

# Shaping Globalisation by Bringing Together Trade, Politics and Democracy – Lessons to Be Learned from European Integration

Christian Calliess\*

## Table of Contents

A. The Challenges Ahead	421
I. The Disputed Legitimation of International Trade Policy	422
II. The Widening of Globalisation from Trade to other Policies Fields	423
B. Lessons to Be Learned From European Integration	424
C. Towards Shaping Globalisation	426
I. The Idea and Concept	426
II. First Steps at European Level: Harnessing Globalisation	428

## A. The Challenges Ahead

Global interaction does not follow a smooth development path and has taken many shapes and forms over the centuries. Yet Europe has been at the very centre of globalisation since its very beginnings. When the first explorers left Europe to discover Asia, Africa and the Americas, their motivations were in many ways similar to today. They were seeking out new knowledge and opportunities, hoping to discover new people and places, to exchange ideas and goods. “Globalisation” itself is often traced back to the early 19th century when commercial interaction between national economies intensified, influencing overall living standards and the distribution of wealth across the globe, as technology improvements made it easier and cheaper to transport goods and people around the world, and the spread of transatlantic cables, telegraph links and the internet enabled investors and merchants step by step to communicate faster abroad.

Global trade shot up as trade barriers were removed by the GATT and then the WTO. While in 1970, trade accounted for just one quarter of the world’s GDP, it now accounts for nearly 60 %. For the EU, which has been built around the very concept of market integration, enabling the free movement of goods, capital, services, and people, trade actually today represents as much as 83 % of total GDP.

\* Christian Calliess is Professor for Public Law and European Law at the FU Berlin (on leave); currently he is Legal Adviser to the European Political Strategy Center (EPSC) of the President of the European Commission. The paper reflects the personal opinion of the author and cannot be regarded as an official position or bind the institution the author works for.

This is also due to the fact that the patterns of trade policy have changed. Since there have already been major reductions in customs tariffs worldwide, the focus for further liberalisation of global and bilateral trade has shifted to non-tariff barriers. These often relate to requirements for products and services that serve to protect public interests like the protection of consumers, the environment and human health. This shift of trade policy towards liberalisation by deregulation led to new tensions between international free trade and national preferences in politics and democracy.

### I. The Disputed Legitimation of International Trade Policy

Though heated and controversial debates about globalisation and its effects on people and societies are nothing new, over the last two decades the public discourse on the political, economic, cultural and environmental implications of a more connected world has surged in tone, intensity and scale.

Many citizens in the EU see the growing interdependence of countries and continents as an opportunity to better their own lives and tackle some of the world's most persistent problems. Social media platforms connect more people than ever before. The sharing of ideas, knowledge and inspiration requires nothing more than a smartphone. New community networks stretch across cities, nations and borders, creating real-time awareness of joint problems such as climate change, food security and air pollution. Across a new "global village", people reach out and transcend their neighbourhood. Travel becomes cheaper and easier, trade barriers come down. Online stores, conveniently open 24 hours a day, and growing global supply chains make the shopping of electronics, apparel, music and movies from all parts of the world an integral part of many Europeans' daily life.

For others, globalisation is the source of unwanted change. Concerns about the erosion of cherished traditions and cultural habits, the loss of jobs, poor environmental and health standards and social injustice feed a strong anti-globalisation sentiment. Over the last two decades, meetings of the World Trade Organisation or summits of the strongest world economies in the G7/G20 format, as well as ambitious trade negotiations like the ones with Canada and the United States of America have been increasingly accompanied by vocal protest, sometimes with violent escalation. Many Europeans feel that the harmful effects of globalisation clearly outweigh its benefits. They see a widening gap between the haves and have-nots, as increasing global wealth is concentrated in fewer hands and fewer countries. They feel that corporate interests and quick profits trump sustainable solutions for their personal future. Their new global neighbourhood is marked by fierce competition, unfair trade practices and a severe lack of respect for their values and way of life. For those Europeans, globalisation is first and foremost an empty promise.

