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CHAPTER 11

Democratic Leadership through Transatlantic Cooperation for Trade and Technology Reforms through the EU-US TTC Model?

Elaine Fahey

1 Introduction: the Transatlantic Partnership as the Future of the Constitutionalisation of Global Governance Failures*

The transatlantic partnership is fundamental to the global economy and world security but also to the future of the constitutionalisation (with a small 'c') of global governance. It has long been one of the problem children of global governance – possibly also, as will be outlined here, its great saviours.[1] This is arguably because the EU and US have consistently shaped international approaches to public international law distinctively and differently.[2] While the US has crafted the global order after World War II (WW2) and has consistently promoted EU integration, it is a difficult partnership to credit with much more than this with respect to the global commons and global challenges. For much of the 20th Century, the US was evidently the stronger partner both militarily and economically and arguably dominant in the partnership legally. Even as Europe grew into a larger and more cohesive economic and normative power, the EU has largely relied upon US security might particularly in the 9/11 period and thereafter.[3] This imbalance has arguably been adverse for the development

* The author is grateful to Ivanka Karaivanova for research assistance provided and to the editors for their most helpful and constructive comments.

1 Ernst-Ulrich Petersmann, 'Prevention and Settlement of Transatlantic Economic Disputes: Legal Strategies for EU/US Leadership' in Ernst-Ulrich Petersmann and Mark Pollock (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford University Press 2003).

2 Jeffrey Dunoff and Mark Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012); Charles Roger, *The Origins of Informality: Why the Legal Foundation of Global Governance are Shifting, and Why It Matters* (Oxford University Press 2020).

3 David O'Sullivan, 'EU-US Relations in a Changing World' in Elaine Fahey (ed), *Routledge Research Handbook on Transatlantic Relations* (1st edn, Routledge 2023).

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of innovation in solving global challenges. Instead, significant human rights challenges have dominated EU reliance upon US legal settlements with respect to civil liberties and security. The EU and US nonetheless constitute two of the leading global figures in trade, economics, agriculture, security. They operate to provide stability as to the liberal global legal order post-WW2, at least until recently when the Trump administration operated a significant deviation from this, particularly as to support for international law and international organisations and they have the capacity in this cooperation to constitutionalise global governance and ameliorate significant previous shortcomings.[4]

The EU actively supported the US pivot to mega-regionals to exclude China and pivot away from the World Trade Organisation (WTO) framework, in particular, the Transatlantic Trade and Investment Partnership (TTIP) during the Trump administration.[5] It spurned a subsequently complex period for EU trade policy, which has framed itself as being based upon 'free and open' trade and competition but has been stymied by a defensive turn to a lexicon of strategic autonomy, digital sovereignty and multiple trade defence instruments. In this new era, the EU has often sought global solutions to global challenges, as part of its constitutional DNA e.g. Article 21 TEU to promote international law, from of the Paris Agreement or the Multilateral Investment Court (MIC) project to reform ISDS globally. Yet these efforts have uniformly not been espoused by the US. In this regard, irrespective of the time period, the EU support for international law and international institutions has remained resolute, but unsupported by the US or US commitment to similar values until recently.

The Ukraine crisis has strengthened relations between the allies. At the same time, however, both structural (the rise of China) and domestic (e.g. 'America first' policy or the strategic autonomy of the EU) factors suggest that the EU-US relationship will weaken over time due to the impact of such factors, in particular on US foreign policy preferences, especially where the EU is strengthening its own foreign policy, including in the area of security and defence.[6] Yet the metrics of the relationship are often shifting across political scientists, political theory and political economy trade and data lawyers and governance scholarship, where the calibration between convergence and divergence has been complex. Within a political cycle, significant variations on the state of transatlantic relations have also followed as well as their

4 Ernst-Ulrich Petersmann in this volume.

5 Gabriel Siles Brugge and Ferdi De Ville, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Polity Press 2015).

6 Marianne Riddervold and Akasemi Newsome, *Transatlantic Relations In Times Of Uncertainty: Crises and EU-US* (1st edn, Routledge 2019).

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analysis. Transatlantic Relations as a regional genre have undoubtedly shown themselves to be a vibrant source of dynamic theorisation. The place of actors, powers, competences and institutions form pivotal concepts but also far from objective ideals, imbued often with constructivism.

A Transatlantic Trade and Technology Council (EU-US TTC hereafter), as proposed by the EU in late 2020 to the new Biden administration and already in place by Autumn 2021, could provide an important bedrock from which multilateral ecommerce developments can flourish and evolve global governance significantly.[7] It has express objectives to address complex trade and technology challenges through institutionalisation and explore global policy objectives, outside of a trade negotiation setting. Yet its objectives appear possibly complex where the US refuses to utilise 'binding' trade agreements and increasingly advocates soft law framework solutions. The TTC has notably significant global law-making objectives as will be outlined here-and a significant stakeholder dimension. It constitutes a similar entity or development to that taking place in EU-India relations, where another so-called Trade and Technology Council has also just been established via soft law.[8] Other countries are supposedly following suit on TTCs e.g. India-Singapore and others want to join the TTC as observers.[9] The place of global challenges and global public goods becomes more important to decipher in this era as to its methods, aims and its actors. The European Commission has sought to emphasise the benefits of the TTC as enabling more constructive dialogues on open disputes and cases e.g. steel and aluminium tariffs, thereby widening its strategic operations, benefits and outcomes. The need for multilateral law-making on contemporary critical challenges of data flows and climate change make for uneasy bedfellows but somehow find themselves in this forum. The idea of a new Council with broad-ranging bilateral and multilateral goals is thus difficult to fathom but is also evidence of considerable ambitions to constitutionalise international economic law, explored here.

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7 The initial Joint Statement – the so-called Pittsburgh Statement: See European Commission, 'EU-US Trade and Technology Council Inaugural Joint Statement' (Press Release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_4951> accessed 30 June 2023; Chad P Bown, and Cecilia Malmström, 'What is the Transatlantic Trade and Technology Council' (*PIIE*, September 2021) <https://www.piie.com/blogs/trade-and-investment-policy-watch/what-us-eu-trade-and-technology-council-five-things-you-need> accessed 30 June 2023.

8 See European Commission, 'EU-India: Joint press release on launching the Trade and Technology Council' (Press Release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2643> accessed 30 June 2023.

