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Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures

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Abstract
This article analyses the roles of the European Parliament and the US Congress in addressing regulatory interdependencies arising in the EU–US strategic partnership. It examines their international actorness as a potential remedy for the problems of democratic participation, executive dominance, and opaqueness in the shaping of transatlantic relations. It shows that legislatures significantly contribute to regulatory discrepancies and trade disputes and that the adverse consequences thereof justify more intensive *ex ante* cooperation between them. The analysis conducts two groups of case studies to demonstrate how the EP and Congress influence law and policy in areas of transatlantic regulatory and foreign policy divergence. The first group of case studies analyses parliamentary involvement in the making of international agreements (TTIP and ACTA). The second group of case studies inspects legislative action with extraterritorial effects (US Helms–Burton and Sarbanes–Oxley Acts). The article argues that the EP and Congress have so far frequently acted against the spirit of the strategic partnership in ways that are injurious to the interests of the other side, and discusses whether an interparliamentary early warning mechanism could reduce legislative and political frictions and increase the coherence of transatlantic lawmaking.

Keywords: Transatlantic relations, regulatory cooperation, TTIP, ACTA, Sarbanes–Oxley, Helms–Burton, Transatlantic Legislators' Dialogue

I. INTRODUCTION

While the literature on transatlantic affairs mainly explores intergovernmental relations,[1] the parliamentary dimension thereof remains understudied. This is unsurprising because parliamentary prerogatives in foreign affairs are more reduced than in domestic affairs and because they are traditionally geared towards control over the national government more than towards autonomous actorness in

[1] See JM Hanhimäki et al, *Transatlantic Relations Since 1945: An Introduction* (Routledge, 2012); NF Sola and M Smith (eds), *Perceptions and Policy in Transatlantic Relations: Prospective Visions from the US and Europe* (Routledge, 2009).

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international affairs.[2] However, the international role of parliaments is an emerging field in both political practice and theoretical studies, and there are important global and regional avenues of parliamentary participation that merit scholarly analysis because of their potential impact on international and EU law.[3]

Propelled by the disaggregation of nation-state sovereignty,[4] international parliamentary actorness is an embodiment of postnational constitutionalism.[5] This phenomenon is manifested in unilateral, bilateral and multilateral action of parliaments beyond the polity in which they are established.[6] Unilaterally, parliaments may issue statements, declarations and resolutions as well as pass legislation with external effects.[7] Similarly, they may organise visits to, and from, other parliaments and executive officials, and thereby maintain their own international relations. Parliamentarians may also establish bilateral forums for dialogue on common challenges, such as immigration, trade liberalisation, environment protection, and combatting terrorism.[8] The most distinct form of international parliamentary actorness evolves at the multilateral level through 'legislative networks'[9] or 'international parliamentary institutions'.[10] These can take the form of parliamentary organs of international organisations or independent associations of parliamentarians. Their activities seek to mirror intergovernmental diplomacy and are, thus, often labelled parliamentary diplomacy.[11]

The goals of international parliamentary actorness range from participating in transnational rulemaking, to overseeing interregional partnership agreements, to increasing the transparency of international negotiations.[12] Parliamentarians may

[2] A Cassese, *Parliamentary Control Over Foreign Policy: Legal Essays* (Sijthoff and Noordhoff, 1980).

[3] D Jančić, 'Transnational Parliamentarism and Global Governance: The New Practice of Democracy' in E Fahey (ed), *The Actors of Postnational Rulemaking: Contemporary Challenges of European and International Law* (Routledge, 2015).

[4] A-M Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39 (2) *Government and Opposition* 159, p 161.

[5] N Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3 (1) *Transnational Legal Theory* 61, p 80.

[6] D Jančić, 'Globalizing Representative Democracy: The Emergence of Multilayered International Parliamentarism' (2015) 38 (2) *Hastings International and Comparative Law Review* 197.

[7] A Malamud and S Stavridis, 'Parliaments and Parliamentarians as International Actors' in B Reinalda (ed), *The Ashgate Research Companion to Non-State Actors* (Ashgate, 2011).

[8] See D Dubois, 'The Attacks of 11 September: EU–US Cooperation Against Terrorism in the Field of Justice and Home Affairs' (2002) 7 (3) *European Foreign Affairs Review* 317; D Jančić, 'The Transatlantic Connection: Democratizing Euro-American Relations through Parliamentary Liaison' in S Stavridis and D Irrera (eds), *The European Parliament and Its International Relations* (Routledge, 2015).

[9] A-M Slaughter, *A New World Order* (Princeton University Press, 2004), p 108.

[10] O Costa et al (eds), *Parliamentary Dimensions of Regionalization and Globalization: The Role of Interparliamentary Institutions* (Palgrave, 2013).

[11] S Stavridis and D Jančić (eds), Special Issue 'Parliamentary Diplomacy Uncovered: European and Global Perspectives' (2015) 10 (3&4) *Hague Journal of Diplomacy*, forthcoming.

[12] See text accompanying notes 20–21 below.

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also express protest against an event or misconduct in international affairs,[13] or bring their political weight to bear on conflict resolution and mediation.[14] Closely related is parliaments' promotion of the values of liberalism and democracy,[15] which facilitates the capacity building of legislatures and reinforces the effectiveness of domestic governance.[16] This may consequently contribute to the democratisation of regional and global governance.[17] Above all, the international actorness of parliaments strengthens their deliberative and communicative functions.[18]

The impact of such actorness can be both legal and political. Legal impact is chiefly sought through pronouncements in legislative and treaty-making processes, while effects of a political and sociological nature are achieved through institutional pressure, persuasion or advocacy.[19] Yet legal actorness is more conducive to exerting influence because it may directly produce binding consequences. Parliaments engage in international actorness both *ex ante* and *ex post*. As the case studies will show, both types of intervention can be effective in occasioning a reaction by their addressees.

The salience of parliamentary engagement in transatlantic affairs is twofold. On the one hand, transatlantic policy making is dominated by governmental cooperation in opaque frameworks, which hampers democratic participation and oversight.[20] Secrecy is a ubiquitous problem that prevents timely parliamentary responses.[21] It is also commonplace that diplomacy and democracy are in tension, and that international lawmaking is farther removed from the national legislature than domestic lawmaking, which allows executive branches to play two-level games.[22] On the other hand, organisations outside parliament cannot perform democratic functions satisfactorily, because they are not vested with a political mandate to represent the electorate. Though civil society and interest groups fulfill certain representative functions,[23] they are not conferred in a democratic process but rely on

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[13] See text accompanying note 94 below.

[14] M Gianniou, 'The European Parliament and the Israeli–Palestinian Conflict' in S Stavridis and D Irrera, see note 8 above.

[15] L Feliu and F Serra, 'The European Union as a "Normative Power" and the Normative Voice of the European Parliament' in S Stavridis and D Irrera, see note 8 above.

[16] A-M Slaughter and W Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)' (2006) 47 (2) *Harvard Journal of International Law* 327, p 334.

[17] C Kraft-Kasack, 'Transnational Parliamentary Assemblies: A Remedy for the Democratic Deficit of International Governance?' (2008) 31 (3) *West European Politics* 534.

[18] R Cutler, 'International Parliamentary Institutions as Organizations' (2013) 4 (1) *Journal of International Organizations Studies* 104, p 104.

[19] Z Šabič, 'Building Democratic and Responsible Global Governance: The Role of International Parliamentary Institutions' (2008) 61 (2) *Parliamentary Affairs* 255, p 258.

[20] D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 (2) *Common Market Law Review* 423.

[21] D Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52 (3) *Journal of Common Market Studies* 684.

[22] RD Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 (3) *International Organization* 434.

[23] See J Keane, *Global Civil Society?* (Cambridge University Press, 2003).

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voluntary acceptance. The 'highly formal theory of democracy' is hence not necessarily blind to the 'loss of public participation'.[24] Unlike civil society, parliaments can apply political sanctions against the government and participate in treaty ratification and implementation.[25] Lacking these levers of influence, the democratic legitimacy of civil society activism is limited.[26]

This article analyses the bilateral international actorness of parliaments in the legal sphere through the lens of transatlantic relations between the EU and the US as two key global strategic partners and it does so from the perspective of EU law. The objective is to establish how the European Parliament (EP) and Congress respond to regulatory interdependencies, whereby policies adopted on one side of the Atlantic significantly impact those adopted on the other side of it, and, potentially, elsewhere in the world. The relevance of this inquiry lies in the fact that policy disparities encumber business and trade, dissuade investment, harm transatlantic and global security, and affect the citizens' fundamental rights. With increasing EU–US economic integration, the law and governance dimensions of parliamentary involvement are becoming ever more salient.[27] Evidence of this is the creation in 1999 of a Transatlantic Legislators' Dialogue (TLD), as an informal forum for biannual consultations between the EP and Congress,[28] which institutionalised the relations that had evolved between them since 1972. The establishment of an EP Liaison Office in Washington DC in April 2010 further helped foster contact between EU and US lawmakers.