Ever since the French diplomat *Jean-Marie Guéhenno* spoke about the "end of democracy"<sup>1</sup> addressing the tensions between globalisation and democracy, academic

<sup>1</sup> *Guéhenno*, *La fin de la démocratie*, 1993; see also the contributions in: Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*, Soziale Welt – Sonderband 18, 2009.

and public debate tended to have a closer look on the political dimension of trade agreements. These tensions can be explained by the coupling of market and democracy within the nation state European citizens are used to: Industrial society based on free competition led to the development of the modern state with its ability to lay down political requirements ensuring socially and environmentally sound production for all companies competing on the national market. This combination of a free market and “flanking legislation” to frame it defines the European model of social market economy (see Article 3 TEU).

In this regard it is often argued that

“globalization reveals the liberating potential of the market for generating unlimited wealth and its blindness as a mechanism for distributing the consequences of this wealth.”<sup>2</sup>

And indeed, the historic symbiosis of market competition and state regulation was basically capable of functioning in nation states despite all conflicts and deficits, as long as they succeeded in enforcing these requirements imposed on the companies on the market equally in relation to all competitors and thereby regulating competition in the public interest consistently. But the market has become global; and the nation state is not. The possibility of national measures for resolving conflicts and deficits in social market economy is limited by the extent to which companies engage in cross border action and become international.

This is because “de-borderisation” placed geographical limits on national authorities to legislate on the enlarged market, for example in the field of social, environmental and consumer protection. If there are at the same time no competences for these “flanking policies” on the central (European or international) level, a democratic mismatch becomes evident: On the one hand, legislation passed in the public interest by national parliaments is “under general suspicion” of causing potential distortion of free trade, on the other there is no competent parliament on the central level to compensate for this by harmonisation of standards.

It was against this general backdrop, that European citizens in many Member States were afraid, that TTIP would challenge the European understanding of the precautionary principle and thereby putting protective approaches in European legislation (like in the REACH regulation) into question.

## II. The Widening of Globalisation from Trade to other Policies Fields

Modern globalisation overlaps with many other phenomena, such as the hyper-intensification of technological change, in particular the rise of digital technologies, demographic shifts, and climate change. While these phenomena are not all necessary effects of globalisation, they certainly interact, making it difficult to know how they individually impact our lives.

<sup>2</sup> Ghani/Lockhart, An Agenda for Harnessing Globalization, The Washington Quarterly 29 (2006), p. 67.

In addition to making traditional trade exchanges easier, safer and faster, the internet and digital technologies are also changing the very nature of what is being traded as services are actively integrated into manufactured products and as data itself becomes a tradable good. Cars today are increasingly about the software they contain rather than their mechanics. In 2014, services already represented more than a quarter of world trade. And, between 2008 and 2012, world-wide cross border trade in data increased by 49 % while trade in goods or services rose by just 2.4 %. Digitalisation is also transforming entire industries, and spreading to sectors that for a long time seemed unlikely to digitise so these trends can be expected to amplify. At the same time, emerging technologies like 3D printing will make it easier for data flows to substitute trade in physical goods into the future.

As global interconnectedness increases, so have new global risks, ranging from financial (subprime crisis), to health (with the rapid spread of pandemics), environmental (depletion of the ozone layer, to climate change, with rising sea levels, severe droughts and extreme weather events), and security (spread of terror attacks worldwide, migration and refugee crisis).

## B. Lessons to Be Learned From European Integration

The globalised economy, which is increasingly displaying demands for free market access as a result of free-trade agreements and investment protection, mirrors the tensions between market and public interests that have been identified for the EU in the 1980s and since then were resolved step-by-step in the course of time.

The opening of internal borders for goods, services, capital and labour by the internal market (Article 26(2) TFEU) created individual gains in freedom that favour mobile individuals and companies, but did not initially succeed in accommodating these by means of democratic counter-processes in the public interest.

In particular the example of market freedoms, establishing transnational individual rights being directly applicable in favour of European citizens, generate an economic dynamic under which the national legislature can no longer sufficiently protect domestic producers from competition by foreign suppliers.

