THE CITY LAW SCHOOL
CITY, UNIVERSITY OF LONDON
EST 1894

Institute for the Study of European Law

Co-funded by the Erasmus+ Programme of the European Union

THE TRANSATLANTIC SPACE BETWEEN SHIFTING ADMINISTRATIONS:

The Place of the EU and US in the Global Legal Order

ABSTRACTS

Kai Purnhagen, Professor of Law, University of Bayreuth, *EU-US regulatory cooperation standards: institutionalising global change and challenges*

Regulatory cooperation in standard setting between the US and the EU has been a hot debated issue. It is general wisdom that both trade partner advocate for a consolidation and ideally harmonization of standards across both sides of the Atlantic in order to provide a level playing field large enough to set a global standard. This requirement is even more evident with Asia being on the rise, China in particular, emerging regulatory superpower. However, it is likewise common wisdom that regulatory cooperation on both sides of the Atlantic differ to such a great extent that it had been fiendishly difficult, if not impossible to provide for such a level-playing field with the result that past endeavours to harmonization on both sides of the Atlantic have largely failed. This piece will paint with a thinner brush. Instead of making broad claims about standards it will carefully investigate the respective market sectors which in the author's view are relevant to transatlantic institutionalisation. It will show that differences in regulatory approach may not be an obstacle to regulatory institutionalisation, they rather call for using different types of tools. In established, heterogenous markets such as product safety standards a negotiation forum, which settles disputes on a case-by-case basis may be the preferable option. In emerging markets such as the regulation of artificial intelligence or blockchains, transatlantic rulebooks, which even include coded law may be the preferable option.

Daniel Francis, Furman Fellow and Emile Noël Fellow, New York University, Former Deputy Director of the US Federal Trade Commission, *The Present and Future of Digital Antitrust*

Competition (or antitrust) law has never been more prominent, with blockbusting digital-markets enforcement actions and investigations ongoing on both sides of the Atlantic, and legislative proposals swirling alongside them. Washington DC and Brussels share this spotlight with 50 state Attorneys-General and the national authorities of the EU Member States -- with the UK's CMA on a newly independent path. I will present the view from the US: current enforcement efforts, an outlook for the next chapter, and some thoughts on the close but complicated relationship between American and European efforts in this sphere.

Jenya Grigorova, Dispute Settlement Lawyer at World Trade Organization, *Reverberations of the CJEU* Achmea B.V. *Decision In The Transatlantic Space*

This talk addresses the practice of EU Member States to raise various arguments related to the recent decision by the Court of Justice of the European Union (CJEU) in Achmea B.V. (CJEU, Slovak Republic v. Achmea B.V. (Case C-284/16)). Such arguments have been raised either before investment tribunals, as a challenge to their jurisdiction (intra-EU jurisdictional objections), or before domestic courts (in particular, US domestic courts) when the

enforcement of investment arbitral awards is sought, in support of motions to dismiss the petitions and deny enforcement of the awards.

Most investment tribunals, as well as some domestic courts, have – in different ways and for different reasons – rejected these "Achmea arguments". The talk analyses and categorizes the different approaches adopted in these cases.

Focusing in particular on the cases recently decided by, or currently pending before US domestic courts, the talk also tentatively assesses the issues raised before these courts, mostly when enforcement is sought in the United States, as well as the potential relevance of the practice on this issue in other jurisdictions (Switzerland, the UK, Germany, Sweden).

Through this analysis, the talk aims at drawing more general conclusions as to the relevance accorded to EU law by investment tribunals and by US courts, and as to the potential practical implications of these decisions (for instance with respect to choosing the seat of arbitral tribunals).

