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Making transnational markets: the institutional politics behind the TTIP

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Making transnational markets: the institutional politics behind the TTIP

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The Transatlantic Trade and Investment Partnership (TTIP) may not bear fruit in its current incarnation, but it certainly teaches us crucial lessons regarding the institutional dynamics of market integration beyond the state. I argue that the TTIP's so-called 'regulatory cooperation', in principle a mere mechanism for 'discussion' and 'exchange' between regulators, would have had a profound impact on the regulatory culture across the Atlantic. I make this argument in three interrelated steps. First, building on insights from constitutional law and political science, I outline an analytical framework for the study of rule-making institutions beyond the state. Second, I analyse the TTIP through the lens of this framework, illustrating the mechanisms through which its model for regulatory cooperation could reform the regulatory culture in the EU. Third, I argue that this change in the EU regulatory culture would have been neither an accident, nor a result of a US-led hegemonic project. Instead, the TTIP's regulatory cooperation is a part of the EU's internal political struggle, intended ultimately to re-balance not only powers between the legislative and the executive in the EU, but also within the EU's executive branch itself.

* Assistant Professor, University of Amsterdam. Email: m.bartl@uva.nl. Many thanks to Daniela Caruso, Candida Leone, Fernanda Nicola and a number of friends and colleagues who have commented on the earlier versions of this paper. I would also like to warmly thank the two anonymous peer reviewers for their insightful comments. The remaining errors are mine.

1. Introduction

The Transatlantic Trade and Investment Partnership (TTIP), one of the biggest trade projects of recent times, is due to stall thanks to the changes in US administration. Whatever the ultimate destiny of the TTIP, we may safely assume that an institutional momentum of these proportions will not wane easily. It remains therefore crucial to continue discussing this path-breaking agreement.

More generally, the TTIP teaches us a lesson about the direction and dynamics of economic integration beyond the state, about actors with leading roles in this global game, and the legitimacy challenges posed by the form of cooperation. On a practical level, the TTIP will remain an important repository of institutional ideas that is likely to set the standard for future trade cooperation across, and beyond, the Atlantic.

What then sets the TTIP apart, and why was it so controversial? In short, the main challenge has been the TTIP's institutional dimension. In Europe, much criticism has been mobilized against the TTIP's Investor-to-State Dispute Settlement (ISDS) scheme.¹ Over time, however, another institutional mechanism has started to compete for attention. The so-called TTIP's 'regulatory cooperation' has increasingly been noticed beyond the circle of EU institutions – by industry, civil society and academics.²

The TTIP's regulatory cooperation was conceived as a set of institutional channels for the exchange of information, methodologies and knowledge between regulators on both sides of the Atlantic. This soft institutional design was driven by a belief that mutual engagement would allow regulators to learn from each other and align the ways in which they 'think'. Such convergence of views would, in turn, encourage consistency in regulation, and eventually achieve the approximation of regulatory frameworks, so to speak, 'bottom up'.

1 For a critical view of the TTIP ISDS chapter see for instance Harm Schepel et al, 'Public Consultation on Investor-State Arbitration in TTIP' (2015) https://www.kent.ac.uk/law/isds_treaty_consultation.html. For a critique of (a certain hypocrisy) of ISDS critiques in the context of the TTIP, see Joseph Weiler, 'European Hypocrisy: TTIP and ISDS' *EJIL Talk* (21 January 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds>.

2 Some examples: Civil Society: Corporate Europe Observatory (CEO), <https://corporateeurope.org/international-trade/2015/04/regulatory-cooperation-ttip-united-deregulation>; <https://corporateeurope.org/international-trade/2016/03/ttip-regulatory-cooperation-threat-democracy>; <https://corporateeurope.org/international-trade/2016/05/ttip-leaks-highlight-dangers-regulatory-cooperation>. Many positions of the business vis-à-vis regulatory cooperation have been obtained from the European Commission by the NGOs, such as CEO, within the 'Access to Documents' procedure. See for instance https://www.asktheeu.org/en/request/meeting_between_dg_envi_and_cefi?unfold=1-incoming-6452.

The proponents of the TTIP saw regulatory cooperation as its most promising element. A study requested by the European Commission predicted that a big portion of the TTIP's economic benefits would accrue from regulatory cooperation.³ A number of commentators also welcomed regulatory cooperation as an exciting new space for experimentation and learning.⁴ Opponents, in contrast, portrayed regulatory cooperation as a space that would allow industry to capture the regulatory process, sheltered in secretive discussions of technical committees and inaccessible to ordinary citizens.⁵ Finally, many lawyers underlined the continuity with the existing forms of cooperation beyond the state, remaining often sceptical about the bite of 'soft' forms of cooperation envisaged in regulatory cooperation.⁶

The aim of this article is to show that the TTIP's regulatory cooperation is far more potent than a traditional legal analysis would

Academics: Joana Mendes, 'Participation in a New Regulatory Paradigm: Collaboration and Constraint in TTIP's Regulatory Cooperation' (Orbilu 2016) <http://orbilu.uni.lu/handle/10993/29428>; Fernanda Nicola, 'The Politicization of Legal Expertise in the TTIP Negotiation' (2015) 78 LCP 175; Jonathan B Wiener and Alberto Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory' (2015) 78 LCP 103; Joana Mendes, 'Regulatory Cooperation under TTIP: Rulemaking and the Ambiguity of Participation' in Luca Pantaleo et al (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?* (Centre for the Law of EU External Relations 2016).

3 See Key Findings, Center for Economic Policy and Research: *Reducing Trans-Atlantic Barriers to Trade and Investment* (London 2013) http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf. This study has been commissioned by the European Commission and it has served to ground numerous subsequent claims as to the economic benefits of the TTIP.

4 Wiener and Alemanno (n 2); Jonathan Zeitlin, 'EU Experimentalist Governance in Times of Crisis' (2016) 39(5) W Eur Pol 1073. For a more general account of experimentalism in global governance see Gráinne De Búrca, Robert O Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 3 B J Pol S 477. Equally, Global Administrative Law contribution to the TTIP debate could be added to this category. See for instance Richard Stewart, 'State Regulatory Capacity and Administrative Law and Governance under Globalization' (IILJ Working Paper 2016/1, 27 March 2016).

5 These concerns were advanced most prominently by NGOs such as Corporate European Observatory, or broader platforms such as alliance STOP TTIP. Of course, many scholars share some of those concerns, articulated often as problems of transparency, democratic legitimacy, participation etc. See for instance Ferdi De Ville and Gabriel Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership* (Wiley 2015); Nicola (n 2); Marija Bartl and Elaine Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014); Heinrich Böll Stiftung and Christiane Gerstetter et al, 'Regulatory Cooperation under TTIP – a Risk for Democracy and National Regulation?' (Ecologic Institute 2014) https://www.boell.de/sites/default/files/ttip_study_regulatory_cooperation_under_ttip_1.pdf.

6 See for instance Gregory Shaffer, 'Alternatives for Regulatory Governance Under TTIP: Building from the Past' (2016) 22(3) Colum J Eur L, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2781188; Tamara Takács, 'Transatlantic Regulatory Cooperation in Trade: Objectives, Challenges and Instruments for Economic Governance'; James

allow us to appreciate. I will argue that the TTIP's regulatory cooperation has the capacity to transform EU regulatory culture. Yet this shift would hardly be an outcome of learning and experimentation in neutral TTIP institutions. The TTIP's regulatory cooperation is designed in a way that would facilitate the shift of the EU *toward the US regulatory model*. What is more, such an outcome would not be a historical accident, or the result of a US-led hegemonic project: the TTIP regulatory cooperation is a political project driven from inside the European Commission, aimed to enforce political agendas currently put forth and implemented in Europe.

I will make this argument in three interrelated steps. In the first part of the article, I outline an analytical framework, which can be usefully employed for the analysis of the institutional design and dynamics in economic cooperation beyond the state. Beyond legal analysis, this analytical framework will draw on political science (new institutionalism) and science and technology studies, in order to add new angles of inquiry necessary to account for the functional and transnational character of economic integration via the TTIP.

In the second part of this article, I turn to the analysis of the TTIP's institutional design. I will argue that the TTIP's regulatory cooperation, aiming at enhancing trade and investment, governed by trade officials and 'regulatory affairs officials',⁷ and finally reliant on a set of instruments such as cost-benefit analysis, sets the ground for the shift of the EU toward the US-style regulatory practices.

In the third part of the article I reach beyond the TTIP's institutional design in order to add an additional political reason as to why we may expect the TTIP institutions to facilitate the shift toward the US-like regulatory style. Neither a historical accident, nor an outcome of a US hegemonic project (as many opponents would have it), the TTIP's regulatory cooperation is a political project of certain sections of the European Commission, stirred to re-balance the powers among the EU institutions, and within the European Commission itself, reinforcing a certain political course in EU domestic affairs.

Mathis, 'Addressing Transatlantic Regulatory Barriers: Can the US and the EU Create an Effective Equivalency Instrument?' in E Fahey and D Curtin, *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014).

⁷ By regulatory affairs officials I mean those members of the governments which are responsible for what is called by the European Commission 'regulatory analytics'. This includes the administration of impact assessments and regulation review. In the US, these are the representatives of the Office of Regulatory Affairs (OIRA) and in Europe, the members of the Secretariat General of the European Commission. The cooperation among those officials has already been taking place for years. See for instance Nicola (n 2).

2. A framework for transnational institutional analysis

It is perhaps commonplace to state that institutions are powerful. They mould the way in which we see and understand the world. Social institutions, such as family or culture, co-determine the way we attribute value and meaning to our lives and the lives of others. The education we receive refines and re-focuses our thinking. It gives us tools to analyse aspects of the world around us, to attribute value, or infer causal relations. It teaches us to see many things that we have not perceived before, but it also blinds us to many others. As we grow up we find ourselves involved in further ‘micro’ institutions, such as workplaces, which again, thanks to their internal structures and hierarchies, shape what we care about and how we should act on it. Political institutions play a similar role: depending on their level of aggregation, they shape the way in which we see and talk about the world at large, and understand the particular tasks that we are called to accomplish.

