Constructing the International Foundations of E-Commerce—The EU-U.S. Safe Harbor Arrangement

Henry Farrell

The implications of e-commerce for international relations are only beginning to receive proper attention in academic debate. Commercial relations conducted through new communications technologies[1] require the adaptation of old institutions[2] and the creation of new ones. Conventional wisdom associates the advent of e-commerce with the retreat of the state and a renewed emphasis on private regulation. Business actors claim that they are capable of regulating themselves, through voluntary codes of conduct, forums such as the Global Business Dialogue on e-commerce,[3] and Alternative Dispute Resolution (ADR) mechanisms. Many scholars argue that new technologies weaken the capacity of states to provide domestic and international order, so that states are giving way to private actors in cyberspace and e-commerce.[4]

However, contrary to many predictions, states are not being displaced in the governance of e-commerce by private actors. Instead, in many areas, new relation-

This article draws on research carried out during a fellowship at the Max Planck Project Group on Common Goods. I am highly grateful to the Project Group, both for financial and intellectual support. I am grateful to Joe Aldeheff and Marc Rotenberg for several conversations about privacy and self-regulation that informed my initial thinking on these topics. I owe a very substantial debt to Greg Flynn, for reading and commenting on various iterations of this article, and for more general conversations on the relationship between constructivism and international relations during the past several years, which have had a deep influence on the research agenda articulated herein. The article benefited from the comments of audiences at presentations in the Max Planck Institute for the Study of Society, Cologne; Georgetown University; and the University of Toronto. Finally, I wish to express my thanks to Phil Agre, Nicole Anastasopoulos, Tom Banchoff, Tanja Boerzel, Christoph Engel, Nicole Erb, Adrienne Héritier, Dirk Lehmkuhl, Margaret Levi, Abe Newman, Eric Posner, Thomas Risse, Vivien Schmidt, Debora Spar, Arun Venkataraman, Marco Verweij, and two anonymous reviewers for encouragement, or for reading and commenting on various versions of the manuscript, and to Peter Gourevitch, David Lake, and Lisa Martin for invaluable editorial comments.

1. Note that e-commerce does not solely consist of transactions carried out on the World Wide Web or the Internet more generally.
2. Drake and Nicolaides 1999.
3. Cowles 2001.
4. See Johnson and Post 1996; Froomkin 1997; Kobrin 1997; Kobrin forthcoming; Spar 1999 (but see Spar 2001 for a more recent account which is broadly compatible with that advanced here); and Simon 2000.

International Organization 57, Spring 2003, pp. 277–306
© 2003 by The IO Foundation.
DOI: 10.1017/S0020818303572022

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

ships between states and private actors are emerging, in which it is by no means clear that the latter dominate. In many important areas of e-commerce policy, "hybrid" forms of governance are emerging, in which states seek (individually or in concord) to set general rules or principles under which transnational private actors implement policy and adjudicate disputes.[5] John Dryden, Head of Information, Computer and Communications Policy at the Organization for Economic Cooperation and Development (OECD), speaks of

> an effective "integrated approach" of a basic legal framework upon which self-regulatory approaches can be built giving scope to innovation and competition. Responsibility stays with national governments, notably to protect vulnerable groups, but the regulatory environment should be a balance between self-regulation and regulation by government and international bodies developed co-operatively by government, business and the public voice.[6]

The emergence of these new forms of governance poses an important puzzle to international relations scholarship. These forms of governance are genuinely unexpected, in that they do not represent the retreat of the state in the face of private actors, nor a simple reassertion of state authority,[7] nor yet traditional multilateral institutions. Nor are they a simple compromise between states and private actors. Instead, these new forms of governance involve complex relations of authority between states and private actors. How may the emergence of these new institutional forms be explained?

In this article, I suggest an alternative origin for hybrid regulation, showing how it may result not from an increase in the authority of private actors per se, but from the effects of e-commerce on interdependence.[8] New communications technologies increase interdependence; they make it easier for modes of activity to cut across national contexts that were previously isolated from each other. States may still seek to regulate such activity. However, their efforts to do so may themselves have negative external effects for other states. If one state seeks to regulate a particular sector of transnational activity along specific lines, the effects of this regulation will frequently spill over its national borders. This may have substantial repercussions for other jurisdictions. Thus many of the problems that states face do not involve loss of power or control, so much as difficulty in coordinating international solutions that prevent or limit such negative spillovers.

However, such problems may be difficult to resolve through conventional bargaining and trade-offs, to the extent that differences in regulatory approach reflect

5. Such arrangements have some domestic precedent in "private interest government." See Streeck and Schmitter 1985. They also have some similarities to relationships between states and private standard-setting bodies. See Mattli 2001b; and Egan 2001.

6. Dryden 2000, 7.

7. Goldsmith 2000 defends states' ability to set the rules of cyberspace using traditional means, while Spar 2001 shows how private actors, once they have succeeded in carving out new social spaces, may turn to states to underpin their positional gains.

8. Keohane and Nye 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

deeper differences in principles of social order. Interdependence may involve not only coordination problems, or conflicts of interest, but also clashes between fundamental social norms.[9] E-commerce, through increasing interdependence, may thus lead to conflict between systems of social order as disputes arise over the principles that should organize activity in a given issue area. Such disputes and their resolution are difficult to model using the standard formal techniques commonly applied to international bargaining. For deeper normative disagreements, successful negotiation may require the kinds of persuasion emphasized in constructivist accounts of institutional change. Further, the kinds of solution arrived at may themselves have novel features.

In the body of this article, I assess the merits of constructivist theory in explaining the emergence and form of hybrid arrangements. Constructivism is not often applied to the study of international political economy,[10] but it claims to provide a more complete account of institutional change, and in particular of defining moments, than do other approaches to international relations. Other approaches also seek to analyze how institutions emerge, typically privileging efficiency considerations[11] or power[12] in their explanations. Although constructivists do not deny the importance of these factors, they contend that institutions also crucially involve shared understandings among social actors.[13] As such, constructivists argue that institutions' origins, and certain of their effects, are difficult to capture using the traditional tools of international relations. Institutions, while they may certainly reflect the desire of actors to find more efficient arrangements, as well as their relative power, are shaped by communicative action.[14]

Specifically, I show how constructivism helps elucidate the origins and negotiation of the "Safe Harbor" arrangement, in which the European Union (EU) and United States have sought to reach agreement on the terms under which privacy of personal information can be guaranteed in a context of international data flows. This arrangement serves as a reasonable test case for a wider phenomenon. Privacy issues have proven to be of key importance to the internationalization of e-commerce,[15] and the Safe Harbor is an important precedent for arrangements

9. Berger 2000.

10. Katzenstein, Keohane, and Krasner 1998. Note that the article does not engage in the wider controversy between rationalist and constructivist approaches. Instead, it seeks to build on a recent tendency in international relations to examine how the strategic concerns that have interested game theorists intersect with ideational factors. See, in particular, Schimmelfennig 2001; also Börzel and Risse 2001; and Checkel and Moravcsik 2001.

11. Keohane 1984.

12. Krasner 1991; and Grieco 1990.

13. Kratochwil and Ruggie 1986. I do not seek to assess the relative merits of constructivism and other forms of institutional analysis in this article, except insofar as is absolutely necessary to my argument; the debate between constructivism, liberal institutionalism, and neorealism is already well-rehearsed in the literature.

14. Risse 2000.

15. See White House 1997; Cowles 2001; Hurley and Mayer-Schönberger 2000; and Zysman and Weber 2001.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

through which the difficult issues of interdependence associated with e-commerce may potentially be resolved.[16] Similar to other such arrangements,[17] Safe Harbor involves states either setting rules individually or negotiating rules among themselves, and then seeking to delegate authority to transnational private actors offering ADR.

