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PART II

Rule-making between the EU and USA

PROOF

Towards a transatlantic community of law?

The use of law between the EU and US legal orders: questions of legal form and characterisation

ELAINE FAHEY

Introduction

In a review published in 1967 of the textbook by Stein and Hay, *Law and Institutions in the Atlantic Area*, Angelo opined that ‘the emergent cross-Atlantic organisations of the 1950’s are suffering from internal attacks. To the casual observer there appears to be more conflict than law in Atlantic institutions ... hope for an “Atlantic Community” or even a “partnership” seems to be an ever-receding dream.’¹ Historically, many have doubted the feasibility of transatlantic integration through law. There is still a discernible view in scholarship about the insignificance of law to transatlantic relations, as an ‘institutional-light’, ‘law-light’ unfixed scientific entity. However, many distinctive ‘interactions’ and rule-making exercises take place in contemporary times between the EU and US legal orders, for example the development of the broad adoption of EU rules in the USA,² major EU–US rule convergence in data protection,³ an institutionalised Transatlantic Trade and Investment Partnership (TTIP) or

Thanks to participants at the workshop *Transatlantic Relations: the Nature of Rule-making*, January 2013, Amsterdam, the Netherlands for comments received there. Thanks also to Christina Eckes, Pieter Jan Kuijper, Chantal Mak and Anniek de Ruijter for their helpful remarks and comments. All errors are solely those of the author.

¹ H. Angelo, ‘Review of E. Stein & P. Hay (eds.) *Law and Institutions in the Atlantic Area*, Readings, Cases, and Problems with Volume of Documents’ (1967) 56 *California Law Review* 923.

² A. Bradford, ‘The Brussels Effect’ (2013) 107 *Northwestern University Law Review* 1.

³ ‘EU urged to choose transatlantic convergence on data protection’, *EurActiv* (5 December 2012). Negotiations on a transatlantic data protection framework agreement began in 2010.

even the EU intervening frequently before the US Supreme Court.⁴ Some of these developments are argued here to indicate the institutionalisation of transatlantic relations. Others are argued to indicate what is termed here as specific degrees of 'proximity' between the EU and US legal orders, that is closeness of instruments, structures or interactions, formal and informal, more specifically defined than the NATO-esque 'Atlantic Area' considered by Angelo. They (i.e. institutionalisation and close proximity) raise the question of the relationship between them as phenomena. Cumulatively, they form the basis for reflections here, by way of a future research agenda, on what the phenomenon of a 'transatlantic community of law' between the EU and USA actually means in contemporary times. Recent developments also provoke a reflection on our understanding of the character of 'real world' interactions between legal orders and perhaps questions of their legitimacy.

More conventional legal analyses of transatlantic relations examine its bilateral agreements *stricto sensu*, especially in sensitive fields such as security. In this perspective, the more conventional template for analysis is the use of mutual recognition and its legitimacy.⁵ Arguably, EU-US security rule-making after 9/11 exposed limits of mutual recognition in security cooperation or the limits of proximity between legal orders. Conversely, it can be argued that more recent forms of EU-US security rule-making go beyond mutual recognition, for example EU-US efforts to engage in global rule-making in cybercrime and cyber security.⁶ Instead, they seem to be the product of the proximity between the two legal orders. It remains to be seen at the time of writing how the EU-US surveillance saga will impact on this state of affairs. Nonetheless, there are many reasons to consider the parameters of proximity between the EU and US legal orders, both within and beyond its conventional forums.

⁴ On the TTIP, see M. Bartl and E. Fahey 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP),' Chapter 9 in this volume. On EU interventions before the US Supreme Court, see section II.

⁵ See E. Fahey, 'Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program' (2013) 32 *Yearbook of European Law* 1; G. Shaffer, 'Reconciling Trade and Regulatory Roles: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbor Agreements' (2002) 9 *Columbia Journal of European Law* 29.

⁶ EU-US Working Group on cyber-security and cybercrime, Concept Paper, 13 April 2011 (hereafter WGCC Concept Paper).

Accordingly, this chapter considers these themes using four largely descriptive theses. First, it is intended to show in section I, following on from accounts in the first part of the volume, how interactions between the EU and US legal orders demonstrate that transatlantic relations can be understood as quasi-institutionalised. This account explores, in section II, how law serves as a medium for communication between the two legal orders, sometimes outside of the strictly conventional bilateral context of EU–US agreements and conventional dispute resolution forums (termed here ‘non-bilateral’), only possible on account of the high quasi-institutionalisation of the relationship or at least very high proximity between the two legal orders. However, it is also shown in section III that there are boundaries or limitations on this proximity or closeness, and also major legitimacy questions. For example, the limitations of mutual recognition in transatlantic justice cooperation are evident from an analysis of bilateral rule-making in security post 9/11. By contrast, in more recent times the high proximity between the two legal orders results instead in more novel forms of bilateral rule-making, leading to the consideration in section IV of the movement of rules between the two legal orders in the phenomena of rule-transfer and tentatively considers questions of its legitimacy, which warrant future study.

I. The character of law and transatlantic relations

A. *Transatlantic integration through ‘law’: what is ‘law-light’?*

Historically, many have sought an ‘Atlantic community of law’,⁷ a ‘Transatlantic Marketplace’⁸ or a ‘Transatlantic Civil Society’⁹ to be forged between the EU and USA. Such entities have been mooted with a view to creating a transatlantic polity of sorts, inter alia for economic, political and even socio-cultural reasons. The recent negotiations between the EU and USA on a Transatlantic Trade and Investment Partnership (TTIP) may signify a new era of legal cooperation between

⁷ See Angelo, ‘Review of Stein and Hay’.

⁸ See L. Britton, ‘Europe: the New Tiger? The Shape of Tomorrow’s Global Economy’, speech delivered at The Kennedy School, Harvard University, Boston, USA (18 March 1998), available at: http://europa.eu/rapid/press-release_SPEECH-98-49_en.htm, accessed 12 February 2014; M. Egan (ed.), *Creating a Transatlantic Marketplace: Government Policies and Business Strategies* (Manchester University Press, 2005).

⁹ F. Bignami and S. Charnowitz, ‘Transatlantic Civil Society Dialogues’ in M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham: Rowman & Littlefield, 2001), p. 255.

them, if successful.¹⁰ Nevertheless, most scholars of transatlantic relations generally express disappointment and pessimism about the trajectory of transatlantic relations through law, particularly in the area of trade. The relationship between the EU and USA is viewed as having generated many failed agreements, binding and non-binding, often caused by a lack of compliance from the lead actors and plagued by sub-optimal remedies.¹¹ Moreover, the relationship between the EU and USA is viewed by scholars as a 'law-light' and 'institutionally-light' scientific entity.¹² In this regard, relations between the EU and USA have been guided by foundational documents such as the Transatlantic Declaration and the New Transatlantic Agenda, which are not legally binding.¹³ Yet even optimistic views of transatlantic cooperation through law are appraised by scholars through a language of legal 'pluralism'¹⁴ or the limits of 'rule convergence',¹⁵ language that emphasises a demonstrable political, social and cultural space between the two legal orders. What is important to

¹⁰ See M. Bartl and E. Fahey, 'A Postnational Marketplace? Negotiating the Transatlantic Trade and Investment Partnership (TTIP)', Chapter 9 in this volume.

¹¹ E. U. Petersmann, 'Dispute Prevention and Dispute Settlement in the EU-US Transatlantic Partnership' in M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham: Rowman & Littlefield, 2001); M. Egan, 'Mutual Recognition and Standard Setting: Public and Private Strategies for Governing Markets' in M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham: Rowman & Littlefield, 2001); E. U. Petersmann and M. A. Pollack (eds.), *Transatlantic Economic Disputes. The EU, the US and the WTO* (Oxford University Press, 2003); M. Pollack et al., *The Political Economy of the Transatlantic Partnership*, Robert Schuman Centre Report (2003), 10; Shaffer, 'Reconciling Trade and Regulatory Roles'.

