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Elaine Fahey *Editor*

Institutionalisation beyond the Nation State

Transatlantic Relations: Data, Privacy and Trade Law

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Foreword

At the end of April 2017, shortly before this book went to press, the EU's Trade Commissioner, Cecelia Malmström, met with Trump administration officials for the first time. In the wake of that meeting, she remarked, 'I hope [the Transatlantic Trade and Investment Partnership (TTIP)] will come out of the freezer but [. . .] the new administration needs a bit more time to look at it and to assess and to get acquainted with it and they haven't done that yet'.[1] This volume takes advantage of the (perhaps permanent) hiatus in the negotiations to provide a serious, scholarly assessment of the process of institutionalisation in the transatlantic economic relationship more broadly, considering data privacy, as well as trade. As Elaine Fahey describes in her introduction, the volume uses institutionalisation as a 'highly provocative lexicon' that has the 'capacity to provoke questions of sovereignty and sensitivity towards embedded institutionalised frameworks'.[2]

By focusing on institutionalisation as a process, as well as an objective, this volume illuminates several features that help to explain why the US and the EU have struggled to institutionalise their trade and privacy relationship(s). A point of departure is that the transatlantic economic relationship is remarkably under-institutionalised.[3] This observation is particularly striking in the light of how interpenetrated their economies are[4] and in comparison both to the trading relationships that they each have with others and to the military alliance that binds them. The TTIP negotiations thus represent(ed) an ambitious attempt to institutionalise transatlantic economic cooperation. Transatlantic cooperation with respect to the related, but formally separate, issue of data privacy seeks to mitigate the adverse economic and security implications of profoundly different domestic privacy regimes. The

[1] *Inside US Trade Daily Report*, 28 April 2017.

[2] Fahey, this volume.

[3] Fahey, this volume.

[4] Hamilton and Quinlan (2017).

volume's focus on institutionalisation draws attention to three particularly valuable observations.

One observation is that domestic institutions—understood both as established policies and as allocations of power—can present an obstacle to international institutionalisation, at least between near peers. Both the EU and US are used to being able to export, albeit in a limited fashion, their own approaches through preferential trade agreements with 'weaker' parties. When they deal with each other, neither is willing to give, except at the margins.[5] The intransigence of domestic institutions is the central explanation for the limited nature of transatlantic privacy cooperation. Their own privacy regimes are so institutionalised and resistant to change that transatlantic cooperation focuses mitigating the economic and policy costs of those differences.[6] The internal allocation of authority can also impede international institutionalisation. The fragmented nature of the US's standard-setting regime, for instance, severely limited cooperation on technical barriers to trade in the TTIP negotiations.[7] The vertical separation of powers within the US constrained the Obama administration's ability to make concessions in the TTIP negotiations on the EU's key objective of liberalising sub-federal government procurement.[8] In the EU context, the vertical separation of powers for trade policy was illustrated by the Commission's decision to treat the Comprehensive Economic and Trade Agreement (CETA) with Canada as if it were a mixed agreement. This required the approval of every member state, which in some instances, most notably Belgium, also required the assent of regional parliaments. The resulting 'vetocracy' almost scuppered the agreement.[9] Thus, domestic institutions can be too difficult to change to accommodate international partners (as with data privacy), or domestic institutions can distribute power in ways that make negotiations with others difficult (as with standards, government procurement and mixed agreements). In both understandings of institutions, domestic institutions acted as a break on international institutionalisation.

A second observation from this volume is that transnational agreements often rely on domestic institutions for enforcement or oversight. Both the Privacy Shield and the Umbrella Agreement rely on US enforcement of standards that the EU is willing to consider acceptable, even if some doubt its adequacy.[10] The need to rely on others to adequately enforce rules is a central challenge to regulatory cooperation. Building that trust was central to regulatory cooperation agreements reached in the shadow of

[5]Garcia, this volume.

[6]Tzanou, this volume

[7]Purnhagen, this volume.

[8]Young (2017).

[9]Kleimann, this volume. The Court of Justice of the EU's subsequent ruling in Opinion 2/15 on the EU-Singapore Free Trade Agreement in May 2017 gave a broad interpretation of the extent of the EU's exclusive competence, but indicated that provisions on portfolio investment and investor-state dispute settlement fall also within the authority of the member states. CETA, therefore, was appropriately treated as mixed agreement.

[10]Tzanou, this volume.

TTIP, most notably the agreement on mutual acceptance of inspections of good manufacturing practices for pharmaceuticals.[11] It is this type of trust that underpins the 'incremental institutionalism' in the Joint EU–US Financial Regulatory Forum.[12] Other contributions highlight the role of domestic institutions in policing transatlantic cooperation. The European Parliament has played a pivotal role in monitoring both the TTIP negotiations and transatlantic data privacy arrangements.[13] There have also been the Commission's efforts to enhance the legitimacy of the TTIP negotiations by consulting the Parliament, convening the TTIP Advisory Group and making many of its negotiating positions public. The US, however, limited the extent of that transparency by insisting that access to joint negotiating texts be restricted.[14] In these instances, domestic institutions, instead of impeding international institutionalisation, underpin it.

The third observation from the volume is that institutionalisation can be the source of problems, not simply a way to overcome them. That TTIP sought to institutionalise transatlantic regulatory cooperation and investor-state-dispute settlement (ISDS) was a key reason why the negotiations provoked such intense popular opposition in Europe.[15] With respect to ISDS, the Commission sought an international solution to the problem, an investor court system, which it hopes to multilateralise.[16] The institutionalising ambition of TTIP also seems to be at odds with the Trump administration's resistance to international constraints on US actions,[17] which bodes ill for the prospects of resuming ambitious negotiations. This leads to the reminder that multilateral institutionalisation occurs in a narrow band, where it is not contested.[18] This volume, thus, serves as a useful reminder that governments are willing to undertake binding commitments only when they expect the benefits of binding others to outweigh the costs of being bound themselves.

The contributions to this volume, therefore, apply the lens of institutionalisation to recent, high-profile examples of transatlantic cooperation to highlight crucial interactions between international and domestic institutions and to remind us that institutionalisation not be an impediment to cooperation and not just a solution to the problems of cooperation.

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Alasdair R. Young

[11] Young, ibid.

[12] Jančić, this volume.

[13] Moraes, this volume; Kleimann, this volume.

[14] Abazi, this volume.

[15] De Ville and Siles-Brügge (2015).

[16] Lenk, this volume.

[17] Finbow, this volume.

[18] Titi, this volume.

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Preface

This edited volume has its origins initially in a workshop on *Transatlantic Relations and Institutionalisation beyond the State*, which took place at City Law School, City, University of London in July 2016, within the Globallaw@City research series of 2015/2016 academic year, funded by the City Law School Research Strategic Fund Programme. The book is published against a very challenging backdrop to portray, perhaps even of an unprecedented nature, and it was very exciting to engage with the contributors despite of, or even *because of*, these challenges. Thanks are due to the editors at Springer for their continuous support throughout the development of the book project. The introductory chapter has been subsequently developed and presented in many fora, particularly at NYU Law School, whilst the editor was on sabbatical there at the Jean Monnet Centre in 2016/2017, and thanks are due to all there for their lively engagement with a truly transatlantic project and for the involvement of some there more substantively also.

Thanks to Angeliki Braouzi, Manpreet Johal, Sarah Lovelace and Nurdan Mekan for their research assistance over the course of this project. Special thanks are owed to (in alphabetical order) Vigjilenca Abazi, Hannah Birkenkötter, Enrico Bonadio, Francisco Costa-Cabral, Marios Costa, Gráinne De Búrca, Filippo Fontanelli, Maria Garcia, David Kleimann, Nari Lee, Hannes Lenk, Peter Lindseth, Christine Landfried, Stefano Pagliari, Argyri Panezi, Kai Purnhagen, Timothy Roes, Guri Rosén, Thomas Streinz, Maria Tzanou, Joseph Weiler and Thomas Wischmeyer for their comments and suggestions on the introductory chapter and/or for reviewing individual chapters at various points in the development of the book project.

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Elaine Fahey

Contents

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Introduction: Institutionalisation beyond the Nation State: New Paradigms? Transatlantic Relations: Data, Privacy and Trade Law

Elaine Fahey

1 Overview

Conventional social science scholars would tell us that institutions should be understood using a broad tableau definition.[1] Sociologists have long considered institutions to be unfashionable, having institutionalised most pillars of social life in their discourse. Leading contemporary global governance theorists now argue that institutions may not matter because they have been displaced imperfectly by private power, indicating a period of de-institutionalisation perhaps.[2] On a purely descriptive level, 'institutionalisation' is a curious term of art, falling somewhere between a verb, noun, adverb and adjective and is defined in the Oxford English Dictionary as follows: (1) the *establishment* of ('something, typically a practice or activity') a convention or norm in an organisation or culture: the institutionalised *practice* of collaborative research on a grand-scale ('as adjective, institutionalised') institutionalised religion; (2) to *place or keep (someone) in a residential institution*: he was institutionalised in a school for the destitute; and (3) ('as adjective, institutionalised') (of a person), *apathetic and dependent* after a long period in an institution: became less institutionalised, more able to function as an individual.[3] Its curious place in a dictionary definition is matched in the wider world. There is no innately shared understanding of the term across disciplines, whether those focussed upon law and governance in the Nation State, beyond the Nation State. Moreover,

[1] North (1990).

[2] Sassen (2017).

[3] 'Institutionalisation', Oxford English Dictionary, 3rd edn. OUP 2016 (British English spelling employed throughout).

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despite its ostensible centrality to the study of institutions and their evolution in the European context, there is little by way of legal literature focussed upon the European Union, centrally considering the concept of 'institutionalisation'. The first meaning above probably dominates many understandings thereof, but the others are, as will be argued here, arguably far from irrelevant. Some of these meanings carry innately negative and positive connotations of conduct or activity, whereas others just suggest coherent development and form difficult 'media' for analysis. As *Reisnik* reminds us, 'is- (or US "iz"-)ation' has become affixed to so many English-language words that it has lost much of its force as an identifier with meaning.[4] Institutionalisation is argued, however, here to *'matter', because organisations that incorporate 'institutionalised' practices, ideals or systems are understood to be more legitimate, successful and likely to succeed*.[5]

In an era where major parts of the world wish to leave or threaten to leave international organisations (African Union from the ICC, UK from the Council of Europe and European Union, US from WTO or UN), we may now even be entering some form of grand era of wholesale de-institutionalisation, albeit such a claim is difficult to prove or evaluate at this moment in time. Developments in the relationship between the EU and US in recent times may not perfectly correspond to these 'critical junctions' in the global legal order, if we can call them that. The reality may be more settled or less far-reaching. However, this account explores the incomplete reality of just one particular case study against this highly esoteric backdrop.

In many subjects and disciplines, institutionalisation features as part of its lexicon, of a 'process', but not necessarily with any scientific definition.[6] Institutionalisation is used sometimes as a 'term of art' beyond any need for explanation or as evidence.[7] The study of institutionalisation additionally presents an empirical problem of 'context' perhaps because it requires a form, context or entity for its study. There is also a tendency across subjects and disciplines to humanise or personify institutions in efforts to focus upon their actorness, especially in legal scholarship, which also complicates matters.[8]

In the context of the Nation State, scholars tend to place much emphasis upon collective agency and action with respect to institutionalisation. Here, institutionalisation can be defined as the process by which a practice or organisation becomes 'well-established' or 'well-known' in defined communities. Consequently, the development of expectations, orientations and behaviour can cement on the basis that this practice or organisation will prevail in the foreseeable future amongst a

[4]Writing of its role aiming to produce state identity in the wake of colonisation: Resnik (2013), pp. 162, 163.

[5]Meyer and Rowan (1977), pp. 340, 363; Sanders (2008), p. 40 ('As historians of knowledge remind us, attention to the development of institutions has fluctuated widely across disciplines, and over time. . .').

[6]Soltys (2014), pp. 342, 362.

[7]Luppa et al. (2008), pp. 65, 78.

[8]E.g. Heclo (2008), p. 732.

community.[9] In certain subjects, such as public administration, democratisation may even act as a proxy for institutionalisation in a Nation State.[10] This tendency is far less evident in the context of, for example, the European Union or beyond the Nation State but still shows the reach of the term and its creeping analytical tentacles.

Beyond the Nation State, the rising incidence of the delegation by Member States of authority to international organisations, the mushrooming of international organisations, the exponential growth of transnational non-governmental organisations (NGOs) and the increase of majority voting in international organisations are charted examples of its existence and evolution.[11] *Institutionalisation beyond the Nation State is often regarded as an antidote to concerns about the delegation of authority beyond the Nation State.*[12] One might argue that in the transnational context, idea of institutionalisation is the study of the belief in publicness, openness and even public institutions.[13] This is because *institutions may provide certainty, clarity and possibly even some form of humanity and appease the uncertainty of transfers of authority to ostensibly faceless global institutional actors.* It thus relates to the faith in the authority of institutions beyond the Nation State, often as a locus for legitimacy or their legitimation. The Transatlantic Trade and Investment Partnership (TTIP) negotiations in particular generated substantial fears at national and EU levels, as to the transfer of authority to a new living entity as a form of global governance, discussed in detail below here.[14] In the EU context, institutions are regarded as a key structural form of progress in addressing, changing and rectifying the mistakes of the past, especially as to its multiples crises.[15] By opting for public institutions and institutionalisation, for example, within TTIP, *it attempted to shift away from the non-institutionalisation* of transatlantic relations in order to enhance the transparency and the 'governability' of transatlantic relations through institutions, discussed below. In other areas of recent intense cooperation, such as data privacy, they appear significantly short of institutionalisation.

In the European context, the EU has a recent history of promoting and nudging institutional multilateral innovations, from the International Criminal Court to a UN Ombudsman to a Multilateral Investment Court, in its efforts to promote internationalisation, accountability, legitimacy and the rule of law as a broad global agenda. The EU was also recently an active participant in the so-called mega-regionals, where EU–US transatlantic relations would have been subsumed within

[9]Katz and Crotty (2006), p. 206.

[10]Elgie and McMenamin (2008), pp. 255, 267.

[11]E.g., See Yearbook of International Organizations (BRILL, Hague), listing new organisations; 'Continent of international law' project accessed <http://www.isr.umich.edu/cps/coil/>; the Authority of International Institutions PICT-PICT Project on international courts and tribunals (PICT) available at <www.pict.picti.org>, accessed 1 June 2017.

[12]Zürn (2016), pp. 16, 82; Zürn (2014), p. 47.

[13]See Zürn (2014); Venzke (2016), p. 374.

[14]E.g. De Ville and Siles-Brugge (2015); Cremona (2015), p. 351.

[15]See generally the conclusions of Goldmann (2017).

a broader geopolitic shift *outside* of the WTO, through 'new' forms of institutional arrangements.[16] In scholarship, institutionalisation arguably has a slightly narrower and less 'glamourous' meaning, where it is used both as a 'bottom-up' understanding of European integration to understand the European space and to contextualise the development of distinct policy fields, often in foreign policy, which raises very specific notions of community.[17] Institutionalisation here is understood as the complementary processes of formalisation and stabilisation of procedures, institutional coordination and the ability of individual actors to influence institutional development.[18] Institutionalisation here often appears syllogistically as an outcome rather than a mode of analysis or theory per se. For example, it is said that the greater is the difficulty in refining the established governance structures and procedures, the more stable the governance arrangements are and the more institutionalised the policy area is.[19] *Sandholtz et al.* have previously argued, writing about the EU at the time of the Treaty of Nice, that greater institutional *adaptation and change* had led to heightened formalisation and stabilisation and more institutionalised policy space.[20] On this view, they assert that the existence and operation of a shared system of rules and procedures to define who the actor is, how they make sense of each other's actions and what type of action is possible for the best provision of collective governance are signs of institutionalisation.[21] Others define an important characteristic of institutionalisation to be the *change in influence* of individuals (agents) in the course of institutional development. On whatever view, *process thus matters* in the EU context in so far as institutionalisation signifies a high level of cooperation and interactions, whereby a dynamic degree of cooperation signifies that the procedures for producing regulatory cooperation rules become the objects of cooperation themselves, albeit it looks further away from the Nation State in so many respects.[22]

1.1 On Method

It might be useful methodologically to stop to consider an example of what is commonly understood *not* to be an example of institutionalisation in the European

[16] Araujo (2017); Benvenisti (2015); Meunier and Morin (2015).

[17] Smith (2004).

[18] Petrov (2010).

[19] Ibid.

[20] Stone-Sweet et al. (2001).

[21] They begin from the premise that the negotiators of the Treaty of Rome did not fully understand the kind of political space that would evolve. More recent study of the history of the sources of EU integration and the development of supremacy by the CJEU suggests otherwise. . . .Writing in the context of a sensitive EU policy field, some define the process of institutionalisation as the increased complexity of institutional action in that collective behaviours and choices are more detailed and closely linked thus applying to more situations: Smith (2004).

[22] Meuwese (2015), pp. 101–122; Meuwese (2011).

context: EU–Swiss relations. However, this much carries a heavy caveat. EU–Swiss relations form a structured and territorialised externalisation of the EU's internal market,[23] in the form of an alternative to institutional integration founded in bilateral treaties on a broad range of areas, where EU law has applied as 'dead end of Europeanisation' *without* institutionalisation.[24] Recent EU–Swiss Agreements on aspects of the free movement of persons follow on from a series of sectoral agreements signed in 1999 after the confederation's rejection of the EEA Agreement in 1992.[25] The Court of Justice has even held that the Swiss Confederation can be equated with an EU Member State for the purposes of free movement of persons.[26] However, others assert that its non-institutionalisation is not so self-evident for a variety of reasons, internal *and* external.[27] It may constitute evidence of how institutionalisation is not inevitable, nor is it necessarily an end in itself, nor is it synonymous with the 'highest' level of integration, mostly likely a mere hard case.

In the context of the EU, it is worth remarking that the study of institutionalisation often appears as a study of formalism and formality, which ironically mostly looks *behind* formality. In this regard, vast networks of public and private actors, transatlantic actors, representatives of Member State governments, firms lobbying organisations, and the EU institutions, and its many agencies, all operate in the EU political space. They change its rules and practices actively and dynamically on a regular basis. This is not surprising, given that the EU Treaties are living legal documents, where inter-institutional agreements and practices can autonomously evolve and change. In the EU, bodies that previously were not formal legal institutions can become such. Quasi-agencies may become regularised by the stroke of a pen, for example, as has occurred with respect to Europol or Eurojust. In fact, one could even argue that institutionalisation does not strictly matter in the EU, which has demonstrated incredible flexibility towards the grant of legal personality and the creation of new entities in its treaties outside of strictly formal parameters, exhibiting the need for institutionalisation to be considered outside of formalism or formality.[28]

[23] See Council conclusions on EU relations with the Swiss Confederation 93/17 (28 Feb 2017), available at <http://www.consilium.europa.eu/en/press/press-releases/2017/02/28-conclusions-eu-swiss-confederation/> accessed 1 June 2017; Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries (16 Dec 2014), available at <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf> accessed 1 June 2017.

[24] Lavenex (2009), p. 547; Lazowski (2008), p. 1433.

[25] Article 14 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, as regards the replacement of Annex III (Mutual recognition of professional qualifications) thereto, 2011/467/EU [2011] OJ L 195/7; COM/2015/076 final. See to similar effect Council Decision (EU) 2015/771 of 7 May 2015, with the same legal bases.

[26] See Case C-247/09 Alketa Xhymshiti v Bundesagentur für Arbeit, EU:C:2010:698.

[27] Church and Dardanelli (2005), p. 163 (finding high levels of similarities between Switzerland & the EU as a confederation and federation at societal and institutional level); Linder (2013), pp. 190, 202.

[28] Fahey (2014b), Ch. 1.

It suggests a more nuanced account of law, and institutionalisation processes and procedures are required. These issues lead to a more substantive analysis here.

1.2 The Focus of This Book on Institutionalisation: Developing a Research Agenda

This book explores how we should understand the development of institutionalisation beyond the Nation State. It focusses largely but not exclusively upon a possibly 'hard case' of global governance, EU–US relations, long understood to be a *non*-institutionalised space, in light of recent legal and political developments in data and trade law, drawing from a range of scholars of various disciplines and subject areas. The book reflects upon two core case studies that are far from disconnected or unrelated data and trade, broadly defined. It deploys the EU–US TTIP negotiations for its trade case study generally and also explores trade in a wider sense, reflecting upon the place of institutions in lawmaking and global governance and beyond the Nation State. As to data, in the transatlantic context, it was taken out of the TTIP negotiations, and so it is largely considered here separately or apart therefrom. It is considered in its broadest iteration as to data flows, transparency and privacy so as to accurately capture its conceptual dimensions vis-à-vis practice in transatlantic relations. However, the intricacies and interrelations of the topics are not overlooked or ignored and instead are considered apart as much as possible for reasons of coherence, albeit that both are understood to be interconnected components of contemporary global economic life.[29] Transatlantic relations represent a highly distinctive case study of quasi-institutionalisation *or less*, in particular in the areas of trade and data law. It argues overall that legal accounts of institutionalisation tend to be concerned with technical and procedural questions of enforcement and legal regimes, whereas non-legal accounts tend to be exclusively concerned with power dynamics. The book reflects as a result upon their interrelationship and the place of *process* here in our analytical frame. It argues that a careful understanding of the relationship between local and global is required here.

The contributors to this book have been asked to consider a series of questions and themes, which are as follows:

- What is 'formalisation' here?
- What is 'stabilisation' in this context?
- The book and its contributors consider, overall, how we should reflect upon 'progress' as a narrative beyond the Nation State. It/they consider(s): what is the place of 'bottom-up' led process?
- What is 'stabilisation' here in the discussion of the existence of a transatlantic community through and by law?

[29] See further Peterson (2016), p. 383.

- Are transatlantic relations useful going forward as a case study of global governance in these troubled times?
- Lawyers studying regional integration typically ask specific questions about institutions and institutionalisation: e.g., is there legal personality in an entity? Is it constitutionalised? Is it bureaucratised? Yet can this mode of analysis capture mere negotiations and processes of development? Is it the starting point or framework from which we begin?
- And so we ask: how do we examine the 'formality' issues here and informality where it is under construction, outside of an organisation?
- And what about 'in-between' institutions? Or international versus localised understandings of the sites of institutionalisation?
- Is a locus or location relevant?

This account thus approaches institutionalisation as a spectrum for analysis primarily but not exclusively from a legal perspective, in a manner that is 'process-based' and possibly incomplete or is dynamic and under development. This book reflects further on how institutionalisation may be held up by domestic institutions. It may involve both weak and strong elements of institutionalisation—and perhaps very little 'in between'. It explores how institutionalisation may arguably incorporate a sliding scale of minimalist enforcement, bottom-up processes of development, accountability processes, stabilisation and actorness all merging together as part of a 'process' narrative. It explores how a legal account may examine the legal provisions and legal effects of new formulations of an institution, through factors such as nomenclature/lexicon, enforcement, objectives and accountability. Many non-legal accounts largely address this from a power perspective. The factors are not exhaustive and cannot be divorced from a broader set of geopolitical factors, factors that may be difficult to holistically portray from any one discipline or subject. This account also explores whether we must also view *progress* as part of this process narrative. Is it possible? What would that mean here? How should we assess per *Keohane* 'the Alice in Wonderland' dimension of integration, where we may need to actively cooperate in order to 'stand still'?[30] How does this metaphor sit with these times of de-institutionalisation, for example? It further explores whether a legal view of institutionalisation is necessarily 'bottom up', piecing together a range of instruments, regimes, practices, norms and enforcement issues. Does a legal view necessarily involve a consideration of rights and effectiveness of good governance and how existing institutions shape norms? How do political scientists and political economy differ? Does comparative institutional analysis assist?

The account that follows next outlines briefly select features of recent transatlantic developments in trade, data and privacy. As noted above, the case studies selected in this account overlap to a significant degree trade drives data and vice versa. Nonetheless, this account studies TTIP in detail, which *excluded* data from its reach, followed by data, information and privacy. The negotiation of TTIP has been

[30]Keohane (1984).

conducted autonomously from data developments, which thus are capable of being distinguished analytically. The EU's most 'progressive' trade deal yet, the EU–Canada Economic and Trade Agreement (CETA), is also analysed here in many contributors' accounts because of its express links to TTIP, textual and political along with global governance developments more broadly. Arguably, strong internationalised institutionalisation appears as the outcome of the trade case study, with significant concerns for good governance and fundamental rights to dominate both the regulatory cooperation and investment court reform proposals. By contrast, extremely weak localised institutionalisation appears the outcome for the data privacy case study, with much weaker commitments to good governance and fundamental rights. Both form examples of global governance in action case studies, of vibrant and live negotiations taking place across an extended time period of different EU and US administrations with a commitment to institutional design and institutionalisation broadly.

At the time of writing, TTIP's future is under review after 15 rounds of negotiations, and it is an opportune moment to be writing on the negotiations. It has mobilised unprecedented debate on and politicisation of EU–US trade policy.[31] Several accounts in this edited volume intersect with the account that follows in different ways. For the sake of clarity and to set the broader agenda, the account next outlines some general features of the question of institutionalisation in EU–US relations, followed by an analysis of the two main case studies of the account in trade and data privacy, without prejudice to or without due regard being had of more specialised and nuanced accounts in this collection on the topics.

2 Transatlantic Relations and (Non-) Institutionalisation

2.1 Overview

One of the most salient features of transatlantic relations according to scholars has been an agreement as to its non-institutionalisation.[32] This is principally because formal bilateral transatlantic relations have long been conducted through a network of non-institutional actors.[33] Whilst relations are understood to have been significantly formalised under the Transatlantic Declaration of 1990 and expanded through the New Transatlantic Agenda (NTA) in 1995,[34] such policy frameworks are not formally binding agreements and never sought to institutionalise transatlantic relations. Instead, its core features have long been its failure to institutionalise two major actors in global governance, irrespective of the type, form or field of cooperation and

[31]Fahey (2016a), p. 327; Garcia-Duran and Eliasson (2017), p. 23.

[32]Pollack (2005), p. 899; Fahey (2014a), p. 368.

[33]Pollack and Shaffer (2001), p. 298.

[34]Pollack (2005).

yet to continuously cooperate. Instead, more novel, innovative, hybrid or opaque structures have characterised its operation overtime, working alongside or in the peripheries of their respective executives, in whatever configurations. The failings and failures of transatlantic cooperation through law are arguably quite plentiful. It is widely agreed that many transatlantic agreements have been doomed to failure through non-institutionalisation, non-compliance, plagued with sub-optimal remedies and a lack of accountability.[35] Nonetheless, at any given point in time, transatlantic cooperation continues to provide a vivid case study of the challenges of regulatory independence, transparency and administrative law requirements, confidentiality, multi-level governance and regulatory sovereignty between advanced forms of legal orders.[36] More recently, it has been argued that there are many institutional and legal components of transatlantic relations not usually accounted for that indicated quasi-institutionalised tendencies.[37] The advent of the Trump administration appears to give effect to an unprecedented shift in transatlantic relations since before World War II. A new era of considerable hostility and scepticism and an ostensible refusal to engage with EU exclusive and supranational competence in a wide range of trade, security, energy cooperation has ensued.[38] The USTR Annual Report for 2016 issued in 2017 outlined in brief how the US was reviewing the state of the TTIP negotiations and key points of differences remaining between the parties. The swift rejection of the TPP by the Trump administration and its apparent favour of bilateralism and 'American First' may possibly change the existing evolving dynamic in the future, perhaps even radically, although this remains yet to be seen.

2.2 Integration Through Dialogues

Historically, transatlantic relations have evolved in a series of official and permanent dialogues that arguably intersect many of these categories.[39] The permanent dialogues include the Transatlantic Business Dialogue, Transatlantic Labour Dialogue, Transatlantic Consumer Dialogue and Transatlantic Environment Dialogue. They have variable degrees of success or failure and comprise public and private spheres, variable actors and

[35]Petersmann (2015), p. 579; see Pollack and Shaffer (2009). Fahey and Curtin (2014); Howse (2000).

[36]Pollack and Shaffer (2001); Petersmann (2015); Krisch (2010), p. 1.

[37]Fahey (2014a), p. 368.

[38]A dispute between the EU and US as to visa waiver arising from the failure of the US to recognise EU competences has escalated, with a threat being issued to revoke visa free travel for US citizens in the EU (De Capitani 2017).

[39]See Fahey (2014a, b).

activities.[40] Others suggest that there are also many so-called *unofficial* Transatlantic Dialogues, for example, on Sustainable Development, Aviation and Climate Change, Policy Networks and Donors Dialogue.[41] Their composition, use of law, tasks, operation and proximity to policymakers vary considerably, and so the taxonomy of this category appears different to gauge. The permanent dialogues are furthered by Annual Summits between EU and US leaders. A Transatlantic Legislators Dialogue has been ongoing since 1972, with only one of the three EU institutional co-legislators participating and with limited output.[42] These are in turn supported by thematic entities such as the Transatlantic Economic Council and the EU-US Energy Council, as well as High Level Working Groups.[43] EU and US Representatives cooperate particularly regularly and closely in foreign policy. For example, the High Representative and the US Secretary of State are reported to have daily contact and approximately 50 EU diplomats work as part of the EU delegation to the US in the European External Action Service. Nonetheless, there is a particular significance to the role of dialogues in generating rule-making in Transatlantic Relations, as wholly regularised and structured process of non-institutional lawmaking. They are perceived, however, to have given certain economic actors privileged access to policymakers at the expense of other sectors of 'transatlantic society'.[44] This leads to a discussion of the idea of society qua community through law.

2.3 A Transatlantic Civil Society?

It has long been a matter of debate whether it could be claimed that some form of Transatlantic Civil Society as a sociological or scientific phenomenon has ever existed. There has been much cooperation between civil society across the Atlantic since the nineteenth century to the present day on topics ranging from peace to slavery. Nevertheless, this category of a Transatlantic Civil Society is more complex, subjective and perhaps multifarious. Given the differences in how US and EU interest groups are organised, it cannot be a surprise that the different dialogues have struggled, to differing degrees.[45] However, civil society participation is now becoming a key constitutional norm of the EU polity, with interesting repercussions in international relations.[46] The history of the participation of civil society in EU–US

[40] See Green Cowles (2001), pp. 213–233. Cf Slaughter (1997), p. 173.

[41] See Bignami and Charnovitz (2001).

[42] I.e. The European Parliament. Cf Jančić (2015), p. 334.

[43] For example, the EU-US Cybercrime and Cyber-security Working Group or the High Level Working Group on Jobs and Growth.

[44] See Bignami and Charnovitz (2001); Petersmann (2015).

[45] Greenwood and Young (2005), p. 290. Cf Young (2016), p. 345; Berman (2017).

[46] Young (2016); Kohler-Koch and Quittkat (2013).

relations has arguably been to privilege private actors in secret dialogue processes.[47] The institutionalisation of civil society participation in the form of an Advisory Group within the TTIP architecture is a notable—and late—step in the negotiations but also evident in other recent areas of collaboration, e.g. EU-US cybercrime and security cooperation, and may change our view thereof.[48] International institutions that are politicised often respond by giving greater access to transnational non-State actors to increase their legitimacy, and in this regard, the TTIP negotiations followed such a pattern.[49] However, with widened participation in the TTIP negotiations, an agenda for deeper and more extensive institutionalisation ambiguously trailed behind, and synergies between the two may not be apparent. The following section considers the model of regulatory cooperation in TTIP.

3 Institutionalisation and TTIP: Lessons from the Regulatory Cooperation Chapter Negotiations

As *Shaffer* has outlined, there are many models of transatlantic regulatory governance that are possible to model or consider.[50] Regulatory cooperation may imply many forms of approximation of legal regimes, from a mere dialogue to methodologies of regulation, supervision and enforcement to harmonisation. The Regulatory Cooperation Chapter was initially arguably the most controversial aspect of the TTIP negotiations. The TTIP negotiations spanned many forms[51] and caused more puzzlement than controversy throughout 15 rounds of negotiation because of its policy span, in the absence of any clear vision of horizontal or vertical forms of accountability.[52] The objectives of the TTIP Regulatory Chapter included the following: to establish and reinforce bilateral regulatory cooperation and to promote an effective

[47]Bignami and Charnovitz (2001), p. 255; Green Cowles (2001), p. 215.

[48]Whether evolving civil society participation in EU law constitutes manufactured or engineered participation is far from an easy question. Kutay (2015), p. 803; Berman (2017).

[49]Zürn (2016); for example, holding open workshops for a broad range of private and public actors and publishing the lists of all of the participants: available at <http://www.enisa.europa.eu/activities/Resilience-and-CIIP/workshops-1/2012/eu-us-open-workshop> accessed 1 June 2017. See the EU's use the email address: trade-ttip-transparency@ec.europa.eu; Twitter account; videos of civil society meetings.

[50]Shaffer (2016), pp. 1–7 (outlining: regulatory cooperation, harmonisation, mutual recognition of standards, mutual recognition of third party certifiers, horizontal and common approaches and horizontal and vertical regulatory dialogues).

[51]Alemanno and Wiener (2015), p. 103; Mendes (2016); Bull et al. (2015), p. 1; Alemanno (2014).

[52]21 March 2016 draft (in Article x1), 'a high level of protection of inter alia public health, health and safety, animal welfare, the environment, consumers, social protection and social security, personal data and cyber security, cultural diversity and financial stability whilst facilitating trade and investment'.

regulatory environment, compatible regulatory approaches and the implementation thereof.[53] The European Commission initially proposed an institutionalised framework for TTIP, which would have strong institutions in order to make it 'living agreement' and accelerate the transatlantic development of global approaches. It then raised the thorny question as to what a living agreement could or should entail.[54] An EU textual proposal on regulatory cooperation in 2015 proposed a Regulatory Cooperation Body (RCB) with powers of monitoring, powers to prepare proposals or initiatives, reporting to the Joint Ministerial Body. By March 2016, however, the RCB had evolved into a mere 'institutional mechanism', seeking to downgrade its significance.[55] The textual proposal of March 2016 provided for more emphasis upon learning processes and exchanges and extensive participation.[56] Indeed, the sheer number of bodies and people potentially involved or whose participation was called for in ex ante and ex post review (thus going beyond previous proposals for ex ante horizontal review between regulators) then began to raise concerns as to the cost and workability of such levels of participation.[57]

On whatever view, this form of proposed institutionalisation reached after 15 rounds of negotiation differs from historical EU–US regulatory cooperation and makes it remark-worthy. Still, a considerably weaker, looser form of institutionalisation became the core of the negotiations, by way of its lexicon.[58] There is a risk at the low-key representation of institutionalisation, deformalising the architecture and processes of rule-making at the same time. Much naturally depends upon the relationship between a cooperation structure and the executive structure and in turn its relationship with the implementation at domestic level.

The absence of direct effect of the Agreement was explicitly outlined in Article X.14, and it leads to a question as to enforceability of rights through redress and review mechanism, and the discussion next turns to the issue of redress and review and TTIP.[59]

[53]March 2016 draft, ibid.

[54]See Article 43 of the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the EU and US, 11103/13 DCL 1 (Brussels, 17 June, 2013): See Bartl and Fahey (2014).

[55]Arguably it envisaged an executive dominated structure of officials tasks with charting TTIP's evolution, through an annual Regulatory Cooperation programme, to outline priorities, suggest new joint initiatives, with reviews only at ministerial level regularly, reporting to the EU-US Summit to legislators every two years, thereby skewing political accountability.

[56]E.g., natural or legal persons may jointly submit concrete and sufficiently substantiated proposal, including from public interest bodies (Article x 5 (2)).

[57]Cf Fahey (2016b); Mendes (2016).

[58]A final EU Proposal for Institutional, General and Final Provisions was tabled in 2016. Mendes (2016).

[59]On its relationship with direct effect: Semertzi (2014), p. 1125.

4 Institutionalisation: The EU's Proposal for a Multilateral Investment Court: TTIP, CETA and Beyond

International investment law provides an unusual case study of the ad hoc adjudication of the regulation of capital and State powers *outside of formal institutions and public bodies or actors*.[60] There are many significant failures in the past of the global legal order of attempts to engage in trade multilateralism, particularly where the rights of investors have been at stake. Those led by the League of Nations in 1928, the International Law Association in 1948 and Harvard Law School and the OECD in the 1960s, instead leading to the ICSID Convention as a multilateral procedural agreement on investment disputes in the absence of an agreement on substantive investment protections, constitute significant and diverse examples.[61] Critics have long contended that it unjustifiably privileges investors, over the host State in its exercise of its regulatory powers, usually developing countries.[62] A proposal for bilateral institutionalisation thereof has been made *initially* within the context of the TTIP negotiations but has also been applied more broadly by the EU initially to the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement, who have accepted its inclusion.[63] The EU has now sought to confer unprecedented legitimacy upon investor-state dispute settlement through its proposed reform in the form of a permanent International Investment Court System (ICS).

In a public consultation on the merits thereof, many had expressed their opposition to ISDS in TTIP, given the existence of reliable local courts available to solve disputes.[64] The strength of opposition and polarisation of views resulted in the Commission promising wholesale reforms of the adjudication system, not exclusively with respect to TTIP, albeit still including it within TTIP.[65] The Commission

[60]Kumm (2015).

[61]Voon (2017). Brown (2013), pp. 6–8.

[62]Stiglitz (2015); Kumm (2015). See Benvenisti (2015); Schill (2011), p. 57.

[63]See 'Press Release, CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement' (European Commission, 1 July 2016), available at <http://europa.eu/rapid/press-release_IP-16-399_en.htm> accessed 1 June 201. EU governments adopted a declaration on the signing of CETA on the multilateral investment court: Council doc. 13463/1/116 (27 Oct 2016).

[64]A publication consultation was organised by the European Commission in 2014 yielded an extraordinary bounty of interest, of approximately 150,000 replies, largely sceptical. Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', COM (2015) SWD 3 final.

[65]See 'Press Release, EU Finalises Proposal for Investment Protection and Court System for TTIP' (European Commission, 12 Nov 2015) available at <http://europa.eu/rapid/press-release_IP-15-6059_en.htm> accessed 1 June 2017.

thus published a Concept Paper 'Investment in TTIP and beyond—the path for reform' thereafter.[66] In this proposal, the Commission sought to explore the creation of a permanent and public International Investment Court and a future multilateral system and bring transparency and permanency to the Court, especially as to the inclusion of independent professional judges, largely through the application of public international law principles.[67]

In February 2016, the European Commission agreed with the Canadian Government to amend the controversial investment protection clause to take on board the EU's new approach to investment and dispute settlement. It made provision for a permanent institutionalised dispute settlement tribunal, which has taken on greater vibrancy than in TTIP. Its inclusion within CETA was trialled as a forerunner to the TTIP negotiations, and its acceptance by Canada as highly developed was intended as a means to 'legitimise' its inclusion in the US negotiations. In order to appease the Wallonian Government in Belgium and the disquiet in certain Member States, an interpretative instrument was agreed by the Member States in late 2016.[68]

The EU–Canada Joint Interpretative Instrument on CETA provides for a broad evolving view of institutionalisation, albeit opening up a gap between the *bilateral ICS* and the *bilateral view of the multilateral*:

> CETA [. . .] lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.[69]

The Commission has been carrying out a detailed impact assessment on this initiative in early 2017, and it is principally considering how to model a multilateral

[66]Commission, 'Concept Paper: Investment in TTIP and Beyond: The Path for Reform' available at <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 1 June 2017.

[67]For example, it sought to provide that the UNITRAL Rule on Transparency in Investor State Arbitration applied along with the Vienna Convention of the Law of Treaties.

[68]The European Parliament rejected a request by 89 MEPs to refer the investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) to the European Court of Justice (ECJ) for an opinion in November 2016 but Belgium appears likely to after Opinion 2/15 is issued by the CJEU. The European Parliament's Legal Service then found no contradiction between CETA's investment chapter and the EU Treaties. An even greater challenge is whether the concerns of the CJEU in its landmark opinion on EU accession to the ECHR, Opinion 2/13 are accurately reflected in the 'legally scrubbed' version of the CETA text and its additional interpretative provisions; See Opinion 2/13 Opinion of the Court (Full Court) of 18 December 2014 ECLI:EU:C:2014:2454. See Opinion 1/15 EU-Singapore ECLI:EU:C:2017:376 (16 May 2016).

[69]Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States Council doc. 13541/16 Brussels 27 October 2016.

court.[70] A concerted strategy to unify an ad hoc system through a new institution currently governed by over 3000 bilateral treaties must be stated to be ambitious and 'global' in scope and has generated a global debate.[71] The shift from ad hoc adjudication appears predicated on a process and formalisation through institutionalisation, breaking ranks with the traditional place of investment dispute settlement origins in commercial arbitration.

Institutionalisation here is then said to shift the framework to a treaty party analysis rather than a disputing party one, and the institutionalisation then is sought to reset the imbalance of interests and rights.[72] The question has arisen as to how the proposed institutionalisation of the Court in this format skews the traditional biases between States and investors on the basis that such a Court would be 'biased' against investors because the judges would be selected by States. It is an important point to reflect upon in so far as it is commonly thought that transnational legal orders often fail to be institutionalised because *States* become sites of resistance to transnational legal norms.[73] Here, however, the number of interests involved and the corrosive relationship of the existing legal framework of international investment law with State sovereignty (e.g., having to accept enormous arbitral awards) appear to make States more inclined to institutionalise to *protect* their sovereignty even within a multilateral framework, rather than *resist*, as might more usually be protected. It is thus a far from atypical story of institutionalisation, as a clear study of strong institutionalisation through formalisation. There are important features of this story, as one of procedural and substantive multilateralism, which are explored in detail in several accounts in this volume.[74]

[70]It is considering the following: Could it be set up of domestic and international courts on appellate level? How would the permanent dimension work or be funded and run? Is it canvassing: what are the difference between the bilateral ICS in CETA and a multilateral court? How do differences in membership, appointments, geographical balance, permanent, enforcement and cost allocations work?

[71]Van Harten (2015), p. 1; Kleinheisterkamp (2014), p. 1; Schill (2015); Opinion 2/13 Opinion of the Court (Full Court) of 18 December 2014, EU:C:2014:2454; Cremona (2015), p. 351; Cf Pernice (2014), pp. 137–138.

[72]Roberts (2017).

[73]Halliday and Shaffer (2015), Section IX; Shaffer and Halliday (2016).

[74]See the chapters of Titi and Garcia respectively in this volume.

5 Institutionalisation Attempts in EU-US Data Flows, Transparency and Privacy: Lessons to Be Learned?

5.1 Overview

The area of EU-US data flows and privacy is an important case study of transatlantic relations as it represents shifts in novel forms of governance.[75] To an outsider, stronger institutionalisation of transatlantic privacy policy might appear to be the next logical step in light of the importance of transatlantic data flows. In the past, the EU and US have set up multiple forms of transatlantic institutions but not based upon a shared consensus of privacy and instead with a learning or evolving remit to evolve privacy. Transatlantic relations in the area of data and privacy have mostly relied upon domestic institutions, in recent or historical forms of agreement. As noted above, TTIP, the largest scale form of transatlantic collaboration in recent history, expressly excluded data flows from its negotiations. Still, data flows are extremely salient from economic, legal and political perspectives and relates to a high degree to the concept of information and information structures of society. The institutionalisation of EU-US data flows and data privacy alleged to be taking place in recent times is vigorously contested as it appears to pivot away from the looser decentralisation prevailing until recently, to some extent at least, and this forms a specific line of enquiry for this book.[76] The EU–US Privacy Shield has recently come into force as a legal instrument that is intended to replace the US Safe Harbour Agreement and specifically to address the concerns around data collection and privacy that arose in the case of Schrems v European Data Protection Supervisor (EDPS) after the NSA, Snowdon and PRISM revelations.[77] It has spurred the development of other instruments and enforcement regimes, such as an EU–US Umbrella Agreement and the General Data Protection Regulation (GDPR). It raises significant questions surrounding the meaning of institutionalisation and non-institutionalisation in this context. Whether it is now any *more* institutionalised and a *less* effective mode of governance remains to be seen. However, it appears as a study of modest institutional innovations taking place at transnational level despite grander ambitions: a difficult mismatch. It thus forms a ripe case study for consideration here.

5.2 EU–US Safe Harbour to the EU–US Privacy Shield

The Safe Harbour Agreement was an important departure for transatlantic relations with a so-called hybrid style governance. It was predicated upon *non-institutionalisation*

[75] Cole and Fabbrini (2016), p. 220.

[76] Schwartz (2013), pp. 1996, 2009.

[77] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176); Case C-362/14 Schrems v Data Commissioner, EU:C:2015:650; Azoulai and Van der Sluis (2016), p. 1343.

because private actors took the lead in coordinating arrangements in a loose form of de facto harmonisation of social standards.[78] The Safe Harbour principles, as endorsed by the European Commission in its somewhat notorious and obscure Decision,[79] constituted until recently the only legally 'binding' and enforceable element of the obtuse relationship between the EU, the US, the Federal Trade Commission (FTC), certification bodies and private contracting bodies. Through a voluntary self-certification system with public enforcement by the US FTC, it required US companies to treat data on EU citizens as if the data were physically in Europe.

The outbreak of the NSA surveillance saga resulted in an EU-US NSA surveillance group[80] and caused many institutional actors to rethink the merits of non- and quasi-institutionalised integration of legal orders. Recent decisions of the Court of Justice as to the Data Retention Directive also changed the parameters of the debate as to the place of the individual, rights-centric data flows and robust scrutiny.[81] Thus, in 2015, in Schrems v. Data Protection Commission[82] the Court upheld a complaint to the Irish Data Protection Commissioner from an Austria law student as to the operation of the Safe Harbour Agreement whereby the Court found them to be bound by the Commission Decision setting up the Safe Harbour regime, having regard to the Charter of Fundamental Rights.[83] The CJEU invalidated Safe Harbour without

[78]Where the principles went beyond the regulatory requirements prevailing in the US Still, the lack of a uniform body of privacy law or regulation and no specialised enforcement authorities still entailed that it was widely assumed that US law would not be regarded as 'adequate'. Cf Schaffer (2002), pp. 29, 77.

[79]Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000/520/EC, OJ L 215 p 7). Article 25 of the Directive provided that Member States would prohibit all data transfers to a third country if the Commission did not find that they ensured an adequate level of protection.

[80]European Parliament Resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP)); European Parliament Resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens (2015/2635(RSP)); European Parliament Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)). Report on the Findings by the EU Co-chairs of the Ad Hoc EU-US Working Group on Data Protection', Council document 16987/13, 27 November 2013; EU-US Justice and Home Affairs Ministerial Meeting of 18 November 2013, Council 16418/13, 18 November, 2013; Commission, 'Rebuilding Trust in EU-US Data Flows' COM (2013) 846 final; Commission, 'Communication on the functioning of the safe harbour from the perspective of EU citizens and companies established in the EU' COM (2013) 847 final.

[81]In Joined Cases C-293/12 & C-594/12 Digital Rights Ireland and Seitlinger and Others EU:C:2014:238; Cf C 131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González EU:C:2014:317.

[82]Case C-362/14 Schrems v Data Commissioner, EU:C:2015:650.

[83]See Statement of the Article 29 Working Party on the implementation of the judgment of the ECJ of 6 October 2015 in Case C-362/14 Schrems v Data Commissioner, EU:C:2015:650;

any direction as to its temporary effects and thus ostensibly changed the institutional dynamic significantly.[84]

However, subsequent EU legislation in the form of the GDPR appears to have backed away from this outcome. The initial outcome of *Schrems* was to subvert the claim that the Internet could be free from regulatory capture, 'Barlow-esque'.[85] It is notable how *Schrems* is perceived as having bucked with a traditional EU 'trend' towards centralisation and instead in promoting institutional configurations, which would empower national supervisory authorities and national courts. However, matters have gone 'full circle', through and by institutions and processes of institutionalisation ironically, to protect the individual from institutional domination.

5.3 *EU–US Privacy Shield*

A new replacement for Safe Harbour emerged in the form of the EU–US Privacy Shield agreement was announced and adopted in 2016, in a byzantine compilation of documents.[86] It purports to follow Safe Harbour with modest institutional innovations and largely replicating the self-certification approach of Safe Harbour. As regards its substantive content, its structure and substance may be said to leave a lot to be desired, scattered across a series of lengthy 'letters'. Its institutionalised dimensions arguably remain weak and highly 'localised'.[87] The Privacy Shield is perceived to be an improvement on Safe Harbour, albeit far from optimal because of its localised 'centre of gravity'. The Privacy Shield purports to institutionalise transatlantic data processing through the evolution of oversight layers (DPA, Ombudsman, judicial authorities) and follows closely existing EU–US data transfer agreements. The Notice provisions are arguably more robust and provide for a broad array of information rights, enforceable at national level. In this regard, DPAs will acquire much significance, whereas US enforcement rests largely with the FTC and appears to strike an imbalance overall through divergent and disparate institutionalisation and enforcement.[88] An Ombudsman is part of the oversight whose function is to report to the Secretary of State. Consequently, there are many who argue that insufficient distance exists from the intelligence community that is

[84]See Azoulai and Van der Sluis (2016); Heisenberg (2005).

[85]Barlow (1996).

[86]Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176).

[87]Jourová and O'Reilly (2016).

[88]Article 29 Working Part Opinion 1/2016 on the EU-US Privacy Shield Draft Adequacy decision 13 April 2016 WP 238; European Data Protection Supervisor, Opinion on the EU-US Privacy Shield Adequacy Decision 30 May 2016, Opinion 4/2016 European Parliament Resolution on transatlantic data flows (26 May 2016) 2016/2727(RSP).

required for the body to act in an independent manner and not to be a true Ombudsman. As a result, the Privacy Shield has not met with widespread approval but instead met with broad condemnation from the Article 29 Working Party, the EDPS and the European Parliament.

5.4 EU–US Umbrella Agreement

EU–US negotiations on a harmonised data protection agreement for the transfer of data for law enforcement purposes have been on slow burn for some time until the NSA revelations. Its content aside, its status as an international agreement pursuant to Articles 216 and 218 TFEU has raised the most concern as a limiting characteristic with respect to judicial review by the CJEU.[89] The lack of equivalent protection for EU nationals under US privacy law was deemed to be a significant hurdle to a finding of adequacy or adequate protection of fundamental rights under EU law for some time. As a result, changes were eventually introduced to permit EU citizens to qualify for protection under a recent amendment to the 1974 Privacy Act under the *Obama* administration,[90] the Judicial Redress Act 2015. However, such developments may be vulnerable to change under the new and possibly more EU-hostile US administration.[91]

The main oversight mechanisms of the Agreement are at national level in the EU and US (Article 21) respectively. The main accountability functions of the Agreement are set out in Article 14, which put an onus on authorities to do so appropriately or risk considerable sanctions. It strives to develop a system to facilitate claims in the event of misconduct and thus constitutes some form of looser localised 'institutionalisation', if it can be called that. The Umbrella Agreement does not cover national security measures, nor does it deal with inter-agency exchange of information or multiple exceptions for law enforcement purposes, which arguably diminishes much of its promise beyond the State. In this regard, a high premium is placed upon experimental learning (e.g., joint reviews) even in a 'harmonised' regime on account of the loose institutional set-up.[92] It is thus quite weak in terms of its institutionalised components.

[89]Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, of an Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offenses' COM (2016) 238 final.

[90]It constitutes a de facto and de jure equivalent of an adequacy decision of the Commission pursuant to Article 5(3) of the Agreement, within the meaning of Article 25 of Directive 95/46 [1995] OJ L 281/31.

[91]Meijers Committee Note on the EU-US Umbrella Agreement CM 1613. The Meijers Committee has raised concerns as to the relationship between this superstructure and the existing EU-US Agreements (Europol, Eurojust, MLA, Bilateral MLA treaties, TFTP and PNR) with regard to the sustainability of an adequacy requirement.

[92]See Fahey (2013), p. 368.

Overall, data in this context constitutes a complex and multifaceted case study. EU-US data privacy innovations are arguably very modest and empower local actors much more than any other. Disparate practices may thus become entrenched, or the norm and non-institutionalisation may ironically in reality be the substantive outcome reached, with all of its adverse consequences for citizens *because of* domestic institutions. Both elements of data flow are considered through different elements here, part and together, in the following chapters, but principally in part I, summarised here next.

6 Outline of Chapters

In part I, focussing upon data, information and privacy, *Morae*s in a chapter entitled 'The European Parliament and Transatlantic Relations: Personal Reflections' demonstrates how the European Parliament plays a crucial role in transatlantic relations in a number ways, directly engaging in political dialogue, in the negotiation of international agreements and in scrutinising key dossiers at Committee level, in particular in the Civil Liberties, Justice and Home Affairs (LIBE) Committee. He outlines how important challenges remain for transatlantic cooperation in the Justice and Home Affairs area, all the more complicated by the 2013 revelations of US mass surveillance activities and allegations of data collection in Europe.

Abazi, in a chapter entitled 'Transparency in the Institutionalisation of Transatlantic Relations: Dynamics of Official Secrets and Access to Information in Security and Trade', shows how some of the most significant challenges regarding parliamentary access to information in the EU arose because of cooperation with the US. Through internal rules and also international agreements instituted mostly behind closed doors amongst a variety of actors, EU institutions, agencies and agency-like bodies, transparency in the EU has undergone significant limitations. What initially emerged as mostly customary standards of conduct in the transatlantic arena now seems to be developed as a fully fledged complex system of rules. Resulting limitations to transparency due to transatlantic cooperation is paradoxical, she argues, because EU–US cooperation has opted for public institutions and institutionalisation.

Tzanou in the chapter entitled 'The EU–US Data Privacy and Counterterrorism Agreements: What Lessons for Transatlantic Institutionalisation?', explores institutionalisation dynamics in three specific sectors (EU–US PNR, EU–US TFTP and the Privacy Shield) and a general data protection instrument (EU–US Umbrella Agreement) in the field of law enforcement and counterterrorism. As she states, transatlantic data privacy relations have been contentious due to two main reasons—the divergent data protection standards on the two sides of the Atlantic and the heightened demands of the US for more personal data to be transferred. *Tzanou* in her chapter reflects upon the macro, meso and micro levels of privacy relationships, which are characterised in places by fragmentation, asymmetry and controversial rules lacking clarity and certainty. She argues that mainly EU institutions have been

actively involved in the dynamic process of institutionalisation laying down a harmonised framework applying to all data transfers. Private actors have also been significant here. However, the *Schrems* case signals a difficult turning point here for institutions and transatlantic privacy 'turns'.

The account of the multi-jurisdictional litigation of Austrian doctoral student Max Schrems was outlined in the chapter by *Mann* in 'The Max Schrems Litigation: A Personal Account' in his own words. His remarkable story whereby he instituted some of the most significant litigation in history on data protection whilst a law student is recounted, outlining the motivations, privacy challenges, cultural norms, etc. that compelled him to take on a national data Protection Commissioner. The chapter describes in detail each stage of enforcement and litigation taken by him, in Ireland, Luxembourg, Austria, and the procedural and rights-based concerns arising at each point.

Thereafter, the reader will find a brief epilogue debate on the contents of the chapter by *Wischmeyer* entitled 'Transatlantic Data Flow: Which Kind of Institutionalisation?', who reflects upon the paradox between the need for a stronger and more robust institutionalisation of transatlantic data and privacy policy and the inadequacy of current institutional arrangements. He argues that there is a tricky gap between domestic and transnational, well played out in the contributions to the book, most acutely felt in the study of transatlantic data flows. The Epilogue constitutes an effort to underline the ongoing and dynamic nature of transatlantic relations in these vibrant topics and to reflect the distinctive moment that the book has been undertaken and completed in, a merely brief contribution to a broader and more vibrant overall debate. It is hoped that the reader enjoys this specific format and its efforts to engage with the contents in a distinctive way.

Next, in part II focussed upon trade, *Purnhagen* in the chapter entitled 'Who Recognises Technical Standards in TTIP?' argues that distinctive views on technical standards in transatlantic trade agreements are of much normative and technical significance. Steering principles on mutual recognition and harmonisation largely depend on who will be given the power to decide on conformity and levels of technical standards in TTIP and CETA. He considers how much institutionalisation will affect technical standard setting on both sides of the Atlantic, drawing from a comparative institutional analysis, where both sides experience common problems of technical standard setting as to expertise, adoptability of the legal system and a high reliance on the technical community. Nonetheless, he argues, the US will insist on an institutionalised procedure where government determines the rules of the game.

Using the case study of transatlantic business and financial services in TTIP, *Jančić*, in the chapter 'Institutionalising Transatlantic Business: Financial Services Regulation in TTIP', takes an institutional analysis of international financial regulation forward. He applies the logic of institutionalisation to efforts to approximate financial industry regulation in the EU and US legal orders. He reflects upon the establishment of a Joint EU–US Financial Regulatory Forum and argues that studying institutionalised cooperation in transatlantic relations is of great importance because the regimes produce significant cross-border or extraterritorial effects.

Overall, he contends that in the area of financial regulation, institutionalisation manifests in a threefold manner—as to interdependence, implementation and governance—and as a result, transatlantic relations could be characterised not by deep institutionalisation but rather by incremental institutionalisation.

Lenk in the chapter entitled 'Something Borrowed, Something New: The TTIP Investment Court – How to Fit Old Procedures into New Institutional Design' investigates the EU's proposal for a TTIP Investment Court in the context of transatlantic institution building. He argues that the successful creation of an EU-US investment court would have a tremendous impact on transatlantic relations. He argues that TTIP paradoxically represents both a catalyst for change and reform in ISDS and a barrier to its global success and has changed the dynamics of relations with Canada rather than the US as an ally to lift it onto a multilateral platform, through an examination of the broader historical, political and legal-institutional context.

Titi in the chapter entitled 'Procedural Multilateralism and Multilateral Investment Court: Discussion in Light of Increased Institutionalism in Transatlantic Relations' reflects upon the growing malaise with multilateralism in international economic governance and an inclination for bilateralism and tailor-made solutions and also more generally the decline in economic regionalism. She argues that despite the growing scepticism existing in the world liberal order and a lack of appetite for multilateralism, procedural multilateralism does exist in international investment law, which she unravels using the example of the EU's and Canada's efforts to create a Multilateral Investment Court. She argues that the multilateralism achieved in recent years is thus relatively narrow and relatively limited because it is on uncontested areas where consensus can be reached.

Kleimann in the chapter entitled 'From Formal to Informal Institutional Change in EU Common Commercial Policy – The Case of the European Parliament' examines the institutional framework governing the EU's Common Commercial Policy (CCP). He draws attention to the role of informal rules and arrangements that have followed and complemented the reform of formal primary law institutions. He argues that the understanding of the evolution of intra- and inter-institutional informality is key to an overall assessment of the post-Lisbon Common Commercial Policy. He contends that both formal and informal rules and institutional arrangements structure the transaction costs of actors involved in CCP governance in a way that advances the original Laeken objectives to variable degrees. Over time, European Parliament intra-institutional information costs have decreased through the generation and reinforcement of both internal and inter-institutional informality. EU level democratic accountability may fall victim to national 'vetocracy', which increases transaction costs of CCP governance.

In part III on global governance, *Finbow* in the chapter entitled 'Can Transatlantic Trade Relations Be Institutionalised After Trump? Prospects for EU-US Trade Governance in the Era of Antiglobalist Populism' reflects upon the broader context of rising economic nationalism, populism and anti-globalisation. Whilst populism and rising nationalism may not yet be adequately understood, they weaken the chances of institutionalisation in economic and trade relations going forward.

Ambitious institutionalisation in the transatlantic context appears delayed with the new Trump administration taking less interest in its evolution. It condemns the transatlantic space to a non-institutionalised design. However, the growing challenge of hyper-inequality and extensive global apathy is a broader context of significance.

Garcia in the chapter entitled 'Building Global Governance One Treaty at a Time? A Comparison of the US and EU Approaches to Preferential Trade Agreements and the Challenge of TTIP' charts the key aims and characteristics of EU and US preferential trade agreement policies since the reframing and curtailment in scope of trade negotiations at the WTO in the 2000s and considers how these have been integrated in bilateral preferential trade agreements. She shows how both have tended to proceed in a competitive manner through bilateral agreements where they can utilise latent and structural power to exert compliance for their governance models. She argues that the underlying differences in preferences, the potential for politicisation and contestation and the importance of power asymmetries in negotiations that derailed the negotiations were severely underestimated at the highest political levels.

In the chapter, *Roes*, in 'Federalism, State Cooperation and Compliance with International Commitments', reflects upon the broadest theme of the book, the division of foreign affairs powers in the EU and US. Despite the overt similarities between them, power is divided vertically between the Union and the States, but with significant differences and challenges. As *Roes* outlines, the US and EU have a fundamental principle in common as divided power systems. In the US, federal government power to enter international commitments poses a risk to the federal structure. The EU increasingly can act alone on the international scene. International relations or foreign affairs afford significant points of reflection where it relates to international commitments and powers to cooperate. As he indicates in a globalised world, international law concerns matters once considered purely to be of local concern and increasingly creates rights for individuals.

7 Conclusions

The lexicon and framework of institutionalisation has been argued here to be both important and a valuable one worthy of being developed out of the shadows of many disciplines. Institutionalisation may be the antithesis of the desired political outcome and simultaneously also the panacea for all harms. Contrariwise, it is a highly provocative lexicon in its own right for its capacity to provoke questions of sovereignty and sensitivity towards embedded institutionalised frameworks. Transatlantic relations provide a vivid multidisciplinary example of the relationship between institutionalisation and private power and quest for new forms of institutionalisation across a range of subjects. At a point of 'critical junctures', if that is where we are at all now, international organisations have not been adequately responsive to legitimacy concerns. Certain States have even started to vote with their feet. However, this does not necessarily provide a complete account of institutionalisation and does not

explain every case study well, not least the EU and US interactions through law. Accounts of data and trade are separately traced here as analytical exercises, where 'rights based' ideals are very different or provide differing views of power and institutions and enable more holistic reflections. In this book throughout, legal accounts sit alongside non-legal accounts, drawn from political science, politics and political enabling, thereby enabling a broader range of framing and methodological techniques to be deployed. The accounts thus collectively engage in a bottom-up analysis of formalisation and stabilisation and the development of expectations of a community as to institutional structures and processes, beyond the Nation State. They explore the ironies and paradoxes of transatlantic non-institutionalisation and efforts to evolve therefrom.

This book argues overall that exploring 'de-institutionalisation' may not capture adequately developments taking place between the EU and US in trade and data privacy. A broader context of extreme volatility in the global legal order is arguably also difficult to capture and pin down as to its specific temporal or conceptual elements. Strong internationalised institutionalisation appears to constitute the outcome of the 'trade' case study, whereas weak localised institutionalisation appears to constitute the outcome of the 'data' case study. Nonetheless, they both represent important evolving concepts of power, rights and authority beyond the State. They also demonstrate both the flexibility and vulnerability of institutions and institutionalisation in the broader scheme of the global legal order as a valuable future research agenda.

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Part I
Transatlantic Data, Information and Privacy

The European Parliament and Transatlantic Relations: Personal Reflections

Claude Moraes

1 Overview

The European Parliament plays a crucial role in transatlantic relations in a number of ways: as an institution directly engaging in political dialogue, in the negotiation of international agreements and in scrutinising key dossiers at committee level. I will use this opportunity to discuss the role of the European Parliament in transatlantic relations more generally before discussing the specific work of the Civil Liberties, Justice and Home Affairs committee in this field. Our committee has relevant competence in the areas of law enforcement, data protection and migration and carries out these responsibilities via annual missions, own-initiative reports (such as my report on NSA mass surveillance),[1] hearings (for example, the Privacy Shield hearing in March 2016[2] and hearings on TTIP and TISA in 2015)[3] and scrutinising

[1] 2013/2188INI Draft Report on US NSA Surveillance (8.1.2014) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-526.085%2B02%2BDOC%2BPDF%2BV0%2F%2FEN.

[2] EU-US 'Privacy Shield': MEPs to examine new deal on transatlantic data transfers (17.3.2016) http://www.europarl.europa.eu/news/en/news-room/20160316IPR19663/eu-us-%E2%80%9Cprivacy-shield%E2%80%9D-meps-to-examine-new-deal-on-transatlantic-data-transfers.

[3] E.g. Joint Hearings of the INTA and LIBE Committees 16-06-2015—Trade agreements and data flows: Safeguarding the EU data protection standards.