Eva van der Zee, Assistant Professor, University of Hamburg, *Fighting climate change together? Opportunities and potential hurdles for an EU-US Transatlantic Trade Agenda*

After Joe Biden was elected president of the US, the EU published a communication on "A new EU-US agenda for global change", focusing, amongst others, on working together to protect our planet and prosperity by establishing a Transatlantic Green Trade Agenda. This Agenda focuses predominantly on setting a global template for Carbon Border Adjustment Mechanisms (CBAM), developing a jointly Trade and Climate initiative within the World Trade Organization (WTO), and forming a new Green Technology Alliance (GTA). But what are the opportunities and hurdles of this new Transatlantic Trade Agenda? Will the EU and US be able to agree on a global template for CBAM? Would a strengthened transatlantic relationship improve climate initiatives within the WTO or would it complicate relations between WTO members even further? What could be the incentives for the US and the EU to form a new GTA with the EU? These are amongst a few of the questions that will be discussed.

Thomas Verellen, Assistant Professor in Law, Utrecht University; Visiting Scholar, University of Michigan, Ann Arbor, *Separation of Trade Powers: The Case of Unilateral Instruments*

Geopolitical rivalry puts pressure on multilateral, plurilateral and bilateral efforts to liberalize trade. At the same time, unilateral measures are increasingly the trade policy instrument of choice on both sides of the Atlantic. The Biden administration's decision to keep tariffs on aluminium and steel in place pending an EU-US agreement on the issue of overcapacity, its emphasis in policy speeches on 'Buy American', and its continued use of secondary sanctions suggest the new administration is not necessarily less willing than its predecessor to wield unilateral instruments. On this side of the Atlantic, in an effort to bolster the bloc's 'open strategic autonomy', the EU has been updating its unilateral trade instrument toolbox. It has updated existing tools (e.g. trade defence) and it is adding new instruments, including an FDI screening framework, and possibly instruments to tackle foreign subsidies, coercive practices by third countries, and a lack of reciprocal access to procurement markets.

David O'Sullivan, Senior Counsellor at Steptoe & Johnson LLP, Former EU Ambassador to the US, *EU-US relations in a changing world*

The EU is an unusual political animal in international relations, an 'unidentified political object', as President Jacques Delors once said. It is not a country. But neither is it a mere international organization. In some areas (trade, market regulation) it has real federal powers. It has (for 19 countries at least) a single currency. It has a

consolidated legal order. When it speaks and decides with one voice, it can have huge influence, such as when it adopted EU regulations on data privacy which have become the de facto global standard. But, as often as it speaks with one voice, the EU can end up speaking with the voices of its 27 members.

This is confusing for friends and adversaries alike.

The United States played an important and supportive role in helping Europe rebuild a new business model for the continent after WW2. Yet, few in Washington, beyond policy wonks, really understand how the EU works and how to deal with it. There is a strong lobby for NATO in Congress. The significance of the EU for US security, economic and value interests has yet to find a coherent voice.

However, in the coming great power confrontation of the 21st century, the EU arguably holds more of the levers than NATO. Kinetic military power will remain important but the real challenges will be economic, technological, cyber and informational. In these areas, it is the EU as a bloc rather than individual member states which yields the real power.

One of the great challenges of future transatlantic relations is how to reflect his new reality in both policy formulation and execution.

Garret Martin, Senior Professorial Lecturer & Co-Director of the Transatlantic Policy Center, School of International Service, American University, DC, *NATO-EU Cooperation and the Future of the European Security Order*

Despite the great geographical proximity of the headquarters of these two institutions, located a few miles from each other, and the significant overlap in membership (21 countries belonging to both), relations between NATO and the EU remain to this day less than optimal. Granted, and in reaction to a more challenging security environment, both organizations have sought since 2016 to bolster their cooperation. Noticeably, NATO and the EU have outlined more than seventy common measures to tackle key challenges, ranging from hybrid threats, cyber challenges, to maritime security. But, for all these initiatives, the ties between NATO and the EU still fall significantly short of a meaningful strategic partnership. This presentation proposes to delve further into understanding why the two organizations have failed so far to establish a more robust collaboration. It will emphasize, for instance, the role of factors such as historical legacy, the piecemeal nature of the development of the EU as a security actor, differences between member states, and disagreements as to how and why NATO and the EU should cooperate. Additionally, this presentation will use the case of the imperfect NATO-EU relationship as a prism to discuss the broader limitations and challenges of the current European security architecture. This includes, to name a few factors, doubts about the continuing long-term commitment of the US to European security, the ability of European actors to develop a common strategic perspective, and the question of inclusion/exclusion in key security institutions.

