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*City Law School Research Paper 2020/08*

# Contemporary Issues in Transatlantic Relations

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Wyn Rees, Mai'a K. Davis Cross,  
Claude Moraes, Théodore Christakis,  
Elaine Fahey, Xuechen Chen, Xinchuchu Gao,  
David Henig, David Collins, Timothy Lyons and  
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Michael Curtis, Mike Smith, Inderjeet Parmer, Wyn Rees, Mai'a K. Davis Cross, Wyn Rees, Claude Moraes, Théodore Christakis, Elaine Fahey, Xuechen Chen, Xinchuchu Gao, David Henig, David Collins, Timothy Lyons and Michelle Egan and Veronica Shleina

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## CONTEMPORARY ISSUES IN TRANSATLANTIC RELATIONS

Michael Curtis, Mike Smith, Inderjeet Parmer, Wyn Rees, Mai'a K. Davis Cross, Wyn Rees, Claude Moraes, Théodore Christakis, Elaine Fahey, Xuechen Chen, Xinchuchu Gao, David Henig, David Collins, Timothy Lyons and Michelle Egan and Veronica Shleina

### Abstract

This report summarises the interdisciplinary seminar hosted by the Jean Monnet Chair in Transatlantic Relations at City Law School and the Institute for the Study of European Law (ISEL). The event consisted of three sessions: The Transatlantic Relationship; Transatlantic Defence, Security and Civil Liberties; Transatlantic and Global Trade. It examined topical issues in transatlantic relations across a range of subjects and issues, from trade, security and data, to defence. The seminar reflected upon the state of the art in transatlantic relations, with speakers from a broad variety of disciplines and practice. It considered *inter alia*: How should we understand the future of 'American First' at the end of the Trump Presidency? What is the current state of the US-Sino tech war and what are its implications for EU-US relations? How do UK-US relations impact upon this equation, in light of the Huawei 5G affair? What is the future of the EU-UK-US triangle in international security, where the EU loses the heft of one of its largest members? Will the UK increasingly align in sectoral fields to the US? What do the negotiation objectives of the EU-US and UK-US indicate to us about the future of the special partnerships? With the world's largest sanctions regimes, the EU and US will pose a challenge for the UK to alignment purposes- will it inevitably be the EU first? What are its implications for a more significant FTA between the respective parties? How does the rise of the EU as a global data actor influence contemporary politics? Has the US succeeded in taming the global mobility of its social media giants through taxation threats? How does a multilateralist such as the EU deal with the future of American First after the next US election and the development of the uncertain path of Global Britain? Does Churchill's call for a United States of Europe with the UK outside but closely aligned within the Commonwealth of Nations have any resonance going forward? In any field at all? What developments in the breakdown of the WTO DS system can occur with the aid of the EU, US and UK? Is the US sincere about its reform? Can Global Britain survive a shift outside of the EU without a WTO DS?

**Keywords:** Transatlantic relations; trade; data; security; essential partnership; US-UK

## TABLE OF CONTENTS

<b>SESSION I: THE TRANSATLANTIC RELATIONSHIP .....</b>	<b>5</b>
Michael Curtis, Overview of the work of the EU EEA's Delegation to the US .....	5
Mike Smith, 'The EU and Trump's US: Two Worlds of Diplomacy?' .....	6
Inderjeet Parmar, 'The future of US-UK Relations' .....	9
Wyn Rees, 'The Demise of the Anglo-American Special Relationship?' .....	12
 <b>SESSION II: TRANSATLANTIC DEFENCE, SECURITY &amp; CIVIL LIBERTIES .....</b>	 <b>14</b>
Mai'a K. Davis Cross, 'EU Security & Defense after the Pandemic' .....	14
Claude Moraes, 'The US and EU as Global Data Actors - comparing Transatlantic Data Agreements' .....	16
Elaine Fahey, 'The Transatlantic data and digital trade stand-offs: the US, EU & UK' .....	18
Theodore Christakis, 'EU-US Negotiations on Law Enforcement Access to Data' .....	21
 <b>SESSION III: TRANSATLANTIC &amp; GLOBAL TRADE .....</b>	 <b>23</b>
Xuechen Chu & Xinchuchu Gao, 'The EU-China Cooperation in Digital Connectivity and the US-China Tech War' .....	23
David Henig, 'Are Transatlantic Trade Relations bound to Disappoint? What do Brexit and the Covid-19 Crisis Mean for the Relationships between the UK, EU and US?' .....	25
David Collins, 'Challenges in UK-US FTA Negotiations' .....	27
Timothy Lyons QC, 'Dispute Settlement Provisions in a future UK-USA Trade and Investment Agreement' .....	29
Michelle Egan, 'Federalism and Trade in US and Canada' .....	30

## SESSION I: THE TRANSATLANTIC RELATIONSHIP

### 1. “Overview of the work of the EU EEA’s Delegation to the US”

#### Michael Curtis, Deputy Head of Delegation of the EU to the US

Curtis discussed the role and activities of the EU Delegation in the US as well as the challenges in the transatlantic relationship. The Delegation consists of over 100 people, drawn from the European External Action Service, the European Commission and from the EU Member States. They cover the whole variety of policy issues and competencies of the EU. They are involved in traditional foreign policy issues such as Venezuela, China, Russia, sanctions. They also deal with EU internal policies including trade, climate change, energy, research and food safety. They also cover security and defence issues and have recently been joined by a military advisor. Expatriate staffing is on a rotational basis with the colleagues rotating every four years in the summer. The Delegation deals not only with the State Department but also with other parts of the administration such as the National Security Council, the Department of Transport, the Pentagon (Department of Defence) and Department of Commerce. Although the focus is on relations with the US government and Congress, a lot of work is done on public diplomacy inside and outside of DC, including with Think Tanks and the business community, explaining and promoting the EU, the value of the EU/ US relationship, etc. The COVID-19 crisis has impacted some of the activities (eg, in-person meetings) but diplomatic work has continued.

The transatlantic relationship is still the most important strategic relationship for the European Union and its Member States. It is indispensable for security and economic well-being of citizens on both sides of the Atlantic. It has a key role in addressing the important global challenges of our times. Indeed, this is a time when it seems there is a need to be working ever more closely together to promote security and prosperity, and shape international norms and standards in the era of global competition. At the same time, the broader environment for EU-US relationship today is characterised by increased unpredictability, a more transactional approach, and sometimes even a confrontational approach from some parts of the administration. For the first time since the Second World War, some do not see the ‘European’ as a force of good, as a force of the benefit of the EU/US relationship. While this is not the norm in DC, it is certainly a trend that needs to be addressed. It can corrode the pillars of established EU/US cooperation, especially on trade. The EU/US relationship has always been very close historically bound together with common values but it should not be forgotten that there have always been points of tension and contention with previous administrations. For example, the TTIP agreement negotiation was not successful. However, the EU has to work increasingly harder to explain how it is a partner of the US which is of mutually beneficial use for both sides.

A lot of work is needed, placing an overriding emphasis on reigniting the understanding and appreciation for the necessity of a strong EU-US relationship based on unshakable shared values and interests, which makes the EU an indispensable partner on almost every global issue, for example the trade relationship. The EU is one of the major contributors to US prosperity in terms of jobs and investment. The priority is making sure that we continue our work in positive areas of cooperation. This could be, for example, on Justice and Foreign Affairs where significant cooperation has been achieved, or on the Western Balkans. The job is also about de-escalating tensions, dispelling misunderstandings and avoiding friction. One very topical example is the decision in the EU to loosen the travel ban which was imposed in March in the light of COVID-19. The fact that the US is not on that list has drawn a lot of

attention both in Europe but also in the US. This required some explanation. There is also some divergence on some of the EU defence initiatives which also require some explanation. Trade is probably the biggest issue in the bilateral relationship at the moment and it is difficult and complex. The US imposed section 232 sanctions on steel and aluminium citing national security reasons. They also imposed tariffs on the EU products in relation to the Airbus/Boeing case. Two weeks ago, there have been investigations launched under section 301 into the digital service tax (DST) of four EU Member States, in addition to France, and the EU itself even if the EU doesn't even have a DST.

In the current times, there are more reasons and more interest in working together in de-escalating trade tensions – e.g. Airbus Boeing for example, where the EU and the US have both been found guilty by the WTO of subsidising the industries. It is an area where collaboration is required, as at the same time, some countries elsewhere are busy subsidising their own domestic aircraft industries. These, in 10 or 20 years, could pose a major threat, and unfair competition to Airbus and Boeing themselves. Trade is an example where the negotiations with the US led to a positive narrative following the 2018 Juncker/ Trump meeting to reduce the tensions.

The Delegation works closely with the Congress, private companies and carries out a lot of public outreach. Working to reduce tensions and sanctions on the EU is something which does take up a lot of time. One of the advantages of the EU is that it is seen as a world regulatory leader and powerhouse which generates both respect and frustration depending on who you speak to in the US, for example, in the areas of data protection, privacy, antitrust regulation, etc. While some parts of the US feel that their companies are being 'hit', other companies and even parts of the administration have sort of taken a much more sympathetic attitude to the EU's work in managing some of these issues. There is an interest to work together on the issues, such as data privacy, artificial intelligence to address the challenges which are coming from elsewhere. There is also more that unites us than divides us, such as free speech, competition, innovation. There are slightly more problematic issues, such as climate change, the US withdrawal from the Paris Agreement. The climate is an example where there is also a lot work done at the state level too. For instance, California which sees the EU as a positive example.

It is an election year. The election cycle in the US seems to be permanent at least for every two of the four years. Although the situation is monitored and it is yet to see what happens in November, the EU/US relationship is here to stay. "The tone" and "the style" might be different depending on the outcome but the role of the diplomatic mission is not to get involved in domestic politics. The work on the pressing issues such as artificial intelligence, climate change etc. will continue.

## **2. "The EU and Trump's US: Two Worlds of Diplomacy?"**

**Professor Mike Smith, University of Warwick**

### ***Introduction***

The presentation considered the extent to which the EU and the US inhabit two different worlds of diplomatic practice: on the one hand, the EU's world reflecting a commitment to multilateralism as principle and practice, on the other hand, the US' world reflecting a transactionalist commitment to 'America First' and to ad hoc deal-making as the basis for diplomatic practice. It examined these positions in general, and then briefly in relation to three

current issues in transatlantic relations: the coronavirus crisis, Hong Kong, and climate change. In conclusion, it re-examined the general argument about ‘two worlds of diplomacy’.

Smith first discussed the idea of ‘two worlds of diplomacy’. This derives from a larger study<sup>1</sup> about the difference between the EU and the US expressed as the difference between multilateral and transactional diplomacy. The main argument is that there is more convergence between the EU and the US than might be thought. However, there is also real divergence. This divergence is not ‘all about Donald Trump’ and his administration. There are key questions about trust and reciprocity, and these questions will not disappear whoever the new president is after November 2020. These reflect as much internal politics as external action and also reflect changes in the global arena.

