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The EU-US Transatlantic Trade and Technology Council: Shifting Multilateralism through Bilateralism and Institutions?

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Abstract

The European Union ('EU')-United States ('US') Trade and Technology Council ('TTC') is a key element of current global law-making in trade and technology, however imperfect it might be. Its soft law structures and formulations contrast considerably with certain developments in EU data governance, but it aligns well with broader new regimes in international economic law. This chapter considers the relationship between bilateralism and multilateralism in the field of trade and technology taking place in light of the new EU-US TTC recently taking effect. It considers a history of transatlantic failures in cooperation, the history of law and governance in EU-US relations in trade and technology and the evolution of the TTC, followed by a series of conclusions. The TTC raises the question as to the place of bilateralism and multilateralism in the complex transatlantic relationship spanning many decades. It forms a unique study of considerable global law-making ambitions and objectives in contemporary times, against a fraught backdrop of complex transnational cooperation. Yet the context of transatlantic relations, itself a rich tapestry of innovations in the area of data transfers between two of the largest global players in trade and technology, may lend the case study of the TTC more gravitas and significance than other forms of bilateralism.

Introduction

Many transatlantic trade agreements have seemed 'doomed to failure' through non-compliance, plagued by sub-optimal remedies (Petersmann, 2003, 1-62; Petersmann, 2015; Pollack and Shaffer, 2009; Petersmann and Mayr, 2017; Gardner, 2020, 105-148). Many Mutual Recognition Agreements ('MRAs') have been alleged to have failed on account of undue power and influence of US federal authorities (Pollack, 2003). As the former EU Trade Commissioner Sir Leon Brittan famously stated, 'governments proved to be more eager than their agencies to cooperate' (in Shaffer, 2000, 13). Indeed, many EU-US agreements have arguably defied legal characterisation or comprise highly complex efforts at global governance —e.g. the US-EU MRA and its six sectoral annexes of 1997, the US-European Community ('EC') MRA on marine safety (June 2001), and the US-EC understanding on safe harbour principles for data privacy protection (of 2000). Indeed, several post-9/11 bilateral EU-US agreements in security have been argued to add little to existing agreements between individual Member States and the US (see also Mitsilegas, 2003; Fahey, 2013).

While there has been little effort to harmonize standards on a purely transatlantic basis, the EU and US have negotiated bilateral mutual recognition agreements. For example, the 1997 US-EC MRA was based largely on the mutual recognition of test results by 'Conformity Assessment Bodies,' which were evaluated pursuant to international standards set forth in International Organisation for Standardisation/International Electrotechnical Commission guides. The National Security Agency surveillance saga triggered by Edward Snowden also caused many to consider the question of the value and merits of transatlantic cooperation through law. Nonetheless, the influence of EU standards as principles caused certain commentators to suggest that EU law had a complex but palpable impact upon US law (Shaffer, 2000. See also Vogel, 2012; Bradford, 2020; Scott, 2009). It is a seemingly endless tale of decades of complex bilateralism and multilateralism efforts, marked by a dominance of soft law and hybrid governance.

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A Transatlantic TTC, as proposed by the EU in late 2020 to the then-new Biden administration and already in place by Autumn 2021, could provide an important bedrock from which multilateral ecommerce developments can flourish via the new so-called ‘Pittsburgh Statement’ (European Commission, 2021a). The TTC has significant global law-making objectives as will be outlined. It constitutes a similar entity or development to that taking place in EU-India relations, where another so-called Trade and Technology Council has also just been established via soft law (see European Commission, 2022a).

This chapter considers the relationship between bilateralism and multilateralism in the field of trade and technology taking place in the new EU-US TTC recently taking effect as a significant development, albeit through soft law, as a meaningful example of regionalism engaging with broader frameworks and themes. The most contemporary and cutting-edge digital trade agreement globally is a soft law non-binding partnership, the 2020 *Digital Economy Partnership Agreement* (‘DEPA’) between Chile, New Zealand, and Singapore (see Burri, 2021). It is not formulated as a trade agreement, but rather intended to address the broader issues of the digital economy through a soft law agreement. Its breadth and flexibility are significant in so far as it purported to traverse a range of contemporary issues. DEPA’s ‘soft’ approach to rulemaking and norm-setting is alleged to have been effective in an Asian context, such as the Asia-Pacific Economic Cooperation (‘APEC’) forum (including on digital governance) and worthy of replication (Goodman, 2021). Its purpose is to enable shaping rules and norms in this critical area otherwise than by the long and arduous process of negotiating trade agreements. It is notably not couched in much multilateralism. Yet, such a framework contrasts considerably with the very different type of debate taking place across the Atlantic in the context of the post-*Privacy Shield Agreement* negotiations, reaching an agreement on a *Trans-Atlantic Data Privacy Framework* in 2022 which includes a binding transatlantic court, discussed below. It raises the question as to the future of bilateralism and multilateralism in trade and technology. The TTC forms a unique study of global law-making as to complex contemporary fields of trade. The place of an institution here to propel law-making is of note. Yet the dominance of soft law and complex governance in EU-US relations operates to cloud its successes and actions.

