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*City Law School Research Paper 2022/11*

## IMAGINING THE FUTURE OF GOOD GLOBAL GOVERNANCE

Elaine Fahey (ed.)

27 September 2022

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## IMAGINING THE FUTURE OF GOOD GLOBAL GOVERNANCE

Elaine Fahey (ed.)\*

### Abstract

*Good Global Governance: Transatlantic Relations'* endeavoured to propose best practices in global governance, focussing upon trade and data protection and administrative law procedures. Participants were asked to consider: What is the place of the transatlantic relationship in modelling good practice? How does cooperation through institutional forms e.g. EU-US Trade and Technology Council impact upon shifts in good global governance? What is its impact on the WTO? How can we understand the place of civil society in the evolving transatlantic relations, e.g. putting labour rights more centrally in trade? What is its impact upon multilateralism? How has EU law and international law evolved in the post-megaregs era? It focusses upon ameliorations in practice, examining two key studies of global governance, trade and data flows. It possibly focuses upon the practices of the EU and US in international negotiations in trade and data. Transparency and openness practices have the capacity to shape future direction of global governance. How do debates within sub-disciplines inform global governance e.g. international economic law or international human rights law? How salient or progressive from the multilateral or transnational perspective is the transatlantic focus given shifts towards workers' rights in US trade policy and Europe's Green Deal? The West is much maligned in the reimagination of international trade/ human rights and so how does the contemporary West respond, lead or advance? As trade agreements broaden and contemporary agreements on data advance considerably eg DEA albeit non-binding, it throws open the question about good regional practices. Do close and proximate efforts at regulation or standards eg EU-US TTC prompt better multilateralism? What are its metrics? Says who? Is a wholly digitised world post-COVID-19 a more open environment to consider global governance? Does openness and digitisation provide a useful metric here?

**Keywords:** Good global governance, EU, US, Organisations, Western alliance, trade, security, openness, transparency

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## Introduction: The place of the West and ‘transatlantic’ in best practices of contemporary Global Governance: Is the West maligned or inspiring?

The short exploratory workshop on ‘*Good Global Governance and EU-US relations*’ on 16 September 2022 concluded the projects of the Erasmus+ Jean Monnet Chair in Law and Transatlantic Relations and began a new chapter of work of the Globallaw@City research stream.<sup>1</sup> This working paper synthesises the core of the short exploratory talks developed at the workshop. It had as its goal to consider best practices in global governance, focussing upon international negotiations, civil society. It reflects upon the idea of metrics of good global governance in the post-COVID-19 era. It had a particular interest in focussing upon shifts in how transatlantic actors have evolved, act and are considered but not exclusively so but is also unashamedly an attempt to ask about where the ‘West is at’. *Good Global Governance: Transatlantic Relations*’ endeavoured to propose best practices in global governance, focussing upon trade and data protection and administrative law procedures. Participants were asked to consider: What is the place of the transatlantic relationship in modelling good practice? How does cooperation through institutional forms e.g. EU-US Trade and Technology Council impact upon shifts in good global governance? What is its impact on the WTO? How can we understand the place of civil society in the evolving transatlantic relations, e.g. putting labour rights more centrally in trade? What is its impact upon multilateralism? How has EU law and international law evolved in the post-megaregs era? It focusses upon ameliorations in practice, examining two key studies of global governance, trade and data flows. It possibly focuses upon the practices of the EU and US in international negotiations in trade and data. Transparency and openness practices have the capacity to shape future direction of global governance. How do debates within sub-disciplines inform global governance e.g. international economic law or international human rights law? How salient or progressive from the multilateral or transnational perspective is the transatlantic focus given shifts towards workers’ rights in US trade policy and Europe’s Green Deal? The West is much maligned in the reimagination of international trade/ human rights and so how does the contemporary West respond, lead or advance? As trade agreements broaden and contemporary agreements on data advance considerably eg DEA albeit non-binding, it throws open the question about good regional practices. Do close and proximate efforts at regulation or standards eg EU-US TTC prompt better multilateralism? What are its metrics? Says who? Is a wholly digitised world post-COVID-19 a more open environment to consider global governance? Does openness and digitisation provide a useful metric here?

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**Poul F. Kjaer** began the sessions by asking whether the 'West' still exists. He introduced this question by referencing Jurgen Habermas' book which argued that the 'normative authority' of the US was ruined after the Iraq War and paved the way for a European 'counter power.' Kjaer continued by describing that the transatlantic alliance i.e. the 'West' has since been in steady decline, and the Trump Administration only exacerbated this. Although, he continued, the Biden administration and the Russo-Ukraine war seems to have reverted this development, the question remains if this represents a permanent change. Kjaer therefore overall questions, where is the transatlantic relationship heading as is the 'West' still a meaningful category?

Kjaer identified four factors. The first one relates to structure. we seem to be dealing with the paradox that increased globalisation imply more not less fragmentation. The pre-1945 world was largely 'euro-centric' in nature and the post-1945 world largely centred on the northern hemisphere through the cold war stand-off between the US and the Soviet Union. Today the 'centre' of global society however seems to be splitting into three with respectively a China, an EU and a US-centric part. One consequence of this is that global frameworks such as the WTO are likely to have less and less traction in the coming years.

