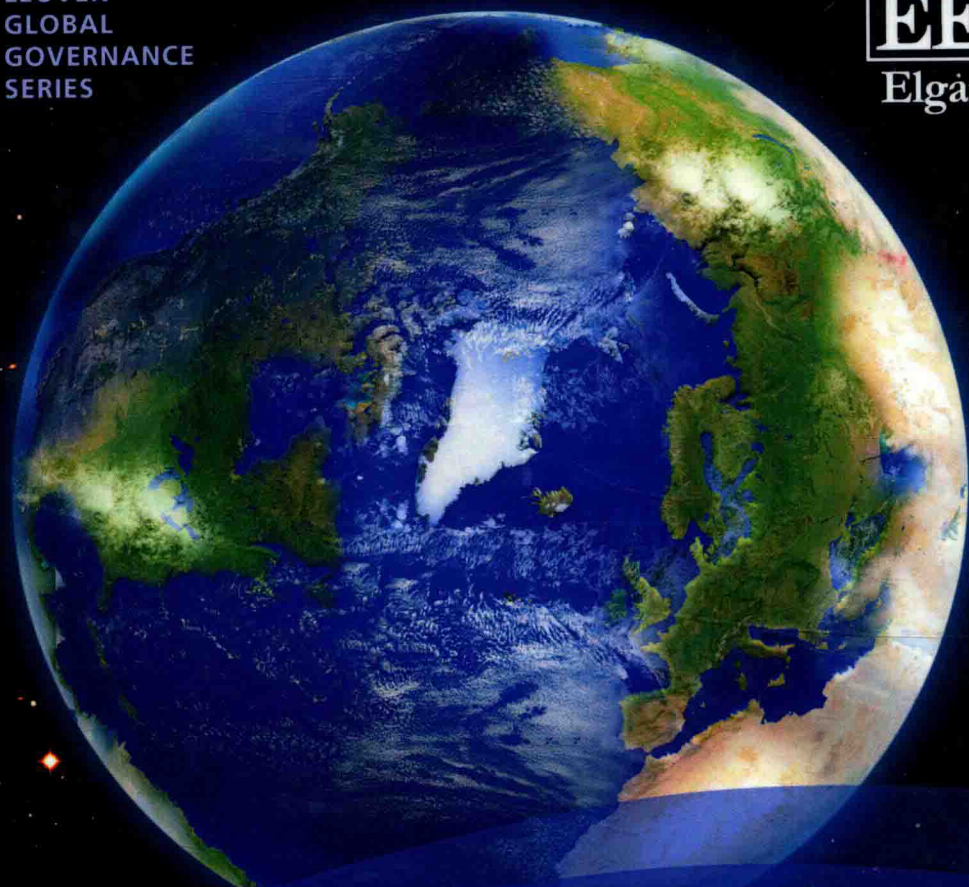


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Global Governance through Trade

EU Policies and Approaches



Leuven Centre
for Global
Governance Studies

Edited by
Jan Wouters
Axel Marx
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Edited by

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Global Governance through Trade

LEUVEN GLOBAL GOVERNANCE

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The Leuven Global Governance series comprises high-quality monographs and edited volumes dedicated to innovative research on global governance. The series focuses particularly on the following themes: European Union and global multilateral governance; trade and sustainable development; peace and security studies; human rights, democracy and the rule of law; space governance; and comparative federalism. In full recognition of the complex issues involved, the series favours studies approaching global governance from a multidisciplinary, multi-level and multi-actor perspective.

