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Legal Convergence Through Soft Law? The EU–US Trade and Technology Council (TTC)

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An EU–US Trade and Technology Council (TTC) has been a key element of transatlantic cooperation in trade and technology in global challenges against a backdrop of decades of complex disputes, regulatory cooperation failures and minimalistic combined multilateralism. It was by intent seeking to move beyond regulatory cooperation and instead was to focus upon policy and shared global challenges. The TTC has evolved during a US administration prioritizing soft law in international economic law, arguably increasingly influencing the EU. The TTC has a complex and bifurcated approach to law that is explored here, arguably evident of its post-Transatlantic Trade and Investment Partnership (TTIP) identity in an era of a shift away from trade agreements. This paper argues that its soft law structures, executive to executive set-up and wide-ranging emphasis on international law-making goals contrasts considerably with certain developments in EU–US data and digital trade governance, involving hard law solutions. The TTC aligns well with broader trends in international economic law preferring soft law solutions. The TTC raises questions as to the place of global law-making goals in the complex transatlantic relationship. It examines its overtly legalistic framing yet heavily delegatized outcomes using soft law, grounded in international law references.

Keywords: EU-US, Trade and Technology Council, TTC, Transatlantic, Cooperation, Convergence, EU, US, external relations, data, trade, international law

1 INTRODUCTION: EU–US TRADE AND TECHNOLOGY COOPERATION – BEYOND COOPERATION FAILURES AND DIVERGENCE

Transatlantic data flows currently amount to some of the most significant for the global economy.¹ Even in the midst of a global pandemic, the transatlantic economy amounted to one third of global GDP.² At the announcement of a

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¹ US Chamber of Commerce, *Transatlantic Data Flows: Moving Data With Confidence* (20 Sep. 2021), <https://www.uschamber.com/technology/data-privacy/transatlantic-dataflows> (accessed 1 Oct. 2024).

² Daniel S. Hamilton & Joseph P. Quinlan, *The Transatlantic Economy 2021*, US Chamber of Commerce (2021), www.amchameu.eu/sites/default/files/publications/files/transatlanticeconomy2021_fullreport.pdf; Daniel S. Hamilton & Joseph P. Quinlan, *The Transatlantic Economy 2023*, US Chamber of Commerce (2023) *Transatlantic-Economy-Report-2023.pdf* (transatlanticrelations.org).

Transatlantic Data Privacy Framework (DPF), it stressed that more data flows between the United States and Europe than anywhere else in the world, enabling the USD 7.1 trillion US–EU economic relationships.³ The Transatlantic Trade and Investment Partnership (TTIP), the largest scale form of transatlantic collaboration in recent history, expressly excluded data flows from its negotiations.⁴ The US shift towards the need for comprehensive privacy laws has considerably altered this debate, arguably moving closer to EU values. Transatlantic law-making thus matters, significantly for reasons of its scale, values and effects. The contemporary salience of trade and technology has thus unsurprisingly perhaps led to closer transatlantic cooperation in the form of a Trade and Technology Council (TTC) in late 2021, deeply embedded in global law-making goals and global standards, appearing to wrap up in 2024.

After the CJEU struck down the EU–US Privacy Shield in *Schrems II*, the EU and US finally agreed in 2022 a new Transatlantic DPF principle, to include a two-tier redress system in the form of ‘transatlantic court’ and independent oversight with a view to enabling an adequacy decision data flow agreement swiftly adopted, undergirded by an Executive Order, rather than Congressional legislative action.⁵ The DPF constitutes a highly significant development. In the US, a proposal for federal (US-wide) privacy legislation has been slowly underfoot and EU law-inspired principles are establishing a stronger foothold, e.g., American Law Institute Principles of Data Privacy 2020 and H.R.8152 – American Data Privacy and Protection Act (2021–2022) and the introduction by nearly eighteen states of comprehensive privacy laws.⁶ The reality of a much more complex convergence may nonetheless result, with the US evolving a Global Cross-Border Privacy Rules (CBPR) despite its agreement to the DPF and its

³ The White House Fact Sheet, *United States and European Commission Announce Trans-Atlantic Data Privacy Framework* (25 Mar. 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-trans-atlantic-data-privacy-framework/> (accessed 1 Oct. 2024).

⁴ European Commission, *Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-commerce* (31 Jul. 2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf (accessed 1 Oct. 2024).

⁵ European Parliament, *Reaching the EU–US Data Privacy Framework: First Reactions to Executive Ord. 14086* (14 Dec. 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739261/EPRS_BRI\(2022\)739261_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739261/EPRS_BRI(2022)739261_EN.pdf) (accessed 1 Oct. 2024); European Commission, *Commission Implementing Decision of 7 Oct. 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU–US Data Privacy Framework*, C(2023) 4745 final (2023); *Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities*, Executive Ord. 14086 (7 Oct. 2022); European Commission, *Commission Implementing Decision of 7 Oct. 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU–US Data Privacy Framework*, C(2023) 4745 final (Brussels 10 Jul. 2023).

⁶ See The American Law Institute (ALI), *Principles of the Law, Data Privacy* (2020); Elaine Fahey, *The EU as a Global Digital Actor: Institutionalising Global Data Protection, Trade, and Cybersecurity*, Ch. 1 (Bloomsbury publishing 2022); IAPP, *US State Privacy Legislation Tracker 2024*, IAPP (2024), <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/> (accessed 1 Oct. 2024).

independent Court and putative alignment with EU values, in the midst of EU–US TTC cooperation.⁷

Much EU–US cooperation has been complex and non-binding – with ultimately no comprehensive trade agreement ever.⁸ The TTC takes place ‘post-TTIP’ in the aftermath of a failed megaregional trade agreement negotiation. It is thus a complex long aftermath of many failed EU–US negotiations and grand ambitions. It is also a period of time where the EU has evolved a trade defence, strategic autonomy and unilateralism agenda arguably on account of its experiences of the US Trump administration and a significant geopolitical turn. The TTC was explicit in its ambitions to move away from regulatory cooperation as an objective towards global challenges resolutions instead. As a result, the legal nuances in its process and methods are of note. As two of the most significant global actors their actions together are still of much importance. The EU–US relationship thus intensified in theory in the form of a TTC, proposed by the EU in late 2020 to the new Biden administration and already in place by Autumn 2021 and through several iterations after a short number of years through to the end of the Biden administration. A ‘TTC’ is, however, a novelty in EU law terms, as will be developed here.

The TTC was set up to hold ‘executive to executive’ meetings on both sides of the Atlantic, as a means of deepening bilateral engagement, particularly after the years of Trump administration hostility.⁹ The TTC was intended to meet

⁷ This logic of significant convergence and divergence as between the EU and US is borne out also as to the US itself where its own digital policies internally and externally have appeared divergent. For instance, in 2024, the US Department of state released the United States International Cyberspace and Digital Policy Strategy. The strategy purportedly ‘focuses on building broad digital solidarity’ yet appears to conflict with US export controls on semiconductors (AI infrastructure), potential export controls on AI, as well as restrictive policies on data exports to certain nations. US Department of state, *United States International Cyberspace & Digital Policy Strategy* (2024), <https://www.state.gov/united-states-international-cyberspace-and-digital-policy-strategy/> (accessed 1 Oct. 2024).