The second factor relates to security. He argued that we are heading into years of sustained confrontation between the US and China with Taiwan, like West-Berlin during the Cold War, acting as the epicentre of the conflict. As a result, he argues, the transatlantic focus, while still important, is a secondary concern for the US. Moreover, he stated that the US's short-term interest will be to set a precedence in Ukraine by deterring Chinese action over Taiwan while weakening Russia, acting as a quasi-ally of China. The long-term US interest is, however, likely to be increased EU security capabilities. With this comes increased EU autonomy, he argues, with the aim that the EU on its own can ensure stability and thus handle a large-scale threat from Russia in its neighbourhood in general, in order to free up US resources and capabilities which can be deployed in the Pacific. Hence, the argument follows that the biggest promoter of a stronger EU security and defence policy is likely to be the US. On that background, the internal EU resistance to increased security collaboration from e.g. Denmark, the Netherlands and Poland are likely to falter, especially after Brexit removing UK opposition and after the German 'Zeitenwende' currently taking place, moving Germany far closer to a French position.

Kjaer's third factor relates to trade and economic regulation. He argued that, in many way, the EU and the US are moving in different directions. This is the case in terms of how to regulate big data and big tech in general, exposing more fundamental, and almost philosophical, divergences in approaches as well as very strong opposing interests. This is reflected in disputes over, for example, data transfer agreement (ie the Privacy Shield), the

Corporate Sustainability Reporting Directive, and the proposed Directive on corporate sustainability due diligence among many other conflicts. The EU-US Trade and Technology Council might help but it won't fundamentally change these tensions. He further argues that the degree of alignment between the EU and the US are likely to be decided internally by the US, as part of a domestic US political conflict. If the sort of political direction the Biden administration advances on issues such as antitrust, climate and many others ends up prevailing then there will be a basis for a far higher degree of alignment between the EU and the US. If the worldview currently dominating the Republican Party prevails, the degree of estrangement will only grow bigger.

Lastly, the degree of ideological and normative differences will therefore be central (fourth factor). Together, with the degree of alignment on the nature of the threat from China and Russia, the outcome of the 'culture war' in the US on abortion, climate change, taxation and not least its impact on the functionality and normative integrity of the US political system, will be the decisive factor in how much alignment can be expected between the EU and US in the future. Will the US be absorbed by itself or outward looking?

He concluded that the US and Europe have been married for more than 70 years. Now, the question is whether it is time to divorce, or remain married but sleeping in separate bedrooms. In any case, the intimate nature of the relationship has passed.

**Tobias Lenz** then began his presentation which discusses the overview of what he calls the changing architect of global governance and the main trends of this change. He begins by noting that the architecture of global governance is diversifying and possibly fragmenting. It is not a different system of global governance, but one where there is a broader set of institutional forums.

The first part of Lenz's presentation focusses on the *vision* of global governance post-World War 2. He says that this structure rested on three main pillars. The first was the creation of formal intergovernmental organisations of global scope (FIGOs). They served to organise policy cooperation in areas such as peace, security and economic issues. They also helped create a negotiation forum for the conclusion of international agreements in areas such as human rights. Regional FIGOs were to supplement the work of global FIGOs.

He then continued with the actual global governance architecture of post-World War 2. Lenz argues that much of the vision previously mentioned had been realised. For example, the United Nations (UN) was created for maintenance of peace and security, and the International Monetary Fund (IMF) for finance and development. The only area in which things didn't go to plan, he says, was the failure to ratify the international trade organisation which was replaced by the General Agreement on Trade and Tariffs; 30 years later, the formal organisation of the WTO was established. Lenz notes the negotiations of the international

agreements, most importantly the Universal Declaration on human rights. Further, we saw the establishment of a further range regional organisations to supplement the global FIGOs recognised by the UN Charter, especially in the work of peace and security. Lastly, he argued that the establishment of the European Coal and Steel Community etc. as forming a part of that broader vision.

Lenz then moved onto the third part of his presentation discussing the Cold War era which saw the expansion of global governance architecture. He argued that, although the UN was 'blocked' by the ideologies of the US and the Soviet Union, the global governance system did continue to expand. A graph on his presentation displayed the vast increase of intergovernmental organisations post-1950. In 2000, 300 intergovernmental organisations had been created compared to just 70 in 1945. However, as the graph showed, there is 'levelling off' of the number of organisations we see today. Therefore, Lenz concluded that the initial vision as he previously described was successful. Although the architecture did evolve in different ways, the UN and the IMF remained at the centre of global governance.

The presentation then moved onto changes in the global governance architecture since the around end of the Cold War. He argued that there are 5 developments since this time. Some, he says are contradictory. For example, these FIGOs, which, as described above, are levelling off in number now, although there still remains a significant amount, are growing in authority. Authority in this sense means that they are growing in independence from member state control. This contained two dimensions – a pooling dimension and a delegation dimension. Lenz stated that a pooling dimension was when member states move toward majoritarian decision-making; they give up their formal veto for decisions these organisations make. There has been a large increase of pooling of IOs since the 1980s. The delegation dimension entails the transfer of competencies to independent third party agents in these organisations e.g. international courts, secretariats etc. There has also been a steep increase of IOs with a delegation dimension since the 1990s. the EU with the Maastricht Treaty is the epitome of that wider trend. Thus, although not growing in number, these organisations are still growing in authority.

But, he argued, these FIGOs, while growing in authority, are being rivalled by other types of institutions. For instance, we have seen a proliferation of preferential trade and investment agreements. This was partially because the multilateral forum for trade negotiations isn't working anymore – the last successful round of the WTO was the Uruguay Round in the 1990s. Thus, states have sought other routes to secure access to foreign markets. Similarly, international investment agreements have decreased since the 1990s. Overall, he argued, this shows that states seek other forums, and not the WTO route, to secure trade agreements.