### ***The European Union: Compulsive or Contingent Multilateralism?***

The idea of the European Union as a compulsive multilateralist - as really wedded to, committed to and invested in multilateralism - is very pervasive in discussion about EU diplomacy and external action. There are questions as to how the European Union sees itself as well as about how others see the European Union. There is also a set of questions about the extent to which, in the current context, the EU can be a compulsive multilateralist? Or has it in fact moved to a certain extent towards a more hard-edged, and to some extent transactional diplomacy? This is not necessarily towards the Trump position on transactional diplomacy, but in a different direction from some of the historical directions of EU diplomacy. The Global Strategy published in 2016 talked about a move from what was called ‘effective multilateralism’, as a key cornerstone of EU diplomacy, to what is now called ‘principled pragmatism.’ This was accompanied by a search for strategic autonomy. Some have argued that this is a move towards the European Union seeing itself as a power, which has been underlined by the current European Commission and others who talked about the EU as a geopolitical actor, rather than as simply a multilateral actor. In other words, adding a hard edge to the ways in which the European Union operates. This is accentuated in part by the fact that the liberal multilateral order the EU has always been identified with, is challenged internally within the EU. The key challenge is what some have called ‘illiberal democracy’ and the rise of populist regimes which have a different take on the way the European Union should be viewed, and the ways in which the European Union should respond to changes in the international arena.

There are related challenges to the rules-based order, which is at the core of multilateralism, to which the EU has responded in a relatively mixed way. The Union is still committed to multilateralism, and still prioritises multilateral solutions to issues. Depending on the issue the European response has become less strongly and normatively multilateral. There are tensions between the ways in which the European Union wants to pursue a comprehensive approach to international problems, and its pursuit of ‘principled pragmatism’. These link to the search for consensus and coherence internally and the way in which the challenges that the EU faces are defined by policy elites. There has been a move from a position in which the EU was always accused of being much more interested in process than results, to one in which conditionality and the search for a particular set of results has become much more obvious. Some would argue that there has been a corrosion of trust in the EU internally and externally because of the various crises that have occurred over the past few years and the uncertainty of the EU’s response. This has implications for the legitimacy and credibility of the EU’s policies.

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<sup>1</sup> Smith, M. (2021 forthcoming) ‘European Union Diplomacy and the Trump Administration: multilateral diplomacy in a transactional world?’ in R. Haar, T. Christiansen, S. Lange and S. Vanhoonacker (eds) *The Making of European Security Policy: between institutional dynamics and global challenges*. London: Routledge.



### ***The Trump Administration: Transactionalism in Practice?***

On the other side, there is the Trump administration, which many have viewed as the epitome of transactionalism - the idea that 'you don't do anything for nothing.' There are no central rules, it is all about the competition of interests. There is no grand strategy, there are no key big guiding principles that are external to the United States. 'America first' indeed is the obvious example of a maxim, not a real strategy, which has been adopted by the Trump administration. This leads to a downgrading of multilateral institutions and rules in respect of key multilateral actors or processes: the World Trade Organisation, the Paris climate change agreements, to certain extent NATO, and now in the recent context the World Health Organisation. There is a promotion of what some have called sequential bilateralism and dealing with different partners, in different ways, at different times. Deal-making goes alongside personalization of the diplomatic process, which is very obvious in the case of the Trump administration, but it has its dangers. In other words, reliance on the ability to do personal deals with other leaders is something that has inbuilt risks. There is certainly a rejection of values-based diplomacy, the idea that a set of more general norms beyond 'America First' should be produced and pursued by diplomacy. Allies and adversaries get targeted. This links back to the point about the European Union, which has been described by the Trump administration as a 'foe' in various areas, and which represents the liberal world order challenged by the Administration. There's a pervading area of 'domesticism' and this particularly in election year, which entails playing primarily to the domestic audience, and this in turn translates into foreign policy and relations with the EU. In this case, US policy towards the Union can be seen as the overspill of domestic national interests. This has led to the idea of transnational nationalism, most particularly in the form of the Trump administration's links with the 'illiberal democrats' in the European Union, and the use of the US economy as a kind of weapon against various targets, including the European Union. The result is diplomacy that is piecemeal and contradictory and also a secular erosion of trust – a contrast to the EU's broad preference for rules, processes and 'negotiated order'.

### ***Exploring the EU/Trump Relationship: Three Cases***

The first case is the COVID-19 crisis. Trump has practiced a form of transactional diplomacy within the USA in relation to the states, but this also has effects on US external policies. This links to the competition for therapies and vaccines, the competition with other countries and other actors to establish a particular narrative of how the US is dealing with the COVID-19 crisis. There is something that is essentially internal but also global and transactional diplomacy gives it a certain expression. In the European Union's case there is also a form of transactional diplomacy within the European Union, which has some people might argue marginalised the European institutions and has created a sense in which the European Union institutions have been in the middle of the battle but not actually taking a dominant part in the battle.

The second case is the one of Hong Kong. In one sense this can be seen as a stake in the transactional politics of US/China relations and part of the looming 'cold war' identified by numerous commentators. If you believe that the European Union is a committed multilateralist, it is a contrast to the kind of European Union emphasis on multilateral rules or the rules-based order. Although there is a convergence of interests in terms of broad security and stability, in it is apparent in a number of key ways, that the European Union and the United States are playing different games with different tactics, even when their interests converge.

The third case is that of climate change. There are accidental gains in a strange way from the COVID-19 crisis, but the US has no inclination to consolidate these accidental gains. It is more concerned with the crisis in the oil and gas industries, which has been produced by low oil prices and the collapse of broader economic activity. There is a significant change in the terms of US self-sufficiency in energy, which will feed through into broader foreign policy positions. This contrasts in many ways with the European Union's dilemma, which is that of balancing

economic recovery with very differentiated challenges and responses in different EU member states. In a way, it is a version of the same problem, but it is approached in a very different way. On the one hand, with a search for rules and institutional responses. On the other hand, with a kind of chaotic diplomacy internally and externally. The question arises, can the EU trust the US in this conjuncture? We have to remember that this is part of a long-term process of EU/ US relations as well as a short-term crisis, and that issues of trust and responsiveness have been part of transatlantic relations since the 1950s.

***Conclusions: Convergence, Divergence or Divorce?***

It is still possible to argue that EU-US relations represent a form of convergence, centred on long term geopolitical and geo economic needs, multipolarity, robustness of multilateral and transnational institutions, and the idea that ‘it happened before and it will pass’.

On the other hand, it is possible to emphasise divergence - there are secular trends towards transatlantic differentiation and disputes. These are accentuated by the attractions of other kinds of powers within the world order. There has been a more general infusion of cost-benefit calculations in economics, politics and security. Therefore, it is possible to identify an erosion of the foundations of EU/ US relations.

It is also possible to see the current situation as part of a process leading to a divorce – this would reflect a de-legitimisation of institutions and rules, a corrosion of domestic consensus in the EU and the US and the emergence of new alignments and coalitions. The tendencies towards multilateralism and transactionalism have always existed in an uneasy mixture in EU/US relations: the question is, have we seen something in the last four years, and will we be seeing something in the future, that leads to any fracturing of the underlying consensus on institutions and values that we have tended to assume? In 1968 Richard Cooper wrote in “The Economics of Interdependence” that the two ends of the transatlantic relationship were gaining trust in each other’s institutions, trusting each other’s political leaderships and political norms. Therefore, they were becoming increasingly integrated<sup>2</sup>. The question is, are we now seeing a process in which each of those things is being eroded?

**3. “The Future of US-UK Relations”**

**Professor Inderjeet Parmar, City, University of London**

***Introduction***

There will be important adjustments in international politics broadly and in US-UK relations. Globally, the US operates in a more competitive world and sees its positions eroding. The US is weaponizing its powers particularly via America First. How this plays out will have significant effects on US-UK relations and global politics, not to mention if the neoliberal anti-statist model can survive intact?

Parmar makes four broad points that help to contextualise the understanding of Anglo-American relations. The first is that the Anglo-American relationship is a fundamental relationship. It is a long lived one, many sided, but should be seen in broader terms, not in bilateral terms only and not in a purely bipolar context. In the Cold War there were always other forces in world politics, other than the two superpowers. That particular issue is now very important in dealing with the future of Anglo-American relations. The second point is that although US and British interests have never been identical, they have been similar, yet

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<sup>2</sup> Cooper, R. (1968) *The Economics of Interdependence: economic policy in the Atlantic Community* (New York: Columbia University Press for the Council on Foreign Relations).

despite this there have been many disruptive moments, many moments of turbulence and tension. But, underlying it, there is a kind of shared agreement between them over the foundations of world power. The British and the Americans share a view that sea power is the basis of world hegemony. The third point is in regard to the post-Cold War period. The forces released by the end of the Cold War, particularly globalisation, and a desire to replace the “containment” of communism thesis, with another concept, together have had effects on the Anglo-American relationship, on the role of these two in the world system and on the rise of competition from abroad as well as de-legitimization of elite politics at home. The consequence of that is that the world is much more turbulent. The fourth point is that the levels of global interdependence are so deep, while the sources of friction are not as deep as they were during the Cold War. Even if we did not have nuclear weapons, some realists argue that there is going to be some sort of inter-hegemonic military conflict between China and the United States. There will be divergences to some extent and convergences as well.

One has to think of the embeddedness of Anglo-American relations in global terms and not just purely bilateral or bipolar. It is clear that the origins of this strong Anglo-American relationship, this alliance between the two, arose largely during and as a result of World War II. There are progressive elements of openness and egalitarianism in the postwar system, the recognition of sovereignty, new international institutions, a whole panoply of Bretton Woods institutions. At the same time, there are certain historical legacies of the colonial era. Clearly, its hierarchies and its imperial character had a continuation into the post-War period as well.

Superpower competition and the Soviet ‘threat’ created a rivalry and bipolarity that, for many, constituted the basis of world politics. Yet, there were also post-colonial states that were also important in shaping the post-War era, from the Non-Aligned Movement, the Bandung Conference, the G77 and demands in the late 60s-early 70s from the global south for a ‘New International Economic Order’, which played a major role in shaping subsequent global development. Some of the issues that we face today in regard to global competition, particularly with the United States and the West more broadly, have their origins in the existence of that third sector in the so-called bipolar world. That is the Non-Aligned Movement, the G77, and those demands for an entirely new international economic order had subsequent global implications because of the way they were dealt with. This is reform or renegotiation of the international system launched what later came to be known as the ‘BRICS’, and which also expanded to a large number of middle-income middle powers as well.

