City Law School, Institute for the Study of European Law

EU Trade and Investment Policy (EUTIP) H2020 Network

Understanding the EU as a Good Global Governance Actor Workshop

1 July 2021, 8:15am – 12:45pm BST (via Zoom)

ABSTRACTS:

Opening reflections papers:

Ignacio Garcia-Bercero, European Commission, and **Kalypso Nicolaïdis**, University of Oxford, *Brussels Calling: The paradoxes of power and the trade/regulatory nexus*

The paper will discuss the articulation between the European Union trade and regulatory policies. Its focus will be normative: While recognising the significance of the so-called "Brussels effect", the authors consider that the European Union will only become a responsible "regulatory power" if it is ready to develop a coherent overall approach to the external dimension of its regulatory policies. Coherence is necessary to enhance both the legitimacy and effectiveness of the EU regulatory influence in the context of the increasing complexity of the regulatory challenges linked to the digital and climate transitions and the increased influence of China as an alternative regulatory pole of influence. The paper will offer a typology of different forms of external EU regulatory impact based on the territorial scope of the regulatory objectives pursued and the aims and instruments of regulatory cooperation policies. It distinguishes between regulations that have an exclusive domestic focus, regulations that partially regulate conduct abroad and regulations where the primary focus is to respond to a trans-border challenge. For each of this type of regulations it discussed the role played by regulatory cooperation and trade policies, while noting that the external dimension has tended to play a "residual "role. The paper will propose a unifying conceptual framework to encompass the array of interventions by revisiting the concept of "managed mutual recognition "as it has developed in the context of the EU single market. While noting that mutual recognition is deeply embedded in an ecosystem that requires supranational institutions, the authors argue that certain of its principles could be relevant, with proper adaptations, to regulatory cooperation policies pursued with countries outside the single market. The paper will then discuss three possible "models" that the EU could follow in its external regulatory policies-the external projection of the single market, the EU as a global regulatory hegemon and the EU as a promoter of good global governance. The authors argue in support of the third model as the one that would better contribute towards enhancing EU soft power on the multilateral arena. In this connection , the paper will also discuss the extent to which the EU regulatory power can be used to pursue geopolitical goals. The paper concludes with a number of suggestions as to how the EU can improve the external projection of its regulatory policies. These suggestions are based on the idea that the European Union needs to develop a strategic approach to regulatory cooperation aimed at fostering compatibility of regulatory regimes. It also calls for greater synergy between trade and regulatory cooperation policies, while ensuring that ensuring that regulatory cooperation activities are pursued in a transparent manner and in full respect of the regulatory autonomy of participants.

Ramses Wessel, University of Groningen, *The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor*

In the context of this book, the present contribution will assess the 'value of EU values' in the Union's dealing with third states and other international organisations. The importance of the EU values in internal situations relating to the rule of law is high on the political agenda. Far less studied is the way in which these values have, or should have, an impact on the EU's external relations. Art. 2 TEU lists these values as such: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Article 3(1) TEU adds that these values are also to be 'promoted': "The Union's aim is to promote peace, its values and the well-being of its peoples". And, Article 3(5) makes clear that this promotion is also part of the EU's external relations: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens". This provisions also adds a number of issues that need to be part of that promotion, as the Union is to "contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." Finally, 21 TEU not only provides that the values are to be 'safeguarded' in the EU's international relations, but also links the values to a large set of principles that should guide the Union's action on the international scene. The legal position of the values in the Treaty and the ways in which they do indeed impose restraints on the EU to act externally (or call for action) remain largely in the dark. While recently many studies have, for instance, addressed ways in which values play a role in the EU's trade policy, conceptual studies on the role of values in EU external relations are less easy to find. The purpose of the present contribution is to assess the legal role EU values (may/should) have in the EU's engagement with third states and other international organizations and in formulating its external policies. This will be done on the basis of a legal theoretical analysis of the hierarchy of norms that are relevant in his setting, but also by assessing the extent to which EU values are part of key instruments in EU external relations and contribute to the EU's good global actorness. The chapter will thus contribute to answering a number of key questions raised by this project: "How can values underpin the EU's action in the world? How, then, do we assess the EU as a Good Global Actor? What parameters and metrics can we use? What normative checks can we apply to its action? What tools has the EU at its disposal to be a 'good' global actor? What are the main challenges and limitations?"

Part 1. On 'Good' Data Governance: the emerging ambitions and values in data flows

Overview paper: **Xuechen Chen**, New College of the Humanities & **Xinchuchu Gao**, Kings College London, *The EU's normative role in cybersecurity and digital connectivity*