Lawyers have been sensitive not only to the power of law in shaping the institutions we inhabit, but also to the influence these institutions have on us – through norms, rules, competences, powers, languages, disciplines. In what follows, I articulate a form of institutional analysis, which will help us analyse how the legal-institutional design of various ‘fora’ for cooperation beyond the state – transnational institutions⁸ – influence the dynamics of engagement in these fora, with direct consequences for how we may expect these institutions to govern.

The proposed transnational institutional analysis builds on a traditional set of questions a constitutional or administrative lawyer would ask regarding the institutional design and functioning of institutions, enriched by insights from other social sciences to account for a set of problems specifically encountered in institutional cooperation beyond the nation state. The framework I propose draws on insights from international relations, as related to the functionalist character of integration beyond the state.⁹ Further, the analysis will incorporate insights from political science and, more specifically, new institutionalism, in order to

8 I use the term ‘transnational’ in order to suggest the broad range of institutions that can be analysed in this way – from classical international institutions to institutions that include both private and public actors.

9 David Mitrany, *The Functional Theory of Politics* ([Published on behalf of] LSE [by] M Robertson 1975); Jean Monnet, *Memoirs*, translated by Richard Mayne (Garden City, NY: Doubleday 1978); see also Peter L Lindseth, ‘Transatlantic Functionalism: New Deal Models and European Integration’, in Symposium, Historical Analysis of Law, in *Critical Analysis of Law* vol 2 (2015) 83.

understand how various institutional incentives,¹⁰ as well as institutional culture,¹¹ operate on actors who partake in these institutions. Finally, and perhaps most importantly, I rely on insights from science and technology studies to account for the impact of expertise and knowledge production practices.¹² This is particularly important, because much of the legitimacy of international institutions comes from their claim to govern in common interest through (objective) knowledge.

I suggest that any such analysis of (emergent) institutions beyond the state needs to integrate three levels of analysis: the level of objectives (what is the purpose of the institution? why cooperate?), the level of institutional design (what kinds of fora are envisioned? who should take part?) and, finally, the level of 'instruments' or 'techniques' (what tools does an emergent institution have at its disposal in order to act on its purposes?). I address these three levels of analysis more specifically below.

2.1 Objectives

The first step of transnational institutional analysis is to consider the possible influence of objectives that the emergent institutions are expected to pursue. While unavoidably indeterminate, such objectives have certain constraining force as to what institutions may do: not everything goes.¹³ Attributing particular objectives to an institution has at least two major consequences. First, the objectives provide *normative*

10 Here I rely foremost on the tradition of 'rational institutionalism', which focuses on the strategic behaviour of actors in institutionalized contexts. Some very enlightened work in this tradition has already been done in the context of the European integration. See for instance Neil Fligstein and Alec Stone Sweet, 'Constructing Politics and Markets: An Institutional Account of European Integration' (2002) 107(5) *Am J Soc* 1206.

11 Insofar as the framework operates with concepts such as language and institutional culture, the main inspiration comes from the framework of 'organizational institutionalism'. See for instance Walter W Powell and Paul J DiMaggio, *The New Institutionalism in Organizational Analysis* (U Chicago P 2012); John L Campbell and Ove Kaj Pedersen, *The Rise of Neoliberalism and Institutional Analysis* (Princeton UP 2001).

12 In this contribution I rely foremost on the American branch of Science and Technology Studies (STS), based at Harvard around Sheila Jasanoff. This school of thought (unlike its European counterpart) engages directly with legal and constitutional issues of governance through knowledge, science and technology. Some of the most relevant contributions for legal public are thought Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004); David Winickoff et al, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law' (2005) 30 *Yale J Intl L*; Sheila Jasanoff, 'In a Constitutional Moment: Science and Social Order at the Millennium', in *Social Studies of Science and Technology: Looking Back, Ahead* (Springer 2003) 155; Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Harvard UP 2009).

13 In the EU, this discussion has mainly concentrated either on the question of its 'economic constitution' of 'economic asymmetry'. While many contributions have been

and cognitive orientation, or simply *language*, in which an institution approaches the world. Second, and of no lesser importance, such purposes make 'obvious' a need for a particular kind of *expertise*.¹⁴

For instance, attributing to an institution the purpose of 'liberalizing trade' or of creating a 'common market' will impact:

1. *Concerns* – that is to say, what the institution and its members are striving for. At a cognitive level, it orients the institution toward an object that it should study and know (trade or market or environment), while at the normative level it aims to influence how to act on this object of study.
2. *Language* – the imputed ends impact the vocabulary which the institution will use. Such language is usually drawn from most 'useful' kinds of knowledge as linked to the objectives of the institution. In our case, for instance, where the objective is to 'liberalize trade and investment', a particular economic and legal vocabulary will be employed, i.e. concepts such as 'market', 'barriers to trade', 'tariffs', 'competitiveness', 'protectionism', 'red tape', 'regulatory burdens' etc.
3. *Expertise* – the imputed ends also influence the kind of expertise that will be sought. Thus, in order to interpret what 'trade' and 'market' require, actors seek expertise predominantly among trade lawyers or economists, and less so among, for instance, anthropologists. The objectives make obvious who has the most 'generalist' competence to speak authoritatively on what the institution's

made in this line of scholarship, here are just a few of the most relevant ones for my account: JHH Weiler, 'The Transformation of Europe' (1991) 100(8) Yale LJ 2403; FW Scharpf, 'The European Social Model' (2002) 40(4) JCMS 645; Fritz W Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8(2) Socioecon Rev 211; MP Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?', in *European Constitutionalism – Beyond the State* (CUP 2003); Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21(1) Eur LJ; Daniel Augenstein, *Integration through Law Revisited: The Making of the European Polity* (Ashgate 2012); Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012).

14 The problem of bureaucratic expertise has been traditionally the object of administrative rather than constitutional law. One need not remind of major contributions to this literature by Max Weber or John M Gaus. More recent legal literature on epistemic challenges in global governance, which is of direct relevance for the account proposed in this article, has proliferated mainly in international law scholarship. An uncomprehensive list of this literature would include Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011); David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton UP 2016); Martti Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', Presentation at Harvard Law School (5 March 2005); Andrew TF Lang, *Legal Regimes and Professional Knowledge: The Internal Politics of Regime Definition* (CUP 2012); Robert Howse, 'Democracy, Science,

purposes actually mean, and what will be done. Of course, at times other kinds of expertise will be necessary. For instance, in order to decide whether a GMO ban is an unjustified obstacle to trade, life-scientists or environmental experts will be summoned. Yet the question as to how much authority their statements will have, and how much the institution will be able to ‘learn’ from these experts, depends ultimately on its composition and rules of procedure, broadly understood.

2.2 The institutional design

The second level of institutional analysis concerns the institutional design. How is the cooperation to take place practically? At this level of analysis, we are interested in more static issues of institutional design, including established questions a constitutional lawyer would ask: who is sitting in emergent bodies, how many members will they have, what competences do they possess, what is their relation to other institutions, on various levels of governance, how representative (and representative of what) the institutions are, which actors can gain access, and on what grounds etc.

a) **The relation between *objectives* and *expertise* in transnational institutions.**

Beyond these conventional – albeit crucial – questions, I would like to suggest that the analyst of transnational institutions needs to reach beyond law in order to identify other possible elements that are of particular importance for the institutional design of such institutions. I have argued elsewhere¹⁵ that one such element is to be found in a specific pattern of international institution-building – along functionalist lines – that has been predominant throughout the twentieth century.¹⁶

The design of many international institutions has followed a similar pattern: a broad objective (such as the liberalization of

and Free Trade: Risk Regulation on Trial at the World Trade Organization’ (2000) 98(7) Mich L Rev 2329; Robert Howse, ‘From Politics to Technocracy and Back Again: the Fate of the Multilateral Trading Regime’ (2002) 96(1) AJIL 94; Winickoff et al (n 12); M Bartl, ‘Regulatory Convergence through the Back Door: TTIP’s Regulatory Cooperation and the Future of Precaution in Europe’, Ger Law J, forthcoming 2017.

15 Marija Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ (2015) 21(5) Eur LJ.

16 Mitrany (n 9); Monnet (n 9); see also Peter L Lindseth, ‘Transatlantic Functionalism: New Deal Models and European Integration’ (2015) 2(1) CALJ 83.

trade, or promotion of human rights, or economic development etc.) and a set of usually expert institutions, which were supposed to implement this goal, with a stronger or weaker oversight by its state parties. In this context, expertise has played an important legitimizing role in integration beyond the state: the putative lack of (democratic) legitimacy was to be cured by objective, apolitical, expert decision-making.¹⁷

What then are the compound implications of purposive *and* expert character of transnational institutions? It is commonplace to say that certain kinds of knowledge and expertise illuminate certain kinds of issues, questions, perspectives or concerns, while at the same time conceal others.¹⁸ Constitutional law theory in a liberal democratic state need not be particularly concerned with such 'blind spots' of expertise because of the state's overall institutional design. In principle a liberal democratic state is not tied to specific (sets of) objectives or purposes but rather entertains a broad range of undefined goals and ends.¹⁹ Even if these goals are articulated through specialized bureaucracies (defence, finance, environment, education etc.), the hierarchy between the 'framings' of the world that underpin these sections of bureaucracy is not pre-determined. Rather, the relative weight attributed to any such goal, with the knowledge that underpins it, is, at least very broadly, left for the political process to establish, and ultimately kept in check through the periodic alternation of governments.²⁰

Beyond the state, however, the institutional framework changes profoundly. The 'functionalist' forms of integration not only sever bureaucratic expertise from more overt forms of democratic control, but by constituting them around purposes, expertise's blind spots

17 Bartl (n 15).

18 There are many whom we would have to thank for this insight. Perhaps the person to mention here is Michel Foucault, whose contribution has done much to make this claim common-sense knowledge today. Among many contributions, two deserve to be singled out here. Michel Foucault, *Security, Territory, Population* (Springer 2007) and Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978–1979* (Springer 2010).