Embedded within that phase is a very strong Anglo-American relationship. Yet even though the United States and Britain share so much history, culture, ideology, institutions, they also have had many ups and downs. There is evidence in the literature that shows that the transition from British hegemony to US hegemony was very turbulent in its own way. But underpinning it I think there was a fundamental agreement about the basis of global power and of what is believed to be an Anglo-American hegemony. The US effectively inherited Britain’s domination of the sea; and that sea power became the basis upon which the United States’ hegemony in the world was very significantly underpinned. Part of the way in which the new international economic order and its demands were dealt with in the 1970s, was through massive investments and loans in those economies in the Global South considered ‘middle class’ aspirational. Those ‘middle-class’ global powers, like India as well as China, received investment that might otherwise remained in the West. There was a massive redistribution of ‘work’ and manufacturing from West to East. Those loans and investments helped to generate the levels of development of industrialization which elevated those countries, and particularly from the late 1970s to the present.

Although the role of China in the global economy constitutes a direct challenge to the whole idea of sea power, the recent and developing opposition to China is a largely pragmatic one.

There are two problems as many strategists in Anglo-America see with China's rise and particularly with the Belt and Road initiative. First of all, there is the tactical one. It is such a large programme, but its mechanisms and governance are so opaque, American companies and other Western companies are unable to take advantage of the levels of investment and contracts which are being handed out. They cannot compete on an equal footing with other companies or corporations or Chinese state corporations. They want more financial benefits. Yet, there is also a fundamental challenge to the whole idea of sea power from the Belt and Road initiative. The building of a land bridge across Eurasia, from Eastern Asia to Western Europe, opens up new avenues for trade with the development of new communications and transport technologies which threaten to marginalise, or radically reduce, the advantages accruing from the control of the seas. The majority of world trade is seaborne, the choke points are controlled largely by American, to some extent Anglo-American power. If your goods travel right across the land-bridge from China through to Western Europe then you effectively bypass that system, and you are rendering less effective the power that inhered in control of the seas. This has been underpinning American power for so long. The third point is that in the post-Cold War period the disappearance of any kind of existential threat and what some called the "end of history" required the development of a new concept to undergird US national security strategies. It also opened up the world market, free from an old rival or alternative ideology and ideological system. The promotion of market democracy, coercively or otherwise, became the process by which more and more parts of the world were forced open to global commerce, exploitation, and investment.

The two processes were tied together. The first one - to replace "containment" was by promoting the 'democratic peace': the idea of democracy promotion, as a way of promoting democratic states and polities which according to the theory, would not fight wars with one another. The second one was the idea of globalisation: to release the forces of globalisation even more. Those twin forces of democracy promotion and globalisation had powerful effects internationally in the greater economic and financial power of new emerging states, but also in terms of wars fought to promote democracy, which led to regime change. That in turn led to a de-legitimization of those foreign policy strategies in Britain and the United States, while the levels of globalisation accompanied by automation together drove deindustrialization. This then helps to lead to levels of inequality internally, which combined with a loss of legitimacy, have created the levels of nationalism and populism challenging domestic and international liberal order. This also elevated the so-called 'China, and others' threat and led to the popularity of the appeals to 'America First', and to a so-called Brexit or global Britain. In that context, clearly Britain and the United States remain locked into a very powerful set of relationships with each other. At the same time, their interests have never been identical.

The key thing is the degree to which the conflict within the relationship with China is going to 'play out'. In that regard the position that China occupies today in the global political economy, if not in the kind of liberal values of its political system, is not China's work alone; the United States, Britain, Western Germany and others, played a very important role in the reconstruction and transformation of the Chinese economy and the introduction of economic reform. That is to say that China's elevation as a world economic power and its levels of interdependence and inter-relationships, financially, 'people to people' in terms of investment, trading goods and services, is a result of Western and particularly United States collaborations, helping, assisting intervening there. That has created much more interweaved set of relationships some of which are being undone, though the majority are continuing. What that suggests is the prospect of great competition and tension but not necessarily inter-hegemonic warfare. There is a lot of heated rhetoric of course with some realists arguing that inter-hegemonic warfare is inevitable or nearly inevitable. On the other hand, there is a very positive picture from liberal internationalists that because there is so much interdependence, that this is a 'win-win' relationship for all peoples. But interestingly, there seems to be the

resurrection of a Marxist (Karl Kautsky's) argument that we are living in a system with 'ultra-imperialism', where there are ruling elite or ruling class alliances, which are like cartels between big corporations because they have shared interests. But on the other hand, they do have certain levels of competition too. The relationship is always going to be tension-filled and turbulent. But that may well lead to a tension short of war.

In that sense, there is a system in which there are no fundamental sources of conflict. Finally, there is unlikely to be a kind of an inter-hegemonic warfare between a powerful China and a perhaps declining United States or west. Within that context, there's a jockeying for position within the Anglo-American and Anglo-phone world that China is a great opportunity that everybody sees because they want to take advantage of. Yet, it does represent a number of security problems as well. And it is going to be the playing out of some of those tensions which is going to determine the nature of that particular relationship. The Anglo-American relationship is a fundamental one and needs to be seen in that global context.

#### **4. "The Demise of the Anglo-American Special Relationship"**

**Professor Wyn Rees, University of Nottingham**

##### ***Introduction***

The turbulence in the Anglo-American 'Special Relationship' during the first Trump administration has led to perceptions that it is over. This paper investigates both the bilateral and multilateral strains between the two countries in recent years. The paper argues that the most significant challenge is the growing divergence between the UK and the US on major global policy issues and the diminishing utility of the UK to the US. The future of the special relationship will be shaped by the American election in November and the UK's relationship with the EU after Brexit.

Rees discussed how Trump made clear in his run for the presidency that he was disrupter of international politics and that he looked to change the international order. Certainly, Trump has asserted US national interests, he has questioned international alliances and he has pursued protectionist trade policies. Rees' provocation was that with a country like the UK who seeks a very close, intimate relationship with the United States, has this caused the end of the US/UK special relationship?

Rees tackled this by enlarging the traditional framework by which analysts have tended to look at US/UK relations. They have tended to focus either upon common interests, or looked at sentiment, at culture, at language, at similar democratic principles and values. Some analysts have varied between the two ends of that spectrum and emphasised different aspects of interest or sentiment. Rees added two other kinds of component parts, which are often missed out. First of all, mutual utility: to what extent the UK and the US provide each other with mutual benefit? Second, the institutional relationship, the daily cooperation between officials and military officers that exists below the level of high politics.

The paper began by discussing common interests and concentrated on three examples. First, the so-called 'Trump doctrine;' comprising the retreat from multilateralism, the abandonment of a rules-based order and the promotion of 'America first.' Trump has moved away from NATO and criticised the G-7 and organisations such as the WTO. The British have diverged significantly with the United States. There have been very clear differences over issues such as climate change and most recently the WHO.

The second interest area is China. The American divergence regarding China is not purely

Trump's fault because that was the trend before his presidency. Nevertheless, Trump has declared China to be an adversary of the United States, has imposed trade tariffs on Chinese goods and engaged in areas of military competition. Britain is diverging with the United States over its attitudes to China. There was a more constructive British attitude towards the Belt and Road initiative. In relation to Chinese companies overseas, particularly in high technology areas, there are very significant differences between the UK and the US over Huawei and 5G.

The third big interest issue in the US/UK relationship is Iran. The Trump administration has withdrawn itself from the Joint Comprehensive Plan of Action (JCPOA) over Iran in which the UK played a major role alongside France and Germany. The Trump administration has imposed sanctions on Iran and, in January of this year, assassinated General Soleimani. There is a very hard-line American attitude towards Iran with the UK on the other side openly diverging and trying to prevent the JCPOA collapsing.

The second area of divergence in the Anglo-American relationship is over sentiment. Trump has made no secret of his disdain for sentiment in international relations: he is a transactional president. Over Brexit Trump treated Theresa May with rudeness and hostility, an attitude rarely seen in Anglo-American relations. Another example of the decline in the sentimental relationship was the ambassadorial affair of Kim Darroch. Private criticisms by the Ambassador were leaked into the public domain and the President refused even to deal with the British ambassador. This was one of the few cases in history of a British ambassador being *persona non grata* in Washington.

To the usual focus on interests and sentiment, this paper adds two further dimensions: mutual utility and institutionalism. Mutual utility has also diminished during the Trump period, not least due to Britain's withdrawal from the EU. Brexit has made Britain a less capable and less valuable power for the United States. One example of that is the role that the British have played in European defence, being an interlocutor between the US and Europe, and holding back some of the more radical proposals of the EU. Now Britain has no say in the EU Common Security and Defence Policy and in EU counterterrorism cooperation. In security and defence Britain is now detached from the EU and therefore can offer much less to the United States.

At the same time the US is switching its priorities to Asia. The British can make relatively little contribution to America's focus on the Asia-Pacific region because of resource constraints.

However, mutual utility also has a flip side because there is the question of what role America can play for the UK. As far as the May and Johnson governments have been concerned, Brexit is not supposed to signal any British withdrawal from an international role. Yet amidst the Trump doctrine, where the President has made very deliberate attempts to downgrade the importance of multilateralism and global institutions, this has undermined the UK's ability to preserve an international role.

The final area is institutionalism - the day to day relationship between US and UK officials in areas of security, nuclear collaboration and intelligence. This is sometimes described as the 'substructure' of the US-UK relationship. Arguably, this area has remained close and largely untouched during the Trump era. The intelligence cooperation has remained intimate and has been reinforced by the Novichok incident in Salisbury. Cyber security, particularly in relation to Russia and China, has increased in importance. Furthermore, nuclear cooperation has remained close due to the renewal of Trident and cooperation on a new nuclear warhead, whilst conventional military cooperation has continued over Syria and against the activities of so-called Islamic State.

Three conclusions may be drawn on Anglo-American relations during the first Trump

administration. First, the assumption that the special relationship is over is premature. Three areas of the relationship have indeed deteriorated: common interests, sentiment and mutual utility. The extent to which they have deteriorated has varied and could change under a subsequent administration. Whilst China is a core issue, and Joe Biden has indicated that he shares many of the Trump administration's concerns on China, other issues could change under a Biden presidency. In that sense, some of the tensions between the US and the UK could diminish over time. Second, the issue of mutual utility seems to be a long-term risk for the UK, because its ability to offer things to the US has diminished. Because of Brexit and because of the earlier period of financial austerity, the UK is less valuable to the US. Finally, the institutional relationship has not substantively degraded during Trump's presidency. Yet, its ability to prop up the Anglo-American relationship over the long term is limited. If common interests consistently diverge and mutual utility has been undermined, then institutionalism itself will deteriorate too. The special relationship is in danger in the longer term.