⁸ *Council Decision of 22 Jun. 1998 on the conclusion of an Agreement on Mutual Recognition between the European Community and the United States of America 1999/78/EC*, OJ L 31, 1–2 (4 Feb. 1999) on telecommunications equipment; electromagnetic compatibility; electrical safety; recreational craft; pharmaceutical good manufacturing practices (GMPs); medical devices. Even its most significant policy instruments, perhaps dating to the 1990s onwards–have not been legally ‘binding’ or in durable legal agreements: Mark Pollack, *The New Transatlantic Agenda at Ten: Reflections in an Experiment in International Governance*, 43 J. Com. Mkt. Stud. 899, 902, 916 (2005), doi: 10.1111/j.1468-5965.2005.00601.x.

⁹ It is self-described to serve as a forum for the EU and US to coordinate approaches to key global trade, economic, and technology issues and to deepen transatlantic trade and economic relations based on shared democratic values: European Commission, *EU–US Trade and Technology Council Inaugural Joint Statement* (29 Sep. 2021), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_4951 (accessed 1 Oct. 2024); The Trade and Technology Dialogue (TTD) supports the EU–US Trade and Technology Council with stakeholder activities and analysis. TTD activities are published on the EU platform Futurium, via the EU platform for engagement; see EU–US Trade and Technology Dialogue, <https://futurium.ec.europa.eu/en/EU-US-TTC/pages/eu-us-trade-and-tech-nology-dialogue> (accessed 1 Oct. 2024) and Futurium, <https://futurium.ec.europa.eu/en> (accessed 1 Oct. 2024).

‘periodically at political level to steer the cooperation’, co-chaired by European Commission Executive Vice-President and EU Competition Commissioner, and European Commission Executive Vice-President and EU Trade Commissioner, on the EU side; and US Secretary of state, US Secretary of Commerce (USTR), and US Trade Representative (TR), on the US side.¹⁰ It has become a twice-yearly ministerial and involved many officials initially in locations outside of conventional capital cities and has evolved considerably.¹¹ Alongside this, further work was set up in the form of EU–US Inflation Reduction Act (IRA) Task Force to find solutions to ‘European concerns’ as to the US IRA, a hugely significant piece of legislation of much concern to the EU for its divergences and competition as to key areas of policies with the EU and its subsidy provisions.¹²

The TTC is a ‘soft law’ vehicle in the form of a ‘Council’ meaning that it operates *outside* of Article 218 TFEU and is not a trade negotiation nor bound by EU external relations law practices or institutional framework as to its end point. Article 218 TFEU deals with the different stages of the life of an EU international agreement, negotiations, signature, termination, some aspects of execution, as well suspension contractual commitments. It uses the expression ‘agreement’ in a general sense, to define any commitment of a binding character, entered into by the subjects of international law, regardless of its form as the CJEU provided for in Opinion 1/75.¹³ It is a ‘procedural code’ for treaty-making, applies to most international agreements – of a constitutional character.¹⁴ It begs the question as to the scale of law-making and international cooperation outside of Article 218 TFEU and its lawfulness. It might be said to be exclusionary of EU institutions and raise transparency issues.¹⁵ Any ‘exclusion’ is formally compensated for by a long-standing Transatlantic Legislators Dialogue and recently TTC ‘forums’ or working groups, where stakeholders have been organized in a series of dialogues. These, however, are arguably less convincing alternatives.¹⁶

The TTC took place during a US administration prioritizing soft law in international economic law, arguably increasingly influencing the EU.¹⁷ The

¹⁰ European Commission, *EU–US Launch Trade and Technology Council to Lead Values-based Global Digital Transformation* (15 Jun. 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990 (accessed 1 Oct. 2024).

¹¹ Often associated with distance or regeneration e.g., Saclay, outside of Paris, Pittsburgh, Pennsylvania, Maryland, Luleå, in northern Sweden and then Leuven as a means of showing its ‘difference’.

¹² Inflation Reduction Act (IRA) of 2022, H.R. 5376, 117th Cong. (2022).

¹³ *Opinion 1/75 Opinion of the Court of 11 Nov. 1975*, ECLI:EU:C:1975:145.

¹⁴ Alan Dashwood et al., *Wyatt and Dashwood’s European Union Law* 936 (6th ed., Hart Publishing 2011).

¹⁵ Ramses A Wessel, *Normative Transformations in EU external Relations: The Phenomenon of ‘Soft’ International Agreements*, 44(1) W. Eur. Pol. 72 (2021), doi: 10.1080/01402382.2020.1738094.

¹⁶ Elaine Fahey, *The ‘Sidelining’ of the European Parliament from the EU–US Trade and Technology Council (TTC): TTC(s) as Post-democracy Divas or Disasters?*, EU Law Analysis (25 Apr. 2023), <http://eulawanalysis.blogspot.com/2023/04/the-sidelining-of-european-parliament.html> (accessed 1 Oct. 2024).

¹⁷ How long would run appeared unclear from the outset.

term ‘free trade agreement’ has not been defined in US law or in EU law and ambiguity as to the term ‘trade agreement’ or the reflection that free trade agreements are ‘old-fashioned’ has been central to the philosophy of the US TR during the Biden administration.¹⁸ Meanwhile, the EU began a ‘similar’ TTC with India as part of a pivot in its external relations to soft digital partnerships.¹⁹ Any similarity, however, seems difficult to assess. The temporal dimension of how long such councils can and will operate is also difficult to estimate, not least what they can achieve.²⁰ The TTC, as a result, forms a reasonably unique study of considerable global law-making ambitions and objectives in contemporary times. Yet the context of transatlantic relations, itself a rich tapestry of innovations in the area of data transfers between two of the largest global players in trade and technology, may lend the case study of the TTC more significance. Indeed, the advantages of global goals, standards and regimes have been proposed by the EU and US to have advantages for efficiency, safety, security, costs and also innovation, to enable growth rather than ‘reinventing the wheel’. From a legal perspective, it is a significant shift away from regulatory cooperation as a law-making goal.²¹ However, it is also very collaborative on key policy goals e.g., mapping exercises in AI working groups to align terminology and concepts.

EU–US relations have long had mainly ‘soft’ law goals, instruments and outputs as their *modus operandi*.²² The TTC appears to formalize the soft law character increasingly of EU external relations and even ‘proceduralize’ it for bilateral relations. This, however, is a phenomenon that is increasingly normalized in EU external relations across the board, from trade, to migration and even in matters digital/ data.²³ Nonetheless, this does not mean that conventional international relations procedures have been neglected entirely. Rather, law-making appears rendered narrower, ‘esoteric’ and more focused – in lieu of broader trade agreements, e.g., critical mineral agreements have been under

¹⁸ Kathleen Claussen, *What Is a Free Trade Agreement, Anyway?*, International Economic Law & Policy Blog (23 Jan. 2023) <https://ielp.worldtradelaw.net/2023/01/what-is-a-free-trade-agreement-anyway.html> (accessed 1 Oct. 2024); Kathleen Claussen, *Trade's Mini-Deals*, 62 Va. J. Int'l L. 315 (2022).

¹⁹ The EU announced the establishment of digital partnerships with Asian countries: Japan, South Korea and Singapore recently and also Canada.

²⁰ European Commission, *EU–India: New Trade and Technology Council to Lead on Digital Transformation, Green Technologies and Trade* (6 Feb. 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_596 (accessed 1 Oct. 2024).

²¹ Alasdair Young, *The Transatlantic Regulatory Relationship: Limited Conflict, Less Competition and a New Approach to Cooperation* in *The Routledge Research Handbook of Transatlantic Relations* (Elaine Fahey ed. 2023).

²² Fahey, *supra* n. 6; *Transatlantic Governance in the Global Economy* (Mark A. Pollack & Gregory C. Shaffer eds, Rowman & Littlefield Publishers 2001). Sabine Saurugger & Fabien Terpan, *Normative Transformations in the European Union: On Hardening and Softening Law*, 44(1) W. Eur. Pol. 1 (2021), doi: 10.1080/01402382.2020.1762440.