9 Informal discussions with EU Delegation, Washington DC, February 2023.

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In terms of trade and economic regulation the EU and US are in many ways moving in different directions. This is the case, in terms of how to regulate big data and big tech in general exposing more fundamental, almost philosophical, divergences in approaches as well as very strong opposing interests, as reflected in disputes over, for example, the EU-US data transfer agreement, the Corporate Sustainability Reporting Directive, and the proposed Directive on corporate sustainability due diligence and many other conflicts. The EU-US Trade and Technology Council might assist but not fundamentally overcome these tensions. Yet regulatory convergence may also be more apparent than real. Five bills (the 'US Antitrust Bills') have been put forward in the US legislature with the aim to regulate digital markets and limit the power of the powerful firms acting on them.[10] As with US antitrust enforcement in digital platform markets, this regulatory sweep might be devised in a way that would limit its effectiveness, not however, diverging significantly from the aims a range of EU legislative measures introduced in recent time such as the Digital Markets Act (DMA) or Digital Services Act (DSA) to address the global challenge of Big Tech power at national level.[11] These developments have been matched by the US Inflation Reduction Act (IRA), with many highly significant subsidies being introduced by the US legal system-and US businesses awash with US subsidies heavily 'courting' EU enterprises increasingly.[12] It is thus a highly complex

10 These bills are: The American Choice and Innovation Online Act (HR 3816, 117th Congress, 11 June 2021), Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 (HR 3849, 117th Congress, 11 June 2021), Ending Platform Monopolies Act (HR 3825, 117th Congress, 11 June 2021), Platform Competition and Opportunity Act of 2021(HR 3826, 117th Congress, 11 June 2021), Merger Filing Fee Modernization Act of 2021 (HR 3843, 117th Congress, 11 June 2021).

11 2022 saw two milestones in digital market regulation. On 14 September, the Digital Markets Act (DMA) was adopted. On 19 October, the Digital Services Act (DSA) was adopted. Both regulations are the culmination of the Commission's 2020 Strategy: 'Shaping Europe's Digital Future'. See respectively, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1 and Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

12 HR 5376 – Inflation Reduction Act of 2022 Pub. L. 117–169, amounting to $369bn in grants, loans and tax credits for the rollout of renewable energy and clean technologies across the US; See Aime Williams, 'US-Europe trade tensions heat up over green subsidies' *Financial Times* (27 February 2023) <https://www.ft.com/content/0f8bf631-f24c-48da-905f-e37f8dc5d5f8> accessed 23 June 2023; European Commission 'Launch of the US-EU Task Force on the Inflation Reduction Act' (Press Release 2022) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_6402> accessed 30 June 2023; See David Kleimann and others, 'Europe should answer the US Inflation Reduction Act'

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backdrop around which to develop global challenge solutions to shared concerns as to trade and technology, particularly as to supply chains and to unite and evolve global challenges, predominantly unifying against China.

It is also difficult to suggest that the EU and US have in reality engaged substantively on democratic issues as to global challenges through leadership *until* the TTC, which targets a vast range of fairness questions, good practices, higher standards and rule deficit issues on global challenges. This chapter thus makes the case for further evolution of the TTC and for policy goals with the aim of *enhancing* its democratic engagement. It does so principally drawing from EU external relations law developments. It thus addresses the methodology question of 'constitutional failures' of global governance of those addressed in this volume.

Section 2 thus situates the historical failures of transatlantic cooperation, as law-light institution-light 'Business-first' engagement without constitutionalisation ambitions. The chapter then considers the Transatlantic Trade and Technology Partnership negotiations (TTIP) precedent, and its evolution of the treatment of civil society (Section 3). Section 4 assesses the constitutionalisation of EU-US relations in the new EU-US Trade and technology Council (TTC) as a global law-making agenda. The chapter then considers the democratic shortcomings of the TTC and its capacity to evolve stakeholder engagement in the face of significant regulatory divergences e.g. the US Inflation Reduction Act and the EU Digital Markets and Digital Services acts respectively (Section 5), followed by Conclusions.

2 How to Learn from the History of EU-US Cooperation Law-Light Failures?

The role of the United States (US) in crafting the global order after WW2 was decisive and it included the active promotion of EU integration. Over the next 60 or so years, the transatlantic partnership was central to global events through the building of the Western liberal order and all the institutions that went with it. It was an imbalanced and unequal relationship. For much of the period, the US was by far the stronger partner both militarily and economically. In 2004 Jürgen Habermas published the 'Divided West' arguing that the

(2023) Bruegel Policy Contribution 04/2023. EU officials have accused Washington of discriminating against European companies and breaking global trade rules — particularly in the electric vehicle sector, where companies score the full tax credit if they manufacture cars in North America.

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'normative authority' of the United States lied in ruins after the Iraq War and called for a European 'counter power'. It was clear in many recent years under the Trump administration that the EU and US alliance had been almost irreparably damaged. A widespread erosion in the place of international organisations was a central touchstone of EU and US tensions on their respective world views, with the EU heavily centering upon institutionalisation.[13] The Eurocentric world of pre-1945 and the resulting shifts of periods of globalisation are of significance.[14] The transatlantic partnership has been far from straightforward legally despite being an obvious basis for global stability of international economic law.

Transatlantic regulatory cooperation has in general been a 'swift' rather than a 'deep' affair, unlike its disputes which often appear to run longer than its agreements.[15] Arising from its last major framework, the New Transatlantic Agenda (NTA) of 1995, by 2003, nine formal binding and non-binding regulatory cooperation agreements had been entered into between the EU and US in areas as diverse as competition, privacy, customs and vetinerary standards.[16] Nonetheless, at whatever stage of its development, transatlantic cooperation has posed major challenges for regulatory independence, transparency and administrative law requirements, confidentiality, multi-level governance and regulatory sovereignty.[17]

Conflict as much as contestation and convergence are easily overplayed or overanalysed. Although a thirst for international cooperation, standards and institutionalisation is seen globally as pivotal to the success of the international economic order, such efforts arguably have often been stymied at transatlantic or domestic level. Ultimately, transatlantic relations are a story of largely cooperative and lively institutional interactions across many individual

13 Elaine Fahey, *Framing convergence with the global order: the EU and the world* (1st edn, Bloomsbury Publishing 2022).

14 Poul Kjaer, 'Does the 'West' still exist? Regulatory Philosophies in a Decentered Global World' in Elaine Fahey (ed), *Imagining the future of good global governance* (2022) City Law School Research Paper 2022/11.

15 See the summary by the Library of the European Parliament, 'Principal EU-US disputes' (Library Briefing, April 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI(2013)130518_REV1_EN.pdf> accessed 30 June 2023.

16 On the NTA, see Mark Pollack and others, *The Political Economy of the Transatlantic Partnership* (2003) Working Paper EUI <https://www.eui.eu/Documents/RSCAS/e-texts/200306HMTMvFReport.pdf> accessed 30 June 2023.