## **SESSION II: TRANSATLANTIC DEFENCE, SECURITY & CIVIL LIBERTIES**

### **1. 'EU Security & Defence after the Pandemic'**

**Professor Mai'a K. Davis Cross, Northeastern University**

#### ***Introduction***

What are the key security and defense policy issues that the EU has been grappling with during and after the pandemic? Why are they now more challenging than ever, especially in the context of a highly strained transatlantic relationship? This talk analyses the trajectory and implications of the pandemic for the EU's defense budget, permanent structured cooperation in security (PESCO), the Common Security and Defence Policy (CSDP), and plans to develop a significant space sector.

Davis Cross approached the EU security and defence in light of the ongoing Covid-19 pandemic. Before the pandemic struck Europe, the EU faced major challenges in terms of security and defence, but it was also using these challenges as catalysts for building a stronger European defence infrastructure and capacity. Despite the economic downturn that is experienced the EU is likely to be able to continue forging ahead with many of his plans on security and defence. This particular argument may acceptable yet from the American perspective it might seem controversial.

First of all, there are a number of catalysts that were present before the pandemic and have been present for a while. That really pushed the EU towards looking to create a defence Union, something that was necessary but also very challenging, mainly in terms of national sovereignty concerns. One of the catalysts was and is Russia. At the beginning of this century it was almost taken for granted that Russia under Putin's leadership was gradually moving closer to the West and that it valued its relationship with NATO. There was even talk of Russia potentially joining NATO. This was a much gradually closer relationship between Russia and the EU, except when things started to turn for the worse following the Russian-Georgian War in 2008 and with the incursion into Ukraine, the annexation of Crimea. Now Russia engages in a hybrid war with the West nearly constantly. A second catalyst is Brexit. The UK has always

of course been a reluctant Member State. It has stood in the way of these agreements. When it was known that the UK was planning this departure there was a sense that the rest of the EU member states could actually start to 'move forward with the things they would wanted to do for some time,' but that the UK had stood in the way of achieving. The third catalyst is Trump and the rift between the EU and the US. Essentially, with this focus more on security and defence, the election of Trump threw the future of NATO into an area of uncertainty. Initially, for Europeans mainly because Trump was literally blatantly saying that he did not see the value of NATO and was not going to abide by some of the key provisions of NATO. Immediately after the election of Trump only 9% of Europeans thought that the US would do right in its foreign policy. The foreign policy chief at the time, Federica Mogherini immediately said upon hearing of Trump's win in the election, that there is a need for Europeans 'to take care of themselves' in security terms, specifically emphasising the EU's role clearly in contrast with the US as a peace superpower.

More generally, whenever the relationship between the US and Europe becomes more 'rocky,' there is a tendency for Europeans to act separately from the US to prepare to move forward, even though they would prefer to act as the transatlantic alliance. This kind of pattern may be seen where for various reasons the US 'pulls away' - maybe the new leader has different norms than Europeans would prefer, or the US is turning towards isolationism, and this presents a challenge for Europeans which results in more effort to stand on their own two feet. Another part of this pattern is that in response to the European effort to stand on its own two feet, the US frequently gives mixed signals. On the one hand it states that Europeans should contribute more to NATO, but on the other hand, back in the 90s Madeleine Albright 'chastised' Europeans for potentially threatening the viability of NATO. This happened even with Trump's first trip to Europe. He said Europeans 'needed to do more' then two years ago, European solidified permanent structured cooperation and defence and then the response again was, don't go too far, because this could undermine NATO. This pattern is something that so far has been kind of encouraging European strategic autonomy and so outlined in the 2016 EU global strategy.

Trump's broader approach undermines the liberal world order and causes many around the world even to question whether it should exist. There is even a stronger sense among EU leaders that the only way forward is to work together. There are a few initiatives as part of the Defence Union plans. One is the permanent structured cooperation as part of a common security and defence policy. This now includes 47 projects that have been introduced in three rounds since 2017. It something that is still in progress, so the outcomes are yet to be seen. Yet, it does represent a breakthrough in terms of defence as it actually means structural integration. It is very different than in the past what member states were willing to do. A second thing is the European Defence Fund, which is another breakthrough because it's actually providing common financial support. A common fund to help bring military cooperation closer and more integrated. Some said this is the biggest step forward and EU defence since the 90s. And in terms of the funding, it included €25 billion for research and technology and €500 million on development and acquisition. Earlier this month, the Commission added another €205 million. This seems relatively small if thought about the overall annual EU combined defence expenditure at about €220 billion euros. Still, this is a major step forward with the new budget plan which is being determined later this month.

The third part about the Defence Union is the eventual creation of European Armed forces. Another to highlight is the EU advancement in the space sector, the space economy in low Earth orbit. For the first time, there has been the creation of the European Commissioner devoted not only to the internal market and the defence industry, but explicitly space. As of 2016 there is a space strategy for Europe. The total global space economy right now is worth almost €400 billion. And in 2040 it is expected that this will triple in size. This is a major future



area for Europe and something that Europeans have been closely paying attention to. Within a decade it is expected that there will be a significant thriving low Earth orbit ecosystem, which is connected to economic, technological development, manufacturing, science. The European companies are a major in this they produce - about a third of the world's satellites and it is a significant part of the European economy. As far as the plan for the budget it was discussed that €16 billion euros would be dedicated to this. In contrast, the plan for the defence on was €13 billion euros.

What about the impact of the pandemic? The impact of the pandemic on the budget is indeed that there is this deep recession and the new kind of budget to be potentially determined on July 17th to the 18th. There have already been talks about decreasing the amount of funding available for Japan: before it would be €13 billion and now it will potentially be scaled back to €8 billion. Despite the fact that there is a lot of leeway available in terms of reducing duplication of spending, (the US has 30 weapon systems the EU has 178; the EU has 17 types of battle tanks and the US has one) even with that decreased budget there is a lot of potential to move forward. Also, just the initiative itself of having a common defence fund will be helpful going forward to achieve the political will. The last point on space on which there are talks about reducing the budget by \$1 million from the \$16 million. This is for every \$1 invested in space, there is usually a \$14 return on investment. This is an area where the EU is quite aware that this has a lot of value for money and it is worth pursuing those goals also related to security and climate change going forward.

## **2. “The US and EU as Global Data Actors - Comparing Transatlantic Data Agreements”**

**Claude Moraes, Former Labour MEP for London, Ex Chair LIBE EP Committee**

Addressing the question - how does the rise of the EU as a global data actor influence contemporary politics and the dominant position of US social media giants? The EU has embarked on a process of data protection and privacy reform. Has that influenced what is happening in the US? Data agreements exist between the EU and US in trade and security such as Privacy Shield or the anti- terrorist Passenger Name Records (PNR) and Umbrella Agreement. Obstacles reflect different perceptions and speed of movement on privacy and data protection issues on each side of the Atlantic.

Moraes talked about the data protection and privacy relationship in the transatlantic relationship, which has not always been an easy one. It has been met by the United States sometimes with frustration. The Lisbon Treaty acquired quite a lot of powers in this area, legislative powers during the time when many of the international agreements were being put together on data protection, both in the security area but also in the commercial area. It has been a really rocky road but also an interesting and important one. Paul Nemitz, one of the architects of GDPR, was quoted on artificial intelligence “in Brussels, we’ve departed from the idea of ethics and arrived at hard laws.”<sup>3</sup> He referred to regulation in relation to the United States. In particular, he said that now people have to come to understand that ethics alone would not do much than the area and heavily dominated by those powerful players, and that legislation is necessary in different kinds of areas, including artificial intelligence. He said that

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<sup>3</sup> Paul Nemitz in Janosch Delcker, ‘Decoded: Researchers speak up — The book Silicon Valley won’t like — US facial recognition debate’ (1 July 2020) *Politico* available at <https://www.politico.eu/newsletter/ai-decoded/politico-ai-decoded-researchers-speak-up-the-book-silicon-valley-wont-like-us-facial-recognition-debate/> accessed 31 July 2020.

this would be the line, adopted by the Commission led by Ursula von der Leyen. He also said that there is now unprecedented digital power by the so-called GAFAs such as Google, Amazon, Facebook, Apple and Microsoft in the United States. He balanced it by also referring to Tencent, Alibaba and Baidu from China. He was talking about their unprecedented power not just in terms of their role social media power but their political power as well. Now, why was he talking about this in relation to AI? He was as the architect of GDPR bringing us up-to-date on a long narrative and story, which had its beginnings in the GDPR.

The snapshot is that, trying to understand the divergence between the European Union, which does not have many of these powerful players, i.e. Google, Amazon, Facebook. In the European Union data protection was always seen as a fundamental right recognised by art.8 of the Charter of Fundamental Rights, or art.16 of the Lisbon Treaty, which is legally binding in the Union when developing all of its policies, either domestically or internationally. In the United States the Constitution did not have an explicit reference to the fundamental right to privacy. The Fourth Amendment protects personal privacy and dignity against unwarranted intrusion by the state, where the individual is a legitimate expectation to privacy. It essentially covers public processing not commercial processing. It does not extend to non-US persons. As it was seen with the GDPR there is a set of consumer privacy laws in the United States like the California law, for example. It is important to understand where the thinking comes from in basic terms. The GDPR is the major diversion or divergence between the EU and the United States that took effect in 2018. That was the biggest piece of legislation to come up with European Union 'point blank.' It was the biggest and sometimes divided, but really a major piece of legislation. The European Union now thinks of the GDPR as a success. It seems to be a global regulation that the EU will stand by. The United States sees it is very complex. Mark Zuckerberg seeing in the senate hearings that they need to achieve GDPR. There are lots of voices in Congress and the Senate looking for the adjustment of the power for the United States as there is no comprehensive set of rules. For the EU the story is that this is the development of the single market. It is an attempt to be a global regulator as well as the European Union regulator. It is a way to foster a digital transformation. It is a way to be a competitor to the US and China. It is a way to foster privacy rights and the European values.

But what does it mean to the US? This is where it gets complex. Mark Zuckerberg admits the need for the GDPR as well, but the reality is a bit more complicated. It is now accepted in the United States that there is a need for an equivalence. Otherwise, there are continuing problems in many of the data transfers of many of the complex packages, Privacy Shield, which is a kind of transatlantic relations vigil with problems, it is a kind of departure in transatlantic relations, this is a hybrid-style governance. There is this commercial data transfer for companies, but it is riddled with problems. The GDPR was the basic 'building blocks' of creating a comprehensive modernization of data protection so that any of data transfer agreements would be sound. The problem was that there was no equivalence in the United States. There was an acknowledgement and there is an acknowledgement no United States about this.