²³ Wessel, *supra* n 15, at 72.

development.²⁴ Thus key legal ‘irritants’ of convergence have emerged in the TTC discussions and have been dealt with using Article 218 TFEU processes. Thus in March 2023, in the midst of the TTC, the EU and the US launched talks on trade agreement on critical minerals agreement (CMA) with the purpose of enhancing international supply chains of critical minerals and related sectors and mitigate some of the negative repercussions of the LCRs under the IRA pursuant to Article 218 TFEU.²⁵ This ‘binding’ or ‘hard law’ solution for US reasons only i.e., US driven-trade facilitation critical raw materials extracted/processed in the EU can be used in vehicles eligible for the US Clean Vehicle Credit subsidies. Notably, a Mineral Security Partnership (MSP) Forum was launched alongside other Minerals Security Partnership (MSP) partners in the sixth TTC and by the sixth TTC a EU–US ‘CMA’ was still ‘work in progress’. Its character here being pursued in both the TTC and erstwhile as an Article 218 TFEU agreement is thus notable. CMAs of the US with other partners e.g., Japan, UK *without* US parliamentary approval appears also notable.²⁶

As will be outlined, the global objectives of EU–US relations appear to have ratcheted up each TTC meeting, couched first in both ‘hard’ and ‘soft law’ as will be outlined below, yet evolving as soft law between imbalanced objectives on trade and technology. Still, international cooperation through global goals and internationalization has been prioritized over international law agreements. Contrariwise, convergence on areas such as transatlantic privacy has occurred around the same time as the TTC in areas outside of *stricto sensu* but close to TTC objectives in the form of hard law.²⁷

²⁴ Negotiations of an agreement with the United States of America on strengthening international supply chains of critical minerals: European Commission, *Recommendation for a Council Decision Authorising the Opening of Negotiations of an Agreement With the United States of America on Strengthening International Supply Chains of Critical Minerals*, COM(2023) 327 final; Art. 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU), OJ C 326/47 (26 Oct. 2012).

²⁵ European Commission, *Recommendation for a Council Decision Authorising the Opening of Negotiations of an Agreement With the United States of America on Strengthening International Supply Chains of Critical Minerals*, COM(2023) 327 final; Art. 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU), OJ C 326/47 (26 Oct. 2012); Council of the EU, *Trade With the United States: Council Authorises Negotiations on EU-US Critical Minerals Agreement* (20 Jul. 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/07/20/trade-with-the-united-states-council-authorises-negotiations-on-eu-us-critical-minerals-agreement/#:~:text=14%3A20-,Trade%20with%20the%20United%20States%3A%20Council%20authorises%20negotiations,EU%2DUS%20Critical%20Minerals%20Agreement&text=The%20Council%20today%20adopted%20a,and%20the%20related%20negotiating%20directives> (accessed 1 Oct. 2024).

²⁶ Example, Critique of non-binding UK-US Atlantic Declaration, see UK Government, *UK and US Launch First-of-Its Kind Economic Partnership* (8 Jun. 2023), <https://www.gov.uk/government/news/uk-and-us-launch-first-of-its-kind-economic-partnership> (accessed 1 Oct. 2024).

²⁷ An EU–US Transatlantic Privacy Agreement and Court is an important outcome from the same Biden administration. Significant transatlantic divergence has also emerged – e.g., the US has passed the

Notably, the TTC outcomes are mainly ‘soft law’.²⁸ The soft law/ hard law dynamic is far from trivial as a background context. Certain pieces of EU legislation are under development with sovereigntist elements excluding foreign operators e.g., cloud certification also cause concern in the evolution of cyber law and policy between the EU and its international partnership.²⁹ EU and US Chips Acts under development mirror each other’s lexicon but also amount further to a complex subsidies race taking place outside of the TTC but linked to its content.³⁰ Certain complex bilateral actions between EU Member States and the US may also render its framing hard to fathom. For example, in 2023, in the midst of the TTC evolution, the Netherlands and Japan agreed with the US to impose controls on the export of certain semiconductors and related products to China.³¹ Strikingly, in the midst of TTC cooperation, in two rounds of restrictions on 7 October 2022³² and 17 October 2023,³³ the US imposed sweeping (extraterritorial) export controls on semiconductors and semiconductor manufacturing equipment (SME) to China and put pressure upon its allies, including the Netherlands, a major producer thereof to institute similar measures in their respective jurisdictions.³⁴

Inflation Reduction Act (IRA) 2022 in the midst of the TTC cooperation – all taking effect outside of the TTC and involving hard law solutions; IRA, *supra* n. 12.

²⁸ *TTC Joint Roadmap on Evaluation and Measurement Tools for Trustworthy AI and Risk Management*, NIST (1 Dec. 2022), https://www.nist.gov/system/files/documents/2022/12/04/Joint_TTC_Roadmap_Dec2022_Final.pdf (accessed 1 Oct. 2024).

²⁹ European Union Agency for Cybersecurity, *EUCS – Cloud Services Scheme* (22 Dec. 2020); Kenneth Propp, *European Cybersecurity Regulation Takes a Sovereign Turn*, European Law Blog (12 Sep. 2022), <https://europeanlawblog.eu/2022/09/12/european-cybersecurity-regulation-takes-a-sovereign-turn/> (accessed 1 Oct. 2024).

³⁰ See Chips and Science Act of 2022, H.R. 4346, 117th Cong. (2021–2022); European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe’s semiconductor ecosystem (Chips Act)*, COM(2022) 46 final. See also The White House, *CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China* (9 Aug. 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/> (accessed 1 Oct. 2024).

³¹ See Peiter Haek, *EU Sidelined in US-Dutch Deal to Block Chips Exports to China*, Politico (31 Jan. 2023), <https://www.politico.eu/article/eu-sidelined-in-us-dutch-deal-to-block-chips-exports-to-china/> (accessed 1 Oct. 2024); Anh Nguyen, *The Discomfort of Extraterritoriality: US Semiconductor Export Controls and Why Their Chokehold on Dutch Photolithography Machines Matter*, EJIL Talk (1 Dec. 2023), <https://www.ejiltalk.org/the-discomfort-of-extraterritoriality-us-semiconductor-export-controls-and-why-their-chokehold-on-dutch-photolithography-machines-matter/> (accessed 1 Oct. 2024); Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology*, Ch. 5 (2023).

³² Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC) (*Bureau of Industry and Security* 7 Oct. 2022) <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file> (accessed 1 Oct. 2024).

³³ Commerce Strengthens Restrictions on Advanced Computing Semiconductors, Semiconductor Manufacturing Equipment, and Supercomputing Items to Countries of Concern (*Bureau of Industry and Security* 17 Oct. 2023), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3355-2023-10-17-bis-press-release-acs-and-sme-rules-final-js/file> (accessed 1 Oct. 2024).

³⁴ The EU and US concluded an interim agreement on WTO Boeing-Airbus subsidies disputes in 2021 and have been in the process of negotiating an agreement on steel and aluminium tariffs abolition by the US in exchange for lifting countermeasures imposed by the EU.