This article argues that the EP and Congress frequently use their powers against the spirit of the EU–US strategic partnership and that transatlantic relations suffer from insufficient *ex ante* interparliamentary dialogue. This is demonstrated with four case studies, selected to depict the variety of policy-making frameworks in which the EU and US legislatures utilise their constitutional powers in transatlantic affairs. They are divided into two groups: one related to international agreements and the other to domestic legislation. In the first group, the bilateral Transatlantic Trade and Investment Partnership (TTIP) and the multilateral Anti-Counterfeiting Trade Agreement (ACTA) are analysed to show that the prerogative of consent crucially determines the level of parliamentary actorness. The second group investigates the transatlantic impacts of the US Helms–Burton and Sarbanes–Oxley Acts to show that legislative spillover caused by parliaments in areas of regulatory divergences

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[24] F Bignami and S Charnovitz, 'Transatlantic Civil Society Dialogues' in M Pollack and G Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield, 2001), p 279.

[25] See R Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press, 2014), ch 11.

[26] R Howse, 'Transatlantic Regulatory Cooperation and the Problem of Democracy' in GA Bermann et al (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press, 2000), p 480.

[27] K Archick and V Morelli, *The U.S. Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation* (Congressional Research Service, 2013) CRS Report R41552.

[28] See its structure and operation in D Jančić, 'The European Parliament and EU–US Relations: Revamping Institutional Cooperation' in E Fahey and D Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press, 2014).

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considerably impedes the EU–US alliance. The analysis then queries whether a more constructive dialogue between the EP and Congress would benefit the transatlantic relationship and examines whether the establishment of a legislative early warning mechanism could promote regulatory approximation, avert the adoption of mutually harmful policies, and decrease juridico-political tensions.

The article proceeds to chart the international actorness of the EP and Congress (Part II). This will set the stage for the argument that the contribution of the EP and Congress to transatlantic trade disputes constitutes the key rationale for their closer *ex ante* cooperation (Part III). This is then operationalised *in concreto* through the case studies (Parts IV and V) in order to assess the possibility of a transatlantic legislative early warning mechanism (Part VI). The insights gained will substantiate the conclusion (Part VII) that EU–US interparliamentary cooperation is fraught with difficulties inherent in the differing European and American constitutional contexts, which may only be overcome through greater political will of both parties to the strategic partnership.

II. EU AND US LEGISLATURES AS INTERNATIONAL ACTORS

Despite executive preeminence, both the EP and Congress have a significant record of engagement in international relations. They have long played a prominent role in the shaping of their polities' diplomacy both through international agreements and wider engagement in international affairs.

A. *The European Parliament*

The Lisbon Treaty has greatly empowered the EP, endowing it with a right of consent to most EU international agreements.[29] The EP's global action is inspired both by the protection of the rights of EU citizens and by an endeavour to increase its institutional power against the Commission and the Council.[30] To this end, the EP engages in the worldwide promotion of democracy, human rights and the rule of law.[31] This value-oriented diplomacy of members of the EP (MEPs) is complemented by region-oriented diplomacy.[32] In addition, the EP plays an active part in conflict resolution, nuclear non-proliferation, and climate change prevention.[33]

To 'extend its influence on global politics',[34] the EP has an intricate system of delegations established specifically for relations with third countries, regions and

[29] Art 218(6) TFEU.

[30] CJ Bickerton, 'Functionality in EU Foreign Policy: Towards a New Research Agenda?' (2010) 32 (2) *Journal of European Integration* 220; AR Servent, 'The Role of the European Parliament in International Negotiations after Lisbon' (2014) 21(4) *Journal of European Public Policy* 568.

[31] Art 2 TEU in conjunction with Arts 3(1) and 21 TEU.

[32] D Jančić, 'World Diplomacy of the European Parliament' (2015) 10 (3&4) *Hague Journal of Diplomacy*, forthcoming.

[33] See S Stavridis and D Irrera, note 8 above.

[34] G Benedetto, 'The European Parliament' in JU Wunderlich and DJ Bailey (eds), *The European Union and Global Governance: A Handbook* (Routledge, 2011), p 87.

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international organisations. Committees for Civil Liberties, Justice and Home Affairs (LIBE), International Trade (INTA), Development (DEVE), and Foreign Affairs (AFET) along with its Subcommitee on Human Rights (DROI), also play an essential role in strengthening the EP's posture in global governance. The EP is rightly regarded as the world leader in parliamentary diplomacy,[35] and its pronouncements 'carry the weight of its institutional legitimacy'.[36]

The EU–US international agreements on the US Terrorist Finance Tracking Programme (TFTP) and Passenger Name Records (PNR) exemplify how the EP succeeded 'effectively to represent EU citizens externally'.[37] Due to privacy and data protection concerns, MEPs effected the amendment of both agreements amid tremendous political pressure. The TFTP Agreement aimed to prevent terrorism after the 9/11 attacks by enabling the US Treasury Department to access data on EU citizens' financial transactions processed by the Society for Worldwide Interbank Financial Telecommunication (SWIFT). Thanks to the EP's rejection of the interim Agreement,[38] safeguards were introduced to ensure greater protection of such data.[39] The current TFTP Agreement of June 2010, which is up for renewal in August 2015, foresees that Europol and European Commission overseers in Washington DC may verify US compliance with the requirements for data requests and transfers.[40] When it comes to transatlantic flights, the current PNR Agreement of April 2012, which superseded the 2004 and 2007 agreements but is up for renewal in 2019, had a similar fate.[41] MEPs played a 'leading part in bringing about a change' in the manner in which the US Department of Homeland Security may access data on EU citizens' flights.[42] The 'push' method now fully replaces the 'pull' method, which improves EU control over data transfers.[43] Nevertheless, these agreements continue to attract the criticism that the US may still use personal data against the interests of EU citizens.[44]

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[35] A Cofelice and S Stavridis, 'The European Parliament as an International Parliamentary Institution (IPI)' (2014) 19 (2) *European Foreign Affairs Review* 145, p 162.

[36] D Thym, 'Parliamentary Involvement in European International Relations' in M Cremona and BD Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart, 2008), p 226.

[37] C Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures' (2015) 12 (4) *International Journal of Constitutional Law* 904, p 906.

[38] J Monar, 'Guest Editorial: Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications' (2010) 15 (2) *European Foreign Affairs Review* 143.

[39] 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 (1) *Yearbook of European Law* 368, p 378.

[40] Arts 4 and 12 thereof.

[41] See background in PM Connorton, 'Tracking Terrorist Financing through SWIFT: When US Subpoenas and Foreign Privacy Law Collide' (2007) 76 (1) *Fordham Law Review* 283.

[42] Y Suda, 'Transatlantic Politics of Data Transfer: Extraterritoriality, Counter-Extraterritoriality and Counter-Terrorism' (2013) 51 (4) *Journal of Common Market Studies* 772, p 780.

[43] Art 15 of the 2012 PNR Agreement.

[44] See CC Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart, 2012), ch 6.

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B. *The US Congress*

American law distinguishes between three types of international agreements: treaties, congressional-executive agreements and sole executive agreements. While they all constitute binding agreements under international law, their domestic classification determines the level of involvement of Congress. According to the US Constitution's Treaty Clause, the President may only ratify treaties after two thirds of the Senators have given their consent.[45] Congressional-executive agreements rely on the Commerce Clause, which empowers Congress to 'regulate commerce with foreign nations',[46] and require approval by majorities in both the House of Representatives and the Senate. Sole executive agreements do not require congressional approval.[47] The President decides whether an international agreement is submitted to Congress as a treaty or as a congressional-executive agreement. Since the 1940s to date, more than 90% of US international agreements were concluded as executive agreements, among which a large majority have been congressional-executive agreements.[48] The latter's sharp rise was caused by the difficulty of mustering supermajorities in the Senate and by the increasing overlap between the subject matter of international agreements and Congress' regulatory authority. Oona Hathaway convincingly argues that circumstances that led to the constitutionalisation of the treaty procedure have been superseded and that congressional-executive agreements enjoy stronger democratic legitimacy.[49]

Congress has been developing a strong agenda in international politics for decades. As Ernest Griffith wrote in the 1960s, the power of the US President in foreign policy creates 'an inherent uneasiness in Congress and leads to the search for ways and means, not so much to circumscribe the President as to insist on a sharing in crucial decisions'.[50] While the President and Congress are portrayed as collaborators in foreign policy making,[51] Congress aspires to build an autonomous profile in external relations. Far from passive or obstructive, Congress uses its powers strategically to:

> assure or reassure other nations that [they] can count on the necessary legislative support if they agree to our official proposals. Similarly, they may serve as warning to other nations as well as to our own negotiators that such support in all probability will not be forthcoming unless certain conditions are met, or perhaps not at all.[52]

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[45] Art II, Section 2, Clause 2 thereof.

[46] Art I, Section 8, Clause 3 of the US Constitution.

[47] CA Bradley, *International Law in the US Legal System* (Oxford University Press, 2015), ch 3.

[48] Ibid, p 76.

[49] OA Hathaway, 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) 117 (7) *Yale Law Journal* 1236, p 1308.

[50] ES Griffith, *Congress and Its Contemporary Role* (University of London Press, 1967), p 167.

