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This paper investigates the climate regime as a case study to assess the engagement of non-state actors from across the Atlantic with the global environmental system. After a short introduction on the role of non-state actors in environmental governance, the paper analyses concrete instances where these actors have engaged in formal law-making processes and in-

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formal standard-setting exercises, as well as litigation concerning climate change law and policy. The conclusions draw a comparative assessment of the contribution of non-state actors from across the Atlantic to the climate regime, and more general reflections on non-state agency in the global environmental system, raising questions for further investigation.

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# The Role of EU and US Non-State Actors in the Global Environmental System. A Focus on Climate Change

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European Union

United States

Climate policy

Non-state actors

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## Introduction

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Starting from the premise that non-state actors are key players in the development and enforcement of international environmental law, this paper analyses their role in the making and enforcement of the climate regime. This narrow focus is justified by the fact that the climate regime is a burgeoning area of the law, which moreover has witnessed an increasing divide between the two sides of the Atlantic.

To fulfil its obligations under the Kyoto Protocol, the 1997 treaty imposing limits on the emission of greenhouse gasses, the European Union (EU) has adopted a comprehensive set of legal measures (Orlando 2013), which are at the forefront of EU law.<sup>1</sup> EU climate law and policy have been developed with decisive inputs from non-state actors. In contrast, the debate on climate law has stalled in the United States (US) Congress, prompting action through alternative routes, including the exercise of regulatory powers by the Environmental Protection Agency (EPA). In addition, some US states have pushed ahead, passing legislation to tackle climate change and forging alliances with like-minded states. Non-state actors in the US have significantly engaged in climate law-making and enforcement at the state level. At the federal level, on the contrary, their action has been more limited, due to lack of an overarching legal framework. These two very diverging domestic pictures have resulted in different degrees of engagement with the climate regime.

Although reflections concerning the climate regime are not necessarily applicable to other areas of international environmental law and policy, the climate regime features characteristics that may be regarded as representative of the proactive stance taken by the EU – as observed also in connection with issues such as deforestation (Savaresi 2012) and chemicals (Wirth 2007). By contrast, the US has taken an increasingly “inward-looking” approach, which is evident not only with regard to climate change, but also to biodiversity (Carlarne 2010:312).

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1 Art. 191(1) Treaty on the Functioning of the European Union (TFEU): “Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and *in particular combating climate change*” (emphasis added).

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As a result, US environmental law and policy is evolving somewhat in isolation, and the United States has progressively moved from a position of standard-setter and norm exporter, to that of (reluctant) norm-importer. This shift is the more remarkable when one considers that numerous innovative approaches propelled through EU action are based upon US experiments with environmental law and policy – such as cap and trade.

This paper therefore investigates the role of non-state actors in driving European and American climate policies down different tracks, by sketching out a framework to assess their engagement with the making and the enforcement of the climate regime. A vast body of literature on the role of non-state actors in the climate regime already exists. Little research has however specifically addressed the comparative engagement with the climate change regime of non-state actors from across the Atlantic. The present paper sets out to propose a framework to analyse this specific dimension of transatlantic relations.

## 1. Non-State Actors. Definitional Issues

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International law has been elegantly described as the “framework within which international co-operation takes place” (Lowe 2007:1). States are no doubt the prime subjects of international law. A heterogeneous set of actors other than states has nevertheless increasingly engaged with international law, contributing at various levels to its making, monitoring and enforcement. Although non-state actors have gained increasing prominence, they are mere additional players in a state-centred process. In other words, non-state actors cannot create international law themselves, and agency beyond the state is not to be understood as agency without the state.

Still, non-state actors exert an increasingly important influence on formal international law-making, acting as lobbyists and consultants. In addition, they engage in a host of informal standard-setting activities, which greatly interact with international law. Lastly, non-state actors perform an important role as watchdogs upon the implementation and enforcement of international instruments. Investigating the role of non-state actors is therefore crucial to understand how the international legal system works in practice. These matters have become the object of much scholarly attention. Recent scholarship has analysed the role of non-state actors as contributors to the making of international law (Aspremont 2011), whereas others investigated also their role in adjudication and enforcement (Bianchi 2009).