More generally, Safe Harbor and its negotiation offer insights into how increasing interdependence may lead to clashes between deeply different systems of norms and social values, and how actors may seek to resolve those clashes. As Stephen Kobrin has argued, the EU-U.S. disagreement over privacy, which led to Safe Harbor, reflects "deeply rooted differences in historical experience, cultural values, beliefs about the organization of the polity, economy and society, and the importance of free speech versus other societal ends."[18] Currently dominant approaches to international political economy provide little guidance about how such fundamental clashes of values may be resolved. Recent developments in constructivism seek specifically to incorporate the kinds of argument through which actors may seek to resolve such clashes.[19] Thus by assessing Safe Harbor, one may arrive at important *prima facie* conclusions regarding the suitability—or possible lack of same—of constructivist theory for modeling how clashes between different value systems may be resolved. Is attention to the kinds of persuasion highlighted by constructivist theory necessary to an understanding of how Safe Harbor came into being? Or, alternatively, are the simpler forms of communication emphasized by formal bargaining models sufficient to explain observed behavior and outcomes?

The article begins with a discussion of constructivist theory. It develops arguments, which are then applied to the case study, Safe Harbor. The empirical study seeks to address three main questions. First, what are the origins of new modes of governance such as Safe Harbor? Second, how are the processes through which Safe Harbor was negotiated best explained? Third, and finally, what are the wider effects of Safe Harbor and hybrid institutions? The article concludes by addressing the wider implications of its findings for the literature.

Constructivism and Institutional Emergence

Over the past several years, constructivism has become an increasingly important approach to the explanation of the creation of institutions. Other dominant

16. See Beier 1999; White House 2000.

17. The most prominent such arrangement is the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet authority on domain name allocation, with its attached ADR system. Other examples include the "new" approach to governance of e-commerce within the EU, and the role of ADR in the Hague Convention on international jurisdiction currently under negotiation.

18. Kobrin 2002, 19. See also Long and Quek forthcoming.

19. See especially Risse 2000; however note that there are important differences between the kinds of argument that Risse emphasizes, and those that I discuss. See further discussion in the next section.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

approaches to international relations have typically emphasized power relations or the benefits of cooperation as the key factors explaining international behavior.[20] Constructivism has not sought to deny the importance of either power or the benefits of cooperation. It has, however, argued that power and cooperation have force insofar as they are embedded in more general structures of intersubjective meaning. To say that meaning is intersubjective is not to say that it is the subject of universal agreement. Actors, when they engage with others, will undertake communicative action, which will involve explicit or implicit dialogue about their underlying worldviews. Thus both power-based bargaining and efforts to realize mutual gain will be embedded in more wide-reaching forms of communicative action. Recent work in the field[21] has sought to identify the conditions under which a constructivist approach has specific insights to offer regarding empirical outcomes.

However, much of the promise of constructivist approaches still remains unfulfilled. Debates between constructivists and other scholars have typically centered on questions of compliance; that is, why it is that actors comply, or fail to comply, with rules, norms, or other institutions.[22] Constructivists have sought to show that values, rather than simple strategic interests, can be an important source of compliance.[23] Further, they have demonstrated that socialization and reasoned argument may be important sources of change in actors' values.[24] While this body of research has generated important insights, it obscures important features of communicative action.[25] In particular, it provides little insight into how communication may affect actors' behavior, without necessarily affecting their deeply held values, through foreclosing[26] or disclosing[27] possibilities of action.[28] Communicative action may "rhetorically entrap" actors, foreclosing possibilities of action that would otherwise be open to them, even if these actors' values remain unchanged.[29] Equally, it may disclose new possibilities of action of which actors were previously unaware, expanding their set of possible actions in a way that goes considerably beyond simple learning within a predetermined strategic setting.

20. This encapsulated description of other dominant approaches to international relations necessarily fails to capture their subtleties, but is a reasonable summary of their main research agendas. The relationship between institutions and power relations is discussed at greater length in Farrell and Knight forthcoming.

21. See the overviews of the debate in Risse 2000; and Finnemore and Sikkink 1998.

22. Checkel 2001.

23. See, for example Checkel 2001; Payne 2001; and Risse 2000.

24. See Checkel 2001; and Risse 2000.

25. Flynn and Farrell 1999.

26. Schimmelfennig 2001.

27. Flynn and Farrell 1999.

28. Some constructivists—for example, Risse 2000—acknowledge that communication may shape views of the world without affecting underlying values, but their primary interest is in the relationship between argument and value change. I suggest that study of how communication may foreclose and disclose new possibilities without necessarily affecting values is of key importance to the constructivist research project.

29. Schimmelfennig 2001.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

Understanding how communicative action may foreclose or disclose possibilities presents an important challenge for international relations. It is here that constructivism, with its specific attention to the relationship between communication and agency, has a particular contribution to offer. Rather than seeking to theorize preference change (arguing for the co-constitution of agent and structure), understanding such action requires attention, in David Dessler's terms, to how structure and the conditions of action are implicated.[30] Thus there is no necessary incompatibility between the study of these forms of communicative action and rational actor theory in its broader sense. Indeed, if communicative action can have such important consequences for behavior, it is an enormously important strategic asset.[31] While it involves persuasion rather than raw bargaining power, it also may involve actors strategically arguing on behalf of versions of the truth that are more or less self-serving, in a "struggle for the real."[32] If actors succeed in so doing, they do not simply win a greater distributional share in a fixed game, but may change the set of possible actions available to other players, and thus the "rules of the game" themselves.

However, even if such communicative action is compatible with a broad rational actor framework, it cannot be represented using the formal techniques that have typically been associated with the application of rational choice in the social sciences.[33] Persuasion and the manipulation of symbols may be motivated by strategic considerations, but insofar as they disclose genuinely new possibilities, they cannot be represented in the language of game theory, which presupposes that all possible actions and events can be labelled and specified in advance.[34] Standard game-theoretical accounts further require that the underlying structure of the game be common knowledge shared by all players.[35] In such models, communication among players may *inter alia* provide information about the type of other players, their past moves, their likely strategies, or which node of the game tree an actor is at; it may not reveal entirely new possible moves of which actors were previously unaware. Indeed, more generally, communication will not change the "worldview"

30. Dessler 1989.

31. Johnson 2002.

32. Johnson 1997, quoting Clifford Geertz.

33. I borrow this critique of game theory from Johnson 2002, on which I rely heavily in the following discussion; see also Binmore 1990.

34. Johnson 2002. In standard game-theoretic models, players must have full knowledge of all parameters underlying the game, including all possible moves (they must have complete information), although they need not have full knowledge of all previous moves in the game (they need not have perfect information). See Harsanyi 1986. Thus forms of communication that disclose new and previously unconceived possibilities of action to actors are excluded. Harsanyi's technique of making games of incomplete information analytically tractable by transforming them into games of imperfect information has no bearing on this issue.

35. As Katzenstein, Keohane, and Krasner 1998 argue, common knowledge is an important point of intersection between constructivist and rationalist approaches to international politics. See also Finnemore and Sikkink 1998. However, the notion of common knowledge is more restrictive and has odder implications than is commonly acknowledged in the international relations literature. See, in particular, Geanakoplos 1992.

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of players—their perception of the parameters of the game—which, as stated above, forms part of their common knowledge.

This limitation has specific implications for theories of international bargaining and cooperation, which have relied extensively on insights from the formal literature during the past two decades.[36] As scholars in the formal tradition have rightly contended, formal models of bargaining can indeed encompass communication and the sharing of information between actors,[37] as well as certain kinds of learning (most prominently Bayesian updating).[38] However, such approaches cannot take account of how argument and persuasion may work to change the worldviews of actors, by bringing them to reconsider the basic presumptions on which they evaluate their world in a fundamental sense, and sometimes even enlightening them to new possibilities of action of which they had been previously unaware. These theories have no way of understanding how communication within strategic situations may disclose possibilities, affecting actors' underlying ideas about the world, rather than merely providing information.[39] While some game-theory-inspired accounts of bargaining have a role for ideas,[40] they systematically discount ideas' heuristic force—how ideas may cause actors to reinterpret the world around them.[41] Instead, they examine how ideas may provide focal points for coordination games, where the idea in question is irrelevant except insofar as it helps actors identify the likely strategies of other actors, and thus converge upon an equilibrium.