Moreover, there has been a growth of informal intergovernmental organisations. These



are state based organisations where governments are represented, but informal in nature as they are not based on a formal treaty or organisational structure. Although some of these existed in the post-World War 2 era, they dramatically increased in number in the 1990s. They provide a more flexible forum for member states to cooperate on issues.

Lenz does agree that, although the structure of global governance has changed, it is still very state-based. But they are increasingly being complemented by private actors such as civil society actors and private businesses. Thus, Lenz's fourth development considers the growth of transnational public/private governance initiatives. These include state actors and private actors cooperating to solve transnational actors. Like the above, since the 1990s, the number of these have increased. They primarily concern issues such as the environment, development and social affairs.

Lenz's last noted change is the growth of private transnational regulatory organisations. He stated this is novel, and that they didn't exist prior to the 1990s. These organisations are purely private for businesses, sometimes civil society organisations, to meet and agree on common rules for operations. They operate through market mechanisms, including consumer demand etc. One of the issue areas in where they become prevalent is climate change. Again, this has increased dramatically since the 1990s; there is now 34 today, including the Carbon Neutral Protocol. They act to fill in gaps that slow action member states have left.

Lenz concluded that these 5 changes demonstrate that the global governance system is changing and diversifying. States, especially the core states of the global north, are losing some of their control over this architecture. He believes that there are a number of reasons for this diversification. The first is the rising number, complexity and interconnectedness of global governance problems e.g. climate change. The second reason is the diffusion of institutional forums; once they emerge and become successful, they are emulated by other actors in the system, and thus we see a proliferation of such. Further, he argues, we see shifts of power in the global system of rising states who have different visions of global governance. Lastly, non-state actors are becoming increasingly confident, and wish to participate participate to govern international issues effectively.

**Kolja Raube** began by considering what is 'good global governance' and where does it come from. He argued that we have some principles and ideas connected to good global governance e.g. transparency, the rule of law, participation, but also the *how* governance should be conducted on all levels. These principles are supposed to guide and bring about good global governance. However, he argued that this is an old paradigm which is now outdated. Former actors who supported good global governance efforts and now seeing themselves in the process of a geopolitical adaptation. Thus, Raube posed the question, how can we make

sense of transatlantic actors who have previously supported good global governance and who now find themselves in geopolitical adaptations, when geopolitics have become so polarised.

Raube noted that it is important to think about the broader questions i.e. how much space for cooperation is left when states are focussing on geopolitical adaptation? And to what extent is the 'gridlock' in global governance becoming a 'deadlock?' He states that there will always be private actors available to work on issues that states are unable to provide solutions to, and proposes that, as such, this question may already have an answer. He also asks about the future action of transatlantic actors – will they play by what he calls 'deeds,' emphasising geostrategic needs over the establishment and implementation of good governance principles and procedures?

He asserted that there are three ways in which we can think about how good global governance and geostrategic adaptations can come together for transatlantic actors. Firstly, he argued that good global governance and geostrategic adaptations are running in parallel; good global governance continues its pursuit while geostrategic adaptations begins its course. For example, the EU continues to focus on its geopolitical adjustment e.g. its global compass, alongside its action plans, frameworks etc. for human rights, democracy etc. Both of these seem to run in parallel. This may be because, he argues, because the EU is based on compartmentalisation.

Secondly, Raube advocated that transatlantic actors are merging good global governance and geostrategic adaptations. This merge occurs by geostrategic adaptations being combined with good global governance but transatlantic actor's action plans. This could be seen, for example, in sanction practices. Sanction practices by transatlantic actions helps to address global governance issues such as a lack of human rights and the rule of law whilst also pushing for a new geopolitical positioning of themselves, vis-à-vis challengers such as China and Russia.

Raube's final way in which we can understand the confluence of good global governance and geostrategic adaptation was the mechanism of the latter outplaying the former. He argues that decisions are ultimately being made for geopolitical reasons. Good global governance may still be involved, but it will be outplayed by geopolitical motivations by transatlantic actors. There are several examples, one being trade. He points out that the EU's latest FTA with Japan was inspired by geopolitical adaptations and the EU pushing for a free trade agreement. The same can be said for the EU-China Comprehensive Agreement on Investment; the EU was said to be trying to 'set a tone' with the US with this agreement, despite the incoming Biden Administration.

Raube concludes by considering what we can draw from these initial reasons. It is interesting to look at the interplay of both components, and this could have major effects on the ways in which transatlantic actors engage in global governance. Depending on the actions

paths that these actors take, we may expect variation on how they follow up on good global governance. Concretely, he argued, this can render implications for both bilateral and multilateral cooperation.

**Simon Dekeyrel** introduced his presentation as related to his own paper, which considers how the Russian invasion of Ukraine has impacted EU energy policy and how this will affect transatlantic energy relations. He argued that the aforementioned invasion has triggered a fundamental shift in energy discourse and governance and proposes to discuss the implications of this shift for EU-US energy relations.