In this regard then, whilst it may also explain these developments, the TTC could be said to be developing a loose ‘institutionalization’ of key bilateral and also global challenges. This is because of its formalization, its structure and its new nomenclature and commitments to a soft law forum.³⁵

This article thus explores the initial set up of international law goals of the TTC in its foundational statements and its implementation of a soft law regime. It focusses predominantly upon six of the meetings to date spanning a period from 2021–2024, examining its initial legal tools, goals and evolving outcomes and the place of law therein. The article considers the use of international law and evolving soft law outcomes. It outlines how the TTC attempts to formalize this soft law character against a more complex backdrop of EU–US relations of hardening legal convergence *and* divergence. It shows how, irrespective of use and framing, the TTC is a rich but paradoxical study of ambitions as to law-making.

Section I considers International law in the EU–US relationship; section II assesses framing global law-making in times of transatlantic soft law-based cooperation outside of international organizations (IOs); section III reflects the framing of TTC ‘international’ outcomes, while section IV TTC as an escalation of soft law in EU–US relations.

2 THE PLACE OF INTERNATIONAL LAW IN THE EU–US RELATIONSHIP

The EU and US conduct relations pursuant to an extensive network of international agreements, with approximately more than thirty-five in all although their views on international law vary greatly.³⁶ On one level, EU and US membership of IOs tends to be somewhat similar and also historically the basis for many key multilateral organizations.³⁷ However, many differences exist between the EU and US as to what their shared understanding of international law and international agreements are, even just from a practical perspective.³⁸ These differences although numerical clearly indicate very difference approaches and preferences to

³⁵ See Fahey, *supra* n. 6.

³⁶ US Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on 1 Jan. 2020* (2020); Keneth Propp, *A US Perspective on Negotiating with the European Union* in *The Routledge Handbook of Transatlantic Relations* (Elaine Fahey ed. 2023); Joris Larik, *The New Transatlantic Trigonometry: Brexit and Europe's Treaty Relations With the United States*, 40 U. Pa. J. Int'l L. 1 (2018).

³⁷ Charles Roger, *Making Transatlantic Governance Work*, in *The Routledge Handbook of Transatlantic Relations* (Elaine Fahey ed. 2023).

³⁸ Larik, *supra* n. 36 at 19–24; see also Mark A Pollack, *Who Supports International Law, and Why: The United States, the European Union, and the International Legal Order*, 13 Int'l J. Const'l L. 873 (2015), doi: 10.1093/icon/mov053.

international law, that are played out in a variety of ways—including to a degree in the TTC but not impractically so as to preclude cooperation.

More substantively, when it comes to international leadership and compliance the contrast between Europe and the US has been ‘stark’ where in the areas of human rights, environmental regulation, and international criminal law European countries have demonstrated a greater willingness to commit to international legal obligations.³⁹ It is also understood to have effects whereby a ‘common charge that the US has withdrawn from its post-war leadership role, acting not as a leader but as a laggard in the negotiation of international treaties ... the mantle of leadership has passed to the EU’⁴⁰ Much divergence exists between the EU and US as to the place of IOs such as the WTO. Reform of the WTO appears to have a continuously complex place in EU-US cooperation despite its salience to global cooperation in an age of trade and technology enhanced law and governance requirements.⁴¹ It has an even more awkward placement in the TTC, often mentioned but not the real focus nor the locus of its global ambitions, which are broader and policy-linked.⁴² This ‘displacement’ of more conventional international economic law forums is thus symbolic— but also of practical significance.

Transatlantic relations are no stranger to a series of ‘innovative’ legal measures, hybridity or even soft law. There have been many so-called transatlantic dialogues over the years. Accordingly, the TTC matters on account of its attempts to *formalize* these dialogues in a series of working groups, executive to executive.⁴³ Still international law and IOs are a prominent part of the transatlantic relationship. Informal IOs are also said have rapidly become a prominent feature of governance in the Transatlantic relationship.⁴⁴ In fact, some frame this as a shift towards informality in times of the proliferation of soft law where international agreements have become more complex to align to, politically and legally-driven by the US – a view arguably confirmed by the TTC.⁴⁵

³⁹ Pollack, *supra* n. 38.

⁴⁰ Daniel Kelemen & David Vogel, *Trading Places: The Role of the United States and the European Union in International Environmental Politics*, 43 Comp. Pol. Stud. 427 (2010), doi: 10.1177/0010414009355265.

⁴¹ Daniel Hamilton, *Getting to Yes: Making the US–EU Trade and Technology Council Effective (Summary Brief)*, Transatlantic (6 Mar. 2022), <https://www.transatlantic.org/wp-content/uploads/2022/03/TTC-summary-brief-final-Mar.-6-2022.pdf> (accessed 1 Oct. 2024).

⁴² Meanwhile some key larger countries pursue the MPIA option. Working Group 10 on global trade challenges, industry and academia focussed upon the need for WTO reform to be prioritized as a transatlantic goal, emphasizing the acute necessity of multilateralism within this bilateral engagement.

⁴³ Pollack & Shaffer eds, *supra* n. 22 at 25–34, 298; Maria Green Cowles, *The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue* in Pollack & Shaffer eds, *supra* n. 22, at 213; Francesca Bignami & Steve Charnovitz, *Transnational Civil Society Dialogues*, in Pollack & Shaffer eds, *supra* n. 22; *Lack of Transparency Could Thwart the Strong Consumer Safeguards That Must Be the Goal of EU–US Cooperation Dialogues*, Trans-Atlantic Consumer Dialogue (28 Sep. 2021), <https://tacd.org/eu-us-organisations-transparency-ttc-pr/> (accessed 1 Oct. 2024).

⁴⁴ Charles B. Rogers, *The Rise of Informal International Organizations*, in *The Routledge Handbook of Transatlantic Relations* (Elaine Fahey ed. 2023).

⁴⁵ Charles Rogers, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters* (2020).

The paper thus next considers the specific place of global law-making goals as part of the ambitions of the TTC from a legal perspective. It focuses upon objective-setting in TTC meetings, instruments used in joint statements and legal outcomes of the expressed goals.

3 TTC AND ITS GLOBAL LAW-MAKING GOALS: ON INTERNATIONAL SOURCES USED

The TTC has been constructed upon ten specific working groups: Technology Standards Cooperation, Climate and Clean Tech, Secure Supply Chains, ICT Security and Competitiveness, Data Governance and Technology Platforms, Misuse of Technology Threatening Security & Human Rights, Export Controls Cooperation, Investment Screening Cooperation, Promoting SME Access to and Use of Digital Technologies and Global Trade Challenges.⁴⁶ Notably, seven of the ten working groups address themes that refer to technology either with a security angle or from a competition perspective.⁴⁷

The TTC is also predicated upon multiple working groups that align with a formula of flexibility. Their topics are expansive and cross-cutting: i.e., Technology Standards Cooperation, Climate and Clean Tech, Secure Supply Chains, ICT Security and Competitiveness, Data Governance and Technology Platforms, Misuse of Technology Threatening Security & Human Rights, Export Controls Cooperation, Investment Screening Cooperation, Promoting SME Access to and Use of Digital Technologies and Global Trade Challenges.⁴⁸ Each of the themes is a vast subject field in its own right and it unclear per se the precise underpinnings of its range. From an EU law perspective, it spans a vast range of EU competences, from trade to environment to defence. This huge span of work possibly raises the question why EU institutional actors have appeared excluded where the procedures take place outside of Article 218 TFEU.⁴⁹

⁴⁶ See EU-US Trade and Technology Council Website, <https://futurium.ec.europa.eu/en/EU-US-TTC> (accessed 1 Oct. 2024).

⁴⁷ Working groups: (1) Technology Standards (2) Climate and Clean Energy (3) Secure Supply Chains (4) Information and Communication Technology and Services (ICTS) Security and Competitiveness (5) Data Governance and Technology Platforms (6) Misuse of Technology Threatening Security and Human Rights (7) Export Controls (8) Investment Screening (9) Promoting Small-and Medium-sized Enterprises (SME) Access to and Use of Digital Tools (10) Global Trade Challenges.