Over the last decade, the concept of digital connectivity, digital governance and cybersecurity have become growing policy issues in EU external relations as well as a new focal point for academic discussions on the EU's role in global politics. In 2020, the European Commission has unveiled a joint communication 'Shaping Europe's digital future', calling for a digital transformation based on European norms and standards as well as fair, open, democratic and sustainable society. The EU also shows a strong ambition to become 'a global role model' for digital governance by developing digital standards and promoting them globally. In the same year, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy issued a new EU Cybersecurity Strategy, which emphasizes the Union's leadership on standards, norms and frameworks in cyberspace. In light of these new dynamics, this chapter seeks to examine the EU's role as a norm-entrepreneur in cybersecurity and connectivity. Building on an increasing volume of literature on the EU's global role in digital and cyber domain (Bendiek 2018; Fahey 2014; Renard 2018), this research asks the following questions: what are

the key factors driving the EU's desire to become a norm-entrepreneur in cybersecurity and digital connectivity at global level? What are the normative underpinnings of the Union's digital connectivity and cybersecurity strategies? In comparison to other international actors, what makes the Union a distinctive actor in promoting digital and cyber norms internationally? In order to answer these questions, this research draws on the existing scholarly discussion on the EU as a normative power or norm-entrepreneur and adopts content analysis approach to investigate a variety of primary and secondary sources, including EU official documents, media coverage and policy reports. The paper is structured as follows: the first section outlines the recent developments and new dynamics of the EU's cybersecurity and digital connectivity strategies both internally and externally. The second section provides a detailed analysis of the normative underpinnings of the Union's digital and cyber policy strategies. It also aims to unpack various driving factors behind the EU's ambition to become a norm-entrepreneur in cybersecurity and digital connectivity domains. The third section further explains the mechanisms and policy tools through which the EU promotes its digital or cybersecurity norms, before turning to the discussion on the strengths and limitations underlying the EU's norm promotion strategies in cybersecurity and digital connectivity areas. The final section concludes the chapter by engaging with the wider debate exploring the inherent contradictions as part of the EU as a (good) global actor.

Jorg Polakiewicz, Council of Europe, *The Emperor's New Clothes – Data Privacy and Cybersecurity from a European Perspective*

This contribution intends to critically examine the role of the European Union in the context of Council of Europe's activities relating to privacy and data protection. EU law and practice in this area have in the past been strongly influenced by the European Convention on Human Rights and the Convention for the protection of individuals with regard to the processing of personal data (ETS 108, 1981). More recently, the EU has been a major actor in the revision of Convention 108 and the additional protocol to the Budapest Convention on enhanced cooperation on cybercrime and electronic evidence (which is still being negotiated). Last but not least, the Council of Europe's internal data protection regulation has been influenced by the relevant EU standards, in particular the General Data Protection Regulation 2016/679 and the Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies. In all these contexts, the EU, usually acting on behalf of its member states, has been a driving force in multilateral negotiations taking place under the auspices of the Council of Europe. The contribution will examine the opportunities for synergies and challenges that result from the coexistence of Council of Europe and EU standards in the field of data protection. Particularly complex legal issues have arisen in the drafting of the provisions on transborder data flows of the revised Convention 108 and the data protection safeguards of the (second) additional protocol to the Budapest Cybercrime Convention. Many of the legal issues that have come up in this context are related in one way or another to the special quality of EU law as a separate legal order which, in accordance with well-established CJEU case law, is constitutional in nature. The CJEU has been arguing consistently that 'the Member States have, by reason of their membership of the EU, accepted that relations between them as regards matters covered by the transfer of powers of Member States to the EU are governed by EU law to the exclusion, if EU law so requires, any other law.' The idea that the EU is not only a new legal order, but also one that is distinct from its member states and from traditional international law has been instrumental in developing the EU's legal order. In its external dimension, this idea has been translated into the paradigm that the integrity of EU law and the EU legal order must not be undermined by the international action of the Union or its member states. The contribution will examine how these requirements of EU law have influenced treaty making in the Council of Europe and what solutions have eventually been identified with a view to accommodating them in the context of negotiations on data protection standards.

Thomas Streinz, New York University (NYU), *The Limits of the Brussels Effect in the Digital Domain*

The EU has been hailed as a global data regulator. Its General Data Protection Regulation (GDPR) applies to extraterritorial data processing, sanctions violations based on companies' worldwide turnover, and subjects

transfers of personal data from the EU to third countries and international organizations to requirements designed to ensure an adequate level of data protection. Anu Bradford has theorized how globally operating corporations may adopt European rules firmwide, thereby extending EU law even further and European policymakers have embraced this "Brussels Effect" as the EU embarks on an ambitious new regulatory agenda to regulate the digital economy within Europe and beyond. The EU's legislative proposals for new European data law are being accompanied by a push towards the creation of European digital infrastructure, in particular for data sharing and cloud computing, in an attempt to buttress the EU's technological sovereignty. This chapter critically examines the limits of the Brussels Effect in the digital domain, advancing both analytical and normative arguments. Analytically, this chapter suggests that the extent to which EU law has shaped the digital domain globally has been overstated. Companies are likely to segment their products as soon as global (pro forma) compliance with EU law is no longer in their interest (in particular with regard to hard limits on certain forms of data processing and more stringent demands for access to data). Data is a highly mobile asset, not unlike financial capital, that can me moved outside the EU's jurisdictional reach unless the EU demands and enforces stringent data localization. Normatively, the chapter argues that the EU needs to find the right balance between openness towards the global digital economy and closeness in terms of retaining regulatory control over data. The Schrems saga, in which the Court of Justice twice annulled transatlantic data flow arrangements, will serve as a case study to illustrate this inherent tension in the EU's data regime. To play a "good" role in the global governance of data, the EU needs to be more aware of the constraints under which it operates. This also requires acknowledging, and maybe even internalizing or otherwise offsetting, the negative externalities that its data policies create for others.