This form of “de-borderisation” might create a problematic form of regulatory competition which occurs in globalised markets as well: When national companies in a market without borders (like the internal market of the EU or in a (less integrated) free-trade zone like the European Economic Area) meet competitors who – in addition to much lower labour costs – are not subject to the same production or product standards, then these requirements (that are manageable on the national market under the same competitive conditions) can become competitive disadvantages that might even threaten their existence or alternatively forces them to leave to low-standard economies. This can be described as a scenario that

“one could characterise, depending on one’s point of view, as a neoliberal dream or as a regulatory nightmare: Unimpeded competition between companies results in a situation of competition on the location-related production conditions, and hence also between the

prevailing regulatory systems, in which it is ultimately the market and no longer politicians that decide which regulations can be enforced or maintained.”<sup>3</sup>

With the completion of the single market the understanding has grown that in the field of technical standards competition between rules based on mutual recognition of national standards and accompanied by adequate consumer information can be an acceptable means. However such an approach in the field of product related standards for health, consumer and environmental protection runs the risk of failing completely in relation to the protective goals of environmental or occupational safety standards. The same counts even more for production standards. With regard to these the market tends to be insensitive, because they relate not to the product itself, but entirely to the production process. In this case competition between national systems creates the risk that more cost-intensive standards will be displaced by less expensive ones. Therefore differences in the “sensitivity of the market” allow for competition between rules only to a limited extent.

Against this background the example of the EU’s single market highlights the need to compensate for inefficiency of national legislation and cover regulation and harmonisation in flanking policy areas. To ensure that the single European market did not fail as a result of different national standards in the fields of health, consumer and environmental protection, it was essential, that these policy areas were “promoted” to European level.<sup>4</sup> Thus the single European market was neither an end in itself nor an objective that would take legal priority over the other objectives of the Treaties. In contrast, the goals and requirements of the single market were to be balanced with the other objectives of public interest, especially those relating to social affairs and environmental issues.<sup>5</sup> On the EU level this is ensured by legislation based on a democratic process, in which the European Parliament, being directly elected by the public, and the Council of the European Union, comprising national ministers controlled by their respective national parliaments, with the participation of civil society and the general public safeguard legitimation.

European experience with the single market highlights that within the new generation of free-trade agreements it will only be possible to realise – on the global level – environmental, health and consumer interests on an equal footing with trade interests if they enjoy a comparable status.

Shaping globalisation – to be understood as framing, flanking or even harnessing globalisation – in this sense means therefore that future trade agreements have to reconcile the objectives of free trade with politics and institutions to conduct this crucial weighing exercise and realise a more balanced approach.

3 Translation from *Scharpf*, Regionalisierung des europäischen Raums: Die Zukunft der Bundesländer im Spannungsfeld zwischen EG, Bund und Kommunen, 1989, p. 13 et seqq. with further references.

4 For the discussion see *Joerges*, Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik, in: Wildenmann (ed.), Staatswerdung Europas? Optionen für eine Europäische Union, 1991, pp. 225–268.

5 *Kabl*, in: Calliess/Ruffert (eds.), EUV/AEUV, 4th ed. 2011, Article 26 AEUV, para. 30.

## C. Towards Shaping Globalisation

### I. The Idea and Concept

Shaping globalisation by more comprehensive trade agreements will not be achieved easily. Already at the EU level, where according to Article 3 TEU all Member States are committed to the objective of a social market economy, national standards in the protection of public interests can vary considerably between countries for historic, social, economic and political reasons.

On global level free trade agreements have to deal with an even greater heterogeneity between the different states. This is an inherently political challenge. At the same time world trade is strongly oriented towards a depoliticised kind of trade liberalisation. It does not provide for systematic inclusion and harmonisation of policies. In general, there are no competences for “flanking legislation” in the WTO agreement itself or any other global trade agreement.<sup>6</sup> Neither is there any direct democratic legitimisation of world trade institutions (such as the WTO).<sup>7</sup> Even the few existing external provisions, particularly in the SPS and TBT agreements, allow only for a limited protection of public interests. At the same time international organisations, which – like the WHO – are concerned with the protection of health, consumer and environmental interests, do not possess any competencies with regard to trade.<sup>8</sup> However in the field of food safety an auxiliary tool, the Codex Alimentarius, was set up by the FAO and WHO. The standards in this codex often serve as a reference for WTO decisions which settle trade disputes. Though it provides guidance to national legislation, it is not actually legally binding on any level – due to the lack of international competence.