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EU Policies and Approaches

Edited by Jan Wouters, Axel Marx, Dylan Geraets and Bregt Natens

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1. Global governance *through* trade: an introduction

**Axel Marx, Bregt Natens, Dylan Geraets and
Jan Wouters**

1. MULTILATERALISM, MULTIPOLARITY AND GLOBAL GOVERNANCE

It has become a commonplace to say that the multilateral institutions which have been set up since the end of the Second World War are currently facing a severe crisis. After the end of the Cold War, everything had looked so promising: an era of international cooperation dawned, in which the United Nations (UN) received a new boost; a great number of multilateral treaties were concluded (from the 1992 UN Framework Convention on Climate Change to the 1997 Kyoto Protocol) and important new international institutions saw the light of day (from the World Trade Organization (WTO) to the International Criminal Court). In Europe, the European integration process yielded new highlights, with the Maastricht Treaty's creation of a European Union (EU or Union), which deepened the internal integration through the gradual implementation of an Economic and Monetary Union, and made the EU a more cohesive international actor, pursuing a set of norms and values on a global scale (Wouters et al., 2012). However, the optimism of the 1990s seems to have ceded to the pessimism of the new millennium. With the emergence of powerful new players with very specific characteristics like China, India and Brazil (Keukeleire and Hooijmaaijers, 2014), reinforced by the global financial crisis and the sovereign debt crisis in the euro area, we seem to have evolved from the bipolarity of the Cold War, over the unipolarity of the 1990s, to some kind of multipolarity or, according to some, interpolarity (Grevi, 2009), in which both Europe and multilateral organizations are confronted with significant challenges.

The multilateral system is facing severe challenges, with regard to the negotiation of new rules and the enforcement of existing rules. First,

multilateral negotiations in several fields are at a stalemate. It appears increasingly difficult to conclude internationally binding agreements or to enforce them. Some observers stress the limits of the consensual structure of the international legal order, which relies on the sovereign equality of states in multilateral negotiation fora (for a discussion see Krisch (2014); for a whole set of case studies on the stagnation of international law see Pauwelyn, Wessel and Wouters (2012; 2014)). Examples include the climate change negotiations, multiple (failed) efforts to reach an agreement on global forest governance and combat deforestation, and the negotiations in the context of the multilateral trading system. The Doha Development Round, which commenced in 2001, has produced very few tangible results. Although the conclusion of the Bali Package in December 2013 resulted in renewed interest for the Round, many still question the ability of the WTO to serve nowadays as a successful forum for conducting trade negotiations (Cottier, 2015).

As a matter of fact, the Doha mandate has been overtaken by reality. The issues that were relevant at the start of the Round, almost 15 years ago, are no longer what is crucial for today's international business community. There is a need for a set of new rules to govern twenty-first century trade (Baldwin, 2014). Actors are now pursuing unilateral, bilateral or plurilateral strategies in order to create these new rules. The main pragmatic reason for this is that agreement will be more easily reached with a limited number of participants. A clear case in point is the proliferation of preferential trade agreements. The trend towards mega-regionalism in trade, exemplified by the US-led Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership Agreement (TTIP) and the China-Japan-Korea trilateral, points to the emergence of a multipolar – and no longer solely multilateral – world trading system.

International forest governance constitutes another example. The international forest community has for a long time demanded an international, multilateral, 'hard' law instrument for the governance of forests. This demand has been supported by several states – the EU, in particular, has fought for a global forest convention for more than two decades. Starting from the failure in Rio in 1992, where no agreement was reached on an international forest convention, over the establishment of the Intergovernmental Panel on Forests (1995–97) and the Intergovernmental Forum on Forests (1997–2000), to the formation of the UN Forum on Forests (UNFF), one can observe the failure of current multilateral initiatives with regard to forest governance. Dimitrov et al. (2007, p. 243) state that the UNFF is 'explicitly deprived of a policymaking mandate'. In the absence of such a global convention, forest governance remains highly fragmented and ineffective (Rayner, Buck and Katila,

2011), and pushes some actors to become what Scott (2013) calls ‘contingent unilateralists’, extending their own regulations extraterritorially.

Second, existing multilateral efforts are increasingly confronted with the limitations of enforcing agreed rules. Where multilateral efforts have resulted in a binding agreement, the absence of an international enforcement mechanism often results in lax implementation of these standards. In the field of labour rights, for example, efforts within the International Labour Organization (ILO) have led to numerous conventions and core labour standards. In the absence of an international enforcement mechanism, it is difficult to ensure that these standards are also applied in practice (for a full discussion, see Hendrickx et al., 2015 forthcoming).