[51] B Hinckley, *Less than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress* (University of Chicago Press, 1994), p 7.

[52] ES Griffith, see note 50 above, pp 178–179.

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Moreover, congressional hearings and plenary debates 'may exert considerable influence in the highly sensitive field of international policy', and speeches, particularly by prominent congressmen, 'are listened to outside the United States as well as, or perhaps even more than, within our own official circles'.[53] The executive-congressional relationship is in constant flux,[54] however, and one of 'creative tension'.[55] Consultation between the President and Congress is nonetheless the 'most effective way to strengthen US foreign policy'. This may foster mutual trust, reduce inter-branch clashes, discourage Congress from obstructing foreign policy making, and give the President additional perspectives on foreign affairs.[56]

In the 1970s, Congress began granting the so-called 'fast-track' or 'trade promotion' authority to the President to negotiate trade agreements, while retaining the right to approve or reject such agreements *en bloc*.[57] Furthermore, the joint congressional War Powers Resolution, adopted in 1973 through an override of the presidential veto, was an attempt, with modest success,[58] to constrain the President's power to commit the US military abroad.[59] Finally, through its budgetary power Congress may approve or deny appropriations necessary for the implementation of international agreements or provision of foreign aid.[60]

The international actorness of Congress members equips them with better information, which they can utilise to shape public opinion,[61] and influence international negotiations.[62] Yet, as with the EP, the practical impact of congressional diplomacy remains elusive.

These features of the EU and US constitutional systems show that the EP and Congress have ample politico-legal means to affect the development of transatlantic relations. However, the following section shows that these are utilised in a fairly protectionist fashion, with a narrow focus on the national interest, and with scant regard for problems that this might engender for the EU–US strategic partnership.

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[53] Ibid, p 179.

[54] See to this effect JL Sundquist, *The Decline and Resurgence of Congress* (Brookings Institution, 1981).

[55] R Zoellick, 'Congress and the Making of US Foreign Policy' (1999) 41 (4) *Survival: Global Politics and Strategy* 20, p 34.

[56] LH Hamilton and J Tama, *A Creative Tension: The Foreign Policy Roles of the President and Congress* (Johns Hopkins University Press, 2002), pp 72–73.

[57] CA Bradley, see note 47 above, p 80. See also text accompanying note 99 below.

[58] JR Crook, 'War Powers Resolution – A Dim and Fading Legacy' (2012) 45 (1/2) *Case Western Reserve Journal of International Law* 157.

[59] 50 US Code §1541–1548.

[60] J McCormick, *American Foreign Policy and Process* (Cengage Learning, 2014), p 306.

[61] JM Lindsay, 'Backseat Driving: The Role of Congress in American Diplomacy' (2013) *World Politics Review,* 19 November.

[62] JM Lindsay, *Congress and the Politics of US Foreign Policy* (Johns Hopkins University Press, 1994), pp 126, 137.

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III. REGULATORY DISCREPANCIES AND TRADE DISPUTES AS TRIGGERS FOR TRANSATLANTIC LEGISLATIVE COOPERATION

Regulatory approximation in EU–US relations is highly significant for liberalising trade and investment, stimulating economic growth and reducing legal disputes.[63] Disagreements primarily arise due to different cultures of standardisation and risk regulation, whereby the EU espouses the precautionary principle and the US the reactionary one. The examples below demonstrate that legislation, which is made by or in cooperation with parliament, often causes a dispute. They also highlight why legislatures may benefit from a tighter *ex ante* dialogue.

Agriculture is the most striking instance of transatlantic regulatory divergence. Different European and American regulation of genetically modified organisms (GMOs) and the EU's *de facto* moratorium on their use gave rise to 'one of the most difficult and intractable disputes'.[64] The US challenge thereof before the World Trade Organization (WTO) in the *Biotech* dispute was feared to 'escalate into a transatlantic war'.[65] At stake was the 1997 Novel Food Regulation,[66] which remains salient in light of the Commission's April 2015 proposal to allow EU Member States to restrict or prohibit GMO use.[67] Another high-profile dispute relates to the EU's import ban of certain hormone-treated US beef, contrary to the WTO Sanitary and Phytosanitary Measures Agreement.[68] This ban was enacted by a series of Directives adopted in the 1980s and mid-1990s,[69] culminating in a 2003 Directive permanently banning one hormone and provisionally banning five.[70] Congress retaliated by enacting the Trade and Development Act in 2000, targeting the goods of the countries that have failed to implement WTO dispute settlement recommendations.[71] It also held numerous hearings, passed resolutions and tabled bills to press the EU to drop its policy.[72] This dispute will end if the 2009 EU–US Memorandum of Understanding is fully

[63] See E-U Petersmann and MA Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford University Press, 2003); HG Krenzler and G Wiegand, 'EU–US Relations: More than Trade Disputes?' (1999) 4(2) *European Foreign Affairs Review* 153, p 154.

[64] MA Pollack and GC Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009), p 279.

[65] A Alemanno, 'How to Get out of the Transatlantic Regulatory Deadlock over Genetically Modified Organisms?' in D Vogel and JFM Swinnen (eds), *Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the US and California* (Edward Elgar, 2011), p 200.

[66] Regulation (EC) No 258/97 [1997] OJ L43/1.

[67] COM(2015) 176.

[68] NC Lloyd, 'Beef Hormones Foster Animosity and Not Growth: An Analysis of the World Trade Organization Solving the United States' and European Communities' Beef Hormone Dispute' (2006) 25 (2) *Penn State International Law Review* 557.

[69] R Johnson, *The U.S.-EU Beef Hormone Dispute* (Congressional Research Service, 2015) CRS Report R4044.

[70] Directive 2003/74/EC [2003] OJ L262/17.

[71] Trade and Development Act of 2000, PL 106-200 [2000] section 407.

[72] R Johnson, see note 69 above, p 23.

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implemented.[73] Other agricultural disputes include those over the EU's preferential imports of bananas from certain former colonies in the Caribbean,[74] as well as over the EU's refusal to import US chlorinated poultry meat.[75]

Aviation furnishes further examples of regulatory fallout. Whether it is subsidies to large aircraft manufacturers, such as Airbus and Boeing, or the EU's prohibition of sound-absorbing mufflers called 'hushkits',[76] parliaments contributed to these disputes through legislation and concession-seeking oversight. In 2012, the EU's Emissions Trading Scheme (ETS), which imposes penalties for carbon emissions made by airplanes flying from or into EU territory,[77] was rejected by Congress in hearings and by statute.[78]

In the chemicals field, the EU's REACH Regulation,[79] has 'stirred up a major, transatlantic regulatory clash',[80] despite serving as a model for American legal reform,[81] and offering an 'unprecedented opportunity' for regulatory cooperation.[82] Additionally, memorandums of understanding between the EU and some US States, particularly California, may spark regulatory developments without parliamentary participation.[83]

These examples support the case for a more constructive relationship between the EP and Congress in creating public policy.[84] It has been argued that the TLD could be used to reinvent transatlantic politics.[85] According to Hugo Paemen, a former

[73] See http://www.ustr.gov/sites/default/files/asset_upload_file254_15654.pdf [last accessed 23 July 2015].

[74] HR Clark, 'The WTO Banana Dispute Settlement and Its Implications for Trade Relations between the United States and the European Union' (2002) 35 (2) *Cornell International Law Journal* 291.

[75] R Johnson, *U.S.-EU Poultry Dispute on the Use of Pathogen Reduction Treatments (PRTs)* (Congressional Research Service, 2015) CRS Report R40199.

[76] KW Abbott, 'US–EU Disputes over Technical Barriers to Trade and the "Hushkits" Dispute' in E-U Petersmann and MA Pollack, see note 63 above.

[77] Directive 2008/101/EC [2009] OJ L8/3.

[78] European Union Emissions Trading Scheme Prohibition Act of 2011, PL 112-200 [2012]. See also D Jančić, note 8 above, p 187.

[79] Regulation (EC) No 1907/2006 [2006] OJ L396/1 as amended.

[80] ACM Meuwese, 'EU–US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?' in D Vogel and JFM Swinnen, see note 65 above, p 262.

[81] 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, however, the argument that the EU's economic power does not easily translate into political power in AR Young and J Peterson, *Parochial Global Europe: 21st Century Trade Politics* (Oxford University Press, 2014), p 183.

[82] MR Schwarzman and MP Wilson, 'Reshaping Chemicals Policy on Two Sides of the Atlantic: The Promise of Improved Sustainability through International Collaboration' in D Vogel and JFM Swinnen, see note 65 above, pp 116, 119.

[83] See CG Hioureas and BE Cain, 'Transatlantic Environmental Regulation Regulation-Making: Strengthening Cooperation between California and the EU' in D Vogel and JFM Swinnen, see note 65 above, p 26.

[84] DL Aaron, 'Strengthening the Sinews of Partnership: Resolving and Avoiding Transatlantic Economic Conflicts' in E-U Petersmann and MA Pollack, see note 63 above, p 556.