But why is it complicated that Facebook say they need the GDPR without probably meaning it? The problem appears to be in the discrepancy between what Facebook said and what it actually meant. And what they really mean is perhaps they do not want the successor to the GDPR, which is e-privacy legislation. E-privacy legislation is about explicit user content for online tracking of cookies. It challenges the business model of Facebook. It undermines what Facebook wants. The problem with the transatlantic relationship is that the big social media players are afraid of their business model to be challenged. It is the same with Google. This affects the transatlantic relationship in many ways. It also affects many transatlantic dealings. It is about this narrative of regulation versus self-regulation or EU-style regulation. This is the

currently emerging conflict which needs to be resolved. It is now coming through to further issues like AI.

### 3. “The Transatlantic Data and Digital Trade Stand-Offs: the US, EU & UK”

**Professor Elaine Fahey, City Law School**

#### ***Introduction***

The talk considers the awkward transatlantic stand-offs on data and digital trade between the EU-US on the one hand and UK-US and UK-EU on the other. Transatlantic data flows constitute of the most sophisticated in the globe- e.g. as to the EU-US Privacy Shield covering over one billions consumers and citizens, pending the outcome of the forthcoming *Schrems II* decision. Digital trade does not fall part of the current EU-US talks which but is a key dimension of the UK-US negotiations potentially. Yet can digital trade unite the transatlantic relationship, even post-Brexit, more than divide? The UK has made significant efforts to obtain an adequacy decision from the EU but also proposes to diverge from EU data rules whilst keeping the GDPR. Can the UK evade the reach of EU data law Can the US avoid adopting ‘a’ GDPR?

#### **Transatlantic Data Trade Between the EU, US – UK: Unity over Division?**

There are difficult questions arising legally and politically as to transatlantic data. Fahey argues that transatlantic data and digital trade have a unique formulation and also opportunity to be a point of unity over division. ‘Transatlantic’ is framed in terms of being the US the EU and the UK. There are many difficult legal issues, emerging in this jigsaw. The question is how to legally define transatlantic data? It is interesting yet complex one as well as extraordinarily broad. It is a highly ‘regulations’ area in contrast to so many regions of the world in terms of just the actual number of provisions, the amount of governance and arrangements. In general, transatlantic data flows today, whilst being some of the most sophisticated globally, are extraordinary unparalleled for legal reasons. Data and digital trade are linked because digital trade is currently not ‘live’ or interesting part of either the US trade negotiations or Brexit. It is on the agenda, it is a key dimension in UK- US negotiations. It makes an interesting focal point to ask to the contemporary understandings of data and trade. Avoidance of new law becomes very difficult for any of the parties given that the EU is a very strong global actor in data. This is a first mover’s advantage constantly in terms of regulation in this field. Yet it is very much imperilled by the Digital Services Tax dilemmas in particular in the transatlantic triangle of the UK/EU, EU/US.

Transatlantic data is a vast amount of legal infrastructure and types of agreements with a lot of joint governance. From Personal Name Records to the Swift Agreement to the Privacy Shield, Umbrella Agreement and to current negotiations is a fairly remarkable set of data flow arrangements that are in place and the governance is reviewed annually. There is a capacity for the EU and US to engage with each other in learning as between the two legal orders. The US missions to the EU’s intervention in the GDPR just very recently where the US made some interesting comments on how EU and US privacy systems, have developed very in different ways and have very different understandings of each other but ultimately have share a lot of core principles across a range of commercial and criminal justice context. That varies from the Privacy Shield, the Umbrella Agreement in particular, and the Passenger Name Records; there is an extraordinary level of intervention between the legal orders in a very positive way even with some model critiques. It is ultimately about the fact that there is an institutional infrastructure and architecture of arrangements as to data flows and privacy which matters in

today's world, because of the scale of it. As it stands, there have been a number of key legal challenges to the Privacy Shield the EU/US Privacy Shield e.g. in the cases of *Schrems v Data Protection Commission*, *Schrems v Facebook Ireland*, *Digital Rights Ireland Limited*, *La Quadrant du Net*, *Facebook Ireland & Schrems*.

In *Schrems II*, the Advocate General Saugmandsgaard Øe had given his Opinion, which essentially reaffirms the sufficiency of standard contractual clauses, but ultimately calls into doubt the US protections for EU data in the national security context and also questions the independence of the newly appointed EU's Ombudsman. There is variety of ways in which one may make some predictions about the judgment. Ultimately, of the likely outcomes to the CJEU decision, they were all highly problematic for the EU. And this presents a lot of concerns for business, for consumers and individuals who are affected by the Privacy Shield to operate under or who decide not to use it on the basis that there are too many legal frailties or uncertainties arising. This is difficult and challenging context.

### **The Fate of Digital Trade in EU-UK Negotiations?**

The question of digital trade is arguably one of the most important aspects of our current society, but it also has a lot of doubts as to its legal definitions just like data. There are many disagreements among scholars as to what is e-commerce precisely, what is included within the digital economy, how high should the standards be. Looking at the Brexit negotiations there is only one of 34 chapters. It is quite striking, however, as to the depth and breadth of the arrangements being reflected upon despite the fact that it is certainly far down the agenda. Looking at the USTR/UK negotiation objectives on digital trade there is a very vibrant set of ideas and cutting-edge understandings from his perspective as to the future of digital trade.

The EU's position is highly contemporary in the current negotiations on this side like TTIP and JEEPA negotiations and expressly follows the EU/Australia FTA digital trade chapters, which aligns with the UK's objectives. The critique has been levelled at the EU for its focus upon data localization, and whether or not the EU now differs so philosophically from the US, the UK and Japan that digital trade is not a meaningful area to speak about. This does not seem to be a particularly accurate view - for example, if we look at the Japanese approach to the 'right to be forgotten' and European case-law principles, there has been a remarkable absorption of a lot of case-law into Japanese law despite the fact that data was originally outside the trade negotiations.

It is also important to note, that very recently the UK has made very significant efforts to get an adequacy decision from the EU, but also to propose that it would diverge from EU law, whilst also stating that it would keep the GDPR. A large number of people remain concerned uniformly by the EU's, UK's Investigatory Powers Act 2016 with respect to surveillance issues and how they might relate to EU fundamental rights Law. Some expressed concern about derogations from the GDPR and the UK Data Protection Act and the fact that if they leave both the Charter on Fundamental Rights and eventually the ECHR there could be difficulties in isolation the contents of a data protection right.

### **Is Avoiding EU law Possible? Juggling Whose Laws?**

'Transatlantic juggling' is good way to reflect upon the power that the EU have generated as a global data actor, but it explains this tremendous US frustration with the GDPR if we look at the US's comments to the EU's GDPR review, yet there is an economic argument that a lot of us are forced to accept it. On the other side of the Atlantic we see that the UK stated that it will abide by the GDPR yet somehow also managed to diverge. This leads to the reflection that many are considering as to how to understand what alternatives there might be. For

example, the Asia-Pacific border, Commission's cross-border privacy rules, the APEC CBPR was adopted by Japan, Singapore Korea Canada, Mexico and the US. It is far from obvious that this could be the case; one may have heard of Zuckerberg's contention that there should be a US GDPR or the movement towards some form of regulation in the US sphere along the lines of EU law remains a vibrant debate. Ultimately, however most likely is that the copy-paste version of the UK/US Privacy Shield will emerge, similar to the US/Swiss Privacy Shield which is a copy paste model of the US Privacy Shield, to some degree. A remarkable degree of convergence, and also the avoidability of EU law, perhaps being quite difficult in a global context. It is also important to remember that in recent times the US regulatory capture of data has been quite weak in the past and that has emerged an extraordinary package in recent times, such as the strategy for data, the single market for data proposed in 2025, a common European data space and some of the areas of AI regulation, the Digital Services Act. It is an extraordinary amount of regulator activity which is only likely to buffer the EU further and this very complex field but one way that you clearly have some form of 'first mover advantage' to the rest of the world in terms of the high standards that it projects.

### ***Digital Services Taxes***

Digital matters raised a lot of complexities and perhaps convergences but also significant digital services taxes. The OECD has been interesting negotiations for some time in a global digital services tax. Only EU Member States and the UK have already introduced these. They have been brought into law in some instances and the EU has said that it wants to introduce additional service tax by the end of this year, pending the OECD's developments. The US has just recently left these negotiations and has launched a whole range of investigations into France's digital service tax but also to many other countries including the UK. This raises the question about tariffs and in the digital arena as being an area of significant conflict and challenge to regulate. However, one might say that maybe on a second more convergent note to conclude, Facebook is before the US courts, where the IRS is suing it for \$9 billion. There has been focus and attention particularly on Facebook and its efforts to evade EU regulatory controls. However, Facebook has also said it is willing to pay more taxes in Europe. Digital services taxes remain a point of significant divergence in current times but ultimately the objectives may be a lot more aligned in some respects and they present a very important future for how we understand data and digital trade in the transatlantic space.

## **4. "EU-US Negotiations on Law Enforcement Access to Data"**

**Professor Theodore Christakis, University Grenoble Alpes**

### ***Introduction***

On September 25, 2019 the EU and the US started officially negotiations for the conclusion of a very important transatlantic agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters. This presentation will present the EU-US divergences on the architecture of the agreement and existing options under EU law. It will also discuss what could be the eventual role of the CJEU. Indeed, it has been said several times that the EU-US Agreement risks to be deferred to the CJEU for judicial review. How could this happen (or not happen)? What are the different precedents and scenarios?

The negotiations are important yet there was little attention on these issues. There have been four rounds of negotiations, which focused on the issues of substance. There are a lot of issues of substance and divergences between the EU and the US on these, including for

instance procedural and fundamental rights safeguards that should be introduced in the agreement. In order to comply with European human rights law, for instance, ensure that data may not be requested for the use in criminal proceedings that would lead to the death penalty or also other issues such as the fact that the EU wants to complement the Umbrella agreement in order to introduce additional safeguards. This created a lot of reactions from the USA and other issues including the fact that the EU wants the agreement to be entirely reciprocal. This also creates a problem of form, and a divergence is concerned with the architecture of the agreement, and some important procedural issues. These issues are extremely important because when negotiators have been wise to focus on your substantive issues and leave the very tricky issues of form and architecture of the agreement for later, nonetheless, these are entirely linked. The content depends on the form of the agreement.

First of all, these negotiations come within the context of law enforcement cooperation, judicial matters, and also data protection issues. The EU already has weight transatlantic agreements concerning law enforcement cooperation with the US, for example the Umbrella Agreement or the PNR agreement, the extradition, Mutual Legal Assistance agreements. Some others, e.g. Privacy Shield, is not international from the point of view of international law, it is not the binding international agreement under the Vienna Convention on the Law of Treaties. It is just an arrangement which has been set up. This has a lot of consequences that could arise after a judicial review by the CJEU. As mentioned *Schrems* case, things are not the same as if the court had to control an international treaty already enforced.