This impasse on the multilateral level coincides with an increasing call to further pursue an international good governance agenda (Wouters and Ryngaert, 2004) and an agenda for the protection of global public goods. As Inge Kaul, then Director of the Office of Development Studies at the UN Development Programme (UNDP), and colleagues noted in 2003, ‘Open borders and the free flow of private economic activity are one side of globalization. Concerted cross-border public policy action must be the other side if globalization is to serve as a means of improving people’s lives rather than wreaking havoc on them’ (Kaul et al., 2003, pp. 2–3). This focus on global public goods and good governance is increasingly gaining attention. In its latest ‘Development Co-operation Report 2014 – Mobilising Resources for Sustainable Development’ the Organisation for Economic Co-operation and Development (OECD) (2014, p. 10) also emphasizes the need for international action to ‘deliver much-needed global public goods such as stable and efficient international financial markets, peace and security, a healthy environment and climate, fair international trade [...] and global knowledge for development’. However, the report also notes that ‘international consensus and concrete collective action on global public goods have been elusive up to now’ (OECD, 2014, p. 10).

Given the stagnation of international action through multilateral channels, one sees a turn to informal lawmaking (Pauwelyn, Wessel and Wouters, 2012; 2014), non-consensual transnational lawmaking (Krisch, 2014), unilateral action (Scott, 2013), and governance *through* trade (this volume). The latter strategy is especially pursued in relation to global public goods by international actors with a strong normative international agenda. The EU qualifies as such an actor. The norms and values which the Union is pursuing are enshrined in EU primary law, most notably the Treaty of Lisbon. They include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Article 2 Treaty on European Union (TEU)). In addition, under Article 21 TEU,

the Union must pursue international policies and actions *inter alia* to consolidate democracy, the rule of law and human rights, and to preserve and improve the quality of the environment and the sustainable management of global natural resources. These objectives apply also to the Common Commercial Policy (Article 205 Treaty on the Functioning of European Union (TFEU)), an exclusive competence of the EU (Article 3 TFEU). However, what does this governance *through* trade, the focus of the present volume, entail?

2. TRADE AS A TRANSNATIONAL GOVERNANCE INSTRUMENT

As noted above, in the absence of multilateral progress, actors seek other mechanisms by which to pursue their international agenda. Savaresi (2012) documents how the EU aims to support forest governance via its Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. In order to promote the verification of the legality of timber through this Plan, the Union has shifted from an approach of trying to achieve a multilateral solution to bilateral strategies with willing third countries. By conditioning access to its market, the EU made use of its weight as a trading partner, inducing timber exporting countries to introduce forest management strategies.

The example of FLEGT illustrates a wider trend to pursue international strategies *through* trade, especially by the EU. This shift to the use of trade as a foreign policy instrument has received scholarly attention in recent times. In an early contribution, Meunier and Nicolaïdis (2006) distinguish between exercising power *in* trade and *through* trade with reference to EU policies. On the one hand, power *in* trade refers to the trade relation in which access to an actor's domestic market is granted conditionally on access to export markets. This is an emanation of the concept of reciprocity in trade. Power *through* trade, on the other hand, refers to the fact that the Union uses market access power and its market size to 'export' its laws, standards, values and norms. When exercising power *through* trade, the EU uses the size of its domestic market as an asymmetric bargaining chip to 'force' domestic changes within the territory of its trading partner on issues such as good governance, environmental policy and human rights (see also Hafner-Burton, 2005; Zwagemakers, 2012).

The use of trade as a governance instrument is becoming increasingly important in a world that has witnessed a tremendous growth in international commerce and an increasing dependency of countries on

exports. As Hoekman (2014) documents, the growth of international trade over the last half century has been spectacular. With an almost thirty-fold increase over 50 years it has truly transnationalized economic activity. The value of global trade in goods and services constitutes 59 per cent of global GDP in 2013, compared with 39 per cent of GDP in 1990. As a region, the Union is the largest importer (€2188 billion in 2013) and exporter (€2415 billion in 2013) of trade in goods and commercial services in the world (European Commission, 2014). This is reflected in the share of trade in the EU's GDP: in 2013, trade in goods and services constituted a whopping 80.5 per cent of EU GDP (World Bank, 2015).