[85] SL Williams, 'Trade Relations between the US and the EU' in T Ilgen (ed), *Hard Power, Soft Power and the Future of Transatlantic Relations* (Ashgate, 2006), pp 99, 106.

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Head of the European Commission's Delegation to the US, legislative and regulatory dialogues might be 'the best way to avoid built-in conflicts'.[86] The next section presents the case studies of international agreements and extraterritorial legislation to elucidate why greater transatlantic legislative liaison might be advantageous to the EU–US alliance.

IV. INTERNATIONAL AGREEMENTS

The previous section has shown that unilateral parliamentary involvement in EU–US regulatory governance may prejudice the attainment of common goals. Parliamentary actorness in TTIP negotiations and ACTA showcases the intensive activity of the EP and Congress in shaping a deeper transatlantic relationship and their continued, but thus far lacklustre, efforts to transform interparliamentary dialogue into concrete policy results.

A. *Transatlantic Trade and Investment Partnership*

TTIP negotiations, begun in July 2013, are paving the way for the largest free trade agreement in history.[87] Its central objective is to remove the remaining obstacles to trade and improve regulatory cooperation. Given such high stakes, the EP and Congress have actively scrutinised these negotiations.

On the European side, MEPs endorsed the negotiations in May 2013, requesting several sectoral safeguards, such as the exclusion of cultural and audiovisual services and the inclusion of financial services.[88] The EP further stressed the necessity of protecting personal data, intellectual property rights and geographical indications.[89] MEPs also highlighted agricultural sensitivities calling on the US to lift its ban on EU beef 'as a trust-building measure'.[90] Crucially, MEPs advocated an 'early upstream regulatory cooperation' mechanism to prevent future trade barriers and ensure lower regulatory and administrative burdens.[91] The EP also committed to 'collaborating with its US counterparts when introducing new regulations' and working closely with EU institutions and the US Administration and Congress.[92] Finally, MEPs warned that their positions should be 'duly taken into account at all stages' if they are to approve TTIP.[93]

[86] H Paemen, 'Practical Recommendations for Policy Reforms in Order to Prevent and Settle US–EU Trade and Economic Disputes' in E-U Petersmann and MA Pollack, see note 63 above, p 575.

[87] M Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 (2) *Common Market Law Review* 351. See also JF Morin et al (eds), *The Politics of Transatlantic Trade Negotiations TTIP in a Globalized World* (Ashgate, 2015).

[88] EP Resolution of 23 May 2013 on EU Trade and Investment Negotiations with the United States of America (2013/2558(RSP)) [2013] OJ C246 E/181, points 10–11, 18.

[89] Ibid, points 12–13.

[90] Ibid, point 17.

[91] Ibid, point 19.

[92] Ibid, points 23–24.

[93] Ibid, point 25.

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The US National Security Agency's online surveillance over EU institutions and citizens through the PRISM programme caused MEPs to caution, in July 2013 and March 2014, that this endangered their consent to TTIP and that they are ready to engage in dialogue with Congress to ensure equal protection of EU citizens in US courts.[94] To this end, MEPs launched the so-called 'European Digital Habeas Corpus' and called for the convention of a Trust/Data/Citizens' Rights group between the EP and Congress and other parliaments.[95] The intransparency of negotiations was also fervently protested, after which the Juncker Commission published the EU's negotiating mandate and texts.[96] Unlike in Congress, a matter of great controversy remains the investor-state dispute settlement (ISDS) mechanism.[97]

Across the Atlantic, Congress also supported the initiation of TTIP negotiations.[98] Accordingly, in June 2015 Congress granted the US President the trade promotion authority, enabling the Administration to conduct negotiations without congressional interference if certain guidelines and negotiating objectives are adhered to.[99] As evidenced by the objections of a large group of Senate Democrats,[100] congressional influence on US foreign trade policy is facilitated by political divisions, which characterised the passage of the TPA. Since it takes the form of a statute, this authority arguably affords Congress greater *ex ante* leverage on TTIP than resolutions do in the case of the EP. TPA also enables Congress to increase the transparency of negotiations and hold the executive to account thanks to provisions allowing their members to access the negotiating texts, receive debriefings, attend negotiation rounds, and create groups advising the Administration on the substance of negotiations.[101]

[94] EP Resolution of 4 July 2013 on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and Their Impact on EU Citizens' Privacy, (2013/2682(RSP)) [2013] OJ C319 E/273, recital K; EP Resolution of 12 March 2014 on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and Their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs (2013/2188(INI)) [2015] OJ C85/198, points 74, 116.

[95] EP Resolution 2013/2188(INI) [2015] OJ C85/198, see note 94 above, point 133.

[96] See C(2014) 9052 and http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 [last accessed 23 July 2015].

[97] See M Weaver, 'The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications' (2014) 29 (1) *Emory International Law Review* 225; R Quick, 'Why TTIP Should Have an Investment Chapter Including ISDS' (2015) 49 (2) *Journal of World Trade* 199.

[98] HR Resolution 76 of 15 February 2013 Expressing the Sense of the House of Representatives that the United States and the European Union Should Pursue a Transatlantic Trade and Investment Partnership, points 1–3. See also HR Resolution 74 of 15 February 2013 Supporting the Goals and Objectives of Ireland's Presidency of the Council of the European Union, point 2.

[99] Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (HR 1890/S 995), signed into law on 29 June 2015. See IF Fergusson, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy* (Congressional Research Service, 2015) CRS Report RL33743.

[100] M DeBonis and S Mufson, 'Senate Democrats Vote to Block Obama on Trade' *Washington Post*, 12 May 2015: http://www.washingtonpost.com/politics/democrats-threaten-to-stall-trade-legislation-in-the-senate/2015/05/12/08f71d66-f8c0-11e4-9ef4-1bb7ce3b3fb7_story.html [last accessed 23 July 2015].

[101] See http://waysandmeans.house.gov/tag/tpa [last accessed 23 July 2015].

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Like the European Commission, the Office of the US Trade Representative has been more transparent in TTIP negotiations than with previous trade agreements.[102] Surveys reveal that while US legislators broadly support TTIP, protectionist impulses are tangible in more sector-specific discussions. Such is the case with access to the US public procurement market or the regulation of geographic indications.[103]

In both the EU and US legislatures, TTIP negotiations are also examined in committee debates. Within Congress scrutiny is conducted through the Trade Subcommittees of the House of Representatives' Ways and Means Committee and the Senate's Finance Committee as well as through a bipartisan congressional caucus on TTIP.[104] Within the EP, the INTA, LIBE and AFET committees take the lead alongside the specially created TTIP monitoring group. The EP's July 2015 mid-term review of TTIP negotiations shows wide internal engagement, with 15 out of 21 committees offering opinions on TTIP, which resulted in no less than 69 concrete recommendations,[105] among which that outlawing the ISDS mechanism.

TTIP has also been discussed within the TLD. At its June 2015 meeting, Congress and the EP emphasised the need for their close involvement in monitoring TTIP negotiations and, eventually, supervising its implementation.[106]

These parliamentary reactions affirm that EU and US legislatures play an increasingly important role in setting the parameters and red lines that need to be observed lest the final agreement be jettisoned in the ratification phase.[107] Giving the EP and Congress the right of formal input in the TTIP institutional framework is one way of heeding their demands.

B. *Anti-Counterfeiting Trade Agreement*

At least regarding the parliamentary 'battle' for transparency,[108] TTIP follows in the footsteps of the multilateral Anti-Counterfeiting Trade Agreement, which the US

[102] L Bergkamp and L Kogan, 'Trade, the Precautionary Principle and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership' (2013) 4 *European Journal of Risk Regulation* 493, p 494.

[103] EP Briefing Paper 'The Transatlantic Trade and Investment Partnership (TTIP): The US Congress's Positions', 9 September 2014, pp 7–8. See also SI Akhtar and VC Jones, *Proposed Transatlantic Trade and Investment Partnership (T-TIP): In Brief* (Congressional Research Service, 2014) CRS Report R43158.

[104] See https://transatlantic-trade-investment-partnership-caucus-neal.house.gov [last accessed 23 July 2015].

[105] EP Resolution of 8 July 2015 on Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

[106] TLD, 76th Meeting, Riga, 27–28 June 2015, p 2.

[107] LJ Eliasson, 'Problems, Progress and Prognosis in Trade and Investment Negotiations: The Transatlantic Free Trade and Investment Partnership' (2014) 12 (2) *Journal of Transatlantic Studies* 119, p 129.

[108] DS Levine, 'Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking' (2011) 26 (3) *American University International Law Review* 811.

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signed in October 2011 and the EU in January 2012.[109] This agreement seeks to establish global mechanisms for the enforcement of copyright laws.[110] ACTA therewith pits the protection of intellectual property rights against a range of fundamental rights, including privacy and data protection.[111]

Before ACTA was signed, the EP objected to the secrecy of the negotiations asking the Commission to publish all relevant documents.[112] Although this was hailed as a 'victory for the transparency critics' because negotiations began opening to the public, swathes of information continued to be withheld.[113] Recalling the EU's high level of fundamental rights protection, the LIBE Committee reiterated that the Union must not allow 'fundamental rights laundering'.[114] Consequently, the EP rejected ACTA in July 2012.[115] This testified to the MEPs' efforts to defend EU values and alert foreign partners that its standpoints need to be given due regard.