These problems stem from limitations of standard game theory. Even those accounts of international bargaining that are not strictly formal will, to the extent that they rely on the logic of game theory to identify the relevant causal factors and make predictions, have difficulties in understanding how argument and persuasion may affect bargaining outcomes through disclosing new possibilities to actors. By extension, when there is evidence that persuasion and argument have had such effects, one may reasonably claim to have identified causal relationships that cannot be understood using standard approaches to bargaining.

How may one show that persuasion and argument have had such effects in any given empirical instance? In this article, I suggest a three-fold test. First, it is necessary to show that communicative action apparently aimed at persuading others has taken place. Second, it is necessary to show that such communicative action has appreciably changed actors' beliefs. Third, it is necessary to show that such

36. This literature is too voluminous to summarize easily; important contributions include Keohane 1984; Krasner 1991; Morrow 1994; and Fearon 1998. See Drezner forthcoming, for an application of bargaining theory to e-commerce.

37. Morrow 1994.

38. I note that Bayesian updating suffers from related limitations; for a trenchant critique, see Binmore 1993.

39. Johnson 1997; 2002. Communicative action of this sort is key to entrepreneurial leadership; see Young 1991.

40. Garrett and Weingast 1993.

41. For a relevant discussion by a distinguished game theorist of the problematic relationship between game theory and interpretation, see Rubinstein 1991.

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change has involved beliefs regarding the underlying parameters of action, or the disclosure of new possibilities of action that were previously unrecognised by actors. If any of these three conditions are not met, then it is not possible to argue with any certainty that theories privileging argument and the disclosure of new possibilities have greater explanatory force than standard game-theoretic accounts of bargaining.[42]

First, it is necessary to show that some form of communicative action, which may reasonably be understood as persuasion or argument, took place. While constructivists are right to insist that communicative action cannot escape from the webs of intersubjective meaning in which it is embedded, many forms of communication may, as formalists argue, be modeled using game theory with relatively little loss of insight. In order to show that persuasion or argument has taken place, it is necessary to demonstrate that actors have communicated with each other in a manner that goes beyond simple bargaining offers, signals of type, and so on. This is not necessarily straightforward. As skeptics have argued,[43] even when actors adopt language that seems superficially to appeal to norms so as to persuade others, they may simply be engaging in empty talk. This makes it necessary to show that argument has had a substantial impact by affecting actors' beliefs or values, and hence their behavior. However, even this is insufficient to show that argument has played an important role; certain kinds of belief change may be easily accommodated by game theory, and, by extension, by accounts of bargaining that rely on it. Furthermore, in many circumstances it may be difficult to distinguish between belief change of this sort, and the kinds of belief change associated with persuasion. Thus in a third step, it is necessary to show that this belief change is of a sort that is difficult or indeed impossible for game-theoretical accounts of bargaining to accommodate. Belief change resulting from ideas that change actors' understanding of the underlying parameters of action provides such evidence. Such evidence is especially compelling when change in beliefs gives rise to genuinely new possibilities for action, which were previously unknown to actors.

The remainder of this article examines the processes of negotiation surrounding the creation of Safe Harbor. There is some reason to anticipate that constructivism's emphasis on argument may help provide insights into the genesis and effects of the arrangements. Constructivists would predict that argument is more likely in situations where substantially different understandings of social order come

42. I note that I deliberately set a high bar here, in that I seek to identify instances of communicative action that cannot be understood in the terms of game theory. In other instances, it may be difficult to distinguish between persuasion, as I use the term here, and the kinds of communication and learning privileged in formal accounts. See Checkel and Moravcsik 2001. However, even in such situations, there is no *ex ante* theoretical reason to prefer "pure" strategic rationality as an explanation over persuasion; that the two may sometimes be indistinguishable does not suggest that the former must necessarily predominate over the latter. Indeed, in nearly all bargaining situations, persuasive action will play some role; actors very rarely come to the negotiating table in entire agreement over what the stakes of the bargaining situation are. See Risse 2000.

43. See, in particular, Goldsmith and Posner forthcoming.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

into conflict, but where actors are relatively uncertain about the long-term consequences of their action, and thus, potentially more open to persuasion.[44] EU-U.S. debates over privacy amply fulfilled these conditions. While actors started from very different normative understandings, they did so in a new and uncertain context—the regulation of e-commerce. In the succeeding discussion, I not only examine the origins of the arrangement, but also seek to establish whether argument and persuasion, as well as simple bargaining, played an important role in Safe Harbor's negotiation and outcome.

Safe Harbor—Negotiations and Structure

The negotiations leading up to Safe Harbor began in the late 1990s in a dispute between the EU and United States over privacy, which intersected with wider debates over e-commerce.[45] The EU's wish to see the data of its citizens protected through extensive legal obligations clashed with a U.S. approach to privacy that in many sectors relied on self-regulation of firms or no regulation at all.[46] The EU had passed the so-called "Data Protection Directive,"[47] which was to take effect in late 1998, and which proposed to harmonize EU member states' divergent approaches to individual privacy.[48] This directive provided for extensive rights and obligations, and a system of data protection commissioners to protect privacy rights. Furthermore, it had clear external consequences: it forbade the export of EU citizens' personal data to third countries that did not have "adequate" protection for individual privacy, except under limited exceptions.

As it had no uniform body of privacy law or regulation, and no specialized enforcement authorities, it was widely assumed that the United States would not be recognized as "adequate." EU officials suggested that they would be satisfied with nothing less than the United States introducing appropriate formal legislation and authorities to protect privacy.

Following early posturing, real discussions began in the first half of 1998, over a "Safe Harbor" arrangement, which might protect the data of EU citizens without requiring the United States to introduce formal legislation. Initial discussions concentrated on a set of "Safe Harbor principles" and associated enforcement mechanisms, which U.S. firms handling the personal data of EU citizens could sign up to voluntarily, to avoid EU sanctioning. The first draft of these principles was

44. See Fligstein 2000; and Risse 2000.

45. Further discussion may be found in Farrell 2002, which concentrates on the effects of institutional structures. See also Heisenberg and Fandel 2002; Long and Quek forthcoming; Kobrin 2002; and, for an important early assessment, Shaffer 2000.

46. Froomkin 2000a.

47. Its full title is the *Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (Directive 95/46/EC).

48. See Regan 1999; and Farrell 2002.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

announced in a letter from Ambassador David Aaron, U.S. Undersecretary of Commerce, to "industry representatives;"[49] in summarized form, they were as follows.

> Notice: Organisations must inform individuals about the type of data collected, how it was collected, to whom it was disclosed, and the choices individuals have for limiting disclosure.
>
> Choice: Organisations must allow individuals to opt out when information has been used for purposes unrelated to the use for which they originally disclosed it. Individuals must be given choice to opt in with regard to certain sorts of sensitive information.
>
> Onward transfer: Individuals must be able to choose whether and how a third party uses the information they provide. When information is transferred to third parties, these parties must provide at least the same level of privacy protection originally chosen.
>
> Security: Organisations must take reasonable measures to assure the reliability of information, and prevent loss or misuse.
>
> Data integrity: Personal data must be kept accurate, complete, and current, and be used only for the purposes for which it is gathered.
>
> Access: Individuals must have reasonable access to data about themselves, and be able to correct it when it is inaccurate, subject to the sensitivity of the information and its dependent uses.
>
> Enforcement: There must be mechanisms for assuring compliance with the principles, recourse for individuals, and consequences for the organization when the principles are not followed. (Enforcement could take place through private-sector programs, legal or regulatory authorities, or the data protection authorities in Europe.)

Both the United States and the EU hoped that Safe Harbor would be swiftly approved; however, several EU member states expressed serious misgivings. Difficult negotiations during the next eighteen months finally resulted in an agreement, which was accepted by the member states on May 31, 2000.