17 See Mark Pollack and Gregory Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman & Littlefield 2001).

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points that perhaps have outgrown traditional typologies of the multi-level nature of EU-US relations.[18]

The sources of bilateral EU-US relations have often been in bilateral regulatory cooperation agreements, as well as Protocols, Exchanges of Letters, thus in both soft and hard law. Law has played a significant role in contemporary transatlantic relations *outside* of the bilateral context which, from the perspective of EU External Relations law, might seem neither conventional nor apparent,[19] e.g. EU *amicus curiae* submissions before the US Supreme Court.[20] Institutions have not been irrelevant. A Transatlantic Legislators Dialogue is on-going since 1972.[21] Transatlantic annual summits have been held since the 1990s, continuing to generate challenges regarding the appropriate EU institutional representation, even after the Treaty of Lisbon and a new European Parliament Liaison Office is situated in Washington DC.[22]

As a result, the bilateral transatlantic relations have been considered to be institutionally modest but also flexible.[23] Views differ substantially on the relative importance of law-light institutional-light framings of the core of the western superpowers alliance, cooperation and engagements-not unimportant to a legal audience-less so other genres of analysis. The EU and US are considered the world's two regulatory great powers and regulatory differences are the most significant impediments to most transatlantic economic activity. In part, as a result, there are common perceptions that the transatlantic regulatory relationship is fraught and that the EU and US are competing to spread their regulations around the world. Non-lawyers claim transatlantic regulatory trade disputes are extremely rare and represent a tiny fraction of transatlantic economic exchange.[24] Many Mutual Recognition Agreements have been

18 Mark Pollack, 'The New Transatlantic Agenda at Ten: Reflections on an Experiment in International Governance' (2005) 43(5) Journal of Common Market Studies 899.

19 Elaine Fahey (ed), *Routledge Research Handbook on Transatlantic Relations* (1st edn, Routledge 2023); Elaine Fahey, 'On The Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (2014) 20 European Law Journal 386.

20 E.g. *Atkins v Virginia* 536 US 304 (2002); *Roper v Simmons* 543 US 551 (2005); *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013); *Abitron Austria GmbH et al v Hetronic International Inc*., Case No 21-1043 (Supr. Ct. Nov. 4, 2022) (*certiorari* granted).

21 I.e. The European Parliament.

22 See Joseph Dunne, 'Connecting the US Congress and the European Parliament: The work and role of the EP Liaison Office in Washington DC' in Fahey, *Routledge Research Handbook on Transatlantic Relations* (n 19).

23 E.g. Pollack (n 18).

24 Alasdair Young, 'The transatlantic regulatory relationship: limited conflict, less competition and a new approach to cooperation' in Fahey, *Routledge Research Handbook on Transatlantic Relations* (n 19); Petersmann, 'Prevention and Settlement of Transatlantic Economic Disputes: Legal Strategies for EU/US Leadership' (n 1); Ernst-Ulrich Petersmann,

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alleged to have failed on account of undue power and influence of US federal authorities.[25] As the former EC Trade Commissioner Sir Leon Brittan famously stated, "governments proved to be more eager than their agencies to cooperate."[26] Indeed, many agreements beyond trade have defied characterisation as complex global governance, grounded in soft law and highly complex administrative arrangements. Several post 9/11 bilateral EU-US Agreements in security have been argued to add little to existing Agreements between individual Member States and the US.[27] The Edward Snowdon / NSA surveillance saga caused many to consider the question of the value and merits of transatlantic cooperation through law.[28]

The advent of the Trump administration appeared to give effect to an unprecedented shift in Transatlantic Relations since before World War II – mostly away from institutions-as well as trade wars.[29] This 'unpleasantness' changed swiftly with the Biden administration – at least in tone – e.g. already with the Transatlantic Trade and Technology Council (EUUSTTC) proposed

'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 Journal of International Economic Law 579; Ernst-Ulrich Petersmann, 'CETA, TTIP and TISA: New Trends in International Economic Law' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TISA: New Orientations for EU External Economic Relations* (Oxford University Press 2017); Anthony Gardner, *Stars with Stripes: the essential partnership between the EU and US* (Palgrave Macmillan 2020); Mark Pollack and Gregory Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press 2009).

25 Pollack and others (n 16); See U.S.-EC Mutual Recognition Agreement (MRA) and its six sectoral annexes (of 1997), the U.S.-EC Mutual Recognition Agreement on Marine Safety (of 2001), and the U.S.-EC understanding on Safe Harbour Principles for data privacy protection (of 2000).

26 Schaffer quoting Sir Leon Brittan, 'Transatlantic Economic Partnership: Breaking down the hidden barriers' in George Bermann and others (eds), *Transatlantic Regulatory Cooperation* (Oxford University Press 2000) 13.

27 E.g. Mitsilegas Valsamis, 'The New EU–USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 European Foreign Affairs Review 515.

28 Gregory Shaffer, 'Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards' (2000) 25 Yale Journal of International Law 1; Anu Bradford, *Brussels Effect: How the European Union rules the World* (Oxford University Press 2020); Joanne Scott, 'From Brussels with Love: the Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 The American Journal of Comparative Law 897.

29 Marija Bartl and Elaine Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge University Press 2014).

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immediately by the European Commission and swiftly implemented and taking effect to be discussed here below – yet still a soft law creation.[30] Transatlantic relations are thus no stranger to evolutions and to a series of innovative hybrid governance or soft law engagement on law-making and soft law outcomes of note and many so-called transatlantic dialogues over the years, even during/alongside their renowned 'failures'.[31]

3 The TTIP Precedent: Constitutionalising the Place of a Transatlantic Civil Society

In June 2013, the US launched negotiations between the EU and US on a Transatlantic Trade and Investment Partnership (TTIP hereafter) with an ambitious time frame for negotiations to be completed before the end of 2014. With the combined economies of the EU and US accounting for almost 40% of global GDP and approximately a third of global economic trade, the TTIP has thus been touted as a dramatic kick-start to the global political economy. The opening of negotiations on a TTIP was commenced after the Report of the EU-US High Level Working Group on Jobs and Growth (HLWG).[32] There, the suggestion was developed that the negotiations would explore (a) market

30 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the European Council and the Council: A new EU-US agenda for global change' JOIN (2020) 22 final; European Commission, 'EU-US Trade and Technology Council Inaugural Joint Statement' (Press Release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951> accessed 30 June 2023; European Commission, 'EU-US launch Trade and Technology Council to lead values-based global digital transformation' (Press Release 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990> accessed 30 June 2023; The White House, 'U.S.-EU Trade and Technology Council Inaugural Joint Statement' (Statement Release 2021) <www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/u-s-eu-trade-and-technology-council-inaugural-joint-statement/> accessed 30 June 2023.

31 Pollack and Shaffer, *Transatlantic Governance in a Global Economy* (n 17) 25–34, 298; Fahey, 'On The Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US' (n 19); Maria Green Cowles, 'The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue' in Pollack and Shaffer, *Transatlantic Governance in a Global Economy* (n 17) 213; Francesca Bignami and Steve Charnovitz, 'Transnational Civil Society Dialogues' in Pollack and Shaffer, *Transatlantic Governance in the Global Economy* (n 17) 275–6.