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ongoing dossiers such as the Umbrella Agreement,[4] data protection issues affecting transatlantic relations and US visa waiver programme reform.[5] I will provide an update on these issues, in addition to other key transatlantic agreements such as the EU–USA PNR agreement, the new data protection reform package, the Privacy Shield,[6] the Umbrella Agreement and the TFTP.[7]

2 The Role of the European Parliament in Transatlantic Cooperation

The European Parliament has been an active partner and actor in the transatlantic political dialogue since 1972, when the first inter-parliamentary meeting with US delegation took place. Since then, EP-Congress exchanges have been held every year and provide an opportunity for sustained inter-parliamentary dialogue. At the 50th inter-parliamentary meeting on 15–16 January 1999 in Strasbourg, EP and Congress delegations decided to launch the Transatlantic Legislators' Dialogue (TLD), the response of the EP and the US Congress to the call in the New Transatlantic Agenda (NTA) of 1995 for strengthened parliamentary ties.[8] Later on, the TLD activities have been broadened and now include also special working groups on subjects of particular interest and possibilities for direct exchanges between legislative committees of the European Parliament and the US Congress.

In terms of organisation, the European Parliament has developed an advanced and well-organised internal infrastructure responsible for the transatlantic parliamentary dialogue. The transatlantic inter-parliamentary cooperation within the Parliament is carried out through the Parliament's permanent delegation for relations with the USA and also through its standing committees. The EP-US delegation is the largest one with allocation of seats among the political parties proportional to their overall size in the Parliament. The EP standing committees are involved in transatlantic relations in their respective area of competence. The inter-parliamentary dialogue with US Congress has been further intensified by the establishment of the European Parliament Liaison Office

[4]On 2 June 2016, EU-U.S. Justice and Home Affairs Ministers formerly signed the 'Umbrella Agreement'.

[5]On 2 March, the European Parliament adopted a non-binding resolution calling the European Commission to suspend visa exemption for nationals of third countries that do not grant a reciprocal visa waiver to citizens of all EU Member States. Under the Article 265 TFEU, the Commission was obliged to define its position on the matter within 2 months. See the response of the Commission: Visa Reciprocity: Commission responds to Parliament Brussels, 2 May 2017.

[6]Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176).

[7]Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (hereafter TFTP), OJ L 195.

[8]See http://www.europarl.europa.eu/intcoop/tld/default_en.htm.

in Washington in 2010. The main task of this office is to provide the Parliament with information on the legislative activities of the Congress and vice versa.[9]

When explaining the role of the European Parliament in transatlantic relations, it is worth mentioning the enhanced powers in relation to international agreements, which it obtained with the entry into force of the Lisbon Treaty. As a result the Parliament has the right to approve or reject international agreements by a majority vote in a broad range of areas (for example, Article 218(1) TFEU gives it the power to consent to agreements covering fields to which either ordinary legislative procedure or the special legislative procedure with the consent of the EP applies).

The new powers allow the Parliament to exercise parliamentary oversight more effectively over the EU's external policies. The Lisbon Treaty and subsequently the Inter-institutional Framework Agreement between the Parliament and the Commission ensure that the Parliament is informed throughout all stages of the negotiation process until the conclusion of the international agreement. Furthermore, the participation of the Parliament in the process of conclusion of the international agreements provides for the possibility to exert influence on the agreements' negotiations. Post-Lisbon, the Parliament has been involved in the conclusion of a number of international agreements with the US in the area of Justice and Home Affairs, including the Terrorist Finance Tracking Programme (SWIFT/TFTP) and Passengers Name Record (PNR) agreements.[10] It will also be called to give its consent on the recently signed EU–US agreement on data protection for data exchanges for law enforcement purposes (Umbrella Agreement).

3 Transatlantic Cooperation in the Justice and Home Affairs and the Role of the LIBE Committee

Formal[11] EU–US cooperation on justice and home affairs started in 1995, on the basis of the New Transatlantic Agenda (NTA) and the Joint EU–US Action Plan. EU–US cooperation is focused on the areas of fight against terrorism and transnational crime, law enforcement and information exchange for law enforcement, protection of personal data, border management, visa and migration policies, cybersecurity and cybercrime.

The LIBE Committee is the EP competent committee for, among others, data protection and fundamental rights issues, whether commercial or law enforcement, migration and asylum matters. In addition to its legislative work (adoption of reports—conducting of the inter-institutional discussions with the Council on behalf of the

[9]See further: http://www.europarl.europa.eu/us/en/.

[10]See Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security of 17 November 2011; COM (2011) 807 final, approved by the European Parliament in April 2012 (hereafter EU-US PNR).

[11]EU-US Joint Action Plan 1995 http://eeas.europa.eu/archives/docs/us/docs/joint_eu_us_action_plan_95_en.pdf.

Parliament or preparation of the position of the Parliament as regards the conclusion on international agreements), the LIBE Committee actively follows matters with impact on its competences. It organises hearings, adopts resolutions or contributes to the work of other committees to ensure consistency in the work of the Parliament.

Transatlantic issues represent a substantial part of the LIBE Committee's work. For instance, most of the legislative files contain an 'external dimension': data protection files, asylum or migration policies, law enforcement instruments. The LIBE Committee considers these matters in a careful manner. Hearings and workshops are organised where US stakeholders take part (e.g., Privacy Shield, data protection reform, visa waiver reform, etc.). Direct contacts with the Congress and US authorities are also maintained. Lastly, a LIBE Committee delegation to the US is organised annually to discuss topics of mutual relevant interest with US authorities, Congress and stakeholders.

I next elaborate in more detail on several transatlantic cooperation dossiers and issues in the area of Justice and Home Affairs. I will start with Passenger Name Record (PNR) data transfer.

4 Passenger Name Record (PNR) Data Transfer

In the discussion on the PNR legislation (the EU PNR Directive[12] and the international agreements) the Parliament has always sought to strengthen security without compromising fundamental rights, and data protection in particular. For that reason, the Parliament did not refrain from exercising its new powers acquired after the Lisbon Treaty and to veto international agreements, including PNR agreements that fail to ensure the right balance.[13]

The history of EU–US PNR agreement was particularly rocky. The current agreement has been in place since August 2012, though it was preceded by three others: a 2004 agreement annulled by the European Court of Justice (ECJ) in 2006 after the Parliament brought a successful action against the legal base chosen, an interim agreement signed in 2006 and a longer-term agreement signed in 2007.[14]

The latest developments as regards the international agreements on transfer and processing of PNR data concern the agreement with Canada. The agreement was negotiated and submitted for the consent of the Parliament in 2013, but the Parliament still has not given consent to its conclusion. In 2015, the Parliament requested

[12]Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

[13]European Parliament resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorise the opening of negotiations between the European Union and Australia, Canada and the United States.

[14]See European Parliament v Council of the European Union (C-317/04) and Commission of the European Communities (C-318/04) ECLI:EU:C:2006:346.

the Opinion of the European Court of Justice on the compatibility of the agreement with the Treaties' provisions on data protection and with the EU Charter of Fundamental Rights and also questioned the chosen legal basis of the agreement. The Court's opinion will have important impact on the agreements in force and on any future PNR agreement the Union will conclude.[15]

After the terrorist attacks in Paris on Charlie Hebdo, the adoption of the PNR directive was identified as an urgent priority measure in the renewed EU Agenda on Security. And in April this year after more than nearly 5 years of discussions, the Parliament and the Council adopted the Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime at the same time as the revised data protection Union legislation.[16] The simultaneous adoption of the three acts is seen as an important guarantee that the transfer and processing of PNR data within the Union will be carried out in compliance with the modernised data protection legislation.

The EU PNR Directive obliges airlines to hand over to EU countries their passengers' data in order to help authorities to fight terrorism and serious crime. The Directive is to apply to 'extra-EU flights', but Member States can also extend it to 'intra-EU' ones, provided that they notify the European Commission. Upon the adoption of the Directive by the Council, all Member States have indicated their intention to apply the Directive to intra-EU flights. Member States will have to set up 'Passenger Information Units' (PIUs) to manage the PNR data collected by air carriers. This information will have to be retained for a maximum period of 5 years.

During the negotiations with the Council, the Parliament sought to ensure that the new Directive complies with the proportionality principle and includes strict personal data protection safeguards. It lowered the retention period for unmasked data to 6 months, after which it will be stripped of the elements, such as name, address and contact details that may lead to the identification of individuals. For example, the data retention period arrangements in the EU–US PNR agreement in force are exactly the same.

5 Data Protection

Data protection is one of the major topics of our transatlantic relations and not always an easy one. The reason for it is the different perception of data protection (or privacy, as it is known in the US) on each side of the Atlantic. In the EU, and more broadly in

[15]Proposal for a Council Decision on the conclusion of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record Data (COM(2013) 528 final). The agreement between the EU and Canada was signed on 25 June 2014 and the Council requested the European Parliament's consent to it on 8 July 2014. The decision to refer it to the Court was taken on 25 November 2014. Opinion 1/15 ECLI:EU:C:2016:656.

[16]Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

Europe, data protection is a fundamental right, expressly recognised by Article 8 of the Charter of Fundamental Rights of the EU (CFR) or Article 16 of the Treaty of Lisbon, which legally binds the Union when developing its policies, domestically or internationally. Any individual in the EU, regardless of his/her nationality or residence, is a beneficiary of this right; the limitations to this right must satisfy strict conditions of necessity and proportionality and be set forth by the law for genuine objectives of public general interest. Public independent authorities placed outside the executive branch ensure the oversight and compliance with data protection principles. It covers data processing for any purpose (commercial or law enforcement), with the exception of national security, which is outside of the competence of the Union. A constant and consistent case law of the ECJ has defined the contents of this fundamental right. Data protection legislation implements this right.

In the US, the US Constitution has no explicit reference to a fundamental right to privacy. The Fourth Amendment protects personal privacy and dignity against unwarranted intrusion by the State where the individual has a legitimate expectation to privacy. It essentially covers public processing, not commercial processing. Lastly, it does not extend to non-US persons. Like the EU, there is no general data protection legislation. The Privacy Act applies to the federal executive branch and agencies. It also allows for broad derogations. The commercial sectoral instruments apply to specific processing (children, students, financial records), but a comprehensive legal framework does not exist. Their oversight regime is also less developed than in the EU. This different perception and the means to address data protection result often in conflicts and misunderstandings.

6 Data Protection Reform (New Package)

The data protection reform will set a modern and robust legal framework for data processing in the EU. It updates current EU data protection system to take account of challenges posed, inter alia, by electronic communications, law enforcement and easier computing techniques. The new system simplifies data controllers/processors administrative burden and enhances data subjects' rights. International data transfers are a major part of the framework. In particular, data controllers will liaise with a single EU data protection authority instead of 28 national ones, as it is the case today.[17]

[17] See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. See also http://ec.europa.eu/justice/data-protection/reform/index_en.htm.

7 Privacy Shield/Safe Harbour

The Parliament considers that international data transfers are essential for economic growth and consumer trust. They must be built on solid and strong instruments establishing legal certainty and respecting fundamental rights. The ruling of the ECJ on the *Schrems* case sets forth clear indications on the basic principles to respect in order to ensure that the level of protection afforded is essentially equivalent to that of the Union.[18] The means to achieve this is left to the parties. We are mutually interested in ensuring that whatever system used for data transfers, adequacy decisions, contracts, binding corporate tools, and international agreements that will meet the test of the Court.

Regarding the Safe Harbour and now the new Privacy Shield, the Parliament has constantly expressed its concerns about their legal certainty and whether they are 'court proof'. We simply want a system that complies with the Charter and the EU data protection law. The EP resolution of 25 April 2016 confirms this approach and calls to implement the recommendations of the EU DPAs (WP29 and EDPS) to make it a stronger instrument. Otherwise, the Privacy Shield risks not achieving the goal for which it has been established and could be challenged at the Court.

8 Umbrella Agreement

Transatlantic cooperation is not only commercial; it also extends to law enforcement and counterterrorism. Both sides have been deeply committed on this matter for years. The Parliament support this cooperation, essential to protect our common shared values. In order to ensure smooth and efficient cooperation, based on the rule of law and the respect of fundamental rights, the Parliament has called for a data protection agreement for data exchanges in the law enforcement sector. After 5 years of negotiations, the agreement was signed last 2 June 2016. In the coming months, the consent of the Parliament will be required so that the agreement can be formally concluded. The Parliament will have to consider if the agreement meets Union law standards and the principles, protections and safeguards governing the transfers of personal data, such as the right to a judicial redress, satisfy the requirements of the Treaty and the Charter. It is the responsibility of the Union to ensure that in a crucial matter as law enforcement, the cooperation is fully in line with Union law and that there are no gaps that could jeopardise it.

[18]Case C-362/14 Schrems v Data Commissioner, EU:C:2015:650.

9 Conclusion

Important challenges remain for transatlantic cooperation in the Justice and Home Affairs area, all the more complicated by the 2013 revelations of US mass surveillance activities and allegations of data collection in Europe, as well as due to major differences between the EU and US over strategies to counter terrorist threat and as regards the protection of personal data. Despite this, the European Union, particularly the Parliament, is fully committed to strengthening transatlantic relations, whether at commercial or law enforcement level. The Parliament does not want to break or slow down relations, even if sometimes this is the perception by US stakeholders. It simply wants to ensure that it is conducted with the appropriate requirements ensuring respect of fundamental rights so as to avoid any potential legal or judicial problems.

Transparency in the Institutionalisation of Transatlantic Relations: Dynamics of Official Secrets and Access to Information in Security and Trade

Vigjilenca Abazi

1 Introduction

This chapter analyses transparency in the context of the institutionalisation of transatlantic relations, more specifically in the fields of security and trade. Transparency is a well-established policy in the European Union (EU). Generally understood as the availability of information about the processes and decisions of an institution,[1] transparency is established most prominently through rules on access to information, which in the EU are stipulated in primary law.[2] In fact, public access to information is a fundamental right, and EU legislation provides for a 'widest possible access' to documents.[3] In the EU's external law and policy, the lack of transparency has been a predominant issue and especially so with regard to transatlantic relations, as for example in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) and even more controversial in transatlantic security cooperation for the agreements on Passenger Name Records (PNR) and the Terrorist Finance Tracking Programme (TFTP).[4]

While concern over whether the EU–US cooperation leads towards 'less' transparency may be warranted, the scholarly debate still lacks a more systematic reflection on questions of transparency and institutionalisation of transatlantic relations. Discussions

[1] Meijer (2013), pp. 429, 430.

[2] Art 1 TEU, Art 15 TFEU.

[3] Art 42 Charter of Fundamental Rights of the EU, Art 1(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[4] See Abazi (2016b), p. 247; Fahey (2016), p. 327; Cremona (2015), p. 351; de Goede (2012), p. 214; Argomaniz (2009b), p. 119.

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have been focused on consequences for certain EU policies, such as privacy and data protection, the increased role of the European Parliament (EP) or the institutionalisation of certain fields of cooperation, such as counterterrorism.[5] This chapter addresses this lacuna by raising a number of questions: is transparency required to attain institutionalisation? To what extent is transparency itself institutionalised in the transatlantic context, or are norms of official secrets more prevalent? What are the implications of these transatlantic dynamics of transparency and official secrets for the internal EU accountability structures, particularly for public and parliamentary access to information? Answering these questions is salient for gaining a more coherent understanding of the (non-)institutionalisation of transatlantic relations,[6] but it is also a quest to understand the shortfalls of transparency and whether institutionalisation could foster the availability of information that may strengthen transatlantic relations and public trust in them.

Both in the areas of security and trade, the EU's rules on transparency clash with (soft) norms and arrangements of official secrets mostly agreed solely between EU and US executives. The paper analyses two relevant cases in this regard: TFTP and TTIP. This selection is justified since both cases take place in the post-Lisbon legal context where the constellation of institutional powers differs to a great extent from previous treaty settings. Hence, these examples of transatlantic relations are more revealing of the current and possibly future relation between the EU and the US. In addition, TFTP has given rise to important recent case law with regard to access to information that is relevant for the TTIP negotiations, as well as more broadly for the legal limits to confidentiality in international relations.[7] Furthermore, TFTP is prominent because it led to a standalone EU–US Treaty with lawmaking effects,[8] but it also illustrates the new type of transatlantic cooperation in the post-9/11 context.[9] It has also been argued that it exemplifies an 'unprecedented' collaboration among a variety of EU and US institutions and bodies such as between the European Commission and Europol on the one hand and the CIA and US Treasury on the other.[10] Although the TTIP negotiations are currently under hiatus, they have already led to significant changes in the EU practice of transparency in negotiations, leading scholars to note that the 'TTIP marks the start of a new approach to transparency'.[11]

This chapter proceeds as follows: after outlining the relation between institutionalisation and transparency (Sect. 2), the chapter examines more closely how

[5]See Kaunert et al. (2015), p. 357; Argomaniz (2009a), p. 151; Cross (2013), p. 388; Rees (2009), p. 108. See also more generally, Fahey and Curtin (2014) and Fahey (2014), p. 368.

[6]See also Introduction in this volume, Elaine Fahey, Institutionalisation Beyond the Nation State: Transatlantic Relations – Data Privacy and Trade Law.

[7]Abazi and Hillebrandt (2015), p. 825.

[8]de Goede and Wesseling (2016), p. 253.

[9]Rees and Aldrich (2005), p. 905.

[10]de Goede and Wesseling (2016), p. 254.

[11]Cremona (2015), pp. 351, 361.

norms of transparency and secrecy have developed in the transatlantic relations (Sect. 3). The analysis then turns to look at the practices of security and trade in order to understand the dynamics between access to information and official secrets in transatlantic relations (Sect. 4). The chapter thereafter discusses the implications of these dynamics for accountability in the EU. It argues that despite the many limitations to access to information, transatlantic relations have contributed to better-defined legal limits to secrecy in the EU (Sect. 5). Yet the chapter concludes that the EU regime of official secrets, largely resulting from security-driven cooperation, grants a wide discretion to the US on disclosure of information and still remains a concern for parliamentary access to information (Sect. 6).

2 Institutionalisation and Transparency

Is the formalisation and visibility of processes a means towards institutionalisation? Would institutionalisation *per se* mean that there is more transparency? The answers to these questions depend on the understanding of the notions of institutionalisation and transparency and should be addressed for the purpose of this chapter to unveil their dynamic in the context of transatlantic relations. While in general the concept of institutionalisation is somewhat elusive, this notion is broadly understood to encompass, firstly, processes of formalisation of procedures and, secondly, established policies.[12] Institutionalisation as a process implies a high level of cooperation and interactions[13] and refers to a process through which a policy arena is structured by rules, procedures and activities.[14] More specifically, a policy arena is institutionalised when 'there exists a widely shared system of rules and procedures to define who actors are, how they make sense of each other's actions, and what types of actions are possible'.[15] Scholars refer to institutionalisation not as a neutral process but rather as means by which 'powerful actors seek to shape the rules of the game in their favour'.[16] When understood as an established set of rules, institutionalisation refers to the precision, formality and authority of these rules.[17]

Transparency is also a complex notion and one for which a variety of definitions have been provided for in the literature. In a narrower understanding of transparency for making processes visible and accessible, institutionalisation through the processes of formalisation could lead to requirements of publicity of rules. However, a more concise legal definition of transparency as formal and clear stipulated rules for

[12]On both of these aspects, see details Introduction in this volume: Fahey, Institutionalisation (n 6), p. 4.
[13]*Ibid*.
[14]Stone-Sweet et al. (2001), p. 3.
[15]*Ibid*, 12.
[16]*Ibid.* 13.
[17]*Ibid.* 7–8.

access to information about (all) processes and decisions, requires that transparency is an established policy itself and not merely discretionary for actors within an arena to decide upon on an ad hoc basis.

Institutionalisation through setting formalities and procedures to define who the actors are and what types of actions are possible contributes to reducing opacity and ambiguities about these procedures. While the latter are important for institutionalisation, they do not as such lead to accessibility of information. In fact, sometimes in practice it seems that in order to achieve institutionalisation of a policy or field of cooperation, transparency is deemed as a hurdle to such a process. For example, in the EU–US security cooperation in TFTP, high-level practitioners acknowledge that 'the more you make this transparent . . . and the more you discuss [the program], you might kill the whole thing'.[18] Indeed, transparency opens procedures to public opinion, and the latter may not always be favourable towards institutionalisation, especially in fields where the balances between certain public interests, such as security, and fundamental rights are not clear. Yet public opinion may also be critical towards a field of cooperation precisely due to its lack of transparency, as it is the case with TTIP. While demands from civil society for more transparency have always followed the EU–US relation,[19] rules on access to information have not been an object of development or formalisation in the transatlantic contexts.

Even the term of transparency is sometimes misrepresented in the legal arrangements between the EU and the US. For example, Article 14 of the TFTP agreement entitled 'Transparency' refers to access to information for the data subjects regarding their own personal data, falling within the legal regime of privacy and data protection, rather than transparency understood as public access to information.[20] In addition to legal ambiguities, the practice of secrecy and transparency in the transatlantic relations is not one of clear binaries between what is transparent and what is secret; rather, there are complexities in who has access to information and how knowledge is 'constrained, partitioned and regulated',[21] as seen in the cases of TFTP and TTIP discussed in Sect. 4 below.

Institutionalisation hence does not necessarily lead to (better or more) access to information, although formalisation of processes may contribute towards clarity about the actions taken and the actors involved. Institutionalisation may even paradoxically *rely on* secrecy as a shield against critical public opinion on the processes of cooperation. Secrecy fosters trust among actors in international relations by providing space for confidentiality in their communication.[22] This space for confidentiality operates

[18]de Goede and Wesseling (2016), p. 10.

[19]Gheyle and De Ville (2017).

[20]Art 14 of Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program *OJ L 8, 13.1.2010, pp. 11–16.*

[21]de Goede and Wesseling (2016), p. 2.

[22]Bok (1982). For an overview of secrecy and its definition, see Blank (2009).

through rigorous rules of exchange of official secrets. The next section examines how a space of confidentiality has emerged and developed in transatlantic relations.

3 Official Secrets in Transatlantic Relations: From Customary Norms in Security to a Comprehensive Policy

Rules on transparency and official secrets in the EU have developed in parallel with the increased cooperation between the EU and the US. While transparency internally in the EU is an institutionalised policy with constitutional relevance, externally between the EU and the US the rules on official secrets are much more established. The development of official secrets in the EU has been more in the shadows in comparison to transparency rules, partly because these rules are generally seen as more technical norms of information management but also due to the closed-door meetings and internal rule-making procedures through which these rules mostly emerged in the EU.[23]

Transparency is manifested through public and parliamentary access to information. Both these legal regimes meet the requirements of precision, formality and authority of rules of an institutionalised policy. Namely, Regulation 1049/01 on the right to public access stipulates a wide access to documents and requires individual assessment from the institution and justification on basis of specific and actual risk. Public access norms are stipulated both in primary and secondary laws, and these rules are binding. Similarly, parliamentary access stipulates for an immediate and full access for the EP in all stages of the procedure set out in Article 218 TFEU; hence, it is also provided in primary law, and it is of a binding character. Furthermore, in *European Parliament vs Council*, the Court has held that informing the EP is a mandatory procedural requirement within the meaning of the second paragraph of Article 263 TFEU, and its infringement leads to the nullity of the measure.[24] By contrast to transparency rules, the rules on official secrets internally in the EU are fragmented, lacking an explicit legal basis in the Treaties and are applicable within the institution.[25]

However, this *internal* relationship between transparency and official secrets in the EU is completely reversed in the context of *external* relations, in the form of transatlantic cooperation. While the institutionalisation of official secrets has not been an objective as such in the EU–US cooperation, an established policy has emerged as a result of the increased legal arrangements in the field of security. The impact of the US on the establishment of rules on official secrets was initially indirect, and it mostly took place through an alliance that connected the EU with the US in issues of security. Namely, in 1999 at the Helsinki Council Presidency meeting, it was agreed that there was a need for further work on the modalities to be

[23] Abazi (2018); Curtin (2014), p. 684; but see also Galloway (2014), p. 668.

[24] Case C-658/11, *European Parliament v. Council of the European Union*, ECLI:EU:C:2014:2025.

[25] Abazi (2018).

developed regarding the cooperation between the EU and NATO. Four ad hoc NATO–EU working groups were established to facilitate the development of EU–NATO relations, and in this respect the working groups covered issues pertaining to the EU's military capabilities, the EU's access to NATO assets and capabilities and the definitive arrangements to be concluded between the EU and NATO.[26] The proximity with NATO and the necessary steps taken for cooperation are seen as influential in the development of official secrets regime, particularly due to the immediate and rapid changes that were made to the rules on classified information.[27] The NATO influence is noted not only with regard to the EU, but also with regard to Member States, asserted through the security of information agreements. For example, the agreement between NATO and Austria shows that the 'operative provisions of this agreement replicate, with some formal adaptations, the exact text. . .down to the article numbers' of the NATO rules.[28]

A more direct period of impact of transatlantic relations on the establishment of rules on official secrets, and perhaps more significant with regard to the resulting consequences of these rules, is the period of post-9/11 security cooperation. Security cooperation has grown into a major feature of transatlantic relations since 9/11.[29] It has been more generally noted that '9/11 represents a critical juncture generating new paths of institutional development branching points and shaping the formation of this domain'.[30] A significant agreement in this respect is the Agreement of December 2001 between Europol and the US in preventing, detecting, suppressing and investigating serious forms of international crime through the exchange of strategic information, such as threat assessment analysis, which Europol conducts on the basis of data from MS and technical information, such as forensic police methods and criminal intelligence analytical methods. This cooperation was followed by the 2002 Supplemental Agreement between Europol and the US on personal data exchange, and since 2004 under the PNR agreement, information on airline passengers was exchanged in a systematic manner between the EU and the US.

The agreement on classified information between the EU and the US came after a number of other legal arrangements had been established in security cooperation and the signatory parties noted the 'permanent need' for exchanging official secrets.[31] Official secrets in transatlantic relations are governed by international agreements established between the EU and the US, as well as more specific agreements with EU agencies, like Europol. The mandate for the agreement between the EU and the US on exchange of classified information was already envisaged in 2003, although the actual agreement was signed in April 2007.[32] Important principles for exchange of

[26]Whitman (2004), pp. 430, 438.

[27]See Roberts (2003), p. 329; Reichard (2006).

[28]Reichard (2006), p. 318.

[29]Rees (2009).

[30]Argomaniz (2009a), p. 154.

[31]EU-US Europol; EU-US Eurojust, EU-US extradition; EU-US mutual cooperation; EU-US PNR.

[32]Agreement between the European Union and the United States on the security of classified information OJ L 115 of 3.5.2007.

Table 1 Degree of institutionalisation of transparency and official secrets

	Transparency		Official secrets	
	Public access	Parliamentary access	EU official secrets	EU–US exchange of official secrets
Precision	– Wide access – Individual assessment – Specific and actual risk	– Immediate and full – All stages of the procedure	– Vague categorisation – Broad assessment of risk – Discretion based	– Vague categorisation – Broad assessment of risk – Discretion based
Formality	Treaty	Treaty	Council decision (guidelines, institutional rules of procedure)	International agreement
Authority	Compulsory	Compulsory	Binding but may not override primary law	Binding but may not override constitutional principles

official secrets were laid out in this Agreement, some of which would at later stages lead to significant challenges for democratic oversight, as discussed below. The key principle in this regard is the 'originator rule' known also as ORCON.[33] This rule on the exchange of official secrets grants the originator of the document a full discretion to decide whether the shared material would be disclosed to any third party. Hence, according to this Agreement, when the US shares official secrets, the EU

> Cannot use the information for any other purpose than the one for which it was provided without the prior agreement of the releasing party; cannot further release or disclose classified information received; must comply with any limitations on the release of classified information specified by the releasing party; must protect the rights of the originator of the classified information, as well as intellectual property rights (e.g. patents, copyright and trade secrets).[34]

It is precisely the ORCON principle established between the EU and the US that gave rise to significant limitations to access to information. It is worth to note that the EP was not involved in the establishment of these agreements as they precede the Lisbon Treaty and the EP's current prerogatives in the field in line with Article 218 TFEU. The agreement is based on at the time Article 24 TEU,[35] which grants prerogatives to the EU to conclude international agreements in the field of Common Foreign and Security Policy (CFSP).

To summarise with the help of Table 1, on the one hand, the cooperation between the EU and the US relies on rules on official secrets. These rules are envisaged to support the highly secured exchange of information and operate under principles that provide unbound discretion to the originator of information about whether such

[33]Roberts (2004), p. 249.

[34]EU-US Agreement (n 32) preamble.

[35]Current Art. 37 TEU.

sensitive material would be disclosed to any third actor. On the other hand, *internally* in EU law and policy, rules on public and parliamentary access to information have constitutional prominence and require wide accessibility of documents. Inevitably, in *external relations law and policy*, an institutionalised regime of official secrets creates tensions for the internal institutionalised transparency in the EU. The recent developments in transatlantic cooperation in security and trade provide insights into how such tensions unfold in practice, which are discussed in the next section.

4 Limitations on Access to Information in Security and Trade

4.1 The Terrorist Finance Tracking Programme: Changing the Boundaries of Transparency in the EU's External Relations

Security has been a growing field of EU–US cooperation encompassing a wide range of legal arrangements, including in law enforcement, exchange of intelligence and data, as well as border and transport security.[36] This cooperation increasingly also includes exchanges and communication among institutions and the participation of EU officials in US institutions and agencies and vice versa. For example, a US liaison attorney attends the meetings of 'Eurojust', an EU agency, whereas Europol has posted two liaison officers in Washington, DC, and the US has stationed 14 officers at Europol, including federal law enforcement agencies FBI and the Secret Service, to work with Europol on counterterrorism and other international crimes, such as counterfeiting and cybercrime.[37] Since 2012, the EU has its own 'Overseer' inside the US Treasury to formally control the arrangements as provided in TFTP.[38] The latter is the central focus of this discussion as it is the main case opening a number of issues with regard to access to information that have also led to some significant legal implications.

TFTP is a key instrument in the set of anti-terrorist measures and serves to share large quantities of data from financial telecommunications company SWIFT with the purpose of mapping terrorist networks.[39] The data is supposed to be shared with the US Treasury, which in turn conducts the analysis for detecting these networks. The programme seems to have provided more than 16,700 intelligence leads since it was launched in 2010.[40] Hence, it is mostly viewed as a valuable instrument for the transatlantic efforts in combating terrorism.

[36] Rees (2009).

[37] Archick (2016).

[38] de Goede and Wesseling (2016).

[39] See Fuster et al. (2008), p. 191.

[40] Funk and Trauner (2016).

TFTP has given rise to transparency limitations on both public and institutional access to information. Regarding public access to information, Ms Sophie in 't Veld, a Dutch ALDE MEP, requested a document containing an opinion of the Council's Legal Service regarding a recommendation from the Commission to the Council about the initiation of negotiations of the TFTP agreement.[41] Her initial request was denied in full. The decision was subsequently revised upon In 't Veld's confirmatory application, leading the Council to grant access to the introductory and general parts of the documents. In 't Veld took the matter to the General Court, which largely ruled in her favour and later on was confirmed by the ECJ in the appeal. It should be noted that the limitation to public access to information was a result of a Council decision to refuse access and hence did not as such directly involve any US institution. Furthermore, the interest of the Council in nondisclosure was not merely related to the transatlantic relations, but it aimed to safeguard its own discretion in international relations. The legal implications of the Court's ruling are quite significant, however, as the Court rules in favour of disclosure of the mandate of the negotiations. The mandate of negotiations is deemed to have a constitutional significance.[42] The Court maintained a distinction between the specific content of the mandate relating to the substance of negotiations and the choice of legal basis regarding those negotiations.[43] The latter does not form part of the substance of the negotiations and as such may be considered separately.[44] Furthermore, the institutions do not have discretion to withhold the mandate merely because it pertains to international negotiations, but rather an assessment must be conducted in line with the exceptions under Article 4(1)(a) of Regulation 1049/01.[45] These aspects of the case are pertinent with regard to the negotiations of the TTIP and the disclosure of the mandate in this context, as will be discussed below.

A more severe limitation due to TFTP pertains to institutional access to information whereby the US Treasury Department directly blocked access to a report classified as 'EU Secret' on the implementation of the TFTP agreement through the ORCON rule. This rule provides unbound discretion to the originator of the information to decide whether there would be disclosure. Neither the EP nor later the European Ombudsman was granted access to this report due to the block by the US Treasury Department. It is noteworthy that there are provisions in the TFTP agreement about the exchange of sensitive information with private contractors, yet there is no provision that allows for any parliamentary oversight.[46] While the only mention of 'oversight' is to be found in Article 12 of the TFTP agreement, it refers to the implementation of the agreement, but a full external parliamentary scrutiny is not foreseen. The TFTP agreement merely provides for the Parliament to receive reports of joint reviews carried out by the Commission and the US authorities. The

[41] See Fahey (2017), pp. 528–551.

[42] Case C-350/12 P, *Council* v. *Sophie in 't Veld,* EU:C:2014:2039.

[43] *Ibid.*

[44] *Ibid.*

[45] Abazi and Adriaensen (2017).

[46] Art 8 of TFTP Agreement.

European Ombudsman (EO) too was denied access to this report, leading the EO to remark:

> For the first time in its 20-year history, the European Ombudsman was denied its right under Statute to inspect an EU institution document, even under the guarantee of full confidentiality, as part of an inquiry. This power to inspect documents is fundamental to the democratic scrutiny role of the Ombudsman and acts as a guarantor of certain fundamental rights to the EU citizen.[47]

The EO noted that the 'the US has effectively been given a veto over the democratic oversight of EU institutions' and considered that the manner in which the technical modalities were adopted, even if their adoption were considered to be formally 'legal', would reflect a democratic deficit at the level of the EU, which must be addressed.[48] The EO called the EP to take further action into looking at arrangements of official secrets in the EU. The Legal Service of the EP, however, has been much more open to the application of the ORCON rule, especially since now this rule is also incorporated in the EP's own regime of handling of official secrets. Hence, there seems to be a disagreement between the EP and EO about the extent to which, especially in issues of security, the OCRON rule should apply in the EU and whether indeed an external third institution could have the power to veto constitutionally set oversight powers of EU institutions. In fact, scholars have already remarked that like no other transatlantic cooperation instrument, the TFTP has generated reactions and issues internally in the EU in all branches of oversight and 'pit the EU Commission against the EU Ombudsperson, and the European Court of Justice against the EU-US Joint Review Team'.[49] Yet, with the focus so much being on the struggles of getting access, it is still not sufficiently known to what extent this level of secrecy about the report is actually justified.

4.2 Negotiations of the Transatlantic Trade and Investment Partnership

In the area of trade and external relations law and policy, as it is the case with the TTIP negotiations, the limitations to access to information related much more to diplomatic secrecy rather than to a rigorous regime of official secrets. Perhaps due to the fact that TTIP had been politicised since its initiation, it has been a process giving more access to transnational non-state actors through open workshops.[50] Yet it cannot be claimed

[47]Presentation by the European Ombudsman Emily O'Reilly, Decision of the European Ombudsman closing the inquiry into complaint 1148/2013/TN as regards Europol, available at http://www.ombudsman.europa.eu/activities/speech.faces/en/58671/html.bookmark.

[48]Decision of the European Ombudsman closing the inquiry into complaint 1148/2013/TN against the European Police Office (Europol), para 17.

[49]de Goede and Wesseling (2016).

[50]See Introduction in this volume: Fahey, Institutionalisation (n 6).

that the TTIP negotiations were initially open or that indeed there was willingness, especially from the Council, to have more transparent negotiations.

TTIP negotiations take place in a legal context in the EU that is already more clear with regard to the legal limits to confidentiality in international negotiations. Namely, as a result of the TFTP, the EU institutions must establish, first, that the disclosure of the requested document could specifically and actually undermine the protected interest and, second, that the risk deriving from the disclosure is reasonably foreseeable and not purely hypothetical. While a public access request regarding the TTIP did not reach the Court *per se*,[51] by analogy to the arguments presented at TFTP, the Court would draw a distinction between negotiation documents that are of constitutional significance, and if they have an impact on fundamental rights, and those aspects of the negotiating documents that pertain more directly with the negotiating positions, which are viewed to be legitimately held undisclosed in order to ensure the negotiating position of the Commission.

At the outset of the negotiations, there was no mention of making public any negotiation documents produced in the context of the TTIP negotiations.[52] A lack of information on the content of the negotiations fuelled speculation in public opinion about what was being negotiated.[53] Hence, the Commission published a communication in which it articulated how negotiations are being conducted and which actors were involved in EU-level decision-making on TTIP.[54] Yet there seemed to be confusion as to who has the authority to release the document. Whereas it was the Commission receiving the criticism that it lacked transparency and refused to share this document in public, the document is under the authority of the Council that issues the mandate, to publicly release it. After extensive pressure from the EO, as well as civil society, the Council released the mandate of the negotiations. Hence, with regard to public access, the issue of limitations of transparency is internally decided by an EU institution and not interfered by the US. However, with regard to parliamentary access to the negotiating documents, the US required special arrangements of secure reading rooms and high level of confidentiality for the parliamentarians to be able to have access to the negotiating documents.[55]

Although the negotiations are currently on hold, the significance of TTIP is that it already had an impact on the interactions of the EU institutions. Most significantly, the Commission has sought to position itself as a pro-transparency actor and shifted the blame for perceived secrecy onto the Council and Member States, as well as tried to influence the Council's relation with the EP. Namely, as of 2011, MEPs part of the European Parliament's Committee on International Trade (INTA) were allowed by the Council to consult the final negotiation directives in secured reading rooms.

[51] See Case T-754/14 Efler and Others v Commission ECLI:EU:T:2017:323.

[52] Coremans (2017).

[53] See Agence Europe, Warnings of growing hostility on TTIP *Bulletin Quotidien Europe*, 2014, nr. 11029.

[54] European Commission (2014).

[55] Crisp (2015).

5 Increased Transparency? Paradoxes and Implications of Institutionalisation

Paradoxically, public access to information *internally* in the EU is legally strengthened not despite of the TFTP and TTIP limitations but precisely because of these agreements, and the negotiations respectively gave rise to a high demand for transparency *in* the EU. While there was a strong resistance from the EU institutions initially to respond to such requests for openness, through case law, decisions of the EO and public pressure, there have been shifts to the boundaries of public access to information in transatlantic cooperation and also international relations more broadly. This is most evident through the case of TFTP regarding public access to documents. As a result of case law, the EU executive institutions have to provide a specific and not a hypothetical broad risk of the EU's interests in transatlantic relations in order to argue in favour of nondisclosure of documents. Furthermore, the legal basis of any agreement, including in questions of security, is a matter of constitutional significance and should be subject to open debate and judicial review. However, the same positive effects cannot be claimed for *institutional* access to information *internally* in the EU. This results due to the fact that the ORCON rule is very much part of the regime of official secrets externally in the EU–US cooperation and internally in the fragmented legal regimes of EU institutions and bodies. The fact that arrangements with the US on official secrets can block constitutionally set structures for oversight in the EU and directly limit the investigative/inquiry powers of the EP and the EO is an issue that merits much more attention in the debate on institutionalisation of the EU–US relations.

The more direct implications for EU constitutional oversight arise due to the institutionalisation of official secrets in the EU–US cooperation. Rules that were negotiated by executive institutions with no involvement of the EP initially emerged as mostly customary standards of conduct in the transatlantic arena but have now developed to a fully fledged complex set of rules applicable in the EU across policy fields. While institutionalisation of secrecy has not been an objective in EU–US relations, it resulted from the increased security cooperation and policies especially since 9/11. The impact of transatlantic relations is relevant in two different aspects of democratic oversight: accountability and public deliberation.

Interconnectedness among different branches of oversight institutions in the EU in order to push back on the executive secrecy emerges as direct result from the transatlantic cooperation. Both in the cases of TTIP and TFTP, the judiciary, parliamentary and administrative oversight institutions acted in a more aligned manner with regard to positions on what information should be publically released. On the contrary, however, it is noted that the EP and the EO do not seem to fully share the same views with regard to institutional access to information and the level to which the ORCON rule may be applied in the EU. Nevertheless, in the TTIP negotiations, the positive development with regard to institutional access has been that both the EP and national parliaments were given access to information and the Commission in particular through its own position as negotiator aimed to increase

the accessibility of information for the EP and provided information also through less formal oversight meetings.

Another implication of the transatlantic cooperation pertains to how public deliberation has been altered. Namely, the increase of 'secure reading rooms', hence the oversight by the EP behind closed-door meetings, raises some questions with regard to what extent, by focusing on accountability, this harms their ability to voice their concerns if these are based on confidential information.[56] Public deliberation and the contribution of MEPs in public debates are essential for the general public to form a better understanding on the negotiations. Deliberation, which is necessary for formation of public opinion, enables also the clarity of processes and more understanding of actors—elements that are important from an institutionalisation perspective. In the case of TTIP, informed public discussions are highly pertinent since the negotiations are highly politicised, and often misconceptions arise with regard to what legal implications this agreement would actually give rise to. Another important aspect for public debate is the publicness and traceability of administrative processes with regard to EU–US cooperation.[57] TTIP in this regard has been more accessible as the Commission aimed through its websites and also through the engagement of the Commissioner through numerous public events to explain and share information about the negotiations. By contrast, the TFTP was fully embedded in the executive secrecy that is more characteristic of security cooperation.

6 Conclusions

The findings of this chapter challenge the assumption that transatlantic relations merely have given rise to limits to transparency in the EU. Indeed, while in the fields of both security and trade cooperation there have been significant challenges with regard to public and institutional access to information, the legal responses through case law and also changes in EU institutional practice have resulted in secrecy having a more confined reach in transatlantic relations.

The chapter showed how transatlantic relations have led to the institutionalisation of official secrets in the EU that initially emerged through security cooperation but have expanded across policy fields. International agreements and other legal arrangements such as memorandums of understanding have been established between the EU and the US to ensure a highly secure exchange of classified information with rigid procedures on how such information should be shared among the EU institutions, agencies and agency-like bodies. The main implication of the institutionalisation of official secrets is the limitations to both public and institutional access to information, which in turn blocked constitutional checks at the EU level, leading the EO to talk

[56] Abazi (2016a), p. 31.

[57] Ibid.

about 'democratic deficit at the EU level'.[58] Yet distinctions should be drawn between the limitations resulting from the norms of official secrets, as it is the case with TFTP relating to national security information, and the limitations to transparency in the TTIP negotiations pertaining to diplomatic secrecy and confidentiality in international relations. The latter is guided not by well-established set of rules but rather by customary norms of negotiations and more broadly the wider discretion of executives in the conduct of foreign policy. Furthermore, the limitations arising from official secrets are not unforeseeable since the rules incorporate a balance between secrecy and disclosure that is in favour of executive discretion to withhold information. The problematic issues in this context is that these rules have been agreed with no participation of the EP or much public debate, or in other words, the EU institution that actually faces the resulting limitation has not been in any position to consent or block such rules.

Based on the findings of the chapter, three observations may be made as foresights in terms of the direction for transparency in the institutionalisation of transatlantic relations. Firstly, parliamentary access to information, although significantly improved in the TTIP case, may remain a challenge since the current internal EU regime on official secrets has incorporated principles that grant prerogative to third parties to block disclosure of information. It should also be emphasized that such rules provide obligations to EU executives to follow the discretion on disclosure to external institutions. This aspect of official secrets rules should be reconsidered, possibly through a revision of the rules in the EU. Secondly, public access to information in international relations has *legally* been clarified. Public access is based not on institutional discretion, but it is subject to judicial review where a specific risk of disclosure is required in order for executive institution to justify secrecy. Yet the practice of TTIP also shows that the Council is not always willing to share the mandate of the negotiations, despite legal advances. Institutional action by the EP and EO, in addition to public pressure, hence continues to play a significant role in the disclosure of documents. Lastly, institutionalisation may also rely on secrecy, especially when cooperation and trust among actors is necessary. Dynamics of transparency and secrecy hence are much more interwoven, and they both further institutionalisation in transatlantic relations.

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The EU–US Data Privacy and Counterterrorism Agreements: What Lessons for Transatlantic Institutionalisation?

Maria Tzanou

Transatlantic data flows have come a long way.[1]

1 Introduction

It is generally accepted that the EU data protection legal framework has had a significant impact in influencing third countries worldwide to adopt data privacy legislation and considerably shaping the form of this[2] to the creation of what has been called 'a substantive EU model of data protection'.[3] This is largely due to the EU requirement of 'adequate protection' that has been characterised as notorious 'gunboat diplomacy'.[4] The US has long resisted the EU's data protection model, but in the interests of international trade, which requires vast amounts of transatlantic data flows, different mechanisms have been devised to allow for these. The development of schemes, such as the EU–US Safe Harbour Programme,[5] Model Contractual Clauses and Binding Corporate Rules,[6] has been hailed as successful 'collaborative

[1] Jourová (2017).

[2] Greenleaf (2012), p. 68.

[3] Schwartz (2013).

[4] Papakonstantinou and de Hert (2009), pp. 885, 892.

[5] Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under Doc No C(2000) 2441).

[6] Schwartz (2013), pp. 1982–1983.

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law-making'[7] that involves innovative, hybrid forms of governance.[8] Indeed, US scholars have welcomed 'an intense process of non-legislative law-making and one that has involved a large cast of characters, both governmental and non-governmental'.[9]

Such schemes, however, govern only one aspect of transatlantic data flows—these referring to the commercial use of personal data by companies. Since the terrorist attacks of 9/11, the US government has increasingly requested extensive access to EU personal data to fight terrorism and other serious crimes. Transatlantic data transfers for counterterrorism and law enforcement purposes have been made possible on the basis of three sector-specific agreements (the EU–US PNR, the EU–US TFTP, the EU–US Privacy Shield) and one general agreement (the EU–US Umbrella Agreement) negotiated between the EU and the US.

Academic scholarship from both sides of the Atlantic has examined the EU–US PNR, the EU–US TFTP and—to a much lesser extent—the more recently adopted Privacy Shield and EU–US Umbrella Agreement, generally concentrating on a comparative analysis of the EU and the US privacy regimes,[10] on an examination of the conditions for transatlantic data flows established by these agreements[11] and on their compatibility with domestic fundamental rights' standards.[12] Similar legislative initiatives in the EU, such as the EU PNR Directive—which establishes the EU's own PNR system—have prompted scholars to examine whether these agreements have had potential regulatory spillovers between the two legal orders.[13]

However, scant attention has been paid to the transatlantic governance created by these instruments that regulate data flows for the purposes of (primarily US) government access. A study of this is important for two reasons. Firstly, the transatlantic governance arising from these instruments is different in manner and in form from the 'collaborative law-making' and the hybrid and innovative forms of governance that characterise the transatlantic data transfers for commercial purposes and should be, therefore, distinguished and studied as a separate issue. Secondly and more importantly, the study of the governance of this aspect of transatlantic relations provides a valuable lesson on whether institutionalisation established through international agreements can effectively resolve transnational conflicts affecting fundamental rights.

Institutionalisation of transatlantic relations is the topic of this edited volume, and the concept of institutionalisation is analysed extensively in the introductory chapter. In the latter, it is suggested that institutionalisation beyond the Nation State denotes an idea of 'publicness, openness and even public institutions' that 'provide certainty, clarity and possibly even some form of humanity and appease the uncertainty of transfers of authority to ostensibly faceless global institutional actors. It thus relates to the faith in the authority of institutions beyond the Nation State, often as a locus for

[7] Ibid.

[8] Fahey (2017).

[9] Schwartz (2013), p. 1967.

[10] See *inter alia* Reidenberg (1999), p. 1315; Cole and Fabbrini (2016), p. 220; Tzanou (2017b).

[11] Boehm (2012).

[12] Tzanou (2017b).

[13] Tzanou (2015), p. 87.

legitimacy or their legitimation.'[14] It has been argued that institutionalisation 'matters'[15] because 'organisations that incorporate "institutionalised" practices, ideals or systems are understood to be more legitimate, successful and likely to succeed'.[16]

Focusing on the transatlantic forms of governance created by these four EU–US instruments in the field of data transfers for counterterrorism purposes, this chapter reflects on the following questions: does institutionalisation matter for the protection of fundamental rights? To what extent do the institutionalisation dynamics established by the three sector-specific and the general EU-US data privacy instruments protect the fundamental rights to privacy and data protection of EU citizens? Or should solutions based on non-institutionalisation/sovereignty continue to frame the debate?

The analysis proceeds as follows: the following section sets the background for the discussion by briefly outlining the EU-US privacy status quo.

Section 3 explores the forms of governance that the EU–US PNR, TFTP, Privacy Shield and Umbrella Agreement have established in the transatlantic data space by looking at the relevant rules, procedures and institutions. Three specific aspects of these are considered: the institutional dynamics during the negotiations of the agreements, the structure and form of the instruments adopted and their substance. Regarding institutional involvement, this chapter argues that the EU–US agreements have created a dynamic that is controlled mainly by the executive serving national security interests often disempowering legislative bodies, such as the European Parliament and other pro-privacy institutions. In terms of form and structure, the agreements have established a complex set of fragmented, uncertain rules that in their substance have weakened fundamental rights' protection. This means that transatlantic institutionalisation in the sphere of data protection understood very broadly as a 'process' through which a political space has evolved[17] through a formalisation of procedures and institutional coordination and development[18] is weak and has not achieved a locus of legitimation.

Section 4 discusses the scepticism of the CJEU towards transatlantic data privacy coordination as reflected in its recent *Schrems* judgment[19] and demonstrates the uncertainty of its fate, which is exacerbated by current political developments in the US. In this respect, this chapter advocates that solutions should be searched at the EU level through the strengthening of the powers of privacy actors and institutions.

Section 5 provides brief conclusions on the lessons learned on whether institutionalisation matters. It is submitted that the transatlantic data privacy experience in the field of counterterrorism suggests that institutionalisation can build a legitimate, successful and likely to succeed system only when it is based on democratic institutional involvement and clear and certain rules that guarantee real and effective protection of fundamental rights.

[14]Fahey (2017).

[15]Ibid.

[16]Meyer and Rowan (1977), pp. 340, 363; Sanders (2008), p. 40.

[17]Stone-Sweet et al. (2001), p. 1.

[18]Petrov (2010).

[19]Case C-362/13 Maximillian Schrems v Data Protection Commissioner, 6 October 2015, unreported.

2 The EU and US Data Privacy Regimes

The EU data privacy framework comprises data protection rules at the level of primary and secondary laws and strong mechanisms to ensure its independent enforcement and oversight. The right to data protection is enshrined in Articles 16 TFEU and 39 TEU and recognised as a fundamental right in the EU Charter of Fundamental Rights (EUCFR) next to the right to privacy[20] in Article 8 EUCFR.[21] Primary law is complemented by a comprehensive legal framework at the level of secondary law. Directive 95/46/EC (the Data Protection Directive),[22] which has been the EU's central data protection legislative instrument for more than 20 years, has been repealed and replaced by the General Data Protection Regulation (GDPR),[23] which entered into force in May 2016 and will apply in Member States from 25 May 2018.

Both instruments lay down a number of rules and principles for the protection of the personal data of individuals—lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, integrity, confidentiality, data security[24]—and create concomitant obligations for the 'controllers' of personal data, understood as the persons who, alone or jointly with others, determine the purposes and means of the processing of personal data.[25] They grant the data subject several procedural rights, such as the right to information, right of access, right to rectification, right to erasure, right to restriction of processing, right to data portability and right to object.[26] Compliance with EU data protection rules is ensured by the National Data Protection Authorities (NDPAs), national courts and ultimately the CJEU. Independent Advisory Body on the protection of personal data is established under the DPD (the 'Article 29 Working Party') and the GDPR (the 'European Data Protection Board').[27] Besides this omnibus legislation, further data protection rules are included in sector-specific legal instruments.[28]

[20] Article 7 EUCFR.

[21] See Fuster (2014); Tzanou (2013), p. 88; Tzanou (2017b).

[22] Directive 95/46/EC [1995] OJ L 281/31.

[23] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[24] GDPR, art 5.

[25] GDPR, art 4 (7).

[26] Tzanou (2011), p. 273; Tzanou (2014), p. 24.

[27] GDPR, art 68.

[28] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L201 of 31.07.2002, p. 37; Regulation (EC) 45/2001/EC of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1 of 12.1.2001; Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, L 119/89 of 4.5.2016.

The legislation protects personal data even outside the EU's borders. As a general rule, data transfers to third countries are allowed when these guarantee an 'adequate level of protection' of personal data.[29] In *Schrems*, the CJEU clarified that adequacy requires a level of protection of fundamental rights and freedoms that is 'essentially equivalent' to the one of the EU.[30] This is based on the premise that data protection is now a fundamental right in the EU legal order that cannot be circumvented by the transfer of personal data to third countries. Transborder data flows, therefore, form part of the EU institutions' fundamental rights protective duty, and a valid argument can be made in favour of the extraterritorial—including the transatlantic application of EU data privacy standards.[31]

On the other side of the Atlantic, the US privacy regime is found in different sources: the US Constitution, the Supreme Court case law, federal legislation, state legislation and the theory of torts.[32] The constitutional protection of privacy is mainly based on the First Amendment (protection of free speech and freedom of assembly), the Fourth Amendment (protection from unreasonable searches and seizures) and the Fifth Amendment (privilege against self-incrimination).[33] The Fourth Amendment, which protects personal privacy 'against unwarranted intrusion by the State',[34] is limited in its scope by the so-called third-party doctrine, which stipulates that the US Constitution does not protect 'what a person knowingly exposes to the public, even in his own home or office'[35] and any 'information in the hands of third parties'.[36] Moreover, the Fourth Amendment does not protect persons overseas, such as EU citizens.[37] At the federal level, there is no omnibus legislation; privacy protection is included in various sector-specific[38] legislative measures that are different for the public and the private sectors.[39] Regarding the oversight of the US privacy legislation, 'the closest that the United States comes to a national data protection agency is the Federal Trade Commission (FTC)',[40] which faces significant limits in its enforcement powers.[41]

[29] GDPR, art 45.

[30] *Schrems* (Case C-362/13 Maximillian Schrems v Data Protection Commissioner, 6 October 2015, unreported), para 73.

[31] Tzanou (2017a), pp. 1, 4; Kuner (2015), p. 235; Taylor (2015), p. 246.

[32] Shaffer (2000), pp. 1, 22.

[33] Brenner (2008), pp. 225, 230.

[34] *Schmerber v. California*, 384 U.S 757 (1966). It should be noted, however, that the Fourth Amendment has not been interpreted to afford a 'comprehensive right to personal data protection'. See Bignami (2015), p. 8.

[35] *Katz v. United States*, 389 U.S 347 (1967).

[36] Ibid.

[37] *United States v. Verdugo-Urquidez*, 494 U.S. 1092 (1990).

[38] Shaffer (2000).

[39] Schwartz (2013) 1974.

[40] Ibid, 1977.

[41] Ibid.

In the context of transatlantic data relations, there has been no formal adequacy finding regarding the US data privacy regime, but the general approach is that the US lacks adequate protection.[42] As noted earlier, schemes such as Safe Harbour, Model Contractual Clauses and Binding Corporate Rules have introduced innovative methods to resolve this problem in the context of transatlantic data flows for commercial purposes. More particularly, Safe Harbour was based on a system of voluntary self-certification and self-assessment of US-based companies that they abide with certain data protection principles, the 'Safe Harbour principles', combined with some enforcement and oversight by the US Department of Commerce and the FTC. On this basis, the Commission recognised the adequacy of protection provided by the Safe Harbour principles.[43] Despite its innovative approach to transatlantic governance, it is worth noting that Safe Harbour was found to suffer from major weaknesses in terms of compliance by the self-certified companies and enforcement and oversight by the US authorities.[44] Eventually, the scheme was invalidated by the CJEU in *Schrems* on the basis that the US authorities were accessing and processing the personal data transferred from EU Member States beyond what was strictly necessary and proportionate to the protection of national security.

The need for transfer of EU personal data to US authorities in order to fight terrorism arose after the 9/11 2001 terrorist attacks and created new, complex problems in the EU–US data privacy relations regarding the involvement of private actors that hold the data and the applicable legal framework to them. Is it US national security law or EU data privacy law? The solution found between the EU and the US was the negotiation of several EU–US sector-specific agreements to allow for transatlantic data transfers for counterterrorism and law enforcement purposes. These normally contain some guarantees that the US side safeguards certain data protection principles on the basis of which the EU recognises 'adequacy of protection' for the relevant data transfer. The institutionalisation that these establish through forms, rules and procedures is examined in the section below.

[42]Ibid, 1979–1980; Article 29 Working Party, Opinion 1/99 Concerning the Level of Data Protection in the United States and the Ongoing Discussion Between the European Commission and the United States Government, 26 January 1999.

[43]Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441).

[44]Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, Brussels, 27.11.2013, COM(2013) 847 final.

3 The Institutionalisation Dynamics of the Transatlantic Data Transfer Agreements in the Field of Counterterrorism: Rules, Procedures and Institutions

3.1 The EU–US Agreements

The EU–US collaboration on the transfer of personal data for counterterrorism purposes has produced the following policy instruments: the EU–US PNR agreements, the EU–US TFTP agreements, the EU–US Privacy Shield and the EU–US Umbrella Agreement.

3.1.1 The EU–US PNR Agreements

The PNR controversy arose in the aftermath of the 11 September 2001 terrorist attacks, when the US government adopted legislation requiring airlines flying into US territory to transfer to designated US authorities data relating to passengers and cabin crew and contained in the so-called Passenger Name Record (PNR). The Passenger Name Record is a computerised record of each passenger's travel requirements that contains information necessary to enable reservations to be processed and controlled by the airlines.[45] The purpose for collecting the PNR data is to identify individuals who may pose a threat to the US aviation safety or national security.

Four EU–US PNR agreements have been concluded so far. A first compromise was reached in 2004, when the Commission adopted a decision confirming the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection (CBP).[46] The Commission's decision and the Council decision authorising the conclusion of the PNR agreement[47] were challenged by the

[45]These data fields include: name, address, e-mail, contact telephone numbers, passport information, date of reservation, date of travel, travel itinerary, all forms of payment information, billing address, frequent flyer information, travel agency and travel agent, travel status of passenger (such as confirmations and check-in status), ticketing field information (including ticket number, one way tickets and Automated Ticket Fare Quote), date of issuance, seat number, seat information, general remarks, no show history, baggage information, go show information, OSI (Other Service-related Information) and SSI/SSR (Special Service Information/Special Service Requests).

[46]Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection, OJ 2004 L 235/11.

[47]Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004 L 183/83 and corrigendum at OJ 2005 L 255/168.

European Parliament and annulled by the Court in May 2006.[48] Following this, a second Interim PNR Agreement entered into force in October 2016.[49] This was replaced in July 2017 by a third EU–US PNR Agreement.[50] Following the entry into force of the Lisbon Treaty, a fourth EU–US PNR Agreement was negotiated and adopted in 2012.[51]

The PNR agreements include a set of provisions on the processing of PNR data by the US authorities, the categories of data transferred to the US, the method of transfer of PNR ('pull' or 'push'), the data retention periods, some safeguards regarding the processing of the data and the rights granted to the data subjects. All the four agreements provide for a joint EU–US review of their implementation.

3.1.2 The EU–US TFTP Agreements

The origins of the EU–US TFTP saga date back to 2006, and a series of articles published in US newspapers revealing that the US Department of the Treasury (UST) had been operating a secret Terrorist Finance Tracking Programme (TFTP) since 2001, under which this in collaboration with the Central Intelligence Agency (CIA) had collected and analysed for counterterrorism purposes huge amounts of data from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) database. SWIFT is a cooperative limited-liability company governed by Belgian law that operates a worldwide messaging system used to transmit financial transaction information. Under the Programme, the UST issued administrative subpoenas to the US operations centre of SWIFT. The purpose was to identify, track and pursue terrorists and their networks by unravelling their money flows.

After the SWIFT media revelations and as a response to the European institutions outcry, the UST sent a letter to the EU Council and the Commission containing eight pages of unilateral representations, which described how the UST handled the TFTP data.[52] Access to financial data by UST continued under this regime until SWIFT

[48] Joined Cases C-317/04 and C-318/04 *European Parliament v Council and Commission (PNR)* [2006] ECR I-4721.

[49] Council Decision 2006/729/CFSP/JHA of 16 October 2006 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security, OJ L 298/27 of 27 October 2006.

[50] Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ L 204/16 of 4 August 2007.

[51] Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security (2012 PNR Agreement) OJ L 215/5, 11/08/2012.

[52] Processing of EU originating Personal Data by United States Treasury Department for Counter Terrorism Purposes—'SWIFT' (2007/C 166/09) Terrorist Finance Tracking Program—Representations of the United States Department of the Treasury, [2007] OJ C166/18.

announced in October 2007 the restructuring of its messaging architecture under which EU originating financial data were to be stored solely in Europe. Since transfers of SWIFT data to UST under administrative subpoenas could no longer take place, the negotiation of an agreement between the EU and the US allowing for the transfer of financial data was deemed necessary. On 30 November 2009, one day before the entry into force of the Lisbon Treaty, a short-term Interim TFTP Agreement was signed between the EU and the US.[53] With the entry into force of the Lisbon Treaty on 1 December 2009, the European Parliament's consent was required for the formal conclusion of the TFTP Agreement pursuant to the procedure of Article 218 TFEU. On 11 February 2010, following a LIBE Committee Recommendation, the Parliament voted against the conclusion of the Interim TFTP Agreement.[54] After the rejection of the Interim TFTP Agreement by the European Parliament, a new TFTP Agreement was negotiated and concluded, following the EP's vote in favour in 2010.[55]

The EU–US TFTP Agreement stipulates the purposes of the transfer of the financial data and the procedures that the UST has to follow in order to obtain them. It sets out the data retention periods, the safeguards applicable to the processing of the data and the data subject's rectification and redress rights. It provides for a joint report on the value of the TFTP, joint reviews of the Agreement, consultation between the two parties and independent overseers that monitor compliance with the Agreement.

3.1.3 The EU–US Privacy Shield

The EU–US Privacy Shield was adopted in July 2016 to replace the CJEU invalidated Safe Harbour. Privacy Shield comprises a 'byzantine compilation of documents'[56] that includes the Commission's adequacy decision,[57] the US

[53]Council Decision 2010/16/CFSP/JHA of 30 November 2009 on the signing, on behalf of the European Union, of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme, [2010] OJ L8/9. The Agreement was deemed to apply provisionally from 1 February 2010 and expire the latest on 31 October 2010.

[54]European Parliament legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Programme (05305/1/2010 REV 1—C7-0004/2010—2009/0190(NLE)) P7_TA(2010)0029.

[55]Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme, [2010] OJ L195/5.

[56]Fahey (2017).

[57]Commission Implementing Decision of 12.7.2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, Brussels, 12.7.2016, C(2016) 4176 final.

Department of Commerce Privacy Shield Principles (Annex II) and the US government's official representations and commitments on the enforcement of the arrangement (Annexes I and III to VII).

Similar to its predecessor, Privacy Shield is based on a system of self-certification by which US organisations commit to a set of privacy principles. However, unlike Safe Harbour, which contained only a general exception for the purposes of national security, the Privacy Shield decision includes a section on the access and use of personal data transferred under the agreement by US public authorities for national security and law enforcement purposes. In this, the Commission concludes that 'there are rules in place in the United States designed to limit any interference for national security purposes with the fundamental rights of the persons whose personal data are transferred from the EU to the US to what is strictly necessary to achieve the legitimate objective in question'.[58] This conclusion is based on the representations and assurances provided by the Office of the Director of National Surveillance (ODNI) (Annex VI), the US Department of Justice (Annex VII) and the US Secretary of State (Annex III), which describe the limitations, oversight and opportunities for judicial redress under the US surveillance programmes.

3.1.4 The EU–US Umbrella Agreement

All the EU–US Agreements discussed above concern specific instances of processing. The EU–US Umbrella Agreement[59] is the only instrument that aims to establish a harmonised transatlantic data protection framework by articulating norms that standardise data transfers in the area of law enforcement. The Agreement was negotiated by the Commission and entered into force in February 2017.[60] The Commission's negotiations followed the work of the High Level Contact Group (HLCG), composed of senior officials from the Commission, the Council Presidency and the US Departments of Justice, Homeland Security and State, established in November 2006 to explore ways that would enable the EU and the US to work more closely and efficiently together in the exchange of law enforcement information while ensuring the protection of personal data and privacy. The adoption of the US Judicial Redress Act,[61] which extends to EU citizens judicial redress protection under the US Privacy Act, was a precondition for the signing of the EU–US Umbrella Agreement.