⁴⁸ See EU-US Trade and Technology Council Website, *supra* n. 46.

⁴⁹ See Elaine Fahey, *On the Benefits of the Transatlantic Trade and Investment Partnership (TTIP) Negotiations for the EU Legal Order: A Legal Perspective*, 43(4) Legal Issues Econ. Integ. 327 (2016), doi: 10.54648/LEIE2016017.

International soft law, agreements and standards have thus heavily informed the work of the TTC EU–US TTC in its framing less so its outputs as will be developed here. A very rough estimate conducted by the present author suggests that at least fifty-three international declarations, recommendations, organizations, agreements, instruments or standards are referenced in the TTC. These are grouped here as ‘international law sources’.⁵⁰ The precise tally is complicated by the fact that there are a multiplicity of references to instruments by different names and a wide range of terminology deployed across documents of the TTC, mostly less legal i.e., not referencing fully and consistently through their official name.⁵¹ It nonetheless as a very significant placement of the ‘international’ at the heart of this bilateral effort.

The formulae of over fifty sources include leading multilateral instruments, significant soft law declarations and a variety of instruments reflects best practice international consensus or IO.⁵² The US has played a key role in drafting numerous international treaties and documents on human rights. However, it has ratified or is otherwise bound to only a handful of treaties in their entirety e.g., Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This position is reflected in the in the TTC. The vast majority of international law measures or instruments referenced in the TTC had EU Member State membership and with only a small number where the US has more patchy US membership reflecting broader US engagement with international law e.g., UNCLOS, which the US has neither signed nor ratified.⁵³ This patchier membership is symptomatic of US engagement with international law.⁵⁴ Still, most instruments are not per se international treaties and probably as a result the combined membership is high.

⁵⁰ Thanks to Ivanka Karaivanova for assistance in compilation of the table.

⁵¹ For instance, the WTO law, which is referred to as ‘WTO law’, ‘WTO rules’, ‘WTO principles’, ‘WTO rulebook’ and ‘WTO regime’, or the vague reference to ‘Special Drawing Rights by the IMF for Africa’ without providing the specific year, or to ‘ILO’s due diligence guidance’ which is, in fact, an endorsement to the UN Guiding Principles on Business and Human Rights (UNGPs), the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) and the OECD Guidelines for Multinational Enterprises.

⁵² Cecilia Bonefeld-Dahl, *Becoming tech allies: 24 targets for the EU-US Trade & Technology Council by 2024*, Digital Europe (2 Feb. 2022), <https://www.digitaleurope.org/resources/becoming-tech-allies-24-targets-for-the-eu-us-trade-technology-council-by-2024/> (accessed 1 Oct. 2024).

⁵³ See *US–EU Summit Statement: Towards a Renewed Transatlantic Partnership*, para. 26 (15 Jun. 2021, Brussels), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2990 (accessed 1 Oct. 2024).

⁵⁴ See *supra* n. 36.

*Table of international law instruments. Compilation of the author**Table of International Law Instruments*

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1. 'Rome Declaration' principles
 2. Outcomes of the World Health Assembly
 3. World Health Organization governance in general
 4. UN 2030 Agenda for Sustainable Development
 5. G20 Common Framework for debt treatment
 6. UNFCCC Paris Agreement
 7. UN Environment Assembly
 8. UN Ocean Conference
 9. UN Intergovernmental Conference on Marine Biodiversity beyond National Jurisdiction
 10. G20/OECD Inclusive Framework on Base erosion and profit shifting (BEPS)
 11. World Trade Organization law in general
 12. Galileo – GPS Agreement
 13. Multilateral institutions for democracy, peace, and security in general, including UN Human Rights Council
 14. International humanitarian law
 15. UN Convention on the Law of the Sea (UNCLOS)
 16. UN Security Council Resolution 2254
 17. UN's proposal for an immediate ceasefire in Libya
 18. OHCHR investigations in Africa
 19. Special Drawing Rights by the IMF for Africa
 20. Joint Comprehensive Plan of Action (JCPOA)
 21. 2016 and 2018 Joint Declarations on NATO-EU Cooperation
 22. Coordination in multilateral bodies (in general), including in the WTO
 23. OECD Guidelines with respect to investment screening
 24. General reference to the parties' international obligations and commitments as to trade in dual-use goods
 25. Promotion of multilateral approach to export controls
 26. OECD Guidelines for Recipient Country Investment Policies Relating to National Security of 2009
 27. Promotion of the respect for human rights and international humanitarian law
 28. Promotion of multilateral approach to export controls and multilateral rules-based trade
 29. Internationally-agreed standards relating to export controls
 30. General Agreement on Tariffs and Trade (GATT)
 31. Multilateral export control regimes
 32. Multilateral and international cooperation
 33. OECD Recommendation on Artificial Intelligence (AI)
 34. FTAs and unilateral measures that concern fundamental labour rights
 35. Cooperation in the ILO, WTO, and other appropriate multilateral for a; Declaration of the Future of the Internet; International standards activities for critical and emerging technologies
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36. 2021 Ministerial Declaration of the G7 Digital and Technology Ministers' meeting
 37. Internationally-recognized labour rights
 38. International standardization organizations
 39. International standards regarding AI systems
 40. Facilitation of bilateral and multilateral cooperation
 41. The International Energy Agency ('IEA')
 42. World Trade Organization Agreement on Technical Barriers to Trade (TBT Agreement)/ WTO law/ standardization
 43. Universal Declaration of Human Rights
 44. Multilateral mechanisms related to data governance and platform governance
 45. G7 Rapid Response Mechanism
 46. Multilateral engagement, including with and within the United Nations, in particular the Office of the United Nations High Commissioner for Human Rights ('OHCHR') and UN Special Procedures
 47. International human rights law
 48. Multilateral engagement, including at the UN
 49. 49th session of the United Nations Human Rights Council
 50. Work in the framework of other international for a; G7 Rapid Response Mechanism ('RRM')
 51. Coordinating in the Organization for Economic Cooperation and Development ('OECD') International Labour Organization ('ILO'), United Nations, G7, G20, WTO, and other multilateral organizations
 52. ILO's new global forced labour estimate; due diligence guidance & international guidelines
 53. Operation of the network of National Contact Points in the OECD
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4 THE FRAMING OF TTC 'INTERNATIONAL' OUTCOMES

Table of TTC outcomes. Compilation of the author

<i>Legally Salient Outcomes</i>	<i>TTC Ministerial</i>
TTC Joint Roadmap for Trustworthy AI and Risk Management December 2022	Ministerial 3 (December 2022)
EU and the US EU-US Terminology and Taxonomy for AI First Edition (European Commission, May 2023);	Ministerial 4 (May 2023)
Recommendation for a Council Decision authorizing the opening of negotiations of an agreement with USA on strengthening international supply chains of critical minerals COM/2023/327 final	Ministerial 4 (May 2023)

<i>Legally Salient Outcomes</i>	<i>TTC Ministerial</i>
Non-legally binding Administrative Arrangement signed between US National Science Foundation (NSF) and the Directorate- General for Communications Networks, Content and Technology (DG Connect).	Ministerial 6 (April 2024)

A separation and compartmentalization of ‘trade’ and ‘technology’ into distinct fields has defined the work of the TTC throughout its many Ministerial meetings and its outcomes, considered here next. This separation evolved throughout its work despite the direction of the regulation of the law and politics of technology and international economic law continuously fusing such concepts e.g., data and antitrust, not considered together by the TTC. It might be plausible to suggest then that the TTC operated upon a complex taxonomy of siloes, that was not always been logical or even legally explicable. Alternate meetings ‘outcomes’ were thus published and expressly stated by the EU and US to have delivered trade outcomes and technology meeting ‘outcomes’, seemingly alternating the meetings between ‘trade’ and ‘technology’.⁵⁵ It was not necessarily clear before the meetings or even thereafter that the meetings would alternate in this way. An imbalance between the focus of trade and technology is palpable in the groups, objects and outcomes but can be explained through the complexity of technology and the difference between EU and US approaches. It nonetheless highlights the apartness of the TTC from directions in international economic law.