Dekeyrel began by arguing that the Russian invasion of Ukraine has delivered a tremendous blow to the EU. Because energy is so central to the dynamic of EU-Russia energy relations, this is especially visible in the energy sector. The gradual reduction in gas by Russia last year had already significantly increased prices, but the war in Ukraine has brought these prices to unseen heights. The European benchmark gas price is currently standing at around 215 euros per megawatt hour, which is about a 570% increase from last year. This is equivalent to a price of 370 dollars per barrel of oil. Considering that the absolute record price for oil stands at 147 dollars per barrel, Dekeyrel argues, this shows how European prices have truly reached unimaginable levels. He added that, with the geopolitical context of the war, this has caused a fundamental shift in how energy dependence on Russia is perceived in Europe. Relying on concepts and insights from securitization theory, Dekeyrel continued to argue that where previous crises such as the 2009 gas dispute between Russia and Ukraine, and the 2014 Ukraine crisis, triggered the riskification of Russian gas imports, the current Russo-Ukrainian war which has caused a shift to securitization. He explained that this shift means that energy dependence on Russia is no longer understood as a risk to be managed, but rather as a direct, existential threat to European security that must be urgently eliminated.

Dekeyrel argued that the shift from riskification to securitization becomes clear when comparing the current discourse of the European Commission etc. with past policy documents. In the European Energy Security Strategy, which was released in the aftermath of the 2014 Ukraine crisis, the Commission stated that the dependence on imports made the EU 'vulnerable to energy shocks'. According to the Commission, this required a 'a hard-headed strategy for energy security which promotes resilience to these shocks and disruptions to energy supplies in the short term and reduced dependency on particular fuels, energy suppliers and routes in the long-term'. This is in stark comparison with the REPowerEU Communication released by the Commission two weeks after the Russian invasion in February 2022, which talks about 'breaking the dependency on Russian energy' and 'eliminating our dependence on Russian fossil fuels'.

As a result, he argued that a logic of war has been introduced in European energy

policy. Russian gas has become understood as an economic and political weapon, threatening European security. For example, President of the Commission, Ursula Von der Leyen, in the State of the European Union talked about ‘a war on our energy, a war on our economy, a war on our values and a war on our future’. Gaining independence from Russian gas is now being framed in existential terms and is no longer about mitigating risks to security of supply, but about survival and European security.

He then moved onto discuss the policy implications of this new logic. He argues that previous crises mentioned above and the subsequent riskification process caused changes *within* the market-oriented policy paradigm of the EU, i.e. security of supply became a more important issue than previously. But the securitization process is effectively triggering a wholesale shift of this market-oriented policy paradigm informing EU energy governance. This is reflected in current debates on market design, where the Commission is now arguing for direct intervention on energy prices via revenue caps, albeit before the summer is maintained there was nothing wrong with the market design. Dekeyrel notes another example is the EU Energy Platform which was established in April 2022, which is envisaged as a mechanism to pool the buying power of member states and to support joint purchases of natural gas from third countries. This mechanism does not aim to enhance competition, or to correct or supplement market functioning, but to effectively replace it by creating a monopsony, by a market situation in which there is only one buyer. As such, he argued that the securitization process is causing a shift from the market paradigm that has dominated European energy governance since the late 1980s.

Dekeyrel then argued that this securitisation also extends to transatlantic energy relations, in light of the paradigm shift and the introduction of a logic of war in EU energy governance. This is because the EU aims to replace one-third of its gas from Russia via additional LNG imports, mainly coming from the US. While US LNG was previously perceived as an optional precaution to mitigate the security of supply risks associated with import dependence, it has now become a necessity to eliminate the existential threat posed by the EU's energy dependency on Russia.

**Nikos Vogiatzis** began his presentation by emphasising that the question of democracy in the EU has produced an extensive debate, due to the apparent democratic deficit and the EU's need to connect with its citizens. He argued that while the institutional strengthening of the European Parliament, the establishment of EU citizenship further to the Maastricht treaty, the EU's stated commitment (on various occasions) to enabling citizens' participation – among others – have been notable developments, arguably the challenge to further democratize the

EU and engage citizens persists.

He reminded participants that the Lisbon Treaty was a compromise, after the failure of the Constitutional Treaty. Although the Lisbon Treaty was not drafted to help solve the democratic problems of the EU, it did contain some key provisions, such as the provisions on democratic principles enshrined in Articles 9-12 TEU. However, Vogiatzis believed that this alone is not a full picture of EU democracy as it does not include matters such as the right of access to documents – among others. Such matters were not addressed further in that presentation.

Moreover, Vogiatzis' main argument was that that the question of EU democracy (and any combination of proposals in this direction) should be mindful of at least two dimensions: first, the need to sufficiently consider *both* the EU and the national levels; and second, that the EU is founded on representative democracy which is, however, complemented with references to participatory democracy.

Vogiatzis used the example of the *Spitzenkandidaten* process. A seemingly minor modification to the process of election of Commission president was fully exploited by the European Parliament in 2014. Of all possible interpretations of Article 17(7) TEU, the Parliament pushed for and eventually succeeded in convincing the other institutions, particularly the European Council, to accept the lead candidate of the party who gained the most seats in the European Parliament elections. This process was not repeated in 2019. While there may be different views on the question of election of the Commission President, the trade-off was summarised as follows: increasing the democratic legitimacy of the Commission (and therefore the EU) versus unduly politicising the Commission. Its future remains uncertain, but it was no doubt part of the discussions of the Conference on the Future of Europe.

Vogiatzis argued that through the monitoring of the principle of subsidiarity, national parliaments are provided with a significant avenue to be involved in EU affairs. While many think that their further participation is essential for a more democratic EU, research has shown that not all national parliaments avail themselves of this opportunity to influence EU legislation. In addition, the principle of subsidiarity is a complex notion subject to various interpretations, both in its EU and general formulation.