¹² 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. See E. Fahey, 'On the Use of Law in Transatlantic Relations: Legal Dialogues Between the EU and US', *European Law Journal* (forthcoming 2014 20(3)).

¹³ The New Transatlantic Agenda (NTA), signed 3 December 1995 in Madrid. See Pollack 'The New Transatlantic Agenda at Ten'.

¹⁴ N. Krisch, 'Pluralism in Post-national Risk Regulation: the Dispute over GMOs and Trade' (2010) 1 *Transnational Legal Theory*; see also M. Pollack and G. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009).

¹⁵ G. Shaffer, '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; F. Bignami, 'European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining' (2007) 48 *Boston College Law Review* 609; see also Bradford, 'The Brussels Effect'.

note concerning the role and view of the role of law here is that most scholarly views on the conduct of two of the world's leading global governance actors are built upon views of rule-making in the bilateral legal context, rather than other autonomous conduct or actions.¹⁶ As a result, it is possible to overlook the significance of certain interactions taking place outside of the conventional bilateral context and their significance for our understanding of an Atlantic community of law. The account next considers the institutionalisation of the transatlantic relationship and its genesis.

B. Institutionalisation and transatlantic relations: why 'institution-light'?

While there is some dispute in scholarship about the main scientific characteristics of the relationships between the EU and the USA, few suggest that a transatlantic or Atlantic community of law exists.¹⁷ The 'institutionally-light' nature of EU-US relations allied to the novel and innovative capacities that have characterised the transatlantic relationship constitutes for some a problematic institutional deficit,¹⁸ but for others a strength.¹⁹ Non-legal scholarship on transatlantic relations is generally unambiguous about the extent to which bilateral transatlantic relations are institutionally modest.²⁰ Such scholarship typically demonstrates how most transatlantic rule-making has been generated by permanent dialogues and by non-institutional actors. However, it can be said from a legal perspective that there are formal and informal aspects of transatlantic relations that indicate that they are at least quasi-institutional, despite their lack of formal legal character, as explored in Section 1 of this volume.²¹ In this regard, a Transatlantic Legislators Dialogue has been ongoing since 1972, albeit with limited output and only one of the three

¹⁶ See, for example, M. Smith, 'The European Union, the USA and Global Governance', in J. U. Wunderlich and D. J. Bailey (eds.), *The European Union and Global Governance A Handbook* (London: Routledge, 2011), Chapter 25.

¹⁷ J. Peterson and M. Pollack, 'Conclusion: The End of Transatlantic Partnership' in J. Peterson and M. Pollack (eds.), *Europe, America, Bush: Transatlantic Relations in the Twenty-first Century* (London: Routledge, 2003), p. 128.

¹⁸ Pollack, 'The New Transatlantic Agenda at Ten'.

¹⁹ J. Peterson and R. Steffenson, 'Transatlantic Institutions: Can Partnership be Engineered?' (2009) 11 *British Journal of Politics and International Relations* 25.

²⁰ E.g. Pollack, 'The New Transatlantic Agenda at Ten'; Peterson *et al.*, 'Review of the Framework for Relations between the European Union and the United States'.

²¹ As I have argued elsewhere: see Fahey, 'On the Use of Law in Transatlantic Relations'.

EU institutional co-legislators participating.²² Transatlantic annual summits have been held since the 1990s, and continue to generate challenges regarding the appropriate EU institutional representation, even after the Treaty of Lisbon.²³ Also overlooked in non-legal scholarship is the direct contact between the US Supreme Court and the Court of Justice of the European Union, which has been increasing since 2000 in the form of periodic judicial visits.²⁴

Historically, most rule-making between the EU and USA has taken place in permanent networks of dialogues. The permanent dialogues include the Transatlantic Business Dialogue, Transatlantic Labour Dialogue, Transatlantic Consumer Dialogue and Transatlantic Environment Dialogue. They have variable degrees of success or failure and comprise public and private spheres, variable actors and activities.²⁵ However, it is the Business Dialogue that is claimed to have had the most success as a rule-making instrument.²⁶ In this regard, the democratic credentials of transatlantic rule-making are not rated highly per se. These dialogues are perceived to have given certain economic actors privileged access to policy-makers at the expense of other sectors of transatlantic society, an assertion that must certainly be the case with respect to the Business Dialogue, which include over 100 CEOs of leading US corporations.²⁷ Some have categorically stated that no Transatlantic Civil Society per se exists, yet there has been much cooperation between civil society across the Atlantic for extensive time periods, not least since the nineteenth

²² That is the European Parliament. See D. Jančić, 'The European Parliament and EU-US Relations: Revamping Institutional Cooperation?', Chapter 3 in this volume.

²³ 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; P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2011). See also 'EU settles on threesome to collect Nobel Peace Prize', *Reuters.com* (17 October 2012).

²⁴ See E. Mak, 'The US Supreme Court and the Court of Justice of the European Union: Emergence, Nature and Impact of Transatlantic Judicial Communication,' Chapter 2 in this volume.

²⁵ See M. Green Cowles, 'The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue', in M. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham: Rowman & Littlefield, 2001), p. 215, on Transatlantic Business Dialogue as the most successful dialogue.

²⁶ See *ibid.* Others suggest that there are also so-called unofficial transatlantic dialogues, for example on sustainable development, aviation and climate change and policy networks: Bignami and Charnovitz, 'Transatlantic Civil Society Dialogues', p. 255. However, their composition, tasks, operation and proximity to rule-makers varies considerably and so the taxonomy of this category is contestable.

²⁷ See Green Cowles, 'The Transatlantic Business Dialogue'.

century, on topics ranging from peace to slavery. This category of 'unofficial' dialogues must of course be regarded as more complex, subjective and multifarious.²⁸ Overall, one may say that the prominence of networks of actors and dialogues in rule-making sustains the 'institution-light' thesis of transatlantic relations. However, rule-making networks between the EU and USA, such as the formal and permanent dialogues between the EU and USA, along with High Level Working Groups, are subject to increasing standards and expectations of participation and transparency, that is EU standards of good governance.²⁹ This may operate to alter the traditional shield of 'high' politics surrounding transatlantic relations, which are rooted in its non-institutionalised state.³⁰ Whether, beyond this, it will incite further and deeper institutionalisation remains to be seen.

The question of institutionalisation has ramifications for our understanding of formal legal cooperation between the EU and USA and the place of law, legal disputes and interactions between the respective legal orders, which are considered here next.

C. *On bilateral agreements between the EU and US legal orders and the forums for their disputes*

As a matter of history, relations between the EU and USA have generated considerable amounts of high-profile rather than high-volume conflict.³¹ Nevertheless, conflicts generated, for example, through breakdowns in agreement and/or challenges to ostensible attempts by both the EU and USA to regulate each other extra-territorially have usually taken place in conventional forums for the resolution of inter-sovereign disputes, that is in the World Trade Organization (WTO), rather than in each other's respective legal order.³² For example, in the mid 1990s the European Community (as it then was) enacted legislative measures to prohibit the

²⁸ See Bignami and Charnovitz, 'Transatlantic Civil Society Dialogues'.

²⁹ On transparency, take for example the EU-US dialogue on the peaceful use of space, led by the US State Department and the European Commission, which recently fostered a long-term cooperation agreement between two organisations, the National Oceanic and Atmospheric Administration (NOAA) and the European organisation for the exploitation of meteorological satellites (EUMETSAT). However, see the meagre public information disseminated: www.euintheus.org/events/signature-ceremony-of-the-noaa-and-eumetsat-agreement-on-long-term-cooperation/, accessed 12 February 2014.