Svetlana Yakovleva, University of Amsterdam, *EU's policy on cross-border data flows: navigating the thin line between liberalizing digital trade, promoting rules-based multilateralism and safeguarding fundamental rights and values*

As cross-border flows of personal and other data have become 'the lifeblood of international trade', conflicts between liberalization of digital trade, on the one hand, and the protection of fundamental rights to privacy and personal data (translating into restrictions on cross-border data flows) have emerged. The EU's external trade policy on cross-border data flows cuts across several EU policy objectives, such as liberalising international digital trade, safeguarding EU's domestic regulatory autonomy to protect privacy and personal data as fundamental rights, preserving the EU's technological sovereignty and strengthening the EU's contribution to rules-based multilateralism. This contribution pursues three goals. First, it maps out the EU's current approach to cross-border data flows and the protection of privacy and personal data in trade agreements, discusses its dynamics and positions this approach against the background of the current European Commission's external trade policy and internal digital strategy. In particular, this contribution focuses on the 2018 EU model clauses on cross-border data flows and the protection of privacy and personal data for its prospective digital trade agreements. The EU has included these model clauses in its proposals for digital trade chapters in bi-lateral trade agreements, such as those with Australia, New Zealand, Chile, Indonesia and Tunisia, and in multilateral negotiations on electronic commerce at the WTO ever since. The EU also tabled the same model clauses in bi-lateral trade negotiations with the UK (following Brexit), which contrasted with the UK's proposal almost verbatim incorporating the US model codified in the Comprehensive and Progressive Trans Pacific Partnership (CPTPP), the United States Canada Mexico Agreement (USMCA) and the US-Japan Digital Trade Agreement. The provisions on cross-border data flows and the protection of privacy and personal data in the recently concluded EU-UK Trade and Cooperation Agreement, however, follow neither of the proposals, which creates an interesting precedent for the EU's departure from the above-mentioned model clauses. Second, this contribution questions whether the EU's current policy on cross-border data flows would indeed allow the EU to reconcile its digital trade ambitions and fundamental rights protection of privacy and personal data, while at the same time pursuing the goals of facilitating cross-border data flows, safeguarding its technological sovereignty and promoting a rules-based multilateral trading system. It argues that superficially the model clauses do seem to provide the EU with the broad autonomy to protect privacy and personal data as fundamental rights while outlawing a number of measures restricting cross-border data flows. However, the proposed model clauses suffer from at least four essential

weaknesses that could make them unable to safeguard the fundamental rights to privacy and the protection of personal data, and undermine the goals of the EU digital trade policy. The first weakness is the unclear relationship of the proposed digital trade exception for privacy and data protection with the general exception, which creates legal uncertainty as to the material scope of the proposed exception. The second weakness is the breadth of the proposed digital trade exception for privacy and data protection, which may nullify the impact of the provision liberalizing cross-border data flows, which outlaws what the EU frames as 'digital protectionism'. More generally, this contribution contends that using the extremely low threshold for a digital trade exception for privacy and data protection, could further undermine the stability of the rules-based international trading order. The third weakness is that the proposed model clauses are overly EU-centric in the sense that they require a recognition of the protection of privacy and personal data as fundamental rights – a commitment that not all EU trading partners may be willing to accept. The fourth weakness is that the model clauses only contain an exception for privacy and data protection and do not provide for a safety valve for other measures that could be necessary to safeguard the EU's technological sovereignty. Third, having identified the weaknesses of the current EU's approach to cross-border data flows in trade agreements, this contribution proposes ways in which the model clauses could be improved.

Part 2. On 'Good' Trade Governance: the emerging ambitions and values of a deeper trade agenda

Overview paper: **Jean-Baptiste Velut**, Université Paris III - Sorbonne Nouvelle, *Environmental allies and trade competitors: a comparative analysis of US and EU governance models for trade and climate action*

With the launching of the European Green Deal and the debates over the US Green New Deal under the administration of Joe Biden, the prospects for strengthening the linkages between trade policy and climate action on both sides of the Atlantic have never been better. Yet, behind the headlines, the EU and US approaches to the trade-environment nexus reveal sharp differences that go beyond the divide between a "good global actor" and a bad one, or between what is commonly seen as the strongest defender of climate action and a stronghold of climate change deniers. Indeed, beyond its central role in the negotiation of the Paris agreement, the United States was a pioneer in the emergence of the trade-environment linkage and has remained a driving force for the development of enforceable environmental provisions in trade agreements. Admittedly, both climate mitigation and trade debates continue to be subject to contentious debates on each side of the Atlantic. Yet, the global notion of the EU as a "good global actor" cannot be taken for granted with regard to the trade-environment nexus and requires a closer analysis of the institutional design, the constellation of stakeholders, the scope and the policy tools regulating trade and climate action. These questions are not only crucial to understand the prospects for transatlantic cooperation but also the future of the global governance of trade-environment linkages. This book chapter compares the EU and US approaches to the trade-environment linkage, with a focus on climate action. It is divided in four sections. The first part will provide a brief history of the emergence of the trade-environment nexus in the United States and the European Union. The second part will outline the European and American model with four key elements: 1) institutional design; 2) scope of action; 3) stakeholders 4) policy instruments. The third part will zoom in on what has become the most contentious issue on both sides of the Atlantic: enforcement and monitoring. The last section will conclude summarizing the potential synergies and conflicts between the two models and discuss whether the US or the EU approach is more likely to become the most influential for global governance.