19 In the category of liberal democratic states I include also federal states, such as Germany or the US. While these have often objectives and competences divided between federal and state levels, which may liken them to functionalist entities beyond the state, they are qualitatively different. This is the case for two main reasons: the lesser dependence on expertise on the input side, due to their thicker political legitimacy, and the broader space for political action on the output side, thanks to their greater capacity for redistribution and solidarity (spending powers). Similarly also Peter L Lindseth, 'The Perils of "As If" European Constitutionalism' (2016) 22(5) Eur LJ 696.

20 Along similar lines also G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2013) 21(1) Eur LJ 2.

may turn into outright policy biases. Christian Joerges, for instance, has persuasively argued that the combination of internal market competence and a claim to expertise has allowed the European Commission to attract and marketize a number of issues, which stood ‘diagonally’ to its purposive legal basis.²¹ And political scientist Nicolas Jabko has shown how the European Commission has strategically used ‘marketization’ to expand its powers.²² The transnational institutional analysis, then, should identify any possibilities of such skewed incentives if it is to contribute to limiting governance biases.

b) The relation between *objectives* and *standing* in transnational institutions.

Access to institutions, in principle (in books) and even more importantly in practice, has been found to have great significance for the development of law and jurisprudence.²³ Equally, political science scholarship has shown that ‘standing’ or ‘access’ has been a major driver in political integration. In a prominent analysis of the European Court of Justice, Fligstein and Stone Sweet have shown the crucial role the ‘stakeholders’, primarily businesses, have played in the European integration.²⁴ Others have analysed the access of actors to the European Commission²⁵ and its agencies,²⁶ showing that the sharing of concerns and language has a profound impact on who can influence decision-making in the EU.²⁷

21 The concept of ‘diagonal conflicts’ describes a situation where the EU takes up an issue because of its internal market/economic dimension, even if we would not have ‘normally’ conceived of such an issue as an economic one (such as public education, health, or a right to strike). See C Joerges, ‘Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline’ (2004) 14(2) *Duke J Comp & Intl L* 149.

22 Nicolas Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985–2005* (Cornell UP 2006).

23 Access to justice is one of the internationally recognized human rights; questions of legal standing have accompanied the fight of various peoples, minorities and suppressed communities in order to gain societal recognition.

24 Fligstein and Stone Sweet (n 10).

25 Beate Kohler-Koch and Christine Quittkat, *De-Mystification of Participatory Democracy: EU-Governance and Civil Society* (OUP 2013); Beate Kohler-Koch, ‘How to Put Matters Right? Assessing the Role of Civil Society in EU Accountability’ (2010) 33(5) *W Eur Pol* 1117.

26 Marjolein BA van Asselt, Ellen Vos and Bram Rooijackers, *Science, Knowledge and Uncertainty in EU Risk Regulation* (UCL Press/Cavendish 2009); Maria Weimer, ‘Risk Regulation and Deliberation in EU Administrative Governance – GMO Regulation and Its Reform’ (2015) 21(5) *Eur LJ* 622; Marjolein BA van Asselt and Ellen Vos, ‘The Precautionary Principle and the Uncertainty Paradox’ (2006) 9(4) *J Risk Research* 313; S Borrás, ‘Legitimate Governance of Risk at the EU Level? The Case of Genetically Modified Organisms’ (2006) 73(1) *Technol Forecast and Soc Change* 61.

27 Benjamin Farrand, ‘Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement’ (2015) 35(3) *OJLS* 487.

The importance of standing, and of access to institutions, is quite obvious to (constitutional) lawyers. Giving equal voice to all citizens is both the normative and the epistemic foundation of the representativeness of political institutions. If, in contrast, certain groups of actors enjoy privileged access, not only is the normative commitment to political equality challenged, but also the epistemological basis of policies is compromised, insofar as a limited group dictates *what* issues/agenda should be discussed, and *how* they should be framed. The identification of asymmetries in standing and access is a core element of transnational institutional analysis.

c) The relation between *objectives* and (political) *geography* in transnational institutions.

Political economists, social theorists and political geographers have analysed, through their own theoretical and methodological lenses, the role of 'space' in integration beyond the state. Some have noted that such integration has created and re-created new and old 'centres and peripheries'. In a persuasive analysis, Damjan Kukovec shows the role played by European law in re-enforcing such dynamics in the EU.²⁸ Saskia Sassen, by contrast, shows that the allegedly virtual global market is in fact re-embedded in a few cities around the world, allowing those present there to dictate the terms of global economic integration.²⁹ Equally, few would doubt that the decision-making of the European Central Bank would be different if the ECB were located in Athens instead of Frankfurt.³⁰

The relation of political geography and political accountability should become one of the centres of transnational institutional analysis. In the following analysis of the TTIP, I do not touch on this issue directly; however, a number of interesting analyses of the role of space for TTIP already exist. Several commentators, for instance, believe that the benefits of integration will not accrue to all in the same way.³¹

28 Damjan Kukovec, 'A Critique of the Rhetoric of Common Interest in the EU Legal Discourse' SSRN (2012); Damjan Kukovec, 'Law and the Periphery' (2015) 21(3) Eur LJ 406.

29 Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton UP 2001); Saskia Sassen, 'The State and Globalization' (2002) 85 CSIR 91.

30 Marija Bartl, 'Contesting Austerity: On the Limits of EU Knowledge Governance' (2017) 44(1) J Law Soc 150.

31 For an excellent analysis of the TTIP induced centre-periphery dynamics by economists, see Werner Raza et al, 'Modelling the Impacts of Trade on Employment and Development: A Structuralist CGE-Model for the Analysis of TTIP and Other Trade Agreements' (Working Paper, Austrian Foundation for Development Research (ÖFSE) 2016) <https://www.econstor.eu/handle/10419/144538>. For an analysis by two political scientists, see De Ville and Siles-Brügge (n 5). In the same direction also Joseph Weiler, *European Hypocrisy: TTIP and ISDS* (21 January 2015) <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds>.

2.3 Instruments

Finally, the third element that should be included in any systematic analysis of (transnational) institutions is a focus on ‘instruments’, or techniques of government, which institutions use in order to act on their objectives. From census to statistics and cost-benefit analysis, societies have developed numerous modes of visibility and calculability that allow these institutions to see, and govern, their subjects.³²

While many of such instruments have spread from powerful states to the broader world (‘norm exporters’),³³ they have usually been re-shaped by the receiving political institutions so as to reflect their goals and normative commitments.³⁴ Thus, for instance, ‘participation’, ‘stakeholders’, ‘transparency’,³⁵ ‘scientific evidence’³⁶ or ‘cost-benefit analysis’³⁷ mean very different things in different political entities, or at different points of time. Comparative law scholarship has constantly been sensitive to any such claims of difference, or conversely, similarity.

In line with our previous discussion of the role of expertise, these various instruments need to be appreciated both for their cognitive as well as political significance. First, they are the tools for the production of knowledge, i.e. they uncover certain aspects of reality while concealing others. Second, they may have differential impacts on the possibilities for participation among various actors and groups. Third, their centrality is particularly resonant beyond the state, where they often promise to ‘bind’ and thus legitimate the exercise of power.³⁸ The focus on instruments and their capacity to produce objective

32 In this field, again the STS and a history of science are helpful to appreciate the political relevance of the ‘instruments’ of government. See for instance Alain Desrosières, ‘How to Make Things Which Hold Together: Social Science, Statistics and the State’, in *Discourses on Society* (Springer 1990); Theodore M Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton UP 1996); Michael Power, *The Audit Society: Rituals of Verification* (OUP 1997). More specifically in legal scholarship, many contributions have dealt with the politics of CBA. For instance Duncan Kennedy, ‘Cost-Benefit Analysis of Entitlement Problems: A Critique’ (1981) 33 *Stanford L Rev* 387; Frank Ackerman and Lisa Heinzerling, ‘Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection’ (2002) 150(5) *U Penn L Rev* 1553; Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New Press 2005).

33 Mark B Baker, ‘No Country Left Behind: The Exporting of US Legal Norms under the Guise of Economic Integration’ (2005) 19 *Emory Intl L Rev* 1321.

34 Pierre Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 *Maastricht J Eur & Comp L* 111.

35 Nicola (n 2).

36 Jasanoff, ‘The Idiom of Co-Production’, in *States of Knowledge* (n 12).

37 Nicola (n 2).

38 The OECD has been one of the major promoters of ‘good regulatory practices’ as a tool to discipline, and thus legitimize, domestic governance. See OECD Recommendation of The

knowledge, and *qua* knowledge also governance, is the core element of the transnational institutional analysis.

3. Making the TTIP

In the following part I analyse the TTIP's regulatory cooperation in light of the foregoing framework for transnational institutional analysis, including TTIP's objectives, institutional design of regulatory cooperation and important instruments available to achieve the TTIP's objectives. Let me start, however, with a few words regarding TTIP's regulatory cooperation.

Regulatory cooperation comprises a set of institutions and institutional channels, which should allow the trading parties to engage in regulatory exchange and cooperation, without a need to open official treaty negotiation³⁹ – thus making the TTIP a 'living agreement'.⁴⁰ The main idea is that by creating institutional channels for the exchange of information, methodologies and knowledge between regulators and stakeholders across the Atlantic, their 'thinking' would align, thus minimizing the numbers of divergent regulations.

Regulatory cooperation has been one of the most important elements of the TTIP agreement.⁴¹ Because most of the economic benefits of the agreement accrue by removing 'behind the borders' barriers to trade,⁴² the costs of which run into hundreds of billions of euros,⁴³ regulatory cooperation becomes crucial for delivering on that economic promise.⁴⁴ Equally, geo-political motives have fuelled

Council on Regulatory Policy and Governance (2012) <http://www.oecd.org/governance/regulatory-policy/49990817.pdf>.