Ten days later, MEP Sophie in 't Veld (ALDE) brought an action before the European Court of Justice seeking annulment of the Commission decision that denied full access to ACTA documents.[116] The March 2013 ruling only partially granted her requests.[117] Deidre Curtin, however, argues that there was nothing in the ACTA negotiating mandate that necessitated such a high level of secrecy, for it solely contained a list of items to be dealt with in the agreement.[118]

On American soil, congressional involvement was avoided by treating ACTA as a sole executive agreement.[119] As in the EU, the problem of opaqueness received considerable criticism.[120] ACTA negotiations were conducted with 'unprecedented

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[109] See ME Kaminski, 'An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement' (2011) 21 (3) *Albany Law Journal of Science and Technology* 385.

[110] See essays in P Roffe and X Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press, 2015).

[111] AJC Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy' (2011) 26 (3) *American University International Law Review* 601.

[112] EP Declaration of 8 March 2010 on the Lack of a Transparent Process for the Anti-Counterfeiting Trade Agreement (ACTA) and Potentially Objectionable Content, point 2.

[113] DM Quinn, 'A Critical Look at the Anti-Counterfeiting Trade Agreement' (2011) 17 (4) *Richmond Journal of Law and Technology* 1, p 23.

[114] Opinion of 4 June 2012, point 8, in EP Recommendation of 22 June 2012 on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (2011/0167(NLE)).

[115] EP Legislative Resolution of 4 July 2012 [2013] OJ C349 E/552.

[116] SIT Veld, 'Transatlantic Relations and Security – Reflections from a Politician, Practitioner and Litigator' in E Fahey and D Curtin, see note 28 above.

[117] *Sophie in 't Veld v European Commission*, T-301/10, ECLI:EU:T:2013:135.

[118] D Curtin, see note 20 above, p 453.

[119] KL Port, 'The Case against the ACTA' (2012) 33 (3) *Cardozo Law Review* 1131, p 1138.

[120] M Blakeney, 'Covert International Intellectual Property Legislation: The Ignoble Origins of the Anti-Counterfeiting Trade Agreement (ACTA)' (2013) 21 (1) *Michigan State International Law Review* 87.

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secrecy', in a manner that evaded public review and inter-branch accountability, and risked 'eroding the legitimacy of US trade policy'.[121] This has been impugned as unconstitutional,[122] and Congress protested accordingly.

Most notably, Senator Ronald Wyden (D-OR), the then Chairman of the Senate's Subcommittee on International Trade, publicly questioned why ACTA had been negotiated in isolation from Congress.[123] He engaged in a series of correspondences with the Administration.[124] A fortnight after ACTA was signed, he wrote first to President Obama[125] and later to Harold Koh,[126] the then Legal Adviser in the State Department, to express reservations about ACTA's constitutionality.[127] The first Wyden's letter was replied to by the then US Trade Representative, Ron Kirk, reaffirming that ACTA was 'fully consistent with US law' and with 'a long line of trade-related agreements' that had previously entered into force without congressional involvement.[128] Kirk added that *ex ante* consultations had been held with Congress and that its views were reflected in ACTA. In reply to Wyden's second letter, Koh argued that the Administration had had a congressional mandate to conclude ACTA.[129] He based this claim on the 2008 Prioritizing Resources and Organization for Intellectual Property Act, which called on the executive to work with other countries to enhance enforcement of intellectual property rights.[130] Wyden strongly disagreed.[131]

Subsequently, on 19 March 2012 he submitted two amendments to the Jumpstart Our Business Startups (JOBS) Bill, one of which explicitly sought congressional

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[121] E Katz and G Hinze, 'The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the US Trade Representative for the Creation of IP Enforcement Norms through Executive Trade Agreements' (2009) 35 *Yale Journal of International Law Online* 24, p 30.

[122] S Flynn, 'ACTA's Constitutional Problem: The Treaty is Not A Treaty' (2011) 26 (3) *American University International Law Review* 903, p 926.

[123] ME Kaminski, 'The US Trade Representative's Democracy Problem: The Anti-Counterfeiting Trade Agreement (ACTA) as a Juncture for International Lawmaking in the United States' (2012) 35 (3) *Suffolk Transnational Law Review* 519, p 521.

[124] SM Flynn 'ACTA's Constitutional Problem in the United States' in P Roffe and X Seuba (eds), see note 110 above, pp 161–162.

[125] Letter of 12 October 2011: http://www.wyden.senate.gov/download/?id=f20e3fd3-f2f1-4fc2-a387-570a575700d6&download=1 [last accessed 23 July 2015].

[126] Letter of 5 January 2012: http://infojustice.org/wp-content/uploads/2012/01/Wyden-01052012.pdf [last accessed 23 July 2015].

[127] MR Keefe, 'The Anti-Counterfeiting Trade Agreement and the "Zone of Twilight"' (2012) 35 (3) *Suffolk Transnational Law Review* 605, pp 607–609.

[128] Letter of 7 December 2011: http://infojustice.org/wp-content/uploads/2012/01/Kirk-12072011.pdf [last accessed 23 July 2015].

[129] Letter of 6 March 2012: http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf [last accessed 23 July 2015].

[130] 15 US Code §8113(a).

[131] Letter of 25 July 2012: http://infojustice.org/wp-content/uploads/2012/07/wyden-07252012.pdf [last accessed 23 July 2015].

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approval of ACTA.[132] However, the amendment was ordered to lie on the table, which means that the Senate's presiding officer held it without further consideration.

The activism of the EP and Congress in ACTA negotiations signifies that legislatures utilise all manner of legal and political tools to affect international negotiations and hold the executive accountable. These tools represent litigative and legislative forms of parliamentary actorness and these have been employed both *ex ante* and *ex post*. The ACTA case study lays bare the conclusion that ignoring parliamentary preoccupations can backfire, frustrate the positive elements of the agreement, and chip away its legitimacy.[133]

V. TRANSATLANTIC LEGISLATIVE INTERDEPENDENCE AND EXTRATERRITORIALITY

The previous section shows that in international negotiations legislatures may have common concerns, such as transparency and information access, that may be better dealt with through concerted rather than individual action. While a mere 1–2% of transatlantic trade is estimated to cause legal controversy, this section demonstrates that extraterritorial legislation jeopardises transatlantic relations and that direct parliamentary exchange remains wanting. Joanne Scott makes a compelling case that although the adoption of extraterritorial legislation remains exceptional, the EU frequently uses the legislative technique of territorial extension to broaden the regulatory and jurisdictional catchment of EU law.[134] In effect, the US acts in much the same way.[135] The following analysis centres on two empirical examples of policy irritants: one in the field of sanctions and embargoes (US Helms–Burton Act) and the other in that of finance and accounting (US Sarbanes–Oxley Act).

A. *Sanctions and embargoes*

American legislation examined here is rooted in several congressional acts decried by the EP. In particular, in a 2006 resolution MEPs condemned 'the extraterritorial approach that typifies much of the United States' foreign policy and foreign economic/commercial policy, as exemplified by the Helms-Burton Law, the Torricelli Law and Section 301 of the US Trade Act'.[136]

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[132] Amendments SA 1868 and SA 1869, 112th Congress (2011–2012).

[133] M Geist, 'The Trouble with the Anti-Counterfeiting Trade Agreement (ACTA)' (2010) 30 (2) *SAIS Review of International Affairs* 137, pp 138, 144.

[134] J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 (1) *American Journal of Comparative Law* 87; J Scott, 'The New EU "Extraterritoriality"' (2014) 51 (5) *Common Market Law Review* 1343.

[135] See AJ Colangelo, 'What is Extraterritorial Jurisdiction?' (2014) 99 (6) *Cornell Law Review* 1303; MP Gibney, 'The Extraterritorial Application of US Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles' (1996) 19 (2) *Boston College International and Comparative Law Review* 297.

[136] EP Resolution of 1 June 2006 on Improving EU-US Relations in the Framework of a Transatlantic Partnership Agreement (2005/2056(INI)) [2006] OJ C298 E/226, point 50.

