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**Citation:** Fahey, E. (2014). On the Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US. *European Law Journal*, 20(3), pp. 368-384. doi: 10.1111/eulj.12046

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## ON THE USE OF LAW IN TRANSATLANTIC RELATIONS: LEGAL DIALOGUES BETWEEN THE EU AND US

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### Introduction

1. There is a perceived excess of “lower case EU constitutional law” in EU External Relations law.<sup>1</sup> However, this excess does not extend to transatlantic relations between the EU and USA.<sup>2</sup> Bilateral transatlantic relations are typically depicted as “institutionally-light”,<sup>3</sup> given that they operate through High Level Working groups, task forces or policy fora and networks of private actors.<sup>4</sup> The sources of bilateral EU-US relations lie in bilateral regulatory cooperation agreements, as well as Protocols, Exchanges of Letters, thus in both binding and non-binding rules. The most significant Transatlantic policy collaboration thus far, the New Transatlantic Agenda (NTA) agreed in 1995, is not itself a formal treaty.<sup>5</sup> The use of law in bilateral transatlantic relations is usually captured in scholarship as an instrument for regulatory cooperation and policy diffusion.<sup>6</sup> Thus law is rarely an “end” in this domain, more so a “means”. Nonetheless, law plays a significant role in contemporary transatlantic relations *outside* of the bilateral context which, from the perspective of EU External Relations law, might seem neither conventional nor apparent.<sup>7</sup> In fact, non-bilateral transatlantic relations increasingly deploy law as a communication tool between the two legal orders. For example, in 2011, the US intervened informally and anonymously in the

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<sup>1</sup> Emphasis supplied. B. De Witte, ‘Too much constitutional law in the European Union’s Foreign Relations?’, in B. De Witte and M. Cremona (eds) *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008), at 11.

<sup>2</sup> Transatlantic Relations are intended here to denote relations between the EU and the USA and not those, for example, with Canada or Latin America.

<sup>3</sup> Pollack, for example, assesses ten years of the policy programme of transatlantic relations, the New Transatlantic Agenda (NTA) from 1995, to contain substantive ambition and legal-institutional modesty: M. Pollack, ‘The New Transatlantic Agenda at Ten: Reflections in an experiment in International Governance’, (2005) 43 *Journal of Common Market Studies* 899. Similarly J. Peterson et al., *Review of the Framework for Relations between the European Union and the United States: An independent study* (Commissioned by European Commission Director General External Relations Unit C1 Relations with the United States and Canada, 2005).

<sup>4</sup> See generally M. Pollack and G. Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman & Littlefield, 2001).

<sup>5</sup> Signed in Madrid on 3 December, 1995.

<sup>6</sup> E.g. M. Pollack and G. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009); D. Bach and A. Newman, ‘Self-Regulatory Trajectories in the Shadow of Public Power: Resolving digital dilemmas in Europe and the United States’, (2004) 17 *Governance* 387; D. Bach and A. Newman, ‘The European regulatory state and global public policy: micro-institutions, macro-influence’, (2007) 14 *Journal of European Public Policy* 827; J. Scott, ‘From Brussels with Love: the Transatlantic Travels of European Law and the chemistry of Regulatory Attraction’, (2009) 57 *American Journal of Comparative Law* 897. Less so, but not strictly speaking in a similar context, N. Krisch, ‘Pluralism in post-national risk regulation: the dispute over GMOs and trade’, (2010) 1 *Transnational Legal Theory* 1.

<sup>7</sup> “Contemporary” denotes here recent developments taking place approximately in the last decade, subsequent to the NTA.

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formulation of EU legislation,<sup>8</sup> while the US House of Representatives passed legislation to prohibit the impact of EU law upon the US legal order.<sup>9</sup> Another example is constituted by EU *amicus curiae* submissions before the US Supreme Court in, for example, death penalty cases.<sup>10</sup> The so-called “Brussels effect” is also the subject of recent scholarship, assessing the perceived spillover effect of EU regulatory standards onto US rules, in areas ranging from genetically modified foods, data privacy standards, antitrust rules to chemical safety rules.<sup>11</sup> Similarly, the extent to which EU legal rules are actually transplanted into US law is increasing- for example, the transposition of EU environmental rules standards in California.<sup>12</sup> Moreover, it has been suggested that the increasingly unitary nature of EU foreign policy has given rise to a heightened responsiveness by the EU to US foreign policy.<sup>13</sup> While the bilateral relationship context is not strictly the focus of analysis here, notably the EU and US have recently begun to cooperate in the realm of Cyber Security and Cybercrime.<sup>14</sup> One of the explicit EU-US goals in this context is to advance participation by EU States in the legally-binding Council of Europe Convention on Cyber-crime, of which the US itself is not even a member.

2. Non-legal scholarship suggests that bilateral transatlantic relations are institutionally modest.<sup>15</sup> However, it is argued here that there are institutional dimensions to formal and informal transatlantic relations which indicate that they are at least quasi-institutional, despite their shortcomings or lack of formal

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<sup>8</sup> ‘Informal note on Draft EU General Data Protection Regulation’ (December 2011), available at [http://edri.org/files/12\\_2011\\_DPR\\_USlobby.pdf](http://edri.org/files/12_2011_DPR_USlobby.pdf):

‘This informal note comments on certain aspects of the widely leaked draft proposal to modernise the European Union’s data protection legal framework, and in particular the draft General Data Protection Regulation (the “draft regulation”). It does not necessarily represent the views of the US Federal Trade Commission (FTC) any bureau of office, or any other US government agency...’

See ‘US Lobbying waters down EU data protection reform’, *Euractiv* (21 February 2012), publishing a US document entitled, ‘Informal Comment on the draft General Data Protection Regulation and draft Directive on data protection in law enforcement investigations.’

<sup>9</sup> European Union Emissions Trading Scheme Prohibition Act of 2011 (HR 2594).

<sup>10</sup> Eg *Atkins v. Virginia* 536 US 304 (2002); *Roper v. Simmons* 2004 WL 1619203 (US). See M. Cremona, ‘Values in EU Foreign Policy’, in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders Policy interconnections between the EU and the rest of the world* (Hart Publishing, 2011), 275. More recently, see *Kiobel v. Royal Dutch Petroleum et al*, pending before the US Supreme Court (No. 10-1491), where the European Commission made submissions in proceedings concerning the application of the Alien Tort Statute 28 USC §§1350 to European companies for human rights abuses in Nigeria.

<sup>11</sup> A. Bradford, ‘The Brussels Effect’, (2012-2013) 107 *Northwestern University Law Review* 1 (forthcoming).

<sup>12</sup> J. Scott, From Brussels with Love, n 7 above.

<sup>13</sup> See the analysis of EU-US relations in the several accounts given in ‘Developments in the Law-Extraterritoriality’, (2011) 124 *Harvard Law Review* 1226.

<sup>14</sup> Council of the European Union EU-US Summit: Joint Statement 16726/10, Presse 315 (20 November 2010), 3; Presidency Conclusions of the Cybercrime Conference (Budapest Conclusions), Budapest (12-13 April 2011). See above Part VI EU-US Cyber-crime and Cyber-Security goals’.