³⁰ See Bartl and Fahey, 'A Postnational Marketplace', Chapter 9 in this volume.

³¹ Petersmann, 'Dispute Prevention and Dispute Settlement'.

³² See Petersmann and Pollack, *Transatlantic Economic Disputes*.

extra-territorial application of the US Helms Burton Act, in response to legal measures enacted by the USA when Cuba shot down US aircraft,³³ because it 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. This resulted in WTO proceedings, albeit that these are still without a *de jure* outcome.³⁴

There are several disputes still ongoing between the EU and USA before the WTO, relating to breakdowns of agreements between the EU and USA.³⁵ For example, the Boeing-Airbus dispute concerns subsidies provided to the companies, initially resulting in an EU-US agreement in 1992 on Trade in Large Civil Aircraft. The USA withdrew from this agreement in 2004 on the basis of support given to Boeing and the EU followed suit with claims as to support granted to Boeing. The WTO was asked by the EU to rule on countermeasures in 2012 and hearings commenced in 2013.³⁶ Similarly, a poultry dispute has been ongoing since 1997 relating to the WTO Agreement on the Application of Sanitary and Phytosanitary measures (so-called SPS measures). This aside, other recent bilateral cooperation between the EU and USA in competition law has been spurred by a desire to avoid extra-territorial legislation or direct challenges to authority in such forums as the WTO, even if the success of this cooperation is complex to measure.³⁷ Overall, however, we may say that disputes between the EU and USA have generally taken place in

³³ Council Regulation (EC) No. 2271/96 OJ L 309/1 (1996), Joint Action of 22 November 1996 OJ L 309/7 (1996). Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms Burton Act) of March 1996, 22 USC §§6021. See J. Huber, 'The Helms-Burton Blocking Statute of the European Union' (1996) 20 *Fordham International Law Journal* 699.

³⁴ The EU requested a WTO Dispute Settlement Panel in 1996 and the EU and USA reached an agreement in 1998 not to proceed with its WTO challenge for a quid pro quo undertaking that the USA would not prosecute any EU citizens under the Act. The agreement reached between the EU and USA was never implemented into US law and a *de facto* truce was reached. See the EC-US Agreement on Trade in Large Civil Aircraft, OJ L 301 of 17 October 1992; Appellate Body Report United States – Measures affecting Trade in Large Civil Aircraft, 892 WT/DS353/AB/R (12 March 2012).

³⁵ For a recent survey of the European Parliament, see Library of the European Parliament, 'Principal EU-US disputes' (22 April 2013), available at: [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI\(2013\)130518_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130518/LDM_BRI(2013)130518_REV1_EN.pdf) and www.wto.org/english/tratop_e/dispu_e/cases_e/ds353_e.htm, accessed 12 February 2014. See Petersmann and Pollack, *Transatlantic Economic Disputes*.

³⁶ Dispute DS392 United States – Certain Measures Affecting Imports of Poultry from China.

³⁷ The 1991 EC-US Competition Cooperation Agreement provides for both positive and traditional comity. See J. Griffin, 'EC and US Extraterritoriality: Activism and Cooperation' (1993) 17 *Fordham International Law Journal* 353. See the later Agreement between the European Communities and the Government of the United States of America on the

WTO dispute settlement forums, irrespective of how sub-optimal such forums may be in terms of outcomes or bindingness or enforceability.³⁸ Moreover, such disputes have not taken place in each other's legal orders generally, neither before the International Court of Justice, nor any other international body. Nor have individuals been the beneficiaries or originators of claims or disputes. This has operated to contain bilateral disputes in a narrow range of forums of legal activity. Of course, the advent of the TTIP may operate to develop and expand the dispute resolution forums between the EU and USA.

This issue of the forum for the litigation of bilateral disputes also raises the question as to its relationship to litigation in another forum, namely the internal legal orders of the EU and USA respectively. The account here next focuses upon litigation in the EU legal order, thus taking the perspective of EU public law.

D. *The litigation of transatlantic relations in the EU legal order*

An analysis of the legal effects of transatlantic measures in the case law of the Court of Justice of the EU does not reveal much by way of quantity.³⁹ The limited amount of case law in this regard is indicative of the contours of EU-US relations in respect of representation and rule-making networks, that is the actors of bilateral relations, as outlined above. One can observe that the rule-making dynamic of transatlantic relations prior to the Treaty of Lisbon generated little by way of conflict between the EU institutions and its Member States.

A decision of the Court of Justice from 2003 may neatly demonstrate this point.⁴⁰ *France v. Commission* serves as a rare challenge by a Member State to the authority of the European institutions to enter into

application of positive comity principles in the enforcement of their competition laws OJ L 173, 18.6.1998, p. 28; Bradford, 'The Brussels Effect'.

³⁸ See on this issue of sub-optimal remedies, see Petersmann, 'Dispute Prevention and Dispute Settlement'.

³⁹ A search in the Curia database for 'transatlantic', that is EU-US specific references, yields few relevant results. One may more broadly include Case C-233/02 *France v. Commission* [2004] ECR I-2759 (EC-US Guidelines on Regulatory Cooperation and Transparency); Case 142/88 *Hoesch AG & Federal Republic of Germany v. Bergrohr GmbH* [1989] ECR I-3413 (Arrangement in exchange of letters); Case C-327/91 *France v. Commission* [1994] ECR I-3641 1991 (EC-US Competition Cooperation Agreement); see the so-called Open Skies case law, e.g. C-467/98 *Commission v. Denmark* [2002] ECR I-9519; Case C-523/04 *Commission v. Netherlands* [2007] ECR I-3267.

⁴⁰ Case C-233/02, *France v. Commission* [2004].

transatlantic relations prior to the Treaty of Lisbon. In 1998 the EU and USA adopted a statement on Transatlantic Economic Partnership, affirming their intention to concentrate on removing barriers to transatlantic trade. The Partnership had an Action Plan approved by the Council in November 1998 and negotiations began in 1999 between the Commission and US government on principles/guidelines. The Council had authorised the Commission to undertake negotiations with a view to concluding a bilateral agreement with the USA in the area of technical barriers to trade, and during the negotiations the representatives of the Commission maintained that the principles/guidelines could not create any obligations binding as a matter of international law. By February 2002 the negotiations on the Guidelines on Regulation and Transparency were finally concluded. However, dissatisfaction prevailed in certain Member States with the outcome of the negotiations and France brought proceedings seeking to annul the decision of the Commission to conclude an agreement with the USA. France contended *inter alia* that the Commission was not competent to adopt the measures as the Guidelines amounted to a binding international agreement. By contrast, the Commission argued that the Guidelines were not legally binding and that the intention not to enter binding legal relations or commitments was expressly maintained by the parties throughout the negotiations. Ultimately, the Court held that the Guidelines were devoid of legally binding effects and that the Court would not restrict the right of initiative of the Commission.

The decision may not be regarded as one of any landmark significance, nor as restrictive of EU authority and EU foreign affairs. Nonetheless, the proceedings serve, even if pre-Lisbon, as a reminder of the ability of EU Member States to directly challenge the authority of the EU institutions to enter formally binding transatlantic relations, which they largely do not do. The proceedings also emphasise how transatlantic relations are strikingly under-litigated. One might observe that the role of the Commission in transatlantic relations has been far less contentious than such proceedings might suggest.