39 Mendes, 'Participation' (n 2).

40 For ambitions of the Commission with regard to the TTIP, see a landmark speech of DG Commissionaire De Gucht (10 October 2013) http://europa.eu/rapid/press-release_S_PEECH-13-801_en.htm.

41 The Report of the High Level Working Group on the Transatlantic Relations, which was a pretext for the start of the TTIP negotiations http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

42 See the Study of the CEPR London: *Reducing Trans-Atlantic Barriers to Trade and Investment* (2013) http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf. One of the key findings: 'Reducing non-tariff barriers will be a key part of transatlantic liberalisation. As much as 80% of the total potential gains come from cutting costs imposed by bureaucracy and regulations, as well as from liberalising trade in services and public procurement.'

43 *ibid.*

44 The European Commission explains:

the European and American systems of regulation are among the most advanced and sophisticated in the world. They effectively protect people, and in most instances to a similar extent, although often in different ways. This also means

the idea that global standards should be set by the US–EU, in order to maintain their economic power and enable a sort of ‘economic NATO’.⁴⁵

Regulatory cooperation in the TTIP envisages three types of regulatory exchanges. First, ‘bilateral exchange’ takes place between sectoral regulators or authorities at the central/federal level, at the counter-party behest. Secondly, the TTIP creates an ‘institutional mechanism’ that coordinates the implementation of the agreement. Finally, it creates sectoral committees, which engage regularly in exchanges regarding particular sectors, such as finance or sanitary and phytosanitary measures (SPS). The analysis put forward in sections 3 and 4 (below) applies *mutatis mutandis* to the CETA’s regulatory cooperation.⁴⁶

3.1 The TTIP’s objectives

The TTIP, a trade and investment partnership between the EU and the US, is concerned with the liberalization of trade and investment across the Atlantic. The first question that the analysis requires is to ask whether and how this objective would influence the operation of the TTIP institutions.

That this is not a redundant question is corroborated by one of the core criticisms of the TTIP, namely, that the TTIP will frame the cooperation between the EU–US cooperation in a way that will prioritize trade and investment at the expense of other normative concerns, such as labour or environment.⁴⁷ This critique has been particularly sharp with respect to the TTIP’s ‘regulatory cooperation’ framework.⁴⁸

The European Commission has made great efforts to make clear that pursuing the goal of liberalization of trade and investment will

that there is a great deal of potential for regulatory cooperation to create new economic opportunities and greater consumer choice. It should also lead to better quality, more thoroughly enforced regulation, and increase our ability to influence the quality of global rules.

See European Commission, ‘TTIP and Regulation: An Overview’ (10 February 2015) http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf.

45 A phrase attributed to Hillary Clinton.

46 There are some differences between the institutional design of the CETA (Comprehensive Economic and Trade Agreement) and the TTIP regulatory cooperation. CETA regulatory cooperation is, for instance, based on voluntariness of exchange, while TTIP regulatory cooperation requires engaging in exchange, however, without committing parties to any particular regulatory outcomes: Bartl (n 14).

47 See for instance Stiftung and Gerstetter (n 5); also Corporate European Observatory, *Dangerous Regulatory Duet* (2016) <http://corporateeurope.org/international-trade/2016/01/dangerous-regulatory-duet>.

48 See above (n 2).

not impact negatively on other normative concerns. According to the Commission:

By cooperating more efficiently, and from early on, regulators will be able to benefit from **sharing resources and expertise to reach their public policy objectives whilst avoiding unnecessary duplications and barriers for trade and investment.**⁴⁹

According to a proposal published in March 2016,⁵⁰ the objectives of regulatory cooperation are:

- a) to establish and strengthen bilateral regulatory cooperation ...
- b) to contribute to parties' activities pursuing public policy ... in**
 - a. public health ...
 - b. environment
 - c. consumers
 - ...
- whilst facilitating trade and investment.**
- c) to promote effective regulatory environment ...
- d) to promote compatible regulatory approaches and reduce unnecessarily burdensome, duplicative or divergent regulatory requirements ...
- e) to further the development and implementation of internationally agreed regulatory documents ...

In order to establish whether these legal provisions are an effective tool to counter such normative drift, let us consider how a 'bilateral exchange', a most promising framework for pursuing 'race to the top' cooperation between the two trading partners,⁵¹ would operate. We will do so by considering one counter-factual: How likely is it that, for instance, a Directorate-General (DG) Environment and Environmental Protection Agency, could jointly foster measures of environmental protection through bilateral exchange?

49 European Commission, 'Regulatory Cooperation in the TTIP, an Introduction to the EU Revised Proposal' (21 March 2016) http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154378.pdf.

50 European Commission, 'Textual Proposal on Regulatory Cooperation' (21 March 2016) http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf.

51 Since bilateral exchanges should take place between various sectoral regulators, with the least involvement of trade officials or regulatory affairs officials, they seem most suitable for pursuing non-trade normative concerns.

In order to respond to this question, and referring back to our analytical framework, we need to ask several questions. Which concerns will be discussed in bilateral exchange? How will these concerns *become* concerns? In what language will the issues and discussion be framed? Whose expertise and participation will be sought?

Bilateral cooperation commences on the proposal of one trading party if it suspects that the measure proposed by the other party may be a barrier to trade or investment. For example, a party may call for bilateral exchange if it suspects that a measure limiting the importation of shale gas is an unjustified restriction of trade.

First, there are important *cognitive* and *normative* consequences that accrue by framing the limitation of imports of shale gas as a barrier to trade – as opposed to, for instance, an environmental protection measure. A plethora of concepts, discourses and knowledge will be mobilized by such a framing. For instance, concepts such as trade barriers, protectionism, competitiveness, level playing field, economic theories of various sorts, cost-benefit analysis and statistics will be discussed, but also trade law expertise, impact assessment expertise, economic expertise and so on will be sought. The environmental agencies themselves may even need ‘external’ expertise, or advice, in order to understand these sorts of arguments. This framing effect means that articulating joint *environmental* objectives will not be straightforward.

A second crucial question is how issues become a subject of bilateral exchange in the first place. By whom and how are these concerns identified? The group relied upon to identify potential barriers to trade, and bring them to their prospective national regulators and authorities, are stakeholders.⁵² In order to support stakeholders in this function, both parties will be also expected to publish comprehensive lists of their *planned regulatory acts*, identifying issues that may present a concern for transatlantic trade.

It is likely that the majority of stakeholders who would avail themselves of the opportunity to bring issues to bilateral exchange will be business stakeholders.⁵³ An NGO could in principle bring a proposal for a bilateral exchange; however, there would be very few incentives to do so. First, any such proposal would have to come packaged in the language of ‘barriers to trade’. Second, it would have to count on involvement of industry across the Atlantic. We may safely assume that industry stakeholders would make sure that the regulators

52 See section 3.3 (below).

53 See section 3.3 (below).

involved in the transatlantic bilateral exchange would not act *ultra vires* and produce outcomes that would be unfavourable to trade. Such constraint would, in turn, considerably limit the kinds of suggestions that the NGOs could put forward. But even more importantly, the NGOs would have little incentive to raise issues for bilateral exchange (instead of approaching their national regulators or legislators) because the outcomes of bilateral exchange would not have *legal effects*. Taking positive action, such as parallel harmonization of standards upwards, would require the involvement of many other institutions.⁵⁴ The TTIP institutional framework is in contrast foremost suited for taking negative action – deciding that a measure should not be pursued or enacted – thus having a definite de-regulatory tinge.⁵⁵

3.2 The institutional design of regulatory cooperation

Until very recently, the Commission's crown institution of regulatory cooperation was the Regulatory Cooperation Body (RCB), tasked with monitoring, implementation and agenda-setting, not least through the so-called Annual Regulatory Cooperation Programme. Met with hesitance on the US side, the Commission's March position paper⁵⁶ discusses this body only in general terms, under the uninspiring title 'Institutional mechanism'. The recent July position paper⁵⁷ brings important changes, which can be interpreted as accommodating US demands. The July papers also count on a strong Joint Committee, while the Regulatory Cooperation Body has turned into the Transatlantic Regulators' Forum, with somewhat less articulated competences and powers. The strengthening of sectoral working groups (discussed in the following part) is perhaps the most important response to US demands.

The Joint Committee is a main TTIP institution, which would have considerable powers. Its aim is to further enhance the objectives of the agreement – trade, investment and regulatory cooperation. Its powers include an important competence to 'adopt decisions or make recommendations suitable for promoting the expansion of trade and investment as envisaged in this Agreement', or 'adopt the interpretations of this Agreement, which shall be binding on the parties, including

54 See also section 3.3 (below).

55 See also De Ville and Siles-Brügge (n 5).

56 European Commission (n 50).

57 European Commission, 'EU Textual Proposal for Institutional, General and Final Provisions' (14 July 2016) http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf.

panels established under Chapter XX' (Investment Chapter). Further, a Joint Committee would guide and facilitate regulatory cooperation, coordinate sectoral committees and working groups established by the agreement, as well as have the power to establish new groups and terminate older ones. Finally, when it comes to regulatory cooperation, the Joint Committee can make recommendation to the Transatlantic Regulators' Forum as to the content of its agenda, and organize a yearly session on regulatory cooperation.

In comparison with the previously proposed Regulatory Cooperation Body, the Transatlantic Regulators' Forum would have fewer powers, since many of its previously envisaged powers have been transferred to the Joint Committee and to sectoral committees (see section 3.2.1 below). Among the remaining powers, the Transatlantic Regulators' Forum would still set the agenda for regulatory cooperation, including identifying new initiatives and monitoring on-going regulatory cooperation (bilateral, but also sectoral cooperation). It would also draw a yearly plan of regulatory cooperation, the so-called 'Joint Overview of EU/US Regulatory Cooperation' – a document previously discussed as the Annual Regulatory Cooperation Program.