With regard to participatory democracy, the various references in the Lisbon Treaty should have generated a more robust response by the institutions. It should be remembered that Article 10(3) TEU declares that decisions should be taken as openly and as closely as possible to citizens. Of course, it is unfair to say that there has been a complete lack of response. However, one area of potential criticism concerns the role of the Commission in the European citizens' initiative (ECI). As is known, the ECI enables at least one million citizens from a quarter of Member States to invite the Commission to submit a proposal. Although

some control by the Commission at the admissibility stage is not undesirable, Vogiatzis asked whether the Commission is prepared to sacrifice *where appropriate* its near-monopoly to initiate the legislative process.

Vogiatzis continued that the EU democracy question featured prominently in the discussions and proposals that stem from the Conference on the Future of Europe. The set-up of the conference shows that the dimensions mentioned earlier have been taken into account: for example, one can mention the composition of the Conference plenary (MEPs, other EU institutions and bodies, national parliaments, among others) or even the fact that both European Citizens' Panels and National Citizens' Panels were established (although, crucially, not all Member States organised one). Turning to the proposals, again, one finds references to addressing representation and participation, but also proposals concerning the national and EU levels. Nevertheless, it is not a given that all these dimensions were given equal weight, and this is something that will be the subject of future work. One finds several recommendations concerning *inter alia* citizens' participation and youth involvement, awareness raising and education, but also European Parliament elections and reconsidering the role of national parliaments.

On the European elections, for example, Vogiatzis pointed out that there are proposals concerning moving towards voting for Union-wide lists, or 'transnational lists' (in the sense that some of the Members of the European Parliament should be elected through a European Union-wide list, the rest being elected within the Members' States), but also about the Commission President (the direct election and the lead candidate system both being mentioned, the aim being that 'European citizens should have a greater say on who is elected as President of the Commission'). Vogiatzis concluded by underlining that the response of the EU institutions to the Conference will matter considerably. While observing the response of the EU institutions, one should not lose sight of the question of possible Treaty reform, which is being pursued by the European Parliament. President von der Leyen has recently opined in the State of the Union address that 'as we are serious about a larger union, we also have to be serious about reform'; and, in accordance with the European Parliament, that the 'moment has arrived for a European Convention'. EU institutions and Member States are therefore likely to debate the question of treaty reform in the near future.

**Isabelle Mancini** began by emphasising that EU's new comprehensive trade agreements affect lots of areas and sections of society which has also had an impact on actors who demand a say in how trade policy is made. The Commission is also becoming more aware of the democratic deficit in this context; there is a wider range of actors who feels as though they should have a say in what is being decided.

Mancini used European Commission policy documents to show the inclusion of civil society actors in trade policy. They introduce a number of initiatives to allow these actors to have a say in such policy making. She argued that the Commission's communication (22.6.22, COM(2022) 409 final) was an unprecedented focus on consultation of trade agreements, as well as the whole life cycle of FTAs, including events even before negotiation.

Participation which includes asking questions as to what kind of participation, participation by whom and when, and at what stage will there be participation. She begins with the priority setting-stage which she says is the least-developed stage for civil society to take part. They don't have a big role at this stage, thus the Commission wants to focus on this to try and eradicate problems they may find at a later stage. There is no institutional venue for civil society to provide input at this stage currently.

The second stage is the negotiation stage. This contains the most popular civil society dialogue as it has the most institutional mechanism. A large number of stakeholders take part, though it has led to a number of impracticalities. She stated that there is now a trade-off between openness but also the possibility to meaningfully understand and respond, and thus follow up to what civil society has said. She argued that it has since become a debrief opportunity for the Commission to civil society and has led to consultation fatigue. She notes that the inclusion of the group experts in the TTIP negotiations, although it only lasted for a year, was a welcome development for civil society as it allowed a more tailored and focused discussion with the Commission. The Commission had followed this suit and has released a communication to reach civil society more effectively in Member States, rather than simply focusing on EU-based civil society.

The third stage was regulatory cooperation. Participation here varies depending on the trade agreements themselves. They range from participating in meetings to simply providing comments; there has been no communication from the Commission to develop this further. Thus, there is no real follow-up to what civil society has to say here.

The fourth stage was implementation/enforcement. She argues that this is where the most development is happening. In the new FTAs, the main mechanisms for civil society engagement is to take part in Domestic advisory Groups. It is one of the main institutional venues for civil society. Interviews Mancini conducted in Brussels revealed those with complained about the lack of formal recognition of these groups and their meetings, particularly when it comes to third-party Domestic Advisory Groups. There is also an issue of who should be a part of these groups and their agenda. It was difficult to establish an agenda when the FTAs cover so many issues. Commission communications have shown developments here for civil society by advocating for more meaningful interaction etc.

Mancini reflected upon whether there was a conceptual change needed i.e. does the Commission understand the need for civil society to participate? At implementation levels,

there will be a more rounded perspective and issues can be identified. But she also considered how the civil society system would change if there were more democratic issues underlying it? Is there a possibility to involve civil society in decision-making processes once the agreement is negotiated? One of the main problems is how to anchor these participatory mechanisms to democratic principles rather than focussing how effective they are for EU trade policy. There are also pitfalls or wider participation, so participation should be worked on with democratic principles.

Mancini then moved onto the examples of civil society participation in other trade agreements. For example, the CPTPP and the USMCA and whether this participation achieved was meaningful or useful etc.