32 Established after the EU-US Summit in 2011; European Commission, 'Final Report High Level Working Group on Jobs and Growth' (2013) Tradoc 150519 <http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf> accessed 30 June 2023.

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access; (b) regulatory issues and non-tariff barriers, and (c) rules, principles, and new modes of cooperation to address shared global trade challenges and opportunities.

The TTIP purported to develop a multilevel post-national marketplace which would deepen and prospectively *institutionalise* EU-US relations in a range of fields-such as pharmaceuticals, chemicals, public procurement or motor vehicles – also through a Regulatory Cooperation Council with rule-making capacity.[33] The TTIP negotiations expressly involved the discussion of the prospective revision and renegotiations of a broad range of existing EU laws, rules and standards of the *acquis communautaire* to progress far beyond the technical scope of the last EU-US Mutual Recognition Agreement from 1997. This form of institutionalisation and prospective re-negotiation of EU laws, rules and standards was unprecedented in an EU international trade agreement.

Much emphasis has been placed both at the outset and during the TTIP negotiations on the substantive and procedural consent from the European Parliament and US Congress, along with Member State parliaments. From an EU perspective, EU international trade agreements post-Lisbon are *formally* legitimated in a new dynamic of European Parliament scrutiny and enhanced transparency practices of heightened involvement, pursuant to Article 218 TFEU and an Inter-Institutional Framework Agreement. TTIP differed from *historical* EU-US regulatory cooperation and was thus controversial as a mega-regionals project of integration.

The constitutionalisation (with a small 'c') of the role of civil society in EU trade negotiations and also their resulting agreements is an important development in EU law, which began in TTIP, and is important as a moment where the EU ceased to disregard ordinary citizens in high-level trade negotiations.[34] Unlike the European Parliament (EP), civil society actors do not enjoy a formal role under Article 218 TFEU for treaty-making, but have benefitted from the emergence of several venues to provide their input. Whether these entities

33 See Article 43 of the leaked Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the EU and US (Brussels, 17 June, 2013): 'The Agreement will set up an institutional structure to ensure an effective follow up of the commitments under the Agreement, as well as to promote the progressive achievement of compatibility of regulatory regimes'. No. 13/801. See also Elaine Fahey, *The EU as a Global Digital Actor: Institutionalising Data Protection, Digital Trade and Cybersecurity* (Hart Publishing 2022).

34 On constitutionalisation in this fashion, see Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) and Ernst-Ulrich Petersmann in this volume.

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actual exert influence or merely constitute a check-box exercise remains to be seen.[35] Civil society actors have indeed challenged the negotiations for the new generation EU FTAs in a number of ways. The lack of information about the negotiations generated civil society organisations on both sides of the Atlantic.[36] The secrecy of the TTIP negotiations gave rise to much concern, even resulting in individual MEPs leaking the negotiation texts 'in the public interest'. Inadequate responses by the Council and Commission to civil society concerns prompted the intervention of the European Ombudsman,[37] resulting in the Commission's decision to publish the EU's textual proposals and position papers, thus making TTIP a unique case of positive shifts towards unprecedented transparency.[38] Significant litigation was also generated by individual parliamentarians working with civil society in the form of a European Citizen Initiative (ECI). During the TTIP negotiations, civil society succeeded in mobilising public opinion and gathering over 3 million signatures for a petition against the conclusion of TTIP and CETA, which resulted in proceedings being taken to the General Court of the EU, seeking annulment of the decision of the Commission to refuse to stop the negotiations.[39] The Court in a broad constitutional reading of the provisions of the Treaty on the democratic life of the Union, held that the Commission's narrow interpretation of law-making that could be stopped so as to preclude negotiations being part of it was incorrect. The Commission thereafter established an Expert Advisory Group specifically for TTIP in order to redress its deficiencies, bringing together business, consumer, labour and health interests,[40] to whom the Commission provided information thereto throughout the negotiations and who were also given

35 Isabella Mancini, 'The European Parliament and Civil Society in EU Trade Negotiations: The Untold Story of an Erratic Engagement' (2020) 27 European Foreign Affairs Review 241.

36 See Alasdair Young, 'Not your parents' trade politics: the Transatlantic Trade and Investment Partnership negotiations' (2016) 23 Review of International Political Economy 345.

37 See also Katharina Meissner, 'Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP' (2016) 21 European Foreign Affairs Review 269.

38 Mancini, 'The European Parliament and Civil Society in EU Trade Negotiations: The Untold Story of an Erratic Engagement' (n 35); Elaine Fahey, 'On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal Order: A Legal Perspective' (2016) 43 Legal Issues of Economic Integration 327.

39 Case T-754/14 *Efler and Others v Commission* EU:T:2017:323.

40 European Commission, 'Expert group to advise European Commission on EU-US trade talks' (Press Release 2014) <https://europa.eu/rapid/press-release_IP-14-79_en.htm> accessed 30 June 2023.

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the possibility to consult EU negotiating texts, raise questions and provide comments.[41] Despite the progress of TTIP, the latest EU-US trade talks have sparked similar criticism by the civil society actors as to the prevalence of behind-closed-door meetings with big business lobbyists.[42]

The EU-US TTIP negotiations appeared to provide some evidence of responsiveness of EU institutional actors to concerns about shortcomings in the democratic process in EU external relations law and hence about the legitimacy of decision-making in the TTIP negotiations. This responsiveness often goes far beyond what the CJEU appears to demand in its recent case law on international relations and access to documents. Importantly, it also eclipses historical precedents in EU-US relations from the 1990s.[43] It is thus a broadly positive story from a legal and specifically EU law perspective in so far as it contributes positively to our understanding of the place of democratisation of international relations in the supranational EU legal order.

In the era of Big Tech dominance, the place of civil society in theory in solving global challenges in this domain seems highly significant, explored in the next sections, which develop further the plan and actions of the EU-US TTC.

4 The EU-US Trade and Technology Council (TTC): Global Law-Making for Global Challenges (through Soft Law?)

Transatlantic data flows amount to some of the most significant for the global economy.[44] The TTIP, the largest scale form of transatlantic collaboration in recent history, expressly excluded data flows from its negotiations. Its negotiation of e-commerce could have been pivotal given the gap between the Trans-Pacific Partnership (TPP) and EU agreements emerging as to data flows but also the gap emerging as to the regulation of digital trade between the EU and

41 See European Commission, 'Terms of Reference' (July 2015) <https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153617.pdf> accessed 30 June 2023.

42 Corporate Europe Observatory, 'TTIP reloaded: big business calls the shots on new EU-US trade talks' (*Corporate Europe Observatory*, February 2019) <https://corporateeurope.org/en/international-trade/2019/02/ttip-reloaded-big-business-calls-shots-new-eu-us-trade-talks> accessed 30 June 2023.