3.2.1 What kind of expertise?

A traditional question that one would ask when it comes to establishing institutions is that of composition. As underlined in section 2.1 in this article, in the context of integration beyond the state, the question regarding the composition should also include institutional affiliation and disciplinary expertise of the participants. This aspect is fundamental in the context of transnational institutional analysis, because there is a comparatively greater risk that narrowly defined expertise may prejudice broader economic and social policies. When it comes to the composition of the proposed institutions:

The Joint Committee shall be **co-chaired** by the United States **Trade Representative** and the Member of the European Commission responsible for Trade, or their respective designees.⁵⁸

...

A Transatlantic Regulators' Forum (the "Forum") is hereby established. The Forum shall meet no later than one year after entry into force of the Agreement. The Forum shall meet at least once a year or at the request from either Party. It shall

58 *ibid.*

be composed of Senior Officials of both Parties responsible for **cross-cutting issues of regulatory policy and good regulatory practices**, senior officials responsible for **international trade**, and **senior regulators for the areas they are responsible for**.⁵⁹

A first issue one notes is a certain ‘naturalness’ that accompanies the institutional design of the TTIP institutions. Given that the TTIP is a trade agreement, with the objective to liberalize trade and investment, the demand for certain expertise and institutional affiliation becomes obvious. Thus, it seems only logical that documents single out *trade officials* as the leaders of the Joint Committee and Transatlantic Regulators’ Forum. It is also not surprising that the latter singles out *regulatory affairs officials*,⁶⁰ insofar as the TTIP is meant to achieve regulatory cooperation through harmonizing regulatory methodologies.⁶¹ These two groups of officials seemingly possess a more ‘general’ competence with respect to the fields dealt with by the TTIP. By contrast, officials who possess different expertise, such as environmental officials, will be invited to participate only if an issue is of direct concern to them.

What are the consequences of this institutional design on the kind of exchanges that occur? Domestically, giving privileged access to the TTIP’s institutions to trade officials and regulatory affairs officials will empower the trade departments’ representatives and those officials who possess skills in ‘regulatory analytics’ (OIRA, the Office of Information and Regulatory Affairs, in the US and the Secretariat General in the European Commission).

What stands out as normatively relevant with respect to these two groups of officials is that they broadly share a similar framing of the world – both groups see the world as a *market*. In such a framing of the world, the problem – or the disrupted harmony – comes from either *barriers to trade* (trade officials) or *unnecessary regulation/red tape* (regulatory affairs officials). In turn, to restore harmony, the barriers to trade or red tape need to be *removed*, or at least *transformed*.

Additionally, this cognitive framework will likely be shared by these groups of officials across the Atlantic, including at least the way in

59 *ibid.*

60 By ‘regulatory affairs officials’, I mean those members of the governments which are responsible for what is called by the European Commission ‘regulatory analytics’. This includes the administration of impact assessments and regulation review. In the US, these are the representatives of the Office of Regulatory Affairs (OIRA), and in Europe the members of the Secretariat General of the European Commission. The cooperation among those officials has already been taking place for years. See for instance Nicola (n 2).

61 See section 4 (below).

which they define problems and consider a range of possible solutions. Making these two groups of officials quasi-permanent members of the Joint Committee and Transatlantic Regulators' Forum, with regular opportunities for them to socialize, will further enhance their acculturation and normative congruence.⁶² By contrast, more incidental 'issue specific' officials are expected to meet from time to time only in the Joint Committee and Transatlantic Regulators' Forum. Such officials are likely to remain an 'out-group', whose contributions may be confronted with settled normative positions of the trade officials and regulatory affairs officials.

The described institutional context surely does not constitute a neutral space for exchange and learning among regulators. Unless remedied, the overrepresentation of trade officials and regulatory affairs officials is likely to negatively impact the development of balanced normative agenda in the TTIP's institutions.⁶³

3.2.2 Heightened challenge: the proliferation of sectoral committees

The contraction of powers of the Transatlantic Regulators' Forum has been compensated for by the establishment of a set of similar regulatory institutions, restricted however to particular sectors. In contrast to general TTIP institutions, the US has been particularly ambitious with regard to the (institutional design of) sectoral committees.⁶⁴ The Commission's latest proposal puts in place several 'sectoral committees', including:

- (a) the Market Access Committee; with subcommittees on Public procurement, Energy and Raw materials and Intellectual property rights;
- (b) the Committee on Services and Investment;
- (c) the Committee on Trade and Sustainable Development;
- (d) the Committee on Small and Medium-sized Enterprises;
- (e) the Committee on Technical Barriers to Trade;
- (f) the Committee on Sanitary and Phytosanitary Measures;
- (g) the Joint Customs Cooperation Committee.⁶⁵

62 James Kwak, 'Cultural Capture and the Financial Crisis', in *Preventing Regulatory Capture* (CUP 2013) 71; Andrew Baker, 'Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance' (2010) 86(3) *Intl Affairs* 647. Along somewhat similar lines, see also Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (CUP 2010).

63 Compare for instance Michel Foucault, *Security, Territory, Population* (Springer 2007).

64 See Greenpeace, *TTIP-leaks.org*; see chapters on Regulatory Cooperation or SPS Measures <https://www.ttip-leaks.org/andromache/doc11.pdf>.

65 European Commission (n 57).

The ‘composition, remit, tasks and functioning of the specialised committees shall be as defined in the relevant Chapters and Protocols of this Agreement or by the Joint Committee’.⁶⁶ Certain competences identified by chapters and protocols include exchange on issues that threaten to undermine trade and investment in their relevant fields, identifying possibilities for regulatory cooperation, monitoring the implementation of the agreement in their sector and reporting to the main coordinating body, all discussed above.

Let us look at one of those sectoral committees, namely the sectoral Committee for Sanitary and Phytosanitary Measures. This is a very important committee insofar as it will be responsible for exchange regarding GMOs and ‘modern agricultural technology’.⁶⁷ Even if the exact wording remains unresolved, both trade partners agree as to the basic *composition* of this committee:

[EU: The Parties hereby establish a Joint Management Committee (JMC) for SPS Measures, hereafter called the Committee, comprising **regulatory and trade representatives** of each Party who have responsibility for SPS measures.]

[US: The Parties hereby establish a Committee on Sanitary and Phytosanitary Matters (the “Committee”) comprising representatives of each Party. ... Each Party shall ensure that its representatives on the Committee are the appropriate officials from its **relevant trade agencies or ministries** and competent authorities with responsibility for the **development, implementation, and enforcement of SPS measures.**]⁶⁸

The US envisages a strong SPS committee. Thus, the US proposal states that the committee should possess formal decision-making powers and be able to *reject* or *modify* measures submitted to it by either party. In a case of such a negative opinion, parties should be able to reverse it only if they comply with higher justificatory obligation.⁶⁹ The US has also proposed a ‘working group on trade in products of modern agricultural technologies’ to discuss issues relevant to the biotech industry (including, most notably, issues related to genetic modification). Additionally, this group would be co-chaired by representatives of each

66 *ibid.*

67 See Greenpeace (n 64), chapter on SPS Measures.

68 *ibid.*

69 *ibid.*

party's trade agency.⁷⁰ Finally, the US has proposed standing 'technical working groups' to resolve disputes regarding the *applicable science and understanding of the relevant risks* in animal health, plant health and food safety.⁷¹ Even if the European Commission has not accepted these proposals, it has accepted the need for 'technical consultation' in the case of divergent opinions of the two parties.⁷²

Whatever the exact shape that this committee, or its technical working groups, would take, trade officials and regulatory affairs officials would be exceptionally well represented. This raises, thus, similar concerns to those discussed in relation to the general TTIP bodies. Moreover, in the context of the SPS chapter, the direct engagement of trade officials and regulatory affairs officials with *science* and scientific standards allows for the replication of disciplinary and institutional bias in the way science is utilized: an issue that is of crucial importance for regulatory policy in the EU and the future of the precautionary principle.⁷³

Last but not least, the proliferation of various sectoral committees and technical working groups in the context of the TTIP may present an accountability nightmare.⁷⁴ The sheer numbers of powerful sectoral bodies will make any parliamentary oversight difficult, if not impossible, yet all the more important. Considering the lip service that the TTIP institutional chapter pays to transatlantic parliamentary cooperation in Article 6, there is a demonstrable lack of meaningful concern for the democratic implications of the proposed institutional structures.

3.3 Instruments

The last level of proposed institutional analysis looks at the 'instruments' through which we govern, and are governed. Analysing the role of instruments is all the more important in the context of the TTIP since their alignment has been at the core of the TTIP project since its earliest

70 *ibid.*

71 *ibid.*

72 *ibid.*

73 Bartl (n 14).

74 While parliaments on both sides of the Atlantic were able to gain some voice in the negotiation of various transatlantic treaties (see Davor Jančić, 'The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance, and CIA Renditions: Parliaments in Transatlantic Relations' (2016) 54(4) *JCMS* 896), the proliferation of various bodies, including multiple sectoral committees, without direct representation of parliamentarians envisaged, would render the possibility of parliamentary oversight illusory.

days.⁷⁵ The last Commission's position paper on 'good regulatory practices' details rules on transparency, planning, stakeholder consultation, impact assessments, risk assessment and management, retrospective evaluation of regulatory acts and, finally, an obligation to establish an internal coordination mechanism (similar to the OIRA in the US, or the new Regulatory Scrutiny Board with similar powers to that of OIRA).⁷⁶

While all the instruments would deserve a separate treatment, for the reasons of space I have to single out only two of these instruments for the analysis here, namely, stakeholder participation on the one hand and regulatory impact assessments (RIAs), including cost-benefit analysis (CBA), on the other.

3.3.1 *Stakeholders as market builders*

The focus on stakeholder participation and the transparency of the regulatory process across the Atlantic has been noteworthy. The foremost concern of the TTIP's creators has been to ensure stakeholder access to the regulatory process from the earliest possible moment. Both trading parties seem to have agreed that stakeholders should have a say not only in the designs of particular measures but also with respect to the setting of priorities – in TTIP regulatory cooperation as well as in the domestic regulatory process.⁷⁷ Moreover, the Commission's recent proposal requires such access not only *ex ante*, in the process of preparing regulations, but also *ex post*, at the stage of review of legislation, whereby stakeholders can express their concerns that certain regulations no longer serve legitimate objectives. The Commission's proposal resonates with the better regulation agenda's concern for the review of existing regulation.