<sup>15</sup> Eg M. Pollack, The New Transatlantic Agenda at Ten, n 4 above; Peterson et al, Review of the Framework for Relations between the European Union and the United States, n 4 above.

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legal character. A Transatlantic Legislators Dialogue is on-going since 1972, with only 1 of the 3 EU institutional co-legislators participating, with limited output.<sup>16</sup> Transatlantic annual summits have been held since the 1990s, continuing to generate challenges regarding the appropriate EU institutional representation, even after the Treaty of Lisbon.<sup>17</sup> Overlooked also in non-legal scholarship is the direct contact between the US Supreme Court and Court of Justice of the European Union, which has been increasing since 2000, in the form of periodic judicial visits, despite a highly imbalanced mutual citation rate.<sup>18</sup> The loose quasi-institutional character of transatlantic relations appears to permit the EU and US to communicate through law. Paradoxically, their respective judicial institutions have actually hosted the legal dialogues accounted for here- for example, as in the case of EU *amicus curiae* submissions before the US Supreme Court.

3. The interactions between the EU and US outlined above deploying law are remarkable, given that they are manifold, frequent and recent. They form a direct and indirect legal dialogue, which actually takes place in their respective legal orders. It is a distinct and observable dialogue, outside of the strictly bilateral setting. "Law" in this context of interactions between the legal orders of the EU and US has a broad interpretation and includes caselaw, legislation, legal procedure, advocacy, procedural rules, legal fora and court procedures. The actors vary, as do the institutional arenas, which range from the legislative to the regulatory to the judicial and diplomatic. There appears to be considerable proximity between the two legal orders and a porous reception of each other's legal standards. Law also remains a central tool in transatlantic disputes as a means to protect the autonomy of their respective legal orders. The bilateral casestudy of cybercrime and cyber security equally provides evidence of the flexible parameters for the use of law in bilateral transatlantic relations.

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<sup>16</sup> i.e. The European Parliament.

<sup>17</sup> And so, at the EU-US Annual Summit on 20 November 2010, post-Lisbon, the President Van Rompuy, President of the European Council welcomed President Obama to the EU-US Summit, while on the bilateral aspects of the economic relations, President Barroso briefed President Obama. The High Representative for Foreign Affairs, Baroness Ashton the new external representative of the EU, remained and continues to remain outside of this institutional interplay. See J. Monar, 'EU-US relations at the outset of the Obama presidency: the potential for leadership and a new deal', (2009) 16 *European Foreign Affairs Review* 1; see also P. Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, 2011).

<sup>18</sup> Press release No. 57/03, Visit to the Court of Justice of the European Communities' by a delegation from the United States Supreme Court (7 July 2003); Press Release No. 18/07, Visit of delegation of the Court of Justice of the European Communities to the United States of America (27 February 2007). A search in the Curia database for a period of the previous five years, searching 'US Supreme Court' in the Court of Justice yields four results, all opinions of Advocate General (27 June 2012). On the converse point, as to the US Supreme Court, see below 'EU *Amicus Curiae* Submissions in US Death penalty cases'.

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4. This account sets out to map the place of law in contemporary transatlantic relations largely but not exclusively *outside of the bilateral context*. The focus of this analysis is not on transatlantic regulatory standards themselves qua law<sup>19</sup> or the motivations behind specific transatlantic policies, but rather to consider the distinctness and significance of certain contemporary interactions taking place between the EU and US which deploy law. This paper explores in detail most of the casestudies sketched in the introductory paragraph. Section I considers six individual cases, outlining the deployment of law in, *inter alia*, rule-making, judicial fora, law migration and policy responsiveness: (1) The EU-ETS Saga, (2) EU *Amicus Curiae* representations in the US, (3) EU Standards migrating across the Atlantic as the “Brussels effect” or “Law Migration”, (4) US Policy Representations in the EU legislative process, (5) EU Foreign Policy “Responsiveness”: Secondary Sanctions and (6) EU-US Cyber-crime and Cyber-security goals. Section II summarises the key elements of the casestudies, specifically the actors, fora and instruments thereof.

### Section I: Select casestudies

#### I. THE EU-ETS SAGA

5. To begin with, a particularly recent and provocative use of law in transatlantic relations arises from the example of the EU-Emissions Trading System (EU-ETS). The EU-ETS is the cornerstone of the European Union's policy to combat climate change and its key tool for reducing industrial greenhouse gas emissions cost-effectively. The inclusion of aviation in the EU-ETS has resulted in significant controversies. Thus, all flights arriving and departing from an aerodrome in the territory of a Member State to which the Treaty applied were included within the scope of Directive 2008/101/EC from 1 January 2012.<sup>20</sup> The EU rules purported to exempt airlines from the ETS in certain instances, providing for a curious “legal equivalence” test. For example, Article 18 of the Directive provided that a third country measure to reduce aviation climate change would be considered by the EU with respect to its optimal interaction with EU law.<sup>21</sup> US and Canadian airlines launched proceedings to challenge the scheme, alleging the incompatibility of the EU-ETS with international law and notably, the non-US

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<sup>19</sup> See, for example, M. Pollack and G. Shaffer, *When Cooperation Fails*, n 7 above; D. Bach and A. Newman, *Self-Regulatory Trajectories in the Shadow of Public Power and The European regulatory state and global public policy*, n 7 above; N. Krisch, *Pluralism in post-national risk regulation*, n 7 above. J. Scott, “From Brussels with Love, n 7 above, considered *infra* in part III. “EU Standards migrating across the Atlantic: The “Brussels effect” or “Law Migration”?”

<sup>20</sup> Dir 2008/101/EC amending Dir 2003/87/EC, 3.

<sup>21</sup> On the nature and operation of this system, see J. Scott and L. Rajamani, ‘EU Climate Change Unilateralism: international Aviation in the European Emissions Trading Scheme’, (2012) 23 *European Journal of International Law* (forthcoming).

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ratified Kyoto Protocol.<sup>22</sup> The decision of the Grand Chamber of the Court of Justice of the European Union on the EU Emissions Trading System (EU-ETS) in *Air Transport Association of America v. Secretary of State for Energy and Climate Change*<sup>23</sup> rejected this challenge in December 2011. Of immediate interest to the present account is the response of the US House of Representatives to the EU rules in the midst of the litigation before the Court of Justice. At this point, it adopted a law prohibiting the application of EU rules in the US to US private actors, thereby supporting the position of the US airlines.<sup>24</sup> Thus on October 24, 2011, the US House of Representatives overwhelmingly voted to approve the European Union Emissions Trading Scheme Prohibition Act of 2011.<sup>25</sup> Members of the US Senate also introduced a similar measure. The bipartisan legislation directed the Secretary of Transportation to prohibit US aircraft operators from participating in the EU's Emissions Trading Scheme (ETS).<sup>26</sup> The House of Representatives sought to express its opposition to the obligation on American carriers to comply with EU law on the grounds that it would cost airlines \$3.1 billion in lost revenue between 2012 and 2020 if they abided by the EU rules. In the wake of the decision of the Court of Justice, which US airlines and legislators further objected to vociferously but subsequently complied with, China also warned of a looming trade war.<sup>27</sup> Ultimately, the US airlines accepted the decision of the Court and imposed charges on airline tickets to recoup their costs,

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<sup>22</sup> It was argued *inter alia* that the EU was exceeding its powers under international law in not confining the scheme to European internal flights, that the scheme should have been negotiated and adopted under the International Civil Aviation Organisation and not unilaterally by the European Union and that the scheme amounted to a tax or charge in breach of international agreements.