The institutional landscape of transatlantic relations post-Lisbon involves the Commission still acting as lead EU negotiator of bilateral agreements, albeit with the European Parliament having consent powers over international agreements, power which has engendered much discussion on accountability in EU international relations.⁴¹ We may observe

⁴¹ On Article 218(6)(a) TFEU and other relevant provisions, see Jančić, Chapter 3, and Santos Vara, Chapter 12, in this volume..

that recent significant litigation concerning accountability and transparency in transatlantic relations has been generated by an individual member of the European Parliament before the Court of Justice.⁴² Yet previous examples of the litigation of transatlantic relations in EU law concern the European Parliament, collectively, challenging the validity of the EU-US Passenger Name Records Agreement, motivated by rule of law and civil liberties concerns.⁴³ While such questions of the rule of law – and specifically accountability questions arising therefrom – are outside of the scope of this chapter, this litigation emphasises the layered dynamic of who the actors in transatlantic rule-making are. Nonetheless, the ‘institution-light’ dynamic of transatlantic rule-making coupled with historically fragmented European external representation has not been causative of conflict through law. Nor has it caused more conventional conflict with the EU Member States themselves. One may conclude that such high politics is viewed as beyond the realm of justiciability.⁴⁴ However, justiciability is not necessarily a useful template for analysis given the sheer amount of interactions taking place through law outside of bilateral relations.

This account next explores further the forums of and means for interactions between the two legal orders, taking place recently outside of the bilateral context in each other’s legal order, which provide a means to examine the contours of an Atlantic community of law.

II. Non-bilateral interactions between the EU and US legal orders

A. Overview of recent developments

There are a series of recent non-bilateral interactions that have taken place between the legal orders of the EU and USA and outside of bilateral agreements, which the present author has sought to develop as evidence of specific ‘proximity’ between the two legal orders that is not conventionally accounted for.⁴⁵ For example, there have been a series of regular EU *amicus curiae* submissions made by the European Commission

⁴² C-350/12 P *In’t Veld v. Council*, Judgment of the General Court of 4 May 2012, [2012] ECR II-000, appeal pending.

⁴³ Joined Cases C-317/04 and C-318/04 *European Parliament v. Council and Commission* [2006] ECR I-4721.

⁴⁴ See E. Fahey, ‘The Justiciability of EU PNR SWIFT Law’ in P. Pawlak (ed.), *Beyond Terrorism and Privacy* (Institute for Security Studies, Chaillot Paper, 2012).

⁴⁵ For a detailed account of the case studies sketched briefly in section II.A, see Fahey, ‘On the Use of Law in Transatlantic Relations’.

through US-based lawyers before the US Supreme Court in, for example, death penalty cases, even where the EU had no prior involvement or link thereto. These submissions were conducted in support of the EU's long-standing campaign against the death penalty in the EU. Subsequently, the EU submissions were accepted and adopted by the US Supreme Court.⁴⁶ The submissions were made prior to the advent of single legal personality in the Treaty of Lisbon, and notably the authority of the Commission to do so on behalf of the EU prior to single legal personality being granted has never been challenged by the Member States, who might have favoured the Council instead, for example, or indeed no such representation.⁴⁷ More recently, in late 2012 the European Commission on behalf of the European Union made submissions before the US Supreme Court, seeking to prohibit the application of the US Alien Tort Statute to EU companies for human rights abuses in Nigeria, with less success.⁴⁸

We may also note that in 2011 the EU took upon itself to include aviation within the scope of EU Environmental Emissions Trading Scheme rules, having failed to see an agreement reached at international level.⁴⁹ It thus adopted a series of rules that were perceived to have a considerable impact on foreign airlines, even when they were outside EU airspace. While further consideration of these events and details has been conducted elsewhere,⁵⁰ for present purposes the most significant event was that the US House of Representatives passed legislation to prohibit the impact of EU Environmental Trading Emission (EU-ETS) rules upon the US legal order.⁵¹ It also supported the litigation by certain US airlines before the Court of Justice to challenge the rule. However, the Court of

⁴⁶ 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* (Oxford: Hart Publishing, 2011), p. 275. Interventions accepted in earlier rather than later submissions: for example, not in *Sosa v. Alvarez-Machain*, 542 US 692 (2004), on the Alien Tort Statute.

⁴⁷ Except see W. Pryor, 'Foreign and International Law Sources in Domestic Constitutional Interpretation' (2006) 30 *Harvard Journal of Law and Public Policy* 173, at 174.

⁴⁸ *Kiobel v. Royal Dutch Petroleum et al*, 133 S.Ct. 1659 (2013), on the effects of inter alia, the Alien Tort Statute 28 USC §§1350.

⁴⁹ Directive 2008/101/EC, amending Directive 2003/87/EC.

⁵⁰ See J. Scott and L. Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469; E. Fahey, 'The EU Emission Trading Scheme and the Court of Justice: the High Politics of the Indirect Promotion of Global Standards' (2012) 13 *German Law Journal* 1247.

⁵¹ See Case C-366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change* [2011] ECR I-000. See also the European Union Emissions Trading Scheme Prohibition Act of 2011 (HR 2594).

Justice rejected the challenge, making no reference to the US legislation in its decision. Nonetheless, the decision of the Court is widely regarded as a landmark ruling on the limitations of regulation and global governance. In particular, it exposed the transatlantic divide on the boundaries of such regulation and governance. Additionally, however, it exposed both the indirect and direct nature of interactions between the EU and US legal orders.

Many now study the phenomenon of EU-US 'rule-transfer'⁵² epitomised recently in the account of Bradford on the so-called 'Brussels effect'.⁵³ This phenomenon involves charting a vast transfer of EU regulatory standards into the US legal order, in areas ranging from genetically modified foods, antitrust rules and data privacy standards to chemical safety rules. Some suggest that the EU has indirectly forced such rule-transfer onto the USA on account of its market size and force.⁵⁴ Others suggest that it is a far less obvious and more nuanced process of rule-transposition.⁵⁵ Nevertheless, we may note that the extent to which EU legal rules are actually transposed into US law is increasing, in whole or in part: for example, the partial transposition of EU environmental rules⁵⁶ in California, Maine and Boston State law, because of the desirability of these rules.⁵⁷ This particular 'transfer' phenomenon is developed in greater detail in section IV.⁵⁸

In addition, the USA recently intervened informally and anonymously in the formulation of EU Data Protection legislation against the backdrop of the EU and US negotiations on a General Data Protection Regulation that had been taking place since 2010.⁵⁹ Furthermore, a more coherent

⁵² On the use of this term, see section IV.

⁵³ Bradford, 'The Brussels Effect'.

⁵⁴ *Ibid.*

⁵⁵ See e.g. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law*, available at: <http://ssrn.com/abstract=2276433>, accessed 12 February 2014.

⁵⁶ 'Reach Regulation': Council Regulation (EC) No. 1907/2006 amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directive 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

⁵⁷ J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57(4) *American Journal of Comparative Law* 897; see also US Government Accountability Office, *Chemical Regulation. Comparison of U.S. and Recently Enacted European Union Approaches to Protect against the Risks of Toxic Chemicals* (August 2007).

⁵⁸ See section IV.

⁵⁹ 'Informal Note on Draft EU General Data Protection Regulation' (December 2011), available at: http://edri.org/files/12_2011_DPR_USlobby.pdf, accessed 12 February 2011. See also 'US Lobbying waters down EU data protection reform', *Euractiv.com* (21 February

EU foreign policy post-Lisbon is asserted to have given rise to a more ready 'harmonisation' of EU law vis-à-vis US foreign policy, for example in relation to secondary sanctions applied to Iran.⁶⁰ Such interactions demonstrate the significance of examining the use of law outside of the conventional bilateral context and the dimensions of the phenomenon of proximity between legal orders, which significance is developed further in the next section.