Martin Trybus, University of Birmingham, *The EU acting through Free Trade Agreements: The case of sustainability and public procurement*

Free Trade Agreements (FTAs) are important external action instruments of the EU. Their main is the opening of markets, both to further the economic interests of the EU and her Member States and to project the EU internal market rational externally into the world. This partly ideological economic rationale is largely shared by the trade partners the EU is engaging with. More recently, the importance of non-economic social and environmental

considerations (sustainability) has increased in the EU internal market and this is also projected externally through third generation FTAs. FTAs are thereby becoming a new instrument to promote sustainability, mainly enshrined in their trade and sustainable development chapters. The aim of this chapter is to evaluate the role of the EU as a global actor by contributing to the discussion of the use of third generation FTAs to pursue non-economic objectives externally. The chapter will discuss FTAs as external action instruments with regards to one specific area: public procurement. Public procurement has been a focus of internal market regulation not least through an increasingly dense set of Directives since the 1970s and especially since the 1990s. Their main aim is to open public contracts to bidders from other Member States. However, sustainability aims have increasingly been incorporated into these instruments, most extensively in the 2014 set of new Directives. Procurement regulation is used as an instrument 'to make Europe a better place'. The buying power of the State (€2 trillion annually, on average 14% of GDP in the EU) can make a difference, not only through the actual market share of the State but also by being an example for other economic actors. However, 'making the world a better place' through public procurement in the FTAs of the EU, is a yet under-researched area. The main research question of this chapter is whether FTAs can be classified as instruments of EU external action to further sustainability though public procurement. This includes the question whether FTAs change the relevant laws of the trading partners of the EU. First, references to sustainability in the trade and sustainable development chapter and the procurement chapter of the CETA Agreement with Canada will be detected. CETA is one of the most extensive third generation FTAs also with regards to procurement. Second, these references will be compared with similar references in other FTAs and with the references in the internal EU procurement Directives. Third, the origin or originality of these references will be ascertained, also in view of whether these were new and controversial for Canada. Fourth, the transposition of these references in CETA in Canada will be investigated to determine whether relevant changes of Canadian procurement law have occurred directly through CETA. CETA is one of the older third generation FTAs and had thus time for transposition. It will be argued that the extent, originality, and impact of sustainability though public procurement in FTAs is limited.

Tonia Novitz, University of Bristol, *The role of the EU in developing 'sustainable' labour linkages in contemporary trade*

This chapter will examine the use by the EU of 'sustainability' objectives to promote more extensive trade-labour linkages, considering protection of collective labour standards within this process. The EU has long promoted sustainable development as a 'good' global actor through the 'Sustainability and Good Governance' incentive provisions in the EU Generalised System of Preferences (Regulation (EU) No 978/2012) and inclusion of 'labour' chapters or clauses as a feature of part of 'sustainable development' objectives in free trade agreements (FTAs), such as Chapters 22 and 23 of CETA and Chapter 13 of EU- Vietnam. The latter FTA is significant to the extent that it also references explicitly the UN Sustainable Development Goals 2015 which the EU is committed to realising, while making a connection to ILO core labour standards (including freedom of association and the effective right to collective bargaining) not so evident in the text of the UN General Assembly Resolution A/RES/70/1 on Agenda 2030. This is a significant blending of two normative compasses that looks set to be a continuing issue from 2021 onwards. What arguably distinguishes the new European Commission from 2019 led by Ursula von der Leyen is a greater emphasis on internal and external policy commitments to sustainability, which seems set to continue in the wake of Covid-19 crisis. The new Commission's approach is evidenced by, not only the Communication of 2019 on the European Green Deal (COM/2019/640 final), but also the Commission Communication of 2020 on 'A Strong Social Europe for Just Transitions' (COM/2020/14 final), which in a short chapter on 'Promoting European values in the world' set out explicitly the Commission's external ambitions, alongside those internal to the EU. That Communication continued the commitment that '[e]very new comprehensive bilateral agreement will have a sustainable development chapter and the highest standards of climate, environmental and labour protection', which is now to be given efficacy by a 'Chief Trade Enforcement Officer'. Notably, since the coronavirus pandemic struck, two potentially significant internal market policy initiatives have been promoted by the Commission, building on the 2020 Communication, which are concerned with access to collective labour rights for digital platform workers and the role of collective bargaining in setting

an adequate minimum wage. The EU is also insisting on trade union protections externally, with the result of the arbitration in the EU-Korea FTA dispute soon to be published. Whether it is viable to situate collective labour rights under a sustainability mantle in a trade context therefore remains a live concern. In this context, the chapter will also consider the emphasis of the current Commission on the unity between its internal and external ethical stance, alongside the dynamics of potential global influence in relation to such matters.