Mike Smith, Honorary Professor in European Politics, University of Warwick, *Interinstitutional cooperation & EU diplomacy in the transatlantic space*

This presentation argues that the transatlantic space is multidimensional, and that as a result it demands approaches to diplomacy and governance that are themselves multidimensional and coordinated. The space can be conceptualised as a space of structures, a space of flows and networks, a space of institutions and a space of ideas. It contains elements of governance at intergovernmental, trans-governmental and transnational levels, which contribute to the evolution of a hybrid transatlantic order. EU diplomacy is conducted through a variety of channels and embodies a number of 'voices', which embody different understandings of transatlantic order in domains including security, political economy and knowledge. The Trump Administration challenged EU diplomacy at both the transatlantic and the global level, by attacking principles of multilateralism and transatlantic governance, and the Biden Administration has made substantial efforts to re-commit to both.

Nonetheless, the issue for the EU is finding a way in which 'joined up' diplomacy can be achieved in the face of inter-institutional competition and institutional overcrowding, both within and outside the Union. Despite current and recent commitments to cooperation, this means that a mixture of competition, convergence and crisis management will remain characteristic of governance in the transatlantic space.

Charles Roger, Assistant Professor and Beatriu de Pinós Research Fellow, Institut Barcelona d'Estudis Internacional, *Making Transatlantic Governance Work*

Transatlantic governance has been crucially important for the global economy, shaping our ability to address the many challenges we currently face. Historically, governance has been conducted at a number of levels—intergovernmental, transgovernmental, and transnational—and the arrangements established have complemented, substituted for, and conflicted with one another to varying degrees. Even compared to 20 years ago, however, the varieties of governance linking states have evolved considerably, making the transatlantic area a unique governance space. Many of these new approaches to cooperation have enormous potential, but concerns have been raised about their effectiveness and accountability as well. This talk draws on recent insights into complex governance and regime complexity, reflects on how these ideas are reshaping our understanding of transatlantic governance, and discusses ideas for improving its practice, particularly in view of the shifting political environment in both Europe and North America.

Joseph Dunne, Director of the European Parliament Liaison Office in Washington DC, *Connecting the US Congress and the European Parliament: The work and role of the EP Liaison Office in Washington DC and the Transatlantic Legislators' Dialogue*

The European Parliament Liaison Office in Washington DC was established some ten years ago to facilitate and deepen ties between the EP and the Congress. The [presentation]/[chapter] will set out how the Office has gone about its task of connection within the overall institutional framework of the Transatlantic Legislators' Dialogue (TLD) and in complementary ways, such as promoting an EU Caucus in the House of Representatives and channelling EP viewpoints and positions to Congress. Its evolution reflects continuity and deepening, as well as developing a more active role over time.

The context of the EU-US parliamentary relationship is one of shared values and shared challenges: transatlantic attempts at legislative and regulatory cooperation, most recently on how to deal with the increasing assertiveness of authoritarian actors and whether and how to converge on the regulation of the digital economy, dealing with attacks on parliamentary and democratic legitimacy and a search for broader forms of cooperation and parliamentary diplomacy in support of democracy. The [talk] will examine such aspects and the increasing legislative cooperation between the European Parliament and the US Congress against the backdrop of these developing threats and pressing choices. Finally, it will explore avenues for future transatlantic parliamentary cooperation to boost democracy at home and abroad, as well as the outreach and projection role the office's unique position allows.