<sup>23</sup> Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, nyr. See Scott and Rajamani, EU Climate Change Unilateralism, n 22 above ; S. Bogojevic, 'Legalising Environmental Leadership: A Comment on the CJEU'S Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme', (2012) 24(1) *Journal of Environmental Law* (forthcoming); E. Fahey & E. Herlin-Karnell, 'Special Issue Editorial: EU Law qua Global Governance Law? Deciphering Regulatory and Constitutional Competence between EU Environmental Law and Global Governance' and E. Fahey 'The EU Emissions Trading Scheme and the Court of Justice: The 'High Politics' of Indirectly Promoting Global Standards,' (2012) *German Law Journal* (forthcoming).

<sup>24</sup> The bill was introduced by Transportation and Infrastructure Committee Chairman J. L. Mica (R-FL), Transportation Committee Ranking Member N. J. Rahall (D-WV), Aviation Subcommittee Chairman T. Petri (R-WI), Aviation Subcommittee Ranking Member J. Costello (D-IL), and other Members of Congress.

<sup>25</sup> See statement of N. Young, 'The European Union's Emission trading scheme: a violation of International Law', available at <http://transportation.house.gov/hearings/Testimony.aspx?TID=6834> (27 July 2011).

<sup>26</sup> The bill also instructed US officials to negotiate or take any action necessary to ensure US aviation operators are not penalized by any unilaterally imposed EU emissions trading scheme. Under the scheme, any flights into or out of an EU airport, regardless of how long that flight is in EU airspace, would be subject to the program's emissions cap and trade requirements. US airlines would be required to pay an emissions tax to the EU Member State to which they most frequently fly. The US Secretary of State, Hillary Clinton, strongly objected to the levy on legal and policy grounds in correspondence to the EU: 'US threatens EU over green levy on airlines', *Financial Times* (19 December 2011).

<sup>27</sup> Chinese airlines were being reported to be refusing to pay EU carbon taxes: J. Watts, 'Chinese airlines refuse to pay EU carbon tax', *The Guardian* (4 January 2012) and recently, the Chinese Air Transport Association was reported to be threatening the EU with counter-measures, such as impounding EU aircraft: A. Leung and A. Kotoky, 'China ready to impound EU planes in CO2 dispute', *Reuters* (12 June 2012). At the time of writing, EU-ETS was being discussed in US Senate hearings: (6 June 2012).

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resulting in compliance with EU law and underscoring the Realpolitik of the litigation.

The EU-ETS saga represents a remarkably successful exportation of EU values, to a point, purporting to regulate where other global governance mechanisms had failed. Notably, the Court and Advocate General outline in detail the failure of the International Civil Aviation Organisation to produce a *global* regulatory regime.<sup>28</sup> That the EU was able to progress its own regulatory regime this far and succeed in this litigation itself represents an important de facto exportation of EU values. The Act of 2011 passed by the US House of Representatives indicates indisputably that the EU-ETS saga is one of the most controversial global regulatory wars of modern times. Overall, we witness EU globalized-rule making which impacted so adversely on US private commercial actors and thus generated EU-based litigation but also legislative action *to prohibit the impact of EU law in the US*. This, however, in turn ultimately resulted in compliance from affected parties in the US, but not from other third country parties such as China. The Act of 2011 had no bearing upon the litigation or the decision of the Court and at its height merely constituted a highly political statement of objection. Its potential, on the other hand, to complicate or colour the litigation was immense. The use of law and the legislative process so as to register disquiet to a foreign legal order with which the US has cooperated with so frequently appears combative, yet which ultimately procured compliance with EU law.

However, the context of the US legislature legislating so as to register a retaliatory response to EU rules is surely remarkable, although not unprecedented in transatlantic relations. For example, in 1996 the EU enacted legislation to prohibit the impact of US law upon the EU legal order and its citizens, responding to the US Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act), which the US introduced after the downing of US aircraft by Cuba that year.<sup>29</sup> Title III of that Act purported to allow legal proceedings be taken against EU citizens and companies involved in the trafficking of property formerly owned by US citizens and confiscated by the Cuban Government. The EU thereafter enacted a Regulation and Joint Action in response to US legislation passed, to protect against the effects of the extra-territorial application of the US Act.<sup>30</sup> The EU later requested a WTO Dispute Settlement Panel in 1996 and the EU and US finally reached an agreement in 1998, whereby it would drop its WTO challenge in return for an undertaking that

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<sup>28</sup> See the Opinion of AG Kokott in case C-366/10 n 33 above, para. 191, on the failure of the ICAO to adopt appropriate standards.

<sup>29</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms Burton Act) of March 1996. Pub L. No. 104-114 110 State 785 (1996) codified at 22 USC §§6021.

<sup>30</sup> Council Reg (No) 2271/96, Joint Action of 22 November 1996, OJ L 309/7 (1996).

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the US would not prosecute any EU citizens under the US Act, an agreement which was never implemented into law.<sup>31</sup> The EU-ETS dispute appears to represent a different form of transatlantic dispute deploying law to object to EU regulatory standards. The protectionist “political sovereignty” dimension to the Helms-Burton dispute appears less evident in the EU-ETS saga, the later focussing upon more “outwards” than “inwards”. The EU-ETS and Helms-Burton disputes may pinpoint specific “low points” in transatlantic relations, but equally underline the centrality of law as a political tool to directly protect the autonomy of the EU and US legal orders respectively.

### II. EU *AMICUS CURIAE* SUBMISSIONS IN US DEATH PENALTY CASES

6. A similarly direct but less provocative intervention into the US legal system on the part of the EU is evident from the recent *amicus curiae* advocacy briefs by the EU before the US Supreme Court in death penalty cases.<sup>32</sup> Of course this advocacy reflects a long-standing opposition by the EU to capital punishment.<sup>33</sup> Notably, the Extradition Treaty between the USA and EU contains a clause permitting the requested State to make non-application of the death penalty a condition of extradition.<sup>34</sup> However, the EU has made various *amicus curiae* submissions in the US Supreme Court in a diversity of cases without specific application to the EU, and importantly, occurring prior to the Treaty of Lisbon.<sup>35</sup> The height of criticism of these representations in scholarship largely concerned the appropriate representation of EU policies and values prior to the EU

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<sup>31</sup> See J. Huber ‘The Helms-Burton Blocking Statute of the European Union,’ (1996) 20(3) *Fordham International Law Journal* 699.

<sup>32</sup> See *McCarver v. North Carolina* 533 US 975 (2001); *Atkins v. Virginia* 536 US 304 (2002); *Roper v. Simmons* 534 US 551 (2005); *Medellin v. State of Texas* 552 US 491 (2008). See the account given M. Cremona, Values in EU Foreign Policy, n 11 above. *Amicus curiae* briefs are also known as Brandeis briefs. There is a longstanding history of the filing of Brandeis’ briefs before the US Supreme Court since the decision there in *Muller v. Oregon*, 208 US 412 (1908). The US Supreme Court receives voluminous numbers of such submissions annually.