Eva Pander Maat, City Law School, City, University of London, *The EU Carbon Border Adjustment Mechanism - merging 'good' global leadership on climate and trade?'*

The EU's leadership position in the global fight against climate change is widely acknowledged.1 By its very nature, climate change forces different legal systems to interact. This is especially true for the relation between climate and trade, as the ever-increasing expansion of production and consumption in a world with finite resources arguably stands at odds with the objective to protect those resources and limit emissions. In an effort to marry these juxtaposed objectives, the EU Commission will in 2021 propose a Carbon Border Adjustment Mechanism (CBAM), which would translate the carbon content of imports into their price. This contribution will, first, assess how the CBAM relates to the legal systems at the intersection of which it is placed and, second, evaluate its impact on the EU as a 'good' global actor on climate and trade. First, with the CBAM, the EU takes it upon itself to create synergy between international climate law and international trade law. This synergy is curiously absent from the Paris Agreement and has proved incredibly burdensome in WTO negotiations. Although the Paris Agreement is implemented through national policies the risk of carbon leakage might make the extraterritorial effects of reduction policies inevitable. In addition, a CBAM risks obstructing, but also has the potential to promote the principle of common but differentiated responsibilities. From the perspective of WTO law, carbon tax proposals often incite suspicions of 'green protectionism'. As the EU is the most vocal advocate of the multilateral rule-based trade order, it would be detrimental to the coherence of EU external action to provoke a carbon trade war. Finally, the intricate relation between EU law and external climate action merits consideration. The Treaties and internal policies determine the EU's global position and power, whilst external commitments and ambitions may accelerate internal developments. The CBAM is instrumental to achieving the carbon neutrality propagated in the EU Green Deal. Scrutiny of the competences on which the CBAM is adopted will shed light on the nature and limits of the EU as a 'good' climate actor. In addition, by addressing carbon leakage, the CBAM is intended to optimize the Emissions Trading Scheme (ETS). Although the ETS was the first of its kind and hence set a global example, low carbon prices have long inhibited its proper functioning. By eliminating free allowances, a CBAM might restore this defect and enhance the credibility of the EU's climate leadership. Second, these legal assessments shed light on the capacity and characterization of the EU as a 'good' climate and trade actor. Literature on EU climate leadership have largely surveyed its role in international negotiations. The CBAM, however, is part of a bid to maintain leadership in a post-Paris world in which the focus has moved to implementation. Whilst the EU is increasing its grip on Member States' emissions targets through energy governance, it seeks alternative ways to move third countries towards emissions reductions. The CBAM might be evidence of directional leadership, in which the EU sets an example by setting - and achieving - the highest targets, or rather structural leadership, as it unilaterally deploys market access as a 'carrot' to incentivize emissions reductions. Alternatively, the CBAM might be an example of contingent unilateralism, in which the EU 'goes at it alone' as part of a strategy to obtain a multilateral solution. Perhaps, however, the CBAM displays a whole new kind of leadership which begs for a reconsideration of the dominant theoretical frameworks. Regardless, the CBAM will present the materialization of a long-held policy ambition, an unprecedented effort to marry the global climate and trade regimes and possibly one of the most assertive climate and trade measures ever adopted. Evaluating its implications on the different legal regimes with which it interacts and on the EU's climate leadership is imperative to the future of the global climate and trade regimes and the understanding of the EU as a good global actor.

Clair Gammage, University of Bristol, *The Next Normative Frontier: The EU as a Feminist Trade Actor?*

This chapter critically examines the EU's emergent feminist foreign policy in the specific context of free trade agreements. By focusing the analysis on women and gender, this chapter contributes to the ongoing debate about the normative foundations of the EU's external action and evaluates the extent to which we are witnessing another normative turn in its trade policy; a feminist turn. There is a growing literature on feminist foreign policies but to date the scholarship on trade and gender is relatively scant. The purpose of this chapter is to problematise and demystify the normative basis on which the EU asserts gender should be included in its FTAs. 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. 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. The language of 'women', 'girls' and 'gender' can have significant normative impacts; the United Nations 2030 Agenda recognises women and girls as important 'economic agents', for example. Gender intersects with many other issue linkages in trade agreements including labour standards, investment, agriculture, environment, and e-commerce. As a consequence, trade and gender raises complex questions about how to regulate and protect women working in both the formal and informal economies. With a focus on the linkage between trade and gender in EU-FTAs, this chapter will explore whether gender clauses in EU-FTAs achieve their intended aims of promoting women's economic empowerment. It will question who these clauses empower and whether that empowerment is felt equally by all women. This chapter will argue that adopting normative positions can and does create and sustain hierarchies and that the EU's inclusion of gender clauses in its FTAs represents nothing more than an 'empty norm signifier' for liberal states. The inclusion of gender clauses merely signals the next normative frontier for the EU to colonise and dominate. This is evidenced by the EU's 'silo-thinking' approach to FTAs wherein each chapter of the FTA is 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.