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The 1996 Cuban Liberty and Democratic Solidarity (Libertad) Act, known as the Helms–Burton Act,[137] was enacted in response to the shooting down by the Cuban Air Force of two civilian US-based airplanes operated by an anti-Castro group.[138] By virtue of Title III of this Act, Congress extended an economic embargo against the Fidel Castro regime *inter alia* by providing for the liability of any person or company that traffics in property claimed by American citizens but confiscated by the Cuban Government after the 1959 Revolution.[139] This enactment built on earlier legislation seeking to isolate Cuba, including the 1992 Cuban Democracy Act, known as the Torricelli Act.[140] The Administration unsuccessfully attempted to persuade Congress to drop this provision.[141] The EP opposed the Torricelli Act from the very beginning too and urged Congress to repeal it.[142]

The Helms–Burton Act directly prejudiced the rights of EU citizens and companies. In retaliation, the Council of Ministers passed a Joint Action and a Regulation explicitly prohibiting compliance with the Helms–Burton Act.[143] The EP was excluded to avoid delaying the latter's adoption.[144] Despite this, the Regulation was seen as a 'surprisingly robust display' of the EU's resistance to the encroachment of American law.[145] The Regulation also encompasses the Torricelli Act and the US Iran and Libya Sanctions Act of 1996, known as D'Amato-Kennedy Act.[146]

The EU sought to settle the Helms–Burton dispute before a WTO panel.[147] The saga ended on 18 May 1998, when the EU and the US reached a political agreement,[148] which did not require parliamentary approval. The US agreed to limit the impact of the Helms–Burton and D'Amato-Kennedy Acts and the EU agreed to freeze further

[137] PL 104-114 [1996], initiated by Senator Jesse Helms (R-NC) and Representative Dan Burton (R-IN).

[138] See further in SE II Lucio, 'Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996: An Initial Analysis' (1996) 27(2) *University of Miami Inter-American Law Review* 325.

[139] Section 302 thereof. See a view defending this Act in BM Clagett, 'Title III of the Helms-Burton Act is Consistent with International Law' (1996) 90 (3) *American Journal of International Law* 434.

[140] VA Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46(2) *International and Comparative Law Quarterly* 378, p 379.

[141] K Gerke, 'The Transatlantic Rift over Cuba. The Damage is Done' (1997) 32 (2) *The International Spectator* 27, p 34.

[142] GM Wilner, 'International Reaction to the Cuban Democracy Act' (1993) 8 (2) *Florida Journal of International Law* 401, p 405.

[143] Council Regulation (EC) No 2271/96 [1996] OJ L309/1.

[144] J Huber, 'The Helms-Burton Blocking Statute of the European Union' (1996) 20 (3) *Fordham International Law Journal* 699, p 710.

[145] VA Lowe, 'Helms-Burton and EC Regulation 2271/96' (1997) 56 (2) *Cambridge Law Journal* 248, p 250.

[146] PL 104-172 [1996]. See the EU's reaction to the Helms–Burton and D'Amato Acts in M Cremona, 'The European Union as an International Actor: The Issues of Flexibility and Linkage' (1998) 3 (1) *European Foreign Affairs Review* 90.

[147] WTO Dispute DS38: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm [last accessed 4 November 2013].

[148] S Smis and KVD Borght, 'The EU-US Compromise on the Helms-Burton and D'Amato Acts' (1999) 93 (1) *American Journal of International Law* 227, p 229.

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WTO action. The EP was dissatisfied with the EU's handling of the dispute and passed a resolution three days before the agreement was reached,[149] recalling that there had been neither time constraints nor any other justification for the lack of *ex ante* consultation. Some four months later, MEPs requested that the Commission appeal to Congress for it to 'refrain from attempts to impose legal order on third countries by extraterritorial policy with damaging effects to the world trade order, including European companies'.[150] It is notable that the EP chose an indirect way to address Congress instead of taking the matter up directly with US lawmakers. In 2002, MEPs once again called for the Helms–Burton Act to be rescinded.[151]

A key scholarly objection to the Helms–Burton and D'Amato-Kennedy Acts is that they upset the separation of powers by instating a 'very high degree of control over the conduct of foreign policy by Congress'.[152] As one author maintains, 'seldom, if ever, has a president handed over the reins of foreign policy to such an extent'.[153] In the case of the EP, its upheaval was important because:

> The Europeans would be committing utter folly if they neglected to oppose the Helms-Burton Act. Unless Congress ceases to enact the type of extraterritorial legislation …, the EU would find a great deal more of its foreign and trade policies being written in Washington rather than in Europe.[154]

It has been argued that the EU's response was insufficient and that more stringent measures were necessary.[155] The latter, however, might have been less pressing had a closer relationship between parliamentarians existed.

This case study exposes the constraints facing parliaments in the diplomatic sphere and their keenness to impart their opinion on extraterritorial law. Although US–Cuban relations are thawing with the reopening of the US Embassy in Havana on 20 July 2015, transatlantic interparliamentary coordination remains highly relevant in the field of international sanctions and embargoes, such as concerning Iran's nuclear programme,[156] or Russia's annexation of Crimea.[157]

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[149] EP Resolution of 15 May 1997 on the Suspension of the WTO Dispute Settlement Procedure as Regards the Helms-Burton Act [1997] OJ C167/150.

[150] EP Resolution of 18 September 1997 on the Negotiations Between the Commission and the US Administration on the Helms-Burton Act [1997] OJ C304/116.

[151] EP Resolution of 15 May 2002 on the Commission Communication to the Council on Reinforcing the Transatlantic Relationship: Focusing on Strategy and Delivering Results [2003] OJ C180 E/392, point 61.

[152] VA Lowe, see note 140 above, p 383.

[153] K Gerke, see note 141 above, p 40.

[154] AM Solis, 'The Long Arm of U.S. Law: The Helms-Burton Act' (1997) 19 (3) *Loyola of Los Angeles International and Comparative Law Journal* 709, p 729.

[155] M Pullen, 'The Helms–Burton Act: Compliance with International Law and the EU's Proposed Counter-Measures' (1996) 2 (5) *International Trade Law and Regulation* 159, p 166.

[156] EP Resolution of 10 March 2011 on the EU's Approach Towards Iran (2010/2050(INI)) [2012] OJ C199 E/163, point 53.

[157] EP Resolution of 11 June 2015 on the Strategic Military Situation in the Black Sea Basin Following the Illegal Annexation of Crimea by Russia (2015/2036(INI)), point 27.

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B. *Finance and accounting*

In this field, four of the six disputes that arose from mid-1990s to 2008 were directly linked with legislative enactments effected in 2002 on both sides of the Atlantic.

On the American side, the adoption of the Sarbanes–Oxley Act (SOX) on 30 July 2002 reformed the rules on corporate accounting and auditing in the securities market.[158] The new, stricter rules were made in response to financial reporting scandals that had caused billion-dollar losses to investors.[159] This Act was drafted with little regard for its international effect and without prior transatlantic consultation, which gravely affected EU investment firms.[160] Three groups of SOX provisions provoked sharp EU reactions.[161] One such provision required foreign auditors of US-listed companies to register with the newly created Public Company Accounting Oversight Board, which meant that hundreds of EU-based companies were exposed to regulatory requirements, compliance with which would violate EU law. Another provision introduced new conditions for the independence of corporate boards and auditing committees, which forced EU companies to accept US rules or lose access to American investors. Yet another friction concerned increased costs for EU companies wanting to maintain a listing on US stock exchanges.

On the European side, the passage of the Foreign Conglomerates Directive on 16 December 2002 subjected large US investment banks to consolidated EU supervision unless they met equivalency standards.[162] Since American supervision did not meet European requirements at the time, US companies would have to undergo costly changes and accept that supervision would be performed by a foreign authority. As Elliot Posner demonstrates,[163] comparable adverse effects for American companies also flow from the EU's 2002 Regulation on Accounting Standards[164] and the 2004 Markets in Financial Instruments Directive.[165]

These problems were eventually solved through concessions, particularly by the US, which retracted from insisting on the exclusive application of American rules. The perceived need for regulatory alignment led to the establishment in May 2002, just a couple of months before the EU and US enactments, of the Regulatory

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[158] PL 107-204 [2002]. Initiated by Senator Paul Sarbanes (D-MD) and Representative Michael G Oxley (R-OH).

[159] See more in B Kim, 'Sarbanes-Oxley Act: Recent Developments' (2003) 40 (1) *Harvard Journal on Legislation* 235; NH Aronson, 'Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002' (2002) 8 (1) *Stanford Journal of Law, Business and Finance* 127.

[160] RJ Ahearn, *Transatlantic Regulatory Cooperation: Background and Analysis* (Congressional Research Service, 2009) CRS Report RL34717, p 16.

[161] E Posner, 'Making Rules for Global Finance: Transatlantic Regulatory Cooperation at the Turn of the Millennium' (2009) 63 (4) *International Organization* 673.

[162] Directive 2002/87/EC [2003] OJ L35/1.

[163] E Posner, see note 161 above, p 684.

[164] Regulation (EC) No 1606/2002 [2002] OJ L243/1.

[165] Directive 2004/39/EC [2004] OJ L145/1.

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Dialogue on Financial Services between the European Commission and the US Treasury Department, the Federal Reserve Board and the Securities and Exchange Commission (SEC).[166]

However, once the enactments had been made, the disputes were managed in isolation from parliaments. Although Congress was lobbied by various interest groups,[167] the disputes were settled by executive actors, primarily the Commission and the SEC. Yet while these two bodies have a wide margin of manoeuvre, both Congress and the EP possess channels to exert influence on them.

Namely, the SEC's Office of Legislative and Intergovernmental Affairs serves as formal liaison with Congress.[168] This Office closely monitors congressional legislative activities and hearings concerning securities markets, and maintains regular communication with Congress members and staff. The Office also administers congressional requests for documents and testimony of SEC members.