Undoubtedly, economic globalization and the consequences thereof on trade, in their own right, impact upon the provision of specific public goods, such as environmental and social protection. This book, however, does not engage in the debate on whether global trade, if left unregulated, contributes to, or rather worsens, the protection of, for example, environmental and social standards. The research on this is long standing and the debates on the trade and environment conflict, or the interplay between trade and human rights, have been discussed before. Such debates on trade and public goods have often been posited in terms of races to the bottom and races to the top. Research shows that trade liberalization can have a negative effect on environmental protection (Esty, 1994) but also a positive effect on environmental standards (Vogel, 1995), and a negative effect on the protection of specific human rights such as labour rights (see Levi et al., 2012; Mosley, 2011) but also a positive effect on the protection of human rights more in general (Potrafke, 2014). As Aaronson and Zimmerman (2007) argue in the context of the human rights and trade debate, but is in our view applicable more generally, it is true that very little is known about the specific mechanisms that determine the way in which trade does or does not influence the protection of public goods. Many different dynamics can unfold and the subject matter is a moving target. Indeed, the recent burgeoning literature on global value chains shows empirically that in certain cases economic upgrading, spurred by greater trade openness and increased international trade, leads to social upgrading (Barrientos, Gereffi and Rossi, 2011). This, however, is not an automatic mechanism and there are, once again, also several case studies that show social downgrading and pressures on the protection of specific rights (for an elaboration on these issues see Marx et al. (2015)).

Notwithstanding these contentions regarding the impact of trade liberalization on the provision of public goods, there is increasing recognition that, by means of the governance of trade flows, one can also govern

social and environmental issues, as exemplified by Meunier and Nicolaïdis' concept of power *through* trade. This governance *through* trade can be executed either directly, by making compliance with specific standards mandatory for market access, or indirectly, by providing additional preferences as an incentive to ratify and effectively implement a series of international human rights, labour, environmental and good governance instruments (such as in the case of GSP+).¹ As a result, several policy initiatives, unilaterally as well as bilaterally, which link trade governance with the governance of non-trade issues, have been developed. How this is done and the results of these initiatives are the focus of the present volume.

This book aims to provide an extensive analysis of both unilateral and bilateral 'new generation' EU governance-*through*-trade policies, in the context of which we seek to understand two key issues. First, we focus on the institutional design of these new instruments. What does it actually entail to link trade with non-trade objectives? How can this be achieved? How is this translated in policy instruments and legal texts? How compatible are these initiatives with international trade law? Second, we aim to understand the impact of these initiatives. For this purpose, contributions to this book elaborate on specific case studies and present original empirical data. In this way our book aims to contribute to the broader study of non-traditional forms of international lawmaking and global governance.

3. OUTLINE OF THE BOOK

The first part of this volume combines insights from political science and legal studies to frame the role of the EU as an actor in the field of international trade. The concept of 'governance through trade' is explored in order to determine why, how and on what legal basis the Union pursues other societal objectives through its trade policy. Following an introductory chapter, the 'new generation' EU governance *through* trade policies is contextualized in Chapter 2 by Chad Damro, who elaborates on the idea of power *through* trade and his concept of 'Market Power

¹ The importance of the link between trade and the governance of non-trade issues is not confined to the actions of state actors, but also to non-state actors. Indeed, the literature on non-state market regulation has for a long time recognized the increasing non-state regulation of transnational supply chains on a set of social and environmental criteria (see, for example, Cashore et al., 2004; Vogel, 2008; Marx et al., 2012).