43 E.g. Pollack and Shaffer, Transatlantic Governance in a Global Economy (n 17); Pollack, 'The New Transatlantic Agenda at Ten' (n 18).

44 See US Chamber of Commerce, 'Transatlantic Data Flows: Moving Data with Confidence' (2021) <https://www.uschamber.com/technology/data-privacy/transatlantic-dataflows> accessed 30 June 2023.

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US.[45] The US shift towards the need for federal privacy laws has considerably altered this divergence to a degree, noted above. Moreover, after the CJEU struck down the EU-US Privacy Shield in *Schrems* II, the EU and US finally agreed in March 2022 a new Transatlantic Data Privacy Framework principle in March 2022, to include a 'trans-atlantic court' and independent oversight, demonstrating the extraordinary capacity of EU-US relations to lead global challenges debates and evolve transnational views on privacy and courts.[46] The framework even appears to be understood as a pre-condition for the TTC to evolve, prior to meeting 2 in Paris-Saclay in May 2022.[47] It thus provided an extraordinary background from which to begin discussions in the TTC-of a shared commitment to the rule of law through institutions and a clear constitutionalisation of relations between the EU and US on trade and technology.

The EU-US Joint Agenda for Global Change included a TTC, putatively developing a loose institutionalisation of key global challenges. The EU proposed as part of its global change agenda a TTC – centered upon multiple working groups that traverse many fields and multiple competences of EU law, from trade, environment, defence to labour: i.e., Technology Standards Cooperation, Climate and Clean Tech, Secure Supply Chains, ICT Security and Competitiveness, Data Governance and Technology Platforms, Misuse of Technology Threatening Security & Human Rights, Export Controls Cooperation, Investment Screening Cooperation, Promoting SME Access to

45 European Commission, 'TTIP: Initial proposal on trade in services, investment and e-commerce' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf> accessed 30 June 2023; European Commission, 'TTIP: Annexes to the services, investment and e-commerce initial proposal' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf> accessed 30 June 2023; European Commission, 'A reading guide to the EU proposal on services, investment and e-commerce for the Transatlantic Trade and Investment Partnership' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153668.pdf> accessed 30 June 2023; European Parliament, 'TTIP Legislative Train Schedule' (2020) <www.europarl.europa.eu/legislative-train/theme-international-trade-inta/file-ttip-services-investment-and-e-commerce> accessed 30 June 2023; See Mira Burri, 'The Regulation of Data Flows Through Trade Agreements' (2017) 48 Law and Policy in International Business 407.

46 European Commission, 'European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework' (Press Release, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2087> accessed 30 June 2023; The White House, 'FACT SHEET: United States and European Commission Announce Trans-Atlantic Data Privacy Framework' (2022) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-trans-atlantic-data-privacy-framework/> accessed 30 June 2023.

47 Although official evidence of this is difficult to find.

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TABLE 11.1 TTC working groups

Working group	Policy topic
1	Technology Standards
2	Climate and Clean Energy
3	Secure Supply Chains
4	Information and Communication Technology and Services (ICTS) Security and Competitiveness
5	Data Governance and Technology Platforms
6	Misuse of Technology Threatening Security and Human Rights
7	Export Controls
8	Investment Screening
9	Promoting Small-and Medium-sized Enterprises (SME) Access to and Use of Digital Tools
10	Global Trade Challenges

SOURCE: EUROPEAN COMMISSION TRADE AND TECHNOLOGY COUNCIL WEBSITE: HTTPS://COMMISSION.EUROPA.EU/STRATEGY-AND-POLICY/PRIORITIES-2019-2024/STRONGER-EUROPE-WORLD/EU-US-TRADE-AND-TECHNOLOGY-COUNCIL_EN

and Use of Digital Technologies and Global Trade Challenges.[48] Notably, seven of the ten working groups address themes that refer to technology either with a security angle or from a competition perspective.[49] What is noticeable is the mission-creep 'evolution' of security between the early meetings, in 2021 into later meetings in 2022 thereafter, as the Ukraine crisis unfolded.

48 See the EU-US Trade and Technology Council Website: <https://futurium.ec.europa.eu/en/EU-US-TTC> accessed 30 June 2023. Elaine Fahey, 'The EU-US Transatlantic Trade and Technology Council: Shifting Multilateralism Through Bilateralism and Institutions?' in Ottavio Quirico and Katarzyna Kwapisz Williams (eds.), *The European Union and the Evolving Architectures of International Economic Agreements* (Springer, forthcoming).

49 Maria Demertzis, 'US-EU relations in the first year of President Biden: a view from Brussels' (*Transatlantic*, December 2021). <https://www.transatlantic.org/wp-content/uploads/2021/12/11-10-2021-Demertzis-US-EU-trade-Challenges-v2.pdf> accessed 30 June 2023.

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The TTC is based upon multiple working groups that align with this formula of flexibility for a cross-policy pollination, i.e., Technology Standards Cooperation, Climate and Clean Tech, Secure Supply Chains, ICT Security and Competitiveness, Data Governance and Technology Platforms, Misuse of Technology Threatening Security & Human Rights, Export Controls Cooperation, Investment Screening Cooperation, Promoting SME Access to and Use of Digital Technologies and Global Trade Challenges all grouped to together but also somewhat distinctively apart.[50] The provenance of the groupings and their selection, much like a lot of the TTC, are difficult to fully discern without significant insider insight.

International agreements and standards have heavily informed the work of the TTC which makes for arguably interesting analysis on the depth of their engagement on global challenges.[51] For instance, the instruments referred to span a vast range: the Guidelines for Recipient country Investment Policies Relating to National Security (OECD 2009), the General Agreement on Trade in Services (GATS), the Global Partnership on AI, the First Movers Coalition, Green Digital coalition, OECD AI Recommendation, WTO Government Procurement Agreement (GPA), Declaration on the Future of the Internet (proposed), UN Universal Declaration of Human Rights (UDHR), UN High Commissioner for HR and UN Special Procedures, UN Human Rights Council and WTO Statement on the Trade and Environment Sustainability Structured Discussions are all widely and on multiple occasions referenced.[52] A very

50 See the EU-US Trade and Technology Council Website: <https://futurium.ec.europa.eu/en/EU-US-TTC> accessed 30 June 2023.

51 EU-US Inaugural Joint Statement, Brussels. 15 June 2021; EU-US TTC Pittsburgh Statement (First Meeting of TTC). 15 September 2021; EU-US TTC Paris Statement (Second Meeting of TTC). 16 May 2022; EU-US TTC Washington Statement (Third Meeting of TTC). 5 December 2022. See also White House, 'US-EU Joint Statement of the Trade and Technology Council' (Briefing, September 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/05/u-s-eu-joint-statement-of-the-trade-and-technology-council/> accessed 30 June 2023.