There is also a need to understand that there was a clear realisation by the two parties in the EU and the US about the need for such an agreement on e-evidence. Today we have a huge problem linked to the globalisation of criminal evidence which is creating significant challenges for law enforcement. Often, there is a need to investigate a crime committed in e.g. London, Paris or Belgium, the evidence is found in another jurisdiction. Yet, there is a need to have access to emails, documents, photos, anything that is stored in the Cloud and very often this is stored in another jurisdiction. In 2018 the European Commission said that electronic evidence is needed in around 85% of all criminal investigations, that is not just cybercrime that is *all* criminal investigations. In two-thirds of these investigations there is a need to obtain evidence from online service providers Google, Amazon, Microsoft or others who are based in another jurisdiction. In order to respond to these, in 2018 the United States adopted the Cloud Act. There are two important parts in the Cloud Act: the first part put an end to the litigation in the US Supreme Court concerning the *Microsoft* case deciding that the US will be able to request data from service providers, irrespective of where they are stored even if stored in Europe and concerned with a European citizen. The second part of the Cloud Act created a new mechanism in order for countries to be able to conclude the executive agreements with the United States and be able to lift part of the blocking statute that prohibits any kind of service provider under the US jurisdiction to give content the data to a foreign state.

In the EU we have the e-evidence developments which was about to be discussed right now in the European Parliament. At the same time the two parties EU and US realise that they need to conclude a transatlantic agreement, especially in order to resolve conflict of laws. As it stands now the cloud conflicts with the GDPR, when the evidence is introduced it will conflict with the Stored Communications Act in the United States. The only way to do this is to conclude the transatlantic agreement. But the problem is that there are divergences about what how this agreement would be structured and what could be its scope and content. Among other things, the Cloud requires a certification by the Attorney General in the United States, that the foreign government with whom the United States concludes this agreement respects some safeguards and some human rights standards imposed by US law. The only way to do this is to conclude bilateral agreements with Member States. Having that framework agreement with the EU and some other Member States but not all Member States. For

example, the United States is very reluctant to conclude such a Cloud Act agreement with Poland or Hungary, because of the rule of law problems. The US thinks that they will not meet the certification requirements of the Cloud Act.

On the other hand, the EU has an entirely different approach - it does not want a framework agreement, followed by the bilateral e-evidence agreements with the members states. It wants to conclude the same standing EU-wide, comprehensive agreement to avoid fragmentation in this field. The EU finds it difficult to engage in a process with the United States, leading to a legal regime which will treat EU member states unequally e.g. different standards for Germany and France and different for example, for the Eastern European EU member states. There is a real problem concerning the Visa Waiver programme. Despite the fact that the EU law has a fundamental principle of fair use common visa policy approach, visa reciprocity does not exist in fact because the treatment of some EU member states varies.

He discussed possible architectures for the agreement and more precisely, the use of the precedents concerning transatlantic agreements and data protection agreements with the United States; as well as the three scenarios, the mixed agreement scenario, but this might be interesting to have an agreement which will be signed both, and ratified both by the EU and member states. In reality this is not solution because this will not give the possibility to the US to pick and choose between EU member states. This is something to consider matching all the different scenarios. One the comprehensive set of standard EU agreements, like the PNR model or the Umbrella Agreement model with United States and the idea framework agreements followed by the bilateral ones, a little bit like the MLA or Extradition Agreements model. This was an entirely different context and extremely tricky and very time-consuming. The Extradition Agreement with the EU were concluded in 2003, negotiations started immediately after 9/11 in 2001, yet only entered into force in 2010. It took more than eight years. In order to conclude all the benefits of switching six other agreements needed in order to have this legal regime. There is no time to wait for an effective legal regime on the evidence. There is a real need of some creative ideas so that we will be able to do conclude a Treaty that will respect the concerns of both parties.

### **SESSION III: TRANSATLANTIC & GLOBAL TRADE**

#### **1. “The EU-China Cooperation in Digital Connectivity and the US-China Tech War”**

**Xuechen Chu and Xinchuchu Gao, King’s College London**

##### ***Introduction***

Over the past decade, the concepts of digital connectivity, digital economy and cyber security have become growing policy issues as well as a new focal point for international relations. This research examines the EU-China relationship in the domain of digital connectivity against the backdrop of a rising technology conflict between the US and China. In particular, Xuechen Chu and Xinchuchu Gao’s presentation analyses the following questions: (1) What is the current state of the US-China tech war, and how does the US-China tech war impact upon the EU-China cooperation in digital connectivity and technology sector? (2) What are potential

scenarios for the EU-China cooperation in digital connectivity in light of the rising tension between the US and China?

### ***Overview of the US-China Tech War***

There are several concerns with raised by the US government. The first one is regarding China's digital trade policy. The first one is the role of the Chinese government in China's economy. It has been argued that Chinese companies, especially in the ICT sector have received massive financial support from the Chinese government, which will allow them to develop competitive advantages over foreign companies. In particular, in the ICT sector foreign companies have a rather limited access to China's domestic market. It is controversial that one of the pre-condition for access to Chinese markets is sharing intellectual property with Chinese partners. Another concern is about the expanding China's investment abroad, which has led to increasing security concerns. Due to these concerns in the past two years, the US has developed a seriously adverse policy towards China. They are mostly unilateral, including increased tariffs and investments screening measures and export controls measures. The US and China have conducted bilateral negotiations to address the trade disputes between them. Two features can be observed in the recent development of US trade policy towards China. The first one is the US is adopting a more 'offensive' approach towards China. The previous investment screening measures can be understood as more 'defensive' approach because they are designed to protect the US companies from Chinese investors and suppliers. However, the most recent export controls measures are more 'offensive' because they are designed to inhibit Chinese companies with critical technologies that could be used for potential trade proposes. Also, we can observe that the US government mostly relies on bilateral and unilateral measures. The US government has made it very limited use of the WTO framework, because it thinks the WTO framework is not well-equipped to develop challenges posed by China.

### ***EU/ China Cooperation and Competition in Digital Economy.***

The EU and China are very unique partners in this fields. On the one hand, the EU tends to consider China as a state that has a different approach towards digital governance. The EU itself has consistently stressed values and norms in its cyber policy, including protecting human rights, the rule of law and sustainable development. However, China has adopted a different one because China's approach is more pragmatic, with more focus on economic growth and infrastructural development. From this perspective China is not regarded as a like-minded partner by the EU in this field. However, despite the fact that the EU and China have different approaches towards digital governance, China is still one of the most important partners in this field for the EU because the EU is relying on China's ICT supplies. The US/China tech war has made the situation even more complicated because since 2019 the US has proactively lobbied EU countries to exclude China's supplies from their 5G networks. For the EU it is quite difficult because for now the US is still the EU's main security provider. The EU finds itself in a rather difficult position between the US and China and faces pressure from both sides.

### ***Opportunities and Challenges for the EU***

Despite the volatility caused by the US/China tech war there are a number of opportunities. First of all, now would be a perfect timing for the EU to enhance its own profile as a digital power and more importantly to provide an alternative model in ICT development cybersecurity and digital connectivity, as opposed to the American and Chinese model. This is especially so when we take into consideration the fact that both the US and China, when developing technology model, they pay relatively little attention to societal issues such as inequality



caused by the Fourth Industrial Revolution, gender equality and sustainability. The EU is in a better position to attract talents in ICT sector by investing more in terms of basic and fundamental research. On a separate note, the current situation may provide the EU with a better opportunity to deepen his cooperation in digital sector, with a number of like-minded states in Asia, such as Japan and South Korea. Then it can take up the leadership role again to promote multilateralism via, for example, WTO and also to cooperate with other regional organisations such as ASEAN in Southeast Asia. Closely related to that point. The EU may be in a very good position to strengthen its role as a soft security provider and a soft security player in Asia, which is in line with the US recent security strategy and adapted version of the EU's foreign policy strategy towards Asia.

However, a number of challenges remain. First of all, the EU has to address the high level of internal dispersion amount, its Member States in digitalization and digital adoption and the relatively slow development of the new generation of digital infrastructure. The second potentially challenging obstacle is that the EU might find number of difficulties in selling its own model and philosophy of digital connectivity because it needs to bear in mind that the EU is not the only international player that has been promoting the idea of a human-oriented or a citizen driven digital economy. Other actors such as Japan and South Korea also play a very important role in these aspects. Furthermore, Europe still lags behind the US and China in multiple ICT sectors, especially in the AI and e-commerce with a relatively limited number of leading companies with global outreach and with the potential to reshape the system in digital sector. The last challenge is about Europe's over reliance on both the US and China in digital area. This is an issue which can hardly be addressed in short-term.

### **Conclusions**

Overall, the EU has struggled to position itself in the current US/China tech war. With the specific context of the EU/China cooperation, even though the EU recognises the importance of the partnership their relationship has been negatively affected by the changing environment caused by the US/China technology rivalry. However, arguably, the EU will not adopt an approach towards China in ICT sector which is as aggressive as the US one. The EU needs to strengthen its own digital autonomy or the so-called technology sovereignty and to develop a more coherent Brussels-level agenda to adjust it challenges posed by the current situation.

## **2. “Are Transatlantic Trade Relations bound to Disappoint? What do Brexit and the Covid-19 Crisis Mean for the Relationships between the UK, EU and US?”**

**David Henig, ECIPE**

### **Introduction**

The UK having now left the EU is in trade talks both with the bloc and the US, trying to navigate issues where their approach differs, most notably around standards and regulations pertaining to food. Meanwhile all of the EU, UK, and US face politicians and public increasingly sceptical of China and demanding to put globalisation into reverse. Yet in 2016 trade talks between the EU and US, in part to help set the rules against Chinese competition, failed, and the US has been undermining the functioning of the WTO. Against this unpromising state of transatlantic trade policy in 2020 can we look forward with any optimism to future relations, or are transatlantic trade relations bound to disappoint?

Henig discussed the transatlantic trade relations in the EU/US and the UK. The essential

argument is that they seem to have been somewhat disappointing for twenty-five years. There has been a number of failed initiatives with Brexit making it worse. There are influential voices in the UK having moved from the EU side wanting to pick the US side and deepen the conflicts. There is a possible solution, but it would involve facing down domestic lobbies and that is going to be very difficult. And that in the meantime during these twenty-five years China has become a major trade power with their own very different interpretation of many trade rules, meaning now it is almost impossible to manage three-way conflict in the trade system. There is a legacy of that the failure of TTIP.