The participation of non-state actors has been particularly prominent in international environmental law. Starting with the UN Conference on Environment and Development held in Rio de Janeiro in 1992, the importance and utility of including non-state actors in international environmental law-making processes has been increasingly recognised (UN General Assembly 1992 and 2004). Non-state actors have performed a key role in prompting the adoption of multilateral environmental agreements – such as the Convention on Biological Diversity (Arts 1998). They have furthermore engaged in a host of standard-setting activities, in the absence of binding international agreements – as for example in the case of forest certification (Guéneau 2009). Non-state actors have also scrutinised states’ compliance with their international obligations by engaging in litigation – as seen, for example, in connection with the implementation of the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Pallemaerts 2011).

This paper takes the climate regime as a case study to analyse the engagement of non-state actors with the global environmental system. The term “climate regime” is used to refer to the 1992 United Nations Framework

Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, as well as the body of decisions adopted by the meetings of their parties.

But who are the non-state actors engaging with such a regime? Anne Peters emphasise how “non-state actor” is not a legal term of art, which is used to encompass a heterogeneous set of entities that “only have in common that they are not the state and are not governmental” (Peters, Koechlin and Fenner Zinkernagel 2009:14). Alan Boyle and Christine Chinkin, for example, include in the notion of non-state actors subjects as diverse as sub-state entities; non-governmental organisations (NGOs); the corporate and the business sectors; and entities denied statehood (Boyle and Chinkin 2007:43-4).

The identification of non-state actors is context-specific. For the purposes of the present study, the main criterion to discern the actors engaging with the climate regime is the definition provided in the second paragraph of Article 7.6 UNFCCC, according to which:

“Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object.” (Treaties 1992)

This provision opens the way to the accreditation of a rather heterogeneous set of observers. The practice under the Convention has been that to distinguish between civil society and international organisations.<sup>2</sup> As the present investigation deals with the engagement of non-state actors with the climate change regime, it will only consider the activities falling under the umbrella “civil society”, by this meaning NGOs and private actors and knowledge-based organisations, leaving out international organisations, which are inherently unions of states, even when they have autonomous legal personality. The engagement of non-actors with the climate regime is assessed by making reference to their participation to law-making and litigation, as the following sections illustrate.

## 2. Non-State Actors Engaging with Formal Law-Making

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Formal law-making under the climate regime is the prerogative of the UNFCCC conference of the parties (COP) and of the meeting of the parties to the Kyoto Protocol (CMP). As mentioned earlier, these meetings are open to civil society observers and thousands of organisations are accredited with the UNFCCC Secretariat. The climate regime is characterised by the fact of having attracted a very diverse constituency of non-state actors, including environmental NGOs, as well as business representatives (Carpenter 2001), which have attempted to influence the law-making process, as well as to exploit it as a bandwagon to promote their agendas (Jinnah 2011).

In February 2013, the log published on the UNFCCC website listed 346 accredited civil society organisations headquartered in the US, versus 726 organisations headquartered in the EU.<sup>3</sup> This difference may be justified by the fact that the Convention Secretariat is situated in Germany, and that the population of Europe is more than 1.5 times that of the US. Such discrepancy may, however, also be viewed as a sign of different levels of engagement with the climate regime.

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<sup>2</sup> See UNFCCC website: *Parties & Observers*, [http://unfccc.int/parties\\_and\\_observers/items/2704.php](http://unfccc.int/parties_and_observers/items/2704.php).

<sup>3</sup> *Idem*.

Observer status is, nevertheless, an erratic feature, in the sense that organisations may ask for accreditation and never send their delegates to COP or CMP meetings. To assess their engagement with the UNFCCC it is therefore necessary to look at the practice under the Convention and ascertain how non-state actors participate to the law-making process.

In the late 1990s an interview-based study by Bas Arts famously argued that NGOs had exerted a considerable influence upon the process of making the UNFCCC, although they had had no direct impact on its drafting (Arts 1998:155-6). UNFCCC COPs have since become sizeable civil society events, with a staggering 13,000 civil society observers attending COP15 in Copenhagen in 2009.<sup>4</sup> How have non-state actors influenced the development of the climate regime, twenty years after its adoption? What is their impact upon the decision-making process under the UNFCCC, which formally remains the sole prerogative of states?