<sup>33</sup> ‘EU Demarches on the issue of the death penalty- Declaration’, in Conclusions of the General Affairs Council, 29 June 1998; EU Guidelines on the Death Penalty, Council doc. 10015/08, 5 June 2008 ; now Article 19(2) Charter of Fundamental Rights. All EU member States are party to the ECHR protocol 13 on the abolition of the death penalty: see also M. Cremona, Values in EU Foreign Policy, n 11 above ; I. Manners, ‘Normative Power Europe: A Contradiction in Terms?’, (2002) 40 *Journal of Common Market Studies* 235.

<sup>34</sup> Agreement on Extradition between the United States and EU [2003] OJ L 181/27, Article 13.

<sup>35</sup> The Union has now single legal personality post-Lisbon: Article 47 TEU; A. Gardner and S. Eizenstat, ‘New treaty, new Influence?’, (2010) 89 *Foreign Affairs* 104. See R. Gosalbo Bono, ‘The organisation of the external relations of the European Union in the Treaty of Lisbon’, in Koutrakos (ed), *The European Union’s external relations a year after Lisbon* (CLEER Working Paper 2011/3), 13 and E. Paasivirta, ‘The EU’s external representation after Lisbon: new rules, a new era?’, in Koutrakos (ed), *The European Union’s external relations a year after Lisbon* (CLEER Working Paper 2011/3), 39.

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possessing a single legal personality.<sup>36</sup> The impact of this EU advocacy in recent death penalty cases is in fact explicit and moderately successful in Supreme Court jurisprudence.<sup>37</sup> Moreover, the US Supreme Court is not noted for its amenability to the deployment of comparative law or the methods of foreign legal orders.<sup>38</sup> As a matter of EU law, certain institutional EU actors possess express *amicus curiae* powers, to advocate EU values. For example, the European Commission possesses *amicus curiae* powers in EU competition law, in Council Regulation (EC) 1/2003 before national courts, in a field where it remains a distinct guardian of the values of EU treaties as a matter of EU law. Notably, it rarely exercises these powers, underscoring the controversy that interventionist representations and direct advocacy can draw upon an actor.<sup>39</sup> The particular relationship between national and supranational enforcement of Competition Law is also relevant there. Thus, the external advocacy of EU values, principles and interests is especially remarkable before the US Supreme Court. It should be noted that in the spirit of reinforcing its advocacy before the US Supreme Court, the EU has recently sought to restrict the availability of the drugs employed in capital punishment in the US.<sup>40</sup>

7. This intervention by the EU in the US highest court suggests a distinctive ambition by the EU to act globally as a virtuous, even noble foreign policy actor, capable of intervening in the “internal affairs” of no less than the US, in a sensitive policy domain.<sup>41</sup> This form of action further suggests that the EU has a

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<sup>36</sup> It has been contended that the EU's *amicus brief* in *Atkins* was filed by the Council and not by the Commission and that here the Commission allegedly pursued the brief without a Council mandate and where the UK accordingly filed a brief; W. Pryor, 'Foreign and International law sources in domestic constitutional interpretation', (2006) 30 *Harvard Journal of Law and Public Policy* 173, 174. See, for example, *Sosa v. Alvarez-Machain* 542 US 692 (2004) where the EU unsuccessfully advocated in respect of the application of the Alien Tort Statute: see W. Dodge, 'Alien Tort Litigation and the perspective Jurisdiction Fallacy', (2010) 51 *Harvard International Law Journal Online* 35, 37. See above n 11.

<sup>37</sup> *Atkins v. Virginia* 536 US 304 (2002). Justice Stevens speaks of the views of the 'world community' in condemning the execution of the mentally retarded: at 317, n. 21. However, see *Medellin v. State of Texas* 552 US 491 (2008), where the EU unsuccessfully made submissions in proceedings concerning the constitutional impropriety of an Executive Order instructing State courts to implement a judgment of the International Court of Justice.

<sup>38</sup> On minimalist comparative law usage before the US Supreme Court: see M. Minow, 'The Controversial Status of International and Comparative Law in the United States', (2010) 52 *Harvard International Law Journal Online* 1; A.L. Paulus, 'From Neglect to Defiance- The United States and International Adjudication', (2004) 15(4) *European Journal of International Law* 783; See D. Sloss, M. Ramsey and W. Dodge, *International Law in the U.S. Supreme Court: Continuity and Change* (Cambridge University Press, 2011).

<sup>39</sup> Pursuant to Article 15(3), Reg 1/2003, the Commission may seek to intervene as *amicus curiae* and submit written observations to the court of the Member States where the coherent application of Articles 101 or 102 TFEU requires doing so. By 2010, the Commission had only used these provisions on four occasions, despite its special place in the EU legal order in relation to Competition Law and Policy. In 2012, there were 8 published *amicus* representations on the website of the Commission- still numerically limited, available at [http://ec.europa.eu/competition/court/antitrust\\_requests.html](http://ec.europa.eu/competition/court/antitrust_requests.html). (last visited 28 June 2012).

<sup>40</sup> E. Pilkington, 'Europe moves to block trade in medical drugs used in US executions', *The Guardian* (20 December 2011).

<sup>41</sup> See I. Manners, Normative Power Europe, n 34 above.

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global “conscience” and is capable of advocating it in any forum, not least the distinctive internal setting of an *amicus curiae* brief in a court case. The global nature of this “promulgation” of EU values is distinctly different to the usual exportation of EU values in, for example, trade agreements, diplomatic advancements and legislation. Cremona has demonstrated how fluid the importation and exportation of values in EU foreign policy remains.<sup>42</sup> There is much fluidity in the notion of value promotion, particularly as the EU frequently imports values and norms, but also acts itself often as a model for values.<sup>43</sup> It seems apparent that EU foreign policy has resulted in precarious commitments by the EU to the spread of its own values—the EU has suspended agreements on fundamental rights grounds only in a minority of instances.<sup>44</sup> The unity of the EU advocacy “position” in an *amicus curiae* brief is in reality justifiable and even perhaps to be expected, post-Lisbon on account of the enhanced coherency on EU external relations. However, it is the locus of the activity which is perhaps more significant—before the highest US Court. This EU advocacy generally suggests a self-perceived ability and intent to influence the outcome of sensitive litigation. Perhaps the unitary actions of the EU in this specific forum *prior* to the Treaty of Lisbon are more significant from the point of view of external observers of EU foreign policy. Successful advocacy, i.e. when *amicus curiae* submissions are adopted, has a tangible and direct effect on the “receiving” legal order. The interventions of the EU in such a high-profile forum so as to advance EU values seemingly renders the EU more prominent globally and indirectly influences the transatlantic dialogue on standards between legal orders.