52 Thanks to Ivanka Karaivanova for assistance on compiling the list that follows: ""Rome Declaration" principles; Outcomes of the World Health Assembly; World Health Organization governance in general; UN 2030 Agenda for Sustainable Development; G20 Common Framework for debt treatment; UNFCCC Paris Agreement; UN Environment Assembly; UN Ocean Conference; UN Intergovernmental Conference on Marine Biodiversity beyond National Jurisdiction; G20/OECD Inclusive Framework on Base erosion and profit shifting (BEPS); World Trade Organization law in general; Galileo – GPS Agreement; Multilateral institutions for democracy, peace, and security in general, including UN Human Rights Council; International humanitarian law; International law, in particular the UN Convention on the Law of the Sea (UNCLOS); UN Security Council Resolution 2254; UN's proposal for an immediate ceasefire in Libya; OHCHR investigations

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rough estimate (with counting complicated by multiple divergent references deployed) suggests that over 50 international agreements, instruments or standards are referenced. Whatever about the actual number, it appears a very significant placement of the multilateral at the heart of this bilateral effort to use global instruments as a law-making agenda, albeit couched in soft law and many complex international actors and organizations. It also demonstrated a willingness to look far and wide for solutions to the many cross-cutting themes of the TTC, where the EU had significant legislative infrastructure especially on Tech, the US far less so.

The first post-meeting consensus was that the TTC was off to a 'promising start', but observers also noted that the bar for success in the first meeting was low.[53] The second meeting already appeared ready for significant policy shifts.

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in Africa; Special Drawing Rights by the IMF for Africa; Joint Comprehensive Plan of Action (JCPOA); 2016 and 2018 Joint Declarations on NATO-EU Cooperation; Coordination in multilateral bodies (in general), including in the WTO; OECD Guidelines with respect to investment screening; General reference to the parties' international obligations and commitments as to trade in dual-use goods; promotion of multilateral approach to export controls; OECD Guidelines for Recipient Country Investment Policies Relating to National Security of 2009; Promotion of the respect for human rights and international humanitarian law; Promotion of multilateral approach to export controls and multilateral rules-based trade; Internationally-agreed standards relating to export controls; General Agreement on Tariffs and Trade (GATT); Multilateral export control regimes; Multilateral and international cooperation; OECD Recommendation on Artificial Intelligence; FTAs and unilateral measures that concern fundamental labour rights; Cooperation in the ILO, WTO, and other appropriate multilateral for a; Declaration of the Future of the Internet; International standards activities for critical and emerging technologies; 2021 Ministerial Declaration of the G7 Digital and Technology Ministers' meeting; Internationally-recognized labor rights; International standardisation organisations; International standards regarding AI systems; Facilitation of bilateral and multilateral cooperation; The International Energy Agency ("IEA"); World Trade Organization Agreement on Technical Barriers to Trade (TBT Agreement)/ WTO law/ standardisation; Universal Declaration of Human Rights; Multilateral mechanisms related to data governance and platform governance; G7 Rapid Response Mechanism; Multilateral engagement, including with and within the United Nations, in particular the Office of the United Nations High Commissioner for Human Rights ("OHCHR") and UN Special Procedures; International human rights law; Multilateral engagement, including at the UN; 49th session of the United Nations Human Rights Council; Work in the framework of other international for a; G7 Rapid Response Mechanism ("RRM"); International engagement on investment security issues; Coordinating in the Organisation for Economic Cooperation and Development ("OECD"), International Labour Organization ("ILO"), United Nations, G7, G20, WTO, and other multilateral organizations; ILO's new global forced labour estimate; due diligence guidance & international guidelines; the operation of the network of National Contact Points in the OECD; Cooperate in international fora".

53 Guillaume Van Der Loo, Thijs Vandenbussche, and Andreas Aktoudianakis, 'The EU-US Trade and Technology Council: Mapping the Challenges and Opportunities for

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By the third meeting over a year from the first meeting, the Ministerial Joint Statement was already trumpeting the success of the outcomes, centered upon developing economies connectivity and AI, amongst many other, although generally unrelated to legal instruments.[54] In fact, this stems possibly from the fact that the external regulatory landscape was understood to be an advantage for the EU in taking the lead – perhaps so much so as to make the rule-making exercise questionable.[55]

It can be said that the challenges (e.g. digitisation or greening) are all global challenges; they cannot per se be resolved by standards alignment alone by like-minded cooperation however noble minded. Whether the working groups outcomes align well more broadly with the WTO agenda also remains to be seen. The TTC ultimately raises questions as to why reform of WTO should not be key focus. The challenges for civil society engaging with the breadth of the issues proposed and, in this fashion, could be arguably higher than usual.[56]

5 Methods and Means to Improve Democratic and Participatory Aspects of the TTC

5.1 *Deepening and Widening Stakeholder Engagement on Global Challenges*

Whether and what the EU has learned from the TTIP precedents is an important question as to the future of global governance and avoiding policy failures. The initial TTC meeting was plagued by allegations of a lack of transparency for its accordance of excessive influence to the US, allegations that beset many contemporary bilateral and multilateral engagements in the field of trade and technology.[57] Civil society responded adversely to its creation and its initial

Transatlantic Cooperation on Trade, Climate, and Digital' (2021) Egmont Paper 113; Jennifer Hillman and Seara Grundhoefer, 'Can the U.S.-EU Trade and Technology Council Succeed?' (*Council on Foreign Affairs*, 29 October 2021) <www.cfr.org/blog/can-us-eu-trade-and-technology-council-succeed> accessed 30 June 2023; Demertzis, 'US-EU relations in the first year of President Biden: a view from Brussels. Transatlantic' (n 49).

54 White House, 'US-EU Joint Statement of the Trade and Technology Council' (n 51).

55 See Bradford (n 28).

56 Daniel Hamilton, 'Getting to Yes: Making the U.S.-EU Trade and Technology Council Effective (Summary Brief)' (*Transatlantic*, 6 March 2022) <https://www.transatlantic.org/wp-content/uploads/2022/03/TTC-summary-brief-final-March-6-2022.pdf> accessed 30 June 2023.