The matter has been widely researched in the literature. Writing in 2001, Chad Carpenter observed the sheer scale of civil society involvement in the drafting of the Kyoto Protocol, remarking the increasingly sophisticated level of engagement with the law-making debate (Carpenter 2001:321). A couple of years later, Steinar Andresen and Lars H. Gulbrandsen reported that NGOs had been “quite successful” in attaining their goals for the design of the compliance regime under the Kyoto Protocol (Andresen and Gulbrandsen 2003:13). More recently, Barbara Unmüssig pointed out how, thanks to the involvement of new civil society actors, “‘forgotten’ or neglected topics” such as climate justice and poverty have garnered better visibility at UNFCCC negotiations (Unmüssig 2011:4). This observation seems to be corroborated by the fact that parties have in recent years agreed for the first time to mention human rights in connection with climate change (decision 1/CP.16<sup>5</sup> in UNFCCC 2011:8), and to negotiate a mechanism to address loss and damage caused by climate change (decision 3/CP.18 in UNFCCC 2013). Whether this progress is the result of the influence of civil society, however, is difficult to say.

There is no established methodology to assess the influence of civil society upon law-making. An ongoing research initiative surveying the activities of think tanks working on climate change has compiled a list of indicators to assess their influence<sup>6</sup> (Trevisan et al. 2012). For the present purposes, two indicators identified in the study seem particularly significant.

The first is *civil society submissions to the COP or CMP*. Like many other international environmental processes, the UNFCCC COP and the Kyoto Protocol CMP have established the practice to enable organisations registered as observers to make submissions alongside parties on matters under their consideration. A glance at the webpage collecting submissions<sup>7</sup> reveals that over the years an increasingly large number of civil society organisations have made use of this prerogative, engaging in debates on technical issues (such as emissions accounting), as well as on substantive matters (such as action to further increase the level of ambition under the Convention). An analogous source of information exists at the EU level, as the Directorate-General for Climate Action of the European Commission regularly publishes information concerning submissions received from civil society on climate-related public consultations.<sup>8</sup>

4 UNFCCC, *Participation breakdown COP 3-18*, 12 December 2012, [http://unfccc.int/files/parties\\_and\\_observers/ngo/application/pdf/participation\\_breakdown\\_cop1-18.pdf](http://unfccc.int/files/parties_and_observers/ngo/application/pdf/participation_breakdown_cop1-18.pdf)

5 Decision includes an all-encompassing reference to human rights, mentioning that “Parties should, in all climate change related actions, fully respect human rights”.

6 Cf. Think Tank Map project website: <http://thinktankmap.iccgov.org/think-global.php>.

7 UNFCCC, *Submissions by non-governmental organizations*, [http://unfccc.int/parties\\_observers/ngo/submissions/items/3689.php](http://unfccc.int/parties_observers/ngo/submissions/items/3689.php).

8 European Commission DG for Climate Action, *Public Consultations*, [http://ec.europa.eu/clima/consultations/index\\_en.htm](http://ec.europa.eu/clima/consultations/index_en.htm).

The second indicator that may be of utility to assess the actual engagement of observers with the climate regime is that concerning “*side events*” organised by civil society in occasion of COPs and CMPs.<sup>9</sup> Very much in line with the practice established under other multilateral environmental agreements, side events serve as a platform for observers to bring matters to the attention of delegates and the media, as well as for information dissemination, capacity building, and policy discussions. The organisation of side events takes place pursuant to a specific call issued by the UNFCCC Secretariat, and only authorised side events may be held. The UNFCCC website also provides a log of side events for each of its sessions, collating the relevant divulgation materials. Observers have remarked how these events have become “as interesting as the official negotiations” (Stripple and Pattberg 2010:137).

Further research may utilise these indicators to analyse submissions made by civil society organisations based in Europe and the US on a comparative basis. This exercise would reveal how many such submissions come from each region and among these, how many have been made by industry, conservation NGOs, and so forth. The same approach could be followed for side events. This data could be used as a proxy to assess the engagement of civil society across the Atlantic with law-making under the climate regime.

### 3. Standard-setting by Non-State Actors

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The tangible examples of actual engagement with the formal law-making process under the climate regime is but part of the picture. There is in fact a host of standard-setting exercises that greatly contribute to the climate regime, while remaining outside the scope of formal law-making processes under the UNFCCC and the Kyoto Protocol. This *sui generis* form of standard-setting has attracted much attention in the literature.