The purpose of the Umbrella Agreement is twofold: on the one hand, to ensure a 'high level' of protection of personal information and, on the other hand, to enhance

[58]Commission Implementing Decision, recital 88.

[59]Commission Proposal for a Council Decision on the signing, on behalf of the European Union of an Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences, COM(2016) 238 final, 29.4.2016.

[60]The legal basis of the Umbrella Agreement is Article 16 TFEU, in conjunction with Article 218 (5) TFEU.

[61]S 2(d)(1) Judicial Redress Act 2015.

counterterrorism cooperation between the US and the EU and its Member States. The Agreement applies to two types of transfers of personal data: those transferred between the competent law enforcement authorities of the EU and the US and those transferred in accordance with an agreement concluded between the US and the EU for law enforcement purposes.

The EU–US Umbrella Agreement contains a number of substantive data protection principles and data subject rights. These include provisions on purpose limitation, necessity and proportionality, information security, data retention, sensitive data, accountability, right to access and rectification, administrative and judicial redress and a right to be informed. The Agreement establishes oversight and cooperation mechanisms, a joint review of its policies and procedure mechanisms aiming to ensure accountability in cases of improper implementation.

3.2 Transatlantic Data Privacy Cooperation: Institutional Dynamics, Structure and Substance

3.2.1 Institutional Dynamics

It should be recalled that all the three sector-specific EU–US data agreements seen above do not govern a transatlantic exchange of data, but rather the 'one-way access of US government agencies to European data'[62] for counterterrorism and law enforcement purposes. From the US side, therefore, the negotiations for these agreements were led by institutions interested in the processing of such data, which—unsurprisingly—form part to a large extent of the national security and law enforcement establishment[63]—DHS, Director of National Intelligence, US Department of Justice. Even in instances where other institutions were involved in the negotiations, such as the UST in the case of the TFTP, data under these agreements can be made available to national security bodies such as the CIA, the FBI and the NSA. Overall, from the US side, it has been the executive that has taken the main seat at the negotiating table.[64]

The picture of the institutions involved on the EU side of the negotiating table is slightly more complicated as it depends on the applicable constitutional legal framework. Several versions of both the EU–US PNR and TFTP agreements were negotiated under the pre-Lisbon constitutional arrangements raising questions as to the appropriate legal basis for the processing. This was indeed the reason for the invalidation of the first EU–US PNR agreement by the Court. The pre-Lisbon constitutional arrangements meant also a limited role of the European Parliament in the negotiation of the agreements. Considering the negotiations overall pre- and post-Lisbon, the Commission and the Council have played a major role in these with the Parliament trying to ascertain its

[62]Koops (2010), pp. 973, 987.
[63]See also Schulhofer (2016), pp. 238, 255.
[64]Ibid.

position as a protector of fundamental rights in several instances, such as the challenge of the first EU–US PNR and the voting against the Interim EU–US TFTP agreement. Other EU pro-privacy institutions, such as Article 29 WP and the EDPS, have been very vocal during the negotiations issuing critical opinions of the fundamental rights protection achieved in the agreements.

Overall, from the EU side, the negotiations of all the four transatlantic data privacy agreements have been highly controversial and have created inter-institutional conflicts with many EU institutions resisting their adoption. The first EU–US PNR was annulled, the Interim TFTP failed, Safe Harbour was invalidated by the CJEU and Privacy Shield is expected to follow a similar fate. The Umbrella Agreement was adopted to address these controversies by establishing a framework of transatlantic data protection, but its substantive provisions suffer from major shortcomings that, combined with the current political climate in the US, do not provide many reasons for optimism.

The Lisbon Treaty has improved the institutional involvement of the European Parliament in the conclusion of international agreements. It remains to be seen how the EP will act regarding transatlantic data privacy agreements now that it is an institutionalised actor and no longer an 'outsider' to the negotiations.[65] The opinion that the EP requested from the CJEU on the EU–Canada draft PNR agreement[66] that can also provide valuable guidance for future negotiations of the EU–US PNR is certainly a positive step towards stronger involvement of the Parliament in the negotiations of such agreements in the future.

At the transatlantic level, the institutional cooperation established by the EU–US agreements is weak. The most common form of institutional cooperation found in all the four transatlantic data privacy agreements is joint review. The purpose of joint reviews is to ensure proper implementation of the agreements, build a relationship of trust between the parties and provide reassurances to interested stakeholders of the usefulness of the transatlantic data transfers.[67] Multiple joint reviews of the EU–US PNR and TFTP agreements have been conducted so far, but there is no evidence that these are paving the way towards stronger transatlantic institutionalisation. The composition of the EU and US teams taking part at the joint reviews is determined *ad hoc* based on pre-existing EU and US institutional structures. Their methodology involves a one- or two-day meeting between the EU and the US teams, a questionnaire sent to the relevant US authority accessing the data, an on-site visit of the operational centre and the review of different normally publicly available documents. The EU team members are required to sign confidentiality/non-disclosure agreements exposing them to criminal and/or civil sanctions for breaches, and

[65]Tzanou (2015), p. 98.

[66]Opinion 1/15 Request for an opinion submitted by the European Parliament, pending.

[67]Report from the Commission to the European Parliament and the Council, On the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, Brussels, 19.1.2017, COM(2017) 31 final.

certain information provided by the US authorities is classified as SECRET.[68] After the review has been concluded, the Commission publishes a report asserting the compliance of the US authorities with the agreements.

Privacy Shield adopts a stronger form of institutional cooperation by establishing the Ombudsperson as an institution with transatlantic functions. Similarly, under the EU–US TFTP, an already established EU institution, Europol is granted the powers of processing UST requests and placing its own requests for financial data. The Umbrella Agreement does not create stronger forms of transatlantic institutionalisation. It provides for joint reviews, consultations on disputes arising from its interpretation and application, but the main oversight mechanisms of the Agreement are maintained at national level in the EU and US respectively (Article 21), with the possibility of cooperation (Article 22).

3.2.2 Structure and Form

The transatlantic privacy coordination is characterised by a *multiplicity* of *fragmented*, *asymmetric* rules that lack legal clarity and legal certainty. There are *multiple* rules in the transatlantic data privacy sphere, with many of them having been negotiated and re-negotiated several times. Four PNR and three TFTP agreements have been adopted between the EU and the US, and Privacy Shield was negotiated to replace the invalidated Safe Harbour.

In terms of structure, these rules are *fragmented* and *inconsistent*. The three initial EU–US PNR agreements, the two initial TFTP agreements and the EU–US Privacy Shield are included in various, scattered legal texts, letters, attachments, representations and assurances exchanged between the EU and the US that hardly resemble a typical international law agreement. This lack of structural uniformity raises serious concerns as to the approachability, clarity and foreseeability of these instruments.

Many of the rules established in the transatlantic data privacy space display an *asymmetry* of data flows[69] or a certain form of *unilateralism*.[70] As already mentioned, all the agreements concern the transfer of data from Europe to the US. In addition to this, many of the EU–US data privacy arrangements are not in fact properly negotiated bilateral agreements but unilateral commitments communicated by the US to the EU. For instance, the substantive provisions of the three first EU–US PNR agreements included in the CBP Undertakings, the Baker letter and the DHS letter essentially described the US authorities' modalities of access and processing of PNR data with the EU side merely asserting its adequacy finding. The same pattern appears in the UST unilateral Representations under TFTP and the representations and assurances that the Commission received regarding the access of US authorities to data transferred under the Privacy Shield. This section of Privacy

[68] Ibid.

[69] Argomaniz (2009), pp. 119, 126–127.

[70] Tzanou (2015), p. 97.

Shield, which normalises and mainstreams public authorities' access to commercial data, is based on a mere detailed description of US surveillance law for national security and law enforcement purposes, which was at place when the CJEU delivered its judgment in *Schrems*.[71]

This asymmetry has not been missed by the EU side, which has insisted on the inclusion of a reciprocity clause in both the PNR and the TFTP agreements, according to which data should also travel towards the opposite direction of the Atlantic for similar counterterrorism purposes.[72] Indeed, the EU has now adopted its own PNR system[73] following the terrorist attacks in Paris on 7 January 2015 and 13 November 2015, in Copenhagen on 14–15 February 2015 and in Brussels on 22 March 2016. The possibility of the creation of the EU's own Terrorist Finance Tracking System (TFTS) has also been explored, but no EU legislative proposal has been put forward in this respect.[74]

3.3 The Substantive Provisions

A closer look at the substantive provisions of the four transatlantic agreements reveals numerous problems from the point of view of fundamental rights. Firstly, the data privacy provisions under all the EU–US agreements are significantly limited compared to the protection provided under the relevant basic EU data protection standards.[75] This is particularly problematic regarding the Umbrella Agreement, which is aimed to serve as a framework for the protection of data privacy in the transatlantic context. The substantive data protection rights recognised in this Agreement lack clarity or include substantive limitations, omissions or exceptions that result to a significant watering down of the relevant EU data protection principles.[76] Data subjects' rights are made conditional upon 'the applicable legal framework of the State in which relief is sought', namely US law, and to 'reasonable restrictions provided under domestic law' for broad purposes. Moreover, the Umbrella Agreement does not apply to the activities of intelligence agencies, and the Judicial Redress Act of 2015, which was a precondition for its application, does

[71]Tzanou (2017a), pp. 17–18.

[72]Tzanou (2015), p. 98.

[73]Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, [2016] OJ L119/132.

[74]Communication from the Commission to the European Parliament and the Council, A European terrorist finance tracking system: available options', Brussels, 13.7.2011, COM(2011) 429 final.

[75]Tzanou (2017b), p. 150.

[76]Ibid. See also Korff (2015); EDPS, Opinion 1/2016, Preliminary Opinion on the agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection and prosecution of criminal offences, 12 February 2016.

not extend equal redress rights to EU citizens as compared to US persons under the Privacy Act[77] despite the relevant assertions of the Commission.[78]

The three sector-specific transatlantic agreements also suffer from major shortcomings. A first problem concerns the fact that the necessity of the data transfers that they request has not been proven. There is no robust, empirical evidence of the effectiveness of the use of PNR, TFTP and Internet communications data to fight terrorism.[79] Secondly, the weak level of institutionalisation that these instruments have created is demonstrated by the fact that issues deemed important by the EP, Article 29 WP and the EDPS, such as the use of the push system for PNR rather than pull, data retention periods and the issue of data deletion, a judicial authority overseeing requests for financial data under the TFTP rather than Europol, which has its own vested interests in the information, have not been effectively resolved despite the multiple negotiations and renegotiations of many of these agreements. Thirdly, there are serious concerns regarding the oversight and enforcement of the agreements. The Commission conducts joint reviews annually, but often significant amounts of information are not provided by the US authorities on the basis that these are classified and confidential.[80] The newly created Privacy Shield Ombudsperson raised hopes of independent supervision of transatlantic data transfers at least regarding Internet communications data transferred under Privacy Shield. However, the current establishment of the Ombudsperson in Privacy Shield reminds more of an example of 'the fox designing the henhouse'. The Ombudsperson is part of the US executive power—an Under Secretary of State—and provides limited remedies and redress rights even though individuals must follow a particularly cumbersome procedure to access her.[81]

The serious fundamental rights' shortcomings of the substantive provisions of the transatlantic agreements raise doubts as to whether the governance created by these is legitimate and successful. This signals that institutionalisation in this field is already extremely weak and, therefore, unlikely to succeed. The potential solutions to this are briefly examined in the following section.

[77]Tzanou (2017b), pp. 147–148.

[78]Communication from the Commission to the European Parliament and the Council, 'Transatlantic Data Flows: Restoring Trust through Strong Safeguards', COM(2016) 117 final, 29.2.2016, 12–13.

[79]Tzanou (2017b), p. 169.

[80]See above.

[81]Tzanou (2017a), p. 19.

4 Taking Back Control? A Return to Sovereignty and De-institutionalisation as Potential Solutions?

Recent developments in the field of data privacy on both sides of the Atlantic have pointed towards a turn to sovereignty-de-institutionalisation-based solutions. In Europe, the scepticism towards transatlantic data privacy cooperation was evident in the CJEU's *Schrems* judgment. In this, the Court invalidated the Commission's Safe Harbour adequacy decision on the basis that the US legislation permitting generalised access to the content of electronic communications compromises the essence of the fundamental right to privacy established in Article 7 EUCFR.[82] The CJEU also found that legislation not providing for legal remedies to individuals to access and obtain rectification or erasure of their data affects the essence of the fundamental right to effective judicial protection enshrined in Article 47 EUCFR.[83]

The most important part of the judgment, however, for the purposes of the present analysis concerns the powers of NDPAs to investigate complaints concerning transfers of personal data to a third country. In this respect, the CJEU held that NDPAs must be able to examine, with complete independence, whether transfers of data to third countries comply with fundamental rights and the requirements of the Data Protection Directive. The Court distinguished two potential outcomes when NDPAs are asked to examine a complaint lodged by an individual regarding the transfer of his data to third countries: if the NDPA concludes that it is unfounded and therefore rejects it, the individual can challenge this decision before the national courts—as *Schrems* did—and the latter must stay the proceedings and make a reference to the Court for a preliminary ruling on validity. If the NDPA considers, however, that the individual's claim is well founded, it must engage in legal proceedings before the national courts in order for them to make a reference for a preliminary ruling on the validity of the measure.

This pronouncement is significant because besides the EU institutions that have been playing a role in transborder data transfers (Commission, Council, EP), new institutions, such as the NDPAs, are given by the CJEU an important role in the field. The power of NDPAs to investigate complaints of individuals regarding the adequacy of data protection provided in third countries, as confirmed in *Schrems*, introduces an additional safeguard to the application of fundamental rights outside the EU's borders. Until now, only the Commission was responsible for assessing adequacy; *Schrems* marked the emergence of NDPAs as the EU institutions entrusted with the important role of investigating individuals' complaints alleging a third country's non-compliance with EU fundamental rights, despite a Commission's adequacy decision on the matter. This means that NDPAs, alongside their current powers to oversee the application of data protection laws in the territories of their respective Member States, also have the power to review the extraterritorial application of the fundamental rights to privacy and data protection when personal data are transferred from their home country to a third

[82] *Schrems* (Case C-362/13 Maximillian Schrems v Data Protection Commissioner, 6 October 2015, unreported), para 94.

[83] Ibid, para 95.

country. The CJEU remains of course the ultimate adjudicator of the adequacy of the protection of fundamental rights outside the EU.

Schrems did not only confirm new, extended powers for NDPAs. It also introduced new players that can act as watchdogs for the protection of data privacy rights beyond the EU borders: individuals, grass-roots privacy organisations and the civil society can now challenge before their respective NDPAs the adequacy of data transfers to the US, thus pushing for more robust data protection safeguards.[84]

In the US, as already pointed out in this book,[85] the current US administration might be signalling the beginning of a new era of de-institutionalisation characterised by hostility and scepticism towards transatlantic—and international—engagement. Data privacy in the US has already been targeted by the new administration through the adoption of legislation that allows Internet service providers to sell the browsing habits of their customers.[86] At the level of transatlantic privacy relations, the picture is not very clear so far, although the signing of the Enhancing Public Safety executive order[87] by President Trump has stirred concern.[88] Section 14 of this order provides:

> Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies *exclude* persons who *are not United States citizens* or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.[89]

This formulation raises concerns about the fate of the EU–US Privacy Shield, the Umbrella Agreement and the Judicial Redress Act.

While both approaches demonstrate distrust towards transatlantic solutions, their potential consequences are fundamentally different: *Schrems* introduces additional safeguards at the EU level for the transatlantic protection of fundamental rights; President Trump's executive order pushes for stronger securitisation by denying the—in any case limited—privacy protections provided to non-US citizens. With the obvious caveat that the political situation in the US—and in the EU—is fluid and might change, it is argued that two opposing tendencies expressing scepticism to weak transatlantic institutionalisation seem to emerge: the one is reinforcing domestic safeguards and standards while accepting that transnational data flows are an unavoidable reality in the current interconnected, digital world; the second is negating a collaborative approach by withholding protection for EU persons, thus risking an EU-US privacy collusion.

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[84]Tzanou (2017a), p. 10.

[85]Fahey (2017).

[86]S.J.Res.34—A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Federal Communications Commission relating to 'Protecting the Privacy of Customers of Broadband and Other Telecommunications Services', 15th Congress (2017–2018), Public Law No: 115-22.

[87]Executive Order: Enhancing Public Safety in the Interior of the United States, January 25, 2017 <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> accessed 26 May 2017.

[88]Nielsen (2017).

[89]Emphasis added.

To avert such a collusion while at the same time address the shortcomings of weak transatlantic institutionalisation, there are two possible solutions: either work towards stronger cooperation and institutionalisation in the transatlantic sphere—which appears very difficult in the current political climate—or search solutions at the domestic level through the involvement of the judiciary and the strengthening of the powers of privacy actors and institutions while allowing for the free movement of data.

5 Concluding Remarks: The Lessons Learned from the Transatlantic Data Privacy Experience

This chapter explored the institutionalisation dynamics developed by three sector-specific—PNR, TFTP, Privacy Shield—and one general—the Umbrella Agreement—EU–US data privacy agreements. It concludes that despite the intense EU–US cooperation in the field, transatlantic data privacy institutionalisation is nevertheless extremely weak for three reasons: the agreements have allowed limited institutional involvement of legislative bodies, such as the European Parliament and other pro-privacy institutions; they have established a complex set of fragmented, scattered in various texts and attachment rules that lack legal certainty, and more importantly in their substance they guarantee a weak, watered-down fundamental rights' protection.

What does this teach us regarding institutionalisation? It shows that strong institutionalisation that creates a space of legitimacy and legitimatisation, based on the involvement of democratic institutions and the establishment of robust rules, does indeed matter for the transatlantic protection of fundamental rights.

Paradoxically, potential solutions for the current inadequate transatlantic data privacy framework could be searched at the domestic level through the emergence of new actors, such as private individuals and independent authorities that can act as watchdogs for the protection of data privacy rights beyond the EU borders, as the *Schrems* case demonstrated. In this respect, this chapter rejects de-institutionalisation approaches that reflect a disengagement from international obligations as they further limit the protection of fundamental rights and risk creating serious privacy collusions between the EU and the US.

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The Max Schrems Litigation: A Personal Account

Mohini Mann

1 Overview

Maximillian (Max) Schrems, an Austrian law student, has been labelled 'a data privacy Robin Hood' after he took decisive legal action following the Snowden revelations on mass surveillance of citizens. Concerned with his data being transferred by Facebook Ireland to Facebook Inc. in the United States and falling subject to indiscriminate activities, *Schrems* complained to the Irish Data Protection Authorities to suspend the data transfers. This was eventually escalated to the European Court of Justice on preliminary referencing procedure, where an assessment was made on the validity of the European Commission's adequacy decision on data transfers to third countries under EU data protection law. The landmark ruling by the European Court of Justice sunk the 15-year-old-data-transfer pact, the 'Safe Harbour' regime, which claimed that companies satisfied an 'adequate level of protection' to European Union standards of data protection. The outcome cost over 4000 transatlantic businesses their privileged status conferred by the self-certification system.

This chapter is a transcribed account of *Schrems'* experience from a lecture he delivered at City University of London in the Globallaw@City research dialogue series in 2016 in the midst of his ongoing litigation in Austria, Ireland and before the European Court of Justice on his personal litigation and its broader context. The talk is a closely transcribed version of his lecture with minor editing for sense, style and tone. The chapter outlines the evolution of Privacy Shield from the complaint lodged against Facebook and focusses on the enforcement of data protection and privacy laws in Europe.

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2 Privacy as a Highly Cultural Issue

To begin, *Schrems* introduced privacy as a highly cultural concept that is capable of producing mixed attitudes. Evidently, the US approach to privacy differs from the European model. The US legal system refers to 'a reasonable expectation of privacy', which is not a definition adopted by the European courts. Depending on the form of privacy, the concept is perceived differently and always involves a greyscale debate. Therefore, privacy cannot be judged through a binary of right and wrong and similarly cannot be based on logic alone. For example, in cultural terms, privacy of sexuality can be deemed as meriting privacy. However, this justification is not based on any definitive logic and, unlike privacy in the voting process, does not uphold democratic values of society.

An increase in global networks has involved an amalgamation of several ideals and cultures of data privacy, which has resulted in clashes in the law. The fact that most of the major data players are typically from the United States has meant that this field has been generally dominated by the US. *Schrems* explained that the US also generally produces more data privacy concerns compared with Europe. This juxtaposes the fact that European fundamental rights of data protection resemble human rights, creating a troublesome setting where ideals over data privacy are likely to become explosive conflicts.

3 Personal Story

Schrems' first-hand experience studying in the social media and tech hub Silicon Valley drew his focus onto the issue of European privacy law enforcement. Whilst engaged as an exchange student at Santa Clara University School of Law, he had the opportunity to hear from a Facebook official. A botched description of European privacy law left him bemused and emboldened him to challenge the company in court rather than opting for the usual route for law students—submission of a paper on the topic.

His first step was requesting data from Facebook, using access requests sent by him and a few friends to the corporate offices of Facebook located in Dublin. He received a PDF file of 1222 pages of data that the social media company had catalogued on him over the 3 years of posting once-a-week as a user. The sheer volume of his file and its content amazed him, which included precise global positioning system coordinates from pictures uploaded on his smartphone. Most surprising of all was that the large quantity of information that he had deleted was contained in the Facebook files; although flagged as deleted, the information was not removed from the server. With a few emails of news releases sent to journalists on his discovery, he became a minor celebrity when information of data being stored on users by Facebook incited a media wave across Europe.

Schrems started research by investigating the surveillance system Prism, which listed Facebook as a participant in the programme, after whistle blower *Edward Snowden* exposed the involvement of Prism in mass surveillance operations on US citizens. Following the revelations made by Snowden, it opened the possibility of a factual basis to believe that such activity had taken place with the support of companies like Facebook, Google, Yahoo and Microsoft, who are also participants of Prism. Although there was huge political outrage across Europe, particularly in Germany, and assurances were made by Article 29 Working Party and the European Commission to investigate and put a stop to such practice, *Schrems* questioned whether anything would change. After being interviewed by a journalist on the legality of data transfers from Facebook Ireland to the US from a European legal perspective, *Schrems* became intent on following this line of questioning to determine the possibilities of data privacy under European law.

4 The Genesis of His Legal Arguments

As an Austrian citizen, *Schrems* discovered that he had a private contract with Facebook, which is headquartered in Ireland for tax avoidance purposes, so it is only required to pay around 2% tax. Since this activity falls within the European Union, he realised that there was no necessity to deal directly with the US in this regard. However, part of his data was handled by US servers, whilst the rest was handled by other servers located in Sweden. Looking at the user basis, *Schrems* learnt that Facebook is 82% an Irish company and only 18% is a US company, so Facebook Inc., the mother company, is considered Irish. As such, it controls all the data processing taking place outside the US and Canada, meaning that any individual residing in China, South America or Africa, for example, will have a contract with the Irish company, thereby falling subject to European data protection law. Under European law, when data are transferred to a third country, it must do so where there is 'adequate protection'. Moreover, the role of Prism in assisting the conduct of mass surveillance is not regarded by European standards as 'adequate protection' and, thus, forms the basis of *Schrems'* argument.

5 A Strategic Approach to the Litigation

Explaining the strategic motivation, *Schrems* elucidated that in the US, there is a public and private surveillance partnership in existence between the National Security Agency (NSA) and electronic communication service providers (ECSPs) such as Facebook. Using the government alone to collect information from citizens to conduct mass surveillance would prove expensive and inefficient. As such, there has been a reliance created on such providers, to collect data. This 'partnership' has thus enabled governments to use 'backdoor' measures to 'tap in to their servers'.

Schrems relied on the legal make-up of Facebook, which is subject to the dual systems of US law and European law due to EU regulation on data transfers to third countries. He anticipated that the possibility of his data being subject to mass surveillance or indiscriminate activities in the US via Facebook would lead the European Court to rule that there was violation of European law. Fortunately, European Union law must be interpreted in the light of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, meaning fundamental rights debates are engaged even in a private contract. *Schrems* observed that this allowed him to establish a case that addressed issues on mass surveillance activity in the US, in a European Court setting.

6 What Legal Sources to Deploy

Schrems affirmed that he mainly relied upon Article 7, the right to respect for private and family life, and Article 8, the right to personal data protection, of the Charter of Fundamental Rights of the European Union. He emphasised the comparison of Prism to the invalidated Data Retention Directive decision made in the Digital Rights Ireland case. He asserted that the Prism programme of surveillance was worse than the invalidated Data Retention Directive in Digital Rights Ireland, cogitating that the declaration that it was illegal surely meant that the Prism programme should be considered in the same regard.

Schrems clarified that Data Retention operated using metadata, which involves information such as who called, which person was contacted and at what time. Prism, on the other hand, used content data, which *Schrems* constituted as far more invasive since it involves the detailed content of the messages and data shared. Similarly, under Data Retention, data would be firstly collected, then stored and regulated in a third country raising issues of protection upon the transfer. However, under Prism, the entire data was required to be made available immediately, without the requirement of storage or transfer. Finally, the timeline under Data Retention meant that data were limited to being retained for a maximum time of 24 months; however, under Prism, no such restriction was taking place, meaning there was an unlimited time span for which data were being stored. By highlighting the differences in practice between the Prism programme and the illegal Data Retention Directive, *Schrems* showed that if one was in violation of fundamental rights, then the other should result in a similar conclusion.

7 On Data Pulling as Interference

The issue of ‘data pulling’, where data were being accessed in a ‘backdoor’ manner from servers, was raised but heavily contested by the US. They conceded that under US law, if data were not being pulled from the servers, then the fundamental rights

protection could not be made available. Under European data protection law, the definition of processing data is 'to make data available', which is the same definition used in the Charter of Fundamental Rights. *Schrems* laid focus on this notion of *access* to data, rather than delving into the issues of surveillance, although this argument did not play out in court as he had predicted. He proceeded to argue that he had no knowledge whether his data were ever pulled, nor did it result in any negative consequences; instead, he maintained that under US law, they would at the minimum be required to make his data available to him. Since the scope of protection under European Union law is broader, *Schrems* could steer clear from issues of surveillance; instead, he kept the matter in the abstract and demonstrated that the threshold to prove was simply that his data should have been made available.

8 The Safe Harbour Agreement

Schrems decided to target the Safe Harbour system, which was not an international agreement but a European Executive Decision made by the European Commission. In Decision 2000/520/EC, the Commission had concluded that the Safe Harbour principles used by companies conferred adequate data protection under European standards. He clarified that this self-certification regime was a factual system decided upon by the US and European governments setting out their data privacy practices and coordinating on it in a specified way.

The Safe Harbour regime recognised that Europe has a 'bubble' of data protection laws, which enables countries, such as Switzerland, that have the same standards of protection to allow free flow of data transfers between them. Thus, the issue arises where data are transferred to countries that do not have similar laws offering such protection since it would render European protection useless, for example if upon transfer to India the data could be uploaded to the Internet and lost entirely. In this manner, there is a form of export control of data under European Union law by relying upon Articles 25 and 26 of Directive 95/46/EC, which states the conditions for which data can be transferred outside of the European Union.

A combination of different laws was used, operating at varying levels of protection. *Schrems* started with the constitutional instruments of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, which operates as a human rights tool. He combined it with European legal provisions Articles 25 and 26 of Directive 95/46/EC, which regulates transfers of data to a third country, and with Article 3 of the Executive Decision Safe Harbour. He pointed to the US provisions of paragraph 4 Safe Harbour principles and FISA (the Foreign Intelligence and Surveillance Act), which together formed the Safe Harbour regime, highlighting that the system partially relied upon US law. In this way, companies in the US that were assigned to Safe Harbour could interpret it under US law, a point that was accepted perfunctorily by the European Court of Justice.

Under Safe Harbour, *Schrems* explained that the system required interpretation of provisions under US law, which was accepted by the European Commission in its

adequacy decision. This left open the possibility of fragmentation and errors since any conflict between European law and US law resulted in the automatic triumph of US law. The existence of such provisions in Safe Harbour, known as the Safe Harbour principles, meant, for instance, that a company in southern Texas requesting access to data under Safe Harbour system based on FISA would override the provisions of protection conferred by European law. In building a 'witches circle' system of laws, *Schrems* demonstrated to the European Court that at some point, the circle would reach a break point where a clash between the European law and US law would take place. *Schrems* laid onus to the point that FISA would conflict with European fundamental rights and affirmed that the role assigned to the European Court was to expose the *exact* breaking point.

9 Procedure

Schrems' critique of the Irish data protection office was unrelenting as he argued that Ireland had no interest in doing its job because it was preoccupied with concerns over investment and considered it a positive business situation not to enforce data protection law. Along with Luxembourg, the Irish Data Protection Commission formally oversees European data protection for the majority of multinationals such as Google, Facebook and Instagram, which headquarter their operations in tax-beneficial jurisdictions. This reticence goaded *Schrems*, who was dumbfounded to discover no lawyers or technicians amongst the 20 employees at the office located an hour away from Dublin, who are tasked with the job of regulating these companies.

Fortunately for *Schrems*, the arduous task of proving the facts that mass surveillance was taking place using data collected through US companies was entirely avoided. This was largely in thanks to the Irish Data Protection Commissioner, who went on national radio and conceded that this practice was taking place when he admitted that the US intelligence service had access from US companies. Instead, *Schrems* was informed over an exchange of 22 emails with the Irish data protection office that his complaint against Facebook would not be investigated due to his claim being considered 'vexatious and frivolous'. The Commission denied that it was under a duty to investigate the complaint where they pronounced that section 10(1)(b), which states, 'we may investigate any company', overrides section 10(1)(a), which states, 'we shall investigate any complaint'. In this idiosyncratic manner, it concluded that *Schrems'* complaint would not be investigated and probably expected that to be the end of the matter, unlikely expecting *Schrems* to take the matter to court.

Ireland was not atypical in its response as Luxembourg also responded that no investigation would take place, claiming that insufficient evidence existed to support participation by Microsoft or Skype in mass surveillance. The Luxembourg authorities maintained that its territory was too small and affirmed that they were restricted to the territory of Luxembourg, so any mass surveillance taking place in the US

could not be investigated. The German response concluded that an investigation into Yahoo was ongoing, so *Schrems* decided to pursue the suit against Ireland, where the facts were undisputed, but the authorities had failed to audit the social media giant. *Schrems* raised the issue to the Irish High Court by filing a judicial review, which can cost up to 100,000 euro if you lose it—no small sum for a law student scraping by on a government stipend. *Schrems* creatively overcame the financial restrictions by generating funding through crowdsourcing, which received donations of 70,000 euro for the case. Ireland proved a successful route for *Schrems* for two reasons: firstly, he was awarded the first-ever successful application of a protective cost order, thereby limiting his personal liability to 10,000 euro; secondly, and most importantly, the Irish judge approved the facts and referred the case to the European Court of Justice.

10 The European Court of Justice

Schrems said that the case took place in the Grand Chamber and consisted of 15 judges, a number usually reserved for high-profile cases, emphasising the valour of *Schrems'* decision to pursue the highly politicised matter. He described the proceedings as mainly concerning criticisms of the European Commission, with *Schrems* being asked only one direct question as a plaintiff. In the politically charged lawsuit, *Schrems* remarked that the impression provided by representatives from the Commission was a half-hearted defence of Safe Harbour. He stated that even the rapporteur of the case, the German judge, fired arsenals of criticisms and attacked the European Commission over its failings.

There were representatives from a multitude of Member States who participated in the proceedings, though some of the large Member States such as the UK and Germany opted out from attendance. *Schrems* contended that despite the political outrage that took place, particularly in Germany, when asked about its decision to withstand from appearing at the proceedings, it responded by listing concerns for its transatlantic relationship. The US position adopted a different approach. *Schrems* explained that in the days leading up to the hearing, he received calls where he was asked to change his position in the European Court of Justice, a point that the US acknowledged when questioned by the Court. He mocked that a US representative in court conceded that he had been informed of the hearing just days prior, even though the information had been published 3 weeks earlier on the Commission website.

11 Findings by the European Court of Justice

Schrems asserted that the idea of losing in the European Court of Justice was not a predominant one once he had received the written list of questions from the Court. The questions that pointed directly to issues of mass surveillance, Safe Harbour and

its validity, clarified that a loss was not on the cards for *Schrems*, even though the US pursued the route of denial until the moment the judgment was delivered. The Court began its analysis on the Safe Harbour decision, finding that it was invalid. In a surprising motion, the end of Safe Harbour took place overnight, leaving a legal void unforeseeable to *Schrems*, who argued in favour of an implementation period. By declaring its invalidity, in theory, from that moment it should have terminated all data transfers to the US, but as *Schrems* pragmatically stated—that would have been practically impossible.

The Court pointed out that mass surveillance ran contrary to the 'essence' of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. The Court also observed that the unavailability of legal redress in the US found in Safe Harbour was in strict violation of the 'essence' of Article 47 of the Charter. The proportionality test used by the European Court, which determines if an interference has occurred with a fundamental right, operates with 'no interference' on the lower end of the scale and moves towards disproportionality as measured on balance to violation of the 'essence' of a right at the furthest point of the scale.

Under the proportionality test, the points on the scale measure as such: (1) there must be a legitimate aim for the measure, (2) the measure must be suitable to achieve the aim, (3) the measure must be necessary to achieve the aim (less onerous way), (4) the measure must be reasonable when considering the competing interests of the different groups at hand. The Court held that whilst Data Retention was found to be disproportionate, in the present case the fact that no limitation existed meant it could not be argued to be reasonable or not. In other words, this was a straightforward violation of the 'essence' of *Schrems'* fundamental rights.

The Court observed that the term 'adequate protection' found in Safe Harbour meant 'essentially equivalent' to EU standards of data protection. *Schrems* explained that he determined that the source of the termed provision 'essentially equivalent' not contained in Safe Harbour was lobbied out by the US and replaced with 'adequate protection'. He explained that this is clearly a vague and difficult concept to comprehend or assess. The Court highlighted the term 'essentially equivalent' as concluding that there must be 'effective detention and supervision mechanisms in that third country'. In this way, *Schrems* explained that the European Court asserted a higher standard of privacy than that agreed between Member States. This notion struck deep with the US in relation to the jurisdictional issue, that European law could apply to a third country, where the European Union could not when dealing with national security issues internally with Member States. As *Schrems* remarked, the quirky observation is an interesting outcome produced by this case, that the European Union has more input in US data privacy than Member States within the Union through the Safe Harbour regime.

Finally, the Court held that the existence of a Commission decision finding that a country ensures adequate protection of personal data did not reduce or eliminate the powers available to national supervisory authorities. In its ruling, it emphasised the independence of national data protection authorities across the EU bloc and their legitimacy in investigating and enforcing European Union data protection laws.

12 How to Bridge the Gap After the European Court of Justice Invalidated Safe Harbour

The first consequence of the ruling was that the 'privileged' status that US companies occupied under Safe Harbour was lost, meaning that effectively the US was considered like any other third country to whom EU outsources data. Whilst this did not effectively prevent data transfers to the US, the consequence of the invalidating of the self-certification system Safe Harbour meant that the data transfers would fall under the derogations found in Article 25 of Directive 95/46/EC. The options for data transfers where the EU 'essentially equivalent' protection is not guaranteed leaves US companies the options of Standard Contractual Clauses (SCCs), Binding Corporate Rules (BCRs) and establishing consent.

The American solution adopted by companies has been to establish that they have consent. Although their response has been to simply insert a consent box for users, *Schrems* argued that some of the American clauses that state, for example, 'your data is subject to US law; your data is subject to all applicable laws; your data may be processed outside the EEA including the United States' still may not meet European standards. Under European law, consent must be freely given, informed, unambiguous, specific, which *Schrems* contended that by encouraging users to simply check a box, consent under the US provisions still falls short. Further exasperating the problem, *Schrems* argued that the availability of 'gag orders' under US law, which contradicts the European policy that consent must be informed, results in consent being difficult to ascertain.

These companies now use other mechanisms of Standard Contractual Clauses and Binding Corporate Rules that enable legal data transfers. *Schrems* outlined these devices as contractual clauses that exist between European companies and foreign companies in agreement that EU data protection principles are being followed. *Schrems* pointed out that under clause 5(b) of the Annex to Decision 2010/87/EU, it is stated that if a conflict exists with the national law of that foreign country, then the country must inform the European Union. This trigger provides the option to then cancel the contract with the foreign company.

Under Article 4(1)(a) of Decision 2001/497/EC, national data protection authorities are authorised to suspend data transfers to a third country where there is a conflict in laws over data protection. When *Schrems'* case was remitted to the Irish High Court, the Irish Data Protection Commission was ordered to investigate *Schrems'* complaint about Facebook. After he waited 7 months for the investigation to commence, *Schrems* received a response from the Commission, which stated that no investigation would take place on the consideration that *Schrems'* assertion that no legal redress was available under the US system was untrue. *Schrems* objected and argued that Article 4(1)(a) was triggered, which meant that the authorities should act to suspend his data from being transferred to Facebook in the US. The matter was remitted to court, where this time *Schrems* was sued, alongside Facebook, by the Irish Data Protection Commission under the Standard Contract Clauses system, stating that *Schrems* had alleged that they were invalid, something *Schrems* denied

ever claiming. Extraordinarily, the Irish data protection authorities did not refer or acknowledge Article 4(1) in any of the submissions.

There are other options available to companies that fall under the exceptions in Article 26(1):

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or
(c) the transfer is necessary for the conclusion of performance of a contract concluded in the interest of the data subject between the controller and a third party; or
(d) the transfer is necessary or legally required on important public interest grounds or for the establishment and exercise of defence of legal claims; or
(e) the transfer is necessary in order to protect the vital interests of the data subject.

13 Privacy Shield

Schrems outlined the difficulty with outsourcing, which remains an issue since it is vastly easier, faster and cheaper to store data in the US than Europe and elsewhere. Hence, the European Union created Privacy Shield, which *Schrems* argued overly resembles Safe Harbour in its textual make-up with a few superficial changes added to it, and labelled it 'Safe Harbour 1.1', in its unworthiness to warrant it 'Safe Harbour 2.0'. *Schrems* referred to the confusing introduction of this system, which is also a self-certification system, and pointed out that even those involved in the negotiations were clueless as to the name of the regime until the press conference. The deadline was set by the European Data Protection Commissioner, yet until the night before no agreement had been reached. A New York Times article had reported that the Europeans had walked away from the negotiations altogether. He explained that the data privacy community was left shocked on the following Monday, when it was announced that the European Justice Commissioner had gone to the European Parliament, stating that a deal had in fact been concluded.

In what *Schrems* determined to be the result of a large amount of political pressure in the background, Europe proclaimed the Privacy Shield agreement without any prior publication of the legal texts. *Schrems* expanded that where a Freedom of Information request was made by an NGO, the response it received was a denied request stating that the record being sought did not exist. It was not until a month later that the legal text of Privacy Shield was released, which exposed that aside from a selection of changes, as requested by the US, the document consisted of few innovations to the Safe Harbour system. *Schrems* pointed out that the problem remains a twofold concern; where little privacy protection exists for individuals and from a business perspective even though companies are encouraged to rely on the regime, such provisions are unlikely to hold up in court. As *Schrems* observed, this produces issues of legal uncertainty.

In response to the ruling of the European Court of Justice on meeting the first requirement of 'essentially equivalent protection', the US produced a 150-page document exclusively focussed on this issue. It attempted to find means of meeting this requirement with the second hurdle to overcome, as set out by the Court, to be in line with the Charter of Fundamental Rights of the European Union. The main argument asserted by the US, according to *Schrems*, is that it had the equivalent level of protection to the weakest standard of protection amongst the Member States, which is the UK.

The approach taken by the private sector was the proposal of the system of 'notice and choice', which *Schrems* pointed out resembles what Europeans determine to be consent. Notice and choice applies to European Union law relating to processing operations: in other words, anything to do with data from the moment they first touch a sensor, hence from data collection to organisation to storage to erasure. This system consists of an opt-out, where a box is inserted on the web page and is unselected as a means of providing a choice to the user. However, *Schrems* asserted that this is still miles away from the 'equivalent protection' set out by the European Court of Justice. Privacy Shield only provides an opt-out for types of data that are 'disclosure by transmission' and 'changes of purposes', where data are collected for billing purposes, for instance, but is then used for advertising, or for any data transferred to another party. As *Schrems* pointed out, if one system covers all data processing operations (notice and choice) yet the Privacy Shield system only covers the two types of data processing operations, then how can this be reconciled with the standard of protection declared by the European Court of Justice?

14 Private Sector Redress

Schrems pointed out the central issue of private sector redress addressed by the European Court of Justice. He set out the process of escalating a complaint against Facebook following the decision, which initially means waiting 45 days after first registering the complaint, to which the most likely response, *Schrems* asserted, is the complaint being dismissed. After 45 days, the user is presented the option to pursue the matter in private arbitration using a service that is selected and paid for by the company; in the present instance, 'Trust-e' is the company whose board consists of shareholders the same as or similar to Facebook. This is the independent body that a user can contact to escalate the complaint, which has the discretion to direct Facebook to act or not, since its decisions are not directly enforceable.

The alternative avenue to pursue if the user is not satisfied with the outcome is by contacting the National Data Protection Authority, who *may* refer the matter to the Department of Commerce or the Federal Trade Commission. The only course of action authorised by these authorities is to either remove Facebook from Privacy Shield or issue a fine, since the decision to mandate Facebook to act on the complaint, again, is not directly enforceable.

None of these bodies have any investigatory powers, for example, to raid the company's server and determine its activities. *Schrems* explained that the likely outcome is a back-and-forth exchange of claims that cannot be substantiated due to a lack of evidence. The final stage in the process is the option to present the complaint before the Privacy Shield panel, which typically consists of 15 lawyers, who must be licensed in the US, meaning a high likelihood of a full panel who are all US lawyers.

As a European, participation takes place by video conference over Skype, the case can be presented to the panel without the presence of a lawyer since the user would have to bear the legal cost. Any recommendation made from a decision by the panel, once again, is not legally enforceable, which leaves the sole option of pursuing the matter in US arbitration, which would only result in enforcement if the US courts made the decision to do so. *Schrems* explained that this is the legal redress system under Privacy Shield, which he contended cannot be what the European Court of Justice referred to in their judgment passage on an effective supervision and detective mechanism.

European companies have argued that this is unfair competition. Whilst they have to jump over additional financial, legal and democratic hurdles, US companies merely have to follow the Privacy Shield.

15 Surveillance Assessment

Schrems explained that the European Court's decision prompted responses by US authorities, who sent out a press release aimed to provide assurances that no indiscriminate or mass surveillance was being conducted by national security authorities. However, Annex 6 page 4 of Privacy Shield, which made mention of Presidential Policy Directive 28 of the US, stipulated certain limits to the activities authorised by US authorities regarding surveillance. It stated that the provisions do not give effect to third party rights, effectively meaning that the US cannot be sued under the instrument, even if it is the result of a violation. *Schrems* pointed out that in the Annex, the provisions determined that intelligence may be collected for six broad purposes, which allowed for the collection and storage of data from any individual by demonstrating that there was 'transnational criminal threat'. *Schrems* furthered that the individual who is being targeted is not required to be part of the threat, so long as the general data collection serves this purpose. As *Schrems* observed, where the situation does not require criminal activity as such, the notion that only the 'threat' is needed results in a very wide scope.

Schrems revealed that on closer inspection of Presidential Policy Directive 28, page 3, there was a footnote under the word 'bulk', which states that the limitation does not apply if the data are 'temporarily acquired to facilitate targeted collection'. *Schrems* explained that if the company first collects all the bulk data and *then* targets the individual from that data, then it is not considered bulk collection, which he suggested cannot constitute protection. He explained that definition of 'targeted' under the instrument involves having to search for the individual person in

the bulk data which would be considered 'targeted surveillance'. He likened the example to conducting a search on Google, which would present a narrow part of the Internet in the results of what is typed in the search box. *Schrems* reiterated that this definition of 'targeted surveillance' is not the one adopted by Europe, which he reminded was necessary to refer to paragraph 94 of his case in the European Court of Justice, which stated that 'legislation permitting [. . .] access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter'.

Schrems summarised the follow-up of mass surveillance and redress under US law in Privacy Shield, for which the lack of a court resulted in the installation of the Privacy Shield Ombudsperson. The Ombudsperson is the Undersecretary in the Foreign Department of the United States and as such is an executive person and not a tribunal, which *Schrems* remarked would have been preferable. The US contended that being a member of the Foreign Department, she is an independent body to the surveillance apparatus. *Schrems* explained, however, that in order to reach the Ombudsperson, the user would have to make a complaint to the National Data Protection Authority, who would forward the complaint to the Privacy Shield Ombudsperson.

The Ombudsperson would coordinate with the other services within the United States, the information of which is kept confidential, which would result in a decision taking anywhere between several months to a few years. The response is one of a pre-selected choice of answers, which is used irrespective of the case specifics: under Annex 3 paragraph 4(e), they will neither confirm nor deny whether the individual has been the target of surveillance, nor will they confirm a specific remedy. *Schrems* explained that the response states either (1) that the complaint has been investigated or (2) that the company had complied with all the rules or did not comply, in which case the situation was remedied. As *Schrems* highlighted, the individual cannot discover whether any surveillance was conducted since the admission of such would create legal standing under the US legal system. He emphasised that this complex opaque process cannot be considered to constitute the Article 47 right to legal redress under the Charter of Fundamental Rights of the European Union.

16 Enforcement

Schrems raised the imperative question of how fundamental rights in Europe can be enforced in a meaningful way. He argued that one answer could be found by looking to national data protection authorities like the Irish Data Protection Commission in Ireland, to which he affirmed that after looking at the annual reports on the receipt of complaints, only 2–4% of complaints were investigated and led to a decision. He observed that judging by those statistics, fundamental rights of European citizens would never be enforced. It was explained that data protection authorities are

showing a trend towards an advisory role to companies like Facebook to help them understand the law. However, he contended that this is a meritless venture when these companies are multimillion euro companies that possess lawyers capable of instructing them how to follow the law. *Schrems* pointed out that some States such as Belgium, France and Germany, however, are demonstrating movement towards functioning as an enforcement body rather than just educating such companies. This may be due to the culture of fear that surrounds data privacy, which *Schrems* argued this trend can help overcome. Looking to the future, *Schrems* referred to the new General Data Protection Regulation, under which there are proposed fines for companies of up to 4% of their worldwide turnover or 25 million euro. So for companies like Google, which is clearly a lot of money when compared with the current preventative maximum of 25,000 euro, it means, as *Schrems* argued, less of a deterrent if companies could pay the fine over for a lower cost than hiring a data protection lawyer.

17 Class Action

Schrems is continuing the fight in Austria, where he explained that he is running a class-action appeal against Facebook's internal privacy policies. Under Facebook's policy, *Schrems* explained, the company chose California law as the legal system in its provisions, which made the chances of sourcing a lawyer well versed in Californian law using Austrian procedural law in Austrian courts slim, to say the least. Fortunately, his time spent studying in California meant this would be a formidable choice. He used the basis of Facebook being headquartered in Ireland as a means of his European Union data protection right being triggered and cleverly opted for a hybrid of European Union law and Privacy Shield by combining data protection law and European Union consumer law. Utilising his status as an Austrian citizen, *Schrems* relied on his European Union consumer right leading to the application of European Union law. As most European law students, scholars and professionals would note, an individual is unlikely to have much luck in being awarded damages under the restrictive approach to torts under European Union law. However, under Californian law, the Austrian law student explained that the approach is likely to produce generous results for punitive damages. He used a combination of European and US laws by relying on the system selected by Facebook.

Data protection law follows jurisdiction, so since Facebook is headquartered in Ireland, it falls subject to EU law. *Schrems* explained that he utilised the hybrid route of EU law with Privacy Shield by using data protection and EU consumer laws, which he could rely on as an Austrian citizen. Under EU law of torts, it is generally accepted that EU takes a restrictive approach; however, under California law, it is considerably more generous for punitive damages. Therefore, he used a combination of EU and US by relying upon California law, which was only available due to the structure that Facebook used, *Schrems* explained, pointing out the irony.

In Austria, *Schrems*' encounter with the first judge resulted in findings of numerous reasons not to pursue the matter further, citing that jurisdictional questions first needed to be addressed. *Schrems* explained that under the Brussels Regulation, jurisdiction would be under Ireland since Facebook is headquartered there. However, under consumer law, it would be Vienna, which is what *Schrems* argued, that he was a consumer who used Facebook for private purposes. Under the Austrian class action, he was suing for torts and unjust enrichment, which is an old Roman law claim. *Schrems* gathered 25,000 participants and went to a procedure financing company, whereby the company pays for all the legal costs but recovers the money on a win, reclaiming 25% of the awarded amount. The law student explained that the procedure resembles an insurance policy on the case and made it possible for him to bring the class action ensuring that everyone involved would be paid. He expanded that an Austrian class action operates through individuals assigning their claim to an individual, in the present case *Schrems*. Through assignment of an individual's rights, the party remains a two-party procedure where *Schrems* pursues Facebook on behalf of another individual. However, the issue presented to *Schrems*, he explained, was that it has been contested by Facebook that under the Brussels Regulation, any rights assigned would lead to loss of the right as a consumer. This argument, he explained, is one in a line of tactical pursuits by Facebook, including the assertion that *Schrems* was not a consumer since he has received remuneration by speaking to the media.

In what can only be described as innovative and provocative, *Schrems* built an online application for smartphones using an individual's Facebook login details to join the class action with *Schrems*. He explained that one in three have pursued the matter, with 1000 users having signed up on the first day alone and 25,000 on the first week. *Schrems* admitted that he was forced to shut down the whole thing because of the sheer volume with a waiting list of 100,000 people or so. However, being a creature of the Internet age, his vision of a fundraising campaign went viral, and he has taken the world's most effective user revolt against Facebook to the next level—in a court of law.

Schrems finalised the discussion with views on another privacy enforcement option aside from his endeavour to bring the first class action to the European Court of Justice, which would be a collective redress instrument. He looked to the General Data Protection Regulation, due to be enforced in May 2018, and asserted expectantly to the possibility that NGOs will be able to represent other people in court. As an avid data privacy rights activist, *Schrems* ended the discussion of data privacy on a hopeful optimistic tone with an eye to the future, in which he hoped would hold further possibilities for the enforcement of European data privacy rights.

Epilogue Debate: Transatlantic Data Flow—Which Kind of Institutionalisation?

Thomas Wischmeyer

Stronger institutionalisation of transatlantic privacy politics seems to be the next logical step in view of the growing social and economic importance of transatlantic data flow. Today, billions of gigabyte are exchanged through transatlantic communication cables.[1] Most of us make daily use of technological systems or IT services that send data across the Atlantic and are thus co-governed by regulatory entities in the European Union (EU) and the U.S. And with the spread of cloud computing and the Internet of things, data flow will continue to grow rapidly. Geographical distance between the EU and the U.S. has given way to digital neighbourhood and regulatory enmeshment.

In order to provide a political and legal space for articulating, discussing and, eventually, settling their well-known differences with regard to data protection,[2] the U.S. and the EU have set up multiple transatlantic institutions in the past. These specialised institutions are not based on a prior consensus on the value of privacy; rather, they are meant to contribute to the creation of such a consensus over time. To this end, the parties have empowered the institutions to enforce and review existing agreements, as well as to propose new rules.[3] For commercial privacy, standard setting is thus not entirely left to private actors. Similarly, for security-related data such as passenger name records, new institutions have replaced the less formal and traditionally largely secret cooperation between the executive branches in the U.S. and EU countries with a more accountable and transparent framework. In the

[1] On the technology side see Kuner (2013), p. 6. On the economic dimension see Meltzer (2014).

[2] From the rich literature on the convergences and divergences of EU and U.S. informational privacy law see only Whitman (2004), p. 1151; Schwartz (2013), p. 1966; Bamberger and Mulligan (2015).

[3] See Tzanou, in this volume.

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security context, the purpose of transatlantic institutions also includes increasing the speed and efficiency of information exchange.

In practice, however, the success of the specialised transatlantic institutions has been rather modest, as described by Maria Tzanou in her contribution to this volume.[4] Some even criticise them as a mere 'charade'.[5] While it is too early to tell how the Trump administration will affect transatlantic privacy relations in the long term,[6] it seems unlikely that any time soon we will see the kind of regulatory convergence or the emergence of shared legal standards, which many scholars predicted in the early 2000s. On the contrary, the U.S. and Europe are heading in diametrically opposite directions in recent years as far as the normative status of privacy protection is concerned: while the legal protection of informational privacy has stagnated in the U.S., the CJEU has used the constitutionalisation of privacy as a means to reinvent itself as a constitutional and a fundamental rights court.[7]

In this context, specialised transatlantic institutions seem more necessary than ever in order to address the growing transatlantic privacy gap. Upon a closer look, however, the case for strengthening these institutions is far from clear. If Europeans and U.S. citizens would only differ on legal issues such as the fundamental rights quality of data protection, a legal forum for dialogue might indeed be the type of institution needed. But in the digital age, disagreements about informational privacy regulation are inextricably linked to core interests of a polity, in particular to the security of its territory and institutions, as well as to the competitiveness of its economy. The CJEU's decision in *Schrems* shows how legal provisions, which were originally created for the protection of privacy in the commercial sector, can be used as tools against government surveillance or—according to a popular reading of the decision in the U.S.—for economic protectionism.[8] In a similar way, the more informal approach of the U.S. towards privacy regulation is often interpreted as part of a strategy that serves to secure and consolidate the U.S.'s political, technological and economic superiority in cyberspace.[9] In other words, decisions on the level of data protection have considerable externalities for security and economy; therefore, the intricacies of transnational privacy politics cannot be fully understood if considered solely as fundamental rights problems.[10]

At this point of time, the institutions created by the various transatlantic privacy agreements are clearly not equipped to address the issue of privacy in such a

[4]See also Bignami and Resta (2015), p. 231.

[5]EDRi (2016).

[6]On the recent privacy-friendly reform of some NSA programs see Wischmeyer (2017).

[7]Wischmeyer (2016).

[8]Layton (2016).

[9]von Bernstorff (2003), pp. 525–526; on the connection between the U.S.'s preference for informal and fluid ordering and its quest for economic and technological dominance in cyberspace von Arnauld (2016), p. 2, with further references.

[10]This is by no means meant to deny "the important role played by the protection of personal data in the light of the fundamental right to respect for private life" (Case C-362/14, Maximillian Schrems v. Data Protection Commissioner, ECLI:EU:C:2015:650 (2015)).

comprehensive manner. The Ombudsperson or the various review groups have neither the legal power nor the resources, let alone the credibility or legitimacy, to successfully negotiate and balance the complex interests at stake. The political weight, which these decisions carry, is too heavy for an Ombudsperson or a review group. It seems also rather unlikely that, in future, the U.S. or the EU will allow the institutions to take the dimensions of security and economy into account because this could have serious implications for their sovereignty.

Does this mean that de-institutionalisation is inevitable or even preferable? If de-institutionalisation means (re-)empowering private actors or leaving the exchange of sensitive private information entirely to the executive branch, this would certainly be a step backwards. However, this is not the only option. Rather, we need to reflect more carefully *which institutions* we need to involve in transatlantic data flow politics. Data flow politics do not have to be delegated to rather opaque transnational institutions or left to the informal cooperation between national governments. Also, democratic domestic institutions can and should have a say in this matter. Focusing on the European Union, it is first and foremost the political and legislative organs of the EU and the Member States that need to—and are legitimised to—develop a more comprehensive approach towards data transfer that takes account of its implications not only for privacy but also for security and for the economy. Chapter V of the EU General Data Protection Regulation (GDPR) with its extensive provisions on the transfers of personal data to third countries is therefore a step in the right direction. In a similar way, it is to be welcomed that the CJEU in *Schrems* has strengthened the role of the independent national data protection authorities (DPAs) with regard to adequacy decisions, as described by *Maria Tzanou* in this volume.

But can domestic institutions successfully regulate *trans*national data flow without being guilty of territorial overreach? In this context, it is essential to overcome the idea that the level of data protection should depend on the location of the server on which the data is stored. Instead of focusing on geography, data regulation in future should place more emphasis on holding data controllers and processors responsible, even if they transfer data out of the EU. This complex matter can only be sketched here very briefly.[11] From 2018 onwards, Articles 46 and 47 GDPR will provide a new legal framework for such an 'organizational-based approach' towards data protection.[12] Under this approach, companies are generally free to transfer personal data abroad but still need to comply with all major EU data protection principles even for the data stored or processed abroad. By this, the need to negotiate privacy standards with third countries, including the U.S., is radically reduced. Because the complex balancing of privacy concerns, security interests and economic

[11]On the current Article 26 of Directive 95/46/EC see, e.g., Article 29 Working Party, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (WP 114, 25 November 2005); Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, [2010] OJ L39/5. See also Moerel (2012).

[12]Cf. Kuner (2013).

considerations is left to the European legislator, the Commission and the national DPAs, this takes a heavy political load off the existing transatlantic institutions. Under this approach, the Commission and the DPAs also do not need to make politically charged judgments on whether or not the data protection level of third countries is really 'adequate'. Rather, they can concentrate on the enforcement of EU data protection standards against those entities, which actually benefit from data transfer.

Robust institutions will be indispensable for the success of data transfer regulation in the future. However, in view of the complex interests at stake, we need to be careful in choosing the right institutions to which we wish to entrust the matter.

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Part II
Transatlantic Institutionalisation Trade and Regulation

Who Recognises Technical Standards in TTIP?

Kai Purnhagen

1 Introduction

Current political discussions on the relationship of technical standards to the Transatlantic, Trade and Investment Partnership (TTIP) concern the questions whether TTIP can provide a transatlantic level playing field for technical standards and whether this will negatively affect technical standards in the European Union (EU) and the United States (US). This piece will instead take a different view on technical standards in TTIP. It will switch the perspective to an individual one, namely to the question who decides on standards. It follows the hypothesis that steering principles on mutual recognition and harmonisation of technical standards largely depend on who will be given the power to decide on conformity and level of technical standards in TTIP. As a basis for such an institutional analysis, this piece will evaluate the leaked documents from the TTIP negotiations. The analysis follows the framework for legal institutional analysis identified in the introduction to this book. The introduction highlights that, as legal applications of regime theory and organisation theory, the acts of autonomy and power by institutions are the real subjects of legal investigation of institutionalisation.[1] This largely reflects an approach to institutionalism voiced by Neil Komesar in the 1990s.[2] As a result, I will identify and map the respective decision-makers and will illustrate the potential impact of these choices on technical standard setting.

[1] Fahey (2018).
[2] Komesar (1997).

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2 The 'Legal', Factual and Methodological Framework for Investigating Technical Standard Setting in TTIP: Why Institutional Questions Matter

Transatlantic preferential trade agreements, particularly the Transatlantic, Trade and Investment Partnership (TTIP), are hotly debated issues with strong opponents and supporters.[3] Unlike any other preferential trade agreement, TTIP has been living through several rounds of criticism, uncertainty and likewise political support and rejection. Depending on where people stand, both agreements are being heralded as a job creator and beneficial for consumers or criticised for being not transparent, undemocratic and a tool to lower social standards.[4] This intensive political debate with strong arguments from both sides is remarkable as, despite significant political turmoil, there is not much legal text to analyse. On top of it, the treaty is under negotiation, and it is still very much uncertain that TTIP will ever materialise. Needless to say that in this environment, legal analysis of TTIP will be based by definition on shaky ground. Besides the possibility to resort to CETA as a forerunner for TTIP, the only documents that give a direct indication for the text of TTIP, which will be made subject to analysis here, are the leaked TTIP negotiation documents (hereinafter TTIPleak); the proposals, position papers and fact sheets published by the Commission of the European Union (EU); and the constitutional requirements set out for the conclusions and negotiations of preferential trade agreements in the legal systems of the EU, the US and the World Trade Organization (WTO). Unlike conventional wisdom, the publication policy of the Commission has made the negotiations of TTIP become one of the most transparent negotiations of preferential trade agreements when compared to the negotiation of other trade agreements.[5] Given these circumstances, the evaluation that this piece seeks to undertake, namely to investigate how a potential transatlantic institutionalisation between the US and the EU with a view to standards may materialise with regard to the question who decides, can only be incomplete and largely remain speculative. It is still worth pursuing, however, as critical acclaim of the ongoing process is desperately needed and can be based, with the leaked TTIP documents at hand, on more solid ground than with any other preferential trade agreement under negotiation in history.

This chapter will look at the question how institutionalisation of technical standard setting in light of regulatory cooperation may affect technical standard setting on both sides of the Atlantic. It will look primarily into the legal material and some of the scholarly works available to dissect who has been assigned the power to decide on the content and equivalence of technical standards at the transatlantic level. It will be contrasted with the socio-economic framework and standard-setting regimes that are embedded in both the US and the EU.

[3] See on TTIP e.g. the survey conveyed by Barker and Workman (2013).

[4] ibid.

[5] Cremona (2015), pp. 351–362.

When we look into the case of technical standard setting on both sides of the Atlantic, procedures, goals and actors in standard setting are fundamentally different.[6] Finding common ground on what can be considered equivalent will hence be, as it was often in transatlantic trade history,[7] challenging. What unites these different approaches are, however, answers to common problems of technical standard setting, such as the need for technological expertise, adaptability of the legal system to technological advancement and a high reliance on the technical community to provide for checks and balances rather than legal procedures. In other words, while the regulatory form may be different, the quantum stays. Starting from this premise, the quantum of technical standard setting is characterised by the need to govern products subject to high innovation, detailed technical knowledge, constant change and advancement.[8] As a consequence, law follows suit by acknowledging the lack of training of lawyers in these areas[9] and increasingly leaving way to non-political and technical decision-makers who are able to understand the regulatory problems in these technical areas. Answering the question who decides on technical standards may hence be more appropriate to ask than investigating the substantive legal standards on technical norms themselves.

While many works exist on the possible regulatory design of such regulatory cooperation,[10] *Mavroidis* and *Wolfe* have identified four possibilities on who can be assigned such regulatory choices in the special case of standard setting[11]: (1) governments (extrapolated to TTIP: regulation at the TTIP level), (2) intergovernmental organisations, (3) recognised non-governmental standardising bodies or (4) private bodies.

Following the institutional question this chapter is based on, the method to determine which one of these institutions decides on technical standard setting is taken from comparative institutional analysis.[12] It rests on the idea that the question who decides in a legal setting tells us something about the outcomes of different values, social goals and the law itself.[13] In the terms of this chapter: those who decide on which technical standards to adopt for harmonisation have the power to implement his or her value judgment into the decision and maybe even attach a normative quality to it if TTIP would give the 'decider' the power to do so.[14] While this chapter subscribes to comparative institutional analysis by acknowledging the importance of identifying who decides, it will not take recourse to the normative part

[6]See for a comprehensive treatise Hanson (2005), pp. 108, 112, 115.

[7]Mathis (2014), p. 138 et sqq.

[8]Brownsword et al. (2017).

[9]See illustratively Posner (2006), p. 1049.

[10]See eg. Ferdi de Ville (2016), Shaffer (2016), pp. 403 et sqq.

[11]See Mavroidis and Wolfe (2017).

[12]Komesar (1997).

[13]Ibid, p. 4 et seqq.

[14]Similarly already Shaffer (2016), p. 415. ('Not surprisingly, each side would like to convince the other to move toward its particular regulatory approach to enhance "coherence".').

of this theory, namely to decide which institution is the 'better' one. This is particularly where comparative institutional analysis has its limits. When deciding on which of the institutions would be better equipped to reach the respective regulatory goal, comparative institutional analysis is constrained by the law as a context condition. To name a famous example: if comparative institutional analysis is used to investigate the principle of subsidiarity in the EU, it cannot do so without acknowledging the competence norms of the treaty,[15] if scholars still value to defending the rule of law. Acknowledging these limits of the methodology, this piece will hence also make policy recommendations only very reluctantly and with reference to the legal framework in which the negotiations still operate.