While Articles 3(5) and 21 TEU may encourage the importance of international law and the EU presents itself as a rule-based international actor, using law to achieve its objectives, the Union is operating in a global context where law is progressively less valued and even actively undermined.⁵⁶ This is possibly also reflected in the nature of the outcomes, soft law mainly in character with limited exceptions. The

⁵⁵ *EU–US Trade and Technology Council Inaugural Joint Statement* (Pittsburgh, Pennsylvania, US 29 Sep. 2021), https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951; *EU–US Joint Statement of the Trade and Technology Council* (Paris-Saclay, France 16 May 2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/14bf0332-62ee-411b-8c74-bea38cd79efb/details> (accessed 1 Oct. 2024); *EU–US Joint Statement of the Trade and Technology Council* (5 Dec. 2023, College Park, Maryland, USA), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7516 (accessed 1 Oct. 2024); *EU–US Joint Statement of the Trade and Technology Council* (Lulea, Sweden 31 May 2023), https://ec.europa.eu/commission/presscorner/detail/en/statement_23_2992 (accessed 1 Oct. 2024); *EU–US Joint Statement of the Trade and Technology Council* (Washington, DC 30 Jan. 2024), https://ec.europa.eu/commission/presscorner/detail/en/IP_24_575 (accessed 1 Oct. 2024); *EU–US Joint Statement of the Trade and Technology Council* (Leuven, Belgium 4–5 Apr. 2024), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_1828 (accessed 1 Oct. 2024).

⁵⁶ Editorial ‘Taking International Law Seriously?’, 61 *Com. Mkt. L. Rev.* 1181–1190 (2024), doi: 10.54648/COLA2024078.

main outcomes (*see above*), largely generate further platforms or mechanisms to engage. Their incidence increased as the Ministerial cooperation evolved, which is to be expected. Their links, however, to the Working Groups are much more difficult to pinpoint, where little or no mention is made of the Working Groups in joint statements and where submissions by the groups to Ministerials appears ad hoc and ill-coordinated. What makes the international law goals and objectives of the TTC of note then was the increasingly significant public divergence between the EU and US as to climate change policy, digital taxation and supply chain policies. It remains arguably also quite confusing that the TTC had international goals but uses only soft law. Arguably, the context of the outcomes becomes more curious as a result where international law outcomes appear to be so meagre.

The *first* post-meeting consensus was that the TTC was off to a ‘promising start’, but observers also noted that the bar for success in the first meeting was low on account of these divergences— in particular the lack of US regulation in many fields of the TTC where EU regulation existed.⁵⁷ Further mutual recognition agreements were perceived to be a laudable goal in fact.⁵⁸

The *second* meeting already appeared ready for significant policy shifts yet its output must be seen in different terms.⁵⁹ The *second* TTC involved the Creation of a Strategic Standardization Information (SSI) mechanism on international standards development to promote technical standards in line with our shared values and economic and political interests. Concrete progress towards coordinating approaches on technical standards for additive manufacturing and megawatt charging systems for heavy-duty recharging points was reported. However, on AI, the outcomes were to be of note, with a dedicated AI sub-group established to realize a commitment to the responsible stewardship of trustworthy AI and joint support for the Organization for Economic Co-operation and Development (OECD) Agreement. The parties thus outlined work towards a shared repository of metrics and methodologies for measuring AI trustworthiness and AI risks,

⁵⁷ Andreas Aktoudianakis et al., *The EU-US Trade and Technology Council: Mapping the Challenges and Opportunities for Transatlantic Cooperation on Trade, Climate, and Digital*, 113 Egmont Paper (2021); L. Daniel Mullaney, *Can the US-EU Trade and Technology Council Succeed?*, Council on Foreign Affairs (29 Oct. 2021), www.cf.org/blog/can-us-eu-trade-and-technology-council-succeed (accessed 1 Oct. 2024); European Commission, *Joint Communication to the European Parliament, the European Council and the Council: A New EU-US Agenda for Global Change* (2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0022> (accessed 1 Oct. 2024); Maria Demertzis, *US-EU Relations in the First Year of President Biden: A View from Brussels*, Transatlantic (8 Nov. 2021), <https://www.transatlantic.org/wp-content/uploads/2021/12/10Nov.2021-Demertzis-US-EU-trade-Challenges-v2.pdf> (accessed 1 Oct. 2024).

⁵⁸ See Oscar Sharma & Vanika Sharma, *Calling on the EU-US Trade and Technology Council: How to Deliver for the Planet and the Economy*, ECIPE (24 Jan. 2024), <https://ecipe.org/blog/call-on-the-eu-us-ttc/> (accessed 1 Oct. 2024); Bill Echikson, Clara Riedenstein & Dimitar Lilkov, *Transatlantic Trade and Technology: Partners or Rivals?*, Wilfred Martens Centre for European Studies (25 Jan. 2024), <https://www.martenscentre.eu/publication/transatlantic-trade-and-technology-partners-or-rivals/> (accessed 1 Oct. 2024).

⁵⁹ See *US-EU Joint Statement of the Trade and Technology Council* (16 May 2022), *supra* n. 55.

including the development of a joint roadmap on evaluation and measurement tools for trustworthy AI and risk management.

Subsequently a TTC Joint Roadmap on Evaluation and Measurement Tools for Trustworthy AI and Risk Management published in late 2022,⁶⁰ containing suggestions for concrete activities aimed at aligning EU and US ‘risk-based’ approaches. For this exercise, a group of experts were allegedly engaged to prepare an initial draft AI terminologies and taxonomies. A total number of sixty-five terms were identified with reference to key documents from the EU and the US EU-US Terminology and Taxonomy for AI ‘First Edition’ of 2023.⁶¹ No international law or legal standards are otherwise used in the taxonomy, which appears heavily prepared by social science not legal methods e.g., citations systems used. IO for Standardization (ISO) standards, the GDPR and in the minority as to the legal sources of terms used. The place of international law in the AI law-making ongoing appears important to a degree with the emphasis upon alignment and cooperation- but not as an end itself.

By the *third* meeting over a year from the first meeting, the Ministerial Joint Statement was already trumpeting the success of the outcomes.⁶² In the third EU-US Joint TTC Ministerial Statement, eleven references are made to intentions as to international standards, international norms, rules, organizations and activities relating to the TTC as ‘outcomes’.⁶³ The TTC was keen to stress as its outcome by its *third* meeting its impact on Jamaica and Kenya in special actions developed, thereby emphasizing its global dimension- even if not relating to a specific global standard but rather global engagement more broadly. It is prudent to remark however that that the TTC is not per se understood to unite the EU and US on geopolitics or instruments per se but more so on China and so these developments may have a broader significance going forward.⁶⁴

The *fourth* TTC meeting announced a Megawatt Charging System standards for electric vehicle trucks as an open, non-proprietary global standard to decarbonize transport worldwide, evidence of the growing technical orientation of the TTC.⁶⁵ It has its intent to decarbonize transport worldwide in medium/ long journey EVs and could possibly be a significant international standard yet its non-proprietary character

⁶⁰ European Commission, *TTC Joint Roadmap for Trustworthy AI and Risk Management* (2 Dec. 2022), <https://digital-strategy.ec.europa.eu/en/library/ttc-joint-roadmap-trustworthy-ai-and-risk-management#:~:text=The%20EU%2DUS%20TTC%20Joint,both%20sides%20of%20the%20Atlantic> (accessed 1 Oct. 2024).