One of the concerns raised by civil society, and supported by empirical research, is that in the past stakeholder participation, both in the EU and even more so in the US, has usually meant a pervasive dominance of more concentrated interests – industry – at the expense of diffuse and less resourceful interests (be they public or smaller businesses).⁷⁸ This influence has been exercised through

75 The Report of the High Level Working Group on the Transatlantic Relations, which was a pretext for the start of the TTIP negotiations http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

76 European Commission, 'Textual Proposal on Good Regulatory Practices' http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf.

77 Compare Greenpeace (n 64) and European Commission (n 76).

78 Wendy E Wagner, 'Administrative Law, Filter Failure, and Information Capture' (2010) 59 Duke LJ 1321; Beate Kohler-Koch and Christine Quitkat, *De-Mystification of*

various channels. Except for more overt forms of regulatory capture, the comment and notice procedure has enabled ‘information capture’, which is said to have disempowered US regulators to meaningfully regulate.⁷⁹ In both the EU and the US, the reliance on knowledge and resources coming from business has involved softer, but powerful, forms of ‘cognitive capture’ and ‘cultural capture’.⁸⁰

On a most general level, the TTIP brings new actors not only to its own institutions and regulatory exchanges, but also into the *domestic* regulatory process. Along with the general category of stakeholders, we may see US authorities and US stakeholders becoming more prominent participants, as well as the TTIP institutions or the industry submitting ‘joint submissions’. The old and new actors will create potentially powerful institutional dynamics.⁸¹

While stakeholders gain important new roles and functions, including agenda-setting and consultative roles, the question that we need to ask is whether the TTIP (in all its domestic interactions) will come with sufficiently symmetrical possibilities for access to various groups and individuals.⁸² This is of fundamental importance for the shape of the transatlantic market.

Research on the domestic context shows that actors who are better resourced are more ‘represented’ in the regulatory process.⁸³ The creation of new spaces for regulatory cooperation outside existing contexts, including new forms of information sharing and access, are likely to increase the need for resources and adjustment. It is highly probable that, at least in the short to medium term, asymmetries will increase due to the TTIP. While such asymmetries may be difficult to avoid, the TTIP does not envisage measures aimed at counter-acting their force.⁸⁴

To the contrary, regulatory cooperation per the TTIP caters more to the needs of business stakeholders. Information sharing, both within the ‘list of planned acts’ and the Joint Annual Regulatory Programme,

Participatory Democracy: EU-Governance and Civil Society (OUP 2013); Maria Green Cowles, ‘The Transatlantic Business Dialogue and Domestic Business-Government Relations’ in *Transforming Europe: Europeanization and Domestic Change* (Cornell UP 2001) 159.

79 Wagner, *ibid.*

80 Daniel Carpenter and David A Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (CUP 2013).

81 See also Mendes, ‘Regulatory’ (n 2); Mendes, ‘Participation’ (n 2).

82 *ibid.*

83 See above (n 78).

84 The first step would be to recognize possible biases, and account for this possibility in the evaluation of participatory input. More pro-active measures could involve designing special mechanisms of contestation and/or alleviating the costs of participation.

will identify ‘barriers’ to transatlantic trade and investment – a language more easily mobilized by business stakeholders. Furthermore, regulatory exchange itself will only start once one of the party is ‘summoned’ to discuss measures that will (more often than not) go beyond the level of protection that is present in the regulatory framework of the counterparty and is likely, as such, to create a barrier.

Equally, the dominance of trade officials and regulatory affairs officials in TTIP institutions (Joint Committee and Transatlantic Regulators’ Forum) is likely to reinforce ideological opposition to ‘red tape’ and ‘barriers to trade’.⁸⁵ This again may be more advantageous to business stakeholders, whose interests will often be aligned with the concerns that motivate the elimination of such barriers/red tape.

Finally, and rather paradoxically, de-regulatory pressures arise additionally because of the limited *legal effects* attributed to regulatory cooperation exchange.⁸⁶ Given that the TTIP institutions will have no formal legal power (except for the ISDS), the members of these bodies are likely to favour those recommendations that may be implemented without requiring many formalities, without the involvement of legislators, and that can be easily monitored. Thus, it is likely that these institutions will tend to decide that certain regulations should *not* be adopted rather than taking positive action. This can take place through the favouring of certain forms of cost-benefit analyses (see section 3.3.2 below) or particular uses of science (e.g. standards of proof).⁸⁷

While the stakeholders’ role is to turn the TTIP into a ‘living agreement’, the TTIP puts in place a set of incentives that will be more easily mobilized by those actors who already have dominant access to the regulatory process – better resourced industry and business – increasingly their existing advantages. If we were to see such skewed ‘stakeholder basis’ of the TTIP agreement, it would give rise to both democratically and economically (epistemically) questionable regulation.⁸⁸

3.3.2 Regulatory impact assessments

Since the TTIP institutions will enjoy only ‘softer’ power, with little formal bindingness, the alignment of regulatory practices has been at the core

85 See for instance the speech of Cecilia Malstrom in Amsterdam, https://www.youtube.com/watch?v=a4cgJFy_d0, after 44th minute.

86 This argument will sound familiar to European scholars. The lack of political capacity at the side of the EU political institutions has made the ‘negative integration’ a main driver of the EU project, with ensuing problems and asymmetries. See more recently Scharpf (n 13).

87 Bartl (n 14).

88 For the elaboration of the theoretical dimension of this argument see Bartl (n 15).

of the project. To paraphrase Alberto Alemanno, the convergence should not come from ‘what we do’ but from ‘how we do things’.⁸⁹ The regulatory impact assessments are central to this enterprise.

The TTIP is the first international treaty to oblige parties to ‘maintain’ (Article 3) and ‘affirm their intention to carry out’ (Article 8) impact assessments.⁹⁰ Beside the legal obligation to carry out the impact assessment, the chapter goes beyond current practices in the EU by requiring that impact assessments:

- a. relate to relevant internationally agreed regulatory documents;
- b. take account of the regulatory approaches of the other Party, when the other Party has adopted or is planning to adopt regulatory acts on the same matter;
- c. have an impact on international trade or investment.

Furthermore:

The Parties shall promote the exchange of information on available relevant **evidence and data**, on their practices in assessing impacts on international trade or investment, as well as on the **methodology** and **economic assumptions** applied in regulatory policy analysis.

The provisions on aligning instruments – or ‘regulatory analytics’ – have accompanied the transatlantic cooperation from its earlier stages. Already in 2007 the Charter of the Transatlantic Economic Cooperation Council, signed by Angela Merkel, Jose Manuel Barroso and George Bush, gave a prominent place to ‘pursu[ing] development of a methodological framework to help ensure the comparability of impact assessments, particularly risk assessment and cost-benefit analysis’.⁹¹

89 Wiener and Alemanno (n 2).

90 In contrast, the protocols to the WTO agreements oblige state parties to base decisions on science and evidence; the specific form is not articulated in the Treaty.

91 The whole commitment taken up in the Annex I, A of the Agreement on the Transatlantic Economic Council is worth reproducing in its entirety. It goes as follows:

Fostering Cooperation and Reducing Regulatory Burdens

Take the following steps to reduce barriers to transatlantic economic integration posed by new regulations by reinforcing the existing transatlantic dialogue structures:

1. Pursue development of a methodological framework to help ensure the comparability of impact assessments, particularly risk assessment and cost-benefit analysis;
2. Appoint heads of regulatory authorities as permanent members of the EU–US High-Level Regulatory Cooperation Forum to report on any risks or benefits from significant differences in regulatory approaches identified in the sectoral

Regulatory impact assessment is an instrument that aims to make more explicit and rationalize the reasoning behind various laws and regulations. It demands regulators evaluate various policy alternatives and compare them – in particular, by reference to the costs and benefits of these alternatives.

Beyond these surface similarities, the two jurisdictions have differed considerably in their appreciation of the purpose and form that this tool should take. The Reagan-era RIAs emerged in an ideological climate of distrust toward state and regulation, in a world where all manner of regulatory capture occurred and where regulation was seen to cause more harm than benefits. The purpose of RIAs in such a climate was to constrain regulatory power and reserve regulatory action only to cases where ‘welfare’ benefits clearly exceeded costs.⁹²

Europe developed RIA much later, ‘centralizing’ the RIAs only in 2002. In a state- and regulation-friendlier Europe, the purpose of RIA has been to aid the development of policies and regulations by providing useful information. On this view, RIA should identify the main options for achieving regulatory objectives and compare their economic, environmental or social impacts.⁹³

Given their different ideological underpinnings, including the attitude toward the state’s capacity to govern, the methods for evaluating the costs and benefits of regulation have diverged significantly across the Atlantic. Even if this gap has narrowed in recent years, thanks to the

dialogues or the European Commission Secretariat General (EC)–US Office of Management and Budget (OMB) dialogue called for under the 2005 EU–US Economic Initiative, recognizing that the Financial Markets Regulatory Dialogue will continue its own, separate, work program described in Annex 6, and updating the Council on its progress as appropriate.

3. Reinforce the existing transatlantic dialogue on regulatory cooperation by cooperating to improve regulation, specifically through cooperation between OMB and the EC to:
 - a) Take into account, among other things, the impact assessment considerations in place, evaluate progress regarding this cooperation, and consider a more formal basis to enhance this cooperation;
 - b) Intensify their dialogue focusing on issues of methodology;
 - c) Hold regular and active exchanges on the overall framework of our regulatory cooperation and on methodological issues which may arise in individual cases;
 - d) Review the application of their respective regulatory impact analysis guidelines so that the regulatory impacts on trade and investment are considered, as appropriate; and
 - e) Share forward planning schedules.