The structure of the paper is as follows: I will first investigate the question who decides on regulations on technical standard setting in TTIP using the relevant TTIPleak documents as a starting point (Sect. 3). I will then draw some final conclusions and make some policy recommendations for TTIP based on the socio-economic and legal framework the TTIP negotiations are embedded in. I will highlight that when deciding on the question who will decide on the compatibility of standards at international level, Europeans will naturally point towards private standardisation bodies and the moderating role of a potential international public body. The US will insist on an institutionalised procedure, where government determines the rules of the game involving the respective stakeholders (Sect. 4).

3 Technical Standards in TTIP: An Overview

This sub-chapter will investigate the regulation of technical standards as they are envisaged in TTIPleak. In TTIPleak, these standards are regulated in the chapter on Technical Barriers to Trade (hereinafter TBT TTIPleak), which will be subject to analysis in turn. TBT TTIPleak displays proposals from the EU and the USA, which will both be used in a comparative manner for the analysis throughout this piece. I will refer to the respective EU proposals as Article XX EU TBT TTIPleak and to the US proposals as Article XX US TBT TTIPleak.

3.1 What Is a Technical Standard According to TBT TTIPleak?

With regard to the question what a standard is, both proposals, namely Article 2 US TBT TTIPleak and Article 2(4) EU TBT TTIPleak, refer to the definition of the TBT

[15]Maduro seeks to remedy this by pointing out the discursive function, which he calls the contrapunctual analysis of EU law, see Maduro (2003), p. 532.

agreement. A standard is hence defined in accordance with Annex I No. 2 of the TBT agreement as a

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

If one supports the development of a common law of trade, this approach is welcome as it relies on an internationally agreed-on term of trade law. However, with the advantages of taking inspiration from an old and long agreed-on concept, the package of old and long-established embedding into adjudicative practice and scholarly analysis may come along. The Dispute Settlement Body (DSB) of the WTO, for example, has provided more flesh to determine the difference of a technical regulation and a standard.[16] Would these considerations also apply to the TTIP? This specific question cannot be answered without making general recourse to the question how provisions of TTIP have to be and should be interpreted in light of WTO law and jurisprudence.

Other provisions of international law concerned with institutionalisation of trade law also make recourse to previously existing agreements. As highlighted in the introduction,[17] the legal relationship between Switzerland and the EU may serve as a blueprint in many ways when finding answers on institutionalisation between different regimes. Indeed, the agreement(s) between Switzerland and the EU on the application of some freedom of movement rules has(have) specific provisions regulating the application of the rules of these existing agreements and the corresponding judicial decisions on the interpretation of the respective agreement.[18] While TBT TTIPleak does not include any provision on the application of WTO jurisprudence, the EU proposal in Article 2(1) EU TBT TTIPleak stipulates that the TBT agreement is 'hereby incorporated into and made part of this Agreement'. While this certainly refers to the text of the TBT agreement, it remains questionable whether this also incorporates WTO jurisprudence and scholarly analysis. Indeed, it is questionable whether in light of TTIP, a North–North agreement, the WTO jurisprudence and scholarly analysis, which includes North–South, South–South and world economic considerations, should be taken into account. On the one hand, this would strengthen a coherent interpretation of a world legal system, contributing to the realisation of what *Ernst-Ulrich Petersmann* has termed an international rule of law in world trade.[19] This would also provide trading partners of both sides with more legal security as resort can be had to previous interpretations of the norms in the WTO context. On the other hand, relying on previous interpretations of the term in WTO law would tie the US and EU trade relationship to

[16] See for a detailed treatise in this respect Delimatsis (2015), pp. 113–120.

[17] See Fahey, Introduction.

[18] See Art. 16 (2) Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit https://www.admin.ch/opc/de/classified-compilation/19994648/index.html accessed 29 May 2017.

[19] Petersmann (1998), pp. 75, 81.

considerations alien to the internal trade needs of both trading blocs. Given the already complex and complicated endeavour of aligning the regulations of both trading blocs, this may additionally and unnecessarily burden the success of such a regional trade alliance. Such a view is also in line with the rules of interpretation of international law: preference shall be given in accordance with Article 31(1) Vienna Convention of the Law of Treaties (VCLT) to the term, context, object and purpose of 'the treaty', taking, according to Article 32 VCLT, supplementarily into account preparatory works and others. That means that, first and foremost, preference shall be given to a TTIP-based understanding of the reference to the TBT agreement, which means as a sole reference to the text, without necessarily referring also to the underlying interpretations in WTO law. This interpretation is, of course, confined by Article XXIV(5) GATT, which requires that such interpretations shall not lead to higher burdens for third-party WTO Members. While an interpretation of the provisions in TTIP in light of WTO law is hence no obligation, it might be advisable to nonetheless take them as a basis for the interpretation of provisions in TTIP to fulfil the requirements of Article XXIV(5) GATT. This is also supported by the fact that the whole language of the TTIP contains a very WTO-friendly notion.

Regarding the question whether recourse to the TBT agreement in Article 2 US TBT TTIPleak and Article 2(4) EU TBT TTIPleak also includes the jurisprudence and the WTO legal context on the TBT agreement, the answer should be, however, negative. To meet the requirements of WTO law, in particular Article XXIV (5) GATT, and to respect the general WTO-friendly language of TTIP, potential interpretations of the TTIP provisions are well advised to base their interpretations on the WTO legal context and consider potential deviations from it with great care.

3.2 The Treatment of Technical Standards in TBT TTIPleak

The treatment of technical standards, and hence the view on the EU-US institutional framework, is spelled out in Articles 6, 7 and 10 TBT TTIPleak. As a general remark, these articles reflect the different institutional settings of standardisation procedures on both sides of the Atlantic.[20] Ever since the 'new approach' came into being in 1985, the development of technical standards is, with exceptions, in the hands of few enumerated co-regulated European standardisation organisations.[21] EU law provides an institutional framework for their operations[22] and also incentivises compliance

[20]See on this point Hanson (2005), pp. 108, 112, 115.

[21]See Pelkmans (1987), p. 249.

[22]See in particular the so-called New Legislative Framework consisting of Regulation (EC) 765/2008 setting out the requirements for accreditation and the market surveillance of products, Decision 768/2008 on a common framework for the marketing of products, which includes reference provisions to be incorporated whenever product legislation is revised. In effect, it is a template for future product harmonisation legislation and Regulation (EC) 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another EU country.

with the standards developed by these private organisations.[23] The development of technical standards in the EU hence primarily rests on few publicly empowered private standardisation organisations with well-aligned responsibilities embedded in a strong co-regulated legal framework at the EU level.[24] Private-sector standards, public-sector standards and the different regulations at national and supranational levels are neatly intertwined. As long as the relevant products are subject to the 'new approach' regime, businesses seeking market access for their products in the EU can hence fairly easily access the technical standards applicable to their product by contacting the relevant standardisation organisation. Compliance with the private-sector standards will not provide them with full certainty to be freed from litigation, but at least it reduces litigation risks by providing them with the legal presumption that their product is safe.

In the USA, on the contrary, the development and application of technical standards is in the hands of many.[25] Some governmental standards are set at federal level,[26] some at State or local level.[27] Due to this plurality, it is often not clear who decides on the respective standard.[28] Like in the EU, each of these standards has different conformity assessment procedures, which usually vary from product to product. In addition, private-sector standards exist, each requiring additional or complementary conformity assessment procedures. Compliance with these voluntary standards is highly recommended as non-compliance can lead to litigation risks. However, unlike in the EU, these different levels of standard setting are more tenuous and tangled in the USA.[29] Public government often makes use of private standards as a source of inspiration for developing public standards, or they are right from the start being developed through cooperation between industry and government.[30]

When bringing these two different regimes in line to form a transatlantic level playing field, the question who should decide is particularly difficult to answer. While in the EU responsibility to conformity assessments and standard setting is comparatively clearly assigned to a few private-sector standardisation organisations, in the US state organisations at federal, State and local levels, as well as trade organisations, have a say in the development of technical standards. It is intuitively clear that neither of these organisations is willing to give in on their power to define the terms of trade.

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[23]As witnessed by the presumption of conformity, see Council Resolution on a new approach to technical harmonisation and standards, [1985] OJ C 136/1. On a judicial treatment see lately *C-613/14, James Elliott Construction Ltd v Irish Asphalt Ltd,* ECLI:EU:C:2016:821, Para 38.

[24]See for a brief overview Schepel (2013), pp. 521, 522–525.

[25]Hanson (2005), p. 115.

[26]See the US Code of Federal Regulations.

[27]See for a thorough overview Hanson (2005), pp. 119–123.

[28]Ibid, p. 115.

[29]Ibid, p. 119.

[30]Ibid, pp. 119–123, providing ample examples.

When regulating this difficult question on who shall decide on the transatlantic character of a technical standard, the TBT TTIPleak distinguishes mainly between two questions:

1. Who is competent to define the relevant technical standard to be recognised by TTIP?
2. Who is competent to decide whether this standard is one of international significance which shall be subject to transatlantic harmonisation?

Both questions are of relevance to institutionalisation as it matters whether the same organisation or different ones decide (internally) on standards and (externally) on their international character.

3.3 The EU Approach: Cooperation of Private Standard Setters and a Public Framework

The EU approach to both questions can be characterised as strengthening a cooperation approach between the standardisation organisations across the Atlantic. This comes as no surprise as in the EU the development of technical standards is traditionally outsourced to private standardisation organisations, which, within a legal framework, de facto exclusively rule the game.[31] The approach taken in TBT TTIPleak is an international advancement of this approach, leaving both the development of standards and the characterisation of standards as relevant for harmonisation to specific private standardisation organisations, assuming that each one covers a specific market as a monopolist. In this respect, Article 6(1) EU TBT TTIPleak stipulates that the relevant standards are decided by 'the standardisation bodies located within their respective territories'. Whether these 'domestic' standards then qualify for establishing a level playing field shall also be determined by these respective standardisation bodies with a view to 'the development of common standards' (Article 6(1)(c) EU TBT TTIPleak) and the 'identification of suitable areas for such co-operation' (Article 6(1)(d) EU TBT TTIPleak). In the eyes of the EU, the role of government when determining these questions is limited to strengthening the cooperation between standardisation organisations (Article 3 EU TBT TTIPleak). The latter can be read as a reflection of the EU's experience in providing a basic institutional framework for the work of private standardisation organisations, as well as an incentive mechanism to comply with their standards. In summary, the EU outsources the question who decides largely to private standardisation organisations.

[31] See for a comprehensive analysis van Gestel and Micklitz (2013), pp. 145–181; also with a view on services standards Delimatsis (2016), pp. 513–544.

3.4 US: Procedural Approach

The US, in turn, approaches both questions through a procedural lens and also facilitates a strong role of both governments in an institutionalised way in determining which standards shall be subject to harmonisation. This outcome comes as no surprise also as the setting of technical standards is first a matter of various largely uncoordinated private and public bodies, and the role of government in setting technical standards is, due to the tangled relationship with private standard setters, much stronger in the USA compared to the EU. With regard to the question of who decides on standards, the US approach in TBT TTIPleak reverts to a procedural solution. According to Article 6(1) TBT TTIPleak, rather than particular institutions, in principle all institutions can set technical standards as long as they are developed in accordance with the respective principles stipulated in the Decision of the TBT Committee on Principles for the Development of the International Standards, Guides and Recommendations (G/TBT/1Rev.10). This is regardless of the fact as to who determines the standards and where it is located (private or public body). Taking the various approaches at various levels and tangled approach to private standards in the US into account, this is also intuitively plausible. In the US, it is often not clear who is actually deciding on the respective standard as standard development is in the hands of many.[32] Hence, the US also assigns the EU and the US the role not only of facilitating cooperation between standardisation bodies but also of active involvement of regulatory cooperation (Article 7 US TBT TTIPleak). To this end, the US seeks to establish a Committee on TBT (Article 10 US TBT TTIPleak) to facilitate such cooperation at international level.

3.5 Reasons for the Difference

In the absence of publicly available background documents or scholarly works on these articles, the analysis of the 'why' question is left to making assumptions about the regulatory background of these choices. It has been correctly pointed out that 'the convergence of the two systems will probably require changes in both',[33] In Europe, harmonisation of standards historically date back to the 'new approach' and its involvement into the principle of conditional mutual recognition.[34] Standards are decided in principle in autonomy by few private standardisation bodies, while in the USA a fragmented landscape of public and private standard-setting institutions exists, each with different procedures and institutional settings.[35] In the EU, the work of few private organisations is orchestrated in co-regulation with the EU, and compliance with these standards is endorsed by an incentive system. The

[32]Hanson (2005), p. 115.
[33]Ibid, p. 108.
[34]Purnhagen (2014), pp. 334–339.
[35]Hanson (2005), p. 115.

cooperation approach of the EU follows the established history of standardisation in the EU, which understands harmonisation of standards as a model deriving from the principle of conditional mutual recognition, while the 'conditionality' is determined by private standard-setting bodies. They may de facto determine under which circumstances standards are not subject to mutual recognition but elevated to a higher EU level. This shall ensure that in the EU, a level playing field of standards exists, which is based on technological knowledge available rather than on public politics. The one who decides on whether and on what level standards should be 'internationalised' within TTIP are, in the eyes of the EU, also the respective standard-setting bodies.

In the US, cooperation is, if at all, orchestrated on a voluntary basis between private standardisation organisations and public lawmakers in setting up and guiding common standards. Technical standard setting in the US, firmly rooted in the private sector,[36] can be said to be influenced by the general approach to public policymaking in the US, which may be described as the iron triangle.[37] According to this approach, standard setting in the US can be viewed as a matter of mutual consent by industries, lawmakers and agencies, each rationally following their self-interest at various levels. Reconciling different interests at various levels is not a matter of multi-level technological balancing for a fragmented internal market such as in the EU but rather a bargain about different interests for a common US market. The main concern for regulation of such a triangle is to avoid regulatory capture of the respective negotiators.[38] It does not matter so much who decides, but rather what is important is which procedures to follow in order to reconcile the respective interests and align incentives along the iron triangle in a meaningful way. In this sense, from the perspective of the US, standard setting at international level is rather subject to setting procedural requirements with which a common level playing field can be established.

The differences in approaches in the EU and the US may be summarised in Table 1.

4 Comparison and Conclusion

Both approaches differ substantially with regard to assigning responsibility to decide on standardisation, as illustrated in Table 2. While the EU's cooperation approach is 'bottom-up', meaning that few different standardisation organisations shall decide on which standard has the potential to become an international one in an iterative process, the US approach can be characterised as 'top-down'.[39] In the terms of the

[36]Ibid, p. 115.

[37]See for a thorough description of the iron triangle Mitnick (2008), p. 1196.

[38]Dockner (2014).

[39]See on the difference and importance of these two approaches in regulatory cooperation already Shaffer (2016), pp. 403 et sqq; as well as van Zeben (2014), p. 84 et sqq.

Table 1 Differences in EU and US approaches

	EU	USA
Rationale	New approach	Iron triangle
Role of public bodies	Framing decision marking of private standardisation bodies, incentivising compliance with private standards	Primus inter pares in standardisation
Framing	Autonomous decision of standardisation bodies	Proceduralisation of cooperation
Legitimacy	Rationalisation and consent inside of bodies	Checks and balances along incentive structure of iron triangle to avoid capture

Table 2 Differences in EU and US approaches

	EU	USA
Approach	Bottom-up	Top-down
Impact	Focus on social differences	Focus on uniformity
Regulatory design	Enabling framework for standardisation organisations	International level playing field 'rulebook of standards'
Legitimacy	Rationalisation and procedure inside of bodies	Balanced involvement and fair negotiation

question on who will decide on standards in TTIP, the EU will provide few private standard setters with the main powers, while the US approach favours the establishment of an international body. International bodies, as to their international settings, are more likely to develop a uniform, international style of argumentation and will also more easily incorporate the various private-sector lobbying groups, which will potentially also affect the respective decision-making on the level of standards. The decentralised EU cooperation approach is more likely to continuously bring cultural and linguistic differences to the negotiation table as the respective standard-setting bodies located in different socio-economic settings are likely to emphasise the cultural differences in the standard setting.

These differences create tension. In both regulatory regimes, the decision on the level of protection of a standard rests with different decision-makers.[40] While the EU is in principle reluctant to formally or informally interfere with the standardisation organisations, in the US standards are set at various levels between industries, agencies and lawmakers. When deciding on the question who will decide on the compatibility of standards at international level, Europeans will naturally point towards private standardisation bodies and the moderating role of a potential international public body. The US will insist on an institutionalised procedure, where government determines the rules of the game involving the respective stakeholders. Any institutionalisation will only be successful if it takes into account these different

[40]See for an illustration how many different standardisation bodies are in involved in the US to decide on equivalent New Approach Directives. Table 6.1 in Hanson (2005), p. 111.

institutional embeddings and provides a forum for negotiations between regulators not only at meta-level but also at lower level. This needs a fine balancing approach between US and EU governmental and business interests, a task that proved to be of particular difficulty within the new political transatlantic landscape.

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Institutionalising Transatlantic Business: Financial Services Regulation in TTIP

Davor Jančić

1 Introduction

This chapter takes the analysis of international financial regulation forward through an examination of the institutionalisation of transatlantic relations in the field of financial services. EU–US regulatory cooperation in finance is assessed through a case study of the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Although its fate is uncertain due to President Trump's unenthusiastic attitude to transatlantic trade, TTIP has been selected because it has already provoked a considerable degree of institutional responsiveness, especially in the EU.[1] This is predominantly because TTIP falls under the category of new-generation trade agreements that exhibit the properties of 'living' instruments, incorporating transnational mechanisms for autonomous rule-making, self-reflection or at least mutual commenting.[2] By engaging in these activities, such mechanisms institutionalise vast arrays of practices, customs and codes of conduct that may later serve as a basis for formalisation.[3]

The present inquiry applies the logic of institutionalisation to efforts to approximate financial industry regulation in the EU and US legal orders. This is carried out by analysing the inclusion of financial services in TTIP and the establishment of a Joint EU–US Financial Regulatory Forum, which has already replaced the formerly operative EU–US Financial Markets Regulatory Dialogue. TTIP is thus observed as

[1] Fahey (2016), p. 327; Peterson (2016), pp. 383 and 388ff.

[2] Jančić (2018).

[3] See more on the theoretical conceptualisation of this in the introductory chapter by Elaine Fahey in this volume. See on the broader context of institutional fragmentation in twenty-first century international trade in: Araujo (2017), p. 101.

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a medium of closer integration of the different yet vastly interdependent EU and US financial markets and their regulatory regimes.[4] This is salient given that the adoption of regulatory and legislative measures on either side of the Atlantic depends on the manner in which each side perceives the optimal balance between control, aimed at preventing the import of instability of global financial markets, and market openness, aimed at maintaining competitiveness and economic growth.[5] Any divergences in the said regulatory regimes may affect the level playing field in which transatlantic business operates. This occurs in two key ways.

On the one hand, these regimes produce significant *extraterritorial effects* that have caused disputes and impeded the growth of transatlantic business.[6] It has, for instance, been held that the extraterritoriality of the US's Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank Act) is 'extremely extensive' and one of 'the most striking aspects' of it.[7] The European Market Infrastructure Regulation (EMIR) adopted by the EU in 2012 has strong extraterritorial ambitions too.[8]

On the other hand, unilateral measures can lead to *retaliation*. A recent example is the EU's proposal to introduce a requirement for third-country financial service providers operating within the same foreign group to establish an intermediate EU parent undertaking (e.g. a holding company) where they qualify as a global systemically important institution or one with total assets of at least €30 million.[9] Large US investment banks, such as Goldman Sachs and JPMorgan, would thereby become subject to EU capital requirements and be obliged to increase the capital and liquidity in their EU subsidiaries. What is central here is that this proposal was largely inspired by US action to the same effect: requiring higher capital requirements for EU groups operating in the US through the obligation to establish a parent

[4] Jančić (2015), p. 334.

[5] Quaglia (2015), p. 167.

[6] Posner (2009), p. 665. See also: Petersmann and Pollack (2003).

[7] White (2015), pp. 301 and 316. To wit, §722(d) within Title VII of the Dodd–Frank Act, which is entitled 'Wall Street Transparency and Accountability', provides that 'non-US persons will be regulated if: they have a direct and significant connection with activities in, or effect on, commerce of the US; or they contravene such rules or regulations as may be prescribed under the Act, necessary or appropriate to prevent the evasion of the relevant provisions'.

[8] Article 4 of Regulation No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, [2012] OJ L201/1, provides that counterparties' clearing obligation applies 'between two entities established in one or more third countries that would be subject to the clearing obligation if they were established in the Union, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation'. See: Carr (2014).

[9] Article 21b of the European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU (known as CRD) as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, COM(2016) 854, 23 November 2016.

holding company. 'We are actually mirroring what the US has already done' has been the EU's response.[10]

Regulatory regimes are therefore crucial determinants of the level of mutual market access in transatlantic relations and of the level of economic benefits attainable through bi-regional collaboration. Transatlantic financial regulation is furthermore an influential benchmark for measuring the scope and manner of implementation of international standards that aim to preserve the stability of the global financial system.[11] TTIP is understood here as an iteration of minilateralism,[12] a form of multilateral diplomacy whereby a small group of partners negotiate common rules or standards in one or more policy fields in an attempt, among other things, to stem harmful unilateral action that has extraterritorial reach.[13] This kind of diplomacy, which has been appraised as a desirable way forward for setting or upholding international financial standards,[14] is relevant here because it can lead to the establishment of new institutionalised forms of cooperation as a means of structuring the dialogue on the impact of regulatory discords and on the resolution of conflicts between legal norms and between varying approaches to regulation. In turn, such fragmented transnational efforts to institutionalise regulatory integration between two different polities can have implications for rule-making. The present analysis studies these implications with respect to transatlantic financial services regulation.

The chapter proceeds as follows. After outlining the problems exposed by the financial crisis, an insight is made into the financial services regulation envisaged in TTIP negotiating documents. The analysis then turns to institutional forms of financial regulatory cooperation in order to discuss the contribution of 'soft' institutional platforms to achieving greater convergence between European and American approaches to safeguarding financial stability and boosting competitiveness in the global market. This is complemented by an assessment of the participation of non-state actors in the shaping of the transatlantic finance dialogue. The chapter suggests that the key advantage of 'soft' cooperation is the possibility to voice and address mutual regulatory concerns, as well as to enhance mutual learning, but that these advantages are offset by the absence of enforcement mechanisms, which itself is a corollary of the absence of political will to cede sovereignty to transnational governance systems. The latter may in turn undercut the effectiveness of soft law as a means of transnational regulation and limit its capacity to shape regulatory action.

[10] *EurActiv* (2016). See also: Barker et al. (2016).

[11] See in this respect: Quaglia (2014), p. 427.

[12] Brummer (2014).

[13] See examples of EU extraterritorial action in: Scott (2014), p. 87.

[14] Coffee (2014), pp. 1259 and 1298.

2 Post-crisis World of Finance

The financial crisis that broke out in 2008 was to a great extent caused by uncontrolled trading in derivatives that were based on sub-prime mortgages and other toxic loans such as for cars or credit cards.[15] In what Saskia Sassen views as 'primitive accumulation', the explosion of collateralised debt obligations and credit default swaps in the market caused their value to reach no less than $630 trillion, which was 14 times the world GDP.[16] Once the underlying assets stopped generating revenue, the consequences were devastating since the global nature of financial services fuels the transmission of risk across legal systems and markets. This forcefully demonstrated that too liberal an approach to finance was no longer viable.[17] As a result, the EU and the US put in place different regulatory requirements to prevent further shocks to the transatlantic and global economy: on the US side, the Dodd–Frank Act and on the EU side, the EMIR.

At the heart of the problem is how to strike the right balance between financial stability and competitiveness. Too much freedom may lead to risky investment, while too much regulation may stifle it. Regulations consequently stimulate banks and other financial service providers to innovate and create new financial products so as to escape the reach of regulation because the latter may restrict some of their most hazardous activities, create costs and thus limit their profits.[18] A former Governor of the US Federal Reserve, Randall Kroszner, has indeed warned that insistence purely on banks' capital holding requirements increases the risk of evasive practices and decreases the effectiveness of financial oversight.[19] Financial authorities may therefore seek to introduce new rules for innovative products. This, however, does not happen immediately upon a product's appearance on the market. The entire FinTech and TechFin industries,[20] often operating as startups, are not regulated in the EU, and the European Parliament advised in April 2017 that time is not yet ripe to do so.[21] Some commentators maintain, however, that it is and that this would contribute to ensuring market efficiency and customer protection.[22]

[15]Greenberger (2013), pp. 467–490.

[16]Sassen (2010), pp. 23 and 38.

[17]See essays in: Porter (2014); Grant and Wilson (2012).

[18]See on this: Avgouleas (2015), pp. 659–694.

[19]Chatham House (2014).

[20]FinTech refers to financial technology and represents a growing industry using digital technology and innovation to provide services in both retail and corporate financial sectors (e.g. mobile stock trading apps, payment apps, money transfer apps and so on). TechFin is a term sometimes used to describe non-financial firms (e.g. in the areas of e-commerce, technology, or telecommunications) which use data and access to a wide pool of customers to enter the financial services markets.

[21]European Parliament, Committee on Economic and Monetary Affairs, Draft Report on FinTech: The Influence of Technology on the Future of the Financial Sector, doc. no. 2016/2243(INI).

[22]Zetzsche et al. (2017).

Yet this cycle, combining public action to regulate financial risks and private action to resist it, has led to arguments that the precautionary principle ought to be applied in the financial sphere like it does in many polities in the fields of health policy, food safety or environmental protection.[23] The goal of this 'financial precautionary principle' would be for regulation to catch not only the conduct of financial institutions—above all banks, hedge funds, asset management firms and insurance providers—but also the marketing of financial products themselves. In this way, it is hoped, financial corporations would not be able to jeopardise the financial stability of the highly interconnected world of global finance through exuberant investment deals.

In this context, institutionalisation has a significant role to play. Crisis has highlighted the importance of precaution, and the need to manage and enforce precaution has brought to the fore the question of institutionalisation.[24] But how does one define institutionalisation? Writing about 'the promise of institutions' in global financial regulation, Chris Brummer usefully defined institutionalisation in the following way: 'by wisely structuring repeating interactions of countries, people, and firms, one can enable cooperation by lowering the information costs, bargaining costs, and enforcement costs needed to achieve it'.[25] Orderly and mutually agreed management of these three types of cost accurately captures the purpose and degree of transnational institutionalisation pursued. Brummer rightly notes, however, that any institution-building endeavour carries costs of its own, given that domestic legislatures tend to guard their polities' right to economic self-determination from international bodies that may enjoy far-reaching competence and exercise it according to complex and opaque procedures while only being subject to limited accountability. There is, hence, a need to balance the economic benefits of institutionalisation beyond the state with demands for public participation through mechanisms that operate with a degree of transparency, openness and publicity. This would help to facilitate the reconciliation between economic rationality and a sense of legitimacy of transfers of authority to transnational governance structures. Financial regulatory cooperation therefore evokes similar doctrinal concerns as those in other instances of delegation of power to global sites of rule-making.[26]

The institutionalisation of cooperative arrangements beyond the state operates as a series of sliding scales and ranges from informal to formal governance structures and from those conferring merely 'soft powers' to those structures (such as agenda-setting rights) to those endowing them with decision-making powers proper (such as to adopt legally binding norms). Transnational governance in transatlantic relations takes the form of dialogues between policymakers and business leaders, civil society networks and, if TTIP were ever to bear fruit, a dispute settlement body potentially taking the shape of an investment court or tribunal.

[23] Allen (2013), p. 173; Webb et al. (2017).

[24] Crotty and Epstein (2009).

[25] Brummer (2014), p. 7.

[26] See the introductory chapter by Elaine Fahey in this volume.

The following sections analyse the manner in which the type of institutional cooperation envisaged in TTIP addresses the challenges described above. The underlying objective is to tease out whether regulatory cooperation in finance, furthered in TTIP or in a future cooperative arrangement, may be helpful as a means of 'advance regulatory mediation' that could address the causes of the conflicts before restrictive or harmful measures are enacted and before they start producing economic disadvantages.

3 Financial Services in TTIP

Although the US has initially opposed the inclusion of financial services in TTIP,[27] the latest 15th round of TTIP talks (3–7 October 2016) shows that negotiations in this area had been underway, including on institutional provisions.[28] The inclusion of financial services was foreseen in the EU negotiating mandate and in Chapters II (Investment) and V (Regulatory Framework) of the EU's textual proposals for services, investment and e-commerce. In mid-July 2016, the EU made an offer to the US on financial services, but negotiations have since stalled due to the Trump administration's change in approach to foreign trade.[29]

The EU emphasises, however, that although it seeks to set up a transparent, accountable and rule-based platform for cooperation between regulators and supervisors, the goal is not to alter the substance of standards defined by international bodies such as the G20, the Financial Stability Board and the Basel Committee or to negotiate prudential rules but to enhance the interoperability of the existing rules and facilitate their correct implementation so as to avoid market fragmentation and improve financial stability.[30] The prospect of market fragmentation is indeed palpable, given that legislatures around the world have opted for different ways to reform banks and shield the depositors from their inherently risky investment business.[31] The US has enacted the so-called Volcker rule in the Dodd–Frank Act to prohibit banks from proprietary trading and from acquiring or retaining ownership in hedge funds and private equity funds. In France and Germany, these kinds of engagements by banks are permitted if exercised through a subsidiary, albeit subject to specific rules, while the UK opted to ring-fence depositary from investment operations.

[27] See accounts on this in: Jones and Macartney (2016), p. 4; Quaglia (2016).

[28] European Commission, Report of the 15th Round of Negotiations for a Transatlantic Trade and Investment Partnership, 21 October 2016, at 5, http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155027.pdf.

[29] The Transpacific Partnership Agreement (TPP), which was signed in February 2016 between 12 countries but which never entered into force due to the withdrawal of the US in January 2017, also contained a chapter on financial services (Chapter 11). In January 2018, TPP was superseded by a revised Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11).

[30] European Commission (2014).

[31] Lehmann (2014). See also: Krahnen et al. (2017), p. 66.

EU textual proposals for TTIP reveal that the liberalisation of investment, cross-border supply of services and the regime of temporary stay of natural persons for business purposes would be likely to apply to financial services. The latter are defined very widely to encompass any service of a financial nature offered by a financial service supplier—including banking, insurance, leasing, lending, asset management, settlement and clearing, auditing and accounting. Any new financial service may be subject to authorisation before it can be put on the market.

TTIP furthermore safeguards domestic regulatory autonomy in four ways. First, there are prudential carve-outs for the protection of investors, depositors and policyholders and other relevant persons, as well as for ensuring the integrity and stability of the financial system. Second, exceptions are foreseen for public retirement planning, social security systems, the exercise of monetary authority and public spending. Third, there are guarantees for the non-discriminatory application of each party's rules notably on bankruptcy, insolvency, bank recovery and resolution, prudential supervision, issuing, trading or dealing in financial instruments, and financial reporting and record keeping. The extent and effectiveness of proposed TTIP provisions on prudential regulation have been a point of contention in the US.[32] Fourth, general dispute settlement provisions would not be applicable to financial services.

However, while data processing would be permitted for the conduct of ordinary business of financial service providers, in this area domestic autonomy has actually been restricted insofar as both parties would be obliged to adopt 'appropriate safeguards' to protect privacy and fundamental rights and freedom of individuals, particularly with respect to data protection. In light of the NSA's online surveillance on EU territory through the PRISM programme,[33] this requirement is primarily inserted to address the EU's concerns.[34]

4 Institutionalisation of Transatlantic Regulatory Cooperation in Finance

4.1 Objectives and Methods

Unlike in the case of dispute settlement, TTIP provisions on general regulatory cooperation would apply to financial services.[35] This refers to the formulation of common principles, guidelines or codes of conduct; mutual recognition of equivalence or harmonisation of regulations; and reliance on each other's implementing

[32]Barbee and Lester (2014), p. 953.

[33]See e.g. Jančić (2016), p. 896; Tourkochoriti (2014), p. 161.

[34]See further the chapters in Part II on 'Data Privacy' in this volume.

[35]See generally Alemanno (2015), p. 625; Meuwese (2015), p. 153.

tools with a view to avoiding the duplication of regulatory requirements such as testing, certification, qualifications, audits or inspections.

The overall objective is to create a more integrated transatlantic financial marketplace and infrastructure. This would promote the compatibility of regulatory and supervisory frameworks, reduce risks and frictions and prevent contagions through better-informed lending and investment. These goals would be pursued on the basis of 'best endeavours' rather than through binding stipulation.

The methods of achieving them include consultations at the earliest stage of the regulatory process and deference to each other's rules for the purposes of assessing compliance with domestic regulations where they achieve comparable outcomes. Moreover, plans for measures on financial services would be included in the Joint Annual Regulatory Cooperation Programme, and cooperation would extend to non-central levels—those of the US states and EU Member States.

4.2 Joint EU–US Financial Regulatory Forum

Global finance is marked by the dominance of soft law as a method of setting standards of financial prudence and as a way to create common rules without requiring the cessation of rule-making authority over international capital flows.[36] TTIP adopts this approach by envisaging the creation of a Joint EU–US Financial Regulatory Forum, which would act in the field of financial services as a specialised 'coordinating structure', which is currently foreseen for general regulatory cooperation. This would be a significant step because the literature has shown that financial crises tend to nudge polities towards inward-looking policies that may encumber transatlantic business.[37]

On 18 July 2016, it was agreed regardless of TTIP negotiations for the Forum to supersede the existing EU–US Financial Markets Regulatory Dialogue, which had been created in 2002. The Forum is an improved version of the Dialogue and clearly signals the political message about the importance of financial services for transatlantic economic relations. Improvements refer to a more clearly defined focus on attaining operative objectives in the respective lawmaking and rule-making processes—such as to increase transparency and regulatory compatibility, reduce regulatory uncertainty and arbitrage and ensure consistent implementation of international standards taking account of the G20 agenda. There is also a stronger push for the inclusion of regulators, supervisors and external experts in the work of the Forum, as well as a more coordinated preparatory and follow-up activities.

When it comes to composition, like the Dialogue, the Forum gathers a wide range of competent EU and US officials. On the EU side, these can include representatives of the European Commission, European Supervisory Authorities (European Banking Authority, European Securities and Markets Authority and European Insurance

[36]Brummer (2015), p. 63.

[37]Howarth and Quaglia (2016), p. 21.

and Occupational Pensions Authority), the Single Supervisory Mechanism (the European Central Bank and national supervisors) and the Single Resolution Board. On the US side, these are the US Treasury, the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Public Company Accounting Oversight Board and the Office of the Comptroller of the Currency. The Forum continues to meet twice a year for an informal exchange of views and information on planned regulatory measures. It adopts joint statements. The functioning of the Forum is to be reviewed at a yearly meeting of the European Commissioner responsible for Financial Stability, Financial Services and the Capital Markets Union (currently Valdis Dombrovskis) and the US Secretary of the Treasury (currently Steven Mnuchin).

The purpose of the Dialogue is to monitor regulatory developments and identify potential substantive conflicts, thus helping to raise concerns directly with staff drafting or implementing regulation. The Forum is therefore described as follows:

> A platform for enabling regulatory cooperation as early as practicable in our respective law-making and rule-making processes, with the general operational objective to improve transparency, reduce uncertainty, identify potential cross-border implementation issues, work towards avoiding regulatory arbitrage and towards compatibility, as appropriate, of each other's standards, and, when relevant, promote domestic implementation consistent with international standards.[38]

It is also foreseen for experts with technical knowledge to meet in advance to prepare meetings, as well as to meet in between Forum gatherings, including by forming *ad hoc* groups.

Examples of the achievements of the Forum's predecessor include facilitating processes of determining regulatory equivalence (e.g., the equivalence of US swaps trading platforms under the EU's MiFID framework), fostering negotiations towards regulatory convergence (e.g., in insurance and reinsurance industries),[39] improving audit oversight (e.g., through joint inspections), finding common approaches to regulatory requirements (e.g., on requirements for central clearing counterparties laid down in the EU's EMIR), clarifying the impact of domestic rules in the area of finance (e.g., the Volcker rule or the functioning of the EU financial passport) and overseeing the implementation of international standards.[40]

Speaking at a Congressional hearing, a member of the Board of Governors of the Federal Reserve affirmed that Dialogue discussions were focused not on technical

[38]Joint Statement, 'Improvements in US-EU Regulatory Cooperation', 18 July 2016, https://ec.europa.eu/info/file/69462/download_en?token=s9X_MdYL.

[39]On 22 September 2017, the EU and the US signed a bilateral agreement on prudential measures regarding insurance and reinsurance. This aims to lower supervisory burdens for insurers and reduce collateral and local presence requirements for reinsurers when they operate in a cross-border fashion. This agreement was a product of 20 years of informal discussions and over a year of formal negotiations. The agreement has provisionally applied since 7 November 2017.

[40]Hellwig (2005), pp. 363–376 at 367ff.

issues but rather on principles, approaches, implementation and timing.[41] While not an issue-solving venue, the Forum was described as useful for diffusing regulatory tensions. It has proven advantageous for anti-money laundering and counterterrorist financing cooperation. Nonetheless, there is little political appetite for transforming the Forum into a policymaking body. That notwithstanding, the soft law approach—premised on intensive exchange of information among regulators, joint risk assessments and results monitoring, and mutual adaptation—is one viable option for post-TTIP transatlantic regulatory approximation.[42]

Addressing regulatory divergences is of particular importance in the context of heavily globalised financial flows, which pose transnational challenges.[43] Transatlantic cooperation in finance is crucial because global finance regulation is still a predominantly transatlantic matter with the EU and the US being the central nodes of it.[44] With respect to this, the European Commission's Trade Sustainability Impact Assessment on TTIP, completed by the consultancy firm Ecorys in March 2017, highlights that regulatory divergence is a 'key barrier' to trade and investment in the financial service sector, that this adds significant costs to transatlantic business and that regulatory cooperation is thus 'key to meaningful trade liberalization'.[45] It has indeed been estimated by the European Commission that TTIP would lead to an increase in EU output of 0.4% for finance and 0.83% for insurance and a more substantial increase in EU trade of 4.18% in exports and 2.61% in imports in finance and of 4.15% in exports and 2.55% in imports for insurance.[46]

Finally, outside the framework of TTIP negotiations, in January 2012, the EU and the US agreed to launch the so-called Insurance Project as a new institutionalised dialogue between officials from the US Federal Insurance Office (established by the Dodd–Frank Act) and the National Association of Insurance Commissioners, on the one side, and the EU's European Insurance and Occupational Pensions Authority and the European Commission, on the other.[47] The main goal of the Project is to deepen mutual understanding of the respective regulatory regimes in search of greater convergence and compatibility. The Project focuses on the following themes: professional secrecy and confidentiality; group supervision; solvency and capital requirements; reinsurance and collateral requirements; supervisory reporting, data collection and analysis and disclosure; supervisory peer reviews; independent third party reviews

[41]Testimony of Ms Susan Schmidt Bies before the Committee on Financial Services, US House of Representatives, Washington DC, 13 May 2004, https://www.federalreserve.gov/boarddocs/testimony/2004/20040513/default.htm.

[42]Shaffer (2016), pp. 403 and 407.

[43]Lovett (2011), p. 43.

[44]Mügge (2014), pp. 316 and 320.

[45]European Commission, 'SIA in Support of the Negotiations on a Transatlantic Trade and Investment Partnership (TTIP) – Final Report', March 2017, at 408. See also: Atlantic Council, Report 'The Danger of Divergence: Transatlantic Financial Reform & the G20 Agenda' (prepared by Chris Brummer), December 2013; Pugliese (2016), p. 285.

[46]ibid 460.

[47]European Insurance and Occupational Pensions Authority (2012).

and supervisory on-site inspections. In July 2014, the Project's Steering Committee adopted a way forward and confirmed its commitment to cooperation.

5 Stakeholders as Institutional Actors

As part of a vivid wider public and political debate on TTIP,[48] the negotiation process has witnessed a very high level of mobilisation among civil society and business organisations.[49] The most active among them have been groups focused on manufacturing, environment and consumer protection, and services (particularly financial services)—with business and industry organisations being largely in favour of TTIP and the civil society against it.[50] Their coordinated collective pronouncement by means of joint statements on common regulatory and legislative goals effectively casts these organisations as institutional actors.

On the side of business, numerous financial service associations have been advocating greater regulatory cooperation in this industry because diverging EU and US policies and regulation could have 'catastrophic consequences on the global scale'.[51] The Transatlantic Business Council, established on 1 January 2013 by a merger between the Transatlantic Business Dialogue and the Euro-American Business Council, put forward a detailed set of TTIP priorities for financial services. Among other things, they called for a formalisation of regulatory cooperation and an upstream 'structured legislators' dialogue' with a view to avoiding the adoption of extraterritorial measures.[52] Action was also taken by the Business Roundtable, an association of CEOs of leading US companies (among which finance companies), which sent letters to the House of Representatives and Senate committees in charge of financial services and banking.[53] The US Securities Industry and Financial Markets Association (SIFMA) and its European counterpart, Association for Financial Markets in Europe (AFME), also issued statements lobbying in favour of removing regulatory barriers for financial firms.[54]

[48]Garcia-Duran and Eliasson (2017), p. 23; See also Fahey (2016).

[49]Yiannibas (2017), pp. 343–360 at 350ff. See more general accounts in: Bignami and Charnovitz (2001), pp. 255–284; von Bülow (2010).

[50]Young (2016), pp. 345 and 348–349.

[51]Bickel (2015), pp. 557 and 586.

[52]Transatlantic Business Council (2016).

[53]Business Roundtable, Letters of 3 June 2013 (identical contents), http://businessroundtable.org/resources/letter-to-house-committees-on-financial-services-and-us-eu-trade-talks and http://businessroundtable.org/resources/letter-to-key-senate-committees-on-financial-services-and-us-eu-trade.

[54]See e.g. 'SIFMA and AFME Statement on TTIP Negotiations' of 19 February 2014 (https://www.afme.eu/globalassets/downloads/press-releases/2014/2-19-14-statement-sifma-afme-on-ttip.pdf) and of 13 June 2014 (https://www.afme.eu/globalassets/downloads/press-releases/2014/6-13-14-statement-sifma-afme-on-ttip.pdf).

The apex of business stakeholder engagement was the creation on 7 June 2016 of a Transatlantic Financial Regulatory Coherence Coalition, which replaced and upgraded the EU-US Coalition on Financial Regulation, which had been set up in 2005. This network comprises 14 trade associations and business groups.[55] This Coalition sees TTIP as key to heading off conflicts, reducing differences and complexity and increasing the efficiency of cross-border regulations. However, while Coalition members support the institutionalisation of transatlantic financial regulatory dialogues (currently the Forum), they warn about its limitations: 'regulatory dialogues do not enjoy the structural safeguards that inclusion in the TTIP agreement could bring, especially when tensions arise and protectionist pressures are high'.[56]

Yet not everyone was delighted with the idea of enhanced transatlantic financial regulatory cooperation. Contrary to the preferences of the industry, the civil society was opposed to it. Namely, in October 2014, no less than 28 EU and 24 US civil society organisations representing environmental, consumer, agricultural, food safety and good governance interests sent an open letter to the then US Trade Representative, Michael Froman, and the then EU Trade Commissioner, Karel de Gucht.[57] They held that financial regulations cannot be treated as barriers to trade and that including financial services in TTIP would encroach on the legitimate outcomes of national democratic processes. They were particularly concerned that tighter regulatory cooperation in financial services would escape parliamentary and public scrutiny, give a greater say to financial firms to influence policy shaping and reduce both parties' autonomy to regulate in pursuit of the public interest. The opposite reactions of the business stakeholders and the civil society demonstrate the complexities of trade negotiations, the diversity of the interests involved and the sensitivities that can affect the nature and fate of institutionalised bilateral venues for regulatory cooperation.

6 Concluding Remarks

From the perspective of international financial regulation, if TTIP ever sees the light of day, it has rightly been pointed out that it would only represent 'a relatively small part, of the rich and complex economic relationship' between the EU and the US.[58] This agreement would nevertheless bring new developments in transatlantic relations in

[55]These are: Association for Financial Markets in Europe, American Chamber of Commerce to the EU, BritishAmerican Business (UK), Federal Association of Securities Trading Firms (Germany), European Banking Federation, European Services Forum, Financial Services Forum (US), Financial Services Roundtable (US), Institute of International Bankers (US), Institute of International Finance, The City UK, Trans-Atlantic Business Council, and the US Chamber of Commerce.

[56]See: http://www.transatlanticbusiness.org/wp-content/uploads/2016/06/Transatlantic-Coalition-on-financial-services-7-June.pdf.

[57]See: https://www.citizen.org/sites/default/files/letter-tafta-financial-regulations.pdf.

[58]Johnson and Schott (2013), p. 10.

terms of institutionalisation. This chapter confirms that in the area of financial regulatory cooperation, institutionalisation is manifested in a threefold manner.[59]

The first facet of institutionalisation refers to interdependence. Tight business and economic links between EU and US banks and other financial firms create strong incentives for establishing closer working relationships. This pushes regulatory institutions to enter into discussions on how the rules they adopt impact the bilateral partnership and how their optimisation and adaptation could yield mutual benefits. Interdependence thus stimulates *rule self-reflection*.

The second facet is implementation. As primary loci for internalising financial standards, institutional processes carry the responsibility for enforcing mutual and international agreements on both market liberalisation and market regulation. Institutionalisation thereby promotes *rule obedience*.

The third facet relates to governance. The need for perpetuating and entrenching regulatory practices that have the potential to accelerate and expand transatlantic business engenders pressures for the institutionalisation of practices, methodologies and formats for dialogue. Institutionalisation operates here as a vehicle for *rule management.*

All of the three facets are present in transatlantic relations, and the financial crisis has emphasised the importance of giving cooperation appropriate institutional channels.[60] The institutionalisation of collaborative regulatory frameworks that could be performed through TTIP would provide a context in which the narrowing of regulatory gaps and disharmonies could take place while at the same time protecting autonomous financial regulation in sensitive matters. This could then lead to greater interoperability of financial markets and reduced market fragmentation.[61]

However, while the refurbished Joint EU–US Financial Regulatory Forum may provide a platform for addressing extraterritoriality and regulatory and legislative spillovers, it is unlikely to change the ethos of the existing cooperative mechanisms on its own. TTIP would not radically transform the institutional quality of the transatlantic partnership. If one can talk of a transatlantic pooling of powers, then this would continue to be less a matter of decision-making and more one of exchange and policy discourse. But this would move the evolution of the transatlantic alliance towards deeper integration. Transatlantic relations would still not be able to be characterised by 'deep institutionalisation',[62] but they would be by an incremental institutionalisation. As a consequence, a well-balanced and inclusive process of the institutionalisation of transatlantic regulatory cooperation could increase the effectiveness of EU–US cooperation, alleviate fears of democratic divestment and enhance public participation in the creation of rules and policies.[63]

[59] Alexander et al. (2006), pp. 647 and 656.

[60] See the call for the establishment of a wider international administrative body for financial supervision in: Pan (2010), p. 243.

[61] See the transatlantic effects of uncoordinated policy responses in: Pagliari (2013), p. 391.

[62] See to this end Pollack (2005), pp. 899 and 902.

[63] See on the importance of balance between autonomy and coordination in: Parker (2016), pp. 1 and 5.

This chapter has demonstrated that institutionalisation is one of the potent consequences of the advancement of transatlantic cooperation in general and in financial matters in particular. This conclusion is rooted in the extension of the competences entrusted to transnational governance structures and the plurality and enmeshment of the institutional actors involved. The latter range from official institutions, vested with formal powers flowing from the EU and US legal systems, to a set of informal actors, which include stakeholders in the shape of various business organisations and lobby groups. Whether definitively agreed or not, TTIP already epitomises the tendency to address common challenges through enhanced forms of dialogue understood as a 'regularised and structured process of non-institutional lawmaking'.[64]

Accordingly, the overall manner in which TTIP approaches financial regulation fits the paradigm of post-national rule-making.[65] Regulatory and business actors come together in the transnational realm to exercise 'soft' powers, which may have a bearing on the legal outcomes in the 'home' legal systems. The establishment of an Investment Court System, although it would not apply to financial services, may plant a seed towards an even higher capacity for transatlantic enforcement. Further questions refer to potential democracy, transparency and human rights deficits,[66] other actors' access to the new Financial Regulatory Forum and the way TTIP would shape global financial regulation.

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[64] Fahey, introductory chapter in this volume.

[65] See Fahey (2015).

[66] See e.g. Petersmann (2016), p. 449.

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Something Borrowed, Something New: The TTIP Investment Court: How to Fit Old Procedures into New Institutional Design

Hannes Lenk

1 Introduction

In 1965, Wolfgang Friedman observed that international law was undergoing significant structural changes. From an instrument for the purpose of coordinating the coexistence of sovereign states—predominantly through the regulation of diplomatic relations—international law was becoming a system of cooperation amongst states.[1] Indeed, no historical period has seen more international cooperation than the post-war era, and the proliferation of international institutions is perhaps the most evident manifestation of this development. The European Union (EU) may serve as an obvious example in this respect. Born out of the desire to establish long-lasting peace in Europe through economic, political and social integration, the EU has become a strong international actor in its own right. However, institutionalisation does not come naturally to sovereign states; it should not, therefore, be mistaken for a universally welcome corollary to an increased appetite for international cooperation on a wide range of matters.

Paradigmatic for international trade is in this regard the General Agreement on Tariffs and Trade (GATT). Put in its historical context, the GATT represents not only the successful multilateralisation of trade regulation but is reminiscent of the failed attempt to establish the International Trade Organization.[2] To this extent it is

[1] Friedmann (1964).

[2] The failure of the ITO is in large part ascribed US omission to ratify its Charter. However, it illustrates a larger point of resistance against international institutionalization. Toye observes that, 'Protectionists, of course, felt that (some forms of) state intervention in foreign trade matters was acceptable, but saw any kind of international trade organization as an incipient "superstate" that would infringe American national sovereignty. What they had in common with free trade enemies

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E. Fahey (ed.), *Institutionalisation beyond the Nation State*, Studies in European Economic Law and Regulation 10, https://doi.org/10.1007/978-3-319-50221-2_9

emblematic of a general reluctance to international institution building and commitments to deeper economic integration. Indeed, the key to successful transnational institution building, at least with respect to decision-making or legislative-type bodies, is the partial surrender of sovereign power to the institution thus created. This has been a continuous struggle even in the context of the EU.[3] Nonetheless, over time, a general tendency to reinforce international cooperative efforts through international institution building can certainly be observed.[4] Even the GATT was ultimately dressed in the institutional cloth of the World Trade Organization (WTO).

EU–US relations, on the other hand, though always strong partners in international cooperation, have historically not always been considered to be a token of deeper integration and transnational institutionalisation.[5] However, strategical realignments in EU foreign trade and investment policy, together with significant constitutional reforms in the EU and an opportune political environment, have provided impetus for new developments. In spite of being a strong supporter of multilateralism, the EU—much in light of the stalemate that characterises the WTO Doha round negotiations—lifted in 2007 its seven-year moratorium on free trade agreements, refocusing foreign trade strategy on the strengthening of bilateral trade relations.[6] Around the same time, the Lisbon Treaty endowed the EU with broader external competencies to negotiate and conclude trade and investment agreements with third countries. The significance of this shift in treaty-making power from the Member States to the EU was recently confirmed by the Court of Justice of the European Union.[7] In Opinion 2/15 on the allocation of competences for the conclusion of the EU–Singapore free trade agreement, the Court affirmed that much of the broad and comprehensive agreement fell under exclusive EU competence, with the exception of portfolio investment, which remains within the ambit of shared competences.[8] Although the Court's reasoning allows for many relevant and intriguing

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of the ITO was support for domestic free enterprise, to which—both groups of opponents claimed—the Havana Charter posed a threat.' (footnotes omitted) Toye (2012), p. 97.

[3]On the dialectic relationship of domestic courts of Member States and the Court of Justice of the European Union, and domestic political reservations from an institutional perspective see Stein (1981), pp. 1–27.

[4]Amongst international judicial bodies for instance the International Court of Justice, the WTO Dispute Settlement Body, the Court of Justice of the European Union, and others.

[5]In a review of Stein and Hay's 'Law and Institutions in the Atlantic Area', Angelo observes: 'The emergent cross-Atlantic organizations of the 1950s are suffering from internal attacks. To the casual observer there appears to be more conflict than law in Atlantic institutions. Hence earlier hopes for an "Atlantic Community" or even a "Partnership" seem to be an ever-receding dream. But in considering the alternatives, many serious citizens may conclude that in preserving and rebuilding Western unity lies one of the principal hopes for establishing a just and peaceful world.' Angelo (2017), p. 923.

[6]Commission Staff Working Document, Report on Progress Achieved on the Global Europe Strategy, 2006–2010, 3SEC(2010) 1268/2, http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146941.pdf (accessed 16 September 2015), see also Rigod (2012), pp. 277, 287–288.

[7]Opinion 2/15, *Free Trade Agreement between the EU and Singapore*, ECLI:EU:C:2017:376.

[8]Ibid, para. 305.

conclusions to be drawn, this paper will largely avoid a detailed discussion of the case. Suffice it to note for the purpose of the present analysis that the judgment has a profound impact on the negotiation, signing and conclusion of the EU–US Transatlantic Trade and Investment Partnership (TTIP) agreement. Indeed, TTIP, if successful, is widely hailed as redefining transatlantic trade and investment relations; reinforcing regulatory and political cooperation; setting new standards for the role of trade agreements in protecting sustainable development, public policy, as well as environmental objectives; and modernising investment protection. In terms of formalisation of norms, processes and routines through institutions with differentiated functions, TTIP therefore represents a significant step towards deeper transatlantic integration and institutionalisation.

Against this backdrop, the current paper is focusing in particular on the proposal of the EU to establish a bilateral TTIP investment court.[9] Although investor-state dispute settlement (ISDS) is of limited relevance in the EU-US context, this permanent body would send an important signal for long-awaited reform of ISDS and carries significance beyond transatlantic relations. Most notably, the bilateral investment court system (ICS), which is now integral to EU foreign investment policy, is only a stepping stone towards the establishment of a multilateral investment court.[10] Indeed, the EU is not the first actor to propose such an institutional reform in an attempt to address the abrasive criticism, which investor-state arbitration has received in recent years. At one point or another during the past two decades, the issue was—albeit unsuccessfully—introduced in a number of international fora. The prospects of a multilateral investment court are discussed in more detail by Catharine Titi in this volume. Section 2 of the present paper will, however, shed some light on the historical and political context of these international developments, which certainly provides a relevant background for understanding the ICS. Although, in the context of EU foreign trade and investment policy, it was the TTIP negotiations, and in particular the Commission's transparency initiative in this respect,[11] that presented the stage for the ICS's debut, other agreements featuring this procedural novelty have progressed more rapidly and are now already close to provisional application. Both the EU–Vietnam FTA and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada serve, therefore, as important reference points for the present discussion.

At a symposium on 'Law and the Information Society' at Fordham University School of Law in 2005, Prof. Gélinas presented the idea of dispute resolution as a driver for transnational institutionalisation.[12] At the example of the WTO, he

[9]Textual proposal for the Chapter on Trade in Services, Investment and E-Commerce in TTIP of November 12, 2015, Section 3, Sub-Section 5 [hereinafter referred to as 'TTIP proposal'].

[10]EU Commission, Directorate General for Trade, Concept Paper, 'Investment in TTIP and beyond—the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', 2015, pt. V; and the EU Commission Communication, 'Trade for all, Towards a more responsible trade and investment policy', 14 October 2015, p. 22.

[11]Commission Press Release of 7 January 2015, trade.ec.europa.eu/doclib/press/index.cfm?id=1231.

[12]Later published as, Gélinas (2005), pp. 489–504.

demonstrated how the establishment of independent judicial institutions—in this case the WTO dispute settlement body—can overcome the aversion of states to create transnational decision-making bodies. Accordingly, the conventional intergovernmental decision-making structure of the WTO is compensated by an efficient dispute settlement institution that is operating 'through the soft conception of precedent which is arguably inherent to legal reasoning'.[13] This idea most adequately describes the ambitions underlying the present study. In other words, it is concerned with the question of whether the ICS has the potential to positively contribute to the institutionalisation of transatlantic investment relations. It must be acknowledged that the ICS faces a conundrum in this respect. Other than in the context of the multilateral trading system, foreign investment protection is highly criticised for its dispute resolution mechanism. Thus, as far as the investment chapters in EU trade and investment agreements are concerned, it is ISDS that has received most criticism for intruding the domestic regulatory policy space, which Gélinas has identified as the source for the general resistance to transnational institutionalisation.[14] Investor-state tribunals are widely considered as giving voice to the broad and generally phrased substantive standards of investment protection that allow investors to challenge regulatory actions and legitimate public policy decisions outside the domestic judicial system. Decision-making bodies, i.e. bilateral trade committees, on the other hand, have thus far largely escaped the scrutiny of scholars and civic discourse.

In conclusion, this paper argues that although the creation of a TTIP investment court provides impetus for further transatlantic and multilateral institutionalisation in the area of foreign investment regulation, the legally, institutionally and politically constrained context, as well as the polarised civic discussion, is likely to impose severe barriers on its successful implementation.

2 Reforming Investor-State Dispute Settlement: A History of Failed Attempts

2.1 The Historical Context

Procedural reform proposals for ISDS have already been discussed from time to time in different institutional settings, commonly focusing on efforts to multilateralise ISDS, replace the ad hoc commercial dispute resolution model with a permanent—judicial—body and (or) establish an appellate mechanism for the review of investment awards. These efforts, thus, respond to criticism over what is widely perceived

[13] *Ibid*, p. 503.
[14] *Ibid*, p. 490.

to be a legitimacy crisis but more generally addresses above all incoherence across arbitral awards and their profound effect on public budgets.[15] As such, the ambitious effort of the OECD to negotiate the Multilateral Agreement on Investment (MAI) is well remembered, not least for its breakdown in 1998.[16] During the negotiations, which addressed both substantive and procedural aspects, the idea of a permanent investment tribunal featuring an appeals mechanism was indeed raised but swiftly abandoned—facing opposition by the majority of delegations.[17] Another encouraging endeavour to multilateralise investment protection was inherent in the idea of extending the WTO framework to cover trade and investment. After all, the link between trade liberalisation and foreign direct investment has long been acknowledged.[18] Incapable of reaching consensus on the matter, the item was ultimately dropped from the WTO agenda in 2003 before dispute settlement could be addressed.[19]

Shortly thereafter, the International Centre for Settlement of Investment Disputes (ICSID) circulated a discussion paper with reform proposals to the ICSID Regulations and Rules, as well as its Additional Facility Rules.[20] Amongst other things, the ICSID Secretariat suggested the establishment of an appeals facility with an extensive scope of application.[21] Accordingly, the ICSID appeals facility was designed not only to review ICSID awards but also awards rendered under UNCITRAL and other arbitration rules as long as the investment treaty, as the basis for its jurisdiction, expressly endorsed the appeals procedure.[22] ICSID provides a permanent institutional framework for investor-state arbitration and, with 153 Contracting States, is the closest thing to a multilateral solution for ISDS that is currently in place. The well-established role of ICSID in investment arbitration made this a particularly promising attempt to ISDS reform on a global scale. However, with the majority of

[15]United Nations Conference on Trade and Development, 'World Investment Report 2015: Reforming International Investment Governance', New York, p. 150; it is generally suggested that an appeals mechanism would enhance credibility, legitimacy, coherence and foreseeability of the ISDS system, although it was also argued that an agreement-centric permanent court system risks increasing already existing discrepancies in awards, see Schwieder (2016), p. 178.

[16]Amarasinha and Kokott (2008), p. 127.

[17]Geiger (2002), pp. 94, 106.

[18]It is noteworthy that, despite the heavy focus on trade liberalization, the WTO has long acknowledged a link between the regulation of foreign investments and trade distortion. Efforts to bring foreign direct investment under the auspice of the WTO has, however, been of limited success, see Amarasinha and Kokott (2008), p. 125.

[19]*Ibid*, pp. 128–129; it should be noted that opposition against the negotiation of multilateral rules on investment within the WTO framework were already voiced in 1999 at the Seattle Ministerial Meeting, see Muchlinski (2000), pp. 1033–1053.

[20]ICSID Secretariat Discussion Paper, *Possible improvements of the framework for ICSID arbitration*, October 2004.

[21]Annex to the ICSID Secretariat Discussion Paper, *Possible improvements*, para. 7.

[22]Ibid, paras. 2–3.

delegations considering the initiative to be premature, it remained unsupported and was indefinitely shelved in 2005.[23]

The lack of progress on the multilateral level prompted a few states to introduce programmatic treaty language to the effect of committing to the establishment of treaty-centred appeals mechanisms in their BITs and model BITs.[24] Certain regional agreements such as the Trans-Pacific Partnership Agreement have adopted similar provisions.[25] Lacking any signs of implementation, however, these efforts can hardly be understood as concrete commitments rather than political 'declarations of intent'[26] and demonstrate clearly the overall unwillingness to further institutionalise transnational investment protection regimes in spite of an evident desire to push forward with procedural ISDS reforms.

2.2 The Political Context

Albeit a great many factors, which contributed to the failure of the MAI, the breakdown of the negotiations is in large part attributed the hostile negotiating environment. Despite initial optimism, the MAI addressed issues that were inherently unattractive for OECD countries at the time. Whereas BITs used to be conceived of by Western governments as a means to protect their national investors from arbitrariness in less-developed countries, this Western-centric paradigm shifted abruptly in the wake of the *Ethyl*[27] NAFTA arbitration. Suddenly, these governments feared their regulatory policy choices to be challenged by foreign investors from traditionally capital-importing countries,[28] rendering the timing for the introduction of ISDS provisions in the OECD MAI proposal particularly unfortunate. Indeed, the political appetite for extrapolating the existing regime of investment protection onto a multilateral level vanished. Moreover, with the initiation of the first NAFTA disputes in 1997, non-governmental organisations woke up to the potential of ISDS as a procedural avenue for aggrieved foreign investors against domestic policy choices and realised the impact that this might have on sustainable development, labour conditions and environmental protection, adding strong opposition

[23]Working Paper of the ICSID Secretariat, *Suggested changes to the ICSID Rules and Regulations*, May 2005; see also Parra (2014), p. 1.

[24]See, for instance, Korea-New Zealand FTA of 2015, Art. 10.26.9; Canada-Korea FTA of 2014, Annex 8-E; Australia-China FTA of 2014, Art. 9.23; Australia-Korea BIT of 2014, Art. 11.20.13 and Annex 11-E; Uruguay-US BIT of 2005, Art. 28(10); Dominican Republic-Central America-United States FTA of 2004, Art. 10.20(10); Chile-US FTA of 2004, Art. 10.19(10); Singapore-US FTA of 2003, Art15.19(10); see also US Model BIT of 2004, Art. 28(10); and US Model BIT of 2012, Art. 28(10).

[25]See, for instance, Trans-Pacific Partnership Agreement, Article 9.22(11).

[26]Kaufmann-Kohler and Potestà (2016), pp. 22–23.

[27]*Ethyl Corporation* v. *Canada*, UNCITRAL, Award on Jurisdiction of 24 June 1998.

[28]Geiger (2002), p. 101.

from civil society to an already politically unfavourable negotiating environment.[29] The failure of the ICSID appeals facility, which would have further reinforced ISDS as a transnational institution, is perhaps also best understood in light of the growing political sensitivity of investment protection and ISDS during that period of time.

Another relevant aspect causing the MAI negotiations to run aground was the fact that developing countries were never adequately represented during the negotiation process. Although the MAI was clearly designed as a multilateral instrument of universal application, the process steamrolled the interests of developing countries.[30] Indeed, the importance of developing countries, whose opposition proved equally fatal to the WTO initiative,[31] appears to have generally been underestimated. Future actions to advance a procedural ISDS reform should, therefore, build upon the participation of developing countries already from an early stage.