The EP is not powerless either. The 2010 Interinstitutional Agreement between the EP and the Commission provides for a constructive dialogue between them.[169] The Commission undertook to provide documentation on its meetings with national experts within the framework of comitology, with a possibility for EP experts to attend them upon request.[170] This is of specific importance in the field of finance because of the Lamfalussy procedure, which delegated to comitology committees the power to implement financial services legislation and which to a certain extent restricted the EP's say.[171] Furthermore, the need for legislative action to enact measures agreed within the Regulatory Dialogue on Financial Services is greater in the EU than in the US, because the SEC possesses far-reaching lawmaking powers.[172]

Discussions on accounting and financial services were also held within the TLD, especially from October 2007 to April 2009.[173] It is questionable, however, whether this had any bearing on the settlement of disputes, even though it aided the exchange of information on the positions of the EP and Congress. The latter is desirable because EU financial markets legislation adopted in the wake of the financial crisis

[166] HJ Hellwig, 'The Transatlantic Financial Markets Regulatory Dialogue' in KJ Hopt et al (eds), *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press, 2005), p 366.

[167] E Posner, see note 161 above, p 687.

[168] See http://www.sec.gov/about/offices/olia.htm [last accessed 31 October 2013].

[169] Framework Agreement on Relations between the European Parliament and the European Commission [2010] OJ L304/47, points 12–13.

[170] Ibid, point 15.

[171] See R Corbett et al, *The European Parliament* (John Harper Publishing, 2007), p 299; N Moloney, 'The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime' (2003) 52 (2) *International and Comparative Law Quarterly* 509.

[172] HJ Hellwig, see note 166 above, p 374.

[173] Joint Statements of 63rd–66th TLD Meetings.

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de facto carries some protectionist effects,[174] which might create transatlantic ripples again.[175]

These two case studies demonstrate three dynamics. The first is temporal and confirms that, from a historical viewpoint, the EU and US legislatures have contributed to transatlantic tensions over a continued period of time. The second refers to the nature and breadth of the tensions and shows that legislative power is used to affect not only bilateral regulatory interdependence but also foreign policy *lato sensu*. The third is of a structural character and makes the case for enhancing interparliamentary dialogue to avoid future transatlantic disputes, which is examined hereunder.

VI. TOWARDS AN INTERPARLIAMENTARY EARLY WARNING MECHANISM IN TRANSATLANTIC RELATIONS?

The 1990 Transatlantic Declaration and the 1995 New Transatlantic Agenda (NTA) called for the improvement of links between the EP and Congress. To diffuse regulatory tensions, the EU–US 1999 Bonn Summit established an early warning mechanism for regulatory cooperation.[176] This is performed through information exchange and consultation with a view to early detection of any initiative that might impact transatlantic relations, so that the interests of the other side could be taken into account. The bodies charged with achieving this are the Transatlantic Economic Partnership Steering Group, the NTA Task Force and the Senior Level Group.[177] Although the TLD was pondered as a potential participant in this effort,[178] the regulatory early warning mechanism is essentially an executive arrangement.[179] To formalise the ties between senior regulatory officials, the High-Level Regulatory Cooperation Forum was created in 2005 and the Transatlantic Economic Council (TEC) in 2007. The Forum agreed in 2011 to inform the EP and Congress of any items in relation to the Commission's Work Programme and the US Government's Unified Agenda for regulatory and deregulatory activities.[180]

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174 L Quaglia, 'The Politics of "Third Country Equivalence" in Post-Crisis Financial Services Regulation in the European Union' (2015) 38 (1) *West European Politics* 167, p 180.

175 S Pagliari, 'A Wall Around Europe? The European Regulatory Response to the Global Financial Crisis and the Turn in Transatlantic Relations' (2013) 35 (4) *Journal of European Integration* 391, p 405.

176 W Meng, '"Early Warning System" for Dispute Prevention in the Transatlantic Partnership: Experiences and Prospects' in E-U Petersmann and MA Pollack, see note 63 above.

177 Joint Statement on 'Early Warning' Mechanism, 21 June 1999: http://useu.usmission.gov/bonn-summit-99.html [last accessed 23 July 2015].

178 Ibid, point g.

179 See the view against establishing a body with legislative powers in transatlantic governance in WH Roth, 'Building the "Transatlantic Economic Partnership": Are New General Institutions Needed?' in Bermann et al, see note 26 above.

180 Common Understanding on Regulatory Principles and Best Practices: http://trade.ec.europa.eu/doclib/docs/2011/july/tradoc_148030.pdf [last accessed 24 September 2015].

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Yet the regulatory early warning mechanism has made a negligible contribution to preventing policy clashes.[181] The limitations of grounding transatlantic cooperation in non-binding commitments flow in part from the non-involvement of legislative bodies.[182] A legislative early warning mechanism, in turn, is requisite because the EU and the US are 'effectively part of each other's policymaking processes',[183] and because the most bitter disputes between them have sprung from initiatives of the EP and Congress, which adopted legislation virtually without considering its transatlantic implications.[184] Worse even is that lawmakers often use legislative power to influence the behaviour of both the executive and its international interlocutors and this is emphatically the case with transatlantic relations.[185] An example of this is EP parliamentary diplomacy in the US on the planned Umbrella Data Protection and Privacy Agreement.[186]

Transatlantic parliamentarism, based on the TLD, remains thin, underused and ineffectual for its incapacity to produce binding results. The TLD has also had 'little impact' due to a 'mix of apathy, lack of funding and interest'.[187] The political impotence of both the regulatory early warning mechanism and the TLD lies in their failure to alter the incentives of those parliamentarians who are inclined to ignore the externalities of domestic laws.[188] The EP highlighted this problem following President Obama's first election by calling upon the EU and US authorities to 'avoid setting up barriers to inward investment and enacting legislation having an extraterritorial impact without prior consultation and agreement'.[189] Vested interests are arguably too powerful to be swayed by parliamentary discussions and information sharing.[190] Yet timely information access is what Douglas Bennet, Assistant

[181] T Takács, 'Transatlantic Regulatory Cooperation in Trade: Objectives, Challenges and Instruments for Economic Governance' in E Fahey and D Curtin, see note 28 above, p 182.

[182] A Alemanno, see note 65 above, p 211.

[183] S McGuire and M Smith, *The European Union and the United States Competition and Convergence in the Global Arena* (Palgrave, 2008), pp 57, 280.

[184] M Pollack, 'The New Transatlantic Agenda at Ten: Reflections on an Experiment in International Governance' (2005) 43 (5) *Journal of Common Market Studies* 899, p 915.

[185] MA Pollack, 'Managing System Friction: Regulatory Conflicts in Transatlantic Relations and the WTO' in E-U Petersmann and MA Pollack, see note 63 above, p 600; M Herdegen, 'Legal Challenges for Transatlantic Economic Integration' (2008) 45 (6) *Common Market Law Review* 1581, pp 1587, 1595–1596.

[186] State Watch, 'Civil Liberties MEPs Make Case for Data Protection during Washington Visit', 24 March 2015: http://www.statewatch.org/news/2015/mar/eu-usa-dp-meps-prel.pdf [last accessed 23 July 2015].

[187] F Cameron, 'EU-US Economic Relations and Global Governance' in K Möttölä (ed), *Transatlantic Relations and Global Governance* (Center for Transatlantic Relations, 2006), p 66.

[188] MA Pollack, see note 185 above, p 602.

[189] EP Resolution of 26 March 2009 on the State of Transatlantic Relations in the Aftermath of the US Elections (2008/2199(INI)) [2010] OJ C117 E/198, point 52.

[190] E-U Petersmann, 'Preventing and Settling Transatlantic Economic Disputes: Legal and Policy Recommendations from a Citizen Perspective' in E-U Petersmann and MA Pollack, see note 63 above, p 587.

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Secretary of State in the Carter and Clinton administrations, has labelled 'the sacred principle of congressional relations' with the executive in foreign policy making.[191] A legislative early warning mechanism could help mitigate the reliance of parliaments on information that is often withheld or filtered by the executive.

Despite these shortcomings, the TLD has also been viewed as a 'good example of the informal but important emergent foreign policy role' of legislatures.[192] The TLD has since 2011 established working groups for financial markets and stability, transport security, agriculture and food safety, and cyber security.[193] As a 'content-based, constructive body' for legislative coordination,[194] a deeper EP-Congress association might be an 'attractive building block' for longer-term transatlantic partnership.[195] According to Robert Zoellick, a former Deputy Secretary of State in the George W Bush Administration:

> Parliamentary and other political exchanges can be particularly useful in shaping Congressional attitudes about foreign policy. Fellow elected officials are often the most respected sources for explanations of different viewpoints on political constraints; democratically elected representatives, schooled in the arts of compromise at home, often recognise the limitations of unilateral acts abroad when fellow parliamentarians can speak directly to the counter-productive consequences.[196]

Anne-Marie Slaughter also warns against dismissing the international role of legislators, because they contribute to legislative harmonisation in interstate and interregional economic integration projects.[197]

This article maintains that the highly expert, science-driven and technical character of regulatory action does not preclude parliamentary judgment of the desired trajectories of such action. As representative institutions, legislatures should focus on legitimising or delegitimising the political decision whether to regulate in a certain policy area and, based on informed consultations and impact assessments, how to regulate it. Increased interparliamentary dialogue is not directed only at harmonising diverging legislative solutions, but also at facilitating a thorough understanding of mutual policies and risks posed by regulatory choices, all of which can be achieved by exchanging information and best practice.[198]

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[191] DJ Bennet Jr, 'Congress in Foreign Policy: Who Needs It?' (1978) 57 (1) *Foreign Affairs* 40, p 45.