⁶¹ European Commission, *EU-US Terminology and Taxonomy for Artificial Intelligence* (31 May 2023), <https://digital-strategy.ec.europa.eu/en/library/eu-us-terminology-and-taxonomy-artificial-intelligence> (accessed 1 Oct. 2024).

⁶² White House, *US-EU Joint Statement of the Trade and Technology Council*, Briefing (29 Sep. 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/05/u-s-eu-joint-statement-of-the-trade-and-technology-council/> (accessed 1 Oct. 2024).

⁶³ See *EU-US Joint Statement of the Trade and Technology Council* (5 Dec. 2023), *supra* n. 55.

⁶⁴ Aktoudianakis et al., *supra* n. 57.

⁶⁵ *EU-US Joint Statement of the Trade and Technology Council* (31 May 2023), *supra* n. 55.

here is of note, grounded thus in soft law and accompanied by sixteen page recommendations Transatlantic Technical Recommendations for Government Funded Implementation of Electric Vehicle Charging Infrastructure, evidencing the detail to underpin it and the means of formulating agreement. The meeting outcomes referenced further soft law agreement developments, emphasizing the need to implement the Joint Roadmap on AI and the evolution of a non-binding Administrative Arrangement on AI for the public good and support for a Declaration on the Future of the Internet.⁶⁶ The parties referenced implementing the administrative arrangements on semiconductors and a Task Force on quantum technologies as outcomes. From a legal perspective, their intention to work to facilitate conformity assessment across a range of sectors, such as machinery, and to continue exploring cooperation on horizontal approaches to conformity assessment garnered questions from the European Parliament as to the depth of cooperation to be expected.⁶⁷

The *fifth* TTC welcomed the International Guiding Principles on AI and the voluntary Code of Conduct for AI developers adopted in the G7 and agreed to continue cooperating on international AI governance. They agreed to intensify their coordination on the availability of critical raw materials crucial for semiconductor production, having activated the joint TTC early warning mechanism for semiconductor supply chain disruptions. The parties agreed on further exchange of information on public support for the investments taking place under the respective EU and US Chips Acts and discussed a report mapping EU and US approaches to digital identity.⁶⁸ The *sixth* TTC and seemingly final one under the Biden and Van der Leyen led regimes contained seventeen references to international outcomes, thus plentifully again across twelve pages of outcomes, referencing an international rules-based order, international technical standards, Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI Systems, international standards, international rules-based order, international standardization, international peace and security, international partners and international connectivity, – less so international law agreements per se.⁶⁹

⁶⁶ Compare, Alex Engler, *The Declaration for the Future of the Internet Is for Wavering Democracies, Not China and Russia*, Lawfare (6 May 2022), <https://www.lawfaremedia.org/article/declaration-future-internet-wavering-democracies-not-china-and-russia> (accessed 1 Oct. 2024); Cameron Kerry, *Battle Lines for the Future of the Internet*, Digital Europe (11 May 2022), <https://www.brookings.edu/articles/battle-lines-for-the-future-of-the-internet/> (accessed 1 Oct. 2024); The White House, *A Declaration for the Future of the Internet* (Apr. 2022), https://whitehouse.gov/wp-content/uploads/2022/04/Declaration-for-the-Future-for-the-Internet_Launch-Event-Signing-Version_FINAL.pdf (accessed 1 Oct. 2024).

⁶⁷ Parliamentary question EU-US Mutual Recognition Agreement on Conformity Assessment (May 2023), https://www.europarl.europa.eu/doceo/document/E-9-2023-003574_EN.html (accessed 1 Oct. 2024).

⁶⁸ *EU-US Joint Statement of the Trade and Technology Council* (30 Jan. 2024), *supra* n. 55.

⁶⁹ The European Commission and US government also released a Digital Identity Mapping Exercise Report the results of an initial mapping centred on the definitions, assurance levels, and references to international standards included across Revision 3 of the NIST Digital Identity Guidelines (Special Publication 800-63, Revision 3) and European Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market with a view toward enabling

The outcomes reference continued support for non-binding AI, standards initiatives in particular. For AI, the TTC outcome includes an expression of support for other multilateral initiatives – G7, the OECD, G20, Council of Europe, and UN and to ‘make progress’ with implementation of TTC Joint Roadmap for Trustworthy AI and Risk Management. As to technology, it prioritizes the evolution of other transatlantic ‘soft law’ visions, bodies and actions e.g., Quantum Task Force to address open questions on science and technology cooperation between the European Union and the United States on quantum technologies, a non-binding EU–US TTC ‘6G Vision’, including a new (non-legally binding) Administrative Arrangement signed between US NSF and the Directorate– General for Communications Networks, Content and Technology (DG Connect). In the field of trade soft law developments featured included the ‘Promotion’ of the Transatlantic Initiative on Sustainable Trade, ‘Clean Energy’ Incentives Dialogue, ‘Fair green energy transition’ for workers and firms, a ‘Possible’ EU–US CMA and ‘Discussion’ on economic security in today’s geopolitical environment. The possible agreement as a source is of note, given its separate development in the Article 218 TFEU process for the EU. The scale of the non-binding outcomes was notably referenced by statements to the effect that, the EU and US actively ‘reaffirm that international rules-based approaches to trade, technology – founded on solid democratic principles’. Perhaps references to rules-based approaches cannot be seen to be anything other than ironic, ostensibly appearing incompatible with the EU’s vision of a rules-based legal order pursuant to Article 21 TEU.

The final section turns to the TTC as an escalation of soft law in EU–US relations.

5 THE TTC AS AN ESCALATION OF SOFT LAW IN EU–US RELATIONS

The TTC took place in the post-TTIP period, as much as the post-Trump era and constitutes the first foray of the Biden administration on transatlantic trade in particular. Binding agreements in the domain of trade have been minimalist in this era, perhaps ironically to a degree as much as those preceding them, during a much more hostile relationship.⁷⁰ It is no longer a relationship built upon a commitment to regulatory cooperation and has morphed legally at least into a much more complex beast. There have been limited transatlantic trade agreements pursued post-TTIP – pursuant to the EU’s Article 218 TFEU international relations

the cross-border use of digital identities and wallets; *EU–US Joint Statement of the Trade and Technology Council* (4–5 Apr. 2024), *supra* n. 55.

⁷⁰ Example, Lobster ‘agreement’, *EU–US Agreement on Lobster Tariffs* (26 Nov. 2020); see European Parliament, *Deal on Lobsters Gets Go-Ahead from Parliament* (26 Nov. 2020), <https://www.europarl.europa.eu/news/en/press-room/20201120IPR92135/deal-on-lobsters-gets-go-ahead-from-parliament> (accessed 1 Oct. 2024).

negotiation ‘apparatus’.⁷¹ The EU and US appear to have common understandings of some aspects of trade policy and the future of trade e.g., labour and workers’ rights and to a degree clean tech and climate change. However, disparities remain.⁷² Despite their differences, the TTC shows how the parties appear to seek to learn from the TTIP era and its challenges for participation and engagement.⁷³ Still, the relationship increasingly shifts to soft law, administration to administration, with the EU being influenced by US practices and preferences.