### III. EU STANDARDS MIGRATING ACROSS THE ATLANTIC: EMPIRICAL ACCOUNTS OF POROUSNESS IN THE “BRUSSELS-EFFECT” AND “LAW MIGRATION”

8. There is an emerging literature on both the reception and effects of EU rules globally, including in the US. This literature purports to capture and theorise an asserted global trend to adopt or replicate EU standards and norms as desirable

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<sup>42</sup>See M. Cremona, Values in EU Foreign Policy, n 11 above, 277, writing of the double commitment of EU to international law and more specifically to multilateralism.

<sup>43</sup> See *ibid*, 285. From a vast number, two prominent examples might be the European Convention on Human Rights or the Geneva Convention on the status of refugees. See M. Cremona, ‘The European Union as a global actor: Roles, models and identity’, (2004) 41 *Common Market Law Review* 553.

<sup>44</sup> e.g. unilateral EU suspension of treaties has occurred in relation to countries such as Zimbabwe, Liberia, Togo, Fiji, Guinea and Mauritania. The EU has also invoked trade sanctions for human rights violations without a human rights clause strictly providing for it in the case of Myanmar: B. De Witte, ‘The EU and International Legal Order: the case of Human Rights’, in M. Evans and P. Koutrakos, *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart Publishing, 2011) 127, at 143. See E. Fierro, *The EU’s approach to Human Rights: Conditionality in Practice* (Martinus Nijhoff, 2003).

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goals but also the inevitable result of trading with the large-scale EU internal market block. Two specific recent empirical analyses of these developments are worth considering for the account here, as tangible evidence of porous transatlantic rule-making *processes* increasingly taking effect across many fields in the non-bilateral context. The first, by Bradford conceptualises the exportation of EU standards *to* the US, while the second by Scott, depicts the actual reception of EU rules *in* the US.<sup>45</sup> Thus Bradford argues that a so-called “*Brussels effect*” has emerged. She argues that the “*Brussels effect*” *de facto* and *de jure* has emerged in a vast array of economic fields, whereby EU standards are adopted, particularly in the US, which are higher than comparable global standards. She outlines that:

“...[f]ew Americans are aware that EU Regulations dictate the make-up they apply in the morning... the cereal they eat for breakfast...the software they use on their computer ... and that’s before 8.30 in the morning...”<sup>46</sup>

Bradford contends that the EU’s unilateral power to regulate globally is in reality greatly underestimated and argues overall that the EU has ignited a process of the Europeanization of important aspects of global commerce. Rather, the EU is often wrongfully portrayed as a weak actor given the reality of its regulatory reach. However, her emphasis on the significance of the “*Brussels effect*” upon US law appears sometimes drawn from slender evidence. For example, she outlines EU antitrust law as an example of unilateral EU global regulation. To this end, she provides four specific instances of stricter EU antitrust laws prohibiting mergers and imposing more stringent conditions than under comparable US laws.<sup>47</sup> Thus four singular cases provide proof that EU regulators and standards are adverse to, or at odds with, decisions of the US regulator (ie the Federal Trade

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<sup>45</sup> A. Bradford, *The Brussels Effect*, n 12 above, J. Scott, *From Brussels with Love*, n 7 above. Bradford depicts the Brussels’ Effect as the opposite of the “*California*” effect, whereby stringent Californian standards are adopted as best practice standards in other States). She cites EU antitrust laws and the EU’s treatment of mergers relative to US transaction clearances as evidence of this. Secondly, she uses the example of EU Privacy standards, being adopted in over 30 countries in similar forms as further evidence thereof.

<sup>46</sup> *Ibid*, at 1, (forthcoming script).

<sup>47</sup> See 12-14 (forthcoming script): *GE/Honeywell, Microsoft and Intel* (citations omitted). *Boeing/McDonnell Douglas* (citations omitted), considered by her, stand alone as a notorious instances of divergence- see J. Griffin, ‘EC and US Extraterritoriality: Activism and Cooperation’, (1993) 17(2) *Fordham International Law Journal* 353, 375 who asserted that despite considerable differences in the legal tests operating to trigger EC jurisdiction as opposed to the tests under US, the differences had not hindered enforcement initiatives on either side of the Atlantic (at 380). The first Merger Regulation was adopted in December 1989. The number of six thousand approximate decisions is arrived by means of examining firstly, the former merger decision search tool (case ordered by number) to see when the first decision was taken [http://ec.europa.eu/competition/mergers/cases/index\\_en.html#by case number](http://ec.europa.eu/competition/mergers/cases/index_en.html#by case number) (last accessed 5 November 2012). The numbering in the beginning is not consecutive but can be contrasted with the latest case number:

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Commission (FTC) and its rules, out of several thousand EU merger decisions.<sup>48</sup> She gives, by contrast, minimal space to exploring how especially high *US* regulatory standards in, for example, financial regulation and corporate responsibility *have not* yet become global standards.<sup>49</sup> Perhaps Bradford indirectly considers or dwells less upon the role or size of markets as an explanation for the adoption of EU practices, a more latent question possibly relevant to such a thesis.<sup>50</sup> Moreover, a distinct question relates to the moment at which an EU Regulation becomes a global regulation and how this differs from the *US* adoption of EU rules. Nevertheless, the “Brussels effect” is a rich account of contemporary rule-making processes between the EU and US and demonstrates the actual proximity between the two legal orders.

By contrast, a more specific casestudy of a similar theme is evident in the account of Scott who has depicted the *actual* reception of EU Environmental chemical standards, REACH,<sup>51</sup> in Californian law, in terms of “law migration”.<sup>52</sup> The EU standards were notably adopted there despite their opposition by US federal government leaders. In fact, REACH rules are studied by a significant range of scholars globally, on account of their innovative character, as well as global desires to comply with their content.<sup>53</sup> Scott sought, however, to depict the transatlantic “reverse” adoption of rules (ie EU rules in the US) by way of comparative law standards- notably publishing the results in the *American Journal of Comparative Law*. Scott suggested instead that sometimes actors simply desire to “trade up standards”, by way of a hypothesis for the adoption of the EU standards in the US. Most significantly to her account was the constitutional explanation within US law for the developments. Thus she contended that the open “disaggregation of power in the US” derived from federalism enabled the reception of such EU standards. Moreover, the end process of the reception of the EU rules in the US, she suggested, was brought about by way of a form of a reciprocal regulatory learning experience, involving a variety of actors- NGO’s producers and consumers alike played a role in the

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[http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_merger\\_by\\_date](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date) (last accessed 5 November 2012), thereby indicating over 6000 approximate cases.

<sup>49</sup> e.g. The Sarbanes–Oxley Act of 2002; The Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.

<sup>50</sup> See D. Drezner *All politics is global: explaining International regulatory regimes* (Princeton University Press, 2007).

<sup>51</sup> Reg (EC) No 1907/2006 amending Dir 1999/45/EC and repealing Council Reg (EEC) No 793/93 and Commission Reg (EC) No 1488/94 as well as Council Dir 76/769/EEC and Commission Dir 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

<sup>52</sup> J. Scott, *From Brussels with Love*, n 7 above.

<sup>53</sup> See e.g. Y. Naiki, ‘Assessing policy reach: Japan’s Chemical policy reform in response to the EU’s REACH Regulation’, (2010) 22 *Journal of Environmental Law* 171.