[192] J Elles, 'The Foreign Policy Role of the European Parliament' (1990) 13 (4) *The Washington Quarterly* 69, p 72.

[193] D Jančić, see note 28 above, p 53.

[194] EP Resolution of 13 June 2013 on the Role of the EU in Promoting a Broader Transatlantic Partnership (2012/2287(INI)) [2013] OJ C253 E/243, point 7.

[195] G Burghardt, 'The EU's Transatlantic Relationship' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008), p 397.

[196] R Zoellick, see note 55 above, pp 38–39.

[197] A-M Slaughter, see note 9 above, p 128.

[198] A Alemanno, see note 65 above, pp 217–219.

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TTIP brings novel developments in this respect. As a 'living' instrument,[199] this agreement is meant to be partially self-evolving through 'forward-looking mechanisms to head off conflicts, including early consultations, impact assessments and regulatory reviews'.[200] According to the EU's TTIP negotiating texts of May 2015, these functions are to be performed by a Regulatory Cooperation Body, which will monitor TTIP's implementation and promote future regulatory convergence.[201] TTIP foresees the interaction between this Body, and the EP and Congress, although concrete arrangements are still forthcoming. Meanwhile, proposals have been tabled for the EU and the US to publish at least once a year a list of planned regulatory acts with an explanation of their scope and objectives. Where these acts undergo impact assessment, information should be made public as early as possible on the adoption schedule, stakeholder consultations, and the potential impact on trade and investment.[202] Another mechanism is proposed whereby written comments on the preparation of regulatory acts that one Party receives from the other are transmitted to the EP and Congress.[203] If adopted, these stipulations might catalyse interparliamentary cooperation.

Though modest, these innovations lay the foundations for enhanced transatlantic parliamentary linkages. The existing TLD framework could be reformed for this purpose.[204] At the March 2014 TLD meeting, the EP and Congress agreed that any TTIP-derived mechanism for regulatory cooperation must be subject to 'effective parliamentary and congressional oversight'.[205] In a similar vein, the June 2015 TLD meeting acknowledged that TTIP is an endeavour to 'reinvigorate our transatlantic partnership well beyond the obvious trade dimension'.[206] Interviews with congressional staff reveal that TLD chairpersons, who are members of the TEC Advisory Group, seem 'fully committed to making the TLD a more active partner in the TEC process'.[207] The EP's July 2015 Resolution on TTIP also called for:

> a deepening of transatlantic parliamentary cooperation, on the basis and using the experience of the Transatlantic Legislators' Dialogue, leading in future to a broader and enhanced political framework to develop common approaches, reinforce the strategic partnership and to improve global cooperation between the EU and US.[208]

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[199] Speech by Karel de Gucht, 'Transatlantic Trade and Investment Partnership (TTIP)–Solving the Regulatory Puzzle', 10 October 2013.

[200] D Hamilton, 'Transatlantic Challenges: Ukraine, TTIP and the Struggle to Be Strategic' (2014) 52(s1) *Journal of Common Market Studies* 25, p 34.

[201] Art 14, Initial Provisions for the TTIP Chapter on Regulatory Cooperation: http://trade.ec.europa.eu/doclib/html/153403.htm [last accessed 23 July 2015].

[202] Ibid, Art 5.

[203] Ibid, Art 9(7).

[204] See also EP Study, 'The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation', April 2014, p 55.

[205] TLD, 75th Meeting, Washington DC, 25–26 March 2014, p 2.

[206] TLD, 76th Meeting, Riga, 27–28 June 2015, p 1.

[207] RJ Ahearn and V Morelli, *Transatlantic Regulatory Cooperation: Possible Role for Congress* (Congressional Research Service, 2010) CRS Report RL34735, p 17.

[208] See note 105 above, point 2(e)(vii) thereof.

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The EP Liaison Office further contributes to long-term joint legislative planning and early warning through identification of issues of mutual interest.[209] The fact that several national parliaments, such as in France and Ireland, have asked to be included in the TLD's work speaks about its continued relevance.[210] Nevertheless, TTIP will not give birth to a Transatlantic Assembly and legislators' summits, whose establishment the EP has tirelessly advocated.[211] Transatlantic governance thus still lacks a genuinely political component.[212]

VII. CONCLUSIONS

This article has investigated the key legal ways in which EU and US parliaments shape transatlantic regulatory cooperation, law and governance. Several conclusions stand out.

First, parliamentary scrutiny of international negotiations and legislative processes on both sides of the Atlantic shows that the EP and Congress are far from idle actors and that they avidly engage in transatlantic affairs. They utilise their formal decision-making prerogatives and informal pressure as bargaining chips to portray themselves as powerful foreign policy actors. Legislative enactments with adverse transatlantic repercussions can be understood as political tools for protecting the autonomy of the EU and US legal orders.[213]

Second, there is a significant degree of alienation between the EP and Congress. The case studies demonstrate that the lack of a meaningful *ex ante* dialogue hinders the transatlantic partnership. Many transatlantic regulatory discords have been managed in a retaliatory fashion through open confrontation or 'mutual regulatory disarmament', such as in the field of finance.[214] Legislation was a source of problems rather than a vehicle for their resolution or avoidance.[215] Instead of lawmakers preventing policy irritants at an early stage, rapprochement was sought through exemptions and exceptions.[216] Most of the parliamentary pronouncements were thus negative and reactionary rather than constructive and forward-looking.

Third, collective transatlantic parliamentarism has proven to be flimsy and the TLD's influence rather marginal. This forum did not seem to have a wider force beyond deliberation and communication. Yet many of the problems arising out of

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209 See http://www.europarl.europa.eu/us/en/home/what_we_do.html [last accessed 23 July 2015].

210 D Jančić, 'Towards a Transatlantic Trade and Investment Partnership (TTIP): National Parliaments and EU-US Relations' *Paper presented at the ACCESS Europe & Academy of Finland Workshop on Legislative-Executive Relations in Foreign and Security Policy*, VU Amsterdam, 21–22 May 2015.

211 See eg EP Resolution of 17 May 2001 on the State of the Transatlantic Dialogue [2002] OJ C34 E/359, point 9.

212 L Kuhnhardt, 'Globalization, Transatlantic Regulatory Cooperation, and Democratic Values' in Bermann et al, see note 26 above, p 490.

213 E Fahey, 'On the Use of Law in Transatlantic Relations: Legal Dialogues between the EU and US' (2014) 20 (3) *European Law Journal* 368, p 371.

214 HJ Hellwig, see note 166 above, p 365.

215 MA Pollack, see note 184 above, p 904.

216 E Posner, see note 161 above, p 672.

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regulatory discrepancies might have been addressed through more inter-parliamentary collaboration towards functional legislative equivalence.[217] The interpenetration of a whole array of sectors speaks in favour of this.

Finally, this study unveils the retributive consequences of restricted hard law rights of parliaments and the limits of a soft law approach to legislative and regulatory approximation in transatlantic affairs. Further, the structural difficulties of finding a workable template of parliamentary cooperation, which derive from different constitutional natures of the EU and US polities, are likely to remain. With the latter clinging to the concept of nation-state sovereignty and the former resting conversely on that of pooled sovereignty, their conceptions of transnational democratic governance are at odds.[218] Another inherent impediment is that the EP and Congress enjoy vastly different constitutional prerogatives. This was most visible in the ACTA episode, where the EP exercised its full constitutional power and rejected its ratification, while Congress did not even have the right to voice its opinion. These underlying dynamics considerably condition the future roles that the EU and US legislatures will play in transatlantic and broader international relations.

However, as the EU's experience with a legislative early warning mechanism shows, despite politico-constitutional differences, the existence of hard law guarantees provides a strong impetus for parliamentary activation and a more intensive search for coordinated approaches to transnational decision making.[219] Better formalised EP–Congress relations could generate similar consequences. They could raise the parliamentarians' awareness of the high level of regulatory and legislative interlacement and provide for a more inclusive policy-making process that could dissuade confrontation and promote substantive *ex ante* consultation. TTIP is likely to make a nudge in this direction, but the extent to which it will incentivise the upgrading of the TLD remains uncertain. It is plausible nonetheless that a TLD with enhanced participatory and oversight rights could begin to change the perceptions of MEPs, and especially Congress members, about the value of interparliamentary coordination.

[217] HJ Hellwig, see note 166 above, p 368.

[218] RO Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 (4) *Journal of Common Market Studies* 743.

[219] D Jančić, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue' (2015) 52 (4) *Common Market Law Review* 939.

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