But as the EU was able to resolve the tensions between free trade and democracy by deciding in favour of “more democracy” and providing for a political framing of the market, this could also be possible with regard to international trade agreements: Of course due the level and extent of integration, the EU cannot be taken as a “blueprint”. Therefore international trade agreements do not have to be based on an institutional backbone similar to the EU. But economic integration must be followed by some kind of political integration process that supports the market. Global markets request global governance. In this spirit, agreements like TTIP should – at least in the medium term, and especially if regulatory cooperation is to be intensified – be supplemented by a democratically legitimised institutional political framework that is capable of safeguarding the protective policies supporting the market and thereby counteracting a transatlantic “stateless market”.

6 See *von Bogdandy*, Chancen und Gefahren einer Konstitutionalisierung der WTO, Verfassungsrechtliche Dimensionen der WTO im Vergleich mit der EU, Forum Constitutionis Europae, speech of 26/6/2002, Berlin.

7 *Krajewski*, Democratic Legitimacy and Constitutional Perspectives of WTO Law, Journal of World Trade 35 (2001), pp. 167-186.

8 Cf. in connection with the discussion on democratic global governance: *Zengerling*, Greening International Jurisprudence. Environmental NGOs before International Courts, Tribunals, and Compliance Committees in: Nijhoff (ed.), Legal aspects of sustainable development vol. 17, 2013, pp. 11 et seqq., 327 et seqq. with further references.

Consequently, the EU as a key player in shaping globalisation must follow a more comprehensive approach in promoting global trade. EU trade policy must consider the balancing exercise of weighing trade on the one side and public interests on the other. In this sense, the EU can pursue its progressive trade and investment agenda as laid out in the “Trade for All” communication which seeks to open markets in reciprocal way as well as levelling the playing field by committing partners to work towards higher standards, not only on economic issues such as public procurement, state subsidies, intellectual property rights or digital governance, but also on environment, working conditions etc. But at the same time, the EU must build global governance. An institutional framework is needed to accommodate and balance all interests alike, and to avoid the “stateless market”. This could be achieved by political integration through permanent institutions, but also governance through NGOs and civil society. In this sense, *Anne-Marie Slaughter* called for a conceptual shift:

“Stop imagining the international system as a system of states – unitary entities like billiard balls or black boxes – subject to rules created by international institutions that are apart from, ‘above’ these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments – legislation, adjudication, implementation – interacting both with each other domestically and also with their foreign and supranational counterparts.”<sup>9</sup>

The State as an actor stays central, but becomes “disaggregated”. This means, that the structural core of a disaggregated world order<sup>10</sup> is to be understood as a set of horizontal networks among national government officials in their respective issue areas, ranging from central banking through antitrust regulation and environmental protection to law enforcement and human rights protection.<sup>11</sup> As this will not be sufficient to shape globalisation, states should in addition decide on a vertical network by, for example, creating supranational institutions or independent courts and tribunals.<sup>12</sup> This approach has to a certain extent become a reality, and it can facilitate integration of NGOs and civil society into the new global governance.<sup>13</sup> In fact, the influence of NGOs has received much attention, but research also showed that “business actors have established transnational regimes that create, shape, and protect markets.”<sup>14</sup> Moreover, “business actors – i.e. interest associations or powerful corporations – participate regularly in the international policy-making process, and in many cases have a strong influence on the outcomes.”<sup>15</sup>

9 *Slaughter, A New World Order*, 2004, p. 5.

10 *Ibid.*, p. 19.

11 With regard to the financial markets see e.g. *Calliess*, Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtssetzung, VVStRL 71(2012), p. 113.