The extent to which "Safe Harbor" will succeed in achieving its stated aims is still unclear. Despite early optimism, only a relatively small number of firms have signed up to it in its first eighteen months (although these firms include Microsoft, Intel, Compaq, DoubleClick, Hewlett-Packard, Acxiom, Dun & Bradstreet, and Procter and Gamble).[50] However, the success or lack of success of Safe Harbor in

49. Complete letter available at ⟨www.ita.doc.gov/td/ecom/aaronl14.html⟩.

50. The predictions of some authors that Safe Harbor will come to have a more overt impact on privacy legislation and practice in the United States may be coming to pass. See Shaffer 2000, and for recent assessments, Kobrin 2002; Heisenberg and Fandel 2002; and Shaffer forthcoming.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

formal terms is only partially relevant to its wider implications in terms of international relations theory.[51]

The Safe Harbor arrangement, as it finally emerged, consisted of three elements: the principles themselves, modified over the course of the negotiations; "frequently asked questions" (FAQs), which provide authoritative guidance regarding the application of the principles; and enforcement mechanisms, which involve a hybrid of state enforcement and self-regulation. Firms that sign up to the Safe Harbor list are considered to be providing "adequate" protection for the data of EU citizens, as long as they abide by the principles and their associated enforcement mechanisms. There are three layers of enforcement within the Safe Harbor arrangement. First is the most immediate layer—the authorities with whom Safe Harbor participants are supposed to cooperate. Firms signing up to Safe Harbor can choose one of two options.[52] They may sign up to resolve complaints with an ADR mechanism, such as those provided by BBBOnline, TRUSTe, or, more recently, the Direct Marketing Association.[53] Or, as a second option, they may sign up to cooperate directly with EU data protection authorities (this is obligatory for certain kinds of data).

Safe Harbor thus envisages an important role for private ADR schemes in enforcement. Nonetheless, EU negotiators have insisted that self-regulation is insufficient unless backed up by formal enforcement mechanisms. Thus the Federal Trade Commission (FTC) plays a vital part in enforcement. While the FTC does not police privacy as such—it has no power to make a firm adhere to a specific privacy policy—it may take action against firms that have publicly stated such a policy and then acted in violation of it.[54] This action may include substantial fines and adverse publicity. The FTC has made a public commitment to prioritize referrals of noncompliance with Safe Harbor from EU member states, as well as referrals from BBBOnline and TRUSTe. It provides a "backstop" to self-regulatory organizations: if firms break their commitment under Safe Harbor to be bound by ADR, the FTC may take action against them for having engaged in deceptive practices. The FTC also claims that it may take action against self-regulatory organizations themselves, if they fail to live up to their promises.

European authorities provide a final level of enforcement. If they are advised by a U.S. government body or ADR scheme that a data flow is in violation of the Safe Harbor principles, they may act to block that flow. Alternatively, under highly restrictive conditions, member-state data protection authorities may still take uni-

51. See "Safe Harbor and Its Consequences" and "Conclusions" below.

52. For certain kinds of data, firms must cooperate with EU authorities. A third option, that of committing to cooperate with a relevant U.S. regulatory authority, is currently impracticable.

53. The Safe Harbor arrangement does not certify ADR mechanisms as acceptable or unacceptable. However, the EU may announce that firms that have signed up with a particular ADR are not considered eligible for Safe Harbor.

54. Most prominently, the FTC took action in 1999 against GeoCities for breach of its privacy policy.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

lateral action to halt data flows. Perhaps most importantly, the EU retains a final veto power over the arrangement: Safe Harbor rests on a unilateral—and revocable—determination on the part of the EU that a certain arrangement may be considered "adequate" under the terms of the Data Protection Directive.

First Beginnings: Clashes over the Regulation of Privacy and E-commerce

The EU-U.S. differences over e-commerce, which emerged most clearly in their disagreement over privacy, reflect a clash between two quite different philosophies of social regulation. Each philosophy has deep historical roots. European decision makers have typically tended to foresee a much wider role for the state in social regulation, even in those instances where public policy is partially delegated to private actors. U.S. policymakers, in contrast, have typically been more inclined to give free rein to private actors and market forces.[55]

In 1997, the White House issued the "Framework for Global Electronic Commerce,"[56] which sought both to create the basis for U.S. e-commerce policy and to influence nascent international debates. In contrast to the more cautious policy of the EU,[57] the U.S. administration wished private actors to take the lead in regulating e-commerce. The Framework was drafted by a working group led by Ira Magaziner, the Clinton administration's e-commerce policy "architect."[58] Magaziner was influenced by the success of the Internet Engineering Task Force (IETF), a self-organized body that had resolved many of the basic technical issues associated with the Internet, and he sought deliberately to keep government at the margins of e-commerce policy.[59] His document succeeded, to a quite extraordinary extent, in setting the terms on which U.S. policymakers would address e-commerce, and in discouraging policymakers from seeking to tax[60] or regulate it.[61]

55. I do not claim either that the EU is a monolith of government regulation, or that the United States is a pure example of an unbridled market, although I note that such simplistic perceptions have often characterized U.S. criticism of the EU, and vice versa, in the sphere of e-commerce. Both are complex—and contested—systems. I merely contend that the regulatory traditions in the two systems have tended on the whole to follow different trajectories of development. For historical evidence, see Spar 2001.

56. White House 1997.

57. See Simon 2000; and Cowles 2001.

58. Technology firms had considerable input into the formulation of the Framework; see Simon 2000. However, the Framework also reflected existing administrative policy, and state actors retained final say on its contents.

59. Interview with Ira Magaziner, 21 September 2000.

60. Many in industry opposed regulation because they feared it would go along with taxes. I owe this point to an anonymous reviewer.

61. It is remarkable how the Framework helped establish the truism that e-commerce should be left to self-regulation insofar as was possible. This was in large part because of Magaziner's policy entrepreneurship. See Jeri Clausing, "Report on E-Commerce Insists on Self-Regulation," *New York Times* (Internet Edition), 29 November 1998.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

The Framework provided a broad overview of the issues that confronted policymakers, including privacy. It encouraged industry-led, self-regulatory solutions to privacy problems and sought to help create a consensus for the establishment of

> a certain set of mechanisms where there are independent auditing agencies, private nonprofit bodies, that essentially award seals of some sort, so that a consumer can know if they see a web site that has a seal on it that it's privacy protected, and if they don't see a seal, then it's up to them.[62]

Independent "web seal" organizations, with sets of privacy principles and enforcement mechanisms, were thus the administration's preferred means of protecting privacy. Market forces would lead firms to voluntarily sign up to self-regulatory schemes, which would give "seals" to certify that their members complied with certain principles. Crucially, these principles would be market-driven; they would not be dictated by government. While the Framework referred to the possibility of government regulation of privacy, this was intended primarily as a threat to prod business into regulating itself.

The EU and the United States had issued a joint statement at the end of 1997, suggesting that public interest goals could potentially be achieved by private-sector initiatives in the overall legal framework provided by states.[63] However, in practice, the EU remained far more ready to regulate e-commerce than the United States. This was especially true in sensitive issue areas such as privacy, where the Data Protection Directive provided the basis for its approach (see previous section). The EU not only sought to regulate privacy within its borders, but also to ensure that external data flows did not undermine the intent of the Directive. Communications technologies made it relatively easy for firms and other actors to transfer data outside of the EU to foreign jurisdictions, many of which had lax privacy protections. Thus the EU reserved the right to block external data flows, and furthermore sought to use the threat of blockages as a means to persuade third countries to introduce "adequate" protection for personal data.

The EU's approach had clear consequences for U.S. e-commerce policy, as Magaziner acknowledged in the Framework. Even after the Department of Commerce had formally taken responsibility for negotiations in early 1998, he continued to play an active role, hoping that establishing self-regulatory organizations would create a sphere of private governance to forestall EU action. As Magaziner described it in early 1999, "if the privacy protections (sic) by the private sector can be spread internationally, that will become the de facto way privacy is protected, and that will diffuse this disagreement."[64]

62. Interview with Ira Magaziner, 21 September 2000.
63. European Union/United States 1997.
64. Quoted in Courtney Macavinta, BBB Privacy Project Faces Online Critics, *CNET News*, 13 January 1999. Available at ⟨http://news.com.com/2100-1023-220101.html?legacy=cnet&tag=rltdnws⟩.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

Magaziner's efforts to encourage self-regulation in privacy got off to a difficult start. Various sets of voluntary principles began to circulate among industry groups, but most business actors were less interested in protecting privacy than in generating the appearance of activity to forestall regulation. The first web seal program to come into existence, TRUSTe (originally Etrust) adhered closely to the regulatory model described in the Framework. Even though TRUSTe was backed by leading industry figures, and involved a set of principles that were substantially less demanding than those stated in the EU Directive, it had a very low take-up rate in its first year. Firms were reluctant to make binding commitments on privacy.