Philipp Pattberg, for example, distinguishes between regulatory activities carried out by *public non-state networks* (such as global city partnerships) and wholly *private networks* (such as certification standards developed by NGOs and/or corporations) (Pattberg 2010:148). Although these processes are independent of states and target subjects other than states, they significantly interlink with the climate regime. One of the most glaring examples of such interaction is that concerning the certification of emission reductions.

Pursuant to the Clean Development Mechanism (CDM), developed country parties to the Kyoto Protocol may finance projects for the reduction or removal of greenhouse gases in developing country parties and receive certified emissions reductions, which they may use to contribute to compliance with their reduction commitments (Treaties 1997:art. 12). CDM projects apply an internationally drawn methodology for project design and monitoring, according to rules adopted by parties to the Kyoto Protocol (decision 3/CMP.1 in UNFCCC 2006). These rules require that CDM project activities be subjected to independent auditing and verification.<sup>10</sup> Such auditing is typically carried out by third party auditing firms, whereby independent private evaluators validate, verify and certify emission reductions or removals. As a result, certification standards set by private companies become instrumental to the functioning of the international legal framework, filling it with content and enabling it to achieve its purposes (Stripple and Lövbrand 2010:171-3).

Some standards developed by non-state actors differentiate between projects that do provide social and environmental co-benefits additional to carbon sequestration. Such differentiation enables credit buyers

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9 UNFCCC, *Side events/exhibits archive*, <http://regserver.unfccc.int/seors/reports/archive.html>.

10 Kyoto Protocol, Article 12.7.

willing to pay special premiums for benefits engendered by project activities that are additional to carbon sequestration, for example in connection with the conservation of biodiversity. This tool for diversification is particularly important, given that the CDM has been criticized for not adopting standards to assess projects' contribution to sustainable development, leaving such assessment to host countries (UNFCCC 2012:6). The most well-known example of such standards is the so called *Gold Standard*, which was developed at the initiative of the World Wildlife Foundation (WWF) to certify climate change mitigation projects that "positively impact the economy, health, welfare and environment of the local community hosting the project" (Gold Standard Foundation 2012). The Gold Standard has become one of the leading voluntary certification standards for climate change mitigation projects. This experiment with differentiation between emission reductions efforts has attracted much attention in ongoing discussion over the reform of the CDM, where suggestions have been made that analogous standards be formally included amongst those for the validation of CDM projects (UNFCCC 2012:6).

Another set of standards that goes beyond those formally adopted by the UNFCCC COP has emerged in the context of the debate on the establishment of a mechanism to reduce emissions from deforestation and incentivise forest carbon sequestration, which is commonly referred to as REDD+ (decision 1/CP.13 in UNFCCC 2008). The UNFCCC COP has adopted safeguards concerning the social and environmental impact of REDD+ activities (decision 1/CP.16 in UNFCCC 2011:appendix I). Additional voluntary standards have been developed by non-state actors to distinguish projects contributing environmental and social benefits additional to carbon sequestration. The most prominent example of such voluntary efforts are the *Climate, Community and Biodiversity Standards*, which were developed by a partnership of US NGOs to identify and certify forest carbon projects that "simultaneously address climate change, support local communities and conserve biodiversity" (CCBA 2008). These initiatives have broken new ground and provided a testing field for the development of REDD+ standards in context of rule-making processes established in the framework of UN specialised agencies (UN-REDD 2012, FCPF 2010). An enlarged consortium, including also NGOs based in the EU, is in the process of developing a voluntary verification and certification system to support government-led REDD+ programs that make a significant contribution to human rights, poverty alleviation and biodiversity conservation (CCBA and CARE 2012).

While the REDD+ mechanism is still in the making, these standard-setting efforts by non-state actors have provided a flexible ground to test the feasibility of distinguishing between emission reductions projects and incentivising additional social and environmental benefits other than carbon sequestration.