B. Why are non-bilateral interactions of significance?

The next question to probe is why these interactions are of significance to the present account. One might begin by noting that 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 USA using US institutions as the forum for their intervention. In this way, the intervention by the EU in formal court proceedings constitutes 'compliant' conduct on the part of the EU with the authority of the US legal order in order to further its own policy goals before a judicial forum. On account of the prominence of this forum, participation by the EU in it has a global impact and allows the EU to impart its message broadly. In the same vein, the use of legislation in the EU-ETS dispute and the deployment of EU institutions and procedures by political actors supported by their government both within and outside their own legal system is a distinctive form of interaction between legal orders. The US legislation was not binding upon the EU and had no authority in the EU legal order. Nevertheless, there was a compliance with the EU legal order, or its legal procedures through the initiation of litigation in its legal order.

The 'Brussels effect' indicates practices of flexible 'rule-transfer', rule convergence or rule migration between legal orders.⁶¹ As a result, we may observe the malleability of the space between the EU and US legal orders to accommodate direct and indirect variants thereof. More concretely, it demonstrates the openness of transatlantic relations to each other's legal

2012); 'Informal Comment on the draft General Data Protection Regulation and draft Directive on data protection in law enforcement investigations,' available at: www.edri.org/files/US_lobbying16012012_0000.pdf, accessed 12 February 2011.

⁶⁰ See the analysis of EU-US relations in the several accounts given in 'Developments in the Law – Extraterritoriality' (2011) 124 *Harvard Law Review* 1226. See also Memorandum of Understanding concerning the US Helms-Burton Act and US Iran and Libya Sanctions Act, EU-US, 11 April 1997, 36 ILM 529.

⁶¹ See further in section IV.

norms. In the case of data transfer, the informal or unofficial advocacy by non-specific US agencies in the EU legislative process resulted in detailed input into EU rules. These unofficial interventions, in the non-bilateral context, are not legally binding yet provide evidence of entry points into formal rule-making processes so as to pursue their law-making objectives. EU foreign policy responsiveness to the US remains in the realm of high politics. However, similar to the Brussels effect, it also indicates that empirically a high degree of proximity actually exists between the legal orders. The interactions demonstrate the centrality of the use of law by many actors in various institutional locations between the EU and US legal orders in recent times, including at the highest possible levels, beyond mere diplomacy.

We may say that, evidently, direct and indirect legal dialogues, both official and formal or unofficial and informal, between the EU and USA are observable outside of the conventional bilateral context of Transatlantic Relations, a contention supported and sustained by the findings of Mak in Chapter 2 of this volume. The actual locations of these interactions, however diverse, are particularly distinctive for a number of reasons. We may note that the EU does not usually communicate its norms using advocacy in third-countries last instance courts. Rather, the EU usually communicates its norms or engages in the promotion of its norms, such as the rule of law and the promotion of fundamental rights, in clauses of agreements with neighbouring countries, candidate countries and trade partners.⁶² Alternatively, the EU issues local statements: for example, in Gaza the EU recently expressed its views on the local use of the death penalty in a public statement.⁶³ More usually, the promotion of EU norms is usually communicated to the subjects and objects of the agreement with legal authority and by agreement, albeit that it rarely enforces its suspension rights for breach thereof in the context of trade.⁶⁴ And overall, we may say that the

⁶² For example, European Commission, Inventory of Agreements containing the Human Rights Clause, DG RELEX/B2 – Treaties Office, 7 July 2011, available at: <http://ec.europa.eu/world/agreements/viewCollection.do>, accessed 12 February 2014.

⁶³ For a list of locally issued EU views on the death penalty, see the website of the EEAS, available at: http://eeas.europa.eu/human_rights/adp/index_en.htm, accessed 12 February 2014.

⁶⁴ See B. De Witte, 'The EU and International Legal Order: The Case of Human Rights' in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011), p. 127, at p. 143; L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', 2012/3 CLEER Working Paper; M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 553.

EU does not usually communicate its norms in the legal orders of these countries in the same way that it does with the USA. Instead, it usually communicates formally with third countries, through clauses of specific agreements. The EU also maintains a transparent treaty register, where it formally categorises the types of norms that it promotes in its external relations.⁶⁵ This renders its communications with the USA all the more distinct, less routine and less conventionally formal. The interactions are not limited to specific formal legal instruments, for example bilateral legal agreements between sovereign actors. They are thus taking place outside of conventional bilateral constraints, practices and legal instruments.

One specific example from practice possibly demonstrates the reasons for such non-bilateral interactions and ties together the strands of the outline developed in sections I and II. As noted above, in 2012 the European Commission made *amicus curiae* submissions on behalf of the European Union in proceedings before the US Supreme Court, as did two EU Member States, concerning the extra-territoriality application of the US Alien Tort Statue to European companies.⁶⁶ However, this practice is striking as one might have thought that, post-Lisbon, only the EU would intervene as the main external institutional representative, whereby it would through the European External Action Service (EEAS) negotiate a position in accordance with the views of its Member States, which would be advocated by the European Commission on behalf of the EU alone.⁶⁷ One can say that the institutional evolution of EU external relations post-Lisbon does not appear to have limited EU Member State interventions through law before the US Supreme Court in recent times, in order to propose a pan-European perspective. The prevailing fluidity of the (institutional) status quo might simply be said then to incite the EU to directly take action in the US legal order using law to obtain a desirable outcome in the political process, conducted outside of the conventional bilateral processes.

The above sections have considered the character of bilateral relations, institutionalisation and forums for interactions between the EU and USA (in section I), explored the idea of non-bilateral interactions between legal orders (in section II) and examined proximity between the EU and US legal orders in various ways. The next section explores the limits of proximity between the EU and US legal orders in the area of bilateral justice and home affairs.

⁶⁵ See n. 62.

⁶⁶ In *Kiobel v. Royal Dutch Petroleum* (i.e. Netherlands, United Kingdom).

⁶⁷ Interviews by the author conducted in late 2012 indicate that EEAS officials, particularly individuals regularly used to making submissions before the US Supreme Court, were not aware of the submissions being made by the individual Member States.

III. Transatlantic bilateral rule-making in justice and home affairs: the character of law

A. Overview

Transatlantic security cooperation received its most prominent rule-making impetus after the September 2001 (9/11) terrorist attacks, when a raft of EU–US Justice and Home Affairs Agreements were enacted.⁶⁸ Rule-making from this particular period may be considered to demonstrate the limitations of mutual recognition of each other's legal order or the shortcomings of adequacy presumptions in law.⁶⁹ Over a decade after 9/11, cooperation is ongoing and also planned in new areas, for example cyber security and cybercrime, with a striking shift in legal form. Even if the impetus for terrorism legislation in the transatlantic context has abated, the effectiveness of transatlantic rule-making has been lauded as a reason to engage in transatlantic 'rule-convergence' in data protection. Moreover, this rule-making has inspired the EU to engage in 'replica' rule-making of policies, programmes and agreements.⁷⁰ The recent National Security Agency (NSA) surveillance saga has placed EU–US Justice and Home Affairs cooperation centre stage once more.⁷¹ These developments invite an analysis of the character of law in contemporary rule-making.

⁶⁸ See J. Santos Vara, 'Transatlantic Counterterrorism Cooperation Agreements on the Transfer of Personal Data: A Test for Democratic Accountability in the EU, Chapter 12, and V. Mitsilegas, 'Transatlantic Counterterrorism Cooperation and European Values: The Elusive Quest for Coherence', Chapter 13 in this volume. See K. Archick, 'EU–US Cooperation Against Terrorism', Congressional Research Service 7-5700 (21 May 2012); Fahey, 'Law and Governance as Checks and Balances'.

⁶⁹ See Fahey, 'Law and Governance as Checks and Balances'; Shaffer, 'Reconciling Trade and Regulatory Roles'; 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.