Kenneth Propp, Georgetown University Law Center, Atlantic Council, Europe Center, *A US Perspective on Negotiating with the European Union*

The United States has concluded dozens of binding international agreements with the European Union, on subjects ranging from trade and investment to transport to law enforcement. It sees EU-level agreements as an efficient means for harmonizing rules not only with EU institutions but also with member states. Most operate smoothly and effectively. In recent years, however, the United States and the EU also have had some high-profile negotiating failures, most notably the collapse of talks on the Trans-Atlantic Trade and Investment Partnership (TTIP). In addition, efforts in recent years to establish a stable legal basis for personal data transfers

from EU territory to the United States in both the law enforcement and commercial contexts have been consistently troubled, facing political controversy at the European Parliament and legal challenge at the European Court of Justice (ECJ).

This presentation will outline why the United States government finds the European Union such a challenging negotiating partner, from the perspective of a former US Department of State lawyer who participated in negotiations on many international agreements with Brussels. These factors include:

- EU inter-institutional dynamics preliminary to international negotiations;
- Questions of mixed material competence affecting the negotiation process;
- Ratification issues, for example whether the EU decides to conclude a mixed agreement; and
- Judicial challenges before the ECJ, arising either from the European Parliament or from member state courts, and testing, for example, whether EU international agreements accord with the Charter of Fundamental Rights.

Fabien Terpan, Jean Monnet Chair in EU Law & Politics, Sciences Po Grenoble UGA & **Elaine Fahey**, Jean Monnet Chair in Law & Transatlantic Relations, City, University of London, The Future of the EU-US Privacy Shield

The contribution will articulate the relationship between institutionalisation and judicialisation in a core area of EU global action - transatlantic data transfer and protection in the Privacy Shield. In the case of an emerging legal regime, like the EU - US regime o f data transfer, only a strong process of institutionalisation can lead to "positive" judicialisation – enhancing the regime by guaranteeing its proper implementation – while a weak process of institutionalisation has the potential to challenge the new legal regime, though conflicts of law and jurisdictions, and thus lead to "negative" judicialisation. The institutionalisation of the Privacy Shield has been created through (negative) judicialisation initially of the Safe Harbour Agreement. We argue overall that the Safe Harbour can be seen as a weak institutionalisation giving rise to negative judicialisation (invalidation) and leading to the Privacy Shield. Institutionalisation has not put an end to judicialisation, quite the contrary: the Privacy Shield was even more subjected to legal attacks, indirectly but also directly through annulment procedures. The Privacy Shield was consistently threatened by invalidation at the CJEU, while institutionalisation was weak. Therefore, it was unlikely that a weak institutionalisation of the EU - US framework could prevent negative judicialisation.

Maria Kendrick, Lecturer in Law, City, University of London, *The EU and US Transatlantic Agendas on Taxation: Is Digitalisation Accelerating a Global Battle*

No international consensus has yet been reached – despite historical, current and ongoing efforts - on how to transform the international tax system in order to grapple with the global imperative of digitalisation. The need to raise tax revenue to fund public spending has been around since time immemorial, however, the modern mix of digitalisation and globalisation of the economy has created a new focus on tax avoidance and good governance in the area of taxation, and essentially 'fair' taxation. This has been spurned on, especially at the EU level, by the need to generate its own resources, especially in order to 'support' the Covid-19 recovery. This contribution will consider both EU and US/transatlantic agendas on 'fair' corporate taxation in a digitalised economy. What will become apparent is that trying to harmonise corporate tax to make it 'fair' is so difficult that we see both the EU and individual states unilaterally resorting to considering digital services taxes (DSTs) as a lesser, but not easier, 'Plan B' option. We also see the position of the EU in wanting to occupy, and indeed dominate, the transatlantic space and agenda on digitalisation and tax.

Giulio Kowalski, Doctoral researcher, City, University of London, *Transatlantic enforcement of digital markets and competition law post-Brexit*

In the present economy, trade and competition are becoming increasingly global. Digitization has only fostered this process of market globalisation, particularly by enabling the birth of so-called "tech giants" or "big tech", worldwide dominant firms such as Google, Amazon, Facebook, Apple and Microsoft. Big Tech's behaviour on the market combined with their strong market position has raised the alarm among competition enforcers and regulators worldwide, producing a wave of vigorous enforcement and new regulatory proposals –particularly in the EU, UK and US – to rein them in.