The development of standards by the private sector has thus supplemented the international legal framework, covering issues that could not be addressed by formal law-making processes, due to lack of consensus. This layering of heterogeneous legal instruments is by no means unique to the climate regime or to international environmental law, and may be regarded as a typical feature of contemporary international law. The climate regime, however, provides an especially clear demonstration of the important role that civil society and the private sector play in operationalising international legal frameworks and filling them with content. It is significant to notice how these standard-setting exercises have been carried out with the participation of a broad range of non-state actors from across the Atlantic, and indeed from all continents, thus revealing a truly global character. These non-state actors are part of a larger climate "epistemic community," which has been defined by Peter Haas as "transnational networks of knowledge-based communities that are both politically empowered [...] and motivated by shared causal and principled beliefs" (Haas 1990:349). Such networks have exercised a considerable influence on the development of the climate regime (Abbott 2011).

## 4. Climate Change Litigation

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The climate regime presently provides little scope for non-state actors to engage with enforcement. However, there has been a growing rate of climate litigation on both sides of the Atlantic. In February 2013 a database maintained by Columbia Law School listed over 350 climate change related lawsuits filed in the US and 122 lawsuits filed outside the US.<sup>11</sup> Even conceding that the information collected in the database may not be complete, there seems to be a great predominance of litigation in the US.

In a path-breaking monograph published in 2010, US-based scholar Cinnamon P. Carlarne emphasises the different role played by climate-change litigation in the EU and the US (Carlarne 2010:98-142). She observes that in Europe litigation has primarily served to drive implementation and enforcement of existing law or address technical challenges to the validity of specific measures. Instead, in the US petitioners have used litigation chiefly to try and compel the federal government to address climate change, or to resist such action. Three main litigation scenarios have emerged across the Atlantic.

First, civil society organisations have *sued the government or its agents challenging statutes, regulations, and failures to act*. One example of this kind of legal suits in the US was *Friends of the Earth, Inc et al v Spinelli et al* (US District Court 2009), where two NGOs and four cities sued the government in a federal court, alleging that financial investments made by federal agencies harmed the US by escalating the intensity of climate change. The case was settled out of court, and hailed as a significant victory to promote governmental accountability for direct and indirect contributions to climate change (Carlarne 2010:100). The most important action of this kind in the US was however the famous *Massachusetts v EPA*, where a large group of petitioners joined an original nucleus of civil society organisations in asking the Environmental Protection Agency to regulate greenhouse gas emissions from new motor vehicles.<sup>12</sup> The petition was denied by the Agency, supported by a group of US states, cities and trade associations.<sup>13</sup> Following a pronouncement by the US Supreme Court (2007), however, EPA was asked to determine whether emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. EPA's Administrator subsequently issued an endangerment finding, declaring greenhouse gases a danger to public health and welfare (EPA 2009). This finding enabled EPA to regulate greenhouse gases as pollutants. Given lack of action by the US Congress, the exercise of regulatory powers by EPA presently represents the main avenue to deal with climate change at the federal level.

This kind of action may clearly also be exercised the other way around, and private actors in the US have attempted to prevent the adoption of climate related legislation at the state and at the federal level (Osofsky 2010:32, Carlarne 2010:103-4). A similar kind of legal action has also been recorded in the EU, where implementation of the European Emissions Trading Scheme has engendered some litigation with regard to the selection of sectors covered by it (for example ECJ 2008). At the EU level, nevertheless, the exercise of this kind of action is constrained by the restrictive interpretation of the notion of *locus standi* operated by the European Court of Justice (ECJ), as a result of which non-state actors are greatly constrained in their capacity to challenge EU laws and policies (Ghaleigh 2009:375, Jans and Harryvan 2010).

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11 Cf. the databases published by the Center for Climate Change Law at Columbia Law School on both US and non US litigation: <http://web.law.columbia.edu/climate-change/resources/us-climate-change-litigation-chart>.

12 Civil society petitioners included: Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and the U.S. Public Interest Research Group.

13 Civil society defendants included: the Alliance of Automobile Manufacturers, the National Automobile Dealers Association, the Engine Manufacturers Association, the Truck Manufacturers Association, the CO<sup>2</sup> Litigation Group, and the Utility Air Regulatory Group.

