some real dilemmas. It cannot behave in the same way as the United States or China without endangering its own internal logic. If it starts to really engage in intense power projection externally, that creates all of these internal questions as well. This brings to a point about how the European Commission is going to get more ‘knacks’ on national champions because it needs to build up European alternatives. That is going to lead to some tricky internal debate about whether it is Germany’s or France’s national champions which prevail. It is going to create a number of blockages that are going to be tricky, and we also see how this is applied in the first phase of coronavirus. The EU has taken these short-term internal steps, when various Member States looked to hoard PPE and ventilators, and that pretty quickly gave way to the EU trying to get rid of those internal controls, but also trying to put blockages on terminal exports. This is a really difficult position for the EU to be in for it is trying to do fundamentally different things inside and outside. This does not work particularly well over the longer term.

The need for political transformations

The EU is not going to succeed at becoming a truly powerful geopolitical actor in the way that it would like to be without some profound and unlikely political transformations. If it wants, for example, to be able to challenge United States financial hegemony, it would have to come up with all of these fiscal capacities for the European Central Bank, with the ability of the European Central Bank to extend swap lines, not only to European actors, but to other actors as well. However, there are areas where the EU could plausibly work to project external power in ways that reinforce rather than in undermine its internal logic. Some of these have to do with the problem of climate change. For example, the way in which various proposals for border taxes might plausibly reinforce an internal imperative towards a reform which tries to push towards a more EU-focused on more strong institutions on the EU level for dealing with climate change. Data flows are an additional

¹⁶ Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* 2018 ECLI:EU:C:2018:37.

issue. The Commission is trying to put together antitrust, citizen protection and data protection all under one basket.

Looking at coronavirus, one can see a much stronger European Union. When it comes to various health capacities, we cannot afford to have 'every member state doing its own thing' The EU member states have been pushing for common patent pools, and other such arrangements to help further with the process of developing vaccines for coronavirus. That is going to project geopolitical force. It has to do so in ways that reinforce and strengthen its own internal ways of working and vice versa.

6. The EU as a “Good” Global Actor: Keynote Remarks Kalypso Nicolaïdis, University of Oxford

Nicolaïdis offered some normative reflections across the topics covered by the conference around the theme of legitimate extraterritoriality. She asked under what condition it may be legitimate for the EU to export rules, laws and norms to third countries. Nicolaïdis raised the following questions: what is it about the EU itself that makes it more or less legitimate? What are the limits of the idea of EU as a (legal) model and power through trade? And how, or to what extent, have and will the Brexit negotiations affect this debate? She discussed in particular three trade-offs: between power and technical logics, between unilateral externalisation and multilateralization, and between deference and interference. The examples she provided covered labour rights, finance, professions, human rights, data, cyber and the environment.

Nicolaïdis started with three framing points and three paradigms for actors. Before framing the first framing point, one has to think about the deep drivers of change in this story. One way of asking that question is to ask “are we moving from a ‘session-one’ world, to a ‘session-two’ world? Are these parallel universes?” This links to Gehrke, Farrell and Newman’s arguments on techno-nationalism, the kind of strategic autonomy that is becoming the core narrative in the pandemic discourse. The question is, what are the tensions in Europe in existing? And the bigger question is, should this all be about some sort of autonomous regulatory orbit for the EU between China and the US? Are we shrinking it or enlarging it? We are in between those two worlds. What matters is how these two logics interact, as argued by Gehrke: what is the field that must be levelled by our rules? Is the position of trade just a distraction, telling other countries what to do? Should EU care about that? Or is the logic of the public versus private as locus of power more important? For instance, Apple and Google are now taking over even the British government for the tracing app, etc. But the question is, what exactly does the crisis tell us about the steady state, will there even be a steady state? There are real risks that are associated with globalised forms of emergency politics, but also political opportunities. One can note the re-rise of a corporative logic. Ignacio Garcia Bercero asked a question on WTO reform and the role that the EU can again play leading on issues of trade in health and a humanity spirit. There is this question of this moment, of the session-one and session-two worlds.

The second framing question concerns the problematisation of this relationship between the analytical and the normative. The bigger picture differentiates between the strong/weak question of power and the normative: is it good or bad? How can it be good? The EU can be weak and good – this is power of being super powerless. Conversely, being strong can be bad. This is linked to Mancini’s discussion on how the EU can be a great rule-maker in the trade and rights agendas. Global governance is made up of global organisations that ‘have teeth with no soul’ and then those who ‘have a soul with no teeth.’ Each may be put their own these categories. The EU at its best wants to facilitate the linking of the two putting trade teeth on labour or human rights soul. But the question is, whose soul is the EU reading? Whose values? This brings back to the Kantian dilemma of asking how to achieve peace. There is a need to find the right balance in our times between mutual interference and mutual deference. Trade for good calls for interference. But at the same time, Kant himself called for avoiding at all cost the kind of colonial interference that he saw in his time. One question that arises is whether the EU wants to project itself in the world as an actor that has been invented in Europe to mitigate power symmetry, to be an anti-hegemonic project inside

his own borders: how does it legitimise projecting power outside? It may not have to, and live with the contradictions. Why this inconsistency then? The answer is – because this is the world we live in.