This situation posed problems. Magaziner and others were then seeking to engage European politicians and European Commission officials in discussions; the European Commission, the executive body of the European Union, had been charged with overseeing the Directive's implementation.[65] The Commission's skepticism about self-regulation was reinforced by the unwillingness of U.S. firms to join TRUSTe. There was also considerable domestic pressure on the administration and Congress to legislate protection for privacy in e-commerce transactions. These two sources of criticism began to reinforce each other, as privacy advocates within the United States started to use the Data Protection Directive and its external aspects as a basis to press for substantive legislation.[66]

By the first half of 1998, it was clear that the EU directive could have serious consequences for U.S. firms, unless the United States could show that self-regulation was effective.[67] The U.S. administration sought to raise the ante for business; policymakers such as Magaziner used the threat of legislation to pressure businesses into signing up to web seal organizations. The results were apparent; TRUSTe saw a surge in membership in the first half of 1998, "strangely coincidental to about the time when the government started really putting down their heavy hand."[68]

However, the administration felt that the TRUSTe program was not enough to convince the EU and allay domestic criticism. Magaziner and a group of large firms sought to convince the Better Business Bureau (BBB), a self-regulatory organization with a considerable reputation in offline dispute resolution, to set up a privacy seal program. The BBB had no previous experience in the area of privacy and was somewhat bemused by this request. However, once firms had guaranteed the necessary funds to the BBB, it started to build up a program under the aegis of its online commercial dispute resolution system, BBBOnline.

Thus in summary, the EU and United States had important differences over principles of social order, which were directly manifested in their differences over privacy in e-commerce. The United States sought to promote self-regulation as a

65. The Internal Market Directorate-General of the Commission had been charged with overseeing the implementation of the Data Protection Directive.

66. See Shaffer 2000; and Farrell 2002.

67. Swire and Litan 1998.

68. Susan Scott, then Chairman of TRUSTe; 1998. Remarks available at ⟨http://www.research.ibm.com/iac/transcripts/internet-privacy-symp/johnpatrick.html⟩.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

means toward the international protection of privacy in e-commerce. Administration decision makers hoped that by encouraging the establishment of self-regulatory organizations with an international ambit, they would effectively preempt further debate and create an international environment for the regulation of privacy that reflected U.S. domestic policy. The EU, for its part, wished to ensure that its domestic system of privacy protection was not endangered by data flows to third countries, such as the United States, that did not provide strong protection. The EU was prepared to use its leverage to pressure third countries into introducing legislated privacy protection such as the EU had itself. Both the United States and EU sought to preserve and extend their domestic systems of privacy protection. Each sought, in effect, to dictate the terms under which privacy would be protected in the burgeoning sphere of international e-commerce. By the same token, each had a preferred solution that might have negative potential repercussions for the other. Had the United States prevailed, so that self-regulation based on market-derived standards became the norm, EU law would have been unable to protect the data of European citizens as intended.[69] Alternatively, had the Europeans succeeded in forcing the U.S. administration to introduce legislation protecting privacy, U.S. efforts to promote self-regulation would have been undermined.

EU—U.S. Negotiations—The Importance of Argument in Creating the Safe Harbor Arrangement

The Safe Harbor emerged from EU-U.S. efforts to resolve their differences over data privacy. Initially, there appeared to be no chance of agreement. The EU wanted the United States to introduce legislative changes that would protect the privacy rights of EU citizens when their data was transferred to the United States. This would involve a set of actionable privacy rights, based on the nonbinding OECD privacy principles that the United States had already agreed to, and enforcement mechanisms resembling the system of data protection commissioners in the EU.[70] The United States was absolutely unwilling to accept these conditions and wanted the EU to recognize the patchwork of existing U.S. law and self-regulatory schemes as providing "adequacy" under the Directive.

These positions were radically incompatible—even if there existed some agreement between the two sides about principles, there was no basis for agreement on

69. While European policymakers were willing in principle to entertain the possibility of self-regulation, in practice they perceived the U.S. system of market-led principles as incapable of providing proper protection.

70. The task of negotiators was considerably eased by the existence of these guidelines, and by the creation of an epistemic community on privacy issues during the 1970s and 1980s. For discussion of these earlier developments, see Bennett 1992; and Mayer-Schönberger 1997. However, the United States had failed to protect privacy formally. See Bennett 1997. Its efforts to implement the guidelines had been limited to (largely ineffective) exhortations to firms.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

how these principles ought to be enforced. Initially, negotiators felt that the best that could be hoped for was damage control. As described by an EU official:

> There was a lot of angst around that this could spin out of control. There weren't any obvious solutions here; it was very black and white in the beginning, the comprehensive legislative approach and the piecemeal self-regulatory approach in the U.S.[71]

While both sides wished to avoid disruption of data flows, neither could see how to do this. Beginning in early 1998, Ambassador Aaron engaged in preliminary, informal discussions with John Mogg, the European Commission's Director-General for the Internal Market, but was unable to create common ground.

The key conceptual breakthrough came about through an idea of Ambassador Aaron's. As he describes it,

> Nobody knew how we were going to do this, and we were just sitting in John Mogg's office one day, and I had always been struck by the idea of "Safe Harbor." When I was first on Wall Street, was when I first encountered the term; it's used in this country primarily in the tax area, in which if you do x, y and z, you're presumed to fall under some tax regime exception or whatever it may be. . . . Somehow the word stuck in the back of my head, and as we were discussing this issue, I thought . . . well if we couldn't get the country to be considered "adequate," maybe what we could get considered adequate are the companies. And that if we could set up some kind of a regime that could have an adequacy finding for a system, not for a whole country's law and regimes, and so the word just popped into my head, as describing Safe Harbor.[72]

European Commission officials were intrigued by this proposal, which reframed the issues so as to make the deadlock resolvable. It potentially protected the privacy rights of European citizens but did not require the United States to introduce legislation. The underlying idea of "Safe Harbor" was that the adequacy test of the Data Protection Directive did not have to be applied to the United States as a whole; instead it could be applied to a specific set of firms that had agreed to adhere to certain privacy standards and enforcement mechanisms. This allowed the United States to claim publicly that its basic policy stance of protecting privacy through self-regulation was unchanged, while allowing the EU to help dictate the terms of regulation. Indeed, negotiators could neatly circumnavigate several of the veto points of the U.S. system; Safe Harbor did not require formal legislative change. The proposal had a transformative effect on the negotiations: it revealed, to both EU and U.S. negotiators possibilities of which they had simply been unaware before commencing dialogue; and it provided them with an alternative to their original, mutually incompatible, sets of demands.

71. Interview with Commission official, 29 June 2000.
72. Interview with Ambassador David Aaron, 19 September 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

> [T]he discussions that eventually led to the Safe Harbor agreement were an enormous learning experience for both sides . . . initially, we both took stances that were rather simplistic, because we didn't know any better.[73]

However, even after the EU accepted the Safe Harbor proposal as a basis for negotiation, the issues were not easily amenable to compromises that sought to split the difference—the efforts to reach a solution were more like "resolving simultaneous equations."[74] Each party perceived itself as defending "fundamental rights" that could not simply be "negotiated away."[75] Even though both sides shared assumptions about privacy principles rooted in the OECD guidelines, they had very different views about how these principles should be implemented. Disputes about the principles of access, choice, and enforcement dominated the negotiations. Each of these principles touched both on important interests and deeper issues of social organization. Indeed, it was sometimes hard to distinguish one from the other—particular interests and principled stance became so enmeshed that it was impossible to tell where one left off and the other began.[76]