Unable to forge multilateral consensus, states turned to address rising criticism of traditional ISDS bilaterally. An important step in this respect constitutes the US Trade Promotion Authority Act of 2002, which provided political impetus for the inclusion of programmatic treaty language to the effect of promising the establishment of bilateral appeals mechanisms in all subsequent US BITs and FTAs with ISDS provisions.[32] However, in light of the fading enthusiasm to push for an appeals facility within ICSID and the political commotion in the aftermaths of the early wave of NAFTA disputes against Western governments, the desire for further institutionalisation of investment relations proved to be short-lived.[33]

The political sentiment surrounding investment protection and, more particularly, ISDS certainly provides much insight into the failures of the above initiatives. But it also allows a glimpse at the prospects of the bilateral ICS proposal of the EU. It is in this respect noteworthy that TTIP, as opposed to CETA or the EU–Vietnam FTA with significantly more concrete ISDS provisions, served as a catalyst for civil society involvement. Other agreements received only little or no media coverage, thus passing for a long time under the radar of public attention. The ICS, on the other hand, is by and large a consequence of civil society engagement during and after the

[29] *Ibid*, p. 105; Muchlinski (2000), p. 1046.

[30] Geiger (2002), p. 98.

[31] Power dynamics in the context of the ITO, the precursor of the WTO, are best explained by a statement of the US negotiator of the ITO Charter in 1947, Clair Wilcox: 'This Charter is very one-sided. It will impose restraints and limitations on one side and leave almost absolute freedom on the other side. And the way it is one-sided is this: It imposes on most of the other countries in the world limitations on their freedom to do a lot of things they have been doing, are doing, want to do, otherwise will do, without this Charter. Now these limitations are also imposed on us, but they are things we haven't done, aren't doing, and don't intend to do. And the Charter, as far as I can see, is not going to prevent us from doing anything that we are doing or intend to do or want to do.' See Toye (2012), p. 97.

[32] The Act effectively inserted as a principal trade negotiating objective, to provide for 'an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements'; see Trade Promotion Authority Act of 2002, P.L. 107–210, sec 2102(b)(3)(g)(iv), 19 U.S.C § 3802(b)(3)(G)(iv).

[33] Parra (2014), p. 9.

public consultation on TTIP. It may be true that post-Lisbon, EU foreign investment policy emphasised the need for—and even committed to—an ISDS reform. It was not, however, until the European Parliament, with its resolution of July 2015, increased pressure on the Commission to replace traditional ISDS provisions in EU trade and investment agreements.[34] In fact, the EU–Singapore FTA in its current version still features traditional investor-state arbitration, and the ICS in CETA is only a result of the legal revision of the otherwise already finalised agreement.[35] Thus, whilst the prospects of a successful conclusion of TTIP with an ICS are uncertain in the current political climate, we probably would not have seen that proposal to prosper in other EU agreements without civil society engagement in TTIP. This is not to say that the involvement of civil society from an early stage of the process has led to a result that all actors universally embrace. On the contrary, investment protection and ISDS largely remain politically sensitive topics, with tangible resistance to its further institutionalisation. This is best illustrated by the difficulties in the Belgian parliament in the days leading up to the signing and conclusion of CETA. It has nonetheless fundamentally changed the process of regulating investment protection and ISDS in EU trade and investment agreements.

However, Gélinas observes the important role of available information for the legitimacy of transnational judicial institutions. Accordingly, '[. . .] information has instrumental value in that it enables civil society to participate in the decision-making process; it enables civil society to provide valid, well-informed input to the process. The information, in other words, can only realize its full value if private parties are somehow allowed into the procedure.'[36] As far as EU foreign investment policy is concerned, civil society involvement appears to have contributed to a renewed political impetus that commits more deeply to a procedural and institutional reform of ISDS bilaterally.

The ICS initiative must also be considered within the context of broader ambitions to establish a multilateral investment court, an endeavour that was given new life not only within the EU foreign trade and investment policy framework. Article 12 of the TTIP proposal reads:

> *Upon the entry into force* between the Parties of an international agreement providing for a multilateral investment tribunal *and/or* a multilateral appellate mechanism *applicable to disputes under this Agreement*, the relevant parts of this section *shall cease to apply*. The [] Committee may adopt a decision specifying any necessary transitional arrangement (emphasis added).

[34]European Parliament, Plenary 8 July 2015, Minutes, pt. 4.1.

[35]EU Commission Press Release, 'CETA: EU and Canada agree on new approach on investment in trade agreement', 29 February 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.

[36]Gélinas (2005), pp. 502–503.

The drafting is prudent compared to similar provisions in CETA[37] and the EU–Vietnam FTA,[38] which provide strong political commitments to engage in negotiations over a multilateral investment court. It nonetheless demonstrates the willingness to work towards not only transatlantic but also broader international institutionalisation. More importantly, it provides an unconditional commitment to accept the jurisdiction of the multilateral investment court, whatever its form. This multilateralisation clause, thus, portrays the TTIP investment court as a transitional arrangement grappling with the need for ISDS reform in a transatlantic context, until a multilateral consensus emerges. Whatever is the success of TTIP, therefore, the EU ICS sets an example for working with—as opposed to against—civil society resistance and towards international institutionalisation of ISDS.

3 Main Features of the Investment Court System

3.1 Institutional Design

The two major innovations of the ICS compared with traditional ISDS provisions are found in its institutional structure. First, the two-tier judicial system features, in addition to a First Instance Tribunal, a permanent appellate body. Historically, as we have seen, this issue was rather controversial. Second, the ICS removes any direct influence by the investor and the responding state over the composition of the panel hearing in individual dispute. This is at odds with the principle of party autonomy, which is fundamental to the idea of arbitration as a private means of dispute resolution.[39] It is noteworthy that the Contracting Parties retain some indirect influence over the composition of panels through the appointment of members[40] to the tribunals. Both the First Instance Tribunal and the Appeals Tribunal evenly represent the Contracting Parties, with one third of members being affiliated to each of them.[41] The remaining one third of members are 'third country nationals', i.e. members without affiliation to either Contracting Party. Considering that the

[37] Article 8.29 CETA.

[38] Article 15, EU-Vietnam FTA.

[39] Pantaleo (2016a), pp. 80–81; he further points out that points out that the lack of party autonomy in the ICS system is likely to render ICS awards judicial decisions rather than arbitral awards in accordance with Art. 1 of the New York Convention, pp. 85–87.

[40] Amongst the EU-Vietnam FTA, CETA and the TTIP textual proposal, it is only the latter that refers to members of the tribunal as 'judges'. Notably, whereas Art. 9 of the textual proposal for the Chapter on Trade in Services, Investment and E-Commerce in TTIP of November 12, 2015, Section 3, Sub-Section 5 [hereinafter referred to as 'TTIP proposal'] refers to Judges on the Tribunal, Art. 10 on the Appeal Tribunal refers to Members of the Appeal Tribunal.

[41] National affiliation of members is in this respect a matter of appointment, rather than nationality, Footnote 25 and 26, EU-Vietnam FTA; Footnote 9, CETA, notably, CETA does not feature a similar provision with regards to the Members on the Appeals Tribunal.

appointment of 'national' as well as 'third country national' members to the tribunals requires a decision in the bilateral trade committee, which in the case of Vietnam and CETA is taken by mutual consent,[42] risks politicisation of the dispute resolution process, something ISDS provisions where traditionally designed to prevent.[43] Whilst these institutional features are meant to strengthen the judicial character of the ICS and protect the independence of members, it paradoxically places significant powers into the hands of the decision-making treaty body. As a judicial institution, the ICS is not therefore a means of breaking resistance to the creation of transnational decision-making bodies. Rather, strong decision-making bodies are established to control the judicial process of the ICS.

3.2 Procedural Innovations

Despite the far-reaching institutional innovations, the ICS is envisaged to operate in much the same way as tribunals in investment arbitration. Lacking the relevant infrastructure, the task of administering the caseload was handed over to the ICSID Secretariat.[44] Likewise, ICS panels operate under the ICSID rules, ICSID Additional Facility or UNCITRAL arbitration rules. Two particular procedural features deserve, however, more discussion. First, with the EU becoming an actor in ISDS, the otherwise formalistic task of determining the respondent to investment dispute becomes significantly more complex. Not only is the EU as an international organisation not subject to the ILC Articles on Responsibility of States for Internationally Wrongful Acts; the problem also has an internal dimension and, thus, requires a determination of the division of competences between the EU and its Member States.[45] The investor, before initiating proceedings before the ICS, must therefore seek a decision from the European Commission,[46] which will determine the respondent in accordance with the relevant internal EU rules.[47] This is particularly relevant given that EU agreements featuring comprehensive chapters on investment protection and ISDS are likely to be concluded as 'mixed' agreements, i.e. signed, concluded and ratified by all Member States in addition to the EU.[48] This seemingly simple procedural solution is, of course, flawed in many respects.[49]

[42]Chapter 17, Article 5 EU-Vietnam FTA; Article 26.3 CETA.

[43]Pantaleo (2016a), p. 82; Schwieder (2016).

[44]Article 12(18) EU-Vietnam FTA; Article 8.27(6) CETA.

[45]Lenk (2016), pp. 1–23; for a general discussion on the role normative control in the attribution of international responsibility to the EU, see Casteleiro (2016).

[46]Article 6(2) EU-Vietnam FTA; Article 8.21 CETA.

[47]European Parliament and Council Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L257/121.

[48]Opinion 2/15, *op cit.*

[49]The system of attribution in international law, following the method proposed in the Draft Articles on International Responsibility of International Organisations, deviates from the model of

It does, however, somewhat shield investors from the external effects of the uncertainty that is inherent to rules on the division of competences.

The second procedural novelty is connected to the introduction of the Appeals Tribunal. Investment awards have always been subject to some sort of review. The ICSID Convention, for instance, provides an internal procedure for the annulment of ICSID awards.[50] The validity of non-ICSID awards can be challenged before domestic courts at the place of arbitration and in accordance with the applicable domestic arbitration law.[51] Within the framework of the ICS, however, both parties to the dispute have for the first time the opportunity to substantively review the award on grounds including, amongst others, the manifestly wrongful interpretation of the applicable law, as well as the wrongful appreciation of facts.[52] Unlike procedures before the domestic courts, which attempt to set aside awards after they have become final on grounds concerning, above all, procedural impropriety, the Appeals Tribunal of the TTIP investment court would be empowered to change the outcome of the arbitration proceedings and, thus, the award before it becomes final. The FTA with Vietnam, for instance, endows the Appeals Tribunal with far-reaching competences to directly 'modify or reverse the legal findings and conclusions', unless the facts of the case require the matter to be referred back to the First Instance Tribunal.[53] The TTIP ICS, in its latest version, appeared to lack final decision-making power and provided instead for all matter to be referred back to the First Instance Tribunal.[54] In CETA, the appeals procedure is yet to be defined.

It is important to reiterate at this point that the panel is governed by ICSID or UNCITRAL arbitration rules. Whereas ICSID sets up a delocalised system that incorporates the annulment procedure—which is now inherently part of the grounds

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determining the respondent under EU agreements with third countries. This point is extensively argued elsewhere, Lenk (2016); for a view to the contrary see Pantaleo (2016b), pp. 847–860.

[50]Articles 52 and 53 ICSID are limited to improper constitution of the panel, manifest excess of power, corruption, serious departure of fundamental rules of procedure, and failure to provide reasons; reasons for setting aside an award are often limited to personal misconduct, procedural improprieties, and the lack of a valid arbitration agreement, see e.g. Section 34, Swedish Arbitration Act (SFS 1999:116).

[51]Dolzer and Schreuer (2012), pp. 300–301.

[52]Art. 28, para. 1, EU-Vietnam FTA; Art. 8.28, para. 2, CETA; Pantaleo (2016a), pp. 89–90, differentiates between a private and public purpose objective underlying appeals mechanisms and emphasizes that the broad powers to review of the Appeal Tribunal in the ICS, including the possibility to review the appreciation of facts, goes beyond what is necessary to guarantee overall credibility, legitimacy and coherence of the dispute resolution mechanism.

[53]Art. 28, para. 3, EU-Vietnam FTA; a decision of the Appeal Tribunal is considered final in accordance with Art. 29, para. 3, EU-Vietnam FTA.

[54]Titi (2017), pp. 11–12, points out that the TTIP proposal blurs the line as to whether the TTIP Appeals Tribunal is endowed with powers of final decision-making, instead the procedure envisages that matters are in all cases referred back to the Tribunal with binding and detailed instructions as to the modification or reversal of the provisional award; CETA provides no guidance on this matter as the CETA Joint Committee has yet to determine the rules of procedure for the CETA Arbitral Tribunal, see Art. 8.28, para. 7, lett. (b), CETA.

for appeal before the ICS Appeals Tribunal—into its own institutional framework (i.e., excluding domestic courts from the review process), UNCITRAL intrinsically depends on the participation of domestic courts. The ICS recognises this difference and purports that awards adopted by the ICS are generally considered to be arbitral awards for the purpose of the New York Convention,[55] unless they are adopted in accordance with the ICSID arbitration rules, in which case they are to be considered automatically enforceable ICSID awards.[56] Furthermore, the ICS appears to introduce a procedural bifurcation upon the adoption of a first instance award. Either party to the dispute may decide to appeal the award before the Appeals Tribunal. Alternatively, in the case of CETA, investors may challenge the award before the ICSID annulment committee, in case of an ICSID award, or within the domestic courts at the place of arbitration.[57] Appellate decisions are no longer subject to review.[58] In the context of the EU–Vietnam FTA, on the other hand, no awards rendered by the ICS shall be subject to review, setting aside or appeals procedures in domestic courts.[59]

In accordance with this reading, the level to which the ICS does in fact purport to withdraw the dispute settlement process from the review of national courts or, indeed, from the ICSID annulment committee varies amongst individual EU agreements. What might be construed as a transitional arrangements presents investors with procedural alternatives for judicial review of awards in CETA, which adds to the overall complexity of investment dispute settlement in an EU context but does little to institutionalise a coherent single process. The EU-Vietnam FTA imposes a mandatory appeals procedure. Likewise, CETA allows for the intellectual-conceptual differentiation between review procedures addressing procedural defects and substantive legal reviews, whereas the EU–Vietnam ICS appears to fulfil both functions.

Alternatively, in spite of the unfortunate integration of that provision into the section on the Appeals Tribunal, one may adopt a broader reading of Article 8.28(9)(b), which stipulates that 'a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section'. Indeed, it would be more in line with the approach taken in the EU–Vietnam FTA to read 'this Section' as referring not to the Appeals Tribunal, and thus appellate decisions, but to the ICS more generally. Domestic courts and the ICSID annulment committee would thus only be charged with review functions in a transitional capacity until the CETA Appellate Tribunal is fully in place. Expectations for a more profound institutionalisation could, thus, even in a transatlantic context be significantly higher.

[55] Although no such reference is made in the TTIP proposal, it is recognized both in Article 31(7) of the EU-Vietnam FTA and Article 8.41(5) CETA.

[56] See Article 31(8) EU-Vietnam FTA Article 8.41(6) CETA.

[57] Article 8.41(3) CETA.

[58] Article 8.28(9)(b) CETA.

[59] Article 10(3)(b) EU-Vietnam FTA.

4 Legal and Institutional Constraints for the ICS

4.1 International Legal Framework

It was already discussed above that the ICS appellate mechanism does little more than providing for a procedural alternative. The disputing parties are therefore faced with the choice as to review the award before it becomes final and accept that decision or challenge the first instance award in either the domestic courts or before the ICSID annulment committee. But even if the broader reading is accepted, a mandatory ICS appeals mechanism would only represent part of the story and neglect the particular international law constraints to which the ICS is, intentionally or unintentionally, exposed. Although the TTIP investment court would, indeed, establish a permanent transatlantic institution, it is not designed to replace existing procedural mechanisms. Rather, the institutional framework is integrated into a particular, already existing, legal and procedural context, the boundaries of which the ICS, nonetheless, appears to disregard. Two examples shall be discussed to illustrate this point.

First, the transposition of ICSID rules out of their established institutional context and into the institutional framework of the ICS does not occur without friction. Article 53(1) ICSID, for instance, prevents ICSID awards from being reviewed outside of its internal annulment procedure. It is, therefore, pivotal to determine the nature of an award, which the First Instance Tribunal has issued in accordance with the ICSID rules. Arguably, the ICS appeals mechanism is central to the finality of the award. Article 8.28.9 CETA, for instance, stipulates that an award is not final unless it was, successfully or unsuccessfully, appealed or appeal was forfeited. On the other hand, finality of the award is also achieved where the first instance award is neither appealed nor challenged before the ICSID annulment committee. This seems to confirm the view that even the first instance awards are covered by Article 8.41.6 CETA, which stipulates that an ICS award that was issued pursuant to ICSID arbitration rules shall qualify as an ICSID award in accordance with the ICSID Convention. The ICS appeals mechanism might therefore present an uneasy fit with provisions that are central to the ICSID rules.

Second, the CETA ICS strongly suggests that the effect of the appellate decision is a withdrawal of an award that was issued in accordance with the UNCITRAL arbitration rules from the review by domestic courts. Notably, UNCITRAL is notoriously dependent on domestic arbitration laws. Considering that arbitration laws do not generally allow Contracting Parties to an investment agreement to contract out of domestic challenges to set aside the award,[60] it has been suggested that the appellate decisions of the ICS might in fact remain subject to challenges before domestic courts. Likewise, although the ICS stipulates that awards issued in accordance with the ICSID rules shall qualify as awards under the ICSID Convention, it nonetheless removes appellate decisions from the scope of review by the

[60]Dahlquist (2017).

ICSID annulment committee. This is without prejudice to the fact that the grounds for annulment under ICSID are now incorporated into the grounds for appeal before the ICS Appeals Tribunal. If anything, it makes matters worse because it no longer justifies a functional delimitation between the ICSID annulment committee, dealing with procedural challenges, and the Appeals Tribunal, exercising substantive legal reviews. It remains furthermore questionable how—and by whom—the interplay between these two procedural and institutional frameworks will be coordinated. The little that the ICS attempts to break loose from domestic judicial oversight and established procedural frameworks for ISDS, it remains significantly constrained by the characteristics of the procedural systems it purports to integrate.

4.2 EU Legal Framework

This being said, it is not only procedural and institutional frameworks outside the EU legal order that would functionally constrain a TTIP investment court. The EU legal and institutional framework poses itself a few challenges for the ICS. These concern, amongst others, the involvement of domestic courts and their duty vis-à-vis the Court of Justice.

In order for the UNCITRAL arbitration rules to work properly, it is essential to determine the place of arbitration.[61] In fact, Article 18(1) of the UNCITRAL Arbitration Rules requires the tribunal to determine a place of arbitration if the parties fail to agree on it themselves. It appears reasonable to assume that even ICS tribunals are bound to determine a place of arbitration. It follows that disputes before the ICS are effectively delocalised when the dispute is governed by the ICSID rules but tied to a seat of arbitration whenever the UNCITRAL rules are to be applied. This raises the question as to the relationship of domestic courts and the Court of Justice where the seat of arbitration falls within the territory of an EU Member State. Generally speaking, Member State courts have the right, and are under certain circumstances obliged, to refer questions on the interpretation of EU law to the Court of Justice. This is relevant, for instance, where the award touches upon a question on the interpretation of EU law and the domestic court considers to refuse enforcement on grounds of public policy.[62] It is of course relevant to distinguish between the role of EU law in the context of agreements with third countries, where it generally enters the dispute as a matter of fact rather than a matter of law. Suffice it to emphasise for the purpose of this paper that the choice of UNCITRAL as applicable arbitration rules could, under certain circumstances, clash with the institutional structure of the EU legal order. The ICS, therefore, operates within three alternative institutional contexts: delocalised, with a seat of

[61] Articles 3(3)(g) and 18 of the UNCITRAL Arbitration Rules.

[62] C-126/97 *Eco Swiss China Time Ltd. v Benetton International NV* EU:C:1999:269; see for a discussion Komninos (1999), p. 459; Von Papp (2013), p. 1039.

arbitration inside the EU or with a seat of arbitration that is determined to fall outside the territory of the Member States. This will ultimately have a significant bearing on the functioning of the TTIP investment court and determine its relation with other institutional frameworks.

5 Transatlanticism: Yes, no, Maybe?

The election of *Donald Trump* as President of the USA has significantly changed the political climate surrounding the TTIP negotiations. During his campaign, he advanced the promise to terminate or renegotiate the majority of free trade agreements, which he considered largely unfavourable to the US. Indeed, this has become a central pillar of the Trump administration's trade policy.[63] His protectionist view on trade became painfully real when he, by executive order, pulled the US out of the Trans-Pacific Partnership (TPP) agreement in early 2017. Only recently, after threatening to terminate the North American Free Trade Agreement (NAFTA), the US initiated the process to renegotiate the agreement.[64] Internally, however, the Trump administration appears heavily divided on trade policy.[65] It is, therefore, virtually impossible to discern a clear and consistent image of US trade policy and predict the prospects for a deep and comprehensive trade agreement with the EU. Within days of his election victory, TTIP was widely considered dead. Underlying Trump's 'America First' policy is clearly the desire to negotiate—for the US most favourable—bilateral agreements with individual Member States. This, however, neglects legal relations within the EU, which is endowed with extensive exclusive international trade competences.[66] Member States are, put simply, no longer competent to negotiate free trade agreements with the US. Recent developments, on the other hand, portray much more willingness to work with the EU as a block and reflect the sentiment that a bilateral EU–US trade deal might after all be of mutual interest.[67]

[63]Presidential Executive Order Addressing Trade Agreement Violations and Abuses, 29 April 2017: 'Sec. 2. Conduct Performance Reviews. The Secretary of Commerce and the United States Trade Representative (USTR), in consultation with the Secretary of State, the Secretary of the Treasury, the Attorney General, and the Director of the Office of Trade and Manufacturing Policy, shall conduct comprehensive performance reviews of: (a) all bilateral, plurilateral, and multilateral trade agreements and investment agreements to which the United States is a party; and (b) all trade relations with countries governed by the rules of the World Trade Organization (WTO) with which the United States does not have free trade agreements but with which the United States runs significant trade deficits in goods.'

[64]Donnan and Webber (2017).

[65]Donnan and Sevastopulo (2017).

[66]In its recent Opinion 2/15 the Court of Justice of the European Union has confirmed that exclusive EU competences are much broader than traditional trade issues, including transport and trade in services. The only major reservation to deep and comprehensive trade agreements remains non-direct, i.e. portfolio, investment.

[67]Holton and Ireland (2017).

More difficult even is the attempt to ascertain the US administration's stance on foreign investment protection and ISDS. A globally broad and extensive investment protection regime might sit uncomfortably with Trump's policy to break up global supply chains. But it appears hasty to transpose his criticism regarding TPP and NAFTA into a transatlantic context. As far as ISDS is concerned, the US has currently only few BITs in place with EU Member States. Out of 11 registered cases, none has been initiated by an EU investor against the US.[68] Noteworthy is, however, that Trump remains sceptical of international courts and tribunals, for instance in the context of the WTO dispute settlement mechanism. It is, thus, unlikely that the US administration will welcome the creation of transnational judicial institutions that would ultimately subject investment disputes under TTIP to the jurisdiction of a multilateral investment court at some point in the future.

But there is more to the prospects of a deep and comprehensive transatlantic agreement than the US policy dimension. The EU certainly suffers problems of its own. The political opposition to CETA in national parliaments and the struggle to ultimately have it signed[69] illustrates the inherent shortcoming of an EU trade and investment policy built on 'mixity'. And whilst the recent Opinion 2/15 has certainly bolstered exclusive EU trade competence, it sends a clear signal that investment protection and ISDS remain politically sensitive areas of shared competence. The EU Commission has already announced that it will seek to conclude exclusive EU trade agreements in the future. The Economic Partnership Agreement with Japan no longer includes the ICS, and draft negotiating mandates for FTAs with New Zealand and Australia are limited to investment liberalization, i.e. market access and non-discrimination. Investment protection and the ICS are, therefore, likely to be pursued in stand-alone investment agreements.[70] Take into account also the vociferous criticism that TTIP has sparked from political actors, civil society and scholars, and it becomes obvious that even if TTIP is not (yet) dead, the Commission's textual proposal provides an unreliable picture of any future transatlantic trade deal. In this construct of uncertainty, the Trump administration's position on the establishment of a transatlantic investment court, and with it the prospects of the Commission's ICS proposal, remains an unknown variable.

In the wake of rising protectionism and a fierce opposition to broad trade and investment liberalisation under the current US administration, other EU trade partners have become important allies. Canada, in particular, which patiently sat through the political turmoil regarding the signature of CETA, is now campaigning together with the EU for the establishment of a multilateral investment court. Thus, whilst the ICS certainly strengthens transatlantic 'institution building' in an area with enormous potential to shape global trends, it appears now likely to see the investment

[68] According to investmentpolicyhub.unctad.org.

[69] For an overview see Von der Loo (2016).

[70] For the final draft text of the chapter on investment liberalization of the Japan—EU Economic Partnership Agreement, see http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156432.B%20Chapter%208%20Section%20B%20Investment%20Liberalization.pdf.

court become a transnational judicial institution in a transatlantic context, which is simply not including the US.

6 Conclusions

According to *Gélinas*, the success of the WTO dispute settlement lies in the balance of legitimacy derived, on the one hand, from the expectations that the actors involved in the process draw from the soft conception of precedent and, on the other, from the transparency of the process that invites the participation of third party members and civil society. Overall, this 'contributes to entrenching the institutionalization of trade law'.[71] Arbitration has a number of inherent limitations. Posner observes that 'arbitration panels do not exploit economies of scale as judicial systems do. An appellate body, for example, can correct errors, but it is never worthwhile to set up an ad hoc appellate body to review the decision of an ad hoc arbitral panel.'[72] The creation of an appeals mechanism for investor-state disputes, therefore, fits more adequately into the context of transnational judicial, rather than arbitral, institutions. The EU proposal is in this respect admirable.

A number of conclusions can be drawn from the above discussion of the ICS in the context of transatlantic adjudicative institutionalisation. First, its success will be dependent on much more aspects than merely its institutional innovations, not least individual characteristics of the members of the tribunals. After all, '[a]djudicative institutionalization entrenches the economic and social value of the specialized knowledge created and possessed by a community of experts whose interests clearly lie in further entrenchment'.[73] Also, the level of transparency in the proceedings should provide a broad range of relevant actors and civil society more generally with access to information and a means of participation in the process. Lastly, the conception of precedent adopted by the ICS and particularly the Appeals Tribunal will be relevant as this will define the role of the ICS in determining 'the type of behaviour that counts as cooperative or predatory against the background cooperative arrangements of states – through the process of reliably determining and credibly revealing states' payoffs from cooperative behaviour'[74]—and thereby contribute to the entrenchment of transatlantic investment protection.

Second, the ICS embraces a model that focuses predominantly on institutional features but relies heavily on already established procedural frameworks. The institutional and legal contexts in which these have been developed, however, appear largely to have been disregarded in the institutional design of the ICS and risk burdening it with serious functional constraints, from the perspective of both public

[71] Gélinas (2005), p. 503.
[72] Posner (2009), pp. 5, 16.
[73] Gélinas (2005), p. 501.
[74] Posner (2009), p. 17.

international law and EU law. Third, in addition to a (yet) uncertain level of withdrawal of the investment dispute settlement process from domestic courts and the ICSID annulment committee, the ICS endows the bilateral trade committees with significant interpretive powers and controlling functions. This questions the role of the ICS for adjudicative institutionalisation as means to circumvent resistance against the establishment of powerful decision-making or legislative-type institutions. Last but not least, in the current political climate, the TTIP negotiations present the least likely forum to invest in the creation of strong transnational adjudicative institutions. At the same time, it makes other transatlantic trade relations that much more valuable. It is therefore that CETA is likely to play a determining role in the implementation of the EU's ambitious foreign investment policy.

In conclusion, the ICS is in many respect an ambitious but limited effort as it must overcome particular legal, institutional and political challenges in addition to the general resistance against ISDS before it can unfold its potential and positively contribute to the adjudicative institutionalisation of transatlantic investment relations.

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Procedural Multilateralism and Multilateral Investment Court: Discussion in Light of Increased Institutionalism in Transatlantic Relations

Catharine Titi

1 Introduction

In his *History of the Peloponnesian War*, waged between the Peloponnesian League, led by Sparta, and the Delian League, led by Athens, in the last 30 years of the fifth century BCE, Thucydides wrote of the greatness of the Athenian polity. He praised Athenian citizens who were quick to devise plans and swiftly act upon them. If they succeeded in an enterprise, they considered that success was small in light of what was yet to come. And if they failed, they formed new hopes because for them, to hope was to achieve since they undertook with speed what they decided.[1] Thucydides' centuries-old narrative bears rare similarities to recent developments in the European Union's (EU's) investment policy. Strictly speaking, the EU has not *tried and failed* to incorporate arbitration in its investment treaties—some institutions, such as the Parliament, have probably never desired such a dispute settlement machinery.[2] But the Union appears to have considered the argument for arbitration to be lost and with surprising speed embarked on an alternative venture, the creation of an international investment court—first bilateral, then multilateral. And yet neither the idea of a court nor multilateralism is 'a given' in international investment

[1] Thucydides, *History of the Peloponnesian War*, Book 1.70.

[2] E.g. see European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM(2012)0335–C70155/2012–2012/0163(COD)), A7-0124/2013, 26 March 2013, Amendment 2, Justification *('It should be highlighted that it is not a necessity to include ISDS provisions in future EU investment agreements and that their inclusion should be a conscious and informed policy choice that requires political and economic justification.').*

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law. The present article will only deal with the latter issue, multilateralism and the EU's initiative for the creation of a multilateral investment court.

Recent decades have witnessed the growing malaise of multilateralism within international economic governance and an inclination for bilateralism and tailor-made solutions. The failure of the Doha Round in the World Trade Organization (WTO), resort to protectionist measures in trade and investment law and the persistently miscarried endeavours to adopt a substantive multilateral investment treaty beyond the sectoral Energy Charter Treaty (ECT)[3] are symptomatic of the faltering multilateralism in international economic relations. More recently, this malaise or crisis also starts to affect economic regionalism: a widespread and often uninformed hostility to international investment agreements (IIAs) and notably mega-regionals, the unwillingness of the current US administration to ratify the Trans-Pacific Partnership (TPP), a growing concern over the future of the North American Free Trade Agreement (NAFTA) and the uncertain fate of the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) testify to a growing scepticism vis-à-vis the world liberal order and demonstrate a profound lack of appetite for multilateralism.

And yet *procedural* multilateralism does exist in international investment law. The ICSID Convention *is* a multilateral treaty, and a recent initiative by the United Nations Commission on International Trade Law (UNCITRAL) in the transparency context, namely the Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention), is multilateral—or at least with multilateral ambition. The European Union *and* Canada are pursuing the creation of a multilateral investment court. Some limited subject-matter multilateral initiatives outside international investment law, notably in the field of international tax law, also offer inspiration in this respect. The scope of this chapter is modest. Its purpose is not to explore all the implications of pursuing negotiations on a multilateral court but to address some aspects of procedural multilateralism and limited subject-matter multilateralism, and the extent to which they can inform negotiations of a multilateral investment court. More particularly, it assesses the Mauritius Convention and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) of the Organisation for Economic Co-Operation and Development (OECD) in order to draw conclusions for the European Union's initiative for a multilateral investment court. Its emphasis is on recent developments, in light of the EU's 2017 public consultation on a multilateral reform of investment dispute resolution and the increased institutionalism in the design of the EU's investment policy. It argues that while the previously cited examples of 'retroactively' reforming thousands of existing treaties offer useful inspiration, the establishment of a multilateral investment court 'applicable' to existing IIAs, as desired by the EU, would require two instruments: a convention regulating the relationship between IIAs and the multilateral investment court and a stand-alone convention—a

[3]The habitual description of the ECT as a multilateral treaty, is not entirely accurate; the ECT is in reality a regional treaty.

statute—on the multilateral investment court. Only the first of these instruments can draw on the UNCITRAL and OECD initiatives, and this is also the focus of the present chapter.

2 Procedural Multilateralism and the Mauritius Convention on Transparency

Investment law is notorious for the failures of multilateralism. And yet recent initiatives show that procedural multilateralism is not a utopia. UNCITRAL's initiative is the most striking example. The Mauritius Convention on Transparency was adopted by UNCITRAL's General Assembly on 10 December 2014, and, as of 15 May 2017, it has already been signed by 19 countries, including Canada, Finland, France, Germany, Mauritius, Sweden, the United Kingdom and the United States. However, since October 2015, it has attracted only three new signatories: the Netherlands (May 2016), Iraq (February 2017) and Cameroon (May 2017). It is put about that Australia is also expected to sign soon. The Mauritius Convention has been ratified by three countries (Canada, Mauritius and Switzerland). Since three ratifications were needed for it to enter into force, following Switzerland's ratification on 18 April 2017, the Convention will enter into force on 18 October 2017. It is also to be noted that former US President *Barack Obama*, in December 2016, shortly before leaving office, recommended the Convention for ratification to the US Senate, highlighting that the United States has promoted transparency in investment dispute settlement and that recent US investment agreements include provisions on transparency.[4] In the ensuing paragraphs, I will consider the adoption of UNCITRAL's Mauritius Convention, in light of UNCITRAL's working methods, the Convention's content, as well as seminar aspects that may have facilitated its adoption.

2.1 UNCITRAL's Working Methods

UNCITRAL's mandate in General Assembly Resolution 2205 (XXI) includes, among others:

> [p]reparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field.[5]

[4]The White House Office of the Press Secretary, Message to the Senate – UN Convention on Transparency in Treaty-Based Investor-State Arbitration, 9 December 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/message-senate-un-convention-transparency-treaty-based-investor-state.

[5]Section II, para. 8 of General Assembly Resolution 2205 (XXI), Establishment of the United Nations Commission on International Trade Law, 1966.

The Mauritius Convention falls squarely within this mandate.

The texts are initiated, elaborated and adopted by UNCITRAL. Preparatory work on topics on UNCITRAL's work agenda is undertaken by working groups. Working groups include as members all UNCITRAL member states and hold annual or biannual sessions.[6] Participants in the elaboration of texts comprise member states of the Commission, observer states, interested international organisations and non-governmental organisations (NGOs).[7] By participating in UNCITRAL, states do not undertake any further obligations than those they have already assumed as members of the United Nations.[8] UNCITRAL decisions are generally taken by consensus rather than by voting. The rationale for this is an endeavour to 'address all concerns raised so that the final text is acceptable to all'.[9]

2.2 *The Content of the Mauritius Convention*

The Mauritius Convention on Transparency is one of several legislative texts prepared by UNCITRAL, its second instrument relating to transparency in investment dispute resolution and one of the two UNCITRAL conventions relating to arbitration and conciliation (the other one is the New York Convention). In other words, the Mauritius Convention's entry into force in October 2017 will not be the first time that the UNCITRAL 'method' will have 'worked'.

UNCITRAL's first attempt to introduce transparency in investment dispute settlement started with the adoption of its Rules on Transparency in Treaty-Based Investor-State Arbitration (Rules on Transparency). The Rules on Transparency apply to investor-state dispute settlement initiated under the UNCITRAL Arbitration Rules pursuant to an international investment agreement concluded *from* 1 April 2014 onwards, unless the parties to the treaty have agreed otherwise.[10] In investor-state dispute settlement (ISDS) proceedings initiated under the UNCITRAL Arbitration Rules pursuant to an IIA concluded *prior* to 1 April 2014, the Rules on Transparency apply if the disputing parties agree to their application with respect to a specific arbitration or if the investor's home and host states have agreed to their application after 1 April 2014.[11] The purpose of the Mauritius Convention is precisely to secure the agreement of states to make the Rules on Transparency applicable to disputes pursuant to IIAs concluded prior to 1 April 2014 (whether or not arbitration has been initiated under the UNCITRAL Arbitration Rules).[12]

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[6]UNCITRAL, *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, 2013, p. 7.

[7]See http://www.uncitral.org/uncitral/en/about/origin_faq.html.

[8]See http://www.uncitral.org/uncitral/en/about/methods_faq.html.

[9]See http://www.uncitral.org/uncitral/en/about/methods_faq.html.

[10]Article 1(1) of the UNCITRAL Rules on Transparency.

[11]Article 1(2) of the UNCITRAL Rules on Transparency.

[12]See Article 2 of the Mauritius Convention.

In 2013, the Working Group was entrusted with the task of preparing that convention.[13] The Report of the United Nations Commission on International Trade Law relating to the Transparency Convention process noted several delegations' support for 'entrusting Working Group II (Arbitration and Conciliation) with the task of preparing a convention on transparency'.[14]

2.3 *Flexibility and Incremental Change Facilitate the Entry into Force and Expansion of the Convention*

Flexibility and incremental change are a fulcrum of the Mauritius Convention. First, a small number of parties are required to deposit their instrument of ratification: according to Article 9(1) of the Mauritius Convention, only three parties were required to ratify, accept, approve or accede to the Convention for it to come into force. Second, after opening for signature on 17 March 2015, the Convention remains open for signature indefinitely to allow for progressive expansion. Article 7(1) of the Mauritius Convention on *Signature, ratification, acceptance, approval, accession* provides:

> This Convention is open for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in New York by any (a) State; or (b) regional economic integration organization that is constituted by States and is a contracting party to an investment treaty. [...]

Third, there is no expectation on states to sign the Convention.[15] It has been emphasised that no value judgment would attach to a state for deciding not to accede to the Convention and that no pressure should be brought to bear on states to ratify it.[16] This non-committal approach may have contributed to the relative rapidity of the process, although its effect on securing a broad membership is as yet uncertain.

Fourth, the Mauritius Convention has a narrow subject matter: it is only concerned with transparency in ISDS. Although it constitutes an attempt to amend the regime multilaterally without negotiating bilateral amendments, it does not aim to replace existing investment treaties (as would a regular multilateral investment

[13]Note by the Secretariat: Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration, UNCITRAL Working Group II, Sixtieth Session, 3–7 February 2014, paras 1, 3; Note by the Secretariat: Settlement of commercial disputes: Application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to existing investment treaties — Draft convention, UNCITRAL Working Group II, Fifty-ninth Session, 16–20 September 2013, paras 1–3.

[14]Report of the United Nations Commission on International Trade Law, Forty-Sixth Session (July 8–26, 2013), Gen. Assem., supp. no. 17, para. 117, emphasis added.

[15]Report of the United Nations Commission on International Trade Law, Forty-Sixth Session (July 8–26, 2013), Gen. Assem., supp. no. 17, para. 117, emphasis added.

[16]Report of the United Nations Commission on International Trade Law, Forty-Sixth Session (July 8–26, 2013), Gen. Assem., supp. no. 17, para. 123.

treaty, such as the OECD's never adopted Multilateral Agreement on Investment (MAI)), but it focuses on only one of their aspects (transparency in ISDS). Not only that, but also the Mauritius Convention does not contain 'substantive' rules. These are included in the UNCITRAL Transparency Rules, while the Mauritius Convention aims to broaden the application of the UNCITRAL Transparency Rules.

Finally, the Mauritius Convention addresses a very prominent but a relatively *uncontested* concern in investment arbitration.[17] In resolving it, perceptions and interests of developed and developing countries and those of NGOs seem to coincide rather than clash. By comparison, broad acceptance of the multilateral investment court is a lot more uncertain.

2.4 *Multilateralism in International Tax Law and the OECD Tax Convention*

Another example of retroactively amending several treaties with a single multilateral instrument comes from a discipline outside investment law but with a certain affinity to it: international tax law and the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS). As in the example of UNCITRAL, the process here was meant to amend a number of bilateral treaties. BEPS relates to strategies for tax avoidance that take advantage from 'gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations'.[18] The OECD/G20 B.P. Project set out 15 actions. Implementation of some of these actions requires amendment of bilateral tax treaties. Given the large number of bilateral tax treaties and the lengthy process that their bilateral amendment would require, Action 15 of the OECD/G20 B.P. Project proposed the creation of a multilateral tax instrument to modify bilateral treaties.[19] The report entitled *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* explored how to develop such an instrument and concluded that this would be both desirable and feasible and recommended the opening of negotiations.[20] It is interesting to note that the report commenced by noting the existence of a 'strong political support' for the treaty's subject matter.[21]

On the basis of the report, a mandate was developed for an ad hoc group open for participation to all countries in order to design this multilateral instrument. The

[17] E.g. see Titi (2015a), pp. 1768–1783.

[18] See http://www.oecd.org/tax/beps/.

[19] http://www.oecd.org/tax/treaties/multilateral-instrument-for-beps-tax-treaty-measures-the-ad-hoc-group.htm.

[20] OECD (2015).

[21] OECD (2015), p. 15.

mandate was developed by the OECD Committee on Fiscal Affairs; it was consequently endorsed by G20 Finance Ministers and Central Bank governors.[22] Within 20 days from the ad hoc group's inaugural meeting, negotiations were concluded among '[m]ore than [one hundred] jurisdictions', and a multilateral instrument was adopted in order to modify more than 2000 tax treaties.[23] The multilateral instrument is expected to be signed in Paris in June 2017. In contrast with the recent flurry of interest in ISDS, international tax law is highly technical and unlikely to attract mass attention from non-specialists. This may render the adoption of such an instrument less complicated than that of a debated and politicised multilateral investment court.

2.5 Interim Concluding Remarks in Light of the Multilateral Investment Court

The UNCITRAL approach and the OECD Tax Convention could be emulated in investment law in order to retroactively reform international investment agreements, even if these do not provide—as CETA does—for the possibility of a multilateral structure taking over the bilateral construct designed by the treaty. For example, a multilateral instrument could be adopted on substantive investment protection. This could be in relation to the interpretation of a substantive investment standard of treatment (e.g., it could spell out the content of the guarantee of fair and equitable treatment), it could introduce exception clauses to the expropriation standard, it could add corporate social responsibility standards and so on. Other examples could relate to adherence to a binding code of conduct for adjudicators, the introduction of an appellate mechanism, or indeed the establishment of a multilateral investment court. Parallels can further be drawn between, on one hand, the Mauritius Convention and the OECD Tax Convention and, on the other hand, a regional project whose success is very uncertain at this stage: the initiative of the Union of South American Nations (UNASUR) concerning the creation of a regional dispute settlement centre.[24]

Emboldened by the relative success of the Mauritius Convention, it appears that UNCITRAL has sought a mandate to negotiate a multilateral investment court. Although it is unknown at the time of writing whether this mandate will be granted, a line needs to be drawn between multilateral procedural rules and the actual creation of an independent multilateral court. An investment instrument on the establishment of an international investment court that is tethered to a specific institution may fail to garner truly multilateral support. Individual institutions' focus areas can hinder

[22] http://www.oecd.org/tax/treaties/multilateral-instrument-for-beps-tax-treaty-measures-the-ad-hoc-group.htm.

[23] http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

[24] On this, see Gómez and Titi (2016a), pp. 515–535 and Gómez and Titi (2016b).

global acceptance of such an adjudicatory body. The negotiation of an independent self-standing international convention is a more appropriate avenue to explore. The multilateral court should have a statute regulating its constitution and function, but its relationship with dispute settlement mechanisms in IIAs could be regulated under a separate instrument. Only the latter would 'resemble' the Mauritius Convention or the OECD Tax Convention and 'amend' IIAs, while the former, in the example of the Statute of the International Court of Justice or the ICSID Convention, would be unconcerned with its relationship with specific investment treaties giving access to it.

3 Multilateral Investment Court

3.1 The Design of the International Investment Court

The EU's current investment court system (ICS) concerns a two-tiered investment court. The tribunal of first instance[25] will have 15 'judges',[26] five of whom shall be nationals of an EU member state, five nationals of the other contracting party and five nationals of third states.[27] The EU–Vietnam FTA provides for fewer judges.[28] Judges shall be appointed for six- (TTIP proposal), five- (CETA) or four-year (EU–Vietnam FTA) terms, renewable once; the terms of seven of the 15 judges, appointed immediately after the entry into force of the agreement and selected by lot, shall extend to nine (TTIP proposal) or six (CETA, EU–Vietnam FTA) years.[29] The tribunal of first instance will hear cases in divisions consisting of three judges, one of whom will be a national of an EU member state, one a national of the other contracting party and one a national of a third country; the third-party national will be the chair.[30] Judges composing a division will be appointed 'on a rotation basis,

[25]Article 8.27 of CETA, version of February 2016; Article 12 of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016; Article 9 of section 3 of the EU TTIP Proposal of 12 November 2015.

[26]In CETA and the EU-Vietnam FTA, they are called 'Members of the Tribunal', e.g. see Article 8.27 of CETA, version of February 2016 and Article 12 of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[27]Article 9(2) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 8.27(2) of CETA, version of February 2016.

[28]Article 12(2) of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[29]Article 9(5) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 8.27(5) of CETA, version of February 2016.

[30]Article 9(6) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 8.27(6) of CETA, version of February 2016; Article 12(6) of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve'.[31] The second level of review is an appeal tribunal. In the case of the TTIP proposal, this appellate structure shall be composed of six members, two of whom shall be EU member state nationals, two nationals of the other contracting party and two nationals of third countries.[32] As in the case of judges, the members of the appeal tribunal are appointed for a six-year term, renewable once, but three of the six members appointed immediately after the entry into force of the agreement, determined by lot, shall have terms that will extend to 9 years.[33]

Judges and members of the appeal tribunal shall be paid a retainer fee to ensure their availability 'at all times and on short notice'; in the EU TTIP proposal, the retainer fee corresponds to one third of the retainer fee for WTO Appellate Body members, i.e. around 2000 euro a month.[34] For other fees and expenses, the proposal makes a *renvoi* to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention.[35] The retainer fee suggested by the EU for members of the appeal tribunal in TTIP would be around the same as for WTO Appellate Body members, i.e. a fee of around 7000 euro per month.[36]

3.2 *The Shift from Bilateral Courts to a Single Multilateral Court*

Multilateral dispute resolution mechanisms had already been considered in the European Commission's concept paper of May 2015, which explained that the reform options proposed there were meant as 'stepping stones towards the establishment of a multilateral system'. An idea floated in that context was to establish an appeal mechanism applicable 'to multiple agreements and between different partners, for example on the basis of an opt-in system'.[37] The current EU design provides for the creation of bilateral courts with no direct means of multilateralising

[31]Article 9(7) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 8.27(7) of CETA, version of February 2016; Article 12(7) of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[32]Article 10(2) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 13(2) of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[33]Article 10(5) of section 3 of the EU TTIP Proposal of 12 November 2015.

[34]Article 9(11–12) of section 3 of the EU TTIP Proposal of 12 November 2015. See further Article 8.27(11–12) of CETA, version of February 2016.

[35]Article 9(14) of section 3 of the EU TTIP Proposal of 12 November 2015; Article 8.27(14) of CETA, version of February 2016; Article 12(16) of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[36]Article 10(12) of section 3 of the EU TTIP Proposal of 12 November 2015.

[37]European Commission, Concept Paper, Investment in TTIP and beyond – the path for reform, 2015, p. 16.

them from scratch. The Union's goal is to merge in the future all bilateral courts into a multilateral court system that it works to set up in parallel.[38]

EU investment agreements concretely envisage a future multilateral court. For example, Article 12 of section 3 of the EU TTIP proposal (*Multilateral dispute settlement mechanisms*) states that upon entry into force between the parties of 'an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply'. Article 12 ensures that should a multilateral investment court be adopted, TTIP disputes will be submitted to that court. A possible interrogation concerns the interpretation of this provision in the event that a multilateral investment court is created but not an appellate mechanism. The wording of Article 12 appears to indicate that, in such a scenario, TTIP's proposed appellate court will have jurisdiction to review decisions of the multilateral court.[39] This may be problematic.

CETA and the EU–Vietnam FTA include a stronger statement on the creation of a multilateral court. Article 8.29 of CETA on *Establishment of a multilateral investment tribunal and appellate mechanism* provides:

> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[40]

Interestingly, this provision engages not only the EU but also Canada to pursue the creation of a multilateral court system with other trading partners.[41] Accordingly, on 13–14 December 2016, the European Commission and the Canadian Government co-hosted an intergovernmental expert meeting on the creation of a multilateral investment court with a view to moving towards the establishment of a permanent multilateral court, available for disputes under existing and future investment treaties.[42] It is to be added that the EU intends not only future EU investment agreements to allow transition to the multilateral court system but also EU Member State BITs authorised under EU Regulation No. 1219/2012.[43]

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[38]See also the European Commission's Communication, Trade for all, Towards a more responsible trade and investment policy, 14 October 2015, p. 22 (The Commission will '*engage with partners to build consensus for a fully-fledged, permanent International Investment Court*').

[39]Titi (2015b), p. 12.

[40]See further Article 15 of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[41]Similarly in the EU-Vietnam FTA, see Article 15 of the Resolution of Investment Disputes section of the EU-Vietnam FTA, version of January 2016.

[42]European Commission, Press release: European Commission and Canadian Government co-host discussions on a multilateral investment court, Brussels, 13 December 2016, http://europa.eu/rapid/press-release_IP-16-4349_en.htm.

[43]European Commission, Inception Impact Assessment, Establishment of a Multilateral Investment Court for investment dispute resolution, 1 August 2016, p. 3.

3.3 The EU's 2017 Public Consultation and De Lege Ferenda Considerations

Several elements have weighted in the Commission's decision to propose the adoption of a multilateral investment court, including the multiple challenges that the functioning of individual bilateral courts would entail.[44] Indeed, some have voiced their support for a system designed as multilateral from scratch.[45] It has also been claimed that a well-functioning bilateral court—this argument was advanced in the context of TTIP—could be a stumbling block to future mutilateralism since its success would make it difficult to replace it later with a multilateral structure.[46] Stakeholders who responded to the Commission's 2014 TTIP consultation suggested that some of the concerns expressed in relation to 'accountability, legitimacy and independence' of ISDS would be more effectively addressed through multilateral reforms.[47] Reasons that militate in favour of the creation of a multilateral investment court include the following:

- Efficiency gains: managing multiple bilateral investment courts would be inefficient.[48]
- Costs: fixed annual costs for each bilateral investment court are estimated at approximately 500,000 euro.[49]
- Increased predictability in investment dispute resolution[50]: multilateralism would have a harmonising effect on jurisprudence and would help prevent contradictory and divergent decisions.[51] Contrarily, multiple bilateral courts, functioning on the basis of different procedural rules—depending on the outcome of each particular set of negotiations—could conduce to new fragmentation through institutionalised multiplicity of dispute settlement procedures.
- Better enforcement: in the absence of a multilateral structure, decisions would in principle only be enforceable on the territory of the (two) contracting parties.[52] It is noteworthy that the Commission appears to consider the possibility of drawing a 'mechanism comparable to ICSID' to allow for enforcement of decisions, i.e. a system where enforcement is not subject to review by national courts.[53]

[44] On the need to multilateralise the court, see Titi (2016).

[45] *Ibid*., with citations.

[46] Schill (2015).

[47] European Commission, Public consultation on a multilateral reform of investment dispute resolution, 2017, https://ec.europa.eu/eusurvey/runner/mutlilateralinvestmentcourt.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid*.

[51] *Cf*. Elaine Fahey, Introduction, in this volume; and Hannes Lenk, in this volume.

[52] For a brief discussion on why decisions would not be enforceable under the ICSID Convention or the New York Convention, see Titi (2016).

[53] European Commission, Public consultation on a multilateral reform of investment dispute resolution, 2017, https://ec.europa.eu/eusurvey/runner/mutlilateralinvestmentcourt.

For the elaboration of the multilateral investment court, the European Commission has expressly sought to draw parallels with the Mauritius Convention. According to the 2017 consultation on a multilateral reform of ISDS:

> A crucial aspect would be that such a single Multilateral Investment Court could potentially adjudicate disputes arising not just under future investment treaties but also under existing international investment treaties. This could for instance be achieved through a system of opt-ins where countries agree in the Treaty/Legal Instrument establishing the single Multilateral Investment Court to subject their investment treaties to the jurisdiction of the Court (a model could be the United Nations Mauritius Convention on Transparency for Investor-State Dispute Settlement). The single Multilateral Investment Court would thus in effect supersede ISDS provisions included in investment treaties of EU Member States with third countries or in investment treaties in force between third countries. It would also replace the ICS that would have been included in EU level agreements with third countries.

As previously argued, such inspiration from the Mauritius Convention can be useful for an instrument regulating the relationship between the multilateral investment court and dispute settlement mechanisms in IIAs. However, the multilateral investment court would require its own independent statute.

It is worth noting that although the EU has been pushing for the creation of a multilateral court system, the 2017 consultation has considered a further option: the establishment of a permanent multilateral appellate facility, which would not impact the current 'first instance' tribunals. It seems that the proposed multilateral appeal tribunal would be limited to dealing with ISDS awards appealed against on grounds of error of law and manifest error of fact, in order to ensure legal correctness of the decision. Although the consultation questionnaire is silent on other claims, such as manifest excess of powers or improper constitution of the tribunal, the implication is that such claims would be adjudicated under the currently available dispute settlement options. Such a division of competence seems impracticable. First, the applicant would have to turn to two fora, to the one to seek annulment (in part or *in toto*) of the decision and to the other to seek appeal. Second, questions can be raised with respect to *lis pendens* or *res iudicata*. Different approaches currently exist with respect to these general principles, and their broad application could see a tribunal decline jurisdiction over a claim that involves the same claimants (although the *petitum* and *cause petendi* would be different).[54] This aspect of the proposal would need to be further improved.

The idea for a multilateral appeal facility had already been floated by ICSID in the Secretariat's 2004 discussion paper *Possible Improvements of the Framework for ICSID Arbitration*.[55] The creation of a multilateral appeal facility was discussed in that context as an alternative to the establishment of individual treaty-specific appellate mechanisms.[56] But according to the Secretariat's later working paper,

[54]E.g. see in general Magnaye and Reinisch (2016).

[55]ICSID, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion paper, 22 October 2004.

[56]ICSID, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion paper, 22 October 2004, para. 23; ICSID, *Suggested Changes to the ICSID Rules and Regulations*, Working paper, para. 4.

Suggested Changes to the ICSID Rules and Regulations, most considered the establishment of an appellate mechanism 'premature'.[57] The project was not further pursued.

A multilateral system for the settlement of investment disputes would in principle require multilateral participation in its elaboration (for the same reasons that, as mentioned earlier, such a system should not be negotiated under the aegis of an institution with a narrow focus area). Given that this is an initiative that has originated in the EU, the Commission has raised some questions in order to take into account the interests of developing countries, notably whether special assistance should be provided to them, following the model of the Advisory Centre on WTO Law (ACWL) and, in relation to the financing of the multilateral body, whether the contribution of states members to the operational costs of the court should be determined on the basis of a 'repartition key', i.e. depending on their level of economic development. It is uncertain to what extent taking into account the needs and interests of developing countries will prove to be a sufficient factor to ensure acceptance by the developing world of a multilateral structure in whose design they will not have contributed. The European Commission further considers that the lower costs due to the multilateral structure would make the multilateral court more attractive to developing countries.[58]

Other questions raised by the Commission relate to whether special provisions must be made for small and medium-sized enterprises (SMEs) (such provisions are already included in the bilateral courts) and whether the number of adjudicators should depend on the likely number of cases rather than on the number of signatories to the agreement. Further issues concern the qualifications and remuneration of judges or members of an appeal tribunal and, notably, the retainer fee, the manner of allocating disputes to ensure impartiality and independence, how to provide for mechanisms that will allow adjustment of the body established to an increasing membership base, whether each country party to the agreement should be able to appoint adjudicators and whether some operational costs should be borne by the users, i.e. by investors and/or states.[59]

3.4 Relationship Between the Treaty Introducing the New Mechanism for IIAs and Existing Investment Agreements

UNCITRAL's working group considered further issues that are also pertinent to the negotiation of a multilateral investment court and notably the instrument concerning

[57]ICSID, *Suggested Changes to the ICSID Rules and Regulations*, Working paper, para. 4.

[58]European Commission, Inception Impact Assessment, Establishment of a Multilateral Investment Court for investment dispute resolution, 1 August 2016, p. 3.

[59]European Commission, Public consultation on a multilateral reform of investment dispute resolution, 2017, https://ec.europa.eu/eusurvey/runner/mutlilateralinvestmentcourt.

its relationship to IIAs. One was the *relationship between the Mauritius Convention and existing investment treaties*.[60] The working group addressed the question whether the Mauritius Convention, upon entering into force, will constitute a successive treaty creating new obligations[61] or whether it will constitute an amendment to existing international investment agreements, pursuant to their provisions on amendment.[62] UNCITRAL and several delegations view the Mauritius Convention as a successive—rather than as an amending—treaty creating new obligations pursuant to Article 30 of the Vienna Convention on the Law of Treaties (VCLT).[63] In reality, the practical implications of whether the multilateral treaty regulating the relationship between existing dispute settlement options and the new body is considered a subsequent treaty or an amending treaty are limited, with the caveat of the discussion in the ensuing paragraphs. In principle, in both cases, the newer treaty will prevail.

Either way, it is possible, and it may be desirable, that the envisaged instrument should include specific provisions to regulate its relationship with existing international investment agreements, including a specification—as in the case of the Mauritius Convention[64]—that a claimant cannot use a most-favoured-nation (MFN) provision to avoid the application of the new dispute settlement mechanism. Interestingly, the Mauritius Convention bars use of the most-favoured-nation provision both ways, i.e. not only to avoid application of the new rules but also to seek to apply the new rules.[65] To the extent that the EU's new IIAs are concerned, with the exception of the EU–Singapore FTA, these, as previously cited, expressly envision the establishment of such a multilateral court that would replace the bilateral courts. They also limit application of the MFN standard to actual substantive treatment received by a foreign investor. It may also be appropriate to address specifically the survival clause in the 'old' treaties, such as by expressly amending that provision, to ensure that it does not interfere with the application of the new system.

Issues can be raised in relation to investment law's only multilateral treaty, the ECT. A multilateral instrument (which in reality at least at first is likely to be plurilateral) will constitute an *inter se* agreement modifying the ECT as among the states parties to it. The conditions under which two or more parties to a multilateral treaty may conclude an *inter se* agreement to modify that treaty among themselves

[60]UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session, Records of the UNCITRAL, 47th session, UN Doc. A/CN.9/794, 2013, paras 17 *et seq*.

[61]Article 30 of the Vienna Convention on the Law of Treaties (VCLT) (1969).

[62]See also Chapter IV of the VCLT.

[63]UN, Report of UNCITRAL – Forty-seventh session, General Assembly, Official Records of the sixty-ninth session, Supplement No. 17, UN Doc. A/69/17, 2014, para. 25; UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session, Records of the UNCITRAL, 47th session, UN Doc. A/CN.9/794, 2013, para. 22. This view is also supported in Kaufmann-Kohler and Potestà (2016), p. 79.

[64]Article 2(5) of the Mauritius Convention.

[65]*Ibid*.

are set out in Article 41 of the VCLT but will not be discussed here. Suffice it to note that the ECT contains a most-favoured-nation-reminiscent clause governing the treaty's relationship to other prior or *subsequent* international agreements that relate either to Part III on Investment Promotion and Protection or to Part V on Dispute Settlement, including investor-state dispute settlement. Article 16 of the ECT states, among others, that nothing in the terms of the other agreement 'shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment'. Interpretation of this clause will doubtless lead to disagreement as to its practical consequences on a subsequent agreement and readily reveals the challenges of wanting to foresee and regulate for the future. Taken on its own terms, if this clause is considered to prevail, it means that if investment arbitration is deemed to be more favourable for an investor than access to a multilateral investment court, the investor will always have access to investment arbitration on the basis of the ECT. In this context, it will make a difference if the convention regulating the relationship between existing dispute settlement mechanisms and the multilateral court is considered as a subsequent or as an *amending* treaty. If it is considered an amending treaty, it can be seen to amend the ECT, including Article 16 on the ECT's relation to other agreements.

Finally, questions arise with respect to the relationship of the ICS or an appellate mechanism with the ICSID Convention. Although some observers see either the ICS or a multilateral appellate mechanism as a permissible *inter se* agreement modifying the ICSID Convention,[66] other readings are also possible. Notably, the ICS itself may not even be necessarily modifying the ICSID Convention.[67] This discussion is beyond the scope of the present chapter.

4 Conclusions

Has failure of multilateralism to do with content or process? My suspicion is that it has to do with both. But past failures need not be a compass for the future, and there is now sufficient support for the success potential of procedural multilateralism.

Multilateralism achieved in recent years is *narrow*. It may be that procedural multilateralism, or at least *limited* multilateralism, is actually relatively easy to bring about. International investment law's only substantive multilateral treaty only covers the energy sector. The UNCITRAL transparency initiative only concerns itself with transparency in ISDS, and the OECD Tax Convention likewise brings about a narrowly targeted change.

Multilateralism achieved in recent years is on *relatively uncontested issues with broad consensus*. The need for transparency is one example. The need to amend

[66] E.g. Reinisch (2016), pp. 1–26; Kaufmann-Kohler and Potestà (2016), p. 85.

[67] Titi (2016), pp. 24–25.

bilateral tax treaties is another. Contrarily, the ambition to establish a multilateral investment court is not uncontested, and the EU may have a difficult task convincing some prospective treaty partners to accept it. Notably, beyond any new challenges that TTIP may confront during the Trump administration, the United States is generally reluctant to submit to the jurisdiction of international courts. In choosing between investment arbitration and an international investment court, the United States may have another reason to prefer arbitration: arbitral tribunals have always been favourable to it.

Finally, it is stressed that creating a multilateral investment court with 'retroactive' effect as envisaged by the EU would require two instruments: an instrument governing the relationship between the new envisaged adjudicatory body and IIAs and an instrument creating the multilateral investment court (the statute). The two should be distinct, and the relevance of the Mauritius Convention approach would be limited to the former.

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Beyond the Shadow of the Veto: Economic Treaty Making in the European Union After Opinion 2/15

David Kleimann

1 Introduction

The focal point of this chapter's enquiry is whether the Lisbon Treaty reform of EU common commercial policy (CCP) has resulted in the achievement of the reform objectives set out by the 2001 Laeken Council,[1] notably the Council's pledge to enhance the legitimacy of EU governance through "more democracy, transparency, and efficiency."[2]

Up until to date, economic treaty making in the EU has been governed "under the shadow of the veto" rather than "under the shadow of the vote," i.e. subject to a consent requirement in the Council and ratification by member states in their own right in addition to EU-level decision making.[3] At the time of writing, however, we can discern the evolution of a new legal-political equilibrium,[4] in which political transactions are shifted to a new treaty-making *modus operandi.* It is the change of constitutional practice from a "mixed" to a non-mixed (EU-only) mode of signing and conclusion of EU external economic agreements that can generate a new balance

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[1] European Council (2001).

[2] In 2011, Markus Krajewski noted that "the results of the EU reform process reached by the Lisbon Treaty, must be primarily assessed according to whether they have contributed towards an improvement in the transparency, efficiency and democratic legitimation of the Union. These aims which were set down by the European Council in the Laeken Declaration are the 'raison être' of the Lisbon Treaty." Krajewski (2013), pp. 67–68.

[3] Weiler (1991), p. 2416.

[4] Weiler (1991), p. 2429.

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of legal-political forces involved in economic treaty making. It is argued here that common commercial policy practice in this new equilibrium would minimize transaction costs of governance, alter the configuration of institutionalized sources of democratic legitimacy, and enhance democratic representation at the same time. The three Laeken Council objectives, which have informed the 2009 Lisbon Treaty reform, can only fully materialize in an EU-only modus of signing and concluding economic treaties.

The constitutional reform of vertical (substantive) and horizontal (procedural) competences through the Lisbon Treaty and legal certainty advanced through recent litigation of external competence only make for a necessary condition to this end.[5] Beyond formal reform and legal certainty provided by the CJEU in its recent Opinion 2/15, we can identify three additional conditions for the "transformation" of EU external economic governance to a new and sustainable equilibrium.

First, both the European and international political economies continue to aggregate a powerful demand for the success of the EU's trade and investment policy agenda,[6] the substance of which is reflected in the 2006 Global Europe strategy[7] and its more recent updates issued in 2010[8] and 2015.[9] Anachronistic political developments in the United Kingdom and the United States have arguably reinforced broader public interests in the expeditious progress of the Union's external economic agenda, which is otherwise driven by private commercial stakeholders.

Second, highly effective interest advocacy has, on the other hand, demonstrated its capacity to capture veto points in the "mixed" mode of external economic governance and to increase the political transaction costs associated with the signing and conclusion of EU external economic agreements to nearly prohibitive levels.[10] In several instances, member states' veto threats and last-minute demands for

[5]Most importantly: Case C-414/11, *Daiichi Sankyo* Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon, EU:C:2013:520 (2013). Case C-137/12, Commission v. Council (*Conditional Access Convention*), EU:C:2013:675 (2013). Opinion 2/15, *FTA with Singapore*, ECLI:EU:C:2017:376 (2017). *Opinion 3/15*, *The Marrakesh Treaty* EU:C:2017:114 (2017).