**Dionyssi Dimitrakopoulos** began by discussing intergovernmental drift which is used to denote contradictory trends in the post-Maastricht development of the EU. On the one hand enhancement of the powers of the European Parliament, the appointment mechanism of the Commission president and the expansion of qualified majority voting in the Council moves towards democratisation. The appointment of the Commission President is explicitly politicised which relates to how the European Council makes its decisions. This opens up a space of political contestation in the EU which renders elections much more salient for ordinary citizens. He argued that this is a decisive step towards democratisation. On the other hand, he argued the European Council's enhanced role decisively via the introduction of a 'permanent' President through the Treaty of Lisbon, and the continued practice of consensus speaking of the Council of Ministers and gradual weakening of Commission appointments, has undermined explicit politicisation of the EU.

Dimitrakopoulos's central contention is the fact that the Post-Maastricht operation of EU has been marked by intergovernmental drift as they subvert from formal commitments made in the treaty and undermine, in practice, the further parliamentarisation and democratisation of the EU. He argued that this happens by Member States increasingly muscling their way in a spirit which undermines the Community method, but also to make their personal choices e.g. the current President of the Commission. This deprives supranational institutions of their relative autonomy. He gave two examples to explain this: the appointment of President Von der Leyen in 2019 and the Council's role in the Resilience and Recovery Fund.

He highlighted why the explicit politicisation of the EU is desirable – it would help overcome policy gridlock, it fosters policy innovations, it forces politicians to communicate their preferred policy, the ability to induce preference change among citizens, facilitate issue linkage to help citizens understand how policy is made at EU-level, and it increases both legitimacy and accountability. Dimitrakopoulos argued that we need these things for a number



of reasons. For example, the end of permissive consensus that took European integration to Maastricht. Importantly, when a political system like the EU is unable or unwilling to allow political contestation, it is likely to lead to the elimination of opposition altogether, to the mobilisation of an opposition principle against the EU as a whole i.e. Euroscepticism. These trends relate to the EU being a trade and foreign policy actor. He argued that trade and foreign policy creates winners and losers, and institutions should talk about this to the broader audience to generate better legitimacy of policies and understanding of these policies at national level. He concluded that it should not take a war, like the one Russia is waging against Ukraine, for the EU to start talking about the EU's weaknesses with Russia and energy supply.

**Anna Pau** began by discussing the common provisions of the TEU, setting values and principles at the basis of the Union's action – article 2 TEU and article 3(5) TEU. Especially the latter exemplifies that international law is at the heart of the functioning of the Union. Pau then moved onto the general provisions on EU external action – article 21 TEU. This policy area is principle and value-based, where international law has a prominent role, as well as to build partnerships based on values and principles and to consolidate and support human rights abroad and across all fields.

According to article 21(3), the EU shall ensure consistency between the different areas of its external action. There were two assumptions from this: the Union must respect/promote international law (as a consequence of a legal obligation), and the Union must conduct a consistent external action (as a consequence of a – arguably – legal obligation). Thus, the EU must consistently respect and promote international law. Respect means to not act contrarily with its principles, and promoting means boosting international law in the wider world. Is the Union doing this *vis-à-vis* its contested partners? Pau's work looked at Israel and Morocco to answer this question, notably due to the Occupied Palestinian Territories, and Western Sahara territory to the left of Morocco, which can arguably be defined as an occupying power there. Pau argued that the EU has legal instruments to use in its relations with its partners to ensure strict observance (but also promotion) of international law. For example, the conclusion of international agreements; the international-law friendly interpretation of international agreements by the CJEU; due diligence instruments during treaty-negotiations (e.g. impact assessments, inclusive consultations with stake-holders); content of international agreements such as human rights essential clauses; and the application or implementation of treaties through soft law instruments.

Pau noted that, with regard to the conclusion of international agreements, the Union has concluded two different agreements with the Palestinian Liberation Organisation and Israel to trade with both entities, whilst there is only one agreement the Union has concluded with Morocco. It was admirable of the EU to conclude two separate agreements with Israel

and Palestine in spite of the lack of consensus of the recognition of Palestine by Member States and this can be considered a sign of legitimisation of Palestine amongst its neighbouring partners. Another sign of legitimisation can be found in the CJEU's interpretation of the agreements differentiating the *contested* territory from the territory of the *recognised* State. After the CJEU's decisions in *Front Polisario* and *Western Sahara Campaign UK*, the Commission and the Council had to renegotiate to include Western Sahara in the scope of the agreements with Morocco, and they did so without inclusive consultations of the people involved (as found by the Court in *Front Polisario III*). With regards to content, both agreements have human rights clauses which were not activated so far because the termination of the agreements is not desirable for the Union. There was some exclusion of products imported from Israeli illegal settlements from the application of preferential treatment, although the EU did not do the same with Western Sahara's products imported by Morocco into the EU. The role of the CJEU is very important here: e.g. the General Court gave *Front Polisario* legal standing and also the Court's subsequent rulings gave a clear sign of the position taken by the Union on the importance of respecting international law.

The EU has been partially consistent and partially inconsistent with the EU 'international values'. There is no unified, comprehensive foreign policy vision in line with these principles, possibly because of the clash between EU values and EU interests pursued through the margin of discretion enjoyed by the EU institutions in the external action field.

**Emilia Korkea-aho** began by arguing that there was a new moral code for lobbying which could be phrased as 'good lobbying for good global governance.' As a way to influence and inform governments, lobbying is an essential part of political life. While its contours may differ from one policy area to another, certain parallel aspects can be detected on both sides of the Atlantic. Business interests seem to dominate the scene, while public interest lobbyists struggle to have their voices heard. Up until now, there has been a reluctance among scholars, policy-makers and perhaps even good-governance campaigners to take a normative stance on lobbying. This means that as far as lobbying is transparent, it is a legitimate tool for influencing public policies. However, this might be changing. The concern about climate change is introducing a new moral code for lobbying. If sustainability is taken seriously to the extent that policy-making should contribute to a sustainable society, then this should also concern lobbying. It is no longer enough that lobbying should be transparent, but it should also contribute to a more sustainable society.