Thus while the negotiations involved hard bargaining, this bargaining was embedded in more discursive forms of dialogue in which negotiators not only sought to make trade-offs, but to convince the other side of the legitimacy of their position and arguments.[77] In so doing, negotiators did not seek to persuade their counterparts to embrace a different set of normative orientations.[78] Their aims were rather more modest. Each group of negotiators sought to make the case that their aims were legitimate, and deserving of respect. They also sought to persuade the other side of the viability of different and new approaches. In short, their activity may be seen as "symbolic action"[79] or "skilled social action."[80] Actors used persuasion to create a common framework of understanding; they sought to foster cooperation by exploring and disclosing new possibilities, and in some cases fore-

73. Interview with Commission negotiator, 15 January 2001.
74. Aaron 1999.
75. Interview with Commission official, 29 June 2000.
76. To take one example, the two sides had little difficulty in agreeing that certain kinds of information were highly sensitive, and should be subject to "opt in"—individuals would actively have to choose to provide information, rather than simply have the opportunity of opting out. However, the two sides vehemently disagreed as to what kinds of information ought to be considered sensitive. European negotiators, reflecting memories of national socialism, insisted that data on ethnic or racial origin was sensitive, a stance which U.S. negotiators found morally repugnant. However, the United States was also motivated by pragmatic considerations—treating such data as sensitive would have imposed a considerable burden on U.S. businesses. U.S. airlines, for example, might have difficulty in collecting or using information on whether their passengers preferred kosher food. In the end, despite these objections, the U.S. reluctantly assented to EU arguments, accepting that they stemmed from a genuinely principled stance, while continuing to disagree with that stance. There were many other areas where clashes of values and clashes of interest reinforced each other, including most particularly freedom of information, freedom of the press, and rights of access to information.
77. More widely, see Risse 2000.
78. Checkel 2001.
79. Johnson 1997.
80. Fligstein 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

closing others. But they also sought to use argument to advance interpretations of the world that served their own ends, engaging in a "struggle for the real."

The crucial roles of persuasion and argument can be seen clearly in the key issue of the negotiations: enforcement. The EU and United States had begun discussions with radically divergent viewpoints on what enforcement should involve. Ambassador Aaron's proposal that a "Safe Harbor" arrangement might provide adequacy for firms was sufficient to create a space for discussion. However, certain member states of the EU were consistently skeptical of the merits of Safe Harbor in particular, and of self-regulation more generally. Some member states, including Germany and France, were opposed in principle to a solution involving substantial elements of self-regulation, so that Commission negotiators were continually forced to tack back and forth on this set of questions.[81] Safe Harbor had no chance of political success unless the larger member states were convinced.

Commission negotiators had sought consistently to persuade critics in European Union member states that the proposed Safe Harbor had merit. However, the negotiators had only mixed success—certain member states continued to hold out either for formal legislation, or for no deal at all.[82] This led many observers to predict that the negotiations had little chance of success.

The breakthrough came in January 2000, when the relevant member-state officials were invited to Washington, D.C. for a seminar on the enforcement of Safe Harbor, at the suggestion of the U.S. government. They engaged in discussions over three days with administration officials, members of the relevant regulatory authorities (in particular, the FTC), and members of privacy seal organizations. Both EU and U.S. negotiators credit this seminar as having been the turning point in the negotiations. Member-state officials, for the first time, had the opportunity to extensively engage in reasoned debate with the bodies charged with enforcement. As described by a Commission official, the seminar was

> a very good learning experience, it put them on a learning curve. It's not to say that suddenly all problems were clear, but . . . they were really touching on the problems that were still outstanding, rather than the fringe areas that they had been interested in before.[83]

While no bargaining or negotiation as such took place during the three days, the member-state representatives' substantive understanding of the issues at hand

81. See Edmund L. Andrews, "Europe and US Are Still at Odds Over Privacy," *New York Times* (Internet Edition), 27 May 1999.

82. If there had been no deal on Safe Harbor, U.S. firms would still have been able to make use of "model contracts" under the Data Protection Directive, which would have provided them with a legal means of transferring data to third countries in the absence of an adequacy judgment. However, model contracts had not been formulated during the period that Safe Harbor was being negotiated; while they have since been issued, they cleave to higher privacy standards than Safe Harbor and are considered unlikely to be attractive to U.S. firms.

83. Interview with Commission official, 29 June 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

changed, and many modified their fundamental skepticism about self-regulation. U.S. enforcement officials and self-regulatory organizations were able to convince them that an arrangement involving self-regulatory elements could provide privacy protection. This did not merely involve explaining how the system would work; Commission negotiators had previously explained the proposed solution in painstaking detail and failed to convince the more reluctant member states.[84] Instead, it was the opportunity for direct dialogue that "broke the logjam"[85] and brought about a quite fundamental change in certain member states' understanding of, and attitude toward, the proposed mix of self-regulation and government oversight.[86] While important questions remained outstanding, it was clear that the outlines of an agreement were in reach. Accordingly, the EU and United States announced that they had reached a provisional agreement in March, paving the way for a more formal agreement in the summer of the same year. Member-state representatives, when the time came to vote on the proposed arrangement, voted unanimously in favor—an extraordinary turnaround from their previous position.[87]

Thus the negotiation of Safe Harbor provides important evidence supporting constructivist accounts of how international actors behave. The two key moments of the negotiations demonstrate the importance of argument and persuasion as a vital explanatory factor. First was Ambassador Aaron's initial proposal for a "Safe Harbor," which allowed substantive negotiations to begin in the first place. By drawing on external experience, he was able to reframe the fundamental dilemmas facing the two sides in such a way as to allow cooperation. His initial proposal for a "Safe Harbor" disclosed new possibilities of action to the protagonists, building bridges between two apparently incompatible sets of objectives, even while seeking to protect the U.S. position.

Second, the persuasion of EU member-state officials by U.S. administration and web seal officials, as well as representatives of self-regulatory organizations, allowed the two sides to reach a final agreement. Actors on the U.S. side were successful in persuading EU member-state representatives to accept a new set of ideas concerning self-regulation and privacy. Officials for recalcitrant member states, who had previously been unwilling to accept that self-regulation could provide adequate protection for privacy, came away from the meeting with a new understanding of the issues at hand, which correspondingly affected their willingness to accept elements of the Safe Harbor proposal to which they had been previously hostile.

In these two instances, which were crucial to the successful conclusion of negotiations, persuasion and argument played a role that cannot be explained by conventional bargaining theory. First, it is clear that negotiators were prepared to engage in argument, and to seek to persuade others of the validity of their positions by

84. Ibid.
85. Interview with U.S. negotiator, 18 September 2000.
86. Interview with Commission official, 29 June 2000.
87. Interview with Commission negotiator, 15 January 2001.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

debating ideas. Second, these ideas had a clear effect on actors' beliefs. The idea of Safe Harbor allowed the EU and United States to commence formal negotiations, moving beyond the normative differences that had led each side to adopt a position radically incompatible with that of the other. Persuasive efforts by actors in the United States caused certain EU member-state officials to do an about-face in their attitude to the self-regulatory elements of Safe Harbor. Finally, beliefs changed in a manner that conventional bargaining theory has difficulty in explaining. In both instances, the underlying worldviews of actors were changed. In one instance, new possibilities of action (the initial idea of the Safe Harbor arrangement), that had not previously been apparent, were revealed. In the other instance, actors who had previously regarded the underlying concept of the arrangement as opprobrious were persuaded to change their assessment.

Safe Harbor and Its Consequences

Safe Harbor reflects neither the initial EU or U.S. positions on privacy and e-commerce, nor even a simple compromise between them. At first glance, it appears to involve important concessions by EU negotiators to the U.S. system of self-regulation. TRUSTe, BBBOnline, and other ADR providers play an important role, providing a first line of enforcement. However, self-regulatory bodies are embedded in a framework created by state authorities, in a manner very different from that originally anticipated by U.S. policymakers. Figures in the administration originally envisaged web seal organizations creating their own standards in a market-driven process. U.S. officials believed that only thus could self-regulation provide the required flexibility and adaptability. Safe Harbor, by contrast, involves a set of principles created by state actors in formal negotiation with one another.