[6]Dür presents empirical evidence on the coincidence between societal demands and the EU's position in trade negotiations, which is explained through "first rate access to decision-makers on trade policy issues". Dür (2008), pp. 27–45. Moreover, Dür et al. show that both business and citizen groups enjoy considerable influence in EU legislative politics. Dür et al. (2013), pp. 951–983.

[7]European Commission (2006).

[8]European Commission (2010).

[9]European Commission (2015).

[10]For a transposition of the transaction cost theory of economic markets onto political markets, see North (1990), pp. 355–367. The "transaction cost approach to politics offers the promise both of better analytical understanding of the political choices made at an instant of time and an explanation for the differential performance of polities and economies over time. It does so, because the level of transaction costs is a function of the institutions employed. And not only do institutions define the incentive structure at a moment of time; their evolution shapes the long run path of political/economic change." North (1990), p. 362.

additional concessions on behalf of small political factions have jeopardized the credibility of the Union as an external treaty maker and put EU external economic action on the brink of failure. The traditional legal requirement for unanimity in the Council, as well as member states' ratification of EU external agreements in their own right in the mixed mode of treaty making, hence poses a credible and systemic threat to the success of the Union's external economic agenda, despite broad general support of the member states and increasing stakes.

EU external economic governance in the twenty-first century, third, requires effective input legitimation through democratic control, transparency, and accountability. As argued elsewhere, the European Parliament does now, almost 10 years after its formal empowerment, provide increasingly effective democratic scrutiny of CCP governance. Moreover, the involvement of the EP in CCP formulation has enhanced procedural and substantive transparency in EU external economic governance to previously unknown degrees.[11] The evolving capacity of the EP to make use of its formal participatory rights in EU common commercial policy underscores the rationale for the abandonment of unanimity voting in the Council and the reduction of veto players through an "EU-only" (non-mixed) signing and ratification of EU external economic agreements.

With these considerations in mind, I normatively and empirically argue in this chapter that the "best-imperfect institutional alternative"[12] to the pre-Lisbon multilevel governance of EU external economic relations stems from an "EU-only" practice of CCP governance. Such practice should employ the available EU and national constitutional space for more representative, effective, and efficient public decision making with regard to the negotiation, signing, and conclusion of external economic agreements. Limiting the substance of external economic agreements to areas of exclusive external Union competence allows for—and requires—the subordination of national political institutions to the political institutions of the Union. Employing the treaty-given constitutional space to relinquish horizontal participatory rights of national governments and parliaments in their own right significantly reduces the number of veto points, process inefficiencies, and rent-seeking opportunities for private interest advocacy.

The remainder of this chapter is structured as follows. Section 2 discusses the conceptual and empirical relevance of "institutional effectiveness" for EU external economic governance. Section 3 reviews the link between procedure and EU competence that applies to external economic treaty making. Moreover, Sect. 3 examines the evolution, as well as litigation, of EU exclusive competence in the area of common commercial policy from the 1957 Treaty of Rome to Opinion 2/15 and presents the most recent institutional practice that is geared toward a seminal transformation of EU external economic governance. Section 4 concludes this chapter by assessing the institutional change presented here, in light of relevant scholarly literature.

[11] Kleimann (2017b).

[12] Komesar (1994).

2 Institutional Effectiveness and Veto Players in EU External Economic Governance

Demonstrating the significance of institutional choice for international economic integration, scholars have applied George Tsebelis' veto player model to analyze the effectiveness of entire institutional architectures across countries.[13] This effort has advanced a comparative assessment of the performance of national institutional frameworks governing external economic integration with respect to the likelihood for deeper external economic integration,[14] the likelihood of a state to sign preferential trade agreements (PTA),[15] and the likelihood to reduce tariff and nontariff barriers.[16] The findings consistently demonstrate that domestic demand for enhanced economic integration is significantly less successful to shape policy outcomes commensurate to the increasing number of veto players involved in the decision-making process. A series of empirical tests based on an analysis of PTA membership from 1950 to 1999 demonstrate in substantively as well as statistically significant manner that an increase in the number of domestic veto players can cut the probability of forming a PTA by as much as 50%.[17]

In the context of EU governance of common commercial policy, the allocation of a veto right to the EP through the 2009 Lisbon Treaty reform would thus be expected to decrease the relative institutional effectiveness of the Commission and the Council in the CCP treaty-making process. The treaty-based evolution from the unanimity requirement for Council decisions under the Treaty of Rome over the introduction of qualified majority voting by the Treaty of Nice to the extension of QMV to the fields of external service trade, intellectual property rights, and foreign direct investment through the Lisbon Treaty, however, should *a priori* lead to the expectation of increasing relative institutional effectiveness of the Commission and the EP within the overall institutional architecture. As Joseph Weiler noted 25 years ago, "reaching consensus *under the shadow of the vote* is altogether different from reaching consensus *under the shadow of the veto*. The possibility of breaking deadlocks by voting drives the negotiators to break the deadlock without actually resorting to the vote. And [...] the power of the Commission as an intermediary among the negotiating members of Council has been considerably strengthened."[18]

The benefits of QMV in the Council, however, only extend insofar as external economic treaties are limited to substance covered by exclusive external competence. In practice, EU external economic agreements have always included provisions falling under shared or member states' exclusive competence, which allowed

[13] Tsebelis (1995), p. 313.
[14] Mansfield et al. (2008), pp. 67–96.
[15] Mansfield et al. (2007), pp. 403–432.
[16] O'Reilly (2005), pp. 652–675.
[17] Mansfield et al. (2007), p. 432.
[18] Weiler (1991), p. 2461.

the member states to insist on their participation in their own right and to opt for the mixed modus of treaty making. The veto rights held by 28 member state[19] governments and their national (and even regional) parliaments in the *modus operandi* applicable to the signing and conclusion of "mixed" external economic agreements, dramatically decrease the effectiveness and efficiency of the overall institutional architecture in the process of CCP governance if compared to a scenario of "EU-only" (non-mixed) signature and conclusion of said agreements. At the same time, they increase the likelihood of successful "capture" of veto points through efficiently organized special or diffuse interest advocacy.

Two examples of post-Lisbon practice serve to illustrate the consequences of unanimous voting requirements in the mixed mode of signing and concluding external economic agreements. The episodes referred to here describe the dynamics of the process of authorizing the signature of the two most advanced and economically most significant trade and investment agreements negotiated in the post-Lisbon era.

The signing of the EU–Korea FTA in September 2010, first, was jeopardized by the Italian government, which threatened to veto the Council decision to authorize the signing of the agreement if the agreement's provisional application was not postponed for another year. The Italian government's position at the time was strongly informed by Italy's troubled small-car maker Fiat, which sought protection from Korean car exports to Europe. The signing by the President of the Council was planned to take place on October 5 at the ASEAN summit in Brussels, a circumstance that placed the Commission and the Council's Presidency under time pressure to forge a compromise. Eventually, the provisional application of the EU–Korea FTA was delayed by 6 months and commenced on July 1, 2011.[20]

Similar to the Italian opposition to the EU–Korea FTA, the veto threat of the regional Belgian government of Wallonia in the more recent episode over the signing of CETA in October 2016 has further increased awareness of the negative repercussions of mixed external economic governance. It raised serious concerns over the effectiveness and efficiency of EU external governance, the success of the overall post-Lisbon trade agenda, as well as the credibility of EU negotiators vis-à-vis foreign governments.[21]

The two examples underscore the significance of institutional choice and institutional change in common commercial policy for the pursuit of legitimate public goods through EU governance, which affect the development path of the European political, social, and economic community in the decades to come. This chapter argues that only Council practice that endorses and acquiesces to Commission proposals for "EU-only" negotiation, signature, and conclusion of external economic agreements—and thereby significantly reduces the amount of veto players—would complete the achievement of all three Laeken objectives. The shift from mixed to

[19] As of March 29, 2019, presumably: 27.

[20] Kleimann (2011), pp. 243–244.

[21] Kleimann and Kübek (2016).

"EU-only" economic treaty making, however, is contingent on the evolution of a new legal-political equilibrium, which allows for more representative and effective governance and generates more efficient outcomes of EU common commercial policy.

3 Competence and Procedure for Economic Treaty Making in the EU

The political significance of the question over the existence and nature of EU external competence derives from its link to the procedural modalities of treaty making in the EU. The choice of EU external treaty-making procedures is the very function of the answer to the question over the nature of EU competence: if the content of a treaty falls within the scope of EU exclusive competence entirely, the conclusion of the treaty by the EU alone is a legal requirement (EU only). In contrast, where an agreement includes (just) a single provision that falls within the scope of exclusive competences of the member states, the EU must conclude the treaty jointly with the member states in their own right (mandatory "mixed" agreement). If, however, parts of the treaty fall under EU exclusive competence whereas other parts of the treaty fall under competences shared with the member states, it is left to the political discretion of the EU institutions to involve the member states as parties in their own right or conclude the treaty alone (facultative agreement). In other words, member states in the Council may insist on their participation in their own right through "mixed" treaty making.[22]

[22]In his submission in the Opinion 3/15 proceedings, Advocate General Wahl recalled that "the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature. That decision, as it is predominantly political in nature, may be subject to only limited judicial review." (Opinion 3/15: Opinion of the Advocate General Wahl. para 119, 120) Such discretion, however, is subject to procedural rules laid down in Article 218 TFEU: The Commission may propose the signing and conclusion of an external agreement as 'EU-only'. Member states represented in the Council can then decide to authorize the signature and conclude the treaty as an EU-only agreement by qualified majority voting (QMV), if TFEU-based unanimity requirements do not apply. Alternatively, the Council may adopt a unanimous decision to amend the Commission proposal for an 'EU-only' agreement and mandate the independent ratification by each and every member state—in addition to the Council decision on treaty signature and conclusion (Article 293(1) TFEU). The Court's wording in Opinion 2/15 (paras 244, 292) cast doubts over the prevalence of the theory of 'facultative mixity'. See, for instance: Ankersmit (2017). The Court, however, re-affirmed the political discretion of the Council to adopt facultative 'EU-only'/'mixed' agreements in C-600-14, *Germany v. Council* (ECLI:EU:C:2017:935), para 68.

3.1 From Rome to Nice: Exclusive External Competence for Common Commercial Policy Before the Lisbon Era

Since the entry into force of the 1957 Treaty of Rome, a number of consecutive treaty amendments have considerably broadened the scope of the primary law provisions governing common commercial policy. The evolution of CCP Article 113 EEC Treaty to Article 133 EC Treaty to, eventually, Article 207 TFEU reflects the efforts of the treaty drafters to adapt the ambit of the CCP to changing patterns in international trade over the past six decades. The treaty reforms reflect the demand for a sufficiently wide constitutional framework that enables mandated political institutions to respond to opportunities and challenges of what has been prominently termed "21st century trade" by Richard Baldwin. Baldwin notes that "[in the 20th century], trade mostly meant selling goods made in a factory in one nation to a customer in another. Simple trade needed simple rules. (...) Today's trade is radically more complex. The ICT revolution fostered an internationalization of supply chains, and this in turn created the 'trade-investment-services nexus' at the heart of so much of today's international commerce."[23]

It is by no coincidence, therefore, that the CCP initially only extended to basic border measures for trade in goods.[24] Consecutive reforms of the primary law provisions through the treaties of Amsterdam,[25] Nice,[26] and Lisbon[27] have widened the scope of the CCP to cover a larger amount of policy instruments that affect external trade in goods and services, as well as foreign direct investment at the border and beyond. The 1957 Treaty of Rome originally designed the CCP with a view to providing the Community with exclusive powers to establish the common external tariff (CET), to enter into external negotiations over obligations that mutually reduce import duties and quantitative import restrictions within the GATT framework, and to adopt autonomous measures that define the framework of its external commercial policy. The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads as follows:

> The common commercial policy shall be based on uniform principles, particularly in regard to *changes in tariff rates*, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies* [emphasis added].

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[23] Baldwin (2011), p. 3.

[24] The original version of CCP Article 113(1) of the 1957 Treaty Establishing the European Community reads: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies."

[25] For a contextualization of Amsterdam Treaty amendments in ECJ jurisprudence and treaty negotiation see: Cremona (2001).

[26] For a comprehensive discussion of the Nice treaty amendments, see Herrmann (2002), pp. 7–29.

[27] Krajewski (2012).

At the early stage of the evolution of this purely external area of EU competence, the judges in Luxembourg were confronted with the question whether the CCP merely extended to trade liberalization or could also encompass the regulation of international commodity trade. In Opinion 1/78, the Court opted for a markedly dynamic interpretation of the scope of the CCP. More than two decades after the entry into force of the Treaty of Rome, the Court held that "it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time."[28]

Rather than being subject to a dynamic judge-made expansion, however, it was consecutive treaty amendments that progressively adapted the CCP to match the needs of EU external action in the WTO and then further broadened its scope to cover "new generation" trade policy areas. The 1997 Treaty of Amsterdam saw the addition of "services" and "commercial aspects of intellectual property rights" to the general scope of the CCP.[29] The 2001 Treaty of Nice placed those concepts within the realm of the common commercial policy competence of the Community, subject to a complex web of restrictions.[30]

3.2 *The Consolidation of Exclusive Competence for Common Commercial Policy Under the Treaty of Lisbon*

The latest EU primary law reform—the 2007 Treaty of Lisbon—considerably consolidated and simplified the provisions of the CCP. Most notably, Article

[28]Opinion 1/78, *International Agreement on Natural Rubber*, ECLI:EU:C:1979:224 (1979). para 44.

[29]The impracticality of joint EC and member state negotiation and conclusion of services and intellectual property agreements with third parties prompted member states' governments to insert, as part of the reforms mandated by the 1997 Treaty of Amsterdam, paragraph 5 into Article 113 EC Treaty. The provision enabled the Council, acting by unanimity, to mandate the Commission to negotiate services and intellectual property agreements on behalf of the Community on an *ad hoc* basis.

[30]The 2001 Treaty of Nice substantially redrafted paragraph 5 of Article 113 in the succeeding Article 133 and listed, in a new paragraph 6, certain services sectors, in which the EC and member states explicitly shared competences—notably audiovisual, cultural, social, education and health services. ECJ Opinion 1/08 affirmed member states' rights of participation and external representation with regard to agreements with third countries that contain provisions governing these services. Opinion 1/08, *GATS Schedules*, ECLI:EU:C:2009:739 (2009).

207 TFEU expressly added the terms "services," "commercial aspects of intellectual property," and "foreign direct investment" to the text of the first paragraph of former Article 133 EC Treaty. Article 207 (1) TFEU now reads as follows:

> The common commercial policy shall be based on uniform principles, particularly with regard to *changes in tariff rates*, the conclusion of tariff and trade agreements *relating to trade in goods* and *services*, and the *commercial aspects of intellectual property*, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of *dumping or subsidies*. The common commercial policy shall be conducted *in the context of the principles and objectives of the Union's external action* [emphasis added].

The arguably most significant expansion of EU exclusive competence occurred in the area of foreign direct investment (FDI). The addition of FDI in Article 207 (1) TFEU, however, raised a number of legal questions with regard to the scope of Union competence in this policy area, as well as over the future substance of EU foreign direct investment policy. Immediate legal issues associated with the transfer of competence were, however, resolved through the adoption of a regulation establishing a transitional arrangement for bilateral investment agreements (BIT).[31] The exact scope of the Union's new exclusive external competence for FDI, however, was only clarified by Opinion 2/15 in May 2017, as discussed further below.

The Commission had negotiated services and trade-related intellectual property rights (IPRs)—i.e. the two other areas that are now part of the realm of EU exclusive competences—since the coming into force of the 1997 Treaty of Amsterdam on the basis of Article 133(5) EC Treaty. The clarification and consolidation of EU exclusive competence in these areas, by means of their inclusion in the first paragraph of Article 207 TFEU, nevertheless have important ramifications for member state involvement in the decision-making procedure. First, member state governments can no longer invoke the right to unanimous decision making in the Council on the basis of their coverage in legislation or external agreements. Second, the signature and conclusion of agreements covering only service- and trade-related

[31] The transfer of external competence for foreign direct investment jeopardized the TFEU compatibility of more than 1000 member states' bilateral investment treaties (BITs) and hence resulted in considerable legal uncertainty for both member states and their external BIT partner countries. In July 2010, the Commission tabled a legislative proposal that provided for a transitional solution to problems associated with the transfer of FDI competence. European Commission (7 July 2010): *Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between member states and third countries* (COD 2010/0197). In 2012, the Council and the Parliament adopted the proposal. The regulation grandfathers existing BITs by authorizing member states to leave national agreements in force in order to guarantee legal certainty, while obliging member states to bring these treaties into conformity with the regulation where necessary. The regulation also authorizes member states, subject to Commission approval, to negotiate individual BITs and envisages the formulation of a comprehensive EU investment policy at a later stage. *Regulation of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (L 351/40).

IPRs and other EU exclusive competences require the "EU-only" *modus operandi*, which subordinates member states' political institutions to the EU level of governance. Member states, in their own right, would be precluded from participation.

Article 207(4)(3) TFEU retains QMV exceptions, which apply to certain service sectors that are regarded as politically sensitive, i.e. cultural and audiovisual services, as well as social, health, and education services. Compared to Article 133 EC Treaty, however, Article 207(4) TFEU has removed such services from the field of shared competences and added them to the scope EU exclusive competence under Article 207 TFEU. Article 207(5) TFEU, however, provides for the last bastion of service sectors that fall in the scope of shared external EU competence. The "field of transport services" remains subject to shared EU competence in accordance with Article 4(g) TFEU if Union competence is not otherwise rendered exclusive by implication via Article 3(2) TFEU.

Article 207 TFEU, in sum, is the latest result of 60 years of formal institutional change in common commercial policy. As predicted by the Court in 1/78 and retrospectively observed by Baldwin, the changing nature and increasing complexity of international trade and investment patterns in the past decades have generated a demand for a constitutional framework that adapted the powers of the Community (and Union) institutions to engage in the regulation of its external economic environment. The profit- and net-welfare-enhancing potential of commercial opportunities inherent to international trade, as well as the evolving complementary international legal institutions that have facilitated and regulated international commercial transactions, has further driven the demand for reform of primary legal institutions governing the EU's common commercial policy.

3.3 *Opinion 2/15: Litigating EU Exclusive Competence for External Economic Governance*

The otherwise rare exclusive nature of EU competence for the CCP, as well as the vagueness of its provisions with respect to its material scope and purpose(s),[32] has, however, provided strong incentives for political and judicial conflict over the operation of the CCP. It is in this context that the interplay between policy demand generated by international economic and legal institutions, the interinstitutional political process at the Community level, primary law reform, and CJEU litigation has created a dynamic of constructive tension. It is this interplay that has catalyzed, as well as constrained, incremental progress toward an expansion of the scope within which EU unity in external commercial policy remains an *a priori* possibility. It is this interplay, moreover, which has set incentives for the EU's political institutions to [seek] greater legal clarity over the operation of the CCP provisions through litigation.

[32]Cremona (2001), p. 6.

Whether the content of the "new generation" of external economic agreements matches or exceeds the scope of the CCP and thus Union exclusive powers over treaty making is the very question that stood at the center of the Opinion 2/15 proceedings. It was of particular concern here whether the Union's exclusive treaty-making competences extend to the entirety of the EU–Singapore FTA (EUSFTA), which makes for a blueprint for the latest generation of EU trade and investment agreements. In its questions submitted to the Court, the Commission asked:

> Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: Which provisions of the agreement fall within the Union's exclusive competence? Which provisions of the agreement fall within the Union's shared competence? and Is there any provision of the agreement that falls within the exclusive competence of the Member States?[33]

In this very context, a two-decade-old observation made by Meinhard Hilf remained valid for the post-Lisbon era up until the Court rendered Opinion 2/15 in May 2017: "The lack of clarity as to the extent of foreign trade authority could pose the currently most important constitutional problem of the Union."[34]

As indicated in the foregoing paragraphs, Opinion 2/15 stands in tradition of the strand of jurisprudence, in which the Commission sought to clarify the scope of EU (or Community) exclusive competence for its external commercial policy. Most prominently, in Opinion 1/94, the Commission requested the Court's opinion on whether the Community was exclusively competent to conclude the WTO Agreement and its annexes under CCP Article 113 EC Treaty.[35] In contrast to the Commission's view, the Court held that trade in certain services and intellectual property rights provisions under the TRIPs agreement were not covered by EU exclusive competence for the CCP but fell under competences shared with the member states. The Court thereby "enabled mixity" and allowed for the exercise of external competence by member states as parties to the 1994 WTO Agreement, which thus required the ratification of the said agreement by all member states of the Community. In Opinion 1/94, the Court was arguably concerned with setting limits to the CCP in light of the nature of corresponding internal competences and shied away from advancing the dynamic interpretative approach, which the Court had chosen in Opinion 1/78 two decades earlier.

The essence of the legal questions over the operation of the CCP has only marginally changed—or rather been refined—over the past decades. The arguably most important issue for the Court in Opinion 2/15 remained the quest for a set of consistent methods that serve to delineate the material scope of the CCP—and thus Union exclusive competence—in isolation, in relation to other areas of external relation competences, and in relation to areas of EU internal competences.[36]

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[33]Request for an opinion submitted by the European Commission pursuant to Article 218 (11) TFEU (Opinion 2/15) (2015/C 363/22), November 3, 2015.

[34]Cited by Cremona (2001), p. 6; Hilf (1997), p. 437.

[35]Opinion 1/94, *WTO Agreement,* EU:C:1994:384 (1994).

[36]Cremona (2001), pp. 6, 20.

Moreover, the enquiry concerning the Union competences for the conclusion of a "deep and comprehensive" international trade and investment agreement invited the Court in Opinion 2/15 to measure the status quo of implied exclusive external competences that the Union has acquired as a result of its constantly evolving secondary legislation in areas of shared internal competence.[37] Closely related to competence enquiries, moreover, stands the question over the choice of appropriate legal basis—or bases—for "multi-purpose" external agreements. The question over the correct legal basis for the act concluding the EUSFTA had not been posed to the Court in the Commission's request for Opinion 2/15. Nonetheless, it remained the task of the Court to address the issue as a matter of practical necessity in order to ground distinctions between exclusive and shared competences on appropriate treaty provisions. Further down the road, it is the scope of responsibilities of EU and member states' political institutions—or horizontal competences—that was clarified by the Court's opinion by implication.

Yet, as Advocate General Sharpston recalled, "the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it. That question is to be resolved exclusively on the basis of the treaties."[38] There is, in other words, only one legitimate answer to the question of competence—notably the one that finds its basis in the authoritative interpretation of EU treaties by the Court. However, the methodological choices of the Court in interpreting the treaties are inherently normative and therefore political.[39] In making these choices, the Court retained ample space of discretionary judicial decision making.[40] The more important questions may well be whether such choices are made in a thoroughly and well-reasoned manner, whether they are systematically coherent within the context of—or in explicit distinction from—the Court's past jurisprudence, and whether they are consistent within themselves.[41]

In her submission to the Court in the Opinion 2/15 proceedings, Advocate General Sharpston argued that several parts and components of the EUSFTA fall under EU shared competence—including certain transport services,[42] portfolio investment,[43] labor rights, and environmental protection obligations[44]—whereas

[37] Article 3(2) TFEU.

[38] Opinion of Advocate General Sharpston delivered on 21 December 2016; Opinion Procedure 2/15 initiated following a request made by the European Commission. para 566. This view mirrors the general stance of the ECJ, as expressed elsewhere, such as Opinion 1/94: para 107 and Opinion 2/00: para 41.

[39] It is far beyond the scope of this chapter to discuss this matter here. It may suffice to refer to Koskenniemi (1999).

[40] Further argued in detail here: Kleimann (2017a).

[41] Ibid.

[42] Opinion of AG Sharpston: para. 268.

[43] Ibid.: para 370.

[44] Ibid.: para 502.

the termination of member states' BITs, in her view, falls within the scope of the exclusive competence of the member states.[45]

The Court's opinion, however, markedly differed from the legal view of the AG and broadly confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of common commercial policy and EU external economic governance—with one notable exception.[46] At the most general level, the Court held that EUSFTA components governing trade in goods, services, commercial aspects of intellectual property, government procurement, competition policy, FDI admission and protection, transport services, e-commerce, and sustainable development provisions related to trade fall under EU exclusive external competence, whereas portfolio investment and the contentious investor-to-state dispute settlement (ISDS) mechanism are subject to shared external competence.[47] It follows that the Union can conclude treaties, which include wide-ranging substantive "areas" covered by exclusive external competence without the participation of the member states in their own right.

Compared to the legal view of the AG, the Court advanced a wider application of the "immediate and direct effects on trade" criterion, which it had developed in its earlier jurisprudence in an effort to add precision to the exact material scope of common commercial policy.[48] By the same token, the Court's reasoning embeds the CCP into the context of EU external action objectives and thus gives full effect to the Lisbon reform of Article 207(1) TFEU in this regard.[49] The combination of these two contingencies led the Court to the rather historical conclusion that the EUSFTA provisions on labor rights and environmental protection fall under the EU exclusive competence attributed to the CCP.[50]

The Court, moreover, cast a wider web for "incidental" treaty content than the AG. Incidental treaty components or provisions, according to the Court's jurisprudence, are subordinated to the agreement's predominant purpose (i.e., commerce within the meaning of CCP Article 207 TFEU) if they are "extremely limited in scope" and thus do not have the potential to affect the allocation of competences.[51]

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[45]The AG opined that "the European Union has no competence to agree to Article 9.10(1) of the EUSFTA", which provides that existing EU Member States' bilateral investment treaties with Singapore "cease to have effect and shall be replaced and superseded" by the EUSFTA. Opinion of AG Sharpston. para 396.

[46]For a first analysis of Opinion 2/15 see: Kleimann and Kübek (2017).

[47]By inference, in conclusion, Opinion 2/15: para 305.

[48]"[A] European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade." Case C-414/ 11 (*Daiichi Sankyo v DEMO*) para 51; C-411/ 06 (*Commission vs Parliament and Council*) para 71; C-347/03 (*Regione autonoma Friuli-Venezia Giulia and ERSA*) para 75.

[49]The (added) final sentence of Article 207(1) TFEU reads: "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

[50]Opinion 2/15: paras 147, 157.

[51]For instance, Case C-377/12 (*Commission vs. Council*) para 34.

In application of a more generous understanding of what is "extremely limited in scope," the Court dismissed the AG's findings that "moral rights"[52] and "inland waterway transport"[53] could make for autonomous EUSFTA components. The Court hence did not require reference to legal bases for which the Union shares competence with the member states.[54] The Court, compared to the AG, also advanced a more permissive interpretation of implied exclusive powers with respect to its ERTA case law,[55] which resulted in a broader shelter for EUSFTA transport services commitments.[56]

In agreement with AG Sharpston's finding on portfolio investment, the Court's ruling dismissed the arguments of the Commission in favor of implied ERTA exclusivity on the basis of a primary law provision, notably Article 63(1) TFEU. In doing so, the Court set an important boundary for the ERTA doctrine: triggering Article 3(2)(3) TFEU requires the existence of internal EU legislation. Primary law provisions cannot be altered or affected by international EU agreements.[57] Yet the Court found that the EU and the member states share the power to conclude nondirect investment agreements on the basis of Article 216 (1) TFEU.[58]

In a surprise finding that is set to change the direction of the Union's policy in pursuit of external investment protection, the Court ruled that the EUSFTA's ISDS mechanism falls within the scope of a competence shared between the EU and the member states and thus objected to AG Sharpston's reasoning. The AG had considered that the investor-state dispute settlement mechanism is accessory to the substantive investment protection obligations of the EUSFTA. According to the Court, however, a regime that removes disputes from the jurisdiction of domestic courts may not be regarded as ancillary (or accessory) to such substantive obligations. Consequently, it "cannot be established without the Member States' consent."[59] It remains a mystery, however, why the Court did not endeavor to ground this finding on an appropriate legal basis. As it stands, it remains entirely unclear which provision in the TFEU the Court deems to confer a shared competence for the establishment of an ISDS regime.

[52]Opinion of AG Sharpston: para 456.

[53]Ibid.: paras 244–246.

[54]Opinion 2/15: paras 129; 216–217.

[55]C-22/70 (*Commission vs Council*) para 17.

[56]Opinion 2/15: para 192.

[57]Ibid.: para 235.

[58]Ibid.: para 239.

[59]Ibid.: para 292.

3.4 The Implications of Opinion 2/15 for EU Economic Treaty Making

Notwithstanding the Court's legal reasoning, its findings in Opinion 2/15 authoritatively clarified the *de jure* legitimacy of EU external action in the area of trade and investment and provide legal certainty over the treaty-making competences of the Union under the post-Lisbon primary legal framework. Seen in context of past political and judicial battles over competence, the Court's decision is, moreover, likely to have a significant bearing on the effectiveness, credibility, and efficiency of multilevel governance of EU external economic relations in the months and years to come.[60]

For EU Commissioner for External Trade Cecilia Malmström, "it's not about winning or losing in Court. It's about clarification. What is mixed? What is not mixed? And then we can design our trade agreements accordingly."[61]The simplification of the delineation of external economic competence of the Union has, in other words, given rise to the expectation of a departure from the past practice of "mixed" signing and conclusion of EU trade and investment agreements—an issue that has taken center stage in the political and legal discourse over institutional change in EU common commercial policy over the past decades.

EU-only agreements would further elevate the role of the European Parliament vis-à-vis national parliaments, subordinate member states' participation to qualified majority voting in the Council, significantly reduce the number of veto players involved in CCP governance, and hence significantly limit the access points for special interest rent seeking and prospects of nonratification of EU external agreements.

In September 2017, to that very end, the European Commission proposed directives for FTA negotiations with New Zealand and Australia that are limited to substance covered by EU exclusive competence.[62] If adopted by the Council and negotiated as such by the Commission, the agreements will require mandatory "EU-only" signature and conclusion. By the same token, the Commission endeavors to split already negotiated agreements with Singapore and Vietnam into the components covered by EU exclusive and shared competence respectively in order to secure a swift EU-only signature and conclusion of all treaty parts other than portfolio investment, as well as investment protection and enforcement disciplines.[63] The Japan–EU Economic Partnership Agreement (JEEPA), moreover, will not cover policy areas subject to shared or exclusive member state competences and thus requires EU-only signature and conclusion in any case.[64]

[60]Kleimann and Kübek (2016).

[61]Financial Times (2016).

[62]European Commission (2017a, b).

[63]EU External Trade Commissioner Cecilia Malmström confirmed respective reports with regard to the EU-Japan Economic Partnership Agreement (JEEPA) in her presentation to the INTA Committee on January 23, 2018.

[64][Unofficial] European Council (2018), para 5.

The Council Presidency has now informally proposed the EU-only signature and conclusion of FTAs with Singapore and Japan and displays readiness to accept EU-only governance of CCP treaty making in the future. The Council would thereby set an important milestone in the evolution of EU external economic governance. In its draft conclusions of February 12, 2018, the Council Presidency notes that "negotiating, signing and concluding free-trade agreements as EU-only agreements would allow the benefits of FTAs to be reaped more rapidly and effectively." It therefore "supports the approach of the Commission that the investment part of the Singapore FTA should be signed and concluded as a separate agreement." Moreover, "[i]n the case of Japan, the Council welcomes the conclusion of negotiations for an Economic Partnership Agreement (EPA)" and "calls on the Commission to continue negotiations with Japan for a separate investment agreement."[65] Finally, "the Council notes that the Commission has not presented negotiating directives for investment agreements with [Australia and New Zealand] *alongside* the directives it has proposed for the negotiation of FTAs. The Council considers that this should not be seen as setting a precedent for the future" [emphasis added].[66]

It would thus become evident that the Council fully endorses and otherwise acquiesces to the Commission approach regarding the new "EU-only" architecture of EU trade (and separate investment) agreements. Even in view of proposed negotiation directives for FTAs with Australia and New Zealand, member states represented in the Council would accept that future directives allow for the separation of negotiations, as well as the signature, and ratification of EU-only trade and investment liberalization agreements, on the one hand, and mixed portfolio investment and investment protection agreements, on the other hand.

The Council Presidency's draft conclusions also mirror ubiquitous legitimacy concerns: "The fact that a FTA falling entirely within the EU's competence is only ratified at EU level and not also at Member States' level should not affect or reduce the legitimacy and inclusiveness of the adoption process or threaten the acceptance of trade agreements by the general public." Rather, the "Council considers that Member States' parliaments, as well as civil society, should be kept closely informed and involved from the beginning of the process of preparation for negotiating trade agreements, even if ratification only by the European Parliament is required."[67]

Only time will tell, however, whether all member states represented in the Council will allow for such a historical reform of the practice of EU external economic governance.

[65] Ibid.: para 5.

[66] Ibid.: para 6.

[67] Ibid.: para 7.

4 Assessment and Conclusions

A look back at scholars' expectations for post-Lisbon external economic governance facilitates the assessment of the potential shift from mixed to non-mixed treaty making in common commercial policy. In 2011, Krajewski anticipated that the "broadening of the scope of the common commercial policy by the Lisbon Treaty will lead to a disempowerment of the national parliaments." He further notes that the "loss of competencies in the member states leads to a removal of the active participation of the parliaments of the member states. This loss is not just of a formal nature, but instead leads in practice to lesser parliamentary control over multilateral commercial agreements."[68] Woolcock, on the other hand, observed that "in practice few Member State parliaments have exercised effective scrutiny of EU trade policy" prior to the entry into force of the Lisbon Treaty.[69] Adding to the lack of political participation, Krajewski considered that "the rejection of an international treaty can practically be ruled out" because, in parliamentary systems of government, the ruling government is frequently backed by voting majorities in parliament.[70] By distinction, the functioning of the EP as a check and balance to the Council and the Commission, rather than approval of government in a parliamentary democracy, rendered the EP more autonomous from the decision making of the executive branch and more comparable to the US Congress than EU member states' parliaments.[71]

In contrast to some of Krajewski's and Woolcock's early observations, member states' parliaments have evidently and markedly enhanced scrutiny of CCP negotiation dossiers commensurate to perceived political value of respective negotiations and agreements, as well as intensifying public concern. Jancic observes that "[t]he developments in EU trade policy have provoked a remarkable reaction in national parliaments. (...) Specifically, TTIP negotiations have been discussed by no fewer than 32 parliamentary chambers," most of which engaged in substantive scrutiny.[72]

Moreover, member states' "vetocracy" in the mixed mode of treaty making[73] has become a credible threat to the Union's trade and investment policy agenda. Most recently, as noted above, Wallonia's regional government's reluctance to authorize the signature of CETA following a negative vote in Wallonia's parliament, as well as associated threats of nonratification, has given rise to concerns that the rejection of highly politicized mixed trade and investment agreements on behalf of member states' parliaments remains a possible—and increasingly probable—scenario.[74] As argued elsewhere in greater detail, the scenario of a member state's parliamentary rejection of a mixed agreement—such as CETA—continues to confront the Union's

[68] Krajewski (2013), pp. 81–82.
[69] Woolcock (2008), p. 5.
[70] Krajewski (2013), p. 69.
[71] Ibid., p. 69.
[72] Jancic (2017), p. 209.
[73] Mayer (2016).
[74] Kleimann and Kübek (2016), pp. 25–26.

institutions with significant legal and political challenges. At the same time, it has sharply increased incentives toward the adoption of a new EU-only architecture of EU external economic agreements.[75]

The Council's endorsement of the proposed new treaty architecture would fundamentally change the mode of member states' political participation in multilevel external economic governance of the European Union. "EU-only" external economic governance will further channel the aggregation of policy demand and political transactions toward the EU triangular institutional framework epitomized by the Commission, the (qualified majority-voting) Council, and the European Parliament. It strips national parliaments of their veto rights and yet incentivizes national legislatures to employ the rights of participation guaranteed under national constitutions to influence the voting behavior of "their" governments in the Council throughout—and not only at the very end—of the negotiation process. The potential historical shift from a mixed to non-mixed mode of EU external economic governance would further elevate and strengthen the responsibilities of the European Parliament—in comparison to its previous marginalization in a multidozen veto-player setting—and allow for it to effectively fulfill its treaty-prescribed role as a check and balance of the Commission and the Council.

The coincidence of the four conditions outlined in the introduction of this chapter both enables and incentivizes the transformation of EU economic treaty-making governance in the Lisbon era. It is the legal clarity and permissible scope for EU-only treaty-making practice, a powerful private and public stakeholder demand for the success of the EU's external economic agenda, the credible and imminent threat thereto generated in a multidozen veto scenario, and the increasingly effective democratic scrutiny of EU economic treaty making through the European Parliament that, in combination, are set to shift common commercial policy governance to a new and unprecedented legal-political equilibrium.

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[75]Ibid., pp. 22–24; Cf. van der Loo and Wessel (2017), pp. 735–770.

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Part III
Institutionalisation and Global Governance

Can Transatlantic Trade Relations Be Institutionalised After Trump? Prospects for EU-US Trade Governance in the Era of Antiglobalist Populism

Robert G. Finbow

1 Overview

This chapter assesses the prospects for EU–US trade governance under the Trump administration, considering the dominance of political debate by plutocratic and populist extremes. Right populist resurgence is in part a backlash against global governance systems that have been indifferent to the impact of transnational integration on marginalised workers in many post-industrial states. The ability to forge transatlantic or other transnational connections is undermined by a global system that enhances inequality, undermines job security and causes precarious living standards for many. This constituency is ripe for protectionist and nationalist policies. However, like the chimera of populism in his economic, employment, health and fiscal policies, Donald Trump's use of populist rhetoric conceals his plutocratic motivations. The US's move towards trade bilateralism—should it survive the chaotic character of the administration—may undermine institutionalised mega-deals with Europe, Asia and elsewhere. But it is in part motivated by plutocratic ambitions to escape constraining multilateral deals and impose US interests via bilateral trading arrangements where the US is the stronger partner.

While the jury remains out on the weight of cultural and economic factors in explaining these populist movements, they have created protectionist challenges to existing and future institutionalisation of economic and trade relations in the transatlantic space. And there is evidence that the Trump campaign successfully used populist rhetoric to portray 'unfair' trade deals, as well as immigration, as contributors to the drop in the well-being of many average Americans. This chapter will outline a framework for assessing the interaction between plutocratic-driven governance and populist rejections of trading regimes. The research is based on academic analyses and official

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documents and commentaries in the US and the European Union, as well as stakeholder interviews at government, corporate and non-governmental agencies. While Trump's trade policy is a moving target, the chapter will provide a preliminary assessment of the prospects for EU–US trade institutionalisation in future, taking into account the complications induced by Brexit. Section 2 will introduce a theoretical framework for pluralistic plutocracy, outlining how plutocratic forces and the reactive (but also interdependent) backlash from populists affect debates over globalisation and transnational institutionalisation. Section 3 will look at the asymmetrical character of the transatlantic economic relationship and its importance, which flourished despite lack of institutionalisation. Section 4 examines the EU's role as a primary initiator of bilateral and multilateral economic and trade agreements and a principle exponent of transnational institutionalisation in economic relations between states. Section 5 traces the emergence of populist backlash against perceived negative effects of globalisation and institutionalised economic and trade agreements and particularly the role of anti-free trade rhetoric in Trump's opportunistic appeal to exclusionary populists. This section will look at the likely character of Trumpism as 'faux populism' and its implications for trade policy in general, given the pressure from his fellow plutocrats in corporations and Congress for continued transnational integration, which could mitigate his populist tendencies. Moreover, it will look more specifically at the potential fate of TTIP under the Trump presidency, which could put the brakes on further institutionalisation of the transatlantic relationship. Finally, Sect. 5 examines whether the US will be able to negotiate a bilateral pact with the UK after Brexit, as Trump quickly promised, or be forced to deal collectively with the EU as a more important trade partner. Despite the high level of uncertainty in this still developing policy area, amidst the chaotic start to the presidency overall, the essay will conclude with reflections on whether regressive populist, antiglobalisation rhetoric will derail transatlantic economic institutionalisation or whether pushback from globalist plutocratic elements among Republicans, lobbyists and Wall Street appointees to Trump's cabinet will result in a more mainstream economic internationalist approach.

2 Explaining the Populist Moment: Competing Plutocracies

Analyses of the rise of right populism on both sides of the Atlantic have sometimes noted the duality of influences, economic insecurity versus cultural resentment.[1] This reflects the growing polarisation of politics, especially in Anglo Saxon first-past-the-post systems. This polarisation is taking place in a governance model where money and wealth command an ever-stronger presence, and democratic politics has become principally a contestation among denizens of wealth.[2] This was evidenced in the US context after Citizens United (with dark money unleashed in politics as never

[1] Inglehart and Norris (2016).

[2] Stratmann (2005), pp. 135–156.

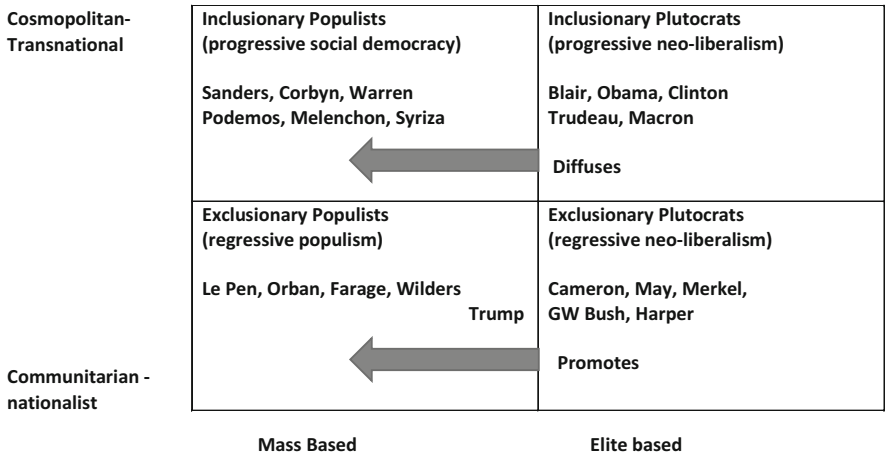

Fig. 1 Political groupings in pluralistic plutocracy (Finbow 2017)

before). Its cynicism was highlighted by *Trump's* labelling of *Hilary Clinton* as the 'Goldman Sachs candidate' prior to appointing many persons from this and similar firms and sectors to his own cabinet. Elsewhere, this author has referred to 'pluralistic plutocracy'[3] where all significant competitive political parties are dominated by wealth and tailor policies accordingly. Where major parties divide now is largely over non-economic sociocultural matters, reflecting contemporary diversity in ethnicity, sexual orientation and connected issues.[4]

The division—as demonstrated in Fig. 1—can be seen as poles on a spectrum between *inclusionary plutocrats*, sometimes called globalists or cosmopolitans, associated with the Davos crowd, and *exclusionary plutocrats*, associated with communitarians and nationalists, willing to use wedge, cultural and moral issues (gays, guns god) to mobilise support for ultimately plutocratic movements (e.g., US tea party; UKIP, etc. in the UK). These two political forces have in the past shared a consensus in favour of liberalised trade and institutionalisation of economic integration through global (WTO) and regional (NAFTA, CETA, TPP, TTIP) economic and trade agreements. But they differ respecting the incorporation of social movement forces from marginalised groups on the basis of gender, sexual identity, race, ethnicity and immigration status; progressive neo-liberals among inclusionary plutocrats favour incorporating these constituencies, while exclusionary plutocrats are willing to promote nativitist, misogynistic and racist tropes to divide working and middle class voters to secure their elite driven agendas.

Plutocracy refers to the 'rule of wealth' and best captures the character of the elites, who currently dominate state decisions at all levels government in most societies. What unites them is a relentless drive for wealth at whatever expense to

[3]Finbow (2016), pp. 62–76; Finbow (2017).

[4]Kruse (2015).

social stability, citizen adaptability to change and even national sovereignty and security. *Inclusionary Plutocrats* adopt a combination of neo-liberal economic policy, tempered by rhetorical (but rarely substantive) commitment to sustainability goals but also wedded to an inclusive social framework involving protection and promotion of social movement constituencies based on racial, ethnonational, immigration status, sexual identity and gender lines. This is sometimes referred to as 'progressive neo-liberalism'.[5] These leaders express a general devotion to neo-liberal transnational integration and support deregulation, privatisation and some social welfare reductions and remain especially committed to free trade agreements. They act to diffuse more progressive populists like *Bernie Sanders* or *Jeremy Corbyn* to preserve the neo-liberal core to economic policy and transnationalism.

Exclusionary Plutocrats have no problem associating themselves with exclusionary and nativist tropes, either as a prominent part of their own core beliefs or as a political strategy to divide mass based challengers on ethnic, gender and racial lines.[6] Most of their goals involve maximising the potential for wealth production via a limited state, downsizing regulations, privatising activities and minimising taxes on corporations, incomes and estates of the plutocrats themselves. This takes the form of regressive neo-liberal economic politics and exclusionary social conservatism. Such actors have encouraged regressive forms of populism through funding for organisations such as the Tea Party in the US and Leave campaigners in the UK, which helped build support for more nationalist approaches.

Plutocratic dominance has led to a populist backlash in many states, which has impacted political campaigns, though not altered major areas of economic policy. *Populism*, per *Mudde*, refers to an 'ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people'.[7] As a 'thin' ideology based around this simple distinction, populism is subject to potential manipulation and exploitation by leaders who employ this rhetoric differentially, especially by providing inclusive or exclusive variants of the 'corrupt elite' versus the 'pure people'.[8] These authors distinguish between *inclusionary* and *exclusionary* populists depending on the degree of pluralism encompassed in the 'pure people', with *inclusionary populists* extending the umbrella broadly and *exclusionary populists* narrowing to a select, traditional definition of 'the people'.

Though *Mudde* and *Kaltwasser* distinguish these types between Europe and Latin America, the potential for both to coexist remains, as we can see in the Saunders appeal to the Occupy generation,[9] alongside the Tea party movement in the United

[5]Fraser (2016), pp. 281–284.

[6]Mayer (2016), pp. 178–185.

[7]Mudde (2004), p. 543.

[8]Mudde and Kaltwasser (2013), p. 151.

[9]Gabbit (2015).

States. In each case, plutocratic interests appeal to the populist base with rhetorical messages that effectively disguise the commitment to neo-liberal policies and ideals, which serve long-run plutocratic interests domestically and transnationally. Exclusionary plutocrats are more willing to hype regressive populist movements for political support; inclusionary plutocrats try to depress progressive radicalisation in mainstream centre left parties in favour of a 'third way' approach that generally serves plutocratic interests in globalisation and institutionalisation.

Electoral mechanisms plus pluralism in the plutocratic stratum ensure shifting coalitions of wealth driving policy in differing directions in response to these civil society forces, but the balance in most states is shifting towards the dominance of corporate entities and individual billionaires. Empirical evidence of this effect in US politics has been provided by *Gilens* and *Page*, who argue that 'economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence'.[10] There has been a concentration of power across transnational and national institutions evident in the ongoing pursuit of free trade and economic deals, with supportive tax regimes, subsidies and regulations domestically. The push for liberalization is amplified by transnational cultural and ideological production by a myriad of think tanks and quasi-intellectuals, some operating in synch, others with varied perspectives from libertarian to state capitalist and beyond as strategically suitable to the pursuit of wealth. This distortion in debate has decidedly influenced trade deals, which have reflected primarily corporate and plutocratic interests. 'These powerful allies have a vested interest to promote liberalization including enhanced capital flows, investor rights, intellectual property protections and deregulation with teeth through disputes settlement arrangements. The result could be a weakening of democratic accountability, with states bound to transnational agreements which constrain their actions, while requiring greater restrictions on citizens in the paradox that is pluralist plutocracy.'[11]

Pilketty issues this warning about the one-sided character of trade deals and globalisation:

> The main lesson for Europe and the world is clear: as a matter of urgency, globalization must be fundamentally re-oriented. The main challenges of our times are the rise in inequality and global warming. We must therefore implement international treaties enabling us to respond to these challenges and to promote a model for fair and sustainable development.[12]

As it stands, globalisation is producing tendencies towards ever-escalating inequalities as elites move capital, avoid taxes and produce trading arrangements designed by and for corporate entities. Few of the benefits of this new-found fluidity and productivity are filtering down towards other sectors of society. Elites shelter revenues and avoid domestic taxation responsibilities while promoting costly militarism. All of this contributes to a sense of marginalisation that demagogues have

[10]Gilens and Page (2014), p. 565.
[11]Finbow (2016).
[12]Piketty (2016).

exploited to rally the disaffected along racial and social cultural lines, dividing those who should be collaborating. Populist leaders direct fire to 'others'—Muslims, Mexicans and, on trade, even Europeans and Canadians who are scapegoated for economic problems generated by globalisation and economic changes guided by and for plutocrats. This played out in Brexit and *Trump's* victory, though in recent EU member state elections, voters have been turned off by racist scapegoating and selected inclusionary plutocrats like *Macron* in France, *Van der Bellen* in Austria and *Rutte* in the Netherlands.

3 Asymmetry in Transatlantic Economic Relationships

The EU and the US have a profitable, if at times contentious, relationship that has been resistant to institutionalisation. The emergence of the global trading order after Breton Woods and GATT involved significant asymmetries in the ability of states to engage, as well as built-in decision-making hierarchies favouring core states at the expense of developing and emerging ones. The emergence of new powers in the South has allowed for gradually stronger challenges to these biases with the shift from GATT to WTO, but the system remains inequitable and indeed has stalled largely because of the unwillingness of the core to provide more balanced trade and investment arrangements. This has in turn led to a shift towards more bilateral instruments on the part of the US and EU, a format that presents even more problems for all but the most robust economies. 'Unequal conditions are even greater in bilateral or inter-regional trade processes than in multilateral processes. The lack of technical capacity has been a key factor in weakening the positions of governments in the negotiations of preferential FTAs with the US or the EU' in highly technical areas like intellectual property, service investment, regulation, etc.[13]

Usually, asymmetrical regionalism in economic and trade relations has been assumed to be North–South, and the EU has been at the forefront, both via individual states pre-Lisbon and the EU institutions post-Lisbon, in pursuing a wide range of advantageous bilateral trade and investment arrangements with less-developed and newly industrialised emerging states. But some longstanding partnerships among developed states are clearly asymmetrical in nature, such as those within NAFTA between the US and both Mexico and Canada. EU–US relations have replicated some of this dynamic, especially as relates to institutionalising aspects of their relationship involving investment and regulation. As Von der Burchard argues, when CETA negotiations began, few commentators paid particular attention to ISDS provisions, but as the TTIP process began, ISDS became the principal target of contention for those opposed to these agreements on both sides of the Atlantic.[14] This reflects an interesting—though expected—reaction to the alteration of the EU's

[13]Tussie and Saguier (2011).

[14]Von der Burchard (2015).

Table 1 Variation in investment flows, EU-North America[a]

	US (TTIP)	Canada (CETA)
EU investment exports	2182 € bn (32% of EU FDI exports)	340 € bn (5% of EU FDI exports)
EU investment imports	2062 € bn (39% of EU FDI imports)	188 € bn (4% of EU FDI imports)

[a]Adapted from Poulsen et al. (2015)

position in relation to the two agreements, which in some ways can be considered an instance of 'asymmetrical regionalism'.

While the EU–US relationship is not fully asymmetrical, the latter power is evidently stronger in many respects, though both have substantial investments the other TTIP partner. The large level of US investment in Europe by major corporate entities which have used investor-state arbitration procedures in the past does create challenges to EU policies. This helps explain European insecurities in developing this relationship in more juridical fashion through the use of an ISDS in TTIP. But EU investment exports to the US outstrip inward flows, creating potential challenges to US laws on a new level (which accounts for US opposition even among normally pro-trade proponents). The EU is more dependent on the relationship, with slight positive balances in exports of goods and services and a greater exposure in outward investment flows.[15] The differential import of the investment relationship of the EU with Canada and with the US is evident in this data, which explains why TTIP generated concerns about ISDS in Europe and why that accord was already in difficulty under Obama.[16]

As Table 1 illustrates, it is clear that US global corporations have an immense stake in European investments. US investment in Germany totalled $116 billion in 2011 figures.[17] This accounted for 20% of FDI-driven projects in Germany. Hence, the stakes for the EU and its largest economy as potential respondents in ISDS cases are much greater than in prior EU agreements. The standard American practice has also been to include robust ISDS measures in all of its external agreements, and a well-tested US model is generally an expectation in any such deal. While the US may have less legal concerns with most of the EU members, new markets in Central and Eastern Europe are often cited tojustify an investment arbitration system as legal protections are evolving and are less tested in those new member states. As the Lisbon treaty was implemented, transferring investment to EU competence, the EU's engagement in TTIP negotiations presented novel challenges for European

[15]EU Business, "The EU's Trade Relationship with the United States". Available at www.eubusiness.com/topics/trade/usa (2011); European Commission 2015.

[16]Interviews with business, labour and academic institutes, 2016.

[17]White House, Office of the Press Secretary "Fact Sheet: U.S.-German Bilateral Economic Ties" *Press Release* June 07 (2011), <https://www.whitehouse.gov/the-press-office/2011/06/07/fact-sheet-us-german-bilateral-economic-ties>, accessed 1 June 2017.

commission negotiators, to go along with questions about member states' competences under Lisbon. These circumstances created complications in the effort to institutionalise US–EU economic relations.

4 EU Trade Agreements and Transnational Institutionalisation

As Fahey notes, the European Union has been a significant proponent of institutionalisation of global governance beyond the EU's own integration process, for instance via global trade and UN agencies. 'The EU was also recently an active participant in the so-called "mega-regionals", where EU-US transatlantic relations would have been subsumed within a broader geopolitical shift outside of the WTO, through "new" forms of institutional arrangements.'[18] The EU's new-era trade agreements emphasised liberalisation and commercial advantage, and the extension of regional trading agreements with a new economy focus. Deals with Korea and Singapore and the CETA with Canada were reflective of this new approach, which went beyond traditional trade and tariff arrangements to include behind the borders matters affecting supply chains, regulations, intellectual property rights, phytosanitary standards, etc.[19] The EU trade strategies were spelled out in the *Global Europe* initiative:

> . . .rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad. This improves the global business environment and helps spur economic reform in other countries. It reinforces the competitive position of EU industry in a globalised economy and is necessary to sustain domestic political support for our own openness. There are two core elements in pursuing this agenda: stronger engagement with major emerging economies and regions; and a sharper focus on barriers to trade behind the border.[20]

These 'new areas of competition policy, public procurement and investment are WTO-plus in that they involve agreements on measures that are not covered by the GATT 1994 and the Uruguay Round Agreements, or they go beyond those provided in WTO law. Many of the provisions in recent FTAs signed by the EC are also WTO-plus. For example, the . . . agreement with Chile includes provisions relating to competition policy, public procurement, investment and intellectual property.'[21] More recently, the EU has put forward its 'Trade for All' strategy for a more 'responsible' and socially aware approach to trade and investment integration. Responding to criticisms that the social element of the EU trade strategy had

[18]Introduction to this volume.

[19]Bendini (2014).

[20]European Commission (2006), p. 6.

[21]Lloyd and MacLaren (2006), p. 431.

atrophied,[22] the policy called for open transparent negotiations, a focus on worker and small business protections, and the promotion of sustainable development, human rights and good governance.[23]

With TTIP, the EU pursued a broad institutionalisation of the hitherto non-institutionalised transatlantic relationship, following a pattern established in CETA negotiations with Canada. Negotiations commenced in 2013, after a high-level working group in the wake of the 2008 crisis determined that 'a comprehensive agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules, would provide the most significant mutual benefit' to both parties.[24] While the initial focus was on tariff reductions and trade rules, there was an intention to expand to an ambitious array of new twenty-first-century issue areas. And this was part of a broader EU institutionalisation strategy 'using the T-TIP to present common approaches for the development of globally-relevant rules and standards in future multilateral trade negotiations'.[25] TTIP would therefore not only cement institutionalisation bilaterally in such organs as the Regulatory Cooperation Council and investor dispute mechanisms but would also have implications for a range of policy and regulatory matters globally.[26]

Using Bartl's methodology, the TTIP reflected a proposal for an institutionalised system developed by proponents in core urban-corporate elites, on matters like regulatory cooperation, investment disputes and tariffs, which determined the way that objectives were framed, institutions were developed and stakeholders are privileged or marginalised.[27] Bartl and Fahey's question of 'who sets the agenda for these far-reaching negotiations and how this specific agenda reflects the EU values and standards for a post national democracy'[28] can be addressed by looking to transatlantic coalitions of wealth, expressed via leading business associations on either side of the Atlantic like Business Europe and the Transatlantic Business Council.[29] This consensus, in the face of declining life opportunities for many marginalised persons and communities, set the scene for emergence of a nationalist, exclusionary populist backlash.

[22]See Finbow (2013), pp. 45–64.

[23]European Commission DG Trade (2015).

[24]Akhtar and Jones (2013).

[25]Akhtar and Jones (2013).

[26]Bartl and Fahey (2014).

[27]Bartl (2016).

[28]Bartl and Fahey (2014).

[29]Interviews with author, 2015–16.

5 Populism, Globalisation, Trade and Trump

Populism's rise is a result in part of a backlash against the consensus among plutocrats in favour of policies of transnationalism and economic liberalisation that have increased inequality and reduced life chances for many, in downwardly mobile communities of despair. Increased inequality in well-being created dysfunctions: unequal and inadequate access to quality education, differential burdens of daily life in working families with less resources where multiple jobs are required to survive, one-parent families where dual burdens and low income are often crippling or even two-parent households where both parents work just to cover the costs of borrowing necessary to approximate what used to be a middle-class lifestyle. The continuing decline in life chances, including life expectancy, for lower middle and working class individuals is being widely recognised at present. 'Only low-wage jobs that lead nowhere are being created at the bottom. The middle class is being hollowed out because manufacturing has been shifted out of the country and new digital technologies, which out-source white-collar work to consumers themselves, are replacing everyone from bank tellers to airline clerks.'[30] And replacement employment is continually downgraded in benefits and wages: '90 percent of the 27 million jobs created in the US in the last 20 years have been in the low-wage 'non- tradable' sectors of retail sales, health care and government service'.[31]

Central to this has been a growing critique of business as usual in globalised neo-liberalism. It should be noted that this populist backlash and retrenchment to community or nation is driven by objective factors like education, wealth, career and social status of many persons who are 'losers' of globalisation, but there is also an 'important subjective component composed of collective identities and the perception of threat that cannot be reduced to mere socio-demographic disparities'.[32] Regressive populism clearly revives an element of national chauvinism that cannot be neglected. Yet the disparities between winners and losers also cannot be ignored as global and technological changes drive ever-greater inequalities in life chances. The issue now is whether these longstanding trends towards liberalisation of economic integration via expert-driven institutions with novel and sometimes loose connections to established state authority will be ended by populists, including Trump.

While nativist and divisive cultural themes played a key role in the US election, there is evidence that local results were affected by economic indicators, which fuelled attentiveness to populist scapegoating. Even before *Trump*, the Republican rank-and-file membership, and its congressional delegation, singled out trade competition and its economic impact as a defining campaign theme. 'Growing import competition from China has contributed to the disappearance of moderate legislators in Congress, a shift in congressional voting toward ideological extremes, and net

[30]Gardels (2013), p. 2.
[31]See Gardels (2013).
[32]Teney et al. (2013).

gains in the number of conservative Republican representatives, including those affiliated with the Tea Party movement.'[33] Unlike technological change, which has more diffuse costs and benefits, trade exposure bears more directly on particular districts housing specific vulnerable industries, making 'the employment consequences of trade acutely recognizable and therefore politically actionable'.[34]

Localised results in key states illustrate that many economically insecure persons were persuaded to support the New York billionaire as negative effects of trade on manufacturing employment and job quality generated increased economic insecurity. Trump support did not vary directly with county unemployment rate, but relative amount of poorer jobs (part-time, lower-wage and precarious jobs) in a county did correlate with *Trump* support. Also, notably, counties where jobs were disappearing from automation or global competition were notable support bases for the GOP candidate. 'Economic anxiety is about the future, not just the present. *Trump* beat *Clinton* in counties where more jobs are at risk because of technology or globalization. Specifically, counties with the most "routine" jobs—those in manufacturing, sales, clerical work and related occupations that are easier to automate or send offshore—were far more likely to vote for Trump.'[35] Counties with these characteristics that voted for *Obama* instead of *Romney* in 2012 were more likely to have voted for *Trump* in 2016. Social problems like drug use, decreased life expectancy and poverty also grouped in Trump districts. 'In many of the counties where Trump did the best, economic precarity has been building and social and family networks have been breaking down for several decades. In these places, there are now far fewer of the manual labor jobs that once provided livable wages, health insurance, and retirement benefits to those without a college degree. Downward mobility is the new normal', making voters susceptible to 'Trump's anti-free trade message'.[36]

Whatever the conclusion of the cultural versus economic populism debate which is likely to persist both academically and strategically in the Democratic Party, it is clear that *Donald Trump* 'succeeded in making international trade a front burner campaign issue in a way no other candidate for president—certainly no Republican presidential candidate—in modern history has'.[37] The ground for *Trump's* protectionist rhetoric has been seeded in part by the proliferation of trade deals that have contributed to capital liberalisation and increased inequality. Although the interaction of various factors affecting economic change is complex, the trading system has been considered a contributing element, through the neo-liberal agenda of deregulating capital and production. By an overwhelming margin, *Trump* supporters viewed globalisation as negative (72%), as opposed to positive (17%); *Clinton* supporters felt that globalisation had been beneficial by a margin of 53–48%.[38]

[33] Autor et al. (2016), p. 44.
[34] Autor et al. (2016), p. 45.
[35] Kolko (2016).
[36] Monnat (2016), p. 5.
[37] Mastel (2016), pp. 60–61, 88.
[38] Dutton et al. (2016).

Table 2 In general, has the United States gained more or lost more because of globalisation?[a]

	Total %	Rep %	Dem %	Ind %
Gained	35	22	50	32
Lost	55	69	42	57
Equal	2	2	1	3
Don't know	8	7	7	8

[a]Source: CBS NEWS/NEW YORK TIMES POLL Before the Conventions: Insights into Trump and Clinton Voters July 8–12, 2016 https://www.scribd.com/document/318340026/Trump-Clinton-voter-toplines-on-issues-CBS-News-NYT-poll-7-14-16#download

Table 3 Effect of U.S. trade with other countries on U.S. jobs[a]

	Total %	Rep %	Dem %	Ind %
Creates jobs	19	16	24	18
Loses jobs	60	70	53	60
No effect	14	10	18	13
Don't know	7	5	5	9

[a]Source: CBS NEWS/NEW YORK TIMES POLL Before the Conventions: Insights into Trump and Clinton Voters July 8–12, 2016 https://www.scribd.com/document/318340026/Trump-Clinton-voter-toplines-on-issues-CBS-News-NYT-poll-7-14-16#download

Trump drew upon this to single out China in particular, which has used its position in the WTO to garner a larger share of global manufacturing production at the expense of countries like the US. Mexico was also targeted as the 'unfair' deal of NAFTA let it undermine US firms. See in this context also Tables 2 and 3. While it was not the top issue in the campaign, concerns about trade policy did resonate more with Trump supporters (64%) than Clinton voters (52%).[39]

These factors played some role in generating support for *Trump*, although the relative degree of influence versus factors like education levels, racism and anti-immigrant sentiment remains in debate. There is a heated debate among Democrats in particular over the relative importance of race, immigration and economic factors; some want to defend the Democrats' position as primarily a progressive party of diversity and insist that there is little reason to seek greater support from economically insecure voters. There is evidence that areas more likely to support *Trump* were less directly affected by job competition by immigrants and job losses to imports.[40] Some economists counter that, in the strategic swing states need for victory, the impact of Chinese imports in particular was significant. 'A counterfactual study of closely contested states suggests that Michigan, Wisconsin, and Pennsylvania would have elected the Democrat instead of the Republican candidate if, ceteris paribus, the growth in Chinese import penetration had been 50 percent

[39]Pew Research Center "Top voting issues in 2016 election" July 7 (2016).