Korkea-aho begins with the example of non-governmental organisations that address climate change. They are campaigning to restrict oil and gas lobbying. The five biggest companies in the sector (BP, Chevron, ExxonMobil, Shell, and Total) spent at least €251 million on lobbying between 2010–2019, and had 327 meetings with the former Juncker

Commission.<sup>1</sup> Accordingly, campaigners are arguing for restrictions on fossil fuel industry lobbying, similar to those that apply to tobacco companies under the WHO framework.

From a transatlantic perspective, it is worth noting that this is unlikely to happen in the US because lobbying is constitutionally protected. In the EU, the treaties have never been interpreted to involve any particular constitutional protection of lobbying as such. But the deliberative-discursive mentality of EU integration means that fossil fuel companies will be kept in. Companies have long engaged with Corporate Social Responsibility schemes. Novel and promising that these schemes increasingly involve commitments to socially sustainable and responsible lobbying. For instance, the Columbia Center on Sustainable Investment created a handbook that helps companies align with the Sustainable Development Goals (SDGs) through four separate pillars of action: Beneficial Products, Sustainable Operations, Sustainable Value Chains, and Good Corporate Citizenship. As far as the fourth pillar (Good Corporate Citizenship) is concerned, there are several commitments with regard to lobbying and more generally participation in the political process. SDG-aligned companies should, *inter alia*,

- “Refrain from or ceasing all lobbying that seeks influence, legislation, regulation, trade agreements or negotiations in ways that undermine the 2030 Agenda”
- Address “risks associated with the revolving door phenomenon, which requires top leadership, government relations and lobbying staff to sign ‘non-complete clauses’ that stipulate that they may not undertake roles in lobbying, drafting or enforcing legislation or regulations related to the industry within three years after employment with an SDG-aligned company. This three-year cooling off period also applies to hiring people directly from government positions”.

While we may question the effectiveness of these schemes, but it is interesting to see these sort of moral code emerging.

**Vigjilence Abazi** began by stating that one of the key components of good global governance is always transparency. Her focus for transparency lies on whistleblowers which have been essential for a wide range of issues, especially from a transatlantic perspective. Abazi focusses on privacy because there is a divergence between US and EU approaches towards such, but it is interesting to observe that, through the transparency of whistleblowers, such as the Cambridge Analytica scandal, it seemed that the EU and the US both reacted in similar ways. She argues that there was thus a unified response.

There is an increasing shift in public behaviour because there is now more acceptance of whistleblowers and there is more demand for this type of transparency and accountability. The increasing awareness of the scrutiny that whistleblowers provide that shows privacy

harms being caused by the tech industry and the timing factor which lawmakers themselves see as essential, and is a unique method of transparency. Thirdly, she argues that the increase in legislation e.g. the European directive on the protection of whistleblowers, which helps to protect those who report breaches of EU law and contains an enforcement logic. It has a dynamic approach – not only does the directive cover all policy fields, it keeps the door open for future legislation. Thus, she argues that the role of whistleblowers are no longer individuals on the ‘fringes,’ but are increasingly playing a large role in transparency and accountability. With the question of democracy in the EU in mind, for the EU to try and establish a direct link between individuals who can report EU institutions without going through national routes, this is important when thinking about the issues in Poland and Hungary. She thus argues there is a new channel for how transparency can be fostered in Europe where national judiciaries and national press won’t facilitate whistleblowing.

With the rise of private power and rise of blurred lines for lack of adequate instruments and competition or antitrust initiatives, this new channel can ensure private companies are still being held to account. We are now seeing the potential of whistleblowing being recognised on both sides of the Atlantic. It is a quick fix for transparency. Although it is positive that there is a directive which protects whistleblowers, we must not rely on these quick fixes and lose track overall on institutional architecture. Whistleblowing is an exceptional mechanism and, instead of relying on it too heavily, we must reflect on the institutional architecture on promoting transparency.

**Sylvia Chen** introduced her presentation by emphasising that good global governance is more important than ever because of global challenges such as the pandemic, supply chain disruptions, war, climate change etc. Trade policy is at the forefront of global governance. The EU and the US coordinate on some of these global issues e.g. sanctioning. On the other hand, transatlantic trading blocs have built up competing policies in order to mitigate supply chain challenges.

The EU and US are the two large traders in goods and services and their actions have overall impacts on the global trade arena. She argues that some of their actions may be targeted at China, but each regulation is still for their own interest. Where the ‘West’ is at in terms of their trade policy is a complex question. In 2015, the EU was ‘trade for all’ and ‘inclusive, openness and transparent’ trade. In comparison, the US was actively negotiated TTIP and TPP. Since then, the US has implemented unilateral trade measures e.g. tariffs on steel aluminium, China tariffs. These are an example of opaque regulations governing what check box to tick. However, unilateral sanctions on Iran and Cuba leaves trading partners in limbo. They must consider the differences in trade regulations to carry out day-to-day business. Today, the US looks more domestic-inwards, and focuses on a worker centred trade

policy. She explains this as US trade policy focusing on what works for the American people and the electorate, rather than what works for nations as blocs. She argues that this is a protectionist policy as it safeguards the interests of everyday workers and to build up US manufacturers capability. This shows a more closed-off selection process. For example, the US Chips and Science Act is a response to the pandemic and supply chain disruption which affected competition between US and China. It is the US' was of bring back its technology capability and their space in these advanced technology areas.