Part 3. The EU Institutional dimension of 'Good' Trade Governance

Overview paper: **Maria Garcia**, University of Bath, *EU as trade negotiator in the international order- Limits of the EU's normative linkages in trade negotiations*

As the EU's first foreign policy, and a foreign policy area where the EU institutional level possesses a far greater degree of 'exclusive competences', trade policy can and has been used as leverage to attain behavioral changes in other states. The use of trade sanctions as punishments, or granting preferential trade access conditioned to domestic law changes is not unusual nor unique to the EU, but within the EU context, this takes on additional significance, as other states experience the EU first and foremost as a trading partner and value their trade and economic interactions with the EU above other aspects of their relationships (see Elgstrom 2007, Chaban et al. 2013). The attraction of the EU market and access to it has also been characterized as a key source of EU power and leverage in the international arena, most notably in Chad Damro's (2012) Market Power Europe (MPE) conceptualization. The EU's market, and its entire integration project is underpinned by a set of values that are apparent in the market (albeit sometimes in somewhat diluted form), such as labour rights, environmental and consumer standards, respect for human rights, gender equality. As a global trade actor, it is, therefore, incumbent upon the EU to ensure that these principles of its markets are maintained in global interactions. The Treaty of Lisbon (Art. 21) made this a legal imperative, and in more recent times, the 'Trade for All' strategy of 2015 further reiterated and emphasized these commitments. However, within the literature on EU trade policy a number of case studies have revealed that in practical terms, these legal imperatives around EU values can be diluted (see Garcia and Masselot 2015, McKenzie and Meissner 2017) given the lack of enthusiasm by partners to embrace EU

normative aims in trade negotiations (Orbie and Khorana 2015), even in cases where the EU is structurally in a position of power (e.g. negotiations with Singapore, Vietnam or India). According to the International Relations literature on leverage in international negotiations, the EU is in a privileged position vis-à-vis partners. Beyond its market power, it typically has greater institutional resources and capacity for negotiations than partners, and also has the ability to make use of issue-linkages (e.g. link access to its market to respect for human rights), which it does utilise (Davies 2004). Moreover, its internal institutional set-up, with various domestic veto players (the member states, and increasingly the European Parliament) in the decision-making process, acts as source of external leverage in negotiations with third parties maximizing the pressure on these to accept EU proposals or risk having the deal vetoed by the European Parliament or a member state. In theory, the EU should experience fewer challenges when it links trade agreements to respect for human rights, rule of law, and when it introduces social and environmental clauses in trade agreements. Yet, the EU continues to face opposition to this approach. In its agreement with Canada (CETA), for the first time, the EU included a definition of what breaching the human rights essential clause could mean. This is defined as a situation of exceptional gravity and nature such as a coup d'etat, or threat to the peace and well-being of international community, curtailing the possibilities for suspending the trade agreement as punishment. In terms of social values, that Ian Manners (2002) referred to as second order values in his conceptualization of the EU and a 'normative power', the EU has chosen to incorporate social and environmental clauses (and now gender ones too) in a non-legally binding manner in its trade agreements. Yet, even this less imposing approach is not free from controversy in trade negotiations. This contribution seeks to illuminate the limitations to the EU's ability to leverage its market power in trade negotiations to fully extract human right and social clauses that would fully uphold its own commitments and normative aims, even when dealing with structurally weaker actors. The chapter will take a comparative case study approach focusing on so-called new generation EU trade agreements (with South Korea, Singapore, Andean countries, Central America, Japan, Vietnam, Canada, Ukraine) to ascertain subtle differences in how the essential human rights clause and legally non-binding clauses have been incorporated into the agreements. It will focus specifically on exceptions and inclusion of supporting measures to facilitate the conclusion of an agreement even when question marks remain regarding respect for the spirit of the human rights and social clauses in the trade agreements (e.g. continued trade unionist assassinations in Colombia, side letter to Singapore agreement accepting all practices as not in violation of the human rights clause). In this way the chapter will be able to elaborate on how the characteristics of the subjects of EU leverage affect EU leverage and its success (their relative economic significance to the EU, their competitiveness). Amongst the characteristics of subjects of EU leverage, the chapter will also take account of geoeconomics positioning with rivals. A key characteristic of leverage in international negotiations is the ability to place the cost of non-agreement squarely on the partner, whilst being insensitive to that delay cost (Davies 2004). In the cases mentioned above, especially the smaller states, in theory a delay would not be so costly to the EU, yet the EU has agreed to flexibility in the incorporation of its values to ensure timely agreements. In other words, it is not insensitive to the costs of delays. This chapter will posit that the relative erosion of EU market power (accelerated by Brexit), the approach of other powers, and the time-pressures in recent years to appear as defender of the international rules-based order, have pushed the EU into the ironic position of accepting some dilution of its preferred values to sign timely agreements that overall support the rules-based trading.