[40]Ojeda (2016).

lower than the actual growth during the period of analysis'.[41] In fact, China's effect on many regions included increased unemployment, lower wages and greater reliance on income support.[42]

While *Trump's* populist appeal was based on exaggerated impressions, partially deliberately constructed, there is evidence that trade sensitivity of districts, particularly caused by Chinese imports, might have played some role in the narrow electoral college victory. As *Kolko* concludes 'the places that voted for Trump are under greater economic stress, and the places that swung most toward Trump are those where jobs are most under threat. Importantly, Trump's appeal was strongest in places where people are most concerned about what the future will mean for their jobs, *even if those aren't the places where economic conditions are worst today*.'[43] Whatever the merits of Trump's arguments their effectiveness can be seen in the tri-national comparison of attitudes towards NAFTA, as US views are the most polarised. Fully 68% off Democrats see NAFTA as positive, but only 30% of Republicans agree. By contrast, 33% of Republicans believe that NAFTA has been bad for America, but only 6% of Democrats agree.[44]

Trump played upon such economic populist themes in his campaign. He declared in his final rallies, 'The corrupt politicians and their special interests have ruled over this country for a very long time. [...] Today is our Independence Day. Today the American working class is going to strike back, finally.'[45] And there seems considerable evidence that in the few key electoral battlegrounds, the Democrats' consolidation as a progressive plutocratic party left many working class persons open to reconsideration of longstanding loyalties. For instance, voters in core mining districts in Pennsylvania expressed openness to Trump, who talked openly of restoring jobs. 'In the past, people here have turned to the Democrats [...] They were the ones who looked after working-class interests, in their minds. But there is a belief that that isn't the case anymore—and now they're shopping around for an alternative.'[46] The tactic worked since *Trump* narrowly won the vote in manufacturing states where people believed they were hurt by imports, including Michigan, North Carolina, Ohio, Pennsylvania and Wisconsin, and he won more union support that any Republican since Reagan.

[41] Autor et al. (2017).

[42] Autor et al. (2013), pp. 2121–2168.

[43] Kolko (2016)—emphasis added.

[44] Stokes (2017).

[45] Smith and Santucci (2016).

[46] O'Brien (2016).

5.1 *Trumpism as 'Faux Populism': The Trade File*

The portrayal of Trump, the billionaire TV celebrity, as a 'populist' has always been disingenuous. Yet the policy conflicts within his administration, between so-called globalist and nationalist factions in the Trump White House, while still in flux and subject to his volatile personality, illuminate the superficiality of his populist commitments. Trade policy can provide an example of this. In some respects, as Mastel (2016) points out, Trump's positions on trade are not too far from other critiques. His assertions that the global trade 'system is broken' reflects other critics of globalisation, who claim the system has destabilising and disappointing effects, real or perceived, absolute or relative, for many voters.[47] The causes are of course complex and include technological advances, and also certain aspects of trade policy, such as China's unconditional WTO admission. China's controlled state capitalism and lack of free, strong civil society organisations (such as unions) have given it unfair advantages in the manufacturing trade. Similarly, Trump is not alone as a critic of NAFTA; indeed, many labour, environmental and human rights organisations have criticised NAFTA for its negative effects on workers, the environment and public services, and the solidification of corporate dominance through investment dispute systems. These same sectors often opposed deals with Europe in the Transatlantic Trade and Investment Partnership (TTIP) or Asia in the Trans Pacific Partnership (TPP), which were seen to replicate similar pro-corporate biases.[48]

Without consistency so far, antiglobalist and trade-sceptical elements appear to be influencing Trump's trade policy. TPP hes been abandoned, TTIP talks have stalled and NAFTA renegotiation has started. As it has developed, the trade team includes some persons known for strong critiques of the existing trading arrangements. The new United States Trade Representative (USTR), Robert Lighthizer, has previously been a trade lawyer who advocated higher steel tariffs to protect domestic consumers. He has been a frequent critic of WTO dispute mechanisms, despite the central US role in forging that institution, blaming the WTO appeal process for changes in arbitration rules, which should be subject to negotiation among signatories. Peter Navarro, the head of a new White House National Trade Council, has been a strong critic of China's role in the global trade system. Therefore, the US trade strategy brought forward after the inauguration emphasised themes of fairness and preference for bilateral deals:

> The overarching purpose of our trade policy – the guiding principle behind all our actions in this key area – will be to expand trade in a way that is freer and fairer for all Americans. Every action we take with respect to trade will be designed to increase our economic growth, promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports. As a general matter, we believe that these goals can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations – and by renegotiating and revising trade agreements when our goals are not being met.[49]

[47] Mastel (2016).

[48] De Ville and Siles-Brügge (2015).

[49] United States Trade Representative (USTR) *The President's Trade Policy Agenda* Washington (2017).

The strategy went on to stress some traditional American goals, such as promoting access for agricultural exports, ensuring intellectual property rights protections, modernising agreements to ensure US business access to markets and prevention of dumping of subsidised goods in the US. But it included elements reflecting Lighthizer's scepticism about the WTO, especially any efforts to use dispute resolution processes to force changes in US laws and regulatory practices; 'even if a WTO dispute settlement panel – or the WTO Appellate Body – rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice. Consistent with these important protections and applicable U.S. law, the Trump Administration will aggressively defend American sovereignty over matters of trade policy.'[50]

The early policy proposals have included relatively aggressive protectionist measures, with threats of taxes or tariffs ranging up to 35% for layoffs related to movement of firms overseas and 45% tariffs on Chinese imports.[51] Subsequent proposals were slightly moderated, including a potential 10% levy for businesses to operate in the US, use of phytosanitary rules to discourage food imports, a 20% surcharge on Mexican imports to pay for construction of a border wall and actual 20% surcharge on Canadian softwood lumber; a 300% tariff on Bombardier aircraft was subsequently overturned by the US Trade commission. In addition, the President has threatened taxation changes, including import surcharges and export tax credits, and ending import deductibility. These measures would make it more difficult for other nations to gain access to US markets and potentially could violate WTO provisions. The American President has been a vocal critic of mega trade deals, which he declared unfair to American interests. He promised to negotiate 'fair' bilateral deals that would bring jobs to Americans. According to Trump, 'we are absolutely going to keep trading. I am not an isolationist. And they probably think I am. I'm not at all. I'm a free trader. I want free trade, but it's got to be fair trade. It's got to be good deals for the United States.'

Trump's populist appeal might seem to threaten the epistemic consensus in favour of transnational institutionalised economic integration and trade liberalisation, including a transatlantic institutionalised TTIP. But the appointment of conventional plutocrats to his administration provides a counterweight. Yet the administration team and policy directions on trade (as in many other fields) have been slow to coalesce and subject to volatility and adjustment. Even GOP lawmakers have become impatient with the President's inflammatory and changeable pronouncements on trade with allies like Canada and Mexico. While the alteration in attitudes towards trade policy was portrayed by Trump as reflecting populist concerns, it was arguably created by transnational urban corporate elites (much like Trump himself). For self-interested reasons, notably to pursue better deals on intellectual property, agricultural good, trade in services, among other areas, exclusionary plutocratic interests reframed transnational integration as a liberalisation project and hyped the increased inequalities and widespread insecurity in working

[50]USTR, ibid, 2017.

[51]Economist 2016 "Dealing with Donald: Donald Trump's trade bluster" *Economist* Dec. 2017.

and middle classes, which were susceptible to protectionist messages via billionaire-funded 'populist' movements.[52] But at their core, plutocrats still benefit from a liberalised global trading regime and profit from transnational integration. Observers note a marked reduction in inflammatory rhetoric (outside the President's tweets) as some trade policy documents reverted to a 'sober critique of the limitations of some of the current trade arrangements, problems that many critics . . . have long identified as serious challenges for U.S. trade policy'.[53]

The administration may well employ anti-dumping measures, safeguards and potential tax adjustments to redress trade imbalances and discourage firms from establishing plants outside the country, though early claims to such job protection have already eroded.[54] And the potential for job losses via disruption of complex supply chains and retaliation from existing trade partners[55] may well dissuade dramatic changes over time. There could be considerable pushback from the Republican Party, closely associated with the plutocratic class and with many allies in the business sector. Corporate America will be divided, with a few benefitting from protection measures. Many firms and workers would suffer from the interruption of transnational agreements and trade, so political backlash can be expected, with significant consequences in the complex US political system. 'Many sectors of the U.S. economy rely on exports and foreign direct investment, and businesses in these sectors have not yet weighed in against the dangers to their workers and profitability the America First strategy would create.'[56] These powerful interests, working through the complex Congressional processes are likely to exert substantial constraint on trade policy experimentation where plutocratic interests are affected.

There is considerable evidence already that the billionaire celebrity was not genuine in his populist leanings, a fact attested by the appointment of numerous Wall Street insiders. These individuals and associated interests could play a role in moderating the trade agenda going forward, given the corporate interest in the liberalised global order. On fiscal and spending policies, financial regulation, tax reforms, health care, etc. this combination of establishment appointees in the White House and fiscally conservative Republicans in Congress will produce policies that deviate from the preferences or interests of Trump's core grassroots constituencies in the white working class. 'The tragedy is that Trump's program will only strengthen the trend towards inequality' through tax and spending cuts and deregulation aimed squarely at the self-interest of plutocrats.[57] Early indications of the bargaining strategies that are likely to take shape in the coming weeks suggest that a move to trade bilateralism will be employed to deepen, not lessen, plutocratic pressures. They will be used to leverage American bargaining power to secure TPP plus in bilateral

[52]Guvenen et al. (2017).
[53]Alden (2017).
[54]Welch (2017).
[55]Egan (2017).
[56]Fidler (2017).
[57]Piketty (2016).

deals (and a redrafted NAFTA) with individual states with less ability to bargain with the American economic superpower.[58] This will include solidification of intellectual property protections, investor right provisions and the like. As with Brexit, where a neo-liberal approach underpinned the leave decision to a great degree,[59] the intention will be to further neo-liberal goals of deregulation, austerity and privatisation while avoiding transnational engagements that might put the brakes on this plutocratic-driven agenda.

5.2 The TTIP Agenda and the Trump Presidency

The election of Donald Trump brought TTIP negotiations to a pause after 17 or 18 arduous rounds; only a week after Trump's election, German Chancellor Angela Merkel declared that TTIP 'will not be concluded now'.[60] TTIP has been a tough sell for many on both sides of the Atlantic, with wide differences on many areas, including investment and regulatory collaboration (interviews with US business and labour associations, 2016). Despite the complexities and concerns, the two parties did report substantial progress in negotiations by the time President Obama left office. A joint report indicated that the two sides succeeded in 'identifying landing zones for certain issues, finding common ground on other important issues, and clarifying the remaining differences'; offers had been exchanged on 97% of tariff lines, measures to ease border flows were agreed, commitments to labour and environmental standards were affirmed, commitments on medium and small enterprises were made and the 'importance of transparency and due process in trade remedy procedures and competition policy' was established (USTR-EU, 2017).

Yet, as the report indicated, a wide range of complex issues were left on the table with the change in administration. Fahey in the introduction to this volume for instance notes retreats on regulatory collaboration, which was already evolving away from full to looser institutionalised and 'learning' processes. And the US and EU remained at an impasse on investment arrangements also. The European Commission eventually proposed an alternative system for handling investor-state disputes in CETA and TTIP. It proposed an investment court system, starting with bilateral courts composed of permanent state-appointed investment judges to replace the corporate-appointed ad hoc arbitrators used in ICSID and other forums to this point. The proposal was essentially designed to protect 'the right to regulate and create a court-like system with an appeal mechanism based on clearly defined rules, with qualified judges and transparent proceedings'.[61]

[58]Freund (2017), pp. 63–64.

[59]Harmes (2017).

[60]Fulton (2016).

[61]European Commission DG Trade "Press release: EU finalises proposal for investment protection and Court System for TTIP" Brussels, 12 November (2015).

The Americans insisted that they would not consider moving away from their own Model BIT. TPP's investment chapters reaffirm the arbitral model used in past US agreements, which they intended to employ in TTIP: 'TPP investors will have the right to pursue neutral, international arbitration in the event of a dispute between an investor of a TPP Party and another TPP Party over a violation of one of the commitments of the Investment chapter.'[62] These arbitrations would be conducted as in past ICSID practices by a private arbitrator chosen by the parties, with a third arbitrator selected by those two nominees. But in keeping with other recent agreements, the USTR asserts that safeguards and improvements have been incorporated to ensure that the arbitral process operates effectively and transparently. American respondents noted that these improvements should be sufficient and negate the need for an independent investment court system, which they regard as 'overkill'.[63]

Even before Trump, intractable EU–US differences would likely have limited the most ambitious plans for institutionalised arrangements. And this appeared to validate the pessimism that the author encountered from stakeholders in Washington months earlier when the viability of the sweeping collaborations required in TTIP was considered a long shot by many respondents.[64] The relationship was already fraught with obstacles. 'With tensions already high as a result of European tax demands levied against American multinationals such as Apple, and the mega-fines levied on European banks imposed by American regulators on the other side, the talks were already in trouble before the election of a President whose campaign was characterized by the bellicose cry of "America First".'[65]

The European Union itself was a frequent target of Trump's rhetoric, with his declaration that Brexit was positive and further fragmentation of the EU should be welcomed. 'Trump's words marked an extraordinary departure from the norms of the postwar transatlantic relationship. For decades, the United States and the EU have been each other's most important foreign policy partners, tightly bound by a thicket of alliances and institutions, joined at the hip in promoting liberal democratic values, and trading and investing with each other at unprecedented levels.'[66] That seems destined to be buffeted, if not reversed in the coming months. The EU leadership found it hard to comprehend the mercurial Trump's sometimes contradictory statements, which reflected divisions between nationalists and globalists in his administration. Chief advisor Steve Bannon, for instance, referred to the EU as a 'flawed construct' and predicted 'hostility towards the EU' after Brexit.[67] Complaining about allies not pulling their weight to support mutual defence and

[62]United States Trade Representative (USTR) (2015), "Investment" *Trans Pacific Partnership: Made in America*.

[63]Interview with US business association, 2016.

[64]Interviews with US business and labour associations 2016.

[65]Moore (2016).

[66]McNamara (2017).

[67]Hughes (2017).

other commitments, Trump once declared that 'pulling back from Europe would save this country millions of dollars annually'.[68]

5.3 *Transatlantic Ties: A Bilateral with the UK?*

The UK vote in favour of Brexit arguably reflected an exclusionary populism, fuelled by a similar conjuncture of factors, including age, education and mobilisation of nativist, xenophobic attitudes. Definitive analyses remain to be conducted, though there is evidence that these factors were underpinned by a sense of actual or relative deprivation and insecurity in the globalised economy. Income and education variations in voters have been identified. Goodwin and Heath illustrate that a large percentage of Leave voters were persons facing unemployment or working in low-skilled and manual jobs, who perceived a decline in their financial position and lacked formal educational qualifications.[69] They were clustered geographically in areas facing economic hardship, with fewer immigrants but a perception of external pressures undermining local prospects. A 'large proportion of votes to leave the EU might be understood to be a visceral reaction from those who have felt increasingly powerless as a result of globalisation, widening economic inequalities and a failure of successive UK government administrations to redistribute income and wealth more equitably for more than thirty, almost forty years'.[70] Hübner likewise notes that the appeal using nationalist rhetoric to mobilise those who feel marginalised by globalisation was effective in districts marked by relative poverty, unemployment, inequality and marginalisation from the global economy, the impact of which has worsened in the UK by the adoption of austerity policies as the UK state failed 'to actively improve the fate of the losers' of transnational integration.[71]

Could this produce the basis for common ground on a bilateral deal between the two Anglo-Saxon states, reviving their 'special relationship' around common right populist principles? Brexit provides a potential opening to Trump to forge a bilateral connection with the UK as a model for the trade deals he seeks. During the campaign, he openly endorsed Brexit and, while in the UK, declared that the British people had 'taken back their country' because they were 'angry over borders, they're angry over people coming into the country and taking over, nobody even knows who they are'.[72] He suggested that the EU was a tool for Germany and extolled bilateral ties with Britain; though less critical than of the TPP, he stated his intention to end TTIP negotiations in favour of bilateral deals in which the American economic

[68]Oliver and Williams (2017).

[69]Goodwin and Heath (2016), pp. 323–331.

[70]Dorling (2016).

[71]Hübner (2016), p. 7.

[72]Buncombe (2016).

superpower would have greater leverage. UK pro-Brexit MPs welcomed that as an opportunity to forge a new bilateral relationship between the two countries. He has certainly garnered the support of leading Brexit supporters, notably Nigel Farage. Trade secretary Liam Fox has emphasised working with the US as part of the strategy of separation from the EU.[73] Several pro-Brexit politicians and journalists suggest that the UK could be given an exemption from the America-first protectionism that other countries may face, while some American trade advocates suggested that a US–UK trade deal might be done expeditiously if the complexity of recent deals was pared back and there was a clear focus on reduction of tariffs and regulatory trade barriers.[74]

Nevertheless, despite Trump's pledge to prioritise a pact with the UK, there are notable obstacles. These include the need for Brexit terms to be reached to clarify UK trade arrangements, the lengthy nature of complex trade and economic negotiations and potential conflicts over agriculture, regulations and public services and procurement. The US will need to see the outcome of Brexit negotiations before working towards a deal with either the UK or the EU. And the UK will have particular challenges mounting a serious negotiation for a US deal. The 'UK's limited resources in this area will be strained, as it has relied on the European Commission to negotiate trade deals for decades now. The UK will have to hire hundreds of trade experts and set up trade institutions from scratch, as well as decide on its own framework for trade agreements. This could slow down its efforts to negotiate new trade agreements' (Lester 2017). US firms might find it difficult to prioritise operations in the UK, which is now used by American investors as a launching point to the much larger European market. The UK may need to accept US pressure on hormone-treated beef, chlorinated poultry and genetically modified crops; US negotiators might also press for greater access to financial sectors and public services like health care. Moreover, uncertainty in the US administration could hamper matters; the more protectionist faction in the Trump White House wants to make bilateral deals more punitive based on the level of trade deficit that the US has in bilateral trade flows; as the UK has a large surplus in trade with the US, it could be a country facing punitive, difficult negotiations.[75]

In addition, German Chancellor Angela Merkel apparently tutored Trump on EU trade law, noting that the UK would not be eligible to negotiate a bilateral deal until after Brexit in 2019 at the earliest. Having expressed ongoing Euroscepticism, Trump suddenly praised the 'wonderful' EU, and Vice President Mike Pence made conciliatory comments about the EU and NATO on a visit.[76] Thus, the US administration indicated that perhaps the EU would have to take precedence in the queue for trade deals over the UK. Indeed, the EU trade commissioner has visited Washington, giving a sign that the US administration may now realise that it must

[73]Merrick (2016).

[74]Lester (2017).

[75]Stephens (2017).

[76]Macdonald (2017).

deal with the EU collectively, and prior to UK talks. Like many administration positions, this remains in flux, with a minimal team available to assist. Some observers suggest that for both the US and UK, prospects for altering trade relationships, with established partners and supply chains, in favour of a bilateral pact need to be carefully weighed and would limit quick action on a deal.[77] Moreover, despite the political appeal to his core constituency, a UK deal would have less benefit for the US than a pact with the much larger EU, which should be a priority at some point. And a politically popular deal with either party will be elusive; TTIP was beset with thorny unresolved issues that would be hard to resolve in the new climate. And 'even the most eager and cooperative British government will not make the negotiations simple. The "special relationship" may endure, but the deal must be plausibly sold as helping to redress the U.S. trade deficit that troubles Trump so much.'[78]

The shift away from support for liberalised trade and regional mega-deals will prove frustrating and complicating to the EU going forward, challenging the core tenets of an institutionalised system that has served its interests well.[79] Trump's approach to transatlantic relations will prove challenging to those used to the established transatlantic order. Yet many observers note that the US has little to gain and much to lose from eroding this order. There are complex issues surrounding the multinational character of production, such as German brand cars made in the US, which could be disrupted by any hasty imposition of trade barriers. 'As Brexit unfolds, the United States has a vital stake in ensuring that each point in the transatlantic triangle – U.S.-UK, UK-EU, and U.S.-Europe – is strong and sturdy. Failure to ensure that these three elements are mutually reinforcing rather than mutually disruptive will shortchange American workers, American consumers, American companies, and American interests.'[80]

6 Conclusion

Like the Brexit Leave campaigners, President Trump relied on an exclusionary plutocratic appeal to regressive right populism, with divisive rhetoric treating immigrant and minority communities as scapegoats for the adjustment difficulties of declining communities in order to target self-perceived 'losers' of global integration and transnational institutionalisation. Like Brexit, Trump's base may have included substantial elements of bigotry and xenophobia towards immigrants and foreign states. Nonetheless, the campaign was also marketed to the economically disaffected and insecure. It has been compared by some to a form of Jacksonian populism, featuring nationalism and distrust of others and global engagements. When it comes

[77] Egan (2017).

[78] Smart and Schneider-Petsinger (2017).

[79] Smith (2017), pp. 83–87.

[80] Hamilton (2017).

to foreign relations and trade, it involves more a generic distrust of the processes and individuals involved, a cultural self-identification with perceived American values under threat, heightened by socio-economic uncertainty. 'Jacksonians are skeptical about the United States' policy of global engagement and liberal order building-but more from a lack of trust in the people shaping foreign policy than from a desire for a specific alternative vision. They oppose recent trade agreements not because they understand the details and consequences of those extremely complex agreements' terms but because they have come to believe that the negotiators of those agreements did not necessarily have the United States' interests at heart.'[81]

The new administration has employed rhetoric designed to emphasise for political purposes this sense of disillusionment with globalisation:

> Americans have been put at an unfair disadvantage in global markets. Under these circumstances, it is time for a new trade policy that defends American sovereignty, enforces U.S. trade laws, uses American leverage to open markets abroad, and negotiates new trade agreements that are fairer and more effective both for the United States and for the world trading system, particularly those countries committed to a market-based economy. The Trump Administration is committed to this policy to increase the wages of American workers; give our farmers, ranchers, services providers, and agricultural businesses a better chance to grow their exports; strengthen American competitiveness in both goods and services; and provide all Americans with a better and fairer chance to improve their standard of living.[82]

This is an opening position in the trade strategy, although the continual oscillations (e.g., on the EU, NAFTA and China, etc.) suggest pushback from globalist plutocratic elements among the Wall Street appointees who are advocating a more mainstream neo-liberal internationalist approach. It is far from certain that the US could prevail over all but a handful of states in aggressive trade negotiations, as many larger trade partners, including the EU, can engage in retaliation harmful to US interests. This is especially so because while many states that have a surplus in goods trade with the US, the Americans have a decided advantage in services, investment flows and intellectual property, which they would be loath to put at risk through aggressive tactics.[83] It could be that Trump will break from the longstanding pattern noted by Bartl, favouring the pursuit of liberalisation via institutionalised transnational arrangements on global or regional levels. He may revert to a bilateral approach enhancing US interests by leveraging its economic size versus most potential bilateral partners. It is doubtful that he will do this for popular interest. As with the hyper-liberalisation, which may flow from Brexit in the UK, this will serve plutocratic goals primarily.

What does this all mean for potential institutionalisation of transatlantic trade and economic relations? While observers had originally considered a change in administration as potentially only a temporary setback in TTIP or a similar agreement, Trump's approach of 'America first' bilateralism suggests that ambitious

[81]Mead (2017), p. 2.
[82]USTR, op cit. 2017.
[83]Gastinger (2017).

institutionalisation may be delayed indefinitely. The ambitious TTIP plans for regulatory cooperation and for an ISDS modelled on the US approach or for a new multilateral investment court all appear more elusive at present. Negotiation of such complex arrangements was already a daunting prospect, let alone with the unpredictable Mr. Trump involved; his first forays to Europe did little to reassure that he would be a reliable partner in such complex talks. It may be that the globalist elements of the administration will moderate the hard-line opening stance in trade policy, but that cannot be certain. And the issues of the President's unpredictability, problematic staffing and complexities of negotiations at the best of times likely condemn transatlantic space to a continuation of what Fahey calls 'non-institutionalised' ad hoc arrangements in the transatlantic space, buffeted by potential undermining of WTO rules and procedures by the maverick US administration.

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Building Global Governance One Treaty at a Time? A Comparison of the US and EU Approaches to Preferential Trade Agreements and the Challenge of TTIP

Maria Garcia

1 Introduction

As a 'new international trade agenda'[1] has evolved, encompassing an increasing array of policy areas, previously limited to the domestic arena (e.g., labour standards, environmental rules, intellectual property rights, competition policy), trade policy has transformed into a veritable tool for the external projection of preferred norms of economic and social governance. Through their preferential trade agreement policy since the early 2000s, consecutive United States Trade Representatives (USTR) and EU Trade Commissioners[2] have sought to externalise United States (US) and EU market rules and regulations beyond their respective borders. When faced with smaller partners, both the EU and the US have been able to leverage their market size and market attraction to extract increasing acquiescence for their respective governance models and preferences. However, as TTIP negotiations have demonstrated, in the absence of structural power derived from asymmetries in the economic relationship, gaining acquiescence for their respective preferences and for the externalisation of their respective markets becomes extremely challenging. Neither party has incentives to alter its institutional set-ups for regulations and market norms crafted over time as a result of domestic political processes balancing complex domestic pressures and contrasting interests from diverse groups.

This chapter charts the key aims and characteristics of EU and US preferential trade agreement policies since the reframing, and curtailment in scope, of trade negotiations at the WTO in the early 2000s and how these have been integrated in

[1] Young (2002).

[2] In the EU case the emphasis on bilateral trade agreements emerges from the 2006 'Global Europe' trade strategy.

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bilateral preferential trade agreements. It does this by undertaking a qualitative comparative analysis of agreements negotiated between the US and EU with the Republic of Korea and Singapore,[3] as well as their most recent and innovative agreements to date, the Comprehensive Economic and Trade Agreement (CETA) with Canada for the EU and the Transpacific Partnership (TPP) for the US.[4] Subsequent sections focus especially on the approaches to labour and environmental matters in these agreements and to regulatory cooperation as these are areas of marked differences, which have been transposed into the challenging TTIP negotiations. Although both the US and EU have long held ambitions to determine global economic governance rules through the creation of institutional arrangements that reflect their respective preferences, both have tended to proceed in a competitive manner through bilateral agreements where they can utilise latent and structural power to exert compliance for their governance models, revealing the practicalities of power deployment in the international arena. The TTIP gambit was embedded within this agenda. The agreement would have not only formalised the relationship but also created a solid institutional framework, including enforceable dispute settlement mechanisms and joint bodies for the creation of rules governing the transatlantic market space. The institutionalisation and codification of the relationship with the TTIP was intended to create the world's largest market and largest regulatory institutional arrangement, whose structural power and gravitational pull would bring other states towards it and its rules and norms. It should have been the Treaty that would bring an end to bilateral treaties by eventually opening up to other states and creating a new set of economic governance institutions and arrangements under it. However, as the introduction to this volume already summarised, some key elements of the proposed TTIP institutional framework (regulatory cooperation and Regulatory Cooperation Body), and their enforceability, were downgraded during the negotiation process. As subsequent sections purport, the underlying differences in EU and US preferences on this, the potential for politicisation and contestation, and the importance of power asymmetries in negotiations have derailed negotiations. Yet these challenges were severely underestimated at the highest political levels, when the original ambitions for TTIP were set out.

This chapter reinstates their significance in the process of institutional creation (rule, norm and market-making institutional arrangements). The chapter is divided into four main sections. An initial section describes how modern free trade agreements have become market-making institutions in their own right. A second section argues that the US and EU have utilised their FTAs to institutionalise some of their preferred approaches to economic regulations beyond their own markets and highlights key similarities and differences in the US and EU approach to regulatory norm

[3]These cases were chosen as examples of developed economies that have FTA texts with both the EU and US. Although the EU-Singapore FTA is pending ratification in 2017, the text is available. The EU and US also have FTAs with developing states in Central and South America, and have similar provisions to the agreements with Asian states.

[4]Upon taking office as President of the US, Donald Trump signed an executive order halting the ratification of TPP by the US and withdrawing the US from the agreement.

promotion in FTAs. A third section posits that despite the high level of ambition of TTIP, in terms of institutionalising novel global economic rules and norms, preliminary and provisional texts as of 2017 reveal a high degree of continuity with past practices and recent US and EU FTAs, as opposed to dramatic institutional innovation. The concluding section explains the dilution of ambition as a result of a combination or matched power in negotiations and crucial responsiveness to increased politicisation of trade policy in recent years and strong and active opposition to the TTIP process.

2 Background: Free Trade Agreements as Mechanism for the Formalisation of Trade Rules and Trade Governing Institutions

Institutions can be defined as relatively enduring rules and practices embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals.[5] They distribute rewards and sanctions and set guidelines for acceptable behaviours.[6] They are, thus, central to social action. As highlighted in the introduction to this volume, the processes of institutionalisation whereby these sets of relative stable norms of behaviour are established can vary in the degree of structural formalisation, stability in time and strength of legal enforceability. The global order established in the aftermath of the Second World War has been characterised by the proliferation of international institutions, with various functions, memberships, purposes and levels of legal enforceability. In terms of economic governance, the World Bank, International Monetary Fund and the General Agreement on Trade and Tariffs (GATT) established new rules about appropriate economic development policies in states. Over time, with changes in the institutions, most notably the shift from GATT to World Trade Organization (WTO) with permanent and binding dispute resolution mechanisms and appellate body, and the impossibility of benefiting from greater market openness elsewhere without reciprocating, as well as the single-undertaking negotiation model, these institutions have greatly contributed to the emergence of today's global economy. Alongside developments at the multilateral level, myriad regional economic organisations have been created since the 1950s, most notably the EU.[7] These have generated additional layers of economic rules and norms governing trade relations amongst states, although each with different levels of enforceability, and formal institutionalisation. At the bilateral level, and especially since the start of the 2000s and the challenges

[5]March and Olsen (2011).

[6]Perrow (1983), p. 119.

[7]Regional economic organisations with various degrees of levels of integration and success have appeared in all corners of the globe (e.g. NAFTA, Andean Community, Mercosur, SIECA, Cariforum, ANZERTA, ASEAN, Eurasian Union, EFTA).

faced at the WTO negotiations in pursuing global rules in new aspects of trade matters that extend well beyond the scaling back of tariffs and quotas applied to imports at the border, bilateral trade agreements have multiplied across the globe. These range from agreements where WTO commitments are reaffirmed and some greater liberalisation of tariffs is agreed to between states to 'deep' agreements that tackle behind-the-border regulatory matters that can affect trade flows in goods and services (e.g., sanitary and phytosanitary measures, different car safety tests, rules regarding labelling information, treatment of personal data in electronic commerce transactions, etc.). Developed states have been at the forefront of negotiating 'deep' preferential trade agreements. The US and EU, in particular, have engaged in bilateral negotiations across the globe, where key aspects of their domestic economic regulatory regimes have been exported to partner countries. Modern trade agreements are, thus, more about regulations and rules than tariffs and as such can encroach on domestic economies and policy space more than trade agreements in the past and formalise certain economic norms and behaviours.

Modern trade agreements, in particular those involving the EU and US, are legally binding international treaties, which include dispute resolution mechanisms (often in the form of initial dialogues, mediation and legally binding arbitration panels) to ensure the enforceability of the agreement. Whilst they may not create new specific institutions with legal personalities, secretariats and staff (e.g., in the way the European Coal and Steel Community created the High Authority and Court), they incorporate formal mechanisms for the monitoring, implementation and further enhancement of the agreement once it comes into force. These mechanisms typically include a joint committee (to meet once a year) at ministerial level to oversee the functioning of the agreement and deliberate on any implementation problems that the more technical working group meetings (of specialised officials) have been unable to resolve. EU trade agreements also include advisory groups and fora for the participation of civil society in the implementation of the agreement and, specifically, in the monitoring of the social and environmental effects of the agreement. EU trade agreements are, also, typically accompanied by a political cooperation agreement (PCA) or a framework agreement (FA) or part of broader association agreements (AA)[8] that set out the broader political framework for the bilateral relationship. The PCA, FA and AAs incorporate formal parliamentary committees or dialogues whereby members of the European Parliament and the partner's Parliament meet annually to discuss the bilateral relationship, including the implementation and effects of the bilateral free trade agreement.

[8]Association Agreements are broad bilateral agreements establishing a free trade agreement and solid political and economic cooperation mechanisms, and have been signed either with neighbouring states (Ukraine, Moldova) or states that, at least in theory share the EU's broad values (Central America, Chile, beleaguered negotiations with Mercosur). Political Cooperation Agreements have typically been signed with developing states and set out the political and development cooperation pillars of relationships that can be later enhanced through the negotiation of a free trade agreement (e.g. Vietnam, Thailand). Framework Agreements (which may have more sophisticated names) have been used with more developed states (South Korea, Canada).

Trade agreements also create new legal commitments and a new international legal order, to the extent that they bind future governments to the agreed provisions (in respect of market access, customs procedures, recognition of foreign testing bodies, etc.) at the cost of financial penalties for breach of the agreement. US trade agreements have also included controversial investor-state dispute settlement mechanisms.[9] Part of the controversy around these mechanisms lies in the fact that they provide foreign investors with access to opaque tribunals where they can sue governments, not only for adequate compensation for the expropriation of their investments but also for compensation for potential losses from changes in domestic regulations and policies affecting the profitability of their investment.[10] Detractors of the system have argued that fearing potential litigation, and the high costs involved for the state, governments may be inclined to avoid policy shifts and new regulations, for instance on the environment, that could originate a claim and that ISDS, therefore, has a 'chilling' effect on future regulation.[11] Until the Treaty of Lisbon (implemented in 2009), the powers to negotiate international agreements on investment remained an exclusive competence of EU Member States. Thus, whilst individual Member States, with the exception of Ireland, had entered into bilateral investment agreements (BITs), many of which included differing arrangements for investor-state dispute settlement, EU trade agreements did not incorporate chapters on investment, unlike US ones.

The FTA negotiated with Singapore between 2010 and 2014 is the first EU agreement to include an investment chapter, in accordance with the expansion of the European Commission's international trade remit under the Treaty of Lisbon. However, the absence of a clear-cut definition of investment in the Treaty of Lisbon led EU Member States to contest the European Commission's prerogative to negotiate investment matters on their behalf as an exclusive Community competence.

[9]Free Trade Agreements contain clauses to end the agreement, which include the advance warning required. Rescinding a trade agreement would mean that tariff benefits under the agreement would be cancelled with trade reverting to non-preferential WTO schedules, and that any additional non-tariff barrier trade facilitation measures under the FTA (e.g. mutual recognition of conformity assessments or safety tests) would also cease, and only whatever measures have been agreed at WTO level would apply, so although the agreements can be terminated, there would be consequences and financial losses for exporters potentially facing more barriers in the partner market, and for importers potentially facing higher tariffs on the products they import from the partner country.

[10]The controversial *Philip Morris vs. Australia* ISDS case, where the tobacco company used a subsidiary firm based in Hong Kong to sue the Australian government for plain packaging regulations, led many to reconsider the merits of ISDS. Although the arbitrator panel decided that the case was outside the remit of the agreement, this case raised the salience of ISDS in public discourses. In Germany, the *Vatenfall* case, where the Swedish company contested the German government's post-Fukushima decision to wind down nuclear power, also incensed public opinion, and helped to build a NGO platform mobilisation against ISDS, which became a key concern in TTIP negotiations.

[11]See Dowd (2017); Statement against Investor Protection in TTIP, CETA and other Agreements signed by numerous anti-TTIP groups, <https://corporateeurope.org/sites/default/files/attachments/s2b_statement_isds_ics_engl.pdf> accessed 23 May 2017; De Ville and Siles-Brügge (2016b), p. 7.

To resolve the matter, Trade Commissioner Karel De Gucht, shortly before the end of his term in October 2014, referred the EU–Singapore Free Trade Agreement to the European Court of Justice (ECJ) for the ECJ to deliberate whether the European Commission had overstepped its powers in the Treaty of Lisbon in the negotiation of an investment chapter or not.[12] On 16 May 2017, the ECJ delivered its Opinion, in which the Court determined that non-direct foreign investment (portfolio investments) and the regime regulating disputes between investors and states were areas of mixed competence, requiring conclusion and ratification by both the EU institutions and the EU Member States.[13] The later point refers to the intent that the inclusion of EU-wide investment chapters in new bilateral trade agreements would supersede existing Member State bilateral investment treaties, to start to create a European external investment regime. The incorporation of investment, and in particular investor-state dispute settlement mechanisms, in the negotiations of a trade deal with Canada (CETA) and in TTIP (discussed in more detail below) has also been highly controversial, receiving wider media attention and mobilising civil society activism against EU FTAs hitherto mostly absent from EU trade policy.

Given the formal legal relationships that modern trade agreements generate, as highlighted previously; the complex nature of modern trade; and its potential to affect domestic economic and social policy making and to lock in certain economic and social policies, some have argued that modern trade agreements, alongside other international rules and institutions, facilitate a 'new constitutionalism' that promotes and consolidates a neo-liberal vision of economic policy and economic interactions.[14]

3 Transatlantic Competition to Formalise Trade Rules Through Free Trade Agreements

Despite the surge in preferential trade agreements since the start of the 2000s,[15] an intriguing characteristic of these had been the absence of trade agreements within the world's largest trade and investment relationships. The EU and US had no preferential trade agreement amongst themselves or with China, even though the existence of close economic ties, even in the absence of the legal liberalising framework of a

[12]European Commission, News archive, 'Singapore: The Commission to Request a Court of Justice Opinion on the trade deal', 10 October 2014, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1185> accessed 25 April 2017.

[13]Opinion C-2/15, Opinion pursuant to Article 218(11) TFEU—Free Trade Agreement between the European Union and the Republic of Singapore—'New generation' trade agreement negotiated after the entry into force of the EU and FEU Treaties—Competence to conclude the agreement, 16 May 2017, <http://en.euractiv.eu/wp-content/uploads/sites/2/2017/05/CP170052EN.pdf> accessed 16 May 2017.

[14]Gill and Claire Cutler (2014).

[15]Urata (2005).

preferential trade agreement, should result in greater economic welfare gains from an agreement than the agreements with smaller and less significant economic partners that the EU, US and China were all engaging in at the time.

The evolution of preferential trade agreement strategies that have resulted in myriad FTAs amongst smaller and medium economies, and between the largest economies and smaller partners, has been mostly explained in the literature on trade agreements as resulting from 'domino effects' elicited by domestic business pressures to prevent a worsening of their access to other markets relative to foreign competitors.[16] Additionally, the literature points to political motivations, including garnering support for domestic reforms, political elites' desire to remain relevant and engaged in processes of regionalisation and fostering closer ties with significant allies or powers, as further explanations for the proliferation of preferential trade agreements.[17]

Within a challenging context at the WTO negotiations, FTAs have afforded states an avenue for exploiting increased trade openness in certain sectors whilst retaining protection for their most sensitive economic sectors via exclusions from liberalisation schedules in FTAs. This form of 'liberalisation without the [political] pain'[18] assists governments to simultaneously respond to liberalising demands by exporters (and increasingly by importers embedded in regional and global production chains)[19] and to persistent calls for protection from external competition by certain sensitive import-competing industries. Although bilateral FTAs enable states to retain some protection for sensitive sectors, according to GATT Article XXIV(8((b) in the WTO framework, which provides for the existence of bilateral preferential trade agreements, which by their nature discriminate against other trade partners and run counter to the WTO's most-favoured-nation principle, FTAs must liberalise 'substantially all trade between the constituent territories in products originating in such territories'.[20] Despite its vagueness, the article implies a liberalising effect of FTAs. US and EU FTAs have taken on board this liberalising remit, and despite the retention of certain protection (particularly in the agricultural sector), both the US and EU have established networks of legally binding bilateral FTAs formalising liberalising reforms in other states.

Bilateral negotiations afford the US and EU advantages in the negotiations.[21] In bilateral negotiations (other than between themselves and with China), their market will be of much greater significance to the negotiating partner than vice versa. Their

[16]Baldwin (1993); Dür (2007), pp. 833–855; Dür (2010).

[17]Ravenhill (2010), pp. 178–208.

[18]Ravenhill (2003), pp. 299–317.

[19]Eckhardt (2013), pp. 989–1005.

[20]General Agreement on Tariffs and Trade, Article XXIV, 1994, <www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm> accessed 20 April 2017.

[21]Bilateral negotiations also afford asymmetric power advantages to China, however, as China's economic liberalisation agenda in FTAs, until now, has been much more limited than that of the US and EU, it will not feature in the present discussion.

ability to leverage their market size and the attraction of access to their markets for other partners generates asymmetric structural power in the negotiations that facilitates their ability to garner acquiescence for their preferences in the negotiations. Moreover, both possess advanced and developed regulatory authorities and systems (regulatory power), which, combined with their market size, enable a description of both as veritable 'market powers'.[22] In bilateral FTAs, this has manifested itself in the form of the evolution of a US FTA template and an EU FTA model, which encapsulate each party's respective existing internal market rules, standards and established ways of doing business and regulating business. Although FTAs do not create the highly formalised supranational institutions that other regional integration initiatives (most notably the EU) establish, they do create oversight joint committees, cooperation dialogues, and rules, procedures and norms for behaviour in economic governance. Since the new institutionalism of the 1990s, in the fields of political science and sociology, rules, procedures, norms and conventions have been considered to form part of broad definitions of institutions.[23] Crucially, the new rules will affect the degree of power of various actors over future policy outcomes[24] as the rules established formalise and crystallise the economic preferences of the most powerful negotiator.

As the US abandoned its prioritisation of the WTO as *the* venue for trade liberalisation in the early 2000s, the US Trade Representative at the time, Robert Zoellick, put forward a series of 'tests' to choose FTA partners. Potential FTAs had to help broaden political support in Congress for US trade initiatives (partially through including countries that in the past Congress has sought to help for economic or political reasons). They also had to promote US economic interests (improve access to growing markets, build alliances for WTO). Potential partners had to be willing and able to undertake pertinent domestic reforms to implement the FTA, thus extending the USA's preferred trade, economic and regulatory model. FTAs also had to promote broader US foreign policy objectives (rewarding friends for international support, economic incentives to promote economic and political reform) again tying the economics and the politics together.[25] Apart from this, partners needed to accept the US's 'gold standard' of WTO plus FTAs, which incorporate comprehensive coverage of goods, services and investments with only limited exceptions, and rule-making obligations in competition policy, labour and the environment and e-commerce, i.e. matters that the WTO Doha Round was failing to resolve. The expectation amongst US trade policy makers was that a competition amongst countries will consequently emerge to provide the most attractive set of incentives for the initiation of negotiations, as states seek not to be left out once their neighbours have established FTAs with the USA.[26] The approach taken, and emphasis on the incorporation of intellectual property rules

[22]Damro (2012).

[23]Koelble (1995), p. 234.

[24]This is a key characteristics of the effects of institutions according to new institutionalists. See Hall (1986), p. 19.

[25]Schott (2006), p. 103.

[26]Phillips (2007), p. 163.

(based on the US intellectual property regime), competition policy, standards and behind-the-border issues, demonstrates the intent of externalising US rules through FTAs, thus reaping benefits for US business in the way of easier access to foreign markets with lower compliance costs.

The EU's new generation of FTAs, triggered by a policy shift crystallised in the 'Global Europe' trade policy of 2006,[27] have pursued a competitiveness agenda shaped by competition with the US and a perceived imperative to prevent loss of competitiveness vis-à-vis the US by failing to negotiate new generation FTAs.[28] This was explicitly articulated in the policy: 'Where our partners have signed FTAs with other countries that are competitors to the EU, we should seek full parity at least.'[29] Consequently, the US and EU have developed FTAs with the same partners. The use of FTAs as a hedge against potential benefits accrued by competitors explains why so far the 'FTA process...more closely resembles fingers reaching idiosyncratically around the globe than the formation of politico-economic blocs centred respectively on Beijing, Brussels and Washington'.[30] Bilateral FTAs have resulted in the formalisation of institutional frameworks, occasionally providing additional rules binding economic behaviour and choices (e.g., through tighter intellectual property rights) to existing ones under the formal institutions of the WTO. Their piecemeal nature has also precluded the formation of a coherent formalised (regional) institution threatening the WTO. TTIP, however, was initially conceived to achieve just that, the eventual creation of a transatlantic politico-economic bloc with some formal institutions managing the transatlantic market space and establishing rules, standards and regulations in an alternative setting to the WTO.

4 Key Similarities and Differences in US and EU FTAs

4.1 Similarities

Given the competition between the US and EU, their agreements with third parties tend to bear many similarities, not least as each will demand at least parity in market access to whatever the other has managed to negotiate with a given state.[31] US and

[27]The competitiveness agenda was continued in Commissioner De Gucht's 2010 trade policy, and in Commissioner Mälmstrom's 'Trade for All' policy of 2015, although the later places greater emphasis on transparency and the values agenda. Continuities and changes in priorities in the EU's trade policy can be found in Garcia (2013).

[28]Garcia (2012), pp. 59–71.

[29]European Commission, DG Trade, European Commission (2006) Global Europe. Competing in the World, Brussels, <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf> accessed 12 March 2017, p. 11.

[30]Hufbauer and Wong (2005), p. 12.

[31]Small differences in the schedules and timelines for liberalisation of trade in goods depend on the specific characteristics of the bilateral trade relation in a FTA.

EU FTAs include extended commitments on matters on which some liberalisation has already been achieved at the WTO. These areas are referred to as WTO plus commitments, and modern EU and US FTAs include increased commitments to market opening in industrial products, agricultural products and intellectual property rights coverage that goes beyond WTO commitments under TRIPs. Agreements also tackle 'behind-the-border' issues that can hamper trade exchanges and include obligations concerning customs administration, technical barriers to trade (TBT), anti-dumping and countervailing measures.[32] Provisions, based on the WTO voluntary Government Procurement Agreement (GPA) covering transparency and procedures for procurement and usually granting the counterparty some improved access to government procurement market, are also included in FTAs.[33] Language curtailing the use of export taxes and relating to state subsidies and state-owned enterprises, and the requirement for these not to act in ways that impede competition, is also present in both EU and US FTAs. With the exception of the EU–Singapore, EU–Canada (CETA), EU–Vietnam FTAs, previous EU FTAs did not contain investment chapters reflecting and improving on commitments under the WTO TRIMS, whilst US FTAs always do.[34]

Facilitating access for US investors to foreign markets (e.g., by reducing limitations on percentage of foreign ownership in a firm or obligations to enter into joint ventures to conclude an investment) represents an externalisation of more liberal US approaches to inbound and outbound investment, as well as the creation of a broader market where US firms can spread investments and seek yields and opportunities for profits. Moreover, the inclusion in investment chapters of investment protection in the form of access to investor-state dispute settlement mechanisms enabling investors to request access to legal procedures outside of the domestic courts via ad hoc tribunal panels formalises the creation of a legal system beyond the nation state.[35] In their FTAs, both the EU and US seek greater access abroad for trade in services, with only minor differences in terms of the service sectors included, which derive from the EU's internal restrictions, such as the exclusion in EU FTAs of audiovisual and cultural services.

[32]Some older US agreements (US-Israel) and politically motivated US FTAs (US-Jordan) have reduced coverage in terms of TBT and customs administration. Horn et al. (2010), pp. 1565–1588.

[33]Ibid, p. 1575.

[34]In 2017 full implementation of any of the EU's new agreements with investment chapters is still pending.

[35]Although the EU has not included investment until recently in FTAs, individual EU Member States have entered into thousands of bilateral investment treaties (BITs), many of which include investor-state dispute settlement along similar lines to US agreements, and using international rules as set out in the ICSID Convention, and UNICITRAL Arbitration rules.

4.2 Differences

In terms of the content of legally enforceable WTO plus provisions, the differences in the EU and the US approaches derive specifically from the domestic characteristics of their respective markets and market rules and regulations. Main differences involve the area of intellectual property, in particular geographic indications (GI), and area where the EU and US have divergent domestic approaches.[36] The EU protects products from a particular locality (e.g., champagne, Parma ham...) through registration in a GI register, which protects all producers in the locality and prevents producers of similar products elsewhere from using said name to describe their product (even if the origin of the product is clearly indicated). The US grants protection to GIs through a trademark system, and the producer that first applies for the trademark is the one that will be granted the protection, preventing others from using the name. Their entrenched positions have led to an inability to resolve the matter at the WTO.[37] Through their FTAs, they each have extended their GI regulatory approach to third parties. In its FTAs, the EU includes a list of its core GIs; although the length of the list varies from FTA to FTA, these typically include the GIs most likely to face competition from similar products elsewhere. The EU demands that the counterparty grant protection to those GIs. For its part, the US includes its trademark laws in FTA agreements.

Following its FTA with the US, Singapore undertook an overhaul of its intellectual property law, to ensure compatibility with the FTA, and based its reforms on US intellectual property provisions.[38] This included a trademark system for the protection of GIs. Singapore has subsequently negotiated an FTA with the EU, in which the EU has introduced its preferred GI protection model, but the existence of a US-aligned trademark system meant that Singapore could not grant automatic protection to the EU's list of GIs, and instead it agreed to develop its own GI register. A side letter on GIs by the EU Trade Commissioner summarises the agreement between the parties for Singapore's GI register processes to be expedited in the case of EU GIs. The procedure grants a period of time for relevant parties to present objections to the GI registration, meaning that potentially US producers using terms they deem as generic or having incorporated them into their trademarks would be able to object to the registration of EU GIs. In this way, the US FTA with Singapore was able to extend US intellectual right protection well beyond the jurisdiction of US legal authorities. For its part, in the side letter, the EU stresses that when dealing with objections on the basis that a generic term is used to describe a type of cheese or other product, Singapore will look for evidence of this generic use only within Singapore, thus attempting to prevent US or other producers that

[36]Geographical indications (GIs) are collective marks signalling the region from which a product comes. The product characteristics must derive from the land and climate (the 'terroir'). GIs originated in Europe and are currently available only for agricultural products.

[37]See Goldberg (2001), pp. 107–152.

[38]See Chiu (2004), p. 489.

generally use that term in their domestic market from preventing the protection of European GIs in Singapore. In this way, the EU, too, is attempting to extend its regulatory mantle beyond its borders. In the letter, the EU relinquishes EU aims for feta cheese to be granted GI exclusivity and instead accepts the coexistence in perpetuity of Greek feta and other feta cheeses even after Greek feta is registered as a GI in Singapore.[39] In the agreement with Canada (CETA), the EU and Canada have also resolved the issue of GIs through a hybrid system, whereby existing trademarks will coexist with GIs entered in the registry system, and five types of cheeses will continue to be used as generic names.[40] The challenges in reconciling entrenched and different regulatory approaches is evident in this example, and concerns have been raised that third parties, with less administrative capacity, could be entering into incompatible agreements by including US trademarks for GIs in FTAs with the US and the EU's GI approach in FTAs with the EU.[41]

Other differences in regulatory approach in the area of trade in goods, particularly sanitary and phytosanitary measures (SPS), including the treatment of genetically modified organisms (GMOs), as well as chemicals and medicines, can also make their way into FTAs. Recent US FTAs include commitments to base regulatory decisions and practices on science-based risk assessments, even if such an approach is not enforceable through recourse to the FTA's dispute settlement mechanism, as for example in the SPS chapter in the US–Korea FTA.[42] EU agreements also adopt a soft approach to regulatory cooperation where commitments are limited to the establishment of regulatory dialogues, which formalise regular contacts at the horizontal and sectoral level aimed at increasing mutual understanding, exchanging information and experiences. They also encourage the use of good regulatory practices, such as the use of international standards where available, transparency, providing information and leaving sufficient time for affected parties to comply with new regulations.[43]

[39]Letter on Geographic Indications from Commissioner Karel De Gucht to Singapore Minister for Trade and Industry, EU-Singapore Free Trade Agreement, 21 January 2013 <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151779.pdf> accessed 20 March 2017.

[40]Moir (2015).

[41]O'Connor (2014), pp. 66–69.

[42]US-Korea Free Trade Agreement, Chapter 8, 2012, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> accessed 8 April 2017.

[43]Articles 4.3 and 4.4 of the Free Trade Agreement between the EU and the Republic of Korea, 2011, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN> accessed 10 April 2017.

4.3 Approaches to Regulatory Cooperation in the Most Recent Agreements

In their most recent agreements, however, the US and EU introduce novel elements to further their promotion of regulatory practices more in line with their own internal market approaches. Although the innovative regulatory coherence chapter (chapter 25) of the Trans-Pacific Partnership (TPP) agreement[44] remains exempt from the application of chapter 28 on dispute settlement, its significance lies in setting norms and principles, based on the US regulatory approach, regarding key characteristics of how to go about drafting and introducing new regulations. These characteristics are the following:

(a) review(ing) proposed covered regulatory measures to determine the extent to which the development of such measures adheres to good regulatory practices, which may include but are not limited to those set out in Article 25.5 (Implementation of Core Good Regulatory Practices), and make recommendations based on that review;
(b) strengthen(ing) consultation and coordination amongst domestic agencies so as to identify potential overlap and duplication and to prevent the creation of inconsistent requirements across agencies;
(c) mak(ing) recommendations for systemic regulatory improvements; and
(d) publicly report(ing) on regulatory measures reviewed, any proposals for systemic regulatory improvements and any updates on changes to the processes and mechanisms.[45]

TPP defines some parameters for Good Regulatory Practices, which include assessment of need for a regulatory proposal, examining alternatives, relying on the best available technical and scientific information, explaining the rationale for decisions taken and writing regulations simply and clearly. Additionally, and subject to national laws, the section implies provision of public access to documentation on the new measure and making it available online, and regulatory agencies should take

[44]TPP brings together 12 Pacific states (United States, Canada, Mexico, Chile, Peru, Japan, Vietnam, Brunei, Malaysia, Singapore, Australia, New Zealand). After years of negotiations it was signed in February 2016, and ratification processes commences in the states. Following the election of President Donald Trump in November 2016, the United States announced it would not proceed to ratify the agreement and would withdraw from TPP (BBC, 'Trump Executive Order pulls US out of TPP', 24.1.2017, <www.bbc.co.uk/news/world-us-canada-38721056> accessed 10 April 2017). The remaining 11 states are looking at ways to continue the ratification of TPP, and engaging the United States. At the time of writing in April 2017 the future of the agreement remains uncertain, but there are possibilities of an altered version re-emerging. Moreover, counterparties have suggested that President Trump use novelties in TPP in his renegotiation of NAFTA (Financial Times, 'Mexico calls on Trump to use TPP deals to reanimate NAFTA' 30.4.2017, <www.ft.com/content/ebb7605e-2c1a-11e7-9ec8-168383da43b7> accessed 10 April 2017).

[45]TPP Chapter 25 Regulatory Coherence, (25.4.2), <https://ustr.gov/sites/default/files/TPP-Final-Text-Regulatory-Coherence.pdf> accessed 10 April 2017.

account of what agencies in other TPP states are doing in a given area.[46] The chapter creates a Committee for Regulatory Coherence tasked with exchanging information and designing avenues for future cooperation, for instance through staff exchanges, seminars, training programmes. TPP does not create formal institutional bodies for regulatory harmonisation with enforcement mechanisms (regulatory coherence is exempt from the dispute settlement mechanism), but it does aim to establish conventions and practices regarding appropriate behaviour (Good Regulatory Practices), including facilitation of dialogue with the public, and contacts and exchanges to encourage greater understanding amongst regulators and eventual socialisation into particular ways of thinking about how to conduct regulatory impact assessments and how to craft regulations, which should, in the long term, lead to an approximation of regulatory approaches. By affecting what is deemed as appropriate behaviour and altering the environment and habitual contexts within which TPP regulators will discuss, think about and enact policies, the coherence agenda articulated in TPP has the potential to generate novel institutional settings for regulatory policy.

The EU's latest, and most comprehensive, trade agreement with Canada (CETA) follows a similar approach to enhancing regulatory cooperation. It creates an institutional framework for enhanced cooperation through a Regulatory Cooperation Forum, which may consult stakeholders in any way chosen by the parties, meets annually and sends an annual report to the CETA Joint Committee.[47] The reporting obligation generates an additional layer of accountability and reinforces the institutionalisation of the dialogue by requiring meetings to be recorded and scrutinised. However, as in the case of TPP, there is no enforceability mechanism. CETA (Chapter 21) explicitly states that cooperation on regulatory matters will proceed on a voluntary basis (21.2.4). Chapter 21 on regulatory cooperation details the aims of cooperation (building trust, improving planning of regulations, identifying alternative measures, reducing duplicative research and, when appropriate, developing a common scientific basis) and possible mechanisms for said cooperation to take place (exchanging experiences, comparing methods of analysis of regulatory proposals, consultations).[48] Parties are required to consider the compatibility of regulatory measures and take into account the regulations of the other party but can adopt divergent regulatory measures.

The voluntary and soft law approach taken with regard to (mostly technical, safety and SPS) regulatory convergence in both the EU and US cases is a recognition

[46]Ibid. 25-3.

[47]Chapter 22 of CETA establishing the Regulatory Cooperation Forum does not mandate consultation with stakeholders, unlike the Chapter on Sustainable Development (Labour and Environment) and Trade. However, it is common practice for stakeholders to participate in policy making in both Canada and the EU (e.g. through online stakeholder consultations in impact assessments), so it is likely that the parties will engage stakeholders.

[48]Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) Chapter 21, 2016, <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf> accessed 15 April 2017.

of the complex and path-dependent rationales for regulatory divergences, which reflect the risk preferences of governments in various jurisdictions, derived from the choices of electorates in democratic states.[49]

4.4 Approaches to Issues Not Covered in the WTO

Henrik Horn, *Petros Mavroidis* and *André Sapir* coined the term WTO extra (WTO X) to refer to provisions in FTAs regarding commitments in areas not currently covered under the WTO mandate.[50] Environmental and labour regulations, which fall under this category, as attempts to link environmental and labour standards to the WTO regime failed in the 1990s,[51] are treated separately in US and EU FTAs and in significantly different ways. US FTAs contain chapters on labour that incorporate commitments to respect fundamental principles and rights as defined by the International Labour Organisation (ILO) yet refrain from language mandating accession to or ratification of the ILO Convention, unlike the EU approach.[52] The EU approach formalises the commitment through an international convention, thus reinforcing international institutions and their rule-making regimes.[53]

Despite the apparent EU preference for fomalisation of labour regulation (through an international institution like the ILO) within FTAs, the US creates formal legally binding mechanisms to enforce labour and environmental standards,[54] in contrast to the EU's promotional and soft law approach to labour and environment in its FTAs. US FTAs explicitly prevent the parties from introducing new regulations that lower their already existing labour and environmental standards for the purpose of gaining

[49]Chase and Pelkmans (2015), p. 9.

[50]Horn et al. (2010).

[51]For more on this see Kolben (2006), pp. 225–258.

[52]The US has not ratified all of the ILO Core Conventions, however, it uses their language in FTAs and requires of the signatory parties in its FTAs domestic measures that ensure these principles.

[53]The ILO enforces its conventions by means mostly of scrutiny through regular reports on states, monitoring and requiring governments to provide information on what they are doing to enact those conventions (sunshine), and by offering states technical support in creating regulations to give life to the conventions (carrot). The ILO can receive complaints over mistreatment of workers in states, and can raise consultations, issue reports and recommendations. Although rarely used, the ILO under Article 33, the ILO has some opportunity for the use of punitive powers (sticks) to encourage states to adopt its recommendations, as it can leave it to the discretion of members to withhold trade as a punitive measure on should they wish to, although this has not been done. See Elliot (2000).

[54]The US approach reflects the lobbying of unions and the importance of Congressional elections as Congress has typically been split between representatives of states suffering from declining industry opposing trade liberalisation and advocating labour clauses in trade agreements to prevent 'social dumping' alongside trade unions (see Kerremans 2003, pp. 517–551). In the EU, too, there has been a cacophony of voices calling for more and less binding social clauses, but, crucially, Member States had different positions leading to a softer EU approach (see Bossuyt 2009, pp. 703–722).

trade competitiveness advantages. Even though US FTAs include explicit language reiterating that each party shall apply its own laws in these matters and has freedom to decide what resources to devote to implementation of measures to comply with ILO standards and that 'nothing empowers a Party to undertake enforcement activities in the other Party', labour and environment chapters detail a mechanism (including detailed timeframes) for consultations to resolve disagreements in the field brought to the attention of the Labour Affairs Council or Environmental Affairs Councils created in the FTA. Crucially, if the consultations fail to deliver a satisfactory resolution, complainants can have recourse to the FTA's general dispute settlement mechanism, which includes suspension of trade preferences as an enforcement mechanism.[55]

The post-2006 EU FTAs include a chapter on trade and sustainable development, which requires parties to ratify ILO fundamental conventions, as well as a series of international environmental agreements, deferring enforceability to those international bodies (often limited to soft approaches). Within the sustainable development chapter, EU FTAs formalise procedures to enhance cooperation and encourage best practices and improved adherence to international labour and environmental standards through the establishment of a Trade and Sustainability Committee (made up of relevant officials from the parties) with regular meetings. Meetings include meetings with a Civil Society Forum, made up of non-government representatives from the parties from the Domestic Advisory Groups (DAG).[56] Whilst not mandating who should take part in the DAGs, EU FTAs, nonetheless, grant formal status to these bodies and create a regular consultation channel, whereas US FTAs leave such bodies at the discretion of the parties (each party *may* create a national labour advisory committee), although US FTAs stipulate that meetings of the Labour Affairs Council *will* include opportunities for public participation.[57] Under the EU trade and sustainability chapters, parties agree to cooperate in labour and environmental matters (information and expertise exchanges, considering joint training, technical assistance…), reflecting the EU's promotional approach to these standards. Parties also commit themselves to not lowering domestic labour and environmental legislation and to respect, promote and realise international standards in the ILO Declaration on Fundamental Rights and Principles at Work and numerous environmental treaties. The cooperative nature of the sustainability chapter is reinforced by the fact that it is subject not to the general FTA dispute settlement

[55]Free Trade Agreement between the United States of America and the Republic of Korea, 2010, <https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file934_12718.pdf> & <https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf> accessed 2 April 2017.

The USA was first required to include binding labour clauses in NAFTA in 1994 to allay Congressional and trade union fears regarding business relocation to Mexico.

[56]For more on these mechanisms, including pitfalls see: Martens et al. (2016).

[57]Free Trade Agreement between the United States of America and the Republic of Korea, 2010, Chapter 19.

mechanism but to its own dispute settlement regime. This determines that complaints regarding breaches of the clause can be notified to the FTA's implementation Joint Council by civil society, businesses or government representatives of the signatory parties. The Joint Council will then appoint a three-member expert panel to investigate and produce a report with non-binding recommendations for action. The expectation is that through benchmarking processes, and a dispute mechanism based on naming and shaming, voluntary measures will be adopted to ensure high standards.[58]

Other WTO X provisions in FTAs include environment, intellectual property, investment, movement of capital, competition policy (which are present in both US and EU FTAs), as well as anti-corruption, labour market regulation and data protection provisions (in US FTAs). EU FTAs tend to additionally include cultural cooperation, education and training, energy, financial assistance, human rights, illicit drugs, industrial cooperation, money laundering, political dialogue, regional cooperation, research and technology, social matters and statistics, and since the EU–Republic of Korea FTA (2011), they also include labour and environmental matters under the sustainable development chapter. Whilst EU FTAs contain a far greater array of WTO X provisions, the degree of enforceability of these is lower than for those WTO X provisions included in US agreements (where only competition and anti-corruption is exempt from the FTAs' dispute settlement arrangements), reflecting a more 'functionalist' approach in the US and a tendency towards 'legal inflation' on the EU side. The latter results from the EU's distinct approach to FTAs. Whilst the US negotiates an FTA as a self-standing legal treaty, in the EU, FTAs have been deemed to regulate and institutionalise the rules of the economic relation between the EU and a third party, within the context of a broader relationship that is institutionalised through a framework agreement, an association agreement or a political cooperation agreement, which lays out the mechanisms for dialogue and cooperation in broad areas of the relationship (e.g., human rights, illicit drugs, research, education, gender equality, poverty alleviation), which are either tangentially related, or unrelated, to trade. The formalisation of these regular institutional links, including parliamentary dialogues and committees (made up of members of the European Parliament and partner's parliaments), is made for the purpose of information exchange, learning and building mutual trust, and, whilst not legally binding, they aim to affect the context of policy choices in the long term.