92 Fernanda G Nicola, ‘Genealogies of Cost-Benefit Analysis in Transatlantic Regulatory Cooperation’ (2017) 15 *Comp Eur Pol* (special issue edited by Mark Bevir and Ryan Phillips on genealogies of European governance).

93 Andrea Renda, *Assessing the Costs and Benefits of Regulation*, Study for the European Commission (Center for European Policy Research, Brussels 2013).

'better regulation agenda' of the European Commission (see section 4 below), there still remain significant differences – primarily when it comes to the method for evaluating costs and benefits.

The main difference between two trading partners lies in the way their respective regulatory systems render comparable, and commensurable, various regulatory alternatives put forth in RIAs. In the US, the main method for rendering various options commensurable has been through reliance on a neoclassical, welfare economics approach to cost-benefit analysis (CBA), enforced by OIRA.⁹⁴ Elevated from its micro-economic context where it has been used to measure the costs and benefits in the context of firms or public projects (such as dams), US CBA tries to compare the costs and benefits of *regulation* in terms of their market value: how much firms will have to spend in order to comply with the regulation in comparison with people's willingness to pay for benefits (such as clean air or health). In its most standard version, costs are established on the basis of an inquiry into the relevant industry regarding how much they estimate they would have to spend in order to comply with proposed regulations. The benefits are then evaluated on the basis of rather costly surveys (usually in shopping malls) which ask 'people' how much they would be willing to pay for, e.g. five extra years of life, or cleaner air.

The main advocates of the US's CBA praise the rationality of decision-making based on this method, given its capacity to clearly quantify costs and benefits in terms of their market value and welfare-enhancing faculties. More recently, for instance, Cass Sunstein has argued this method is 'the best we have' and agencies should not be so easily excused from its use.⁹⁵ The critiques of welfare economics CBA, by contrast, suggest that this kind of CBA ascribes ultimately rather speculative values to costs and benefits of regulation,⁹⁶ that it discounts the future benefits for present costs, contributing thereby to inter-generational injustice, or that it often fails to account for less tangible benefits.⁹⁷

94 The new Better Regulation guidelines establish an organ with similar competencies in the EU: the so-called Regulatory Scrutiny Board. See Bartl (n 14).

95 Most recently see for instance Cass R Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, Harvard Public Law Working Paper No 16-12.

96 Ackerman and Heinzerling, *Priceless* (n 32); Ackerman and Heinzerling, 'Pricing the Priceless' (n 32); Kennedy, 'Cost-Benefit Analysis of Entitlement Problems' (n 32).

97 *ibid.* An additional important feature that distinguishes the US from the EU system is the possibility to enforce 'better regulation' in courts. Since the US courts have been eager to enforce a strict standard of review as it concerns scientific evidence, that needs to be provided by the regulator if she is to regulate, as well as level of engagement with the

The valuation of costs and benefits in the EU, by contrast, is far more pluralistic than in the US – including both quantitative and qualitative methods, and among quantitative methods includes several variants: welfare economics CBA, social CBA, and most importantly multiple criteria analysis.⁹⁸ It is understood that this plurality of methods allows for a more accurate valuation of costs and benefits in the face of ‘values’ that are often difficult to quantify.⁹⁹ This concern with a plurality of methods, and their close relation to underlying normative commitments, has been affirmed in the latest May 2015 package.¹⁰⁰

Eventual convergence toward the US single-form CBA, including its economic assumptions, imply a radical political choice for the EU, with significant normative consequences that would touch on the broadest range of regulatory issues. The assumptions behind (US) CBA are patently normative: (a) it assumes that all sorts of values can be expressed as individualized market preferences on a monetary scale, (b) that the best policy is the one that is the most efficient – the one that produces most benefits in comparison with its costs, and, finally, (c) the efficiency principle remains insensitive to its distributional effects – who incurs benefits and who incurs costs (Kaldor-Hicks efficiency).¹⁰¹

Expanding the scope of US CBA would force the EU regulator to make several normative choices – before even starting its quantification. First, it forces the regulator to take the market as the correct frame of reference for thinking about social justice, the environment or public health. Second, given that welfare economics CBA is indifferent to distributive effects of regulation and understands costs to business as costs to society, the question who bears the costs and who reaps the benefits of the (missing) regulation is hidden from its purview. By embracing CBA, the EU would neglect the responsibility for the future impacts of our behaviour. The metric of market and individualized preferences depends on ‘discounting future benefits’, valuing

stakeholders (Information capture – Wagner), the court involvement has caused significant regulatory chill. Sometimes it is enough if the industry threatens with going to the court and the regulators will water down the proposal. This has been very different in the EU, where the courts both endorsed precautionary principle (EU treaties, case law) as well as large deference to administration. To this effect see Wagner (n 78); David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton UP 2015).

98 Renda (n 93).

99 *ibid.*

100 One should not discount, however, the nudging effects of the fact that the last better regulation package gives considerably more space and attention to welfare economics cost-benefit analysis.

101 Ackerman and Heinzerling, *Priceless* (n 32).

more current costs (to business) than future benefits (to society).¹⁰² Now, while such normative assumptions may be appropriate in certain contexts, they are largely inappropriate for the majority of regulatory measures that cater to values other than efficiency.

I have thus far only described the main differences between valuing costs and benefits in two regulatory systems. The critical question, however, is whether and how the TTIP's institutions might tip the balance toward one of these methods. Whatever shift we may expect, it will proceed incrementally and, at some level, multidirectionally: TTIP regulatory cooperation surely does not present a one-way street from the EU pluralistic model to the US orthodox model of evaluating costs and benefits. In fact, in reaction to criticism, the last versions of the Commission's position papers mention that impact assessment should not rely only on quantitative cost-benefit analysis, and that the regulatory cooperation should not prevent member states from maintaining their approaches to risk analysis and management.

Yet, despite this laudable commitment, there are several institutional reasons that will facilitate the shift toward more orthodox US-style evaluation of costs and benefits in the EU rather than the other way around. First of all, the TTIP empowers those actors – in bilateral exchanges, sectoral committees, the Transatlantic Regulators' Forum or Joint Committee, but also in domestic regulatory processes (stakeholder participation and good regulatory practices) – who are likely to prefer US-style CBA.

Most obviously, the involvement of US authorities, who already rely on welfare economics CBA and who, additionally, are expected to use the exchange in order to eliminate barriers to trade (which is, in principle, in the common interest of both businesses and consumers) will add some weight to this form of CBA. The involvement of the US officials is certainly not enough. In fact, we could speculate that the transfer could easily also go the other way around. Yet, more importantly, the TTIP (asymmetrically) empowers more resourceful stakeholders from both the EU and US side, thus garnering vocal supporters of the regulation un-friendly welfare economics CBA. Finally, perhaps the most important factor is that the TTIP makes trade officials and regulatory affairs officials the core members in the TTIP institutions, empowering thus those actors in the EU who already favour (Secretariat General of the Commission¹⁰³) or are more likely to favour (trade officials, thanks

102 *ibid.*

103 Andrea Renda et al, *Assessing the Costs and Benefits of Regulation* (Brussels 2013) http://www.economistiassociati.com/files/cba_study_sg_final_0.pdf.

to their concern with eliminating problematic barriers to trade) the shift toward a streamlined, US-like CBA. These institutional reasons offer sufficient ground for a conclusion that the TTIP sets a ground for tilting the EU toward the US-like CBA – rather than the other way around.

4. The interaction of better regulation and the TTIP regulatory cooperation

While a previous institutional analysis suggests that the TTIP's regulatory cooperation prepares grounds for the shift of the EU toward the US-like regulatory style, in this section I add an additional political reason that grounds this suspicion. I do so by placing the TTIP discussion within the context of the EU domestic political clash.

Relatively recent Greenpeace leaks have revealed that the US has pushed for (infamous) 'notice and comment' procedures in the TTIP, the US-like CBA as well as the requirement of so-called 'sound science'. However, this push is certainly not coming only from without. In fact, comparing the leaked documents and the February papers reveals that EU concessions to the US could have been given with a 'light heart' since many of them have been first implemented within the EU Better Regulation guidelines, as a part of the political programme of the Secretariat General of the European Commission. It is only within the TTIP however that they are given the force of (international) law.

The so-called 'better regulation' agenda in Europe has its own history. While in the Thatcher and Reagan era significant opposition to regulation developed in the US and the UK, it was not until the first Barroso Commission that the European Union began to treat regulation as a *problem* to be solved. So-called 'smart regulation', 'better regulation', 'evidence based decision-making' or 'regulatory fitness' gradually came to place emphasis on regulatory impact assessments, including cost-benefit evaluations, broad consultations of stakeholders, transparency, review of regulations etc. The purpose of these instruments was to regulate more rationally and efficiently, imposing less cost – or 'red tape' – on businesses.¹⁰⁴

Some have recognized that this shift (perhaps unfairly discounting British influence) is a swing toward *American* regulatory culture.¹⁰⁵ In

104 See the European Commission's webpage 'Better Regulation: Why and How' http://ec.europa.eu/info/strategy/better-regulation-why-and-how_en.

105 Vogel (n 97).

more than a decade, the definition of ‘red tape’ in the EU has expanded. Some allege that previous concern regarding ‘administrative’ burdens (reflected in the term ‘red tape’) has over time become a ‘green tape’ or an initiative to cut regulatory burden on businesses in general.¹⁰⁶ The search for ‘methodological alignment’ within the context of Transatlantic Economic Integration in the mid-2000s, where Chancellor Merkel, President Barroso and President Bush placed methodological alignment at the heart of the Transatlantic Economic Council, can be seen as a part of this shift.¹⁰⁷

The emphasis on cutting red tape through *better* regulation was reinforced with the first ‘truly’ political Commission headed by Mr Juncker, who has made cutting ‘red tape’ a central theme of his presidency. In May 2015, the Commission published a new, better regulation package,¹⁰⁸ introducing important changes that bring the EU, directly or indirectly, closer to the US mode of regulation. The most important changes are:

1. *Two stage-impact assessment and stakeholder consultation.* Regulatory initiatives will be subject (depending on the importance of the intended regulation) to a two-stage impact assessment and a two-stage consultation procedure: inception impact assessment should be accompanied by initial consultations to determine the proper framing of the problem and methodologies to address it. If the regulatory idea surmounts this hurdle, a full impact assessment should be developed, accompanied by a second (public) consultation. In this way, similarly to the US procedure, stakeholders get access at a much earlier stage to the framing of the ideas and priorities of regulation. They have, as well, a say as to the methodologies for evaluating costs and benefits.
2. *Regulatory Scrutiny Board.* The new guidelines also introduce a Regulatory Scrutiny Board (RSB), which is to replace the Impact Assessment body. The difference between its old and new incarnation

106 Pieter de Pous, *Better Regulation under the Radar* (Forum Umwelt und Entwicklung 2016) <http://www.eeb.org/index.cfm/library/better-regulation-ttip-under-the-radar/>.