A second kind of climate-related litigation concerns cases where petitioners have brought *action against private individuals and companies*, alleging that they are contributing to climate change. For example, in the US a group of states, supported by civil society groups, filed a public nuisance lawsuit in a federal court against five power companies, demanding that the companies be forced to reduce their emissions. The suit had a long *iter* and eventually reached the Supreme Court, which found that the recourse to the exercise of regulatory powers conferred upon EPA was a better means to address such a matter (US Supreme Court 2009 and 2011). Some litigation of this kind has also taken place in Europe, where an NGO, Germanwatch, has undertaken legal action challenging both the German state and private industry on their contributions to climate change (Berlin Administrative Court 2006).

Finally, civil society petitioners may be allowed to *bring climate change-related complaints before international tribunals*. The most well-known attempt to argue along these lines was the petition filed against the US before the Inter-American Commission on Human Rights in 2005 by a US-based NGO (the Center for International Environmental Law) on behalf of 63 American and Canadian citizens (IACHR 2005). The petition concerned the impact of global warming on the Inuit and other vulnerable communities in the Americas, and the implication of these impacts for human rights. The petition was rejected but the petitioners were invited to provide testimony on the links between climate change and human rights. A report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights, however, subsequently remarked how qualifying the effects of climate change as human rights violations poses a series of difficulties, including that of disentangling “complex causal relationships,” as well as that to address projections about future impacts, whereas human rights violations are normally established after the harm has occurred (OHCHR 2009:para. 70). As a result, few human rights petitions addressing climate change have been lodged to date.<sup>14</sup>

There has been some debate about bringing the matter of climate change before the International Court of Justice (ICJ). The government of Tuvalu reportedly sought legal advice to sue the US before the ICJ (Jacobs 2005). Litigation before the Court in state–state cases is however based on consent, and it seems unlikely that the US would consent to the Court’s jurisdiction. A London-based NGO, FIELD, has instead facilitated discussions around the possibility of asking the Court for an advisory opinion on climate change damages under Article 96 of the UN Charter (FIELD 2011). To date the issue has not been further pursued.

Lastly, even when they do not participate directly in litigation, non-state actors play an important role in commenting on the legal substance of cases and providing additional information through the submission of *amicus curiae* briefs.<sup>15</sup> Again, while international tribunals have complete discretion in determining whether to accept them (Dumbery and Labelle 2012:367, Hernández 2012:150), the practice of submitting *amicus curiae* briefs is well established both in the EU and in the US. Numerous US cases mentioned above, such as *Massachusetts v EPA*, saw the intervention of large number of private actors, NGOs and corporations. At the EU level, a prominent example of such practice may be found in the briefs submitted by EU- and US-based NGOs in connection with the reference for a preliminary ruling concerning the inclusion of emissions from aviation in the EU Emission Trading Scheme (ECJ 2011).<sup>16</sup> The case originated from the petition of an airline trade association and a group of US airlines, who jointly asked the High Court for England and Wales to quash the 2009 Aviation

14 The database maintained by Columbia Law School lists only two such cases, including, in addition to the Inuit Petition, also *Gbemre v Shell* (Nigeria Federal High Court 2005).

15 The term *amicus curiae* has been defined as “[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter” (Garner 2004:93).

16 Reference for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), made by decision of 8 July 2010, SI 2009/2301.

Greenhouse Gas Trading Scheme Regulations, which implement the ETS Directive in the United Kingdom. The petition was resisted by the UK Secretary of State for Energy and Climate Change. A group of EU- and US-based environmental NGOs<sup>17</sup> intervened in support of the Secretary of State, both in the domestic proceedings, and before the European Court of Justice, once again providing an example of the transnational cooperation of non-state actors on matters pertaining to climate change.

This brief overview shows that litigation has been used by civil society to influence climate change policy across the Atlantic, to re-interpret existing legislation, to force the creation of new laws and regulations, and to ensure compliance with existing laws, policies, and even international agreements. The use of litigation as a mechanism for compelling public and private actions is emblematic of involvement of civil society in environmental law and policy. This instrument has however been used preponderantly in the US. Further research could utilise the database compiled by Columbia Law School to review the quality and quantity of climate related litigation in the EU and the US, to assess how the trends sketched out here continue to unfold.