[58]In addition to the Labour, Environment Committees mentioned and Regulatory Fora, EU and US FTAs create a Joint Committee (at ministerial level) which oversees the implementation of the FTA and work of all committees and working parties, as well as a variety of Committees to exchange information on work on the implementation of the major chapters and discuss issues as they arise. These can vary slightly from FTA to FTA but typically cover Committees for Agriculture, Trade in Goods, SPS, Technical Barriers to Trade, Financial Services, Professional Services (working groups to investigate ways to move towards mutual recognition of professional qualifications to facilitate cross-border services provision), Textile and Apparel.

5 TTIP Ambitions: A Treaty to Usher in Global Trade Rules

5.1 Overview

In February 2013, a joint statement by US President *Barack Obama* and the presidents of the European Commission and European Council, *Jose Manuel Barroso* and *Herman Van Rompuy*, officially announced the launch of negotiations for a deep and comprehensive trade and investment agreement between the EU and US, the Transatlantic Trade and Investment Partnership (TTIP). TTIP looked set to mark a watershed in the evolution economic governance through trade agreements. The geopolitical goal of creating and institutionalising a particular set of rules and norms governing economic and social interactions through a transatlantic agreement was high in the TTIP agenda and was even present in the brief launch statement, which stressed that '(t)hrough the negotiation, the EU and US will have the opportunity to (. . .) the development of global rules'.[59] This key geo-economic aim of TTIP has been reiterated throughout negotiations on both sides of the Atlantic. German Minister for Economic Affairs *Sigmar Gabriel* argued that 'a transatlantic agreement should and must set standards for economic globalisation'.[60] On the US side, the combination of TPP and TTIP aimed to consolidate President *Obama's* view that '(t)he world has changed, (and) (t)he rules are changing with it, (and) (t)he United States, not countries like China, should write them'.[61] It has been estimated that the EU and US are the source of roughly 80% of global rules regulating the functioning of the world's markets.[62] By formally linking together the American and European markets, TTIP would result in the world's largest market, accounting for almost half of global GDP. A set of consistent rules and regulations in this mega-market would create an incentive for producers and exporters elsewhere in the world to voluntarily adopt those standards in order to secure their access to the mega-market. The combined weight of the markets would also generate additional leverage for the EU and US to persuade other states to recognise and approve TTIP standards. Moreover, it was hoped that in the interest of efficiency savings, others may unilaterally adopt TTIP standards in their domestic settings. Crucially, TTIP was supposed to allow third parties, willing to accept the texts and commitments, to accede to TTIP further expanding the regulatory reach of the agreement.

TTIP should have been the trade treaty ushering in a new set of (mostly) global economic and social governance rules. This would have been achieved by the

[59]Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso, 13 February 2013, <http://europa.eu/rapid/press-release_MEMO-13-94_en.htm> accessed 25 March 2017.

[60]Van Ham (2014), p. 7.

[61]Obama (2016).

[62]Sapir (2007).

institutionalisation of rules relating to trade and investment in the TTIP legal texts with their accompanying enforcement mechanisms (dispute settlement mechanisms, including recourse to WTO, and investment arbitration panels), as well as through the creation of institutional bodies in the form of joint committees within the agreement that would ensure the implementation and future adaptation of the agreement. A crucial institutional novelty was meant to be the creation of institutional mechanisms to realise extensive regulatory cooperation and eventual convergence rather than exchange of information as in other agreements. TTIP was supposed to evolve into a 'living agreement', constantly evolving and delivering a mechanism joining up the US and EU regulatory systems and regimes, through mutual recognition of standards and practices, as well as setting up bodies able to jointly set regulations. However, as the subsequent section reveals, proposals bear resemblance to the regulatory cooperation arrangements established under CETA and existing transatlantic cooperation practices.

5.2 Regulatory Cooperation

Bowing to pressure from an intense civil society campaign, from January 2015, the European Commission began to release its proposals and position papers on TTIP.[63] Final TTIP texts will result from a discussion and negotiation of these positions and texts with the US; however, the positions and released documents make it possible to discern EU aims in the negotiations and give some indication of what TTIP may look like. The European Commission's proposals for institutional arrangements to be created within the framework of TTIP, described below, shows a great degree of continuity with existing transatlantic practices and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. In a 2013 initial position paper on TTIP institutional provisions, the European Commission recommended an institutional framework to facilitate regulatory information exchange, cooperation and convergence consisting of the following:

1. a **consultation procedure** to discuss and address issues arising with respect to EU or US regulations or regulatory initiatives, at the request of either party;
2. a **streamlined procedure to amend** the sectoral annexes of TTIP or to add new ones, through a simplified mechanism not entailing domestic ratification procedures;
3. a **body with regulatory competences** (a regulatory cooperation council or committee), assisted by sectoral working groups, as appropriate, which could be charged with overseeing the implementation of the regulatory provisions of the TTIP and make recommendations to the body with decision-making power under

[63]European Commission Press Release, 'European Commission publishes TTIP legal texts as part of transparency initiative', 7 January 2015, <http://europa.eu/rapid/press-release_IP-15-2980_en.htm> accessed 8 April 2017.

> TTIP—this regulatory cooperation body would, for example, examine concrete proposals on how to enhance greater compatibility/convergence, including through recognition of equivalence of regulations, mutual recognition, etc. It would also consider amendments to sectoral annexes and the addition of new ones and encourage new regulatory cooperation initiatives. Sectoral regulatory cooperation working groups chaired by the competent regulatory authorities would be established to report to the regulatory cooperation council or committee. The competences of the regulatory cooperation council or committee will be without prejudice to the role of committees with specific responsibility on issue areas such as SPS.[64]

The European Union's proposal for institutions under TTIP of July 2016 no longer mentions a regulatory committee/body but rather mentions a Transatlantic Regulators' Forum, implying a more casual and informal institution. The Forum would be tasked with discussing trends in regulatory cooperation, considering regulatory cooperation activities, organising meetings with stakeholders and meeting with the Civil Society Forum established under TTIP. However, the role and activities to be undertaken by the Forum vary little from those suggested in the 2013 version, where the proposal for regulatory cooperation focused on highlighting broad aims: the promotion of cooperation at an early stage in the regulatory process, the promotion of adoption of compatible regulations, the achievement of increased compatibility (mutual recognition, recognition of equivalence where appropriate) and the affirmation of the role of international disciplines.[65] The 2013 proposal builds on the recommendations of the 2011 Common Understanding on Regulatory Principles by the High-Level Regulatory Cooperation Forum, which summarised transatlantic best practices in regulation (transparency, regulating on the basis of cost-benefit analyses, avoidance of unnecessary burdens, opportunities for stakeholder consultation, impact assessment of proposed measures and alternatives, periodic evaluation of measures) and suggested improvements to existing cooperation mechanisms (soliciting input from international stakeholders, greater use of online planning tools for enhanced transparency).[66] The 2013 proposal additionally suggests improving feedback mechanisms to enable the parties to have an opportunity to comment before a proposed regulation is adopted and to cooperate in the collection of data and evidence and exchange data and information between regulators.[67]

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[64]European Commission, *EU-US Transatlantic Trade and Investment Partnership, Trade Cross-Cutting Disciplines and Institutional Provisions, EU Initial Position Paper*, 2013, p. 5, <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf> accessed 8 April 2017.

[65]Ibid.

[66]United States–European Commission High-Level Regulatory Cooperation Forum Common Understanding on Regulatory Principles and Best Practices, 2011, <http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148030.pdf> accessed 8 April 2017.

[67]European Commission, EU-US Transatlantic Trade and Investment Partnership, Trade Cross-Cutting Disciplines and Institutional Provisions, EU Initial Position Paper, 2013, <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf> accessed 24 May 2017.

The EU's 2016 proposal is more detailed, as rather than a position it constitutes a potential and incomplete textual proposal for the TTIP agreement. Whilst retaining the aims of promoting effective regulatory environments, promoting compatible regulatory approaches reducing burdensome duplication and reiterating the importance of international regulatory standards and bodies, the text explicitly states that the chapter does not oblige parties to any particular regulatory outcome, nor does it affect their abilities to adopt measures to achieve public policy, provide support for services of general interest (water, health, education, social services) or apply its fundamental principles governing regulatory measures, as for example in the areas of risk assessment and risk management.[68] Such explicit exemptions reflect a response on the part of the EU to criticism and activism against TTIP, which centred around fears that the EU's precautionary approach to risk management in regulation, whereby in the case of insufficient scientific evidence to permit a complete evaluation of the risk a decision can be made to stop the distribution of products that could be hazardous, could be diluted.[69] This contrasts with the US approach, where scientific uncertainty would be a reason to not regulate or act, as it is the authorities that have to prove that a product would be harmful before they can take actions to curtail it.[70] European civil society groups, initially led by NGOs with a history of campaigning on trade issues in Brussels since the 1990s–2000s mobilisations against the WTO, mobilised against TTIP early on.[71] Opposition centred around safeguarding the EU's precautionary principle in regulation, preventing a lowering of standards through regulatory convergence and the introduction of ISDS, as well as the behind-closed-door nature of negotiations.[72] Their success has been argued to stem precisely from their ability to reframe discursively the global trade and investment regime as a threat to fundamental values.[73] In response, the European Commission took the unprecedented step of publishing TTIP documentation and its positions, and European leaders have reiterated that TTIP would not lower EU regulatory standards, in the words of Trade Commissioner *Cecilia Malmström*:

[68]European Commission, EU Proposal for institutional, general and final provisions in TTIP, July 2016, <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf> accessed 8 April 2017.

[69]European Commission, The Precautionary Principle, COM(2000)1, 2000.

[70]Bartl (2016), p. 5.

[71]Despite a Citizen's Initiative signed by around 3 million citizens across the Union, a pan European platform #StopTTIP, and demonstrations (of variable sizes) across the continent, the bulk of the opposition was located in Germany, Austria and France, were issues regarding food safety gained visibility and salience due to Greenpeace and other campaigns. As the media reported on these, the issues gained increased notoriety. The level of mobilisation and media attention and public debate on TTIP varied greatly from state to state. In the UK, *The Guardian* newspaper ran a series on TTIP, mostly highlighting threats, but has a readership of around one million, and NHS workers organised some (small) demonstrations, but otherwise the matter went largely unnoticed by the bulk of the population.

[72]In Germany and other Central European states the issue of chlorinated chicken, hormone treated beef and GMOs food from the US became rallying cries of civil activism and fears.

[73]De Ville and Siles-Brügge (2016a), p. 95.

'It begs to be said, again and again: No EU trade agreement will ever lower our level of protection of consumers, or food safety, or of the environment.'[74] Such reassurances made their way into the proposed regulatory cooperation chapter of 2016.

Limitations and reassurances notwithstanding, concerns continue to be raised regarding the potential impact of TTIP. NGOs argue that demands by the US to allow stakeholders to read and write in comments on proposed regulations at early stages of the regulatory proceed risk handing corporations regulation-drafting powers. In May 2016, Greenpeace Netherlands leaked a series of provisional TTIP chapters.[75] The leaked regulatory cooperation chapter contains greater level of detail regarding procedures, including how to make draft regulatory proposals available to stakeholders for comment, and language similar to that contained in TPP. The US has argued that the European Commission should publish draft legislation and regulation on the Internet for comment from all stakeholders and that it should then summarise and respond to comments and evidence provided when it finalises the proposal.[76] The European Commission has its own mechanisms for stakeholder inputs into the regulatory and legislative process, both through formal institutions like the European Parliament, which is a legislative body of the EU and can amend most legislative proposals, and the advisory Economic and Social Committee (EESC) representing trade unions and business interests and through more informal channels such as public consultations and meetings with interested parties, and since the early 2000s, it has endeavoured to facilitate dialogues with civil society and participation in impact assessments whilst preparing legislative proposals.[77] At present, the European Commission publishes its proposals once the proposal has been agreed within the Commission. The US would like these published at the draft stage for comment, as it does, but it is worth remembering that Commission proposals are draft legislation as the decision-making powers in the EU lie with the Council and European Parliament. *Peter Chase* and *Jacques Pelkmans* have highlighted the Commission's reluctance to publish pre-drafts as it could interfere with its right of legislative initiative and have suggested continuing with the current system but allowing a period of time for stakeholders to also submit comments to the Commission as a way of reconciling US demands.[78] US insistence

[74]The Independent, 'TTIP Greenpeace leak shows how US can pressure EU to compromise health and the environment under trade deal', 5 May 2016, <http://www.independent.co.uk/news/business/news/ttip-leak-greenpeace-trade-deal-eu-us-tpp-ceta-health-environment-a7014731.html> accessed 10 April 2017.

[75]The leaks can be accessed at https://ttip-leaks.org/ttip/ Greenpeace stands by the veracity of the documents, however, when dealing with leaked documents there is always a certain degree of uncertainty.

[76]Chase and Pelkmans (2015), p. 14.

[77]European Commission, Communication from the Commission—Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission COM/2002/0704 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52002DC0704> accessed 15 April 2017.

[78]Chase and Pelkmans (2015), p. 15. This is, in fact, what is incorporated in the European Commission's Better Regulation Agenda of 2015.

on this measure reflects the aforementioned situation whereby the US utilises FTAs as a way of extending its own institutional practices. At the same time, these practices are viewed with suspicion by European civil society, as expressed in Greenpeace's statements accompanying the leaks and critiquing opportunities to participate in decision-making as granted to corporations to intervene at the earliest stages of the decision-making process as a corporate takeover.[79]

Crucially, as is the case with previous FTAs, mechanisms for regulatory cooperation aim to impact the environment within which regulators make regulation, institutionalising and normalising new ways of thinking about regulation. Marija Bartl has claimed that whilst TTIP does not change the regulatory framework enabling the EU to make use of the precautionary principle, the institutional design of TTIP could in the long term undermine the precautionary approach to regulation in the EU. This could happen as regulatory cooperation (dialogues, the forum) will operate outside of direct oversight by parliamentary bodies (although they will be required to report to the Joint Council of TTIP), and if successful via interactions, exchanges and learning processes, cooperation could reshape the thinking of EU and US regulators, shifting how they approach cost-benefit analyses and the use of science. Moreover, as TTIP has as its aim trade facilitation, the framing of discussions within regulatory dialogues will shape a particular way of thinking about regulation, likely to be exacerbated by the prominence of trade officials and regulatory affairs officials in the proposed cooperation mechanism, who share a cognitive framing of the world as a market.[80] To the extent that institutionalisation refers to the establishment of norms and cultures in an organisation, the proposed regulatory forum could institutionalise and reinforce particular views around the value of regulation and how to regulate and lead to greater socialisation of regulators into a particular outlook. A homogeneity of opinion could reduce creative responses to regulatory problems[81] and crucially enhance perceptions of inadequate democratic inputs. As mentioned in the introduction, the existing transatlantic dialogues have generated rule-making processes in structured, if non-institutional, processes but have been criticised for privileging certain actors' access to policy makers at the expense of other sectors of transatlantic society.

TTIP was billed as the treaty to end trade treaties, the treaty ushering in new rules and regulations, as well as novel regulatory institutions to generate the rules of the future, set to become the new global economic rules. However, upon further scrutiny, it becomes apparent that TTIP builds on past US and EU FTAs. The proposed institutional set-up in regard to Fig. 1 varies little from CETA.

CETA and TPP go beyond past FTAs in terms of the institutionalisation of procedures and mechanisms for regulatory approximation, although both exclude regulatory cooperation from enforcement procedures of the FTA, and fall short of creating supranational institutions tasked with regulation. In the absence of a

[79]Greenpeace, TTIP Leaks, <https://ttip-leaks.org/faq/> accessed 10 April 2017.

[80]Bartl (2016), p. 15.

[81]Wiener and Alemanno (2016).

TTIP INSTITUTIONS (EU proposal of July 2016)
JOINT COMMITTEE
SPECIALISED COMMITTEES
Market Access
Services & Investment
Mutual recognition of qualifications
Trade & sustainable development
Small & medium-sized enterprises
Technical barriers to trade
Sanitary & phytosanitary measures
Joint customs cooperation
TRANSATLANTIC REGULATORS' FORUM
TRANSATLANTIC LEGISLATORS' DIALOGUE
DOMESTIC ADVISORY GROUPS
CIVIL SOCIETY FORUM

Fig. 1 TTIP institutions as proposed in July 2016

finalised TTIP text, it is challenging to assess how much further TTIP will go in this respect. Leaked texts and EU proposals give some more detail regarding processes for cooperation than CETA but appear to fall short of supranational regulatory bodies. The matched 'market power' of the US and EU has made negotiations extremely challenging, with neither party wishing to cede ground on its core objectives. The extensive relationship between the US and EU, framed around a series of long-standing dialogues on all issues, and regulatory cooperation stretching back to the mid-1990s, means that the 'low-hanging fruit' and matters where mutual agreement can be found have already been covered.[82] TTIP negotiations were never going to be easy; however, the unprecedented level of civil society mobilisation around the agreement and sustained opposition to it further complicated negotiating dynamics. Opposition created a critical juncture in the institutionalisation process

[82]Over the years the US and EU have agreed on numerous issues from transfer of passenger name records to mutual recognition of conformity assessments for marine equipment. For more see Chase and Pelkmans (2015).

derived from FTAs for the European Commission to include (or attempt to include) further safeguards to guarantee future policy space, exactly the opposite of what FTAs normally do. It also fostered institutional innovation, most clearly expressed in the investment court system proposed in CETA and later in the FTA with Vietnam, which marks a clear departure from the original text of CETA, which continued the existing ISDS regime, albeit with clearer wording as to what constitutes legitimate cases. It remains uncertain whether the US, much more invested in the existing ISDS regime, will respond favourably to this novel institutional arrangement.[83]

5.3 *Investor-State Disputes*

The institutionalisation of regulatory cooperation in TTIP has been controversial, as has been the inclusion of investor-state dispute settlement mechanisms, to the point that the European Commission elaborated new institutional proposals in CETA for an investment court system, in order to get that agreement approved, after mobilisation against TTIP spilled over into contestation of CETA and the agreement seen as a precursor to TTIP due to their similarities. Countering opposition to ISDS given the opaqueness of the *ad hoc* tribunal regime, absence of appeal procedures, high costs and, in the case of some bilateral investment agreements, ambiguity regarding indirect expropriation facilitating claims, the EU renegotiated the ISDS section of CETA before submitting it to ratification. CETA Chapter 8 on investment establishes an investment court for the agreement, which will be made up of a roster of selected arbitrators who will work exclusively for the court for set periods of time, to prevent them simultaneously having close ties with litigant firms, and will have an appellate tribunal as well. The chapter also establishes that the losing party will bear the costs of the proceedings and includes more detailed and restrictive language as to what types of actions can be contested under the chapter.[84] It also reaffirms the rights of the parties to legislate and regulate in the interest of the public; this is further reiterated in explicit language in the Joint Interpretative Instrument on CETA, which was included to assuage fears expressed by the Wallonian Parliament in their vote to authorise the Belgian executive to accept CETA.[85] The European Commission aims to create a multilateral investment court system to replace the existing ad hoc ISDS regime. If it succeeds in that, it will generate a novel international formal institution

[83]Whilst there is still uncertainty regarding President Trump's eventual trade policy and international policy, the 2017 Trade Policy released in March hinted at lack of enthusiasm for international institutions, including the WTO, which would suggest there may not be much enthusiasm in the administration for an international investment court.

[84]Comprehensive Economic and Trade Agreement between the EU and Canada, 2016, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 15 April 2017.

[85]Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 27 October 2016, pp. 3–4 <http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf> accessed 15 April 2017.

(along similar lines to the WTO dispute arbitration) with authority above national states. However, there is no public information as to the US's response to such a proposal, and it is expected that the legal firms involved in the current ISDS regime, many US based, will lobby hard to prevent the US acquiescing to such a system. Again, the significance of FTAs, as a tool to institutionalise preferred rules, engrained interests and economic governance mechanisms, comes to the fore. For the European Commission, new to ISDS, such a degree of institutional innovation is feasible (unlike in the case of regulatory cooperation). Moreover, the necessity to address opposition to ISDS in TTIP, rising mobilisation against TTIP and the politicisation of its trade policy, alongside the rise of antiglobalisation and trade sentiment in Europe, as expressed partly in the rise of anti-establishment parties and movements, created a critical juncture for the European Commission to propose novel institutional arrangements in this area.

6 Concluding Remarks

Since the early 2000s, the US and, subsequently, the EU have sought to further influence global rules regarding trade, investment and a whole host of rules and procedures affecting global economic interactions, through free trade agreements, given the increased challenges of crafting global economic rules at the WTO reflecting the interests of their own economic interests. Negotiating with smaller partners, the US and EU are able to leverage their considerable 'market power' and gain acquiescence, in most cases, for their particular preferences for rules on intellectual property, investment, competition policy. Through their FTA network, they have formalised a network of institutions governing trade and investment, alongside global governance rules at the WTO. The US has taken a more formal approach, by ensuring that most of the matters covered in its FTAs are subject to the dispute settlement mechanism and therefore legally enforceable. By contrast, the EU has included in its agreements a large number of WTO X matters that lack enforceability, including its sustainability chapters, which instead are subject to a soft law approach of dialogue, information exchanges and formal and institutionalised procedures aimed at altering understandings of appropriate behaviours. *James March* and *Johan Olsen* have included rules and practices prescribing appropriate behaviour for specific actors within their definition of institutions,[86] and in this sense the EU's soft law approach can also be considered to create new institutional settings that aim to affect future policy making in the partner state.

Whilst building on practices established in previous agreements, TTIP's proposed Transatlantic Regulator's Forum and initial ambitions to include all sectors aimed at creating a treaty from which would emerge the rules and regulations of the future. However, in late 2016, EU politicians in France and Germany, facing elections in

[86]March and Olsen (2011).

2017, and not wishing to be associated with an unpopular TTIP in their states, started to distance themselves from the agreement.[87] At the same time, Donald Trump was elected US President on an antiglobalisation campaign and a rejection of TPP and, apart from withdrawing from TPP, proceeded to cancel TTIP negotiations.[88] In April 2017, House Speaker *Paul Ryan* hinted at the possibility of restarting TTIP negotiations.[89] Despite the, for now, failure of negotiations, the EU's Better Regulation Agenda of 2015 (mid-point of TTIP negotiations to date)[90] included a series of processes that align with some of the US demands and bring it closer to the US *modus operandi*. A key example of this is the Commission opening up its policy-making process to further public scrutiny and input, with a web portal where initiatives can be tracked and new public consultations can be viewed when evaluating existing policies or assessing possible new proposals; new opportunities for stakeholder comments throughout the entire policy life cycle, from the initial roadmap to the final Commission proposal; as well as the possibility for any citizen or stakeholder to provide feedback or suggestions within eight weeks, which will feed into the legislative debate before Parliament and Council.

FTAs create new formal mechanisms to institutionalise rules around economic governance, and they demand of parties a willingness to adopt domestic regulations that do not contravene the FTA and that enable its implementation. Often many of these adaptations are adopted prior to the end of negotiations. The US approach to FTAs, indeed, includes the willingness of parties to adopt economic and regulatory reforms as a precondition for choosing an FTA partner. Whilst it is not clear, in the EU's case, whether Better Regulation stems from TTIP constraints, internal Commission ideas about regulation, lobbying or, indeed, an influence of US approaches seeping into EU processes as a result of decades of regulatory dialogues, the fact remains that these changes will be effected irrespective of TTIP, and if TTIP negotiations are reactivated, they should facilitate an approximation of positions in the negotiations.

A resumption of negotiations is, nevertheless, likely to reactivate public opposition to the agreement. As highlighted in the introduction to this volume, institutionalisation beyond the nation state is regarded as a way of appeasing concerns over the transfer of authority to global institutional actors. The move to institutionalise transatlantic relationship through TTIP should enhance transparency

[87]French and German Ministers complained about the lack of substantive progress in the negotiations to warrant concluding the negotiations ahead of the end of President Obama's term as had been hoped.

[88]In the US, anti-globalisation mobilisation has coalesced around TPP, whereas TTIP failed to achieve the same degree of public salience.

[89]Euractiv, 'Ryan: Washington will 'chart a path forward on TTIP', 24 April 2017, <www.euractiv.com/section/economy-jobs/news/ryan-washington-will-chart-a-path-forward-on-ttip/> accessed 3 May 2017.

[90]European Commission, Better regulation for better results-An EU agenda, COM(2015)215, 2015, https://ec.europa.eu/info/sites/info/files/communication-better-regulation-for-better-results-an-eu-agenda_may2015_en.pdf accessed 2 May 2017.

and legitimacy, according to this school of thought. However, the reality on the ground has been unprecedented contestation and politicisation of trade policy in Europe, not seen against any other previous FTA. FTAs institutionalise a particular set of preferences regarding economic governance at a time when opposition to the economic status quo remains high; it seems unlikely that those opponents will support further institutionalisation of existing preferences through TTIP.

Formal institutions are not created in a vacuum but rather are shaped by the specific context within which they arise. The present context exposes some hostilities to the overarching neo-liberal economic norms that have already been spread and institutionalised through the WTO and myriad FTAs, which is expressed in the opposition to TTIP, viewed as a more ambitious institutionalisation of the economic *status quo* to further entrench it. Simultaneously, the TTIP process has exemplified the inertia of existing institutional norms, rules and patterns of behaviour, in the impossibility of reaching an agreement on how to develop a new institutional setting for transatlantic regulatory creation, given each party's support for its own preferred approach. Those preferences arose from particular values embedded in each of their institutional frameworks as developed within their distinct societal contexts. Over time, these approaches have become stabilised and solidified and have conferred relative power to various groups in society. For instance, producers of innovative products in the US can have advantages with the absence of a precautionary principle in regulatory assessments, whilst small agricultural producers in the EU derive economic advantages from reduced competition through the European approach to GI protection. More so than other modern preferential trade agreements, TTIP aimed to crystallise the privileges of certain groups and a particular vision of economic governance through the institutionalisation of norms, rules, regulations. However, contesting voices, the degree of difference within broadly similar visions between the EU and US and, crucially, the symmetry of the relationship have revealed the challenges of formal institutionalisation in the absence of the coercive threat of trade and investment diversion.

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Federalism, State Cooperation and Compliance with International Commitments

Timothy Roes

1 Introduction

The US and the EU have a fundamental principle in common: both are divided-power systems[1] in which the Union government only has enumerated powers. All other powers belong either to the States or to the people.[2] The US federal government, for instance, cannot make it a federal crime to have a gun near a school,[3] and the EU legislator could not harmonise high school curricula if it wanted to.[4] In other words, the States have some measure of 'constitutionally entrenched' autonomy, which is enforceable as a matter of legal right.[5] There are certain things that the federal government cannot do.

In the US, fierce partisan division has led to a renewed appreciation for federalism. People on the right, as well as the left, have rediscovered the virtues of federal system and its promise of accommodating diversity and encouraging State experimentation. President Obama faced federalism-based objections to the Affordable Care Act (ObamaCare), which was argued would unconstitutionally coerce the States.[6] Likewise, President Trump's controversial executive orders on immigration led several cities to announce that they would not allow local law enforcement to

[1] The term comes from Stein (1983), p. 27. It is a more generic term that avoids qualifying the EU as a federal system—which it obviously is.

[2] See the Tenth Amendment to the US Constitution and Article 5(2) TEU, respectively.

[3] *United States v. Lopez*, 514 U.S. 549 (1995).

[4] Article 165(4) TFEU.

[5] Young (2014), p. 34 at 38.

[6] *King v. Burwell*, 576 U.S. ____ (2015); *National Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012).

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cooperate with federal immigration agents, upon which the President issued an executive order threatening to remove federal funding from these 'sanctuary cities'.[7] On the other hand, when it comes to the new administration's equally controversial foreign policy, the States' options seem much more limited. This piece briefly examines to what extent federalism complicates foreign affairs, both in the EU and the US.

2 Divided Power and EU External Relations

The EU and the US differ with respect to how, why and to what extent the States play a role in foreign affairs, which means that the resulting complications for the institutionalisation of their international relations are different, too. On the EU side, the division of legislative power between the Member States and the Union makes it more difficult not only to negotiate agreements but also to ensure their ratification. The recent attempt of the Walloon regional parliament to block the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada had made this abundantly clear.[8] It also complicates acting within international institutions because it requires intense coordination between both levels of government. Either on the basis of formal arrangements or *ad hoc*, the Union and the Member States must decide who will exercise speaking and voting rights for each agenda item, depending on whether the subject matter falls predominantly under Member State or Union competence.[9] Occasionally, disputes arise because Member States want to remain visible on the international scene and resist a stronger EU presence, for instance by refusing to give the Commission a mandate to negotiate, in close cooperation with the Member States, matters falling under shared competence.[10] Moreover, because the Union's exclusive external competence is dynamic—as the Union regulates a field internally, Member States lose the right to act externally to the extent that doing so might affect internal rules or alter their scope[11]—it is not always clear on what subjects Member States may still submit proposals within an international organisation.[12] All of this makes EU external relations complex and often inefficient.

[7]Exec. Order No. 1376882 Fed. Reg. 8799 (Jan. 25, 2017). See Chacón (2017), p. 243.

[8]On the Walloon saga and the complexities of so-called 'incomplete mixity', see Van der Loo and Wessel (2017), p. 735.

[9]Wouters et al. (2015), p. 45 at 64–65. See generally Hoffmeister (2007), p. 41.

[10]De Baere (2012), p. 640. Sometimes Member States' resistance is directed at more symbolic trappings of external sovereignty. See Wouters et al. (2015), pp. 49–50 (mentioning *inter alia* UK resistance to the use of EU nameplates when delivering common statements in the FAO).

[11]Articles 3(2) and 216 TFEU. These provisions codify the doctrine established in the *ERTA* judgment (*Commission v Council ('ERTA')*, 22/70, EU:C:1971:32).

[12]See Judgment in *Commission v. Greece ('IMO')*, C-45/07, EU:C:2009:81.

That said, EU law has developed ways to mitigate these problems. On the one hand, the Court has emphasised that both levels of government have a duty to cooperate when the subject matter of an agreement falls in part within the competence of the Member States and in part within that of the Union. This means that Member States must take the Union's interest into account when they exercise their external competence. Formally, this entails mostly procedural obligations. For instance, a Member State must 'inform and consult' the Union institutions before submitting a dispute under a mixed agreement to an international tribunal if there is a risk that this tribunal would rule on the scope of Member States' obligations under Union law. The duty to cooperate may, however, also go further and give rise to substantive obligations. It may render formal voting and speaking arrangements legally binding[13] and even require a Member State to abstain from exercising the external competence that it shares with the Union when doing so would be liable seriously to compromise the exercise of a Union competence.[14] On the other hand, the scope of the Union's exclusive external competence has gradually expanded.[15] The common commercial policy, for instance, now encompasses all matters covered by the WTO covered agreements[16] and nearly the entire scope of 'new generation' trade agreements, as Opinion 2/15 on the *EU–Singapore Free Trade Agreement* recently demonstrated.[17] As a result, the Union can increasingly act alone on the international scene.

3 Foreign Affairs and the US Constitution

The US Constitution, by contrast, gives the federal government plenary power over foreign affairs. The Framers were convinced that international recognition, credit and a common trade policy were essential to ensure the preservation of the Union. Under the Articles of Confederation (1776–1789), the States had repeatedly endangered the fledgling American nation by their failure to respect the Treaty of Peace,[18] denying claims for the repayment of war loans. Perceived as untrustworthy, the US

[13]Judgment in *Commission v. Council ('FAO')*, C-25/94, EU:C:1996:114.

[14]Judgment in *Commission v. Sweden ('PFOS')*, C-246/07, EU:C:2010:203. The first time that the Court mentioned the duty to cooperate was in Opinion 1/94, *WTO Agreement*, EU:C:1994:384, para. 109. That duty was arguably also of a substantive nature: in the context of the WTO agreements, Member States may have to take retaliating measures in an area that belongs to their retained powers when the Union cannot retaliate effectively by taking measures in its own sphere of competence. However, see Kuijper (1995), p. 49 at 59–60, who explains that things are not that simple in practice.

[15]Either as a result of the pre-emptive effect of internal legislative action under the *ERTA* doctrine or as a consequence of Treaty amendments.

[16]Eeckhout (2015), ch. 10.

[17]Opinion 2/15, *EU-Singapore Free Trade Agreement*, EU:C:2017:376.

[18]Golove and Hulsebosch (2010), p. 101.

could not secure vital international lines of credit, or even get British troops to leave the territory, as the treaty required. This explains why, in Federalist 42, James Madison forcefully states that '[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations'. Thus, the States are barred from entering into any agreement or compact with a foreign power, unless Congress consents.[19] Whenever the Constitution addresses the relations of the United States with the outside world, be it in the form of waging war[20] or laying and collecting customs duties,[21] it assigns power to the federal branch.[22]

Specifically, the Constitution gives the President the power to make treaties 'by and with the advice and consent of the Senate [. . .] provided two thirds of the Senators concur'.[23] That formulation left open the question whether the exercise of the treaty power was confined to the fields committed to Congress by the other enumerated grants of power.[24] In *Missouri v. Holland*,[25] arguably the most important case in US foreign relations law, the Supreme Court held that this was not the case. In other words, the subject matters that may be regulated under the treaty power are not limited to those that Congress may regulate by statute. Deciding that the President and the Senate are unconstrained by 'some invisible radiation from the general terms of the Tenth Amendment',[26] the Court gave the treaty power a wide berth.[27] This so-called foreign affairs exceptionalism makes it simpler for the US to negotiate, conclude and ratify treaties—as well as to exit from them. Yet it does not make it easier: the two-thirds threshold in the Senate, a political safeguard of federalism, means that a minority of the States can block a treaty concluded under Article II.[28]

In response, Article II treaties have become rare, and the federal government increasingly has recourse to 'congressional-executive agreements'.[29] The Constitution does not say so explicitly, but it is generally accepted that Congress can authorise the President to conclude an international agreement by way of a joint resolution under its Article I powers. It can even do so in advance, for instance to

[19] Article I, §10, clause 3.

[20] Article I, §8, cl. 11–14. See also Article I, §10, cl. 3 and Article II, §2, cl. 1.

[21] Article I, §8, cl. 1.

[22] See also Article I, §8, cl. 2–5 and 10.

[23] Article II, §2. See further Henkin (1996), p. 177.

[24] The same question arose under Congress' Taxing and Spending Powers (Article I, §8). See *United States v. Butler*, 297 U. S. 1 at 65. (1936).

[25] 252 U.S. 416 (1920).

[26] *Id.*, 433–434.

[27] Though note *Reid v. Covert*, 354 U.S. 1 (1957) (international agreements must comply with the (other) restraints imposed by the Constitution, in particular the Bill of Rights).

[28] However, with the adoption of the Seventeenth Amendment (1913), the two Senators that each State has are no longer elected by the State legislatures but by the people thereof. Consequently, the Senate arguably no longer protects the interests of the States as States, like it did under original design. See Schleicher (2014), p. 1043.

[29] See Hathaway (2008), p. 1236.

give him temporary and conditional trade promotion authority (fast track).[30] What is more, the Supreme Court has recognised that, in the exercise of his powers, the President may make 'executive agreements' without the participation of the Senate or Congress.[31] All of this does make it easier for the US to enter into international commitments, whether by concluding treaties or by acting within international organisations.

This classic picture is misleading, however, because it fails to acknowledge that federalism plays a role in US external relations, too.[32] EU lawyers have internalised Louis Henkin's point that 'as regards US foreign relations, the states "do not exist"',[33] but the situation is more complex. It is true that the States are not involved in the making of treaties. They do not get a seat at the negotiating table together with the federal government, nor do they join international organisations, not even when the subject matter belongs to their reserved powers internally.[34] Yet the States play a role in US foreign affairs in other ways.

4 State Cooperation in the Implementation and Enforcement of International Commitments

First, the States often are essential for the implementation and enforcement of the international commitments that the US assumes. US constitutional law draws a distinction between treaties that are self-executing, i.e. treaties that may be enforced in the courts without legislative 'implementation', and those that are not.[35] When a treaty requires implementation, Congress' power to do so under the necessary and proper clause is not kept separate from the President's power to make the treaty. 'If the treaty is valid', the Court held in *Missouri v. Holland* that 'there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the Government'. Because the Court held, in that same judgment, that the Treaty Power is not constrained by the federal government's enumerated powers, Congress may arguably regulate any subject matter to the extent that this is necessary for the implementation of the treaty. A treaty regulating child support, for instance, could thus empower Congress to enact national legislation in

[30]Henkin (1996), pp. 215 *et seq.*

[31]*United States v. Belmont*, 301 U.S. 324 at 330 (1937).

[32]See generally Glennon and Sloane (2016).

[33]Henkin (1996), p. 150.

[34]Involving the States in that process may originally have been the idea behind the Treaty Power's insistence that the Senate give both advice and consent to treaties made by the President. However, neither the President nor the Senate found the idea of the latter advising the former throughout the treaty-making process practical, resorting instead to deliberate and pass judgment later. Henkin (1996), p. 177.

[35]See Vazquez (1995), p. 695.

the realm of family law, and a human rights treaty could provide a basis for legislation prohibiting States to administer the death penalty to juvenile offenders. On this view, *Missouri v. Holland* gives the federal government permission to make an end run around the federal system, allowing it to take all actions that a treaty requires, even if some of these could normally only be taken by the States.

Nonetheless, compliance with international commitments often cannot be ensured by the federal government alone and requires the States' cooperation. A good illustration is the Vienna Convention on Consular Relations, which gives foreign nationals certain consular rights when arrested on the territory of one of the Contracting Parties to the Convention.[36] Given that the vast majority of arrests are carried out by State police, it is clear that US compliance with the treaty requires imposing obligations on the States. Even if the federal government wanted to, it could not ensure the treaty's effective application without the States' cooperation. In other cases, it is theoretically possible for the federal government to do so, but it would be prohibitively expensive. A treaty requiring the US to criminalise the sale and use of marijuana and to ensure effective and deterrent enforcement, for instance, would require a massive expansion of federal law enforcement.[37] Because this is unrealistic, it becomes clear that practical constraints often make the cooperation of State and local law enforcement necessary.

In this respect, things are easier under EU law than they are under US constitutional law. The EU does not have its own executive apparatus and relies on the Member States to implement measures on the ground. For instance, if it wants to comply with its WTO commitments, it needs the cooperation of the customs officials of 28 different States, which, among other things, must levy MFN-conforming tariffs and apply phytosanitary requirements in a non-discriminatory manner. Crucially, the Member States are constitutionally obligated to cooperate.[38] When the EU concludes an agreement, that agreement forms an integral part of Union law and binds the Member States,[39] who have a legal obligation to take measures to implement, administer and enforce it. In other words, to comply with its international obligations, the EU enlists the executive machinery of the Member States, which must make law and apply it to individuals. Moreover, EU law relies on the vigilance of individuals to make sure that Member States do their job properly. It not only relies on the Commission but also gives individuals a right of action against the Member State in State court.[40] While it cannot physically compel a recalcitrant State to comply or have Union personnel step in and implement the agreement on State territory, the EU is well equipped to enforce the obligations for which it assumed international responsibility.

[36] See *infra*, note 61.

[37] Mikos (2009), p. 1421.

[38] Article 4(3) TEU. See generally Klamert (2014).

[39] Article 216(2) TFEU.

[40] Judgment in *Van Gend & Loos*, 26/62, EU:C:1963:1 at p. 13.

Under US constitutional law, by contrast, the States do not have an obligation to implement and enforce federal policy. According to the anti-commandeering doctrine, expounded by the Supreme Court during the federalism revival of the Rehnquist Court, Congress may not 'commandeer' State legislatures to regulate private conduct[41] or the State executive to enforce federal policy.[42] This imposes significant limits on the federal government's power to pre-empt. The latter may, however, induce or even pressurise the States to participate in national governance. For instance, Congress may threaten to pre-empt the area and let federal agencies enforce federal policy (conditional pre-emption), although this will only work if the threat is credible and States are given some discretion to make their own policy. It may also use its spending power to attach conditions to federal grants (conditional spending), although it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.[43] Congress' financial inducement, moreover, must not be so coercive as to pass the point where pressure turns into compulsion.[44] The bottom line is that the states' cooperation must be voluntary.[45]

A further limitation on that power is the States' sovereign immunity, which precludes individuals from suing a State without its consent, either in federal court or in State court, and Congress from abrogating that immunity by creating remedies against the State.[46] The Supreme Court views the States' immunity from private suits, sometimes called Eleventh Amendment immunity,[47] as an 'essential attribute' of the sovereignty that they enjoyed before the ratification of the Constitution and of which they retain 'the dignity, though not the full authority'.[48] Because it is a constitutional principle, Congress cannot abrogate that immunity by legislation under its Article I powers.[49] For instance, it could not adopt a statute under the

[41] *New York v. United States*, 505 U.S. 144 (1992). This must be read strictly—the prohibition does not cover situations in which Congress subjects state governments to 'generally applicable' laws, that is, to the same legislation applicable to private parties (*Id.* at 160). The Court in *New York v. United States* made it very clear that the anti-commandeering doctrine does not speak to whether Congress could (for instance) subject state employers such as schools and hospitals to the Fair Labor Standards Act, like it had other employers.

[42] *Printz v. United States*, 521 U.S. 898 (1997).

[43] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[44] *Stewart Machine Co. v. Davis*, 301 U.S. 548 at 590 (1937); *South Dakota v. Dole*, 483 U.S. 203 at 211 (1987).

[45] *Printz* moreover suggests that federal commandeering will not be prohibited where it is authorised by the Constitution itself, for instance when implementing the Extradition Clause (521 U.S. 898, 908–909). See Carter (2001), p. 598 at 624.

[46] The literature on the Eleventh Amendment is vast. See e.g. Pfander (1998), p. 1269; Marshall (1989), p. 1372; Jackson (2000), p. 953; Clark (2010), p. 1817.

[47] However, the sovereign immunity of the states 'neither derives from, nor is limited by, the terms of the Eleventh Amendment'. *Alden v. Maine*, 527 U.S. 706 at 713 (1999).

[48] *Alden v. Maine*, 527 U.S. 706 at 713–715 (1999).

[49] *Seminole Tribe v. Florida*, 517 U.S 44, 47, 59–66 (1996). See Weinberg (2001), p. 1113 at 1124 *et seq.*

commerce power that, apart from granting certain rights and imposing certain obligations on individuals and States alike—say, minimum wage legislation—also gives private parties a remedy against the State in federal court. This is unfortunate because many treaties require the availability of effective private remedies against governmental authorities.

Since it would be difficult to ensure the supremacy of the Constitution and of federal law over the States if the States were not amenable to suit at all, the Supreme Court has created several exceptions to this doctrine. First, Congress may abrogate sovereign immunity when it exercises its power under Section 5 of the Fourteenth Amendment.[50] Because that amendment is of a later date—it is part of the Reconstruction—it is treated as a waiver on the part of the States.[51] Second, Congress may also incentivise the States to consent to waiving their immunity by resorting to conditional spending or conditional pre-emption. Third and most important, in *Ex parte Young*, the Court has held that individuals may sue State officers in their individual capacity in federal court for violations of the Constitution or of federal law.[52] They may, however, only claim prospective (injunctive or declaratory) relief, not damages (which are retrospective), and the State may not be the real party in interest.[53] In recent years, the Supreme Court has limited the scope of these exceptions, which means that the State sovereign immunity doctrine is still a very real constraint on Congress' power to pre-empt.[54]

Scholars debate whether the anti-commandeering and State sovereign immunity doctrines apply with full force when the President and the Senate make treaties under the treaty power and Congress when it enacts statutes implementing them.[55] *Missouri v. Holland* is usually read as authority for the nationalist proposition that there are no federalism-based restrictions to the treaty power (so-called foreign affairs exceptionalism).[56] On this reading, it does not matter that the judgment examined only whether there were limitations as to which subject matters the federal government could regulate by treaty (*quod non*), but it did not consider whether there also

[50] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). However, the Court has interpreted that congressional power restrictively. See *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), all striking down statutes as exceeding Congress' power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

[51] *Fitzpatrick v. Bitzer,* 427 U.S. 445 at 453–454 (1976), referring to *Ex parte Virginia,* 100 U. S. 339 (1880). But see Weinberg (2001), pp. 1113 at 1148–1149.

[52] *Ex parte Young*, 209 U.S. 123 (1908). Building on this decision's finding that suits against State officials are not suits against the State, Congress has created (in 42 U.S.C. §1983) a general cause of action for violations of federal law under colour of State law by State officials.

[53] Fallon et al. (2009), pp. 922 *et seq.*

[54] See Weinberg (2001); Currie (1997), p. 547; Jackson (1997), p. 495; Thomas (1998), p. 1068.

[55] See *inter alia* Vázquez (1999), p. 1317; Swaine (2003), p. 403; Bradley (1998), p. 390; Carter (2001), p. 598; Ku (2004), p. 457.

[56] Golove (2000), p. 1075.

were limitations as to how it could regulate those subject matters. Justice Holmes' opinion stated that when asking whether an Article II treaty and its implementing statute are 'void as an interference with the rights reserved to the States [. . .] it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United Sates'.[57] Since both the anti-commandeering doctrine and the State sovereign immunity doctrine can (with some effort) be qualified as expressions of that amendment,[58] it stands to reason that they do not constrain the treaty power. By allowing the federal government to compel the States to enforce a treaty and to create judicial remedies against the State, this view permits the US internally to ensure compliance with its international commitments. It avoids that the nation suffers the adverse consequences (retaliation, war) of a few unwilling States.[59]

However, many scholars have challenged this nationalist view. As far as State sovereign immunity is concerned, *Missouri v. Holland* refers to the Tenth Amendment, not to the Eleventh, on which that doctrine is based.[60] As Vázquez points out, the Court maintains that its interpretation of the latter amendment, including the three exceptions to sovereign immunity discussed earlier, adequately ensures the supremacy of federal law. It is not readily clear why the supremacy of treaties, which under US law stand at the same height as ordinary statutes, would demand a more relaxed view of State sovereign immunity and more judicial remedies to ensure State compliance.[61] Likewise, the (questionable) rationales behind the Court's anti-commandeering doctrine would seem to apply equally to internal and external affairs. Historically, the Framers chose to give Congress the power to 'regulate individuals, not States' because 'using the latter as the instruments of federal governance was both ineffectual and provocative of federal-state conflict'.[62] As discussed above, the States were as unreliable when it came to the implementation of the treaties concluded by the Union (in particular the Treaty of Peace) as they were in the execution of the recommendations of the Continental Congress. Functionally, the anti-commandeering doctrine seeks to allow the residents of a State to retain the ultimate choice as to whether or not the State will comply, thus ensuring that State officials remain accountable to those residents.[63] This rationale, too, holds true for treaties as well. If commandeering were permitted, the federal government would reap the benefits, while the State must absorb the costs of implementing federal policy, and its officials 'bear the brunt of public disapproval'.[64] That being said, as Carter has argued, the anti-commandeering doctrine works internally because it

[57]252 U.S. 416 at 432 (1920).
[58]Vázquez (2002), pp. 726 *et seq.*
[59]*Id.* at 728–729.
[60]*Id.* at 730–731.
[61]*Id.* at 732.
[62]*Printz v. United States*, 521 U.S. 898 at 919 (1997).
[63]Swaine (2003), pp. 482–483. See *New York v. United States*, 505 U.S. 144 at 168–169 (1992).
[64]*New York v. United States*, 505 U.S. 144 at 169 (2002).

promotes tolerable alternatives to heavy-handed unconditional federal mandates, most notably conditional spending and conditional pre-emption. These alternatives, however, lose much of their allure when dealing with treaties because the US cannot unilaterally adapt their content to convince the States to participate in the regulatory scheme.[65] It is thus not entirely clear whether the anti-commandeering and State sovereign immunity doctrines fully apply to treaties adopted pursuant to the treaty power and the statutes adopted to implement them.

Whatever the outcome of that debate, in practice federalism-related limits loom large in US external relations and will continue to do so, for at least two reasons. First, there is the ascendancy of congressional-executive agreements.[66] These are made pursuant to Article I and therefore are undoubtedly constrained by Congress' enumerated powers (Article I, §8) and other federalism-related limits. That congressional-executive agreements are so much more common than Article II treaties suggests that federalism-related limits are not perceived as problematic. Indeed, the second reason seems to indicate that the opposite is true. The federal government, 'reluctant to displace the traditional allocation of regulatory power',[67] frequently attaches reservations, understandings or declarations (RUDs) to international agreements that it concludes to protect the traditional federal balance. To the extent that these are not (or not unequivocally) mandated by the Constitution, they indicate that the US government voluntarily endorses federalism-related limits in its diplomatic practice. For instance, Swaine observes that when Congress implemented the WTO agreements and NAFTA, it 'pointedly impaired the effectiveness of the agreement for the [S]tates' sake', for instance by 'establishing extraordinary procedural barriers to the invalidation of conflicting state laws'.[68]

At the same time, RUDs provide an effective way to 'work around' the problems that these limits cause, most notably the risk that the US must bear international responsibility for the action or inaction of one or more uncooperative States. As Nash explains, federalism-related RUDs generally take one of two forms.[69] Either they effect a 'carve-out', which ensures that the failure of a State to cooperate in the enforcement or implementation of the agreement does not put the national government in breach of the treaty. Sometimes the treaty itself already states that a certain obligation is subject to the Contracting Party's constitutional requirements. For example, a State legalising the sale and use of marijuana would normally violate the Single Convention on Narcotic Drugs, but the US can plausibly maintain that the anti-commandeering doctrine prohibits it from compelling the States to enact particular laws. As a result, a State's policy can go directly against the treaty without resulting in a breach for the US. Alternatively, they install a 'breach-curing provision', an escape valve that permits the federal government to cure what would

[65]Carter (2001), p. 614; Swaine (2003), p. 484.

[66]Hathaway (2008), p. 1236.

[67]Ku (2008), p. 1063 at 1068–1069.

[68]Swaine (2003), p. 420.

[69]Nash (2016), pp. 50 *et seq.*

otherwise be a breach caused by a State's refusal to cooperate. For instance, the treaty may allow the federal government to pay its way out of a breach. The US has included RUDs of both types in several human rights treaties, often in combination with a RUD stipulating that the treaty is non-self-executing within the US legal order. As Nash puts it, '[t]he two RUDs in tandem seem to work to frustrate any notion that the treaty will be followed by states, other than voluntarily'.[70]

5 Conclusion

From the perspective of international law, the constitutional issues discussed above are important because the parties to a treaty (or the members of an international organisation) effectively serve as the executive branch of the legal order that it establishes.[71] The members are at once principal and agent.[72] As joint principals, they have created an institution and assigned certain tasks and functions to it. As their agent, the institution must, for instance, gather information, make law, monitor State compliance or adjudicate disputes. At the same time, the members are themselves agents, tasked with the execution of the norms that the institution produces. Indeed, the executive function is not typically assigned to the institution. Surely, the latter often carries out certain tasks that may be characterised as executive in nature, such as supervising State compliance or organising information sharing. However, it is for the members to implement the law and apply it to individuals in their own territory. This decentralised executive implies what Scelle called *dédoublement fonctionnel*: the members' executive machinery must behave schizophrenically, serving both as organs of the State and as organs of the institution.[73]

US federalism, and in particular the anti-commandeering and State sovereign immunity doctrines, creates 'a cleavage between what the US may constitutionally accomplish and its international obligations'.[74] The States' cooperation often determines whether the US complies with its international obligations, yet under US constitutional law the federal government cannot usually compel the States to cooperate in national governance. Moreover, when treaties demand the creation of private remedies against the States, the US may not be able to deliver, especially when it concludes the treaty as a congressional-executive agreement. Although the States do not play a role in the making of treaties, like they do in the EU, they loom large in US foreign affairs in other ways.[75]

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[70] *Id.* at 58.

[71] See Klabbers (2002), pp. 174–177.

[72] Bergman (2000), p. 415 at 423; Tallberg (2003), p. 26.

[73] Scelle (1943), pp. 190 *et seq.* See earlier Scelle (1932). See also Cassese (1990), p. 210, in particular at 231 (arguing that Scelle's ideas have explanatory potential in the EU context).

[74] Swaine (2003), p. 432.

[75] See further Flaherty (1999), p. 1277; Ku (2006), 2380; Halberstam (2001), p. 1015.

While the federal government's plenary power to enter into international commitments is a key part of the American constitutional design, this model is challenged by globalisation and the changing nature of international law.[76] In today's globalised world, international law routinely concerns subject matters that once were considered of purely local concern. Treaties regulate topics such as discrimination in the workplace, violence against women,[77] child benefits[78] or consular rights upon arrest.[79] These examples also demonstrate that the times in which treaties only contained reciprocal obligations between States are long gone. Today, international agreements routinely create rights for individuals on which they may rely against the State or even against other individuals. As a result, the federal government's power to enter into international commitments, unconstrained by Congress' enumerated powers, now poses a real risk to the federal structure.[80]

In practice, however, the federal government appreciates the virtues of federalism and shows deference to the traditional federal balance. Today's federalism doctrines are concerned not so much with subject-matter limitations as with the federal process and the modalities of the exercise of federal power. While even these limitations arguably do not apply in full force to the federal government when it acts under the treaty power, the latter has not sought to push the limits of its foreign affairs power to the detriment of the States. By resorting to RUDs, it has attempted to protect State autonomy and simultaneously to limit the drawbacks of doing so for the faith of the nation.

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[76] See generally Yoo and Ku (2012).

[77] Cf. *United States v. Morrison*, 529 U.S. 598 (2000) (declaring unconstitutional on federalism grounds the part of the 1994 Violence Against Women Act that provided a private civil remedy in federal court to victims of gender-motivated violence).

[78] The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, *UNTS* No. I-51361, 47 *ILM* (2008) 257.

[79] The Vienna Convention of 22 April 1963 on Consular Relations, 596 *UNTS* 261.

[80] See already in 1995, with regard to human rights treaties, Henkin (1995), p. 341.

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Part IV
Closing Remarks

Conclusions

Elaine Fahey

This book has explored how we should understand the development of institutionalisation beyond the Nation State, focussing largely but not exclusively upon a possibly 'hard case' of global governance, EU–US relations, long understood to be a non-institutionalised space, in light of recent legal and political developments in trade and data law. The contributors have amply addressed the variety of methodological questions posed. This book, through its contributors, has reflected upon two core case studies at the outset of the *Trump* presidency that have been shown to be far from disconnected or unrelated. Several authors of this book have deployed the EU–US TTIP negotiations for its trade case study generally and also trade in a wider sense, reflecting upon the place of institutions in lawmaking and global governance and beyond the Nation State. Both areas explored in this book have been ably demonstrated to be interconnected components of contemporary global economic life.[1]

As *Young* has stated in the Foreword to this book, there is a perplexing irony to the transatlantic relationship, and it is one that the book has sought to address both methodologically and substantively. While on the one hand transatlantic relations is remarkably under-institutionalised, the transatlantic economies are also highly interrelated and integrated. Law contributors arguably have quite a different methodological 'take' on the research question. Nevertheless, all adopt an approach addressing the 'active' and actor-specific components of institutionalisation, in law and through law. The contributors have actively engaged with this conundrum through the lexicon that is 'institutionalisation' and explored explicitly its latency, potency and familiarity in specific case studies. It is in general a conceptual rubric

[1] See further Peterson (2016), pp. 383–401.

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that is not necessarily positive—many contributions demonstrate that the promise of institutionalisation often falls short of the desired. It too easily faces enforcement and implementation challenges and is disruptive and even impractical in many instances. Still, many case studies also demonstrate the paradoxical importance of the lexicon of institutionalisation towards solving transnational challenges, irrespective of the outcome.

As Young also states, there are three specific issues that many contributors to this volume demonstrate vividly. Firstly, obstacles to international institutionalisation between 'near peers' are well presented. For example, EU-US privacy regimes are arguably so heavily institutionalised domestically—and, as a result, resistant to change that the transatlantic relations struggled to overcome this much and to mitigate costs of differences. Fragmented regimes such as US standard-setting regimes severely limit the capacity between the EU and US for technical cooperation on barriers to trade. Secondly, transnational agreements often rely on domestic institutions for enforcement, and many areas of cooperation exemplify the need for trust between the regulatory authorities to be built up. Here, case studies in transatlantic trade differ significantly from those in data transfer, and data privacy yet prove well this thesis overall. Thirdly, and well explored in this volume from a variety of perspectives, institutionalisation can be a source of problems rather than solutions, as in the case of an investor court system, even when it is so far-reaching, possibly sophisticated and internationalised (e.g., as a wholesale multilateral proposal).

The contributors to this book have considered a range of case studies in response to questions posed in this introduction so far as possible, beginning with what is 'formalisation', 'stabilisation' and progress in processes in this context beyond the Nation State? Legal accounts of institutionalisation mostly tend to be concerned with technical and procedural aspects of enforcement and legal regimes, whereas non-legal accounts largely focus upon the power dynamics and broader geopolitical context. Both demonstrate amply how institutionalisation may arguably incorporate a sliding scale of minimalist enforcement, bottom-up processes of development, accountability processes, stabilisation and actorness all merging together as part of a 'process' narrative.

Arguably, strong internationalised institutionalisation appears as the outcome of the trade case study, with significant concerns for good governance in both the regulatory cooperation and investment court reform proposals. By contrast, extremely weak localised institutionalisation appears the outcome for the data and privacy case study, with much weaker commitments to good governance and fundamental rights. Both pertain to vibrant and live negotiations taking place across an extended time period of different EU and US administrations, with a commitment to institutional design and institutionalisation broadly. Whether this will be the case going forward remains to be seen.

In Part I, *Moraes* ('The European Parliament and Transatlantic Relations') demonstrated how the European Parliament has played a crucial role in transatlantic relations in a number of ways, in particular in the Civil Liberties, Justice and Home Affairs (LIBE) Committee, work which is often overlooked or studied in less detail than it merits as a hub for democratisation, accountability and legitimacy in

transatlantic relations. *Abazi*, in 'Transparency in the Institutionalisation of Transatlantic Relations: Dynamics of Official Secrets and Access to Information in Security and Trade', outlined many significant challenges regarding parliamentary access to information in the EU because of cooperation with the US. Resulting limitations to transparency due to transatlantic cooperation is argued by her to be paradoxical because EU–US cooperation has opted for public institutions and institutionalisation. *Tzanou* then explored institutionalisation dynamics in several transatlantic data privacy, law enforcement and counterterrorism ('The EU–US Data Privacy and Counterterrorism Agreements: What Lessons for Transatlantic Institutionalisation?'). She argued that mainly EU institutions have been actively involved in the dynamic process of institutionalisation laying down a harmonised framework applying to all data transfers. However, the *Schrems* case signals a difficult turning point here for institutions and transatlantic privacy turns, which was outlined well in the account of Schrems' litigation and its aftermath by *Mann* ('The Max Schrems Litigation: A Personal Account'). *Wischmeyer*, in a piece entitled 'Transatlantic Data Flow: Which Kind of Institutionalisation?', reflects ably upon the paradoxes explored in the book as to the case study of data transfers and considers the difficult place of domestic institutions vis-á-vis the need for stronger transnationalism and more robust transatlantic institutionalisation, also reflecting more broadly upon the gap between domestic and transnational exposed well in the case study of transatlantic relations.

In Part II, *Purnhagen* ('Who Recognises Technical Standards in TTIP?') focused upon who would be competent to define the relevant technical standard to be recognised and who is competent to decide whether the standard was of international significance. In both regimes, the decision about the level of protection rests with different decision-makers. Nonetheless, the US will insist on an institutionalised procedure where government determines the rules of the game. In his chapter on 'Transatlantic Business and Financial Services in TTIP', *Jancic* contended that in the area of financial regulation, institutionalisation manifests in a threefold manner: as to interdependence, implementation and governance, and as a result, transatlantic relations could be characterised by deep institutionalisation but rather by incremental institutionalisation. *Lenk* ('Something Borrowed, Something New: The TTIP Investment Court—How to Fit Old Procedures into New Institutional Design') investigated the EU's proposal for a TTIP investment court in the context of transatlantic 'institution building'. He argued that TTIP paradoxically represents both a catalyst for change and reform in ISDS and a barrier to its global success and has changed the dynamics of relations with Canada rather than the US as an ally to lift it onto a multilateral platform, through an examination of the broader historical, political and legal-institutional context. ***T****iti*, in a chapter entitled 'Procedural Multilateralism and Multilateral Investment Court: Discussion in Light of Increased Institutionalism in Transatlantic Relations', showed how despite the growing scepticism existing in the world liberal order and a lack of appetite for multilateralism procedural multilateralism does exist in international investment law. The multilateralism achieved in recent years is, however, relatively narrow and relatively limited because it is on uncontested areas where consensus can be reached and renders all the more

remarkably developments between the EU and Canada as to a multilateral court. *Kleimann*, in a chapter entitled 'From Formal to Informal Institutional Change in EU Common Commercial Policy—The Case of the European Parliament', examined the institutional framework governing the EU's common commercial policy (CCP) and the role of informal rules and arrangements that have followed and complemented the reform of formal primary law institutions. He argues that the understanding of the evolution of intra- and inter-institutional informality is key to an overall assessment of the post-Lisbon common commercial policy.

In Part III, *Finbow*, in a chapter entitled 'Can Transatlantic Trade Relations Be Institutionalised After Trump? Prospects for EU–US Trade Governance in the Era of Antiglobalist Populism', reflects upon the broader context of rising economic nationalism, populism and antiglobalisation. He argues that the ability to forge transatlantic institutions or transnational connections is undermined by a global system that enhances inequality. While populism and rising nationalism may not yet be adequately understood, they weaken the chances of institutionalisation in economic and trade relations going forward. *Garcia*, in a chapter entitled 'Building Global Governance one Treaty at a Time? A Comparison of the US and EU Approaches to Preferential Trade Agreements and the Challenge of TTIP', charted the key aims and characteristics of EU and US preferential trade agreement policies since the reframing and curtailment in scope of trade negotiations at the WTO in the 2000s and considers how these have been integrated in bilateral preferential trade agreements. She argued that the underlying differences in preferences, the potential for politicisation and contestation and the importance of power asymmetries in negotiations that derailed the negotiations were severely underestimated at the highest political levels. *Roes* in a chapter, 'Federalism, State Cooperation and Compliance with International Commitments', demonstrated how there are important questions to be addressed as to comparative divisions of powers between the EU and US, warranting close scrutiny of the federal government's plenary power over foreign affairs and EU exclusive competence. He outlined succinctly the dramatic shifts in the scope of the EU's external exclusive competence, which has gradually expanded. Sometimes matters are easier under EU law than US constitutional law in this field despite much touted complexity and inefficiency. Yet constitutional issues matter where the parties to a treaty end up serving as the executive branch of the legal order that it establishes. State cooperation in the implementation and enforcement of international commitments is increasingly of concern on both sides of the Atlantic.

The contributions overall demonstrate how transatlantic relations have and continue to provide a significant example of the vibrant relationship between institutionalisation and private power and quest for new forms of institutionalisation across a range of subjects. They may vary significantly, as they appear to now, from data to trade on their degrees of institutionalisation and/or the stumbling blocks to institutionalisation. At a point of critical junctures, international organisations have not been adequately responsive to legitimacy concerns. However, this does not necessarily provide a complete account of transatlantic institutionalisation and certainly does not explain every case study well. The accounts of all contributors demonstrate the value in collectively engaging in an exploration of the dimensions of

a bottom-up and also top-down institutionalisation in their respective case studies across subjects. The contributions will hopefully have shown to the reader the significance of charting the development of expectations of a community as to institutional structures and processes, beyond the Nation State, as a broader future research agenda of significance.

Exploring de-institutionalisation may not capture adequately developments taking place between the EU and US in trade and data privacy, and it is probably inaccurate to say that transatlantic relations is entirely institution light. A broader context of extreme volatility in the global legal order is arguably difficult to capture and pin down as to its specific temporal or conceptual elements. Strong internationalised institutionalisation appears to constitute the outcome of the trade case study, whereas weak localised institutionalisation appears to constitute the outcome of the data case study, and so it is far from a coherent case study that is presented here. The lexicon of institutionalisation has been argued to here to be a valuable one worth deploying, however inconclusive the outcome or broader context may be. Institutionalisation may be the antithesis of the desired political outcome and simultaneously also the panacea for all harms. Contrariwise, it is a highly provocative lexicon for its capacity to provoke questions of sovereignty and sensitivity towards embedded institutionalised frameworks. Its explicit study in this book hopefully provides a trajectory for a future research agenda, of interest across disciplines.

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