107 See the document establishing the Transatlantic Economic Council http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134654.pdf.

108 Better Regulation guidelines can be accessed here: http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm. These efforts have also had strong political support from the recent European Parliament, and recently also received the endorsement of the next three Council Presidencies (Netherlands, Slovakia and Malta). For an excellent discussion of the Better Regulation guidelines see Mark Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’ 53(5) (2016) CM L Rev 1209.

is that the new body, which is not far from the US OIRA, becomes a permanent organ with a right to *veto* all Commission's proposals that are not in line with better regulation standards. The RSB has already shown its teeth, rejecting more RIAs than its predecessor.¹⁰⁹

3. *Cost-benefit analysis*. The new guidelines set rules on how to conduct cost-benefit analyses. While at several points the Commission admits that certain values are difficult to quantify, for instance those related to fairness, redistribution or valuation of human life, the guidelines at the same time provide very specific instructions regarding how to monetize those otherwise unquantifiable concerns (life, environment, etc.).¹¹⁰ In the 2015 report, the Commission, seemingly pleased, notes that the number of impact assessments, where the quantitative analysis has been performed, has increased.¹¹¹
4. *Surveying regulatory fitness*. Regulation 'fitness' will not only be tested *a priori* but also *a posteriori*. The testing will be undertaken by the RSB, as a matter of standard regulatory practice, or upon the proposals of stakeholders. These proposals may be independent, or they may come from the so-called REFIT stakeholder group. The purpose of these 'performance checks' is to remove ineffective or burdensome regulatory measures.

The Commission's proposal for regulatory cooperation, April 2015, preceded the EU's latest Better Regulation guidelines by a month. The new 2016 position papers on regulatory cooperation differ considerably from the May 2015 position papers, taking on board much of the Better Regulation guidelines – which already correspond to many US demands, as can be inferred from the Greenpeace leaks on regulatory cooperation, which predate the March 2016 position papers of the European Commission.

The concessions that the Commission has been willing to make *vis-à-vis* the US crucially relate to the expansion of 'good governance' principles committed to in TTIP and the expansion of sectoral committees, while cutting down on other institutional provisions.

109 See the report comparing the activities of the Impact Assessment Board and Regulatory Scrutiny Board in 2015 http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_rsb_stats_2015.pdf.

110 For instance, the 'quality-adjusted life year' matrix is placed under the rubric of non-monetary valuations, since they concern *years* saved instead of *money* saved. Yet the value of years is calculated in monetary terms. The usefulness of the regulation – its benefits – is given monetary value correlated to how many years of life the regulation will save: the younger the person saved, the more money will be saved, and the more efficient the regulation is. European Commission, 'Better Regulation Guidelines' 198ff http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf (accessed 9 May 2016).

111 See above (n 106).

First of all, in line with US demands, the proposal introduces an obligation of retrospective review of regulations.¹¹² This obligation was not part of the previous Commission's proposals, but it is already an important, if not foundational, element of Better Regulations (REFIT programme). Second, an important concession is the introduction of an internal coordination mechanism, at the insistence of the US. The emergence of the Regulatory Scrutiny Board, a new body with large competences not dissimilar to the US OIRA, has greatly influenced this concession.¹¹³ Finally, broad possibilities for stakeholder participation and transparency, including a say for stakeholders in priority-setting, and their right to provide their view also on 'retrospective evaluation', was unimaginable prior to the issuance of the Better Regulation guidelines last May.

All those commitments elevated from Better Regulation guidelines into the TTIP attain not only the status of international law but also a set of new stakeholders (US authorities or stakeholders) who can legitimately demand their fulfilment. This juridification of better regulation upwards, to the TTIP, is ultimately intended to facilitate the de-regulatory efforts of the current European Commission, often presented as a quest for 'regulatory fitness' or cutting 'red tape'.

Beyond the substantive similarities between the EU Better Regulation and TTIP's regulatory cooperation proposals, we could have also expected the interaction between these two sets of rules and institutions. In fact, the Better Regulation–TTIP compendium would reinforce each other, creating an enhanced set of hurdles for the prevention of 'inefficient' or 'burdensome' regulations.

To illustrate, any potential EU regulatory measure must pass a multi-stage process in which many actors have their say. First, in the *initial stage of the impact assessment* introduced by the latest Better Regulation guidelines, stakeholders introduce their initial objections, as to the framing of the problem and the methodologies chosen for evaluating risks or costs of regulation. If the regulatory idea survives

112 European Commission (n 76):

Article 9 – Retrospective Evaluation

1. Each Party shall maintain procedures or mechanisms to promote periodic retrospective evaluations of regulatory frameworks.
2. The Parties shall promote the exchange of experience and share information on planned retrospective evaluations.

113 European Commission (n 76):

Article 3 – Internal coordination

Each Party shall maintain internal coordination processes or mechanisms in order to foster good regulatory practices, including transparent planning, stakeholder consultation, impact assessments and retrospective evaluations of regulatory acts.

this consultation, the next phase involves a full impact assessment and a second (public) consultation.

The impact assessment is required to comply with the Better Regulation guidelines, which in principle allow for various kinds of analyses of costs and benefits but ultimately prefer quantitative analysis and, most specifically, welfare economics CBA, to which a preponderant amount of space is devoted in the Better Regulation guidelines. The Regulatory Scrutiny Board scrutinizes whether the impact assessment has been performed adequately, and the Board has the right to veto proposals that do not meet its standards of evidence.

Once the TTIP institutions (or eventually sectoral agreements) are in place, the same regulation would be included in 'the list of preparatory acts', where each state party must compile all those regulations that are likely to pose a barrier to trade (the majority of regulations, if divergent, constitute such barriers). This list will assist the counter-party and its stakeholders to identify which proposals are impediments to market access or their other interests. If such impediments are identified, the US may then request the engagement of bilateral exchange, or refer the issue to the Transatlantic Regulators' Forum or a sectoral committee. Special concern is afforded to joint submissions by stakeholders from both sides of the Atlantic.

Whichever TTIP body treats the issue, it will be an institutional context in which the proposal has to be explained and justified. Let us recall some of the main institutional characteristics of the TTIP bodies. They will be composed mainly of trade officials and regulatory affairs officials, the majority of whom will view the world as being composed of barriers and red tape impeding efficient market functioning. From the European side, we refer to DG trade officials and members of the Secretariat General of the European Commission, responsible for the coordination of regulatory activities; from the US side, delegates of the US Trade Representative and OIRA. The officials of other DGs, or US agencies, will be a minority both in numbers and likely also in terms of their normative influence in these institutions. It is submitted, thus, that in such a constellation we may expect the TTIP framework to become a vehicle to pressure for the quantification of measures through the more 'solid' US-like welfare economics CBA.

Finally, an interesting dynamic emerges between the TTIP mechanism and the Regulatory Scrutiny Board. If a particular DG has been advised by the TTIP bodies that either its 'numbers' are not right, or sufficiently robust, or its science is not 'sound', the Regulatory Scrutiny Board may veto such proposals. The TTIP advice will anyhow

correspond to the tools envisaged, or even prioritized, by the Better Regulation guidelines.

5. Conclusion

The TTIP institutional framework of regulatory cooperation has often been presented as an innocuous space for regulatory learning and exchange. Yet institutions rarely ever present an institutionally 'neutral' stage, free of politics. Rather, institutions in general, and the TTIP's institutions in particular, will both constrain some types of exchange while enabling others, and allow for some kinds of learning while impeding others.

This article has aimed to offer a framework for the analysis of institution-making beyond the state. Incorporating insights from law and political science, I have suggested that any such analysis needs to focus on three levels of inquiry: (a) the normative overflow of the objectives of functional integration, (b) the structure and composition of emergent institutions, primarily from the perspective of the kinds of knowledge and expertise that are likely to prevail and, finally, (c) the study of the instruments of governance, such as regulatory impact assessments and cost-benefit analysis. This level of inquiry also asks which empowered stakeholders are supposed to bring the 'new' institution/market into life.

With this lens, I have proceeded to analyse TTIP's regulatory cooperation, which is often presented by proponents as a mere space for learning and exchange, or discounted by lawyers for its inability to produce legally binding decisions. I have suggested that the type of regulatory cooperation envisaged by the TTIP could have far more impact than often acknowledged. It could change the institutional landscape in both the EU and the US, re-positioning various participants in the political struggle over market regulation, creating asymmetries as to who has access to these new institutional spaces and what kind of issues will be raised and discussed and, finally, limiting the array of available solutions to common problems.

While the proposed analytical framework may find broad applicability in the study of transnational institutions, I acknowledge that the specific evaluation of the institutional dynamics in each particular case ultimately requires the appreciation of political and economic facts that evade any linear methodological framing. The possibility of different interpretations should not, however, discourage scholars from engaging

in such evaluative/predictive exercises. It is of crucial importance that legal scholars with diverse sensitivities (administrative lawyers, international lawyers, trade lawyers, EU lawyers and so forth) engage with the institutions whose importance transcends any of those particular fields and which, sooner or later, may govern our lives in perhaps subtle but profound ways.