City Law School, Institute for the Study of European Law

EU Trade and Investment Policy (EUTIP) H2020 Network

THE EU AS A GOOD GLOBAL ACTOR

SPEAKER ABSTRACTS

Isabella Mancini A deep agenda for fundamental rights in trade agreements

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, this presentation aims to provide a research agenda on the EU as a global actor in trade and fundamental rights, while shedding light on methodological and normative challenges.

Elaine Fahey Metrics of the EU as a Good Global Actor

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?

Eva Kassoti EU Trade Agreements and the Duty to Respect Human Rights Abroad: Some Reflections on the Extraterritorial Applicability of the EU Charter of Fundamental Rights

Is the EU bound by human rights obligations towards individuals outside the territory of its Member States when it concludes trade agreements with third countries? In the literature, the question has been viewed as part of the broader issue of the 'extraterritorial scope' of the EU Charter of Fundamental Rights – which, until recently at least, had received scant scholarly attention. However, recent developments have rekindled interest in the topic. More particularly, the General Court's (GC) judgment as well as the Opinion of Advocate General Wathelet in the context of the *Front Polisario* cases before the CJEU have provided a more solid basis for engagement with the issue of the EU's duty to protect human rights extraterritorially. The *Front Polisario* case concerned an action for annulment brought by Front Polisario, the main Saharawi national liberation movement, against the

Council decision[1] adopting the 2010 EU-Morocco Agreement on agricultural, processed agricultural and fisheries products ('Liberalization Agreement') in so far as that Agreement extended to the territory of Western Sahara. According to the applicant the decision breached EU and international law.

The General Court (GC) ruled that since the Liberalisation Agreement facilitated the export into the EU of products originating from Western Sahara, the Council should have ensured that the production of the goods in question is not conducted to the detriment of the population of the territory and that it does not entail infringements of fundamental rights. At the same time, it needs to be noted that the GC simply assumed the extraterritorial application of the Charter, namely its application vis-à-vis the peoples of the Western Sahara — without providing more by way of explanation. The GC concluded that the Council failed to fulfil its obligation to examine all the elements of the case before the adoption of the Decision and thus, it annulled the contested Decision insofar as it approved the application of the Liberalisation Agreement to Western Sahara. On appeal, while Advocate General Wathelet agreed that fundamental rights may, in some circumstances, produce extraterritorial effects, he argued that the conditions for the extraterritorial application of the Charter were not fulfilled *in casu.* The ECJ did not have an opportunity to pronounce on the matter since it concluded, on the basis of relevant international law rules applicable between the parties (namely the EU and Morocco), that neither the EU-Morocco Association Agreement nor the Liberalization Agreement were intended to cover the territory of Western Sahara - and it quashed the GC's judgment. Thus, although the precedential value of the GC's judgment is limited due to the peculiarities of the case, the question of whether the EU is bound by the Charter when it concludes agreements that may affect the enjoyment of fundamental rights of distant strangers still looms large. In this light, the purpose of this paper is to revisit the question of the extraterritorial scope of the Charter in the light of this new jurisprudential development and to evaluate the current state of the law.

Maria Garcia 'Leverage in the negotiation of international trade agreements'

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?

Christopher Kuner The EU as a Global Data Actor in the COVID Era

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 realized 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 prioritize 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.

James Harrison Free Trade Agreements and Global Labour Governance-The European Union's Trade-Labour Linkage in a Value Chain World

Based on research to be published with Routledge in an inter-disciplinary book in September 2020, this presentation will examine 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 presents 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, it 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 were exacerbated by the agreement's commercial provisions.

It will then go on to explore how such agreements might in future be reconstituted to better address the issues raised in the first half of the presentation. It will suggest 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 will also suggest 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.

Ewa Żelazna 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.

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.

Claire Gammage EU FTAs and Gender-Sensitive Trade Policies

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 raises 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 policy-making. Second, the paper will examine the extent to which EU-FTAs recognise the interconnections between gender and other issue linkages. I will be argue that the EU adopts a 'silo-thinking' approach wherein each chapter of the FTA is treated as conceptually distinct from other chapters. I submit that 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 I will draw on my forthcoming scholarship in this field to identify 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.

Andrea Ott & Anke Moerland Trade in non-personal data and e-commerce: The EU's push for a global zone of free data flow?

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 Digital Single Market and to that end 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 localization 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 our contribution, we focus on the rules relevant for the regulation of trade in non-personal data and analyze how the EU is pushing the exportation of its own rules and the development of new rules at the global level. We map and frame the different activities and players involved in the trade in non-personal 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, characterized by digital trade generally, and more specifically cloud computing, data processing services and computer and ICT services. We will then proceed 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, we also analyse 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., i 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. We will analyze 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.

Svetlana Yakovleva Reconciling data privacy and global data flows the EU way

In 2018 the European Commission published model clauses on cross-border data flows and the 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. My presentation will provide a critical assessment of the EU's model clauses and evaluate whether the proposed language is effective in reconciling data privacy and global data flows. It will then examine possible better alternative ways of achieving the same result. I will also reflect 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.

Billy Melo Araujo The EU Deep Trade Agenda Stalled: The Case of Regulatory Disciplines in Services

This contribution examines the EU's "deep trade agenda" as materialized 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.

Oisin Suttle Doing Good vs Not Doing Bad: Duties and Baselines in Bilateral Trade Agreements

What are the appropriate normative criteria for assessing the EU's approach to FTA 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.)

- 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 EPA, 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 don't 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 / results:

1. Anything Goes: FTAs are optional, if states don't 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 on the matter.

2. 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.

3. 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 groduned 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.

4. Protected Interests Side-Constraints: FTAs are objectionable to the extent that they adversely impact / fail to protect / fail to advance particular protected interests, whether in participating states or non-participants. The relevant interests might include human rights / vulnerable groups / environment / self-determination etc. 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 over-determined 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.)

Tobias Gerhke The Geoeconomics of the Data-Trade Nexus

The Geoeconomics of the Data-Trade Nexus

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.

Henry Farrell and Abraham Newman Geopolitics, multilateralism and the coronavirus pandemic.

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 maneuvering 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 this paper, we examine how these two imperatives are coming into conflict because of the coronavirus pandemic. Both internally and externally, the EU faces difficult tradeoffs between multilateral solidarity and national self interest. We argue 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.

Kalypso Nicolaïdis The EU as a "Good" Global Actor: Keynote remarks

My keynote will offer some normative reflections across the topics covered by the conference around the theme of legitimate extraterritoriality, and ask under what condition it may be legitimate for the EU to export rules, laws and norms to third countries. I will ask inter alia: 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. I will discuss in particular three tradeoffs: between power and technical logics, between

unilateral externalisation and multilateralization, between deference and interference. Example will cover labor rights, finance, professions, human rights, data, cyber, the environment.