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migration of law.<sup>54</sup> What was unique about this migration process, she contends, was that it was not attributable to courts, nor was it attributable to any formal hierarchy of norms. Another less vivid formula to depict the REACH casestudy is as a legal transplant, a well-worn formula derived from comparative law literature.<sup>55</sup> The distinct character of US federalism in the midst of this use of EU legal standards is quite significant to the adoption of REACH, as is the progressive character of Californian environmental policy. Put another way, the adoption of innovative legal standards was far from impossible and was appropriate to the needs to the legal trans-planter. These empirical accounts both depict widespread *practices* involving the reception of standards and the reasons for them, as well as the porousness of the space between the EU and US to each other's legal norms. The "Brussels-effect" or "law migration" to the US of EU rules provide considerable empirical evidence of contemporary transatlantic rule-making between legal orders, thus a very distinct and observable legal dialogue.<sup>56</sup>

### IV. US POLICY REPRESENTATIONS IN EU LAW-MAKING

9. A particularly notable intervention by the US in EU law-making and its legislative process has been in the area of data transfer law. Data transfer in bilateral EU-US Justice and Home Affairs agreements constitutes a particularly sensitive area of EU-US relations.<sup>57</sup> Thus a particularly notable intervention by the US in internal EU law-making occurred recently in 2011, whereby a self-expressed "Informal note" on a Draft EU General Data Protection Regulation was published as a leaked document by the Civil Liberties organisation Digital Civil Rights in Europe. The document was expressly formulated not to represent the views of a variety of US agencies- such as the US Federal Trade Commission, FTC bureau or agency

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<sup>54</sup> She relies extensively in her account on the work of J. Resnik, 'Law's migration: American exceptionalism, silent dialogues and federalism's multiple ports of entry', (2006) 115 *Yale Law Journal* 1564, which similarly places federalism centrally to that account.

<sup>55</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, 4th edn, 2010).

<sup>56</sup> However, their empirical accounts do not capture the converse transfer of "adversarial" legal culture from the US to the EU, which for example Kelemen has sought to depict, considering the rising incidence of litigation culture in the EU, albeit a European variant thereof. Yet their accounts depict actual rule-transfers rather than social practices. See R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the EU* (Harvard University Press, 2011); R. D. Kelemen, 'Eurolegalism and Democracy', (2012) 50 *Journal of Common Market Studies* 55. The case studies of Bradford and Scott are notable in so far as they indicate the reception of EU economic-based rules in the US. By contrast, in EU legal scholarship, there is a distinct viewpoint that the EU has adopted policies in the area of counterterrorism and EU-US cooperation arising from an imbalance of political power: See M. Cremona, *Justice and Home Affairs in a Globalised World: Ambitions and Reality in the tale of the EU-US SWIFT Agreement* (Institute for European integration Research, Working Paper No. 4/2011).

<sup>57</sup> Cremona, n 68 above.

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or any other US agency and intended to influence EU rules.<sup>58</sup> The document raised a range of legal concerns which were interpreted overall to be a measured contribution towards the substantive policy debate.<sup>59</sup> By contrast, the US Department of Commerce had previously made so-called “informal representations” on EU data legislation, which were perceived to have had a considerable impact on the legislative process.<sup>60</sup>

10. The actions of the US agencies or bodies in the former intervention, expressly dissociating themselves from US agencies, but suggesting a desire to be a stakeholder in EU policies, indicates a particular state of diplomacy. These particular representations are significant because of the explicit polarity between the EU and US legal orders on mutual recognition. Remark-worthy is the extensive, early and detailed nature of the legal policy interventions by the US in EU law.<sup>61</sup> The nature of the representations made by the US are ostensibly of more interest to the present author than the precise substance of them, yet the substance is not irrelevant given the character of law and justiciability in bilateral security agreements. However, the uniform consensus of US-based political scientists, international relations experts and legal scholars based in the US is that EU rules have resulted in higher standards of US data policies.<sup>62</sup> Newman has argued that transatlantic bilateral agreements have resulted in different constellations of US agencies and have ameliorated agency “territories” and practices.<sup>63</sup> Equally,

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<sup>58</sup> ‘Informal note on Draft EU General Data Protection Regulation’ (December 2011): ‘This informal note comments on certain aspects of the widely leaked draft proposal to modernize the European Union’s data protection legal framework, and in particular the draft General Data Protection Regulation (the “draft regulation”). It does not necessarily represent the views of the US Federal Trade Commission (FTC) any bureau of office, or any other US government agency’, available at [http://edri.org/files/12\\_2011\\_DPR\\_USlobby.pdf](http://edri.org/files/12_2011_DPR_USlobby.pdf).

<sup>59</sup> The comments, critical overall, suggested *inter alia* that the EU rules had potentially adverse effect on the global interoperability of privacy frameworks, would undermine freedom of expression, criminal cooperation and would undermine civil litigation.

<sup>60</sup> ‘US Lobbying waters down EU data protection reform’, *Euractiv* (21 February 2012), ‘Informal Comment on the draft General Data Protection Regulation and draft Directive on data protection in law enforcement investigations.’ A more conciliatory tone was later adopted by the US:

‘The United States understands and respects that the EU is still in the early stages of considering data protection proposals to strengthen and update its framework. At the same time, however, we have heard reports that, based on inter-service consultation, the widely – available version of the draft Regulation...may undergo further review before it is released.’

<sup>61</sup> Media reports suggested that the US had sought to be briefed unusually early and had contacted EU officials and briefed them with the position of the US Government, out of normal practice: ‘US Lobbying waters down EU data protection reform’.

<sup>62</sup> The Safe Harbor Agreement represents a useful example of the impact of EU data transfer principles upon US policy, adopted into response to EU law, albeit by means of a voluntary framework: U.S. Dep’t of Commerce, Safe Harbor Principles, July 21, 2000. See <http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm>. The principles were endorsed by the European Commission: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, 2000/520/EC, OJ L 215 p 7).

<sup>63</sup> Bach and Newman, Self-Regulatory Trajectories in the Shadow of Public Power, n 7 above.

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Shaffer and Bradford amongst others seem to be uniformly of the viewpoint that cooperation with the EU in Justice and Home affairs has operated to raise US standards of data privacy.<sup>64</sup> By contrast, EU scholars caution against the impact of transatlantic security measures on individual rights under EU law.<sup>65</sup> Whichever viewpoint is preferred, one witnesses transatlantic intervention in the EU legislative process and active participation in transatlantic rulemaking, using law in a variety of ways.

Two further but briefer case studies are outlined here next, followed by a summary of the features of the examples detailed.