> These are two governments that got together, that drafted the rules of the game. Industry commented . . . [t]hey were never in the meeting rooms, they never participated in the drafting sessions, they were bystanders.[88]

As a consequence, Safe Harbor has encountered opposition, not only from certain business organizations that fear government intervention by stealth,[89] but from some of the original architects of U.S. e-commerce policy. In Magaziner's words, "[t]he problem I have with the Safe Harbor agreement—if, in effect it becomes a way for governments to set what the standards would be. . . . Then I think it's a problem."[90] Safe Harbor not only involves state-created standards, but embeds web seal organizations and other relevant ADR providers in a framework of state enforcement and oversight. Their activity, insofar as it relates to Safe Harbor, is now subject not only to FTC control, but to scrutiny by EU authorities.

88. Interview with Commission official, 29 June 2000.
89. Interviews with U.S. business organizations, February 2001.
90. Interview with Ira Magaziner, 21 September 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

Thus Safe Harbor is neither a simple recognition by the EU of the U.S. system of self-regulation, nor an extension of the European system of formal legislation. It is qualitatively different from both. It can most accurately be seen as an "interface" between the two.[91] Safe Harbor is intended to provide European states with reasonable assurance that the private information of their citizens is not abused when it is exported by member firms. By the same token, it does not directly require the United States to change how it regulates e-commerce and privacy. Safe Harbor seeks to mitigate the problems of interdependence that have arisen between the European and U.S. systems, minimizing the potential for conflict between the two, without overtly requiring either to change its approach.

As such, Safe Harbor may serve as a model for resolving the clashes between different regulatory systems resulting from e-commerce. As described by the U.S. government,

> The data privacy issue is likely the first of many trade issues involving electronic commerce and the agreement reached . . . could provide a model for how the U.S. and the EU can move forward as they grapple with conflicting national laws and regulations.[92]

However, even if Safe Harbor provides an interface between the very different EU and U.S. systems, it is not a hermetic seal. Although Safe Harbor does not involve direct changes to either system, it indirectly affects both, as well as an emerging sphere of transnational private regulation of privacy that cuts across not only the EU and United States, but third-country jurisdictions as well.

First, the possibilities disclosed by Safe Harbor have importantly affected debates about government–private actor relations within the EU. Current debates about governance among the EU's institutions have increasingly come to intersect with wider debates about international governance, in considerable part because of the experience of negotiating Safe Harbor.[93] Commission officials credit the Safe Harbor negotiations as having made them aware of the possibilities of new modes of regulation, and in particular, of how bodies such as the FTC may act as a nonprescriptive enforcer.[94] Many policymakers now view an FTC-type system as a faster and more flexible alternative to the tortuous EU legislative process. Interviews with these officials indicate that their willingness to entertain these new possibilities emerged from their arguments with the United States over Safe Harbor.

91. I borrow this use of the term "interface" from Scharpf 1994. See also Farrell forthcoming; and Newman and Bach 2002.

92. White House 2000. See also Beier 1999.

93. The Safe Harbor negotiations were not handled by one of the external relations Directorate-Generals, but rather by the Commission's Directorate-General for the Internal Market. Thus there has been considerable overlap between those officials involved in negotiating Safe Harbor, and those officials leading current discussions about new forms of governance within the EU itself.

94. Interview with Commission official, 29 June 2000; interview with Commission negotiator, 15 January 2001.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

Political actors outside the Commission are also watching Safe Harbor closely as a policy experiment. If it proves successful, Safe Harbor will, in the words of the current president of the European Parliament, serve as a "template for the future," and a model for regulation in areas beyond privacy and data protection.[95] Political actors within the EU who favor more flexible forms of regulation are seeking to use Safe Harbor as a focal point for policy discussions, and as a potential example of how the EU may regulate itself in future.[96]

Second, the rules of Safe Harbor allow the state actors who negotiated them to exert influence over the self-regulatory organizations involved, which extend beyond the parameters of the Safe Harbor arrangement itself. This was foreseen by EU negotiators, whose willingness to engage in negotiations over Safe Harbor, and to seek to persuade reluctant member states of its merits, was in large part grounded in their perception that it opened the way to a wider influence over U.S. privacy practice. Under the Directive, the EU could have advocated an approach based on contracts rather than a Safe Harbor–style arrangement; EU negotiators preferred the latter because

> [C]ontracts only deal with the transfers that they are concluded to deal with. They are much less likely to have any secondary or spin-off effects. Whereas the Safe Harbor was much more likely to have a general upward pulling or pushing effect on privacy in the U.S. in general. Including through the alternative dispute resolution mechanisms.[97]

The existence of Safe Harbor has allowed public actors to exert an influence on web seal organizations that they otherwise would not have had.[98] Public actors have been able to create a de facto international standard for self-regulatory organizations' privacy standards and practices. Interviews with web seal officials, as well as their public statements and actions, suggests that they acknowledge the importance of these standards, even in interactions where Safe Harbor is not strictly supposed to apply. TRUSTe, the larger of the two web seal organizations, with about 2,000 members, has yet to update its principles to the Safe Harbor stan-

95. Speech by Pat Cox, 8 September 2000.

96. Interview with Pat Cox, 1 March 2001. These developments pose complex questions regarding the possible future relationship between these new forms of self-regulation, and existing varieties. For insightful analysis of different modes of self-regulation, see Newman and Bach 2001. I also note that if the implementation of Safe Harbor proves problematic, it may come over time to serve as a negative, rather than a positive, example.

97. Interview with Commission negotiator, 15 January 2001.

98. Other state actors, most prominently including data protection commissioners in OECD countries, are also seeking to exert influence over web seal organizations. Interview with Malcolm Crompton, Federal Privacy Commissioner for Australia, 8 September 2000. Interview with Stephen Lau, Data Protection Commissioner for Hong Kong, 9 September 2000. Discussion with Blair Stewart, Assistant Privacy Commissioner for New Zealand, 8 September 2000. However, while data protection commissioners believe that they may have substantial influence in the future, their current efforts are currently greatly overshadowed by the twin pressures of Safe Harbor and market forces, suggesting that Safe Harbor has indeed enabled its negotiating parties to have an effect that they would not otherwise have had. See Cavoukian and Crompton 2000.

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dards, although officials indicate that it wishes to do so in the future and has created a new Safe Harbor program for its members.[99] BBBOnline, with 850 members, has upgraded its principles so that they are fully compliant with Safe Harbor, even for those member firms that have no dealings with the EU, and thus have no overt reason to comply.[100]

In the interim, both organizations have become genuine transnational actors, as they expand their horizons and membership beyond the United States and create joint programs with self-regulatory organizations in third countries. As this new sphere of transnational action expands, so too may Safe Harbor come to enjoy a wider influence. BBBOnline has recently announced an alliance with JIPDEC, a Japanese privacy organization sponsored by the Japanese industry and trade ministry (MITI), in which the two organizations will harmonize their standards, thus introducing the Safe Harbor principles into a domestic political context entirely unrelated to that for which they were originally intended. Most recently, on 20 August 2001, Australia's national Internet organization, the Internet Industry Association (IIA) announced a draft code of privacy practice modeled on the Safe Harbor principles, intending to protect Australian firms from application of the external provisions of the EU Data Protection Directive.

In summation, Safe Harbor is best understood as an interface solution, mediating between two systems of regulation that are based on different—and partially incompatible—principles of social order. The arrangement is intended to mitigate interdependence between these two, assuring Europeans that their personal information will be protected when imported into the United States by Safe Harbor member firms, while not requiring extensive changes in the U.S. system of e-commerce regulation. However, while Safe Harbor is intended to mitigate negative spillovers, it is itself having important effects, through disclosing new possibilities in the debate on new modes of regulation within the EU, and providing the EU and United States with a new means of influencing the practices of private self-regulatory bodies.

Conclusion

This article examines new "hybrid" institutions involving both states and private actors, in seeking to answer three questions. First, what are the origins of these institutions? Do they involve (as much of the prevailing literature would suggest) the displacement of states by private actors? Second, what are the processes through

99. For an early statement of TRUSTe policy on Safe Harbor, which emphasizes the disadvantages of failing to bring TRUSTe standards into line with Safe Harbor requirements, see Scott 1998. The failure of TRUSTe to update its principles is in large part because of the unwillingness of some member firms to commit to the higher standards that Safe Harbor requires in the area of access to data. Interview with TRUSTe official, 20 February 2001.