12 *Ibid.*, p. 20.

13 *Calliess*, Ansätze zur Subjektivierung von Gemeinwohlbelangen im Völkerrecht – Das Beispiel des Umweltschutzes, ZUR 2000, pp. 246-257.

14 *Koenig-Archibugi*, Global Regulation, in: Baldwin/Cave/Lodge (eds.), *The Oxford Handbook of Regulation*, 2010, p. 421.

15 *Ibid.*, p. 422.

Against this backdrop, the threat of new protectionism in some countries is not sustainable, but presents an opportunity to more convincingly advocate for open but rules-based and fair exchanges. At the same time, these rules must be backed by a solid backbone of governance and ensure high standards – because they will be maintained globally or not at all. The EU is well-placed to exercise leadership in this context by showing that a different path is indeed available. This can be pursued both bilaterally and multilaterally, horizontally or vertically. In this respect, the EU would ensure that these trade agreements do not in any way limit its capacity, or that of its Member States and trading partners, to pursue policies in the public interest, but would acknowledge the benefits of globalised trade as well as the need to balance it with public interests. By ensuring such balance via international institutions, the EU could maintain and even strengthen current levels of consumer, environmental, social and labour protection.

First examples can be found in trade and investment agreements like CETA, EU-Korea FTA, investment negotiations with China. Moreover there are many proposals to reform the investment protection system by more balanced rules as well as a Multilateral Investment Court. At the same time the private sector can be addressed by the means of Corporate Social Responsibility (CSR).<sup>16</sup>

The EU should also continue to play its role in other global governance fora – including G20, G7, IMF, ILO, environmental conventions and even NATO – to actively set global standards and foster cooperation in order to tackle challenges requiring joint action, from financial stability to tax avoidance, data flows, social dumping, irregular migration, climate change, and health and cyber threats.<sup>17</sup>

In the public opinion the EU is nevertheless often perceived as part of the problem, not the solution. For many, the Union is simply a champion of global free trade, without sound approaches to balance the negative effects stemming from it. Some are disappointed as they expect the EU to better defend European values and interests against profound global change. Others see the EU as rigorously using its economic weight against weaker communities, countries and continents. A third group demands smarter and better tailored policies to empower Europeans to succeed in a more connected world.

## II. First Steps at European Level: Harnessing Globalisation

Against this backdrop the European Commission started to develop a more comprehensive approach towards trade policy that in 2017 was taken further and put in far more concrete terms. On 1 March 2017, the European Commission presented a White

16 See *Spießhofer*, Wirtschaft und Menschenrechte – rechtliche Aspekte der Corporate Social Responsibility, NJW 2014, pp. 2473-2479.

17 See European Commission, European Political Strategy Center (EPSC), Building an Effective European Cyber Shield, EPSC Strategic Note Issue 24, 2017, p. 11 et seqq.; *Pernice*, Cybersecurity Governance, Humboldt Institut für Internet und Gesellschaft, Discussion Paper No. 2017-05.

Paper on the Future of Europe.<sup>18</sup> It was deemed to be the starting point for an honest and wide-ranging debate on the future of the European Union at 27. The European Commission fed that discussion by presenting a number of reflection papers on key issues that matter for the future of the European Union.

The Reflection Paper on Harnessing Globalisation from 10 May 2017<sup>19</sup> is the second in the series. It offers policy options with regard to the following questions: What is globalisation and does it present an opportunity or rather a threat to the European way of life? What are globalisation benefits and are they fairly distributed across European societies? Does the EU need stronger shields to protect its common interests? Are better global rules needed to ensure fairness? How can the EU and its Member States manage globalisation effects? Shall the EU develop European solutions or will national, regional and local solutions provide better responses?

The Commission's reflection paper intends to make international trade more inclusive and more in line with the EU's values and interests by promoting an international rules-based order, both protecting European standards and values and shaping global standards. Therefore it calls for progressive rules-based trade policy to establish an open and fair international trade regime. According to this the EU would seek to open markets in a reciprocal way, while ensuring states can continue to pursue legitimate public policy objectives, promoting high standards and sustainable development, in line with the Sustainable Development Goals (SDGs).

