Forthcoming in *Institutionalisation beyond the Nation State Transatlantic Relations, Data Privacy and Trade Law Editors: Fahey, Elaine (Ed.), Chapter: Introduction, Publisher: Springer Law* (2018) (ABBREVIATED VERSION FOR COPYRIGHT REASONS)

INTRODUCTION: INSTITUTIONALISATION BEYOND THE NATION STATE: NEW PARADIGMS? TRANSATLANTIC RELATIONS: DATA, PRIVACY AND TRADE LAW

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Abstract

The chapter explores how we should understand the development of institutionalisation beyond the Nation State. It focuses 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 How should we reflect upon 'progress' as a narrative beyond the Nation State? What is the place of bottom-up led process? The lexicon and framework of institutionalisation is argued 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 multi-disciplinary example of the relationship between institutionalisation and private power and quest for new forms of institutionalisation across a range of subjects. 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.

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, (1) the *establishment* of ('something, typically a practice or activity') a convention or norm in an organization 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

[1] DC North, *Institutions, institutional change, and economic performance* (CUP 1990).
[2] S. Sassen, 'Embedded borderings: making new geographies of centrality', Territory, Politics, Governance (March 2017).

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, either those focussed upon law and governance in the Nation State, beyond the Nation State. Moreover, 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 carrying 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

[3] ' Institutionalisation', Oxford English Dictionary, (3rd edn. OUP 2016) (British English spelling employed throughout).
[4] Writing of its role aiming to produce state identity in the wake of colonization: Judith Resnik 'Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century' (2013) 11(1) I-CON 162,163.
[5] John Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) American Journal of Sociology 340, 363; Elizabeth Sanders, Historical Institutionalism' in in Sarah Binder, R.A.W. Rhodes, Bert Rockman (eds.) The Oxford Handbook of Political Institutions (OUP, 2008), 40 ('As historians of knowledge remind us, attention to the development of institutions has fluctuated widely across disciplines, and over time… 40'
[6] Dennis Soltys,'Challenges to the Institutionalisation of Environmental NGOS in Kazakhstan's Corporate Policy Arena' (2014) 44 Journal of Contemporary Asia 342, 362.
[7] Melanie Luppa, Tobias Luck, Elmar Brahlet, and Helmut-Hans Konig, 'Prediction of institutionalisation in Dementia' (2008) 26 Dement Geriatr Cogn Disord 65, 78.

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 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 (NGO's) 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 level, 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

[8] E.g. Hugh Heclo, 'Thinking Institutionally' in Sarah Binder, R.A.W. Rhodes, Bert Rockman (eds.) The Oxford Handbook of Political Institutions (OUP 2008) 732.
[9] Richard Katz and William Crotty (eds.) Handbook of Party Politics (SAGE 2006) 206.
[10] Richard Elgie and Ian McMenamin, 'Political Fragmentation, Fiscal Deficits and Political Institutionalisation' (2008) 136 Public Choice 255, 267.
[11] E.g See Yearbook of International Organizations (BRILL, Hague), listing new organizations; '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] Michael Zürn, 'Opening up Europe: Next Steps in Politicisation Research'(2016) 39 West European Politics 16, 82; Michael Zürn, 'The Politicization of World Politics and its Effects: Eight Propositions' (2014) 6 European Political Science Review 47.
[13] See Zürn, ibid ; I. Venzke, I. Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication. (2016) 17(3) Journal of World Investment & Trade 374.
[14] E.g. Ferdi De Ville and Gabriel Siles-Brugge, TTIP: The Truth about the Transatlantic Trade and Investment Partnership (Polity 2015); Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 Common Market Law Review 351.

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 to short 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, 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 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 the difficulty in refining the established governance structures and procedures, the more stable the governance arrangements are and the more institutionalized 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 the existence and operation of a shared system of rules and procedures to define who the actor, how they make sense of each other's actions and what type of action is possible for the best provision of collective governance

[15] See generally the conclusions of Matthias Goldmann,'The Great Recurrence. Karl Polanyi and the Crises of the European Union' (April 22, 2017). Available at SSRN: https://ssrn.com/abstract=2956874

[16] Billy Melo Araujo 'Setting the Rules of the Game: Deep Integration in Mega-Regional and Plurilateral Trade Agreements and the Role of the WTO' (2016) (forthcoming); Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' (2015) 8 Global Trust Working Paper Series 1; Sophie Meunier and Jean-Frederic Morin, 'No Agreement Is an Island: Negotiating TTIP in a Dense Regime Complex'in Mario Teló and Tereza Novotná (eds.) *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Ashgate 2015).