The third frame-point relates to the problematisation of the EU itself and the relationship between the 'internal' and the 'external.' What is it about the EU that makes what it does outside legitimate? We represent a kind of credo for universalism multilateralism. It is known what this means for the rest of the world – the self-image. We cannot be too self-reflective. At the same time, do not we need to rescue the rescue narrative? We want to do good in the world, maybe we can still rescue this narrative. But only if we are well aware of two fundamental tropes in this narrative. One is the trope of hierarchy, as Gammage mentioned in her presentation. The idea inherited from XIX century, that Europe at the time, could be and should be the gatekeeper for access for the international society. The very first international organisations and health and communication, we decide who passes the test of standards of civilization and create that hierarchy. We are not there yet. We created the UN and hierarchies over right. But it is pivotal to always be wary of this trope of gatekeeping that the EU might top.

The second bit of the civilizational discourse that is always perceived by others, especially obviously in the former colonised world, is that of denial of agency to the other side and loss of self-determination, and so on. That is always what we run against, whether you were talking about Vietnam or Korea, how do we do this? Of course, there is a kind of infinite regress there, because we might want to talk about agency of some other country. How do we promote through trade certain standards while respecting their agency? On the other hand, we might care about agency inside those countries, for those who are less empowered within. We might say well we bypass government agency if we do not find it that legitimate because we want to empower women or workers. But then how do we choose? Is not that another kind of interference when is that legitimate or not? This leads us to think about our role in the global governance agenda in trade and regulation, as maybe necessarily to participate, rather than promote. That is the bigger frame for the thinking about the EU in the world, that in our policies, especially in trade because that is our main instrument of power. We need to move from post as reproduction of old patterns of gatekeeping and denial of agency to post as transcending because of self-awareness. It is not just a kind of normative imperative. And those questions are about the credibility of Europe in the world, and therefore its legitimacy, and therefore its effectiveness. It is in itself a discourse of power. Finally, that discourse is not necessarily served by saying we will be more effective by being more united, by having one voice. We need to problematise that question and in terms of our legitimate power. It may be that the many facets of diversity in Europe, and how we negotiate diversity in how we project power externally itself is a source of legitimacy.

This leads to the other point that is related to self-reflectiveness about the EU. The consistency not just in terms of how we think about power, but indeed about 'internal' and 'external' on the free data flow zone, but also more broadly the vulnerability that we may have in terms of accusation of hypocrisy double standards. This echoes Gammage's point: we may want to "pink-wash", "green-wash", external trade deals. But what have we done internally? Do not we need to start with the awareness that the EU does not apply trade instruments internally to uphold what we would call the 'Copenhagen criteria', the holy trinity of democracy rule of law and human rights? Why-because we are 'beyond this' in the EU. We have rules and we have common understanding. But these are based on an underlying assumption that we have mutually recognised our legal and political systems. We mingle our laws. But we need to ask the question, how credible this is vis-a-vis the rest of the world, including questions about the European Parliament for instance, as the guardian of these values. Is it consistent internally and externally? The moment of consistency with the new trade, the way we come out from the top from the current COVID crisis. The new great Green New Deal, the grounds for the external border tax on environment - how will not reconcile the 'internal' and the 'external'? That is a framing question. Perhaps, the three types of actors that the EU wants to be can be in the international system, when it comes to trade-regulatory nexus.

These paradigms have different status in both our practices and our imaginary. First, there is an old paradigm of EU as a model. The 'model' talk is an epistemic power. In the 80s and early 90s,

the EU could 'show the way'. As Melo Araujo made very clear, that is a train that has passed. The way in which the EU went beyond the national treatment, through mutual recognition. It was through such a complex way of managing mutual recognition. That is not reproducible because in the rest of the world there is no direct effect. It is needed, because the underlying trust is also only possible due to our ecosystem and of course it is not a blind trust. Nevertheless, this underlying discourse that the EU can and should be a model still comes in the infamous kind of 'sea water snake'. But the bigger structural problem is that of conceptual constitutionalisation, the danger that we raised in promoting our way of doing things globally is the idea that we would over constitutionalise WTO and the global governance system in ways that cannot be upheld globally. That echoes to this day because they are in different locus, the eternal dance between law and politics and the extent to which big political decisions can be made by judicial pronouncements.