Based on a proactive economic diplomacy that goes beyond conventional trade and investment policy the EU should deploy all available tools to advance EU economic interests abroad, by promoting multilateralism, fair rules and high standards globally in line with European values. Therefore instruments to ensure a level playing field are necessary to respond to those who do not respect the rules. In concrete terms the EU is in need of an effective trade defence armoury to deal with countries that discriminate against EU companies or engage in unfair practices (e.g. in government procurement). An important element of this could be a screening of inward Foreign Direct Investment.

Last but not least the reflection paper addresses ways of more effective, transparent and accountable decision-making procedures, that would allow the EU to pursue effective collective action on the international level and to act as a credible negotiator, even when agreements cover a broad range of sectors (the case of "mixed" agreements). In this context transparency, engagement with national parliaments and civil society should raise acceptance by European citizens for trade policy. At the same time the reflection paper addresses both pro-active and re-active policies, in order to mitigate the negative impacts for European regions under pressure. EU policies can play a role, even if many of the key instruments to manage globalisation are in the hands of Member States. This requires new collaborative approaches in the regional policy of the EU with key stakeholders to maximise impact at local level.

18 European Commission, White Paper on the Future of Europe, Reflections and scenarios for the EU27 by 2025, COM (2017) 2025 of 1/3/2017.

19 European Commission, Reflection Paper on Harnessing Globalisation, COM (2017) 240 of 10/5/2017.

In concrete terms the Reflection Paper on Harnessing Globalisation develops a European strategy based on three elements:

First of all, transparency and communication on the added value of globalisation shall be enhanced. This can be done by publishing in full all draft negotiating mandates proposed by the Commission and adopted by the Council.

Secondly, the EU should aim at defining a progressive trade and investment policy agenda with the objective to establish a fair level playing field with EU's trade partners (as opposed to only opening markets and facilitating trade), reflecting values and core standards taking into account people's concerns (i.e. social, environment, tax, consumer protection, working conditions, anti-corruption rules, responsible business conducts, investment clauses, etc.).

Thirdly, the EU should propose means to embed globalisation in a broader package of policies – including fiscal, educational, social – to facilitate adjustment and compensate those regions (e.g. carbon-intensive regions/deprived regions) and groups that lose out from technological change and international competition.

A strategy based on these three pillars would provide for a more comprehensive and more integrated multilevel approach in trade policy. It would reflect the reality that the impact of global trade on people depends very much on the national policy settings in the Member States. Each government needs to create the conditions at home that would allow the potential benefits of open markets and technological progress to materialise. This means strategic investments in education, skills, innovation, and physical infrastructure, along with supportive labour market policies, well-functioning financial systems, effective public institutions and a predictable rule of law. This implies for the EU to act not only through a macro-economic angle but also with a more micro one from the regulatory and investment perspectives, which would attempt at consolidating in a more strategic way all EU policies, instruments and funds, to be rolled at regional level, and along an open and inclusive process.

A more comprehensive and integrated approach to trade policy will also be crucial at the global level (G20, G7, WTO or within other major International Organisations) in order to show that a more progressive trade agenda is now being pursued without falling into the trap of protectionism. The Commission's reflection paper wants the EU to show leadership in this context since it can use the current momentum to reinforce its position in overall trade relations, speed up its ongoing negotiations with key partners, and take the lead in promoting trade on the basis of socio-economic and environmental standards. The EU needs to pursue a strategic approach when engaging proactively in trade negotiations, ensuring reciprocity when it comes to market access and overall benefits, whilst monitoring foreign direct investments and subjecting them to predefined governance rules and principles. The EU also needs to make clear and explicit in its trade agreements that nothing limits the EU's right to pursue policies in the public interest, that no trade agreement will ever lower levels of consumer, environmental, social and labour protection, and that any change to levels of protection can only be done "upwards". Such an approach will only make sense if Europe is equipped with appropriate trade defence instruments, the ability and will to use them, and a strong economic diplomacy to defend its interests.