The last time the US and the EU were seen working together on the global trade system was in 1992, something called the Blair House Accord. It is a crucial facilitator for the creation of the World Trade Organisation in 1995 and that point is a great boost for global trade. In 1995, the US and EU launched the new transatlantic agenda, including the launch of the transatlantic business dialogue. The truth is it does not really deliver. In 1998 some Mutual Recognition Agreements are negotiated except most of them never in fact entered into force or do not in fact deliver. For example, the Mutual Recognition Agreement in 1998 on pharmaceutical inspections is renegotiated and finally comes into force in 2019 - 21 years after it was first negotiated. In 1998 the WTO fines against the EU in the case of a beef hormones. This goes to various dispute processes and appeals and in 2008 there was a more mixed ruling. The dispute is still ongoing, and it does not seem to be resolved anytime soon. In 2007 there is another upsurge in attempts to create a stronger transatlantic trade relationship with the launch of the transatlantic Economic Council. This was followed by a launch of a high-level Working Group on Jobs and Growth in 2011. This leads the launch of the TTIP talks in 2013, which then failed by 2016. In fact, many of the fundamental issues not having been really discussed. The last four years of growing tensions just exacerbate what was already happening between the US and the EU. Furthermore in 2016 Brexit happened.

Rather unfortunately, those fundamental issues within the existing world trade system have not been resolved. Both the US and the EU want the trade system to work in their own way according to their interpretation, and they will not back down from that. This is at the heart of the failure of TTIP. It is fundamental in their differing approaches to managing their own modern regulatory economies. Both want access for their producers to their own markets, but the domestic systems mean that they interpret WTO rules in a very different way. This is not about the precautionary principle. This is about regulations on food technical issues, sanitary and phytosanitary technical barriers to trade. In the US a lot of what happens is really independent of the federal government, very strong independent regulators and frequent state-level regulations. Business has to deal with a plethora of regulatory bodies, often using large numbers of intermediary services, such as lawyers and third-party testing bodies and having been through these hoops the role of the US Trade Representative is to confirm all these US regulations should be sufficient to reassure that everything is safe. Under the WTO rules everything is fine, the products should be automatically on the market of other countries because of rules on equivalence. The standards are high and international so everyone should all accept their products.

It is drawn from a position where because of the regulatory system, because of fragmentation, there is very little else that the US can do. They are trying to get the US goods on the market, whereas the EU is more centralised. It has very strong regulatory bodies but under the control of the Commission. The process is based around the Member States consenting to rules, and once they have done so the EU wanting not to reopen those. What they would then state is that they would want the regulators to work together to come to a solution, without reopening the rules. Even though potentially they could. We might recognise your products, if they meet our rules but we are going to be very careful about it. The US is wanting just on automatic access for their products. The EU wants a regulator-to-regulator dialogue and that did not

happen with the US. When that comes into World Trade rules it just ends up with a fundamental inconsistency between the two sides that has been ongoing for a while the EU is not going to accept chlorinated chickens and beef treated with hormones and various technical standards, because they have been through a very painful process with Member States and this is they have reached the decisions. The US states that is against World Trade rules which it may or may not be. The EU is not going to reopen it equally. This is a situation where neither side is willing to change leading to the ongoing tension. This is not going to be solved by WTO cases and it never really got very far in solving this in TTIP.

One of the arguments for TTIP was to allow the EU and the US to at least have more influence against the rise of China and that failed. We are now in the exact predicted situation where there is the fragmentation. Brexit and COVID exacerbated this because the EU and the US both see this as an opportunity to increase reassuring and to continue their own ways instead of trying to find solutions to the global trade system. Brexit, potentially, could have helped to make the UK a more effective bridge between the US and the EU to broker new solutions. It is more likely the more influential voices are the ones who say that actually the EU system that we have left is the one that is wrong, and we should challenge the EU system along with the US. This would make it even worse because the EU is not going to change their approach. It is hard to see at the moment any new approaches coming out of either Brexit or COVID. In fact, the EU/UK approach has been quite orthodox, it is almost pre-TTIP, TPP and the mega-regionals and back to agreements just focusing mostly on tariffs rather than regulatory issues.

Where does that leave us a potential solution? What so much of the potential solutions are focused on EU are going to change the rules or the precautionary principle? Or the US are going to change the rules? Or the independent regulators will come into trade deals that the UK is going to join the US side and make all the difference? Or somehow can all be ignored and the two can come together over China? None of these seem likely. It seems that one can only recognise the systemic differences that lie at the heart of the US and EU tension; move away from the legalistic arguments and the expectation that one side wins and find those common principles that provide some kind of underpinning to allowing the US and the EU to work together again. One of the most fundamental principles is recognising the right to regulate that is very ambiguous in WTO case law. There is national treatment and non-discrimination that should be emphasised more and that both the EU and the US have areas of their operations that are discriminatory towards other countries that do not allow for national treatment for the product from other countries. On that reading the EU can have their food rules as long as they are applied in a non-discriminatory manner. The UK can have rules on animal welfare. The US which also regulate heavily can have their approaches as well.

That provides more basis to modernise trade rules and acknowledge different regulations and finding ways in which we can acknowledge that. This seems unlikely and we come across to things like the digital sales tax and the various technology data, disputes. It is almost the same thing that both sides are being 'annoyed' at the others' regulations and differences, and it is not going to change. How should that dialogue be rebuilt? Unless this is changed the way both parties are approaching it, and for that they would have to face down their domestic lobbies in some way, then even a change of US President will not make the difference. The disappointing transatlantic trade relations and ongoing conflict will continue.

### **3. "Challenges in UK-US FTA Negotiations"**

**Professor David Collins, City Law School**

## **Introduction**

Over the last few months the US and the UK have released their official negotiating objectives for the highly anticipated UK-US Free Trade Agreement (FTA), outlining the intended scope of the agreement including economic forecasts. This presentation will discuss some of these objectives, which are both ambitious and comprehensive, reflecting the most up-to-date material built upon recent US and global practice in international trade negotiations. While broad consistency in the parties' objectives is encouraging, there are some potential areas of conflict including Rules of Origin, Government Procurement, Trade Remedies and SPS rules.

Collins talked about challenges in UK/US free trade agreement negotiations more narrowly. Over the last few months the US and the UK have released their official negotiating objectives for the highly anticipated UK/US Free Trade Agreement. It outlines the intent, scope and economic forecasts. They are fairly comprehensive, and they reflect material built upon recent US global practice albeit not very detailed. The recent statements that have been made by the UK Secretary of State for International Trade, Elizabeth Truss and her counterpart US Trade Representative Robert Lighthizer have not added much. The broad consistency in the party objectives is encouraging but there are some potential areas of conflict. The UK has stated that it seeks a best in class agreement with the US Armed Services, which is the UK major export strength. This should focus on equivalence in terms of financial services meaning that providers can be regulated by their home regulators without being subjected to additional regulation overseas. There is good reason to believe that that can be achieved but it will certainly take time to validate. In terms of timeframes it is unlikely we are going to see anything akin a substantial equivalence regime this year. Negotiating services with the US is going to be difficult because some of the services are regulated at the sub-federal level, notably legal services. It would be preferred to see an express reference to legal services in the UK negotiating document. The most likely outcome will probably be something similar to what we see in the CPTPP, which merely sets out a framework for removing barriers. The US is really not open for foreign legal services. Significantly, a number of US states do not even recognise for legal consultant status.

One of the emerging concerns and certainly the one that attracted the most attention of the media seems to be in relation to agriculture and access for US food products. There has been a certain degree of exaggeration or mythmaking about how poorly animals in the US farm are treated relative to the UK or to the EU. Many UK/EU produce agricultural products would be 'offensive' to some people as well as the way it is done in the US. This is why the focusing should be on labelling to explain the way in which the food is produced, whether it is beef or chicken. It should be up to the consumer to choose. The problem with this is that the US has specified in its negotiating objectives that it has opposed to unjustified labelling. There might be quite a significant pushback from the US even about labelling products. The Rules of Origin are going to be a major stumbling block; this came out in the hearings last week with Elizabeth Truss. The US MCA which has very high thresholds for Rules of Origin, and the technical document under the USMC is very complicated. The UK wants simple and modern Rules of Origin. It is not clear whether the US is going to grant this.

The US is going to want to push the UK to tighten its intellectual property protection for pharmaceuticals, but this is going to raise prices for the NHS. In its negotiating document the US said that they want to ensure that regulatory reimbursement regimes are fair. The UK has made clear that the price the NHS pays for drugs will not be negotiated. We have seen statements along the lines of the price the NHS pays for drugs will never be on the table. There is an internal issue within the US that many democrats do not want tighter IP protections for drugs so that may disappear as an issue if Biden is elected. It is worth recalling that, the US push for stronger IP protections for pharmaceuticals in the US MCA. Ultimately that was

dropped from the negotiation. The US clearly wants to keep their countervailing duties and anti-dumping powers which seems plausible. It will be interesting to see if some of the reforms to the WTO's subsidies chapter, which have been proposed by the US and EU and Japan find their way to the negotiating text.

The other big problem is going to be government procurement. The US clearly want to retain their 'Buy American' policies and that would leave UK suppliers out. It is hard to believe that the US states are going to open their procurement markets, meaning the sub-central procurement, they did for Canada in the US MCA. There does not seem to be any movement on that for the UK. Will the US insist on a China clause in the UK/ US FTA? This means that approval from the other party will be required when negotiating free trade agreements with non-market economies. This could be an issue if the UK wants an FTA with China going forward. It should be noted that the US has already broken that commitment under the US MCA by its first-round trade deal with China. It may be queried as what kind of data protection regime will be in place, will it be like the GDPR? It is not clear where the UK stands on investment, on investor state dispute settlement. The UK's negotiating document says that it is open to ISDS if appropriate. Lighthizer recently suggested that the US is 'done' with investor state dispute settlement. Maybe they will keep it in various formats like they did in the US MCA. Interestingly, the negotiating objectives in the UK/US FTA hardly mentioned investment at all. There seems to be a bit too much on climate change and the environment in the UK's negotiating document. This could end up alienating the US. The looming US elections remain important but securing an FTA with the UK will probably not be as relevant to the President's re-election agenda as it might have been last year; now he's consumed by domestic issues, especially COVID. There is very little chance that there will be anything like a full FTA with the US before November. There might be a mini deal, like the one the US did with China, maybe covering the tariffs. The US/UK FTA is the right move but it might not be achieved as easily as wanted.

#### **4. "Dispute Settlement Provisions in a future UK-USA Trade and Investment Agreement"**

**Timothy Lyons QC, 39 Essex Chambers**

##### ***Introduction***

Provisions governing the resolution of disputes in trade and investment agreements have a history of arousing strong feelings. Dispute settlement has been considered recently in the context of the WTO, the USMCA, the EU's negotiations with third countries and negotiations between the UK and the EU. What may we learn from debates in relation to these topics about likely areas of concern in the negotiations between the UK and the USA?