⁷⁰ For example, Proposal for a Directive on the Use of Passenger Name Record Data for the prevention, detection investigation and prosecution of terrorist offences and serious crime, COM(2011)32, Commission Communication, 'A European Terrorist Finance Tracking System Available Options,' COM(2011)429 final. See Mitsilegas, Chapter 13 in this volume.

⁷¹ See 'EU–US Counterterrorism pacts at risk over snooping affair', *EUObserver.com* (5 July 2013); 'MEPs raise suspension of EU–US bank data deal', LIBE Press release (24 September 2013), available at: www.europarl.europa.eu/news/en/news-room/content/20130923IPR20604/html/MEPs-raise-suspension-of-EU-US-bank-data-deal, accessed 12 February 2014. See also Intervention of Commissioner Malmstroem during this event on the use of TFTP dispute resolution clauses.

The legal form of rights, redress and remedies in such rule-making is indicative of a particular imbalance of powers in transatlantic relations in this period, borne out in many accounts.⁷² A particular agreement may be underpinned by formulations of mutual recognition of each other's legal order: access to it and assumed and expressed similarities. Mutual recognition in justice inevitably involves the acceptance of aspects of the content and form of the legal system of another legal order. This phenomenon has proven to be particularly complex amongst the EU Member States themselves, where mutual recognition in justice is recognised as having both substantive and procedural components.⁷³ However, the imbalance evident overall arguably reflects the impossibilities of actual transatlantic mutual recognition in justice.

By way of illustration, two of the most prominent agreements entered into by the EU with USA in the post 9/11 period, designed to communicate air passenger data and to target the financing of terrorism, are the EU-US Passenger Name Records (EU-US PNR) Agreement and EU-US Terrorist Financial Tracking Programme (EU-US TFTP) Agreement, a phenomenon considered here next.⁷⁴ These two agreements have generated much controversy on account of their limitations on redress and their uneven application of US law to EU citizens, not enabling the latter to fully realise their rights to redress and review. The formulation of the character of rights, remedies and redress is distinctively replicated in both agreements in a broad time frame, extending well after a decade post 9/11.⁷⁵ Their genesis and operation is exhaustively analysed here in Part

⁷² See further Fahey, 'Law and Governance as Checks and Balances'; Mitsilegas, Chapter 13 this volume. 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* (Oxford: Hart Publishing, 2008), p. 11; Cremona, 'Justice and Home Affairs in a Globalised World'.

⁷³ See Shaffer, 'Reconciling Trade and Regulatory Roles'; V. Mitsilegas, 'Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.

⁷⁴ See 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 of 17 November 2011; COM (2011) 807 final, approved by the European Parliament in April 2012 (hereafter EU-US PNR Agreement); Agreement between the European Union and the United States of America on the processing and Transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, OJ L 195 (hereafter TFTP Agreement).

⁷⁵ On the background to the EU-US PNR Agreement see Santos Vara, Chapter 12 in this volume, and Fahey, 'Law and Governance as Checks and Balances'.

III of this volume and this account conducts a particularly brief analysis of only specific aspect of one such agreements as a result.

The most recent so-called 'Second Generation' EU-US PNR Agreement was intended to represent. Over a decade after 9/11, an improved agreement with the USA to transmit air passenger data to the USA in the name of fighting serious crime and terrorism,⁷⁶ but remains very similar in form and in substance to 'First Generation' EU-US PNR Agreement. The Second Generation Agreement now provides for a default 'push' system in Article 15 thereof, with a 'pull' system provided for in exceptional circumstances in Article 15(5), indicating that the legal character of the Agreement still is significantly disposed towards US concerns.

In the EU-US PNR Agreement rights of redress, access to personal information and rights of correction and rectification are provided in Articles 11–13. Article 13 expressly provides that any individual, regardless of nationality, country of origin or place of residence, whose personal data and personal information has been processed and used in a manner inconsistent with that agreement, may seek effective administrative and judicial redress in accordance with US law. Moreover, it provides that any individual is entitled to seek to administratively challenge Department of Homeland Security (DHS) decisions related to the use and processing of US law. EU citizens can petition for judicial review under an express list of US Acts in Article 13(3), including the Freedom of Information Act, the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act. However, the US Privacy Act of 1974 is not one of the listed acts and is an intentional and significant omission, limited as it is to US citizens only. This thus deprives EU citizens of important legal protections. The agreement provides in Article 14, simply entitled 'Oversight', that compliance with privacy safeguards in the agreement will be subject to independent review and oversight by Department Privacy Officers, such as the DHS Privacy Officer, expressed to have a 'proven record of autonomy', who will exercise inter alia 'effective powers of oversight, investigation, intervention and review'. In turn, the agreement expresses

⁷⁶ Improving upon the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security (DHS), Bureau of Customs and Border Protection ([2004] OJ L 183/ 83, and corrigendum at [2005] OJ L 255/168); Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ 2007 L 204/18.

itself to be subject to independent review and oversight by the DHS Office of the Inspector General, the Government Accountability Office and the US Congress. Thus considerable administrative discretion is accorded to a variety of US agencies that are checked in turn by further agencies and government. The extent to which an EU citizen will be in a position to challenge their effectiveness seems problematic. Moreover, Article 21 expressly provides that the agreement shall not *inter alia* create any right or benefit for any person, arising from the standpoint of the USA in negotiations that the agreement would not create new rights under US law.⁷⁷ This reinforces how mutual recognition or equivalence seems far from apparent in this area.

A critical view of the evolution of the EU–US PNR Agreement may be readily adopted, given that the expressed improvements of the agreement appear as piecemeal changes without any fuller integration of the two legal orders. Overall, the formulation of rights and remedies therein appears singularly deficient for EU citizens, even when expressed to the contrary. The specific character of legal rights in the EU–US PNR Agreement is especially novel and qualified but arguably highly imbalanced as regards EU citizens. In this way, the use of law in transatlantic relations is revealing as much about the proximity between the legal orders as the state of transatlantic relations in the post 9/11 era, even a decade thereafter. The controversy of NSA surveillance in 2013 put the spotlight on their deficiencies and structural imbalances once again.

However, newer forms of bilateral cooperation offer an alternative perspective on justice and home affairs in transatlantic relations, for example in the area of EU–US cybercrime and cyber security, which is the latest form of transatlantic bilateral security cooperation. They offer a different perspective on the boundaries of bilateral cooperation precisely because they indicate closeness between the legal orders. They are much more indicative of the contours of what might be understood in contemporary terms as an ‘Atlantic community of law’, explicable alongside the many non-bilateral interactions through law identified here.

B. EU–US cybercrime and cyber security cooperation

The latest transatlantic cooperation in justice and home affairs is in cybercrime and cybersecurity, in the form of the EU–US Working Group on

⁷⁷ See EU–US data protection negotiations during 2011, Council doc. 5999/12, Annex note from Commission DG Justice.

Cybercrime and Cybersecurity (WGCC), which was established after the EU–US Summit in November 2010.⁷⁸ However, the origins of this cooperation date back a decade earlier to the Joint EC-US Task Force on Critical Infrastructure Protection.⁷⁹ Also around this time the Council of Europe Cybercrime Convention was adopted, which now forms a central legal element of EU–US cooperation as well as internal EU rule-making in this field.⁸⁰ The EU–US cooperation goals are predominantly in four areas: (1) the expansion of cyber incident management response capabilities jointly and globally, through a cooperation programme culminating in a joint-EU–US cyber-incident exercise by the end of 2011; (2) to broadly engage the private sector using public–private partnerships, sharing good practices with industry and to launch a programme of joint awareness-raising activities; (3) to remove child pornography from the Internet; and (4) to advance the international ratification of the Council of Europe Convention by the EU and Council of Europe Member States and to encourage pending non-European countries rapidly to become parties.