[17] Michael Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation* (CUP 2004).

[18] Petar Petrov, 'Early Institutionalisation of the ESDP Governance Arrangements: Insights from the Operations Concordia and Artemis' in Sophie Vanhoonacker, Hylke Dijkstra and Heidi Maurer (eds) Understanding the Role of Bureaucracy in the European Security and Defence Policy (European Integration Online Papers 2010).

[19] Ibid

[20] Alec Stone-Sweet, Wayne Sandholtz and Neil Fligstein (eds) *The Institutionalization of Europe* (OUP 2001).

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 context: EU-Swiss relations. However, this much carries a heavy caveat. EU-Swiss relations form a structured and territorialised externalization 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.

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[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: Michael Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation* (CUP 2004).

[22] Meuwese, Anne, 'Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective' (2015) 78(4) Law & Contemporary Problems, 101-122; Meuwese, A.C.M., 'EU-US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?', in D. Vogel & J. Swinnen (eds.), Transatlantic Regulatory Cooperation. The Shifting Roles of the EU, the US and California (Edward Elgar 2011)

[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] Sandra Lavenex, 'Switzerland's flexible integration in the EU: A conceptual framework' (2009) 15(4) Swiss Political Science Review 547; Adam Lazowski, 'Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union' (2008) 45(5) Common Market Law Review 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 [2010] I-11845.

[27] Clive Church and Paolo Dardanelli, 'The Dynamics of Confederalism and Federalism: Comparing Switzerland and the EU' (2005) 15(2) Regional and Federal Studies 163 (finding high levels of similarities between Switzerland & the EU as a confederation and federation at societal and institutional level); Wolf Linder, 'Switzerland and the EU: The Puzzling Effects of Europeanisation without Institutionalisation' (2013) 19 Contemporary Politics 190, 202.

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 can becomes formal legal institutions of the EU previously who were not. 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] It suggests a more nuanced account of law and institutionalisation processes and procedures is 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 focuses 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 law-making 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 inter-relations 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 inter-connected components of contemporary global economic life.[29] Transatlantic relations represent

[28] Elaine Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of EU and Public International Law* (Routledge 2014) Ch. 1.
[29] See further John Peterson, 'Choosing Europe or Choosing TTIP?: The European Union and the Transatlantic Trade and Investment Partnership' (2016) 21(3) European Foreign Affairs Review 383.

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 inter-relationship and the place of *process* here in our analytical frame. It argues that a careful understanding of the relationship between the 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 should we 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?
- 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 which 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 which 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 which 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 have been conducted autonomously from data developments thus are capable 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

[30] R. Keohane *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984).

politicisation of EU-US trade policy.[31] Several accounts in this edited volume intersect with the account which 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

O*ne 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] While 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 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

[31] Elaine Fahey, 'On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal Order: A Legal Perspective' (2016) 43(4) Legal Issues of Economic Integration 327; Patricia Garcia-Duran, Leif Johan Eliasson, 'The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions' (2017) 51(1) Journal of World Trade 23.
[32] Mark Pollack, 'The New Transatlantic Agenda at Ten: Reflections in an experiment in International Governance', (2005) 43 Journal of Common Market Studies 899; Elaine Fahey 'On The Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (2014) 20(3) European Law Journal 368.
[33] Mark Pollack and Gregory Shaffer (eds.) *Transatlantic Governance in the Global Economy* (Rowman & Littlefield 2001, 25-34, 298
[34] Pollack, ibid.
[35] Ernst-Ulrich Petersmann 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) J Int Economic Law 579 ; See Mark Pollack and Gregory Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (OUP 2009). Elaine Fahey and Deirdre Curtin (eds.) *A Transatlantic Community of Law* (CUP 2014); R. Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy' in G. Bermann et al (eds.) *Transatlantic Regulatory Cooperation* (OUP 2000).
[36] Mark Pollack and Gregory Shaffer (eds.) Transatlantic Governance in the Global Economy (Rowman & Littlefield 2001); Petersmann, ibid; N. Krisch, 'Pluralism in Postnational Risk Regulation: The Dispute over GMOs and Trade', (2010) 1 Transnational Legal Theory 1.

usually accounted for 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 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 policy-makers varies 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 is on-going since 1972, with only one of the three EU institutional co-legislators participating and with limited output.[42] These are in turn are 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