Lyons looked at the dispute settlement provisions. The attitude of countries to dispute settlement tells a great deal about the attitude of those countries to trade and foreign policy, more generally. The kind of dispute settlement provisions that the US and the UK argue for may tell how transactional, the US is going to be. It may tell how concerned to establish a rules-based trading system or to preserve the rules-based trading system the UK proposes to be. One might start with looking at what respondents to a UK consultation, said they wanted in respect of settlement mechanisms. What people said they wanted and what the UK government says it recognises is a settlement mechanism that is robust, transparent and based on existing international mechanisms such as those found at the WTO and many existing FTAs. This seems to indicate that it is not clear what exactly is wanted. There are

many existing international mechanisms and they are varied which means it is going to be necessary to make some policy choices. In order to determine what mechanisms, you ultimately choose. In order to inform how those choices are going to be made, it is worth thinking about free trade agreements more generally. A number of questions arise: what kind of an agreement is a trade agreement? What is the nature of the disputes which are being settled and between whom do they arise? And it is only then when these questions are answered, there is a serious chance of knowing what settlement provisions are going to be appropriate.

### ***What kind of an agreement is a trade agreement?***

At first glance it might seem obvious - an agreement about trade. Is it about trade or is it really a political agreement, from which all sorts of trade provisions and trade agreements can flow? Looking at the titles that the UK gives to its new trade agreements, the influence of politics quite substantially may be seen. For example, the UK agreements with Andean countries are simply called Trade Agreements. The agreements with Eastern and Southern Africa are called Economic Partnership Agreements. There are Association Agreements in Central America. The agreement with Israel is set to be a Trade and Partnership Agreement. Not only is there a highly political element to these trade agreements but they also cover very different provisions, in respect not just to relations between countries and states and between the participants but also between the traders in those countries. Investment is a particular area in which you might expect quite specific dispute settlement provisions to arise. Before you come to look at dispute settlement provisions you have to decide what is the sort of agreement that you have come to. Is it really fundamentally a political agreement in which raw power is really to be exercised or is it much more of a rules-based regulated system? If you believe that trade agreements exercise is in power, then your dispute settlement provisions will leave lots of room for negotiations and mediations. The results of the dispute settlement process will become binding only in limited circumstances. You may not have any appeal provisions in your dispute settlement arrangements. You may have particular provisions about fact finding on the part of the panel hearing the dispute.

So far the EU is concerned it has reiterated its commitment to a “rules-based environment for fair and sustainable trade and investment.”<sup>4</sup> The EU is demonstrating its continued commitment to a rules-based environment. That is entirely to be expected from an organisation, which is a creature of law and which tends to deal with the external world with a similar set of fundamental assumptions which govern its internal affairs both it would like to see fundamentally to be rules-based. Bearing that in mind, it is worth looking at the dispute settlement provisions in the agreement between the US and Mexico and Canada. For example, in one of the articles on dispute settlement there is a provision which says that following an adverse panel report, once the matter is has been hardened, and a report has been delivered, it is required that the parties shall endeavour to agree on a resolution of the dispute. In other words, the panel is not there behaving like a judge who has the last word. Instead of that, the panel report becomes a contribution, an important one but nevertheless, *only* a contribution to the ongoing dialogue between the parties. It is a help to resolving the dispute. It is not of itself the resolution of the dispute. There is no appeals mechanism. If one looks at the WTO, then obviously there are some provisions for the input of political considerations. There is the adoption of panel reports. Nevertheless, one does have things like an appeals process which caused so much ‘trouble,’ particularly for the United States. There is a very substantial difference between the approaches one may take. Is settlement dispute binding or advisory? What settlement provisions are we going to apply? Who makes the decisions? What roles do experts have there? But ultimately, it is the respondents telling

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<sup>4</sup> European Commission Consultation Note 16.6.20

us that they want the dispute settlement system based on existing international mechanisms. What the US and the UK have to do is to decide which ones.

## 5. “Federalism and Trade in US and Canada”

**Prof. Michelle Egan, American University, DC**

### *Introduction*

The international trading system is in turmoil in part due to the unilateralism, protectionism and unpredictability of the Trump administration. While the US has sought to fundamentally restructure trading relations with its allies, push for change at the international level and compel China to restructure its model to level the playing field, we might focus on the domestic determinants of trade policy. In looking at Canada and the United States, it is interesting to think about the role and impact of states and provinces in trade negotiations as much of European demands for market access are often regulated at the subnational level.

Egan discussed the restructuring of US trade relations both with its allies. The US was pushing for change at the international level compelling China to restructure its model to level the playing field. The focus here is on the domestic determinants of trade policy. What this might mean for the transatlantic relationship is that under either administration, Democrat or Republican, the transatlantic trade imbalance will remain an issue for the United States. Since the financial crisis 2009 to 2019 the United States has run a cumulative merchandise trade deficit with the EU, definitely offset by trade and services, but it is an important political issue. The second important issue is the one of trade promotion authority. It seems a long way away, ending in June 2021. That means that Congress will have a say in the next TPA. That will be very important given what has happened under the current administration. It is one thing to say that potentially under the new administration there will be a new tenor of debate. Yet, there has been a significant linkage of trade and national security in this administration, using 232 of the trade Expansion Act 1962. This is the so-called national security statute that gives the President a wide latitude to define the nature of a threat to national security and to take appropriate action. The current administration is taking full advantage of the new anti-dumping prohibitions of what should have been exceptional measures have become normalised. The question is how much can they walk them back? These national security measures have not only been embedded in the tariffs, the anti-dumping, but also in the modernization of the investment screening provisions in the United States. That has exploded under the Trump administration. Increasingly, it has shifted from what used to be military infrastructure to joint ventures and critical technology. It has moved increasingly to the west to California.

The trade agreements are based on this balanced set of commitments to lower tariffs and other trade barriers. In this transatlantic relationship, especially when the US is using these safeguards to undermine a lot of these credible commitments. A rule-based system seems to have been impacted by this disruption and transactionalism both bilaterally and multilaterally. This seems to be at odds with the risk management, and the risk mitigation approach that reflects the EU as a regulatory power. The three issues are actually amplified by the COVID crisis because of the digital transformation that we have seen, and that will impact the transatlantic relationship. We are going to be amplifying what have already been trade frictions in this area in current issues such as data privacy, storage monopolies and the digital tax. We have heard about how the US is reacting to the new taxes on digital services and the large companies, the US companies with operations in Europe may be hit. Obviously, the likelihood of retaliatory tariffs is high. What is also interesting in terms of the US investigations into these

proposed new digital taxes, is that they have highlighted some European states where the legislation is not yet in place. The range is wide: Austria, Czech Republic France Hungary, Italy and the UK.

The second issue is data protection. With the UK leaving the EU, it will become a third country on under GDPR. The issue of equivalence for the UK has come up, but this also for the US specific EU standards certificates, privacy, intellectual property rights of the digital economy are key concerns of the United States; especially given the legal challenges in Europe.

The third issue which has not come up in transatlantic discussions is state aid subsidies and the recovery programme in Europe. The EU, in some ways, is talking in both directions. It is once a level playing field discussion with the UK, but it is relaxing its state aids and rules temporarily with these measures to react to the labour market, social protection, healthcare. It is also having some discussions, particularly pushed by Germany and France about an industrial policy and covering both public and private to try and revitalise the European single market. The problem is that the US and EU have had direct criticism of Chinese state subsidies and managed economy. But what we are not talking about is the extensive not only Chinese state subsidies, but the massive subsidisation that takes place both locally, regionally within the United States. It is called corporate welfare in republican circles, but it is very pervasive. Will this be a beggar thy neighbour policy between the US and EU given their state subsidies and different sort of into inventions in the economy? The transatlantic relations are often tied to the notion that the United States is the largest market, but we need to talk about the interconnectedness of trade agreements and the domestic context of trade policy. One of the ways we need to think about is the role and impact of states, and if we want to bring in Canada provinces in trade negotiations. A lot of European demands for market access are actually regulated at the sub-national level. We would expect international agreements to reverberate within domestic politics and the negotiation literature sort of talks about how one level affects policy options and another level. Domestic actors are influencing the content of the agreement during negotiations - this as a reverberation effect. It would make sense for sub-national actors and sub-national economic interests, states or provinces to try and influence the domestic determinants of trade policy, because obviously there are distributional consequences of liberalisation. There is a lot of encroachment on these domestic regulatory agendas, many of which are at the sub-national or provincial level. The point is that multi-level politics of trade are important. The focus is usually on the horizontal level within the United States executive, legislative relations, or even within the EU Council, Commission and Parliament. There is also a need to think about the fact that when we look at the multinational multi-level politics of trade in the United States and in Canada, that there is a lack of a single internal market. There is quite a lot of divergence in subnational regulation.

Because a trade agreement exposes these regulatory inconsistencies is at the sub-national level in federal system, one of the ironies of this is that in the Canadian/EU CETA case, they felt that they were giving more access to European producers and European exporters than they were to their own domestic producers because of these internal interprovincial trade barriers. From that point of view, inter-Canadian trade, interprovincial trade is remarkably low. Ontario's biggest market is North America - the United States, rather than the rest of Canada.

The second issue is the nature and scope of trade policy and trade expansion. The expansion of these agreements has heightened attention to the sub-national competences and the regulatory authority. For both Canada and the United States provincial and state competences cover labour mobility and the professions. They cover trade and services, insurance and securities, and they definitely cover trade in procurement. 80% of procurement is at the local and state level in the United States. The other issue beyond simply saying that these issues are sub-national competences the response to this has been remarkably different between



the US and Canada. Unusually, in CETA, provinces were included in the negotiations which is new. In the case of the United States the role of the states in trade negotiations is very marginalised. It is not just simply where the competences are located, we also have to look at the specific benefits. We would think of them as discriminatory in the EU, that have been given at the state level. The United States provides a lot of price advantages it provides a lot of state preferences and set-asides, it provides a lot of 'Buy America' local content. It even allows specific state exemptions, so sub-federal market access is often taken off the table. It certainly was in terms of procurement in TPP. There is a much more model of what we would think of as differentiated integration in the US, than we typically give credit for. We often talk about the US and trade as a unitary actor, but it is not.

And the second issue that we tend to forget about is the importance of states is regulatory oratories and states off regulate at the sub-national level, and it gets picked up at the federal level as well. Domesticism and federalism matters. The path that the United States and Canada have taken allowing provincial access in some sectors, not putting state issues on the table in the US, really has an impact on both the UK and the EU in any future free trade agreement. We focus a lot on influencing the content of specific chapters opposition to the ratification of the trade agreement in Europe. We need to focus more on enforcement and compliance. We need to think about the highlighted interdependence and interconnectivity. These trade agreements are nested regimes, overlapping agreements. The US MCA came into force on the 1<sup>st</sup> of July and the ink has not dried yet there are already concerns about grace periods, implementation, compliance, contestation of the labour laws with Mexico, dairy and agriculture Canada GMO exports to Mexico, and approval of drugs and intellectual property laws and compliance. If that is something that has been around since 1994 and updated that does not bode well for the UK and EU.

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