This chapter considers the relationship between bilateralism and multilateralism in the field of trade and technology taking place in the new EU-US TTC recently taking effect. It considers a history of transatlantic failures in cooperation, the history of law and governance in EU-US relations in trade and technology and the evolution of the TTC, followed by conclusions. It thus evaluates a time period which spans a very short range of time of less than a year at the time of writing. Yet it is still a very rich study of a period of time of extraordinary actions and ambitions.

1. A History of Failing to Cooperate and Disputes

A broad range of attempts at transatlantic governance have been characterised as unsuccessful in scholarship, raising the question as to what the history of transatlantic governance indicates to us in terms of the expectations and realities of transatlantic cooperation. Petersmann sought to demonstrate how so many transatlantic agreements seemed doomed to failure through non-compliance, plagued with sub-optimal remedies (Petersmann, 2015). The 1997 MRA between the EC and US is viewed as having been hampered by a multiplicity of actors involved in its implementation, as well as certification issues and the general dominance of private economic actors (see also Petersmann, 2015; Nicolaidis and Shaffer, 2005). The most significant transatlantic digital trade cooperation, the EU-US *Privacy Shield Agreement*, arguably was not adequately ‘policed’ by the US Federal Trade Commission (Terpan, 2018; Fahey and Terpan, 2021). Yet we may note that, Krisch sought to challenge the characterisation of almost a decade

of work by Pollock and Shaffer of the infamous EU-US Genetically Modified Organisms ('GMOs') regulatory dispute, as 'failed' transatlantic cooperation (Pollack and Shaffer, 2009). Instead, he argued it was an example of both horizontal and legal pluralism, which indicated a very high degree of cooperation between legal orders (Krisch, 2010). Similarly, in the 1990s, positive comity arrangements were entered into between the EU and US enabling extra-territorial enforcement in competition law so as to avoid transatlantic disputes. They are largely perceived as successful arrangements, albeit with highly publicised yet limited disagreements (Bradford, 2020).

At the time of writing, there were a number of high-profile and longstanding disputes between the EU and US at the World Trade Organisation ('WTO') only recently resolved, outside of the multilateral institutional system—that is, the WTO. For example, there was an ongoing dispute between the EU and US as to Airbus and Boeing and the subsidies provided to the companies, initially resulting in an agreement in 1992 on trade in large civil aircraft.¹ The US withdrew from this agreement in 2004 on the basis of support given to Boeing, and the EU followed suit with claims as to support granted to Boeing. The WTO was asked by the EU to rule on countermeasures in 2012 and hearings commenced in 2013.² Similarly, a poultry dispute has been ongoing since 1997 relating to the *WTO Agreement on the Application of Sanitary and Phytosanitary SPS Measures*. Many longstanding disputes between the EU and US, however, have been swiftly resolved, paused, or halted, at the outset of the Biden administration again mainly outside of institutions (Zalan, 2021; Fahey, 2021).

The European Commission has sought to emphasise the benefits of the TTC as enabling more constructive dialogues on open disputes and cases eg steel and aluminium tariffs, thereby widening its strategic operations, benefits and outcomes. The idea of a new Council with bilateral and multilateral goals is thus difficult to fathom but is also evidence of considerable ambitions, explored here. First, however, the chapter turns to the framing of law and governance in EU-US trade relations and their forums.

2. The Law and Governance of EU-US Trade Relations and Its Forums

Many landmarks in the history of EU-US relations in trade and technology and other areas date to the transatlantic declaration of 1990, expanded through the *New Transatlantic Agenda* ('NTA') in 1995, and have taken soft law form (Pollack, 2005). Traditionally, political science accounts have contended that EU-US relations are both law- and institution-light (Pollack, 2005, 916; Fahey, 2014, 370). The advent of the Trump administration appeared to give effect to an unprecedented shift in transatlantic relations since before World War II. Prior to this, the Obama-era Transatlantic Trade and Investment Partnership ('TTIP') negotiations had brought the EU and US closer to much deeper forms of cooperation (Bartl and Fahey, 2014). Countless trade wars ensued which already appears to have changed with the Biden administration, for example already with the EU-US TTC proposed immediately by the European Commission and quickly taking effect- to be discussed here below (European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 2020; European Commission, 2021a; European Commission, 2021b; White House, 2021). Yet its law-light, institution-light characteristics are beyond dispute and evidence a new era of negotiation, law, policy and governance of trade and technology.