[37] On the Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (2014) 20(3) European Law Journal 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. [Emilio De Capitani 'Parliamentary Tracker: a new episode of the EU-US visa waiver saga' (Free-Group: European Area of Freedom, Security & Justice, 3 March 2017) available at < https://free-group.eu/2017/03/03/parliamentary-tracker-a-new-episode-of-the-eu-us-visa-waiver-saga> accessed 1 June 2017]
[39] See Fahey, 2014.
[40] See Maria Green Cowles, 'The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue' in Mark Pollack and Gregory Shaffer (eds.) 213-233. Cf Anne Marie Slaughter, 'The Real New World Order' (1997) 76(5) Foreign Affairs 173.
[41] See Francesca Bignami and Steve Charnovitz, 'Transnational Civil Society Dialogues' in Mark Pollack and Gregory Shaffer (eds.) Transatlantic Governance in the Global Economy (Rowman & Littlefield 2001).
[42] i.e. The European Parliament. Cf D. Jančić "Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures" (2015) (17) Cambridge Yearbook of European Legal Studies 334.
[43] For example, the EU-US Cybercrime and Cyber-security Working Group or the High Level Working Group on Jobs and Growth.

regularised and structured process of non-institutional law-making. They are perceived, however, to have given certain economic actors privileged access to policy makers 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 19th 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 relations has arguably been to privilege private actors in secret dialogue processes.[47] The institutionalisation of civil society participation within 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.

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[44] See Bignami and Charnovitz; ibid; Petersmann, ibid.

[45] Justin Greenwood and Alasdair Young , 'EU interest representation or US-style lobbying?' in Nicolas Jabko and Craig Parsons (eds.) W*ith US or Against US? European trends in American Perspective* (OUP 2005) 290. Cf A. Young, 'Not your parents' trade politics: The Transatlantic Trade and Investment Partnership negotiations,' (2016) 23(3) Review of International Political Economy 345; Ayelet Berman, 'Taking foreign interests into account: Rulemaking in the US and EU' (2017) 15(1) I-CON (forthcoming).

[46] Young; ibid;; Beate Kohler-Koch and Christine Quittkat (eds.) De-mystification of Participatory Democracy: EU-Governance and Civil Society (OUP 2013).

[47] Bignami and Charnovitz, ibid, 255; Green Cowles, ibid, 215.

[48] Whether evolving civil society participation in EU law constitutes manufactured or engineered participation is far from an easy question. Acar Kutay, 'Limits of Participatory Democracy in European Governance' (2015) 21 European Law Journal 803; A. Berman, ibid.

[49] Zürn, ibid; 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.

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: to establish and reinforce bilateral regulatory cooperation, to promote an effective regulatory environment, compatible regulatory approaches and implementation thereof.[53] The European Commission initially proposed an institutionalised framework for the TTIP, which would have strong institutions in order to make it 'living agreement' and accelerates 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 considerably 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

[50] G. Shaffer, 'Alternatives for Regulatory Governance under TTIP: Building from the Past' (2016) 22(3) Columbia Journal of European Law 1, 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] A. Alemanno and J. Wiener, 'The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Policy Laboratory', (2015) 78 Law and Contemporary Problems 103 ; Joana Mendes, 'Participation in a new regulatory paradigm: collaboration and constraint in TTIP's regulatory cooperation' IILJ Working Paper 2016/5 (MegaReg Series); R.T Bull, N.A Mahboubi, B.S.Richard, and J.B Wiener 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP and Mega-Regional Trade Agreements' (2015) 78 Law and Contemporary Problems 1 ; A Alemanno, The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation (April 10, 2014). European Parliament Policy Report, Brussels, April 2014. Available at SSRN: http://ssrn.com/abstract=2423562

[46] 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.'

[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 M. Bartl & E. Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in Fahey and Curtin (n 35).

[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)).

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, deformalizing 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 it 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]

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. For examples, 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 its regulatory powers, usually developing countries.[62] A proposal for bilateral institutionalisation thereof has been made *initially*

[57] Cf Elaine Fahey, 'The TTIP Negotiations Innovations: On Legal Reasons for Cheer' (Verfassungblog, 24 Aug. 2016) available at <http://verfassungsblog.de/the-ttip-negotiations-innovations-on-legal-reasons-for-cheer> accessed 1 June 2017; Mendes (n 51).
[58] A final EU Proposal for Institutional, General and Final Provisions was tabled in 2016. Mendes, ibid.
[59] On its relationship with direct effect: Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded Free Trade Agreements' (2014) 51 Common Market Law Review 1125.
[60] Matthias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalisation of Unjustified Privilege' (2015) 4(3) ESIL Reflections, available at <http://www.esil-sedi.eu/node/944> accessed 1 June 2017.
[61] Voon, Tania S.L., Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules (March 4, 2017). Forthcoming World Trade Review (2017). Available at SSRN: https://ssrn.com/abstract=2929145 C. Brown (ed) *Commentaries on Selected Model Investment Treaties* (OUP 2013) 6-8.