Wolfgang Weiss, University of Speyer, *Democratisation of good global governance: The EU´s role in the Parliamentarisation of trade policy*

The quest for good governance in trade relations occurs against the backdrop of an increasing politicization of trade policy. In the new reality of global value chains and inter-twinned markets, the regulation of trade goes far beyond technical issues. No longer is meaningful trade regulation that effectively addresses trade barriers an issue of reducing entrance barriers and tariffs, but a comprehensive endeavour of scrutinizing and policing behind-the-border issues. Hence, trade policy ever more becomes regulatory policy; it becomes ever more politicized. Therefore, one requirement emerges: a call for raising the legitimacy of trade policy formulation and implementation. Hence, parliamentarisation of trade policy is ever more necessary. Politicization results in a need

for stronger parliamentary involvement, and vice versa. A more meaningful role for parliaments will by necessity result in a comprehensive politicization of trade policy. This connection can be observed when looking at the Lisbon Treaty: While trade policy has become embedded in external policies and their values and objectives, calling for its multiple coherence, the involvement of the European Parliament (EP) in the definition of trade policy has been both deepened and expanded. The EU´s constitutional development can be perceived as a good example for more parliamentary involvement in trade policy determination (by expansion of the parliamentary impact both formally as well as informally). Along with this came a strengthening also of other legitimacy dimensions: transparency (e.g. with regard to negotiation mandates); out-put legitimacy (as trade policy considers also other policies); and public participation. Thus, the EU has emerged as an innovative driver for more parliamentarisation in external relations by different mechanism that where more or less invented in EU external relations policy, in particular in the trade field. One early instrument were mixed agreements, which required the involvement of domestic parliaments, thus bringing together national and supranational parliaments in trade policy decision-making. Even though this type of parliamentarisation on EU level currently is under fierce contestation, the mechanism still exists and is in use. Another mechanism are tools of cooperation. International parliamentarisation emerges in external cooperation of the EP with parliaments of trade partners as provided in EU Association Agreements. An Internal dimension of cooperation among domestic parliaments in EU policies (e.g. by establishing COSAC) was also induced by EU integration, admittedly though less so in the field of EU external relations. With regard to trade policy, domestic parliaments´ cooperation still is of little relevance. Current constitutional developments on EU level might prompt the need for its increase. Finally, the EP was an innovative actor of increased parliamentarisation by applying parliamentary diplomacy, e.g. by exchange of delegations. As alluded to, currently there are opposite movements as mixed agreements are increasingly replaced by EU only in the area of trade. This comes along with allocating more power to the supranational level, both executive and parliamentary. Hence one can contend that there is a certain move towards de-parlamentarisation of trade policy on domestic level. But such conclusion appears premature. To the contrary, one can contest that this is de-parlamentarisation. Maybe it is more apt to perceive such developments as an expression indeed of a re-parlamentarisation by fostering the awareness of a need for new ways and mechanisms of parliamentary involvement on domestic level in EU external affairs. Thus, it is not a move towards de-parliamentarisation, but towards a search for other tools, hence a stimulus for change in parliamentarisation. More power to the EP does not mean less powers to domestic parliaments but a change in their exercise. The present contribution will elaborate on the above innovations developed by EU parliamentarism and analyse their exemplary impact on increasing parliamentary involvement in external relations, in particular in the area of trade. It hypothesizes that EU is a good global actor in fostering democratic accountability of external relations, contributing to good (i.e. more democratic) global governance.

Ewa Zelazna, University of Leicester, *The EU as a Good Global Actor in International Economic Relations: The Role of Parliaments*

The release of the EU's new trade strategy makes the important question about its international identity resurface again. Since the entry into force of the Treaty of Lisbon in 2009, the EU has made the effort to become a good global actor by incorporating provisions on environmental and fundamental rights protection into its FTAs. The EU's future agenda maintains the focus on promoting value-based international trade system, with the European Green Deal taking the commitment to sustainability to the next level. The re-orientation of the EU's common commercial policy towards sustainable liberalisation of trade and investment coincided with an increase of powers of the European Parliament. Since 2009, the European Parliament has been proactive in developing a treaty-scrutiny practice that has ensured its meaningful involvement throughout the negotiating-cycle. The Parliament has strongly supported commitments to environmental and fundamental rights protection and adopted the position that trade liberalisations should not be just a goal in itself but also a mean to spread the values of the EU worldwide. This chapter evaluates how the European Parliament contributes to the shaping of the EU's international identity as a normative force for good. To that end, the chapter firstly presents the rationale for ensuring a strong position of the European Parliament in the common commercial policy and evaluates two aspects of its involvement which

present themselves as key challenges for the future. The first issue concerns parliamentary scrutiny during the implementation stages of the FTAs. The last decade of the common commercial policy has seen a significant proliferation of the EU FTAs. As the increasing number of these treaties have entered into force, the European Parliament needs to focus its attention on developing a practice that ensures effective scrutiny throughout the implementation phase of the agreements. As the FTAs become more complex and cover a wider range of areas, a practice has emerged to conclude them as, so called, 'living agreement.' These arrangements give considerable powers to treaty committees to implement necessary amendments, which creates a need to develop a robust accountability mechanism. Parliamentary oversight could help to ensure that throughout their lifecycle the FTAs support the EU's wider objectives, such as those embedded in the European Green Deal. The second issue considered in this chapter relates to the public perception of the EU trade policy in its Member States. While the EU has been at the forefront of promoting trade and sustainable development, a number of its high-profile agreements has been contested by the civil society. A strong resistance and hostility towards the EU's trade policy internally, will make it difficult to project outwards an imagine of a good global actor. In the light of this, the chapter enquiries whether and how involvement of parliaments could build greater support towards the EU's trade policy among the citizens.