On the other hand, she argues that the EU also has changed from its former 'trade for all' policy to a more assertive trade policy. The proposed regulations from this new policy, she argues that the EU seems more closed and assertive rather than open. Although they have a sustainable element, it seems to still have a discriminatory affect to non-EU participants and to force non-EU actors to play by EU rules (the Brussels Effect). She argues that these policies are examples of how these actors look at their own interests.

The EU has the most direct investment in the US compared to any other country and vis-versa. Thus, the US and EU have interest in aligning their regulations and policy with each other which can be seen in the EU-US TTC and working groups. Alignment of sanctions against Russia can come from these working groups. She argues there is more technical private diplomacy between Commission-level and US agency-level which allows them to push through more cooperation, especially export control and the US worker force act (EU legislation of the same subject is currently coming into force).

Chen argues that EU and US have used '*wandel durch handel*' – "come to our club, only if you play by our values." If they don't subscribe to values, the entity will not secure trade deals. However, many other countries have established new trade agreements e.g. DEPA which are flexible enough for other members to join, compared to the rigid process of TTIP. She argues that perhaps the West should start small and flexible with their trade agreements with informal diplomacy rather than a big trade agreement.

**Maarten Hillebrandt** began with the observation that the EU seems to always be in an imminent crisis and on the brink of collapse, something he says to be taken with a pinch of salt. However, the crises the EU is currently facing might lead us to conclude some serious geopolitical challenges lie ahead e.g. externally, the Russian invasion of Ukraine, internally with the rule of law crisis, and horizontally, the climate crisis. He proposed that 'club government' might be a way on how the Union could deal with these different challenges. He believes that club government should go beyond merely the interaction of member states – which is what Helen Wallace's 2002 definition discusses. He argued that the analysis could be broadened to include wider actors.

He first discusses internal challenges, namely the rule of law crisis. The negotiation of

the last EU budget was very intense. Before this, the EU was already negotiating with instruments on the conditionality of the disbursement of EU budget funding. Legal advice was issued on this regulation. Request for access to the document was rejected. Moreover, regular talks in Hungary and Poland regarding the rule of law of these states were regularly held behind closed doors. An element of club governance here can be discerned, as discussions were protected from too much visibility. However, Hungary used to closed door meeting to their advantage and argued they were being singled out.

Hillebrandt then began to discuss Frontex. Frontex became a subject of intense scrutiny over its competencies for water protection, and was accused of assisting pushbacks in the Mediterranean. Documents were requested to establish to what extent Frontex was involved, but they lost their case; Frontex asked for their legal fees to be paid, which were much higher than usual given the relative routines of access to document cases. The activists refused to pay the fee, and Frontex took them to court for this for intimidation purposes. The EP became more involved and asked more questions. He argues, as a result of investigative journalism, it was highly implausible that Frontex wouldn't have known about the push backs.

He then discussed the COVID-19 pandemic. He argues the response of Member States was scattered, so the Commission decided to take control of the policy response to the pandemic. What could have been presented as a success by the Commission i.e. its ability to order a large quantity of vaccines when they became available, Von der Leyen boasted that she had overseen the negotiations for such via text messages with the Pfizer CEO. Access to these text messages was requested. The Commission argued that the short-term nature of text messages should not be considered documents under the access regulation, and were not registered by the Commission. This caused an outcry among civil society. The Ombudsman found maladministration on the part of the Commission though they still decline access to such. Journalistic and civil society actors try to probe how finances are disburse in Member States and whether it will be spent free from corruption.

He then moved onto argue that there is a same reflex – negotiating behind closed doors and coming to a decision. But this will become untenable, as seen in the examples above. At the same time, he argues that certain ventures of the EU are too big to fail, but too divided to succeed. The different policy objectives of the different actors have become much more scattered. Actors are still able to hold positions in spite of their opaqueness when it comes to policy making. Finally, he argues there is a shift from intergovernmentalism with new kinds of club members. The fact that Member States are not involved in 'Pfizer-gate' shows they do not care to change the highly irregular way of negotiating this deal. Thus, he argues we have new types of actors taking a place at the table in the lens of club governance.

In conclusion, he discussed the three cases in light of Harlow's notion of club government. He

argues that each case is characterized by the reflex –also described by Harlow– to negotiate and agree on highly salient policies behind closed doors, directly if sometimes tacitly authorized by the EU's Member States. As seen in the examples above, in many cases this dynamic ultimately becomes untenable, due to a mixture of press scrutiny and public opposition. At the same time, he argues that certain ventures of the EU are too big to fail - but also too divided to succeed. The different policy objectives of the different actors have become much more scattered in a more ambitious club comprising more members. This is underlined by the Council's secretive handling of its policy on rule of law breaches, which was unable to cover up significant political conflict among the Member States. In the case of supranationally operated policies, this dynamic lends some previously subservient actors greater leeway in spite of their opacity even in light of (perceived) policy failures and scandals. As a consequence, he observes a conceptual shift from intergovernmental club government to a club with new kinds of members. The fact that Member States did not get involved in holding Von der Leyen accountable over 'Pfizer-gate' shows they do not care to correct the Commission's sometimes highly irregular and soloistic manner of acting. The picture is different with Frontex, where, after a protracted period of silence over a series of uncovered scandals, its Director Leggeri was eventually forced to resign. Thus, he argues that the analysis of (in)transparencies in EU policy making helps us identify new, non-state actors joining the table in the lens of club governance.

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