From its distinctive legal objectives, it seems apparent that the WGCC had first and foremost ‘global’ rule-making objectives. The WGCC Group mentions specific countries to be ‘encouraged’ to become parties to the Convention, countries within and outside the EU.⁸¹ However, while during 2012 Belgium, Malta and Austria ratified it, there are several EU Member States still ‘resisting’ ratification on various grounds. In this regard, of note is that the USA is not a member of the Council of Europe but took part in the drafting of the Convention and has signed and ratified it. Also of note is that in 2008 the European Commission suggested that its redrafting or modernisation had become unachievable, but nonetheless promoted both international and EU ratification, as it currently does.⁸² Another notable and global-esque expected goal of EU–US cooperation includes the endorsement of EU–US ‘deliverables’ in cybercrime by the Internet Corporation for Assigned Names and Numbers (ICANN), a notable US-based entity engaging in significant postnational rule-making.⁸³ And further evidence of the nature of the ‘global’ objectives of rule-making and policy development is provided by

⁷⁸ WGCC Concept Paper, Annex 1.

⁷⁹ ‘Creating a safer Information Society by improving the security of information infrastructures and combating computer related crime’, COM(2000)890 final.

⁸⁰ See *Cyber-security Strategy of the European Union: An Open, Safe and Secure Cyberspace*, JOIN(2013)1final, Brussels (7 February 2013).

⁸¹ WGCC Concept Paper, 4. ⁸² COM(2010) 517 final, 2.

⁸³ WGCC Concept Paper, 3.

the minutes of a 2011 meeting of EU–US Senior JHA Officials, where it was stated that the EU and USA would work together in the UN to avoid dilution of the body of international law on cybercrime.⁸⁴ Similarly, the European Commission has been oriented towards global-like objectives, seeking global cyber security policies before its own internal policy at EU level had been conceived.⁸⁵ And well in advance of the adoption by the EU of its internal rule-making objectives in this area, in particular its Cyber-security Strategy published only in 2013 and thus after the EU–US cooperation, the European Parliament in 2012 advocated an EU framework on cyber security, with a view to the policy being ‘brought up’ at G8 and G20 level.⁸⁶

This latest EU–US cooperation may be said to indicate new boundaries in the transatlantic relationship on account of their global rule-making ambitions, notwithstanding first, formal limitations on the conduct of the USA as an actor outside of the Council of Europe and second, the unwillingness of certain EU Member States to cooperate in bilateral rule-making.⁸⁷ There are of course other precedents for the USA acting as a vocal and active observer, even if it is not a member of a specific international organisation. For example, in the Convention on Biodiversity, whilst only an observer, the USA still played a major role in the drafting process of a Protocol, so as to ensure a particular relationship of the Convention with WTO law.⁸⁸ Yet it is the regional territorial limits or boundaries of the Council of Europe as an organisation in addition to its regional goals as an organisation,⁸⁹ juxtaposed alongside the goals of the EU and US cyber

⁸⁴ ‘Summary of Conclusions of the EU–US JHA Informal Senior Officials Meeting of 25–26 July,’ Council Doc. 13228/11, p. 3.

⁸⁵ See ‘Critical Information Infrastructure Protection – Achievements and Next Steps: Towards Global Cyber-security,’ COM (2011)163 final.

⁸⁶ See the account in ‘Parliament demands single EU voice on cyber-security,’ *EUObserver.com*, 13 June 2012.

⁸⁷ See the European Commission’s advocacy of the Convention, emphasising how the Convention had been signed by 25 out of the 27 Member States and ratified by only 15 of them: COM(2010) 517 final, p. 2. See the ratification table at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>, accessed 12 February 2014.

⁸⁸ E.g., the 1992 Convention on Biological Diversity (CBD) and process of the adoption of the Cartagena Protocol on Biosafety to the Convention. See N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), p. 194.

⁸⁹ On the objectives of the Council of Europe, which specifically identify its Member States as its objects, see its website www.coe.int/aboutcoe/index.asp?page=nosObjectifs, accessed 12 February 2014.

cooperation, that indicate the irrelevance of territory. Instead, it suggests considerable proximity between the legal orders using law. The WGCC indicates that the boundaries of traditional bilateral cooperation are not fixed, that their rule-making objectives form a striking context of cooperation beyond the nation state. The goals of the WGCC suggest that they will lead eventually to the adoption of a global-like cyber policy or at the very least global standard-setting, through their promotion of the primacy of external norms.

In conclusion, unlike earlier bilateral rule-making, this newer rule-making appears to have joint-shared 'global' objectives. An imbalance in legal form is not apparent – the current bilateral legal goals are not weighted or disposed towards the USA. Instead, this newer bilateral rule-making is distinctive because it does not seek to engage in mutual recognition in justice and home affairs but rather has 'larger' global-like legal goals. While there are specific curiosities to these goals, particularly when contrasted with the EU-ETS rule-making, a newer era of greater proximity between the two legal orders seems apparent. Whether the latest saga of NSA/PRISM surveillance will alter this remains to be seen.

Section IV considers the phenomenon of rule-transfer between the EU and US legal orders and its relation to the idea of proximity in transatlantic rule-making considered here throughout. This section draws from one specific case study in justice and home affairs, thus developing the themes considered in section III.

IV. Transatlantic rule-transfer: the effects of the bilateral relationship in justice and home affairs

As outlined briefly above in section II, there is an emerging legal scholarship on actual rule-transfer, that is the movement of rules between legal orders, from the EU legal order to the US legal order, which suggests that it is far-reaching and widespread. The so-called 'Brussels effect' is the subject of recent US-based scholarship, assessing the perceived 'spill-over' effect of EU regulatory standards on US rules.⁹⁰ Equally, accounts consider the extent to which EU legal rules are actually transplanted or physically replicated in the USA is increasing – for example, EU environmental rules.⁹¹ These (legal) accounts conceptualise the actual

⁹⁰ Bradford, 'The Brussels Effect'; Scott, 'Extraterritoriality and Territorial Extension in EU Law'; Scott, 'From Brussels with Love'; Shaffer, 'Globalisation and Social Protection'; Bignami, 'European Versus American Liberty'.

⁹¹ Scott, 'From Brussels with Love'.

transfer of rules from the EU to the USA. Of course, this phenomenon may bear some similarities to the concept of a legal transplant, a principle of comparative law, where a rule is transplanted into another legal order, different to its country of origin.⁹² Moreover, there is also a body of non-legal scholarship describing the diffusion of values from the EU to the US legal order, focusing more upon the reasons for this diffusion rather than the process itself or its conceptualisation. However, this scholarship is not couched in terms of rule-transfer or less still transposition.⁹³ Nor does such scholarship focus upon legal aspects of the process of rule-transfer.

Rule-transfer may thus be described a means or process by which legal rules are adopted in other legal orders. It is a term deployed in non-legal scholarship on governance and policy development, often focusing upon the reasons for the adoption of rules or promotion of the adoption of rules by the EU.⁹⁴ However, while it has a central and distinctive legal component as a concept, given that it depicts legal rules and/or legislative measures, it is not so conceptually fixed or certain. This process of the adoption of EU rules elsewhere, particularly in the USA, is sometimes referred to as 'rule-transfer', 'sideways rule-transfer' or 'rule-migration'.⁹⁵ Such accounts conceptualise the actual transfer of rules from the EU to the USA, and less so the process, and offer limited normative explanations other than economic power or alternatively assume a 'horizontal' in the legal relationship between the two legal orders without offering a normative perspective thereon.⁹⁶ Moreover, some draw a distinction between

⁹² See H. P. Glenn, *Legal Traditions of the World*, 4th edn (Oxford University Press, 2010).