### V. EU FOREIGN POLICY “RESPONSIVENESS”: SECONDARY SANCTIONS

11. Finally, a perceived heightened policy responsiveness on the part of the EU in the transatlantic context mediated through law is worthy of some mention. A unified EU Foreign Policy was the intended objective of the Treaty of Lisbon.<sup>66</sup> It has entailed that the EU is a more vocal and effective actor in international relations and has begun to participate more effectively as a matter of international law and Global Governance- for example at the UN.<sup>67</sup> However, the EU has frequently opposed efforts to extend extra-territorial jurisdiction on the part of the US across the Atlantic.<sup>68</sup> Equally, many allies of the US have vigorously opposed the most aggressive US claims of jurisdiction.<sup>69</sup> The US often displays exceptionalist practices in its interactions with the international legal system. For example, Congress has passed legislation which the State Department had previously advised explicitly to be inconsistent with international law.<sup>70</sup> The asserted recent responsiveness of the EU to secondary sanctions of the US is notable then. In this context, primary sanctions involve trade boycotts and are used to restrict, for example, US companies and businesses from trading with rogue groups or

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<sup>64</sup> G. Schaffer, ‘Globalisation and social protection: the impact of EU and international rules in the ratcheting up of US data privacy standards’, (2000) 25 *Yale Journal of International Law* 1; A. Bradford, *The Brussels Effect*, n 12 above.

<sup>65</sup> e.g. M. Cremona, *Values in EU Foreign Policy*, n 11 above.

<sup>66</sup> See, for example, P. Koutrakos (ed), *European Foreign Policy*, n 18 above.; J. Monar, *US relations at the outset of the Obama presidency*, n 18 above.

<sup>67</sup> Contrast, for example, the role and impact of the EU in the negotiation of the UN disability Convention as outlined by G. De Búrca, ‘The EU in the negotiation of the UN Disability Convention’, (2010) 35(2) *European Law Review* and then later its evolution post-Lisbon to super-observer status, accorded in 2011. On 3 May 2011, the UN General Assembly adopted Resolution A/65/276 upgrading the status of the European Union’s participation in the United Nations.

<sup>68</sup> See *Developments in the Law-Extraterritoriality*, n 14 above.

<sup>69</sup> H. Clark, ‘Dealing with US Extraterritorial sanctions and foreign countermeasures’, (1999) 20 *University of Pennsylvania Journal of International Economic Law* 61; J. Griffin, ‘Extraterritoriality in US and EU Antitrust Enforcement’, (1999) 67 *Antitrust Law Journal* 159.

<sup>70</sup> See *Cuban Liberty and Democratic Solidarity Act of 1996*, and *Developments in the Law-Extraterritoriality*, n 39 above, at 1246, fn. 7 and above section I, part I.

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terrorists. However, secondary sanctions are trade boycotts which are used to restrict the economic ability of, for example, non-US actors from doing business with groups or entities the subject of primary sanctions, for example, in the form of the US Helms-Burton Act discussed above.<sup>71</sup> Extra-territoriality is thus often a significant element of secondary sanctions. In recent times it has been stated that the EU has harmonized its laws to accord with US action in the area of secondary sanctions or secondary boycotts unlike any other previous transatlantic cooperation.<sup>72</sup> European resistance to US secondary sanctions is suggested to date back to the 1960s, whereby the EU continued protesting against US secondary sanctions throughout the 2000's.<sup>73</sup> The shift in the state of relations here is then discernible.

12. In 2010, the US passed extra-territorial US legislation on sanctions against Iran, namely the US Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). The decision of the EU to respond to extra-territorial US legislation on sanctions against Iran in the form of *harmonising its own laws* with the US sanctions in 2010,<sup>74</sup> has been interpreted to have occurred on account of changes to the structure of the EU's foreign policy and its increased diplomatic powers post-Lisbon. On this view, the Treaty of Lisbon thus enabled the EU to respond more efficiently to the US and cooperate with it using legal instruments more readily.<sup>75</sup> Moreover, a unitary EU foreign policy structure post-Lisbon was perceived to increase the likelihood that US policymakers would consider the EU's interests differently and more readily, giving the EU greater negotiation credibility. However, it should be noted that subsequently in 2012, the EU again imposed sanctions against Iran,<sup>76</sup> but the actions of the EU do not necessarily appear to correlate to US action at this time.

13. The economic tradeoffs raised by the US measures, CISADA, were less significant than those faced in other earlier extraterritoriality conflicts, as was the security and diplomatic context prevailing. Judgments on these types of assertions are

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<sup>71</sup> See J. Mayer 'Secondary thoughts on secondary sanctions' (2009) 30(3) *University of Pennsylvania Journal of International Law* 905 at 905-906; N. Davidson 'US secondary sanctions: the UK and EU response' (1998) 27 *Stetson Law Review* 1425. See above section I, part I.

<sup>72</sup> Developments in the Law- Extraterritoriality, n 14 above; J. Griffin, EC and US Extraterritoriality, n 59 above; A. Bradford, The Brussels Effect, n 12 above.

<sup>73</sup> See 'European Union: Demarches Protecting the Cuban Liberty and Democratic Solidarity' (LIBERTAD), Act (5 March 1996 & 15 March 1995) reprinted in 35 ILM 397, 398-399; Memorandum of Understanding concerning the US Helms-Burton Act and US Iran and Libya Sanctions Act, EU-US, 11 April 1997, 36 ILM 529.

<sup>74</sup> e.g. Council Reg (EU) No 961/2010 repealing Reg (EC) No 423/2007.

<sup>75</sup> Developments in the Law- Extraterritoriality: The European Union and Secondary Sanctions', n 14 above, at 1246.

<sup>76</sup> Council Implementing Reg (EU) No 54/2012 implementing Reg (EU) No 961/2010; Council Reg (EU) No 56/2012 amending Reg (EU) No 961/2010; P.E. Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran', (2012) 17 *Journal of Conflict and Security Law* (forthcoming).

more challenging to assess given that the policy, the timing of the reaction policy and the form of the policy responded to must be considered in their context, and much of this form of analysis is outside of the scope of the present discussion. Overall, however, this specific instance provides another example of certain proximity in-between the legal orders and in rulemaking. It also forms an example of the use of law as a central tool in a context readily depicted as high politics.

## **VI. EU-US CYBER-CRIME AND CYBER-SECURITY COOPERATION**

14. Finally, worthy of remark is recent bilateral EU-US cooperation with particularly unusual legal parameters. While it should be repeated that bilateral relations are not the main focus for analysis here, one specific casestudy is notable on account of its legal objectives. The EU and US have recently begun to cooperate together in the realm of Cyber-Security and Cyber-crime, which has relevance for the current account.<sup>77</sup> EU-US Cyber-crime and Cyber-Security Working Group (WGCC) was established after the EU-US Summit in November 2010.<sup>78</sup> The EU-US goals in this regard are to formulate global strategies, to carry out joint and global incident management, to foster public-private partnerships, to remove child pornography from the internet and to advance the international ratification Council of Europe Conventions on Cyber-crime<sup>79</sup> of which the US is not a member but which it took part in drafting and has signed and ratified, promoting both international and EU ratification.<sup>80</sup> There are several EU Member States still resisting ratification, including the Czech Republic, Greece, Ireland, Poland and Sweden. This makes the specific (legal) objectives the EU-US cooperation more curious. The extraordinary legal goal of this collaboration is evidence of the fluid parameters of the use of law in transatlantic relations.