There have been many so-called transatlantic soft law dialogues over the years (Pollack and Shaffer, 2001, 25-34, 298; Fahey, 2014). Certain dialogues appear more permanent or high-profile whereas others have been less than transparent and their business dominance has been

¹ *Measures Affecting Trade in Large Civil Aircraft* (second complaint) - AB-2011-3 - Report of the Appellate Body U 12/03/2012, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm. Accessed 31 July 2022.

² Dispute DS392 *United States — Certain Measures Affecting Imports of Poultry from China* (WTO).

heavily criticized (Green Cowles, 2001, 231; Bignami and Charnovitz, 275-276). The Transatlantic Consumer Dialogue ('TACD') has become increasingly high-profile in the age of 'Big Tech' assessing the need for voluntary and transparency exchanges between regulators and involvement of all stakeholders and sharing best practice, particularly as to privacy (TACD, 2021).

Many other *formal* law-making processes take place against this difficult backdrop (Fahey, 2014; Jančić, 2015). One of the most significant sites of transatlantic 'law-making' if one can use that term has been until recently at the WTO. Most disputes between the EU and US have taken place before the WTO Dispute Settlement Body ('WTODSB') in recent times, at least until the demise of that organ in late 2020 (Library of the European Parliament, 2013; Pollack and Shaffer, 2009; Petersmann, 2015). There, the EU and US have historically been involved in the most disputes (European Commission, 2021c. See also European Commission, 2021d). The resolution of such WTO disputes, eg the Airbus-Boeing large civil aircraft dispute in 2021, is highly significant but perhaps an important side-issue to the main 'act'. It can be easily suggested that the history of transatlantic relations shows a fine line between cooperation and conflict. The engagement of the EU and US on the future reform of WTODSB has reached a critical juncture, with the failure of the US to nominate judges to the body and to increasingly be opposed to this forum in its existing format with respect to the rules-based system of multilateralism that both the US and EU have long subscribed to (European Commission, 2018; US Trade Representative, 2010). The Biden administration appears to have located WTO dispute settlement reform within broader EU cooperation. The EU and 15 WTO members established contingency appeal arrangement for trade disputes in March 2020, with the number trebling a year later (European Commission, 2020). The extent to which the US will join the EU as to shared visions of the WTO reform remains to be seen. This dimension of ordinary law and governance of EU-US relations in trade, beyond the WTO, remains thus a complex issue.

3. Background to the TTC

Transatlantic data flows amount to some of the most significant for the global economy (US Chamber of Commerce, 2021). Even in the midst of a global pandemic, in 2021, the transatlantic economy amounted to one third of global GDP (Hamilton and Quinlan, 2021; Hamilton and Quinlan, 2022). At the announcement recently of a transatlantic data privacy framework, the US Government stressed that more data flows between the US and Europe than anywhere else in the world, enabling the US\$7.1 trillion US-EU economic relationship (White House, 2022). The TTIP, the largest-scale transatlantic collaboration in recent history, expressly excluded data flows from its negotiations. Its negotiation of e-commerce could have been pivotal given the gap between the TPP and EU agreements emerging as to data flows (European Commission, 2015a; European Commission, 2015b; European Commission, 2015c; European Parliament, 2020. See Burri, 2017). The US shift towards the need for federal privacy laws has considerably altered this debate, as discussed below.

The EU-US *Joint Agenda for Global Change* included a transatlantic TTC, putatively developing a loose institutionalisation of key global challenges. The EU proposed as part of its global change agenda a TTC—centred upon multiple working groups. Notably, seven of the ten working groups address themes that refer to technology either with a security angle or from a competition perspective (Demertzis, 2021). Whether it will generate global lawmaking in any of these fields remains to be seen. As to working group 10 on global trade challenges, industry and academia were united on the need for WTO reform to be prioritised as a transatlantic goal, emphasising the acute necessity of multilateralism within this bilateral engagement (Bonefeld-Dahl, 2022). The initial TTC meeting was nonetheless plagued by allegations of a lack of

transparency for its accordance of excessive influence to the US, allegations that have beset many contemporary bilateral and multilateral engagements in the field of trade and technology (TACD, 2021). Civil society responded adversely to its creation and its initial working phases despite its development to avoid the challenges of the EU-US TTC as a ‘megaregs’-era agreement, creating upset among civil society as to investment issues, secret courts and a lack of participation (TACD, 2021).

Outside of the context of trade specifically, *General Data Protection Regulation* (‘GDPR’), appeared some have depicted a *convergence* arising between the EU and US legal orders on data standards (Bach and Newman, 2004; Bach and Newman, 2007; Shaffer, 2002). This appears increasingly the case in the post-GDPR era, where more US states have adopted GDPR-esque laws, such as the *California Consumer Privacy Act* passed in that State in 2018. This form of ‘Brussels Effect’, however limited, shows the rising significance of the EU as a global data actor (Bradford, 2020).