Some years ago, scholars wrote about a Transatlantic Community of Law existing, given the increasing legalization of many practices, instruments and actors.⁷⁴ The TTC perhaps ironically shows something quite different more than a decade later – gravitation to law even in era of soft law – but arguably closer to ‘de-legalization’ showing the interest of the transatlantic partners in more flexible outcomes and processes. In a different setting, it has been further argued that the transatlantic relations had taken a significant turn towards using ‘soft power’ which largely relies on persuasion rather than on other traditional means such as coercion or bargaining, a form capable of ‘gluing’ the EU–US relations together.⁷⁵ Within this understanding, the TTC can be perceived as a unique component of that ‘glue’ and an important barometer of international relations and revealing of convergences and divergences in international law ideals and regulatory standards pertaining in their own legal orders more than anything else. The TTC is ostensibly different to the EU–India TTC, as the EU–US TTC has a very different placement of law, with none featuring therein in the EU–India statements, documents or website.

Non-legal scholars particularly in political science/ political economy have written extensively on the so-called depoliticization of EU–US relations and international relations emerging post-TTIP, partly in response to changing geopolitics.⁷⁶ Yet many key EU trade developments are heavily ‘legalized’ in the post-Trump era e.g., its use of defensive trade instruments, ratcheting up its legal tool box as well as its policy framework.⁷⁷ As leading international economic law

⁷¹ See *Supranational Governance at Stake: The EU’s External Competences caught between Complexity and Fragmentation* (Mario Telò & Anne Weyembergh eds, 2020).

⁷² Claussen (23 Jan. 2023), *supra* n. 18; Claussen (2022), *supra* n. 18.

⁷³ Elaine Fahey, *Democratic Leadership Through Transatlantic Cooperation for Trade and Technology Reforms Through the TTC Model?*, in *Constitutionalism, Transnational Governance Failures and Policy Responses* (Ernst Ulrich Petersmann & Armin Steinbach eds 2023).

⁷⁴ *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Elaine Fahey & Deirdre Curtin eds 2014).

⁷⁵ Simon Schunz, Giles Scott-Smith & Luk Van Langenhove, *Broadening Soft Power in EU-US Relations*, 24 Eur. Foreign Aff. Rev. 3 (2019), doi: 10.54648/EERR2019016.

⁷⁶ Example, Kolja Raube & Raquel Vega Rubio, *Coherence at Last? Transatlantic Cooperation in Response to the Geostategic Challenge of China*, 10 Polit. & Gov. 176 (2022), doi: 10.17645/pag.v10i2.5022.

⁷⁷ Thomas Verellen, *Imperial Presidency Versus Fragmented Executive? Unilateral Trade Measures and Executive Accountability in the European Union and the United States*, 24:7 Ger. L. J. 1127 (2023), doi: 10.1017/glj.2023.80.

scholars point out, a significant number of ‘alternative’ forms of trade agreement increasingly emerge with new characteristics and as a result, EU law and external relations perspectives may add much here.⁷⁸ The EU has also learned in the post-TTIP era to be even more concerned with its stakeholders and how to engage with them and here, soft law mechanisms may clearly support this.

The TTC thus shows a waning enthusiasm for law in its outcomes. Few international law-based goals appear as outcomes of the meetings. It aligns with expectations of transatlantic relations generating another law-light and institution-light entity if we are to listen to age-old wisdom of transatlantic political scientists, but yet paradoxically highly structured and rooted in international law. It might be explicable on the basis of the heavily ‘siloed’ approach adopted, separating trade and technology in such a complex fashion.

The TTC began ‘life’ heavily framed in international law, and rapidly shifted towards soft law. It shows nonetheless important place of international law in the relationship. The TTC parties commits to the rule of law and a democratic view of the global legal order. This is in the DNA of the EU, in Article 21 TEU and Article 218 TFEU, set out in its treaties. Whether a significant shift to soft law is compatible with these texts remains to be seen. The TTC shows ample evidence of its complex desire to afford legitimacy to its outcomes through soft law convergence and cooperation.

6 CONCLUSIONS

Trade and Technology appear intertwined as the new ‘oil’ of the global economy, and yet considerable work needs to be done on understanding the place of major global law-making initiatives especially outside of the WTO and other organizations if mediated through soft law. The TTC is a useful entry point into these developments, even if only at a bilateral level.

The TTC’s development resonates with the view prevailing to that soft law approaches have been preferable for lead trade actors in international economic law, including the US and EU throughout the Biden and Von der Leyen administrations. Its purpose was to enable shaping rules and norms in this critical area, rather than lengthy trade agreement negotiations. Yet such a framework contrasts with the very different type of actions taking place across the Atlantic for the post-Privacy Shield negotiations, reaching an agreement on the DPF which includes a *binding* transatlantic ‘court’ and significant convergence with EU law. It raises the question as to the future of bilateralism and multilateralism in trade and technology inside and outside of ‘hard law’.

⁷⁸ Claussen (23 Jan. 2023), *supra* n. 18; Claussen (2022), *supra* n. 18.

Looking forward, there were few initiatives that were likely to concretely legal result from the TTC in the short-term. This also support claims as to any alleged ineffectiveness of the TTC. However, this is difficult to assess at this remove. The EU appears to have pivoted towards US perspectives on soft law in economic matters in particular, witnessing a significant escalation of soft law in EU–US relations. However, after the conclusion of the TTC, the USTR sought to involve TTC stakeholders officially in Federal Register calls in order to involve Europe more centrally in its law-making, evidence of the structured nature of the collaboration irrespective of its hard or soft law nature.⁷⁹

The TTC is argued here to represent a low-bar of cooperation, albeit a highly structured one. EU–US TTC cooperation has been heavily centred on China as a common concern. The EU and US unity on this front appears channelled into the TTC that is not always per se explicit. The ‘law-light’ ‘institution-light’ character of EU–US relations has featured as a significant context in EU–US relations for some time. The TTC paradoxically displays this arguably as well.⁸⁰ Global challenges appear to the forefront– against the backdrop of a collapse in institutions and IOs– and much more informal IOs organically emerge. While debates on the character of soft law are manifold, the TTC represents a curious study of global law-making across its key years of existence throughout the Europe-friendly Biden administration. As this piece has shown, the TTC has outcomes that mostly appear decidedly ‘alegal’ alongside some significant global law-making goals. It appears a more flexible multifaceted forum as a result–but one also adopting an esoteric position as to law.

Overall, the EU–US TTC has been arguably anti-climactic for its limited outcomes – relative to its immense political success – which developed sustained and organized dialogues. It easily overtook the EU’s other TTC with India for its scale and ambitions. The broader impact of the TTC upon the evolution of international economic law may be more limited. It seems likely to have propelled international economic law towards more soft law. The work of the EU and US to align and synthesize views in the TTC e.g., on AI is of much importance given the tendency to assume a race to regulate amongst the great world powers. The EU–US TTC may not have directly caused convergence between EU and US law on data privacy but has taken place alongside important legal shifts in transatlantic data privacy. Its future impact may be seen in that light, as a vehicle for convergence. In future times, the EU–US TTC may be understood historically as a highly institutionalized platform to delegalize transatlantic relations further, which is critical for global leadership in such key fields.

⁷⁹ USTR, *Request for Comments on the US–EU Trade and Technology Council (TTC) Global Trade Challenges Working Group*, Docket Number USTR–2024–0017 (9 May 2024).

⁸⁰ Pollack, *supra* n. 38.