57 Trans Atlantic Consumer Dialogue (TACD), 'Lack of transparency could thwart the strong consumer safeguards that must be the goal of EU-US cooperation dialogues' (*TACD*, 28

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working phases despite its development to avoid the challenges of the EU-US TTIP agreement negotiations, creating upset with civil society as to investment issues, secret courts and a lack of participation.[58] Yet there is much to learn from this era of EU external relations for its deeper engagement and transparency with civil society and stakeholders and its efforts to attempt to bring more into the transatlantic definition of civil society and its unique stakeholders, having prioritised business for so long.[59]

Stakeholder assemblies have been set up to engage with a wide diversity of actors and interest groups in the work of the TTC, moderated by thinktanks. Stakeholders' inputs and suggestions have been included in zoom meetings, supposedly 'creating space for broad exchanges and structured dialogue' and giving stakeholders the opportunity to 'influence the work and priorities of the TTC'. The Stakeholder Assembly in January 2023 aimed to discuss the outcomes of e.g. the third TTC Ministerial Meeting and priorities for 2023 by generating exchanges between a cross-section of stakeholders from government, industry, academia, and civil society on key issues in transatlantic trade and technology policy-making. These assemblies have continued in other specialist areas of TTC work e.g. as to AI policy. The TTC Stakeholder Assembly is part of the stakeholder activities organised by the TTD to increase transparency and stakeholder participation in the TTC workstreams. The purpose of the engagement activities has been in theory to enable an open exchange among stakeholders and to update them on the work progress of the TTC. Stakeholders could ask questions on the TTC to assist them in understanding the current technical work progress, moderated by thinktanks. Stakeholders could also exchange information, concerns, and ideas for future action among each other. Commission officials attended to observe the stakeholder-to-stakeholder exchange and listen to the stakeholders' perspectives in six thematic rooms on zoom. Criticisms can be expressed as to the stakeholder assembly related to its vast array of areas, lack of focus and unduly broad effort to engage with every issue, entailing that any international organisation of engagement however robust nonetheless is doomed to limited effectiveness. Of the 3 TTCs so far at the time of writing, many global challenges policy outcomes were touted by third meeting. Only time will tell as to the effectiveness of its longer term ambitions to formulate solutions to global challenges, not least the sustainability of

September 2021) <https://tacd.org/eu-us-organisations-transparency-ttc-pr/> accessed 30 June 2023.

58 Ibid.

59 Bartl and Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (n 29).

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an executive to executive forum twice a year with high-level policy-making as its ambition.

5.2 *Changing the Marginalisation of the EP from EU-US Relations*

One entity not officially to be found within the TTC is the EP. The same can possibly also be said of the US Congress but this argument is not explored here on account of space and also highly variable infrastructures existing in the US as to trade, technology and international relations. The EP is formally not part in any way of the TTC. The TTC has held at the time of writing three 'high-level' political meetings so far, described as executive to executive 'ministerial' meetings steering cooperation within the TTC and guiding its 10 working groups. Yet despites its entirely legal operation outside of the channels of Article 218 TFEU, the question remains why an entity dealing with global challenges and global law-making would be so eager to remain exclusively executive to executive and to continue to exclude parliaments, at least officially? From an EU law perspective, this marginalisation appears complex and indeed easily remedied.

Since 1972 the EP has been regularly participating in a Transatlantic Legislators Dialogue with the US. The EP litigated notoriously the EU-US Passenger Name Records Agreement (PNR) and swiftly rejected the EU-US Transatlantic Terror and Financing Programme (TFTP) giving it much legal prominence in EU-US relations.[60] Yet while individual parliamentarians such as Sophie in 't veld, ex chair of the EP Civil Liberties Committee, have been litigating civil liberties issues in transatlantic security agreements, they were notably not supported by the EP as a whole. The EP did not issue recommendations on the opening of EU-US trade negotiations in 2019 and the EP notably even rejected a draft resolution recommending the opening of Trump-era EU-US trade talks (on both industrial goods and conformity assessment relating to concerns as to the Trump administration, Eastern European country visas for the US). In 2020, the Parliament's INTA Committee eventually approved the mini-tariff agreement (lobsters) with the US with no amendments but it stood out as a peculiar and hostile engagement in a complex era of EU-US relations.[61]

60 Elaine Fahey, 'Of "One Shotters" and "Repeat Hitters": A Retrospective on the Role of the European Parliament in the EU-US PNR Litigation' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence, Law in Context* (Cambridge University Press 2017).

61 In 2019, the Parliament adopted a resolution on the allocation of a share of the EU quota for hormone-free beef to the US. In 2021, INTA adopted an opinion on EU-US trade relations, as part of a resolution on the future of EU-US relations adopted by Parliament on 6 October 2021; See European Parliament Legislative Observatory, 'Motion for a resolution on the future of EU-US relations' 2021/2038(INI); European Parliament Legislative

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The place of the Washington DC Liaison Office as a conduit for law-makers and Big Tech alike appears increasingly salient as it seeks to raise its profile, its 'go-between' activities and technical functions. Again, the EP is still not part of this TTC forum as an executive to executive forum-first, which appears unaligned with the institutional evolution of the EP. This would mark a highly significant shift towards the form of 'citizen sovereignty' outlined by Steinbach in this volume in particular, as a shift in how global challenges are formulated and engaged with.[62]

5.3 *Reframing Participation of Civil Society, Industry* and *the EP*

The TTC has a range of engagement strategies for stakeholders. The 'mission creep' of the TTC appears to generate ever more problematic stakeholder engagement as a result. A TTC Stakeholder Assembly was organised by the Trade and Technology Dialogue (TTD) which adopts the EU international relations lexicon of dialogues with stakeholders, increasingly found in EU trade negotiations and resulting agreements as it leads important innovations through its deeper trade agenda. Vast stakeholder series of events are part of the TTC. One may say that it is a confusing series of alphabetised meetings called the TTD, meant to support the TTC. The sheer range of issues and topics considered by the TTD by zoom-using breakout rooms-is particularly remarkable and easily accused of being ill focused given the massive number of topics covered by the TTC.[63] The lack of formal accountability here appears striking so far with stakeholder sessions run by thinktanks for the EU. High level US

Observatory, 'Opening of negotiations of an agreement with the USA on conformity assessment' COM(2019)0015; European Parliament Legislative Observatory, 'Opening of negotiations of an agreement with the USA on the elimination of tariffs for industrial goods' COM(2019)0016; European Parliament, 'Resolution on the EU/USA Agreement on the allocation of a share in the tariff rate quota for imports of high-quality beef' (2019) 10681/2019 – C9-0107/2019 – 2019/0142M(NLE).

62 See further Armin Steinbach in this volume.

63 TTD outlined in writing its Stakeholder Participation Policy for 31 January 2023: 'The purpose of the engagement activities is to enable an open exchange among stakeholders and to update them on the work progress of the TTC. During the first part of this event, stakeholders will be able to ask questions on the TTC to assist them in understanding the current technical work progress. During the second part of the event, stakeholders will be able to exchange information, concerns, and ideas for future action among each other in dialogue. Please note European Commission officials will be present to observe the stakeholder-to-stakeholder exchange and listen to the stakeholders' perspectives in the six thematic rooms. This Stakeholder Assembly is part of the stakeholder activities organised by the TTD to increase transparency and stakeholder participation in the TTC workstreams.'