After the Court of Justice of the European Union struck down the EU-US *Privacy Shield Agreement* in its *Schrems II* decision,³ the EU and US finally agreed in March 2022 a new *Transatlantic Data Privacy Framework* principle in March 2022, to include a ‘trans-Atlantic court’ and independent oversight (European Commission, 2022b). The framework appears to be understood as a pre-condition for the TTC to evolve, taking place prior to the second meeting in Paris-Saclay in May 2022. Its evolution takes place against a curious regulatory backdrop. The capacity for this convergence to evolve and to align bilaterally, particularly through institutions, could become pivotal going forward. Its global effects, however, remain to be seen.

4. TTC and Global Law-Making?

The TTC is also predicated upon multiple working groups that align with this formula of flexibility, such as technology standards cooperation, export controls cooperation, and investment screening cooperation, among others. It remains to be seen the extent to which the working groups evolve to become successful. Moreover, the degree of engagement of civil society and Big Tech with the respective working groups is a matter for further analysis in due course given that the personal experience of the author following the working groups appears to suggest uneven engagement across platforms, possibly related to issues, staffing, capacity and the nature of the platform itself.

International agreements and standards have heavily informed the work of the TTC. For instance, the Organisation for Economic Cooperation and Development (‘OECD’) Guidelines for Recipient country Investment Policies Relating to National Security, the 2009 *General Agreement on Trade in Services* (‘GATS’), the Global Partnership on AI, the First Movers Coalition, the Green Digital coalition, OECD AI Recommendation, WTO Government Procurement Agreement (GPA), and the *Universal Declaration of Human Rights* among many others are all referenced. A very rough estimate (with counting complicated by multiple divergent references deployed) suggests that at least 55 international agreements, instruments or standards are referenced. Whatever about the accuracy or methodology, it appears a very significant effort to locate the multilateral at the heart of this bilateral effort and in need of future research.

The first post-meeting consensus was that the TTC was off to a ‘promising start’, but observers also noted that the bar for success in the first meeting was low (Van Der Loo, Vandenbussche, and Aktoudianakis, 2021; Hillman and Grundhoefer, 2021; European Commission and High Representative of the Union for Foreign Affairs and Security Policy.

³ *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems* (C-311/18) [2020] ECLI:EU:C:2020:559

2020; Demertzis, 2021). The second meeting already appeared ready for significant policy shifts. In fact, the external regulatory landscape was understood to be an advantage for the EU in taking the lead—perhaps so much so as to make the rule-making exercise together questionable bilaterally. The TTC has concrete and broad ambitions to align standards in times of geopolitical shift, with the EU and US coming together to align technical standards and enable joint mapping for certain key goods supply chains. The question as to global standards and objectives remains complex. Some have even sought to moot a so-called possible ‘TTC effect.’ Yet can strategic partners follow up to align inside and outside of multilateral values? It can be said that the challenges, such as digitisation or greening, are all global challenges, but cannot per se be resolved by standards alignment alone by like-minded cooperation (however noble minded). The TTC raises questions as to whether reform of the WTO should be the key focus. Whether the working groups outcomes align well more broadly with the WTO agenda also remains to be seen. The challenges for civil society engaging with the breadth of the issues proposed and, in this fashion, could arguably be more salient than ever (Hamilton, 2022).

Conclusion

The EU-US TTC is a key element of current global (soft) law-making in trade and technology, however imperfect it might be. Its structures and formulations contrast considerably with certain developments in EU data governance, but align well with broader new regimes in international economic law. The TTC raises the question as to the place of bilateralism and multilateralism in the complex transatlantic relationship spanning many decades. It forms a unique study of considerable global law-making ambitions and objectives in contemporary times, against a fraught backdrop of complex transnational cooperation. Yet the context of transatlantic relations, itself a rich tapestry of innovations in the area of data transfers between two of the largest global players in trade and technology, may lend the case study of the TTC more gravitas and significance than other forms of bilateralism. It is a considerable area of interest as a future research agenda and a useful case study as concerns the thin line between cooperation and conflict in global partnerships on key global challenges of our times. The objectives are considerable and far-reaching, despite the regular failures of negotiation, law, policy and governance. Trade and technology appear intertwined as the new ‘oil’ of the global economy, and yet considerable work needs to be done on understanding the place of major global law-making initiatives outside of the WTO context. The EU-US relationship is no doubt esoteric, but also possibly significant as to the place of framing and institutions of the future of global governance if soft law is to continue to dominate, shrouded in the lexicon of multilateralism and law-making.

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