⁹³ 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; W. Rees and R. Aldrich, 'European and US Approaches to Counterterrorism' in R. Tiersky and E. Jones (eds.), *Europe Today: A Twenty-First Century Introduction*, 3rd edn (Lanham: Rowman & Littlefield, 2007), p. 437; Z. Laidi, 'European Preferences and their Reception' in Z. Laidi (ed.), *EU Foreign Policy in a Globalized World. Normative Power and Social Preferences* (London and New York: Routledge, 2008), p. 1.

⁹⁴ See, for example, its use without any formal definition by F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and European Europe' (2004) 11 *Journal of European Public Policy* 669. See M. Rousselin, 'But Why Would They Do That? European External Governance and the Domestic Preferences of Rule Importers' (2012) 8 *Journal of Contemporary European Research* 470, examining the reasons for the process of rule transfer.

⁹⁵ Bradford, 'The Brussels Effect'; Scott, 'Extraterritoriality and Territorial Extension in EU Law'; Scott, 'From Brussels with Love'.

⁹⁶ See Scott, 'Extraterritoriality and Territorial Extension in EU Law'.

the EU's transfer of legal rules and governance practices externally.⁹⁷ In doing so, some argue that rule-transfer constitutes an exportation of rules. However, this is not necessarily the case, given that it implies only the form of development discussed here next. Others define transnational law itself as the 'migration of norms, rules and models across borders',⁹⁸ distinguishing 'rule mimicry', which takes place out of 'convenience' or because of the economic weight of the rules from 'rule diffusion', based upon market dominance of sets of rules in a jurisdiction. However, this arguably blurs the conceptual and the methodological question of why rule-transfer occurs and is rooted in assumptions about the normative character of transnational law.⁹⁹

The impact of transatlantic rules upon and in the EU legal order is argued here to be relevant to the theorisation of rule-transfer, as a useful means to consider the place of and phenomena of law in transatlantic relations. For example, there are several EU security policies being pursued that have clear imprints of EU-US policies: for example, an EU Passenger Name Records Directive and an EU Terrorist Finance Tracking System, mirroring in form, context and lexicon the EU-US PNR Agreement and EU-US TFTP Agreement.¹⁰⁰ We may observe that EU 'internal' security readily embraces 'external' transatlantic security. Put another way, EU security rules under development may be said to demonstrate the migratory effects of EU-US legal rules by way of some form of rule transposition or 'rule-transfer'. Moreover, the adoption of transatlantic measures in EU law, particularly in a more stringent format, may be evidence of the highly fluid importation and exportation of values. The EU frequently imports values and norms and itself often acts as a model for values.¹⁰¹ However, EU value importation through law is far from uncontroversial. For example, there is a view that in the realm of terrorist financial transactions the EU has largely adopted international law measures wholesale,

⁹⁷ E.g. G. De Búrca, 'EU External Relations: The Governance Mode of Foreign Policy' in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2012).

⁹⁸ See D. Bodansky and G. Shaffer, 'Transnationalism, Unilateralism and International Law' (2012) 1 *Transnational Environmental Law* 1.

⁹⁹ See P. Zumbansen, 'Transnational Legal Pluralism' (2010) 1(2) *Transnational Legal Theory* 141.

¹⁰⁰ See above, n. 70.

¹⁰¹ Cremona, 'Values in EU Foreign Policy', p. 285. The European Convention on Human Rights and the Geneva Convention on the status of refugees are examples of the former; the evolution of the legal order of ASEAN might represent the latter. See also Cremona, 'The Union as a Global Actor'; Pech, 'Rule of Law as a Guiding Principle'.

which has been critiqued as an unduly 'blind' absorption.¹⁰² Of course, the use of international norms in internal EU policy-making in the realm of counterterrorism is far from unprecedented or unprincipled. The normative reasons for such adoption are usually well intentioned, for example ostensibly high legal standards or benchmarks from best international practice, or a desire to establish compliance at international level by using standards from such a forum.¹⁰³

The theme of exportation of EU values has a very broad interpretation and considerable span of subject areas beyond security.¹⁰⁴ For example, all forms of EU trade agreements contain value commitments and value exportations, but they are controversial and have been haphazardly applied.¹⁰⁵ Legal scholarship asserts across a broad range of subject areas that there is much fluidity and uncertainty concerning the importation and exportation of values in EU law. Seen in this light, the transposition of transatlantic rules into EU law seems entirely comprehensible, or at the least similarly fluid. Nevertheless, in the area of security, transatlantic relations represent a tricky balance of powers, where the EU has jointly agreed to particular value commitments, similarly entered into by the USA. Legal scholarship has engaged with this phenomenon of the balance of powers in transatlantic relations in security more readily than rule-transfer.

Many have provided accounts mapping specific imbalances or unevenness of the rule-making between the EU and US legal orders in the post 9/11 period as considered here. This specific context renders any effort to subsequently transpose transatlantic standards, *de facto* and *de jure*, into EU law all the more challenging. As discussed above, transatlantic security rules derived from the post-9/11 period are perceived to have emanated from a peculiarly complex legal and political context. Whilst a future problem, the legal review of the emerging EU internal security law with its origins in EU-US relations remains problematic. Evidently, the appropriate place for redress, justiciability and fundamental rights generally in security rules is far from settled. The phenomenon of rule-transfer possibly adds a significant dimension to our understanding of transatlantic

¹⁰² E.g. O. Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Aldershot: Ashgate, 2011).

¹⁰³ E.g., M. Scheinin (ed.), *European and United States Counter-terrorism Policies, the Rule of Law and Human Rights*, EUI RSCAS Policy Papers (2011/03).

¹⁰⁴ See also S. Lucarelli, and I. Mannes (eds.), *Values and Principles in EU Foreign Policy* (London: Routledge, 2006).

¹⁰⁵ The EU has suspended agreements on fundamental grounds only in a minority of instances: See De Witte, 'The EU and International Legal Order', p. 143.

relations outside of the bilateral context and proximity between the legal orders of the EU and USA. It is suggested here that it warrants being part of a future research agenda, one that is only canvassed here rather than developed. It indicates a richer context to transatlantic relations outside the strictly bilateral context, but one also in need of close analysis and reflection, especially in security. In this regard, the interactions between the EU and US legal orders outside of the bilateral context operate in the background to the ambiguity and malleability of transatlantic rule-transfer. It is yet again a significant aspect of contemporary transatlantic relations outside of the bilateral context and further reason to adopt a larger view of what could be considered to be a contemporary Atlantic community of law.

Conclusion

This account has explored what the phenomenon of an Atlantic community of law actually entails in contemporary times. The account has sought to develop its exploration descriptively and perhaps rather tentatively, as part of a future research agenda. It has sought to show how there are many recent interactions and rule-making exercises between the EU and US legal orders that demonstrate that transatlantic relations could be understood as quasi-institutional rather than law-light and institution-light. Many recent interactions between the legal orders of the EU and USA take place in unconventional forums and ways, explicable through and even as a result of quasi-institutionalisation and/or, at the very least, high proximity existing between the two legal orders. However, there are boundaries to this proximity. A more conventional analysis of bilateral agreements in post 9/11 justice and home affairs cooperation suggests serious limits to the idea of proximity between legal orders, along with major legitimacy issues. Paradoxically, newer cooperation suggests higher proximity between the legal orders of the EU and USA. Such a thesis is echoed by the development of transatlantic rule-transfer and borne out in particular in new EU security measures, the latter warranting further exploration. This account also forms the basis for reflections on our understanding of the character of real world interactions between legal orders, not least across the Atlantic and possibly also their legitimacy.