100. Interview with BBBOnline official, 20 September 2000.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

which these institutions have been articulated and shaped? Third, and finally, what are their likely effects, and their wider implications for international relations scholarship? I treat each of these questions in turn.

Safe Harbor provides evidence to support the hypothesis that hybrid institutions have originated with states. As discussed in the introduction, this hypothesis is the opposite of what much existing scholarship has predicted: that private actors would come to the fore in the governance of e-commerce, displacing states. States are presumed to be incapable of governing e-commerce and cyberspace, so that private actors create their own forms of authority. The evidence from Safe Harbor provides a different explanation. While private actors do play an important role in the governance of privacy, this is in large part because of state action.[101] Self-regulation of privacy had its origins in state strategies; it was a key U.S. policy aim in the sphere of e-commerce. The U.S. administration not only laid out the blueprint for web seal organizations in its White Paper, but was forced continually to intervene as it became clear that firms were unwilling to regulate themselves without the threat of government legislation. Thus in an important area of e-commerce activity, the claim that self-regulation had its origins in state incapacity is almost precisely the opposite of the truth.

The history of Safe Harbor suggests that hybrid arrangements have their origin in the increasing interdependence to which e-commerce gives rise. As e-commerce creates new spheres of social activity that cut across national borders, and as interdependence grows, previously separate systems of regulation may begin to undermine each other, or even come into direct conflict. When differences in regulatory approach reflect deeper clashes over underlying principles of social order, these problems are difficult to resolve through conventional bargaining. The EU and United States had very different approaches to privacy protection, which were rooted in different understandings of state-society relations.[102] These increasingly came into conflict as e-commerce and associated forms of communication meant that regulation within one system increasingly had implications for the other. The EU and United States thus sought to create an interface arrangement, through which the problems of interdependence might be mitigated.

Second, I examine how Safe Harbor was articulated over the course of discussions between the two sides. Safe Harbor's origins had clear implications for the

101. This is true for other important areas of e-commerce policy, such as ICANN's role in domain name regulation. For an excellent overview, see Drezner forthcoming; on ICANN, see Froomkin 2000b. These findings echo the more general arguments of Krasner 2001.

102. Privacy is not the only area of activity where e-commerce exacerbates tensions between different systems of social order. Similar problems have arisen in other areas of e-commerce policy, such as content regulation, free speech, and consumer protection. Indeed, these problems extend beyond the realm of e-commerce. In an important recent overview of the globalization debate, Suzanne Berger concludes that globalization is less about the transfer of political relationships from the national to the international realm, than a new set of "international conflicts over the economy" which "reflect different national conceptions both of interest and of the basic norms of social life." See Berger 2000, 59. Berger's restatement of the globalization thesis finds support in the phenomena under exploration here.

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processes that shaped it. As I have suggested, argument, in the constructivist sense, will be more likely when actors have different understandings of the problem at hand and the appropriate solutions. This suggests that the conditions of interdependence identified above, in which previously isolated systems of social order come into conflict, provide strong reasons for actors to engage in argument and reasoned debate. If actors representing different systems wish to avoid mutually destructive stalemate, and to identify potential solutions, they typically must engage in dialogue with each other, outlining and defending their normative positions. These processes of dialogue may lead to argument between actors, in which each set of actors seeks to persuade the other, changing the fundamental ground rules of debate; or, more interestingly, in which actors agree on a solution that would have been obvious to none of them before commencing discussion.

Safe Harbor shows that efforts to resolve interdependence can involve just such dialogue. Actors started from different—and radically incompatible—notions of how privacy should be protected. They finished by reaching a solution that represented neither starting position, nor a straightforward compromise between them, but something new. Deliberative argument played a highly important role in this process. Simple bargaining, on the basis of the original positions held by the two sides, would have been extremely unlikely to lead to agreement. The successful outcome of the negotiations was rooted in participants' efforts to argue, and to persuade. The idea of Safe Harbor effectively transformed initial discussions, by revealing new possibilities of action to participants. Otherwise, there would have been little basis for formal negotiations in the first instance; in the language of two-level games, the "win sets" of the EU and United States did not intersect. Further, persuasion—and change in underlying worldviews—was key to the willingness of EU member-state officials to change their minds regarding the self-regulatory aspects of Safe Harbor. Neither of these key moments would have been predicted or explained by standard bargaining models that draw on game theory (and thus have difficulty in understanding how argument may change worldviews and disclose new possibilities). However, the bulk of constructivist work on persuasion to date has focused on the intersection between persuasion and value change, and more specifically on how changes in norms may lead to cooperative outcomes[103] when actors are persuaded, by others who adhere to a norm, that they should themselves adhere to it. This arguably undersells the promise of constructivism—equally important, if not more so, is how argument may reveal new possibilities of action that may have been previously unavailable to persuader or persuadee. Argument thus not only involves one actor, or set of actors, persuading another to adopt a preconceived set of norms; it may disclose previously unconceived possibilities.

Finally, one may ask about the wider consequences which Safe Harbor, and similar arrangements, are likely to have. On the one hand, some circumspection is

103. I owe this formulation to Eric Posner.

https://doi.org/10.1017/S0020818303572022 Published online by Cambridge University Press

warranted. Mann, Eckert, and Knight describe how "[t]he accord, something of a hybrid between the market and mandated approaches, possibly portends a merging of the two approaches in future treatment of e-commerce issues," but they also note persistent ambiguities within the arrangement.[104] Their caution is appropriate. Many issues regarding implementation remain unresolved. Furthermore, such arrangements may prove to be controversial if they are generalized; critics argue, with considerable validity, that such public-private arrangements blur democratic responsibility and accountability.[105] What this suggests is that the current impetus toward Safe Harbor-style hybrid solutions should not be viewed as a final culminating event, but rather as a stage in an iterated and ongoing process. As I have suggested, the example of Safe Harbor is exerting an important influence on regulatory debates within Europe; it may come over time to have a similar role for debates within the United States.[106] However, the political viability (or lack of same) of Safe Harbor–style arrangements will only be established over the medium term.

On the other hand, the case study set out in this article holds important lessons. The history of Safe Harbor shows how actors in the EU and United States both sought initially to construct the edifice of international e-commerce regulation—but on the basis of very different foundations. Through a process of argument, these actors succeeded in discovering new possibilities of action, reaching a provisional understanding about a new institutional approach to resolving the vexing dispute over privacy regulation, which may be applied to other areas of e-commerce. This agreement has transformed the relationship between state and private actors in the arena of privacy. Web seal organizations, which were originally created so as to keep states out of e-commerce regulation, have instead become vectors of state influence.[107] Hybrid arrangements allow state actors to set broad rules within which private actors operate in a given area of activity, and thus to exercise influence over these actors. A new vein of work in international political economy[108] has begun to explore how private actors are creating new transnational spaces. Safe Harbor shows how state actors may exert influence over the principles on which these private transnational spaces are articulated, and thus points to a new—

104. Mann, Eckert, and Knight 2000, 133. See also Heisenberg and Fandel 2002.

105. See Cutler 2000. I note that argument, as I understand it in this article, carries no normative implication of legitimate outcomes; its relationship to deliberation proper is tenuous or nonexistent.

106. Shaffer 2000. The current U.S. administration of George W. Bush, however, is markedly less open to compromise than its predecessor; see Heisenberg and Fandel 2002.

107. As described in the previous section, the EU sought deliberately to use the Safe Harbor standards to influence the web seal organizations, and thus privacy practice and debate within the United States. These new forms of state–private actor relationship have interesting implications for ongoing debates within international relations about the relationship between the international and domestic arenas; private transnational actors create new channels of influence between the two, which other actors (such as states) may also take advantage of.

108. See Mattli 2001a; Stone Sweet 1999; and Knill and Lehmkuhl 2002.

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and important—set of relations in the governance of e-commerce, which international relations scholarship is only beginning to address.[109]

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109. For a different, but complementary understanding of state–private actor relations in e-commerce, see Spar 2001. Kobrin 1997 and forthcoming examines similar issues, but concludes that e-commerce is substantially weakening the effective authority of states.

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