15. Finally, worthy of brief mention are the expected other deliverables of EU-US cooperation, which include the endorsement thereof by the Internet Corporation for Assigned Names and Numbers (ICANNs).<sup>81</sup> The aims of the transatlantic cooperation are thus to promote global standards through cooperative rule-making. Further evidence of the global objectives of the rule-making and policy development is provided by the minutes of the July 2011 meeting of EU-US

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<sup>77</sup> Council of the European Union EU-US Summit, n 15 above; Presidency Conclusions of the Cybercrime Conference Budapest Conclusions Budapest, n 15 above.

<sup>78</sup> Ibid.

<sup>79</sup> European Treaty Series (CETS) No 185 Budapest (23 September 2001).

<sup>80</sup> J. M. Balkin (ed) *Cybercrime, Digital Cops in a Networked Environment* (New York University Press, 2007). See also M. G. Porcedda, 'Transatlantic Approaches to cybersecurity and cybercrime,' in P. Pawlak (ed), *The EU-US security and justice agenda in action* (EUISS Chaillot Paper, 2012).

<sup>81</sup> EU-US working group on cyber-security and cyber-crime, Concept Paper (13 April 2011), 3.

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Senior Justice and Home Affairs (JHA) Officials, where it was stated that the EU and US should work together in the UN to avoid dilution of the body of international law on cybercrime.<sup>82</sup> The overtly global ambitions of both the EU itself and the EU-US together, i.e. seeking to promote global standards arising from their own rule-making, are striking. The objectives and deliverables of the bilateral cooperation seem to suggest that legally conventional goals are not applicable here, emphasising the dynamism and flexibility of transatlantic rule-making between the EU and US legal orders, which in turn allows the EU and US to pursue higher and more globalised objectives through the medium of bilateral relations. While the specific relationship between non-bilateral and bilateral relations is difficult to pinpoint, law is deployed very flexibly in both contexts such that the pursuit of global rule-making becomes feasible.

### Section II. THE KEY ELEMENTS OF TRANSATLANTIC LEGAL DIALOGUE DEPLOYING LAW

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#### *A VARIETY OF ACTORS, FORA, FLEXIBLE AND VARIABLE INSTRUMENTS*

There is a legal and institutional component to transatlantic relations that is discernible from the many casestudies here. More recently, a direct and indirect legal dialogue between the EU and US is observable outside of the conventional bilateral context of EU External Relations law. The quasi-institutional character of transatlantic relations permits these dialogues or interactions through law to take place, yet also acts as a backdrop for such interactions, for example, for example, in each other's judicial institutions. There is also a significant proximity between the EU and US legal orders, evident in various empirical accounts and foreign policy developments. Overall, the individual case studies presented here suggest porousness and ease in the use of law by many actors in various institutional fora between the EU and US legal orders in recent times.

To summarise the case studies, firstly, the use of legislation in the EU-ETS dispute and the deployment of EU institutions and procedures by transatlantic political actors supported by their legislators in their own legal system is a distinctive form of transatlantic rule-making. The legislation in the EU-ETS dispute unsuccessfully challenged European efforts to engage in global governance legislation when global legislative infrastructure did not offer the EU appropriately high legislative standards. Secondly, the submissions made by the EU before the US Supreme Court in death penalty cases show the EU indirectly engaging in rule-making in the US using US institutions as their forum. The

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<sup>82</sup> General Secretariat of the Council, 'Summary of conclusions of the EU-US JHA Informal Senior Officials Meeting 25-26 July' (29 July 2011) p. 3.

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intervention in formal court proceedings constitute compliant conduct on the part of the EU, in order to further its own policy goals before a judicial forum where considerable discretionary constitutional powers are exercised. On account of its prominence, the participation in this forum clearly has global impact and offers the EU visibility. In this way, the use of law between the EU and US deploys many fora and actors, at the highest possible levels, beyond diplomacy. The use of advocacy is highly distinct behavior and sets particularly broad parameters to the use of law in transatlantic relations. Thirdly, the “Brussels effect” and law migration instances may indicate flexible rule transfer. The widespread nature of the practices asserted in this regard are themselves notable and again emphasize the malleability of the space between the EU and US to accommodate direct and indirect rule adoption and rule transfer. The accounts of the “Brussels effect” and “law migration” indicate the openness of transatlantic relations to each other’s legal norms. Fourthly, in the case of data transfer rule development, the interventions by non-specific US agencies using advocacy resulted in detailed input into EU rules. This input is permitted between the legal orders given that the legal space is flexible, as are its procedures. However, the contrast here between formal and non-formal rule-making is particularly notable, given the explicit polarity *in the bilateral context* between the two legal orders on mutual recognition of each other’s justice systems.<sup>83</sup> For example, the most recent EU-US Passenger Name Records Agreement expressly limits legal redress and delimits legal character under US law to administrative effects only and not legal effects, despite its curiosity as a statement under international law.<sup>84</sup> A European Commission so-called “non-paper” leaked in February 2012, however, outlines to the Council the state of negotiations between the EU and US on Data Protection. It discloses significant legal differences between the two orders in the realm of justice and home affairs cooperation, differences which have some relevance to the analysis conducted here of the non-bilateral context.<sup>85</sup> The US interventions then in the non-bilateral context are not per se legally binding but nonetheless provide evidence of variable entry into rule-making fora so as to pursue their lawmaking objectives. Penultimately, EU foreign policy responsiveness to the US remains in the realm of high politics. However, it also indicates the high degree of proximity actually existing in-between the legal orders. Last but not least, EU-US Cyber-crime and Cyber-security cooperation emphasises how seemingly impossible legal goals

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<sup>84</sup> Article 21, Draft Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record Data to the United States Department of Homeland Security, Council doc. 10453/11 (20 May 2011).

<sup>85</sup> See EU-US data protection negotiations during 2011, Council 5999/12 (Brussels, 3 February 2012): Annex note from Commission DG Justice.

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through law become possible on account of the close cooperation between the two legal orders using law.

These examples drawn together indicate the diversity of elements of contemporary transatlantic relations which overall deploy law flexibly. They provide many vivid examples of the variable institutional and legal components of transatlantic relations.

### Conclusions

At first glance, the account provided here is arguably neither conventional nor apparent as a matter of EU External Relations law. Nonetheless, it has been shown here that a direct and indirect legal dialogue between the EU and US legal orders in the non-bilateral context is evident and observable. This dialogue indicates that contrary to the ostensible insignificance of law in contemporary non-bilateral transatlantic relations, law has in fact a broad application in this domain. The EU and US use readily the legal procedures and constitutional structures of each “other”. The case studies depicted here involve many actors in diverse institutional settings- political, institutional, individual and corporate actors. The US Supreme Court has provided the EU with a prominent forum to promulgate its policies. Similarly, the US has participated in the EU legislative process using law as a medium so as to advance its own position.

Several of the accounts provided here constitute striking examples of the use of law as a political tool or the use of law to protect the autonomy of their respective legal orders. Other instances of similarly direct but less provocative interventions between the legal orders show the varying levels of engagement through the dialogues. The actual proximity between legal orders in the area of rule-transfer is an important facet to the dialogues depicted here also, ranging from the “Brussels’ effect” case studies to secondary sanctions. These case studies emphasise the significance and centrality of the role of law and institutions to the legal dialogues taking place between the EU and US.