The symmetries of power matter, it does matter for developing countries, whether we would have frozen intellectual property rights in the WTO. Especially at a time when the EU and the US were promoting this embedding liberalism. The idea that we would then push for constitutionalisation enshrining into superior law. This dis-embedding was seen as illegitimate globally and this is part of what explains what happened later when the Doha Round. It can be argued that hegemonic stability theory tells us that it can be legitimate to use one to fuse power and purpose to create a stable international system. Either passively - that is the Brussels effects or one can use gravity, or through an increasing degree of more active strategies. And when we come back to the question of strategic autonomy and the world we live in. Even unilateral decisions can have their own legitimacy, based on hegemonic power. Voluntariness is so important, because there is a whole EU discourse of choice, other actors decide to interact with us they have choice. but in a world of asymmetric structure where is really this this choice it's a very different world. When we negotiate TTIP with the US and when we negotiate with trade agreement with Vietnam.

Secondly, there is the question of slippery slope - how far do you go in sanction in what in IR is called 'liberal crusading through trade.' Thirdly, the question of hypocrisy of motives, or at least the contradictory motives as is perceived from the outside. Adequacy decisions that should be driven by adequacy. But in fact, we know whether it is from Brexit or any other area where we do adequacy that they are driven also by reciprocity, commercial considerations, strategic considerations and so on. The EU always needs to negotiate legitimation from protection of consumer or own stability and competition. Now we might call competition unfair. But that is in the eyes of the beholder. What is clear, is that in today's world, perhaps legitimately, the EU is worried about competition period in the AI and digital world, in terms of enforcing on some sort of strategic survival. But these are different logics. To what extent can we continue to be opaque and put them together? At least, as scholars, we can separate them and say we do this for good reasons of security protection. It would be healthy to be more explicit about this distinction. The crux of the problem here for the EU is to confront the issue of symmetry. What we are seeing with Brexit, and which will spill over more broadly, is the demand for reciprocity, mutuality, symmetry. For the EU, as any actor, this great trade-off dealing with the demands for symmetry through participation at the centre. Basically, the all affected principle is we would tend to political theory, but that leads to the EU being 'the victim of its own success'.

Moreover, sometimes it is the other way around. With Brexit, the EU suggests Britain to work together. Britain wishes to live its own life. There are limits to inclusive governance. The trade-off there is to say: if we co-develop these standards we need to think about ways of asserting deference to the other side. How much discretion do we leave the other side? Who decides? We have the second paradigm of the EU as a regulatory hegemon and the power and normative limits of that, which is linked to a third paradigm: the EU as a stakeholder in governance and global governance and actor, which from its normative and material power can actually affect global governance for the better. There are a number of points that were one of the narrative: that the EU can move from a narrative of liberalisation to regulation. Here is where we are in the trade-regulatory nexus. We are increasingly driven by the second leg as we were driven by the first. Speaking of regulation – by who and whose rule? It is more than the good old idea of cooperation.

We need to ask: what about the inequalities in regulatory capacities, regulatory development that

we see in the rest of the world? How do we think about localising the appropriate rules in a world where, with Covid-19, we are seeing increasingly that differentiation and localisation of rules is paramount? How do we deal with this: a holistic regime cluster dimension of international cooperation? Rather, the question is, who is made to adjust and who is always bearing the cost of adjustment? And how does that spill over from one regime to the other? A second point is on the rules governing mutual interference. What are the standards? The reference should not be EU standards but global standards. Sometimes they are uploaded from the EU or downloaded to the EU. But nevertheless, if the bias has its global standards, we still need to ask the question, where is the discretion for interpretation? We saw this with the WHO, recently. The power is still nested in interpretation.

Secondly, even if we talk about global standards and we can even globalise interpretation- what kind of standards do we privilege? Do we privilege process? That is sort of a way of granting agency or allowing for agency. But even if we accept that, in many cases process standards be privileged, what kind of the power configurations exists within countries? Back to Gammage's point – there might be formal reference in terms of standards for what we are looking for other countries. There are the actual structural effects of trade liberalisation, for instance on women, which are so important. Certainly, there were questions about scope and inclusiveness. We have the good old problems of digital apartheid and ways to manage it. Why inclusiveness in this increasingly plurilateral world of WTO? How can the EU be the opposite of the gatekeeper the guardian of inclusiveness, not just formally, but materially?

Perhaps most important is the whole question of democratisation. The European public is connecting in different ways, but they are trying to protect their own social contracts, whether national or European. How does that affect the social contracts of the other side in the case of CETA? When we talk about democratisation of trade inside the EU, it is always about the effects within the EU rather than the kind of impact we have on other countries. Finally, how can we think about democratisation, not just as a question of vertical demand for accountability of a trade world that that is very close into itself, but one about the distributed intelligence that XXI century relies on for democratisation?

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T: +44(0)20 7040 3309
E: law@city.ac.uk



Email enquiries:
law@city.ac.uk



Telephone enquiries
+44 (0) 44 02 7040 5787



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