Eva Kassoti, TMC Asser Institute, **Graham Butler**, University of Aarhus, *The EU Courts Approach to International Law: Towards a Conceptual Framework*

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda. Apart from an economic power, the Union has consistently portrayed itself as a virtuous normative actor committed to the ethos of international law. The EU's external projection of itself as an entity firmly committed to the strict observance and development of international law generates the expectation that the EU Courts – the Court of Justice and the General Court – also espouse something of this internationalist approach. The question of the EU Courts approach towards international law has been traditionally framed in terms of its Völkerrechtsfreundlichkeit, namely its open attitude towards international law. However, viewing the Court's approach through the classic, binary of 'openness/hostility' prism is not only unwise, but deficient. Such narrow and typically one-sided analysis is unable to capture the reality of EU judicial practice. In its case law, to some readers, the EU Courts may seem to oscillate between an open and closed approach to international law. Yet this understanding is misleading, to the extent that it only provides a reader with a partial picture and glimpse of how international law is actually used in practice. Recent judgments of the EU Courts attest to the need to move beyond the 'openness/hostility' debate, and to engage in more detail with the EU Courts actual use of the relevant rules. In this vein, the present chapter analyses the EU Courts approach to international law through the lens of the judicial activism vs. judicial passivism debate. Despite the disagreement surrounding the definition of the concepts of judicial 'activism' and 'passivism', the chapter argues that these concepts are a shorthand for the type of reasoning employed by a court in a given case. This debate has largely remained underdeveloped in international legal literature, and it has not been applied thus far as an analytical lens through which the EU Courts approach to international law can be perceived. Analysing the relevant case law through this lens allows a focus on the actual reasoning employed by the EU Courts, and thus, on the actual use of international law norms. This includes analysis of the contextual factors that may affect the EU Courts approach to in each case. The chapter continues by identifying a number of indicators between the opposing conceptions. These include, deference to the International Court of Justice (ICJ); consideration for the nature of the legal order; the nature of the proceedings, the indeterminacy of the international legal rules invoked, the politically sensitivity of the dispute at hand, as well as the existence of prudential doctrines such as the political question doctrine, the reception of such judgments in academia, as well as legitimacy considerations. In this light, the chapter argues that the EU Courts have predominantly exercised judicial passivism in its approach to international law. With a few exceptions, which are usually denounced and misunderstood as a norm, the EU Courts have mostly followed relevant ICJ pronouncements, instead of boldly developing international law. However, the picture becomes more complicated in politically sensitive cases when the EU Courts has not only shown extreme constraint, but, on occasion, even employed avoidance techniques to avoid getting embroiled in issues that are absent of justiciable accessible criteria. At the same time, the chapter demonstrates that the EU

Courts reluctance to adopt a bolder approach to international law issues can, on occasion, be explained on the basis of the complexity of the relevant international law rules invoked. The chapter concludes by highlighting the limitations of the classic, binary of 'openness/hostility' understanding as a tool for describing the EU Courts approach to international law, as well the need to develop more nuanced tools and frameworks to engage therein.

Gesa Kubek, University of Leuphana, *Dispute Settlement under EU FTAs: The Role of Sustainable Development Chapters*

The enforcement of Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs) has been widely discussed in both academia and practice. So far, the discussions have largely focused on the binary distinction between a cooperative and a sanctions-based enforcement approach. There have been fewer discussions about the ways in which TSD Chapters may impact the outcome of disputes under EU FTAs irrespective of the applicable dispute settlement procedure. The present Chapter explores three procedural avenues for settling disputes that (also) concern TSD objectives under EU FTAs. In light of recent panel reports and developments, it seeks to show that there are various ways to raise TSD concerns in disputes under EU FTAs and that, either way, TSD Chapters can have a decisive impact on the balance stuck between trade and non-trade objectives. The first procedural avenue that the paper explores is the soft enforcement model specifically foreseen in EU FTAs for settling disputes on TSD. The EU recently triggered this procedure for the first time in Republic of Korea – Compliance with Obligations under Article 13.4(3) EU-Korea FTA. The final report of the expert panel will provide a first interpretation of the scope and reach of TSD Chapters in EU FTAs. Compliance with the panel's recommendations may also be an important yardstick for evaluating the procedure's effectiveness. Secondly, TSD Chapters may play a role in state-to-state dispute settlement proceedings in EU FTAs – although they may not form the legal basis of such disputes. In Ukraine-Wood Product, the arbitration panel found that TSD Chapters may serve as "relevant context" for the interpretation of provisions that allow introducing and maintaining derogations to the purely trade-related part of an FTA, such as the general exceptions clause (Article XX GATT; here Article 36 EU-Ukraine Association Agreement). TSD Chapters may thus be decisive for finding that a measure in pursuit of sustainable development can be justified under Article XX GATT – even if it is highly trade restrictive. A third procedural avenue for settling disputes on TSD has been enshrined in the EU-UK trade and cooperation agreement (TCA). The TCA introduces a "rebalancing" procedure to cancel-out significant divergencies between the parties, inter alia with respect to labour and social, environmental or climate protection. Whether the rebalancing procedure may serve as a blueprint for future EU FTAs or will remain a specific tool to maintain a level-playing field with the UK post-Brexit remains to be seen.