Europe' (MPE) (Damro, 2012). MPE posits that the Union should be seen as exercising power 'through the externalization of its social and economic agendas' (Damro, 2012, p. 696). Damro introduces the debate on the 'EU as a Power' and conceptualizes MPE. The author discusses the centrality of trade policy and the ways in which new generation trade policies provide MPE with an additional tool to externalize the EU's market-related policies and regulatory measures. He clarifies the contentious nature of the efforts of MPE to externalize different types of new generation trade policy and the ways in which the three characteristics of MPE (market size, institutional features and interest contestation) help to inform the analysis. Damro elaborates upon and extensively discusses issues of inconsistency which emerge out of the application of power *through* trade. The core of the problem with inconsistency is that any action that appears to be the promotion of one general non-trade objective may at the same time contradict or be inconsistent with the promotion of other general non-trade objectives. Damro offers several suggestions to overcome problems of inconsistency. In Chapter 3, Joris Larik addresses the linkages between the EU Common Commercial Policy and the Union's contribution to 'good global governance' in the TEU. Pursuing 'good global governance' in its external actions, including its trade policy, is an obligation of constitutional rank for the Union – regardless of the instructive character of this obligation. Larik concludes that 'the trade policy of the EU is certainly no end in itself, but a powerful means to ends now prominently enshrined in the highest laws of the EU'.

In Part II of this volume (on 'exporting' social and environmental compliance through bilateral conditional market access), the new generation of EU free trade agreements (FTAs) is addressed. The authors analyse the types of mechanism to manage and leverage global public goods, such as the environment and human rights, that are set out in these FTAs, and how these mechanisms are subsequently implemented (for an early analysis, see Dimopoulos, 2009). In Chapter 4, Lorand Bartels addresses the extent to which human rights and sustainable development obligations in EU FTAs give the EU the means of implementing its obligations under the TEU and TFEU. Bartels finds that the human rights clauses in these FTAs are effective in the sense that they allow the Union to fulfil its constitutional objective of respecting human rights in its external action by withdrawing from a commitment that may jeopardize that objective. The same cannot be said for the sustainable development clauses, which do not leave such leeway. This may be explained by the language of the objective of promoting sustainable development, which is less obligatory than the language on human rights in Article 21 TEU.

Moreover, the internal coherence of both objectives in EU FTAs is lacking, as a result of differences in implementation and remedies. These differences may be difficult to sustain.

In Chapter 5, Rafael Leal-Arcas and Catherine Wilmarth focus further on sustainable development in FTAs by conducting a comparative analysis of the negotiations on sustainable development for the Pacific Rim Trans-Pacific Partnership (TPP) and for the EU-US Transatlantic Trade and Investment Partnership (TTIP). The authors argue that mega-regional FTAs, such as the TPP and TTIP, can be more efficient vehicles for the promotion of sustainable development than multilateral environmental agreements. The question is whether that potential appears to be fulfilled in the negotiations for the TPP and TTIP. After assessing relevant issues related to sustainable development in both negotiations, the authors compare the available relevant information on scope, enforcement, dispute resolution, implementation and constraints on regulatory autonomy in the TPP and TTIP negotiations. For now, the conclusion is that the TPP does not appear to live up to its potential as an efficient agreement promoting sustainable development, while it remains to be seen whether the EU and the US will make the TTIP an exemplary agreement in this regard.

Chapter 6 by Nicolas Croquet turns to a specific case study and assesses the climate change provisions in the EU-Korea FTA from the perspective of hard and soft law, based on legal scholarship and the direct effect doctrine of the Court of Justice of the European Union (CJEU). The provisions that deal directly with climate change are characterized by generality, looseness, and policy-oriented and conditional language. They contain a low degree of clarity, detail and self-sufficiency, and reflect in essence best-efforts legal obligations rather than result-based obligations. They can best be characterized as soft law obligations. In comparison, the indirect climate change provisions can be characterized as hard law. These provisions do not deal with climate change directly, but touch upon this issue as they, for example, include the general exceptions clause of Article XX of the General Agreement on Tariffs and Trade (GATT) 1994 which is incorporated through *renvoi*. However, there is merit in the provisions that deal with climate change directly: the normative interactions with the indirect climate change provisions of the EU-Korea FTA urge the signatory states to interpret the FTA's trade-furthering and trade-restricting provisions in the most environmental law-friendly way. This includes triggering good administration principles and defence rights that supplement the direct climate change chapter's embryonic transparency provision. Consequently, the 'direct climate