[62] Joseph Stiglitz, 'The Secret Corporate Takeover of Trade Agreements' (The Guardian, 13 May 2015) available at <https://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements> accessed 1 June 2017; Kumm,

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 polarization 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 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 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 a 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 disquiet in certain Member States, an interpretative instrument was agreed by the Member States in late 2016.[68]

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ibid. See Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' GlobalTrust Working Paper Series 08/2015; Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach'(2011) 52 Virginia Journal of International Law 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;

[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).

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 court.[70] A concerted strategy to unify an ad hoc system through a new institution currently governed by over 3.000 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 settlements 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 of 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

[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.
[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] Gus Van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP' (2015) 16 Osgoode Legal Studies Research Paper 1; Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' [2014] SSRN Electronic Journal 1; Stephan Schill, ,The Proposed TTIP Tribunal and the Court of Justice: What Limits to Investor-State Dispute Settlement Under EU Constitutional Law?' (Verfassungblog, 29 Sept. 2015) available at <http://verfassungsblog.de/the-proposed-ttip-tribunal-and-the-court-of-justice-what-limits-to-investor-state-dispute-settlement-under-eu-constitutional-law> accessed 1 June 2017; Opinion 2/13 Opinion of the Court (Full Court) of 18 December 2014, EU:C:2014:2454; Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 Common Market Law Review 351; Cf Ingolf Pernice, 'International Investment Protection Agreements and EU Law', in (2014) Studies on Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements commissioned by the European Parliament's Directorate-General for External Policies, 137–138 available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979(ANN01)_EN.pdf > accessed 1 June 2017.
[72] A. Roberts, 'Would a Multilateral Investment Court be Biased? Shifting to a treaty party framework of analysis' EJIL Talk (28 April 2017) https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/

institutionalised because *States* become sites of resistance to transnational legal norms.[73] Here, however, the number of interests involved and corrosive relationship of the existing legal framework of international investment law with State sovereignty (e.g. having to accept enormous arbitral awards) appears 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]

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 which 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

[73] *Transnational Legal Orders* (Terence C. Halliday & Gregory Shaffer eds., 2015), Section IX; Gregory Shaffer and Terence C. Halliday, With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering (December 8, 2016). UC Irvine School of Law Research Paper No. 2016-59.
[74] See the chapters of Titi and Garcia respectively in this volume.
[75] David Cole and Federico Fabbrini, 'Bridging the transatlantic divide? The United States, the European Union, and the Protection of Privacy Across Borders' (2016) 14(1) I-CON 220
[76] Paul Schwartz, 'The EU-US Privacy Collision: A Turn to Institutions and Procedure' (2013) 126 Harvard Law Review 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-

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 but it appears as 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* 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 re-think 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

362/14 Schrems v Data Commissioner, EU:C:2015:650 ; Loïc Azoulai and Marijn Van der Sluis, 'Institutionalizing Personal Data Protection in Times of Global Institutional Distrust: Schrems' (2016) 53(5) Common Market Law Review 1343.

[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 Gregory Schaffer, 'Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbour Agreements' (2002) 9 Columbia Journal of European Law 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.

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 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 are arguably remain weak and highly 'localised'.[87] The Privacy Shield is perceived to be an improvement upon 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

[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;
SeeL. Azoulai & J. Morin, ibid; Dorothee Heisenberg, Negotiating Privacy: the European Union, the United States and Personal Data Protection (Lynne Rienner Publishing 2005).
[85] J. P. Barlow, A Declaration of the Independence of Cyberspace (1996) <https://www.eff.org/cyberspace-independence> last accessed 1 June 2017.
[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).

Věra Jourová and Emily O'Reilly, 'Follow-up reply from the European Ombudsman to Commissioner Jourová on the use of the title "Ombudsperson" in the EU-US Privacy Shield agreement', (European Ombudsman, 2 May 2016) available at <http://www.ombudsman.europa.eu/resources/otherdocument.faces/nl/66926/html.bookmark> accessed 1 June 2017.

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 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 and instead, 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 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 the 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

[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).
[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.

a 'harmonised' regime on account of the loose institutional set up.[92] It is thus quite weak in terms of its institutionalised components.

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, summarized here next.

…

[92] See E. Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records & the Terrorist Finance Tracking Program' (2013) 33 Yearbook of European Law, 368.