However, while global competition law enforcement seems to converge on similar allegedly anticompetitive conduct (e.g., the EU, US, UK and Australia are investigating Apple for practices allegedly limiting app distribution through the App Store), local regulation appears to diverge, with single Member States (e.g., Germany and Italy) adopting their own ex ante tools in addition to the "centralized" EU Digital Markets Act.

Against this background, the presentation will investigate the reasons behind global convergence in competition law enforcement and European regulatory divergence. Then, it will look at the potential effects of such divergence, particularly whether it could produce more legal and economic uncertainty, thereby impairing incumbent digital firms' ability to deliver value and harming consumers as a result.

Peter Van Elsuwege, Jean Monnet Chair in EU Law, Ghent University and **Viktor Szep**, Postdoctoral Researcher, University of Groningen, *Transatlantic cooperation in sanctions policy*

The inauguration of the Biden administration raised reasonable expectations that EU-US relations will intensify in many policy areas. This study will focus on cooperation in foreign policy matters and in particular on the coordination of sanctions policies. The aim is to understand how the (legal) framework for cooperation has changed since the new US administration took office and how this may further evolve in the future. For this purpose, the research first examines the EU's practice of cooperation with like-minded states, including Australia, Canada, Japan, etc. to demonstrate successful and failed attempts of sanctions coordination. Subsequently, EU-US relations will be examined in detail to understand how both sides have re-established cooperative arrangements that are required for successful coordination in sanctions policy, including the revival of the Office of the Coordination for Sanctions Policy. The study will look at different cases where there seems to be more willingness to coordinate sanctions, including human rights restrictive measures against Russia. Finally, the EU's reaction to the extraterritorial application of US sanctions and its implications for EU-US cooperation will be discussed.

Sara Poli, Professor of Law, University of Pisa, *Who is entitled to protect the energy security of the Union? The challenges posed the construction of North Stream II for the transatlantic cooperation and for the Union energy policy*

The United States has adopted legislation imposing sanctions on companies who engage with the construction of the pipeline "North Stream II". These measures qualify as extraterritorial sanctions and are incompatible with international law to the extent that they affect the sovereignty of a member of the Union, Germany. The secondary sanctions adopted by the US are disproportionate to the objective of protecting national security and should not be used since they also seriously affect the transatlantic cooperation with the EU and its member States. The presentation considers the nature of infrastructure project and argues that it is a private project which has been conducted with the agreement of the mentioned EU member State. Germany retains competence to decide about the conditions for exploiting its energy resources under the Treaty rules. Yet, the project affects common European interests and objectives in the field of energy; this is also clear from a ruling of the GC, T-883/16, Poland v Commission, where the general principle of energy solidarity was for the first time

identified by the ECJ. In light of the relevance for the EU of the project, the EU institutions should have "a say" on the project. This is also in line with the judicial principle whereby even in areas of national competence, Member States should exercise their sovereign choices in a manner that is compatible with EU law. The presentation comments on the varied reaction of the EU institutions to Germany's decision to continue the construction of the contested pipeline and on the EU legislation on access to gas pipeline. In addition, the opposition to the US legislation will be stressed. Finally, the presentation will discuss what are the options for the EU to make sure that the project is conducted in a manner that is compatible with Germany's retained sovereignty in the field of energy as well as with the EU energy policies.

The European Commission has already said that this infrastructure does not lead to diversification of the energy sources of the European Union, which is one of the objectives of our Energy Union. But it is a private endeavor. The European Union does not have the means and tools to decide what to do on Nord Stream 2. It is a matter of private firms and it is a matter of the Germans.

What we can do when Nord Stream starts operating – if it does – is to require that it will be working in a non-discriminatory and in a transparent way with an adequate degree of regulatory oversight, in line with the key principles of International and European Union Energy law.