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administration, professional lobbyists and/or thinktanks and EU institutions – but not the EP – entail a clear dominance of non-EU-institutional 'thinking' and limited concern for fundamental rights or the EU public interest-and a very particular view of the development of policy on global challenges.[64] The EP has received briefings on the TTC from the Commission, although this information is very difficult to discern publicly. The EP INTA Trade committee has received outsized prominence in EU-US relations matters on account of the significance of digital trade. However, democratic scrutiny has been repeatedly mentioned by the EP as to the TTC-albeit via EPRS briefings rather than via a resolution; members of the EP have described the work of the TTC as being 'modest' to date-which could readily change.[65] Future TTC meetings on global challenges could make these models for engagement worthy of more reflection, analysis and development.

5.4 *The EU 'in' the US: Institutions and Diplomacy Ratcheting Upwards*

The exclusion of the EP formally is very notable given the EU's ratcheting up of institutions and diplomacy in the US post-DSA and DMA. An array of factors are all combining to change traditional attitudes in the Congress on the need to deepen EU-US cooperation. It was only in 2010 that one side established a dedicated structure with the explicit task of channeling and deepening ties between the EU and US legislatures-a European Parliament Liaison Office (EPLO) – still with no US equivalent.[66] The EPLO sits alongside physically the European External Action Service (EEAS) in Washington DC in the same building but notably on the floor below it. EPLO Washington DC has added an important 'hard' dimension to institutionalising the EU-US inter-parliamentary relationship.[67] Aside from the EEAS office in Washington DC and the EPLO in Washington DC alongside it, the EU recently opened its new EEAS office in San Francisco, California, as a self-professed global centre for digital technology and innovation.[68] Its mission was said

64 European Parliament, 'European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA)' (P7_TA(2010)0432). First Reading, (EP-PE_TC1-COD(2005)0127).

65 'EU-US Trade and Technology Council: Modest progress in a challenging context' (*European Parliament*, 10 February 2023). <https://epthinktank.eu/2023/02/10/eu-us-trade-and-technology-council-modest-progress-in-a-challenging-context/> accessed 30 June 2023.

66 Dunne, 'Connecting the US Congress and the European Parliament: The work and role of the EP Liaison Office in Washington DC' (n 22).

67 Ibid.

68 The opening of the office was said to be as a result of the 2021 EU-US Summit shared commitment to strengthen transatlantic technological cooperation and is a core part

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to be to promote EU standards and technologies, digital policies and regulations and governance models, and to strengthen cooperation with US stakeholders, including by advancing the work of the EU-US Trade and Technology Council.[69] The office was said to work under the authority of the EU Delegation in Washington, DC, in close coordination with Headquarters in Brussels and in partnership with EU Member States consulates in the San Francisco Bay Area-but again without any mention of or reference to the EP.[70] This model of developing further diplomacy 'islands' appears to contradict many of the tenets of the direction of EU-US engagement to widen and deepen its subjects, objects and actors.

6 Conclusions

Transatlantic relations is a seemingly endless tale of decades of complex bilateralism and multilateralism failures. It has been marked by a dominance of soft law and hybrid governance, not necessarily always a clear or positive impact upon multilateralism per se. What is global law-making policy in a mired multilateral world may constitute for many blue-sky reflection-but in reality the TTC marks the most significant shift in global governance thinking on trade and technology in the 21st century to date, even where the definition of public goods is under strain and where increasingly data flows defy characterisation. A transatlantic alignment of lexicon, policy and ambitions through bilateral cooperation should mark the future of global governance shifts. On

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of the Conclusions on Digital Diplomacy. See Council of the European Union, 'EU digital diplomacy: Council agrees a more concerted European approach to the challenges posed by new digital technologies' (18 July 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/07/18/eu-digital-diplomacy-council-agrees-a-more-concerted-european-approach-to-the-challenges-posed-by-new-digital-technologies/#:~:text=The%20Council%20today%20approved%20conclusions,the%20geopolitical%20balance%20of%20power> accessed 30 June 2023.

69 European External Action Service, 'US/Digital: EU opens new Office in San Francisco to reinforce its Digital Diplomacy' (September 2022) <https://www.eeas.europa.eu/eeas/usdigital-eu-opens-new-office-san-francisco-reinforce-its-digital-diplomacy_en> accessed 30 June 2023.

70 It was to be headed by Gerard de Graaf, a senior Commission official who has worked extensively on digital policies, most recently on the EU's landmark new platform laws, the Digital Services Act and Digital Markets Act. See European Commission, 'Digital Services Package: Commission welcomes the adoption by the European Parliament of the EU's new rulebook for digital services' (Press Release, 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4313> accessed 30 June 2023.

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one level, the TTC represents an important and positive institutionalisation of the outcomes of the failed TTIP negotiations and many lessons learned from many transatlantic experiments in global governance. Yet it is only a step in the right direction and considerably more can be done to evolve the precedent of the TTIP era. Developing global challenges through institutions and deeper and wider engagement marks an important step in constitutionalisation – but with much that can be done to enhance it. The capacity for this convergence to evolve further and to align bilaterally, particularly through institutions, could become pivotal going forward as to global law-making. This chapter has outlined a range of policy formulations and evolutions that can readily be implemented.

The TTC it is notably not the only recent Council proposed by the EU – as noted, there is the new EU-India Trade Council. These new Councils represent a new modus operandi for the EU to engage with complex large third country partners through executive to executive engagement, meeting agency counterparts regularly in close groups in an era of EU trade policy deepening its stakeholder and civil society ambit overall. The TTC has a vast range of policy-making activities, traversing many areas of EU law. Their selection and future is difficult to understand in EU trade and data policy seemingly pivoting to executive-led soft law in some arenas and then towards more robust global courts such as a Transatlantic Data Review Court in others. Still, however, there is an effort to learn from the TTIP precedent-which must and can be taken further. Above all, they are characterised by more outreach and a deeper understanding of the need for multilevel engagement-and to think 'bigger' about the nature of democratic engagement in global challenge policy development. Yet, such intergovernmental and non-transparent collaboration of executives and businesses risks also being 'captured' by rent-seeking interest groups influencing negotiations on new product and production standards and subsidies in their favour to the detriment of general consumer welfare and total citizen welfare. There is clearly some constitutional danger or risk of regulatory capture of the TTC.[71] So far, the TTC may reflect more the business-driven, neo-liberal US tradition of economic regulation than Europe's multi-level economic constitutional approaches to regulating 'market failures' (like information asymmetries and abuses in the Internet and ecommerce) and related 'governance failures' (like insufficient protection of fundamental rights in data regulations).[72] However, European first-mover advantage in the field

71 See Ernst-Ulrich Petersmann in this volume.

72 Ibid.

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of tech and data privacy and its important constitutional evolutions in stakeholder engagement may indicate that the outcomes of the TTC are complex to evaluate at this juncture.

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