## Conclusions

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This paper has provided an overview of the engagement of civil society with climate law-making and litigation in the EU and the US. There is ample material to conduct a more systemic investigation based upon the information collected in databases maintained by the UNFCCC Secretariat and Colombia Law School. The preliminary review conducted in this paper demonstrates that there seems to be a difference in the level of engagement of civil society with the climate regime across the Atlantic. While the legal debate on climate change in the US tends to be more focused upon domestic issues, the existence of a detailed legal framework on climate change in the EU has given European policy-makers an incentive to engage vigorously with the global climate regime. This divide seems to characterise also the attitude of civil society. Civil society in the US has attempted to occupy a void left by lack of federal action, and to condition the US climate policy agenda “from the bottom up” (Carlarne 2010:255). Litigation has been a fundamental tool in this connection, very much in line with established US environmental law and practice. Conversely, civil society in the EU seems to have been comparatively more outward-looking and keen to engage with international climate law and policy.

The overview provided in this paper reveals that, while states remain the dominant actors of the climate regime, international environmental law and policy alike are increasingly shaped with a crucial input from civil society. This trend is not new, but the experience with emission reduction certification and the development of voluntary carbon markets demonstrates that an heterogeneous set of actors has engaged with the climate regime, producing regulatory instruments that do not fall within the scope of traditional sources of international law. This set of non-state actors is increasingly transnational in character. Far from being a phenomenon observed only with regard to the climate regime, the increasing importance of international and transnational networks of non-state actors has become a salient feature of the global environmental system, which seems destined to characterise its development in the years to come. In this perspective, the divide between regions may with time progressively lose its importance.

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<sup>17</sup> Namely, the Aviation Environment Federation, WWF-UK, the European Federation for Transport and Environment, Environmental Defense Fund and Earthjustice.

## References

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### 1. Books and articles

Abbott, Kenneth W. (2011), "The Transnational Regime Complex for Climate Change", *Environment and Planning C: Government and Policy*, Vol. 30, No. 4, p. 571-590.

Andresen, Steinar, and Gulbrandsen, Lars H. (2003), "The Role of Green NGOs in Promoting Climate Compliance", *FNI Reports*, No. 4/2003, <http://www.fni.no/doc&pdf/rapp0403.pdf>.

Arts, Bas (1998), *The Political Influence of Global NGOs. Case Studies on the Climate and Biodiversity Conventions*, Utrecht, International Books.

Aspremont, Jean d', ed. (2011), *Participants in the International Legal System. Multiple Perspectives on Non-state Actors in International Law*, Abingdon and New York, Routledge.

Bianchi, Andrea, ed. (2009), *Non State Actors and International Law*, Aldershot and Burlington, Ashgate.

Boyle, Alan, and Chinkin, Christine (2007), *The Making of International Law*, Oxford and New York, Oxford University Press.

Carlarne, Cinnamon P. (2010), *Climate Change Law and Policy. EU and US Approaches*, Oxford and New York, Oxford University Press.

Carpenter, Chad (2001), "Businesses, Green Groups and the Media: The Role of Non-Governmental Organizations in the Climate Change Debate", *International Affairs*, Vol. 77, No. 2 (April), p. 313-328, <http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2001/inta194.pdf>.

Dumberry, Patrick, and Labelle-Eastaugh, Érik (2012), "Non-state Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-state Arbitration", in Jean d'Aspremont, ed., *Participants in the International Legal System. Multiple Perspectives on Non-state Actors in International Law*, London, Routledge, p. 360-371.

Garner, Bryan A., ed. (2004), *Black's Law Dictionary*, 8th edn, St. Paul, Thomson/West.

Ghaleigh, Navraj Singh (2009), "Emissions Trading Before the European Court of Justice: Market Making in Luxembourg", in David Freestone and Charlotte Streck, eds., *Legal Aspects of Carbon Trading. Kyoto, Copenhagen, and Beyond*, Oxford and New York, Oxford University Press, p. 367-388, <http://ssrn.com/abstract=1371513>.

Guéneau, Stéphane (2009), "Certification as a New Private Global Forest Governance System: the Regulatory Potential of the Forest Stewardship Council", in Anne Peters, et al., eds., *Non-State Actors as Standard Setters*, Cambridge and New York, Cambridge University Press, p. 379-408, [http://www.unece.lsu.edu/certificate\\_eccos/documents/2007July/ce\\_011.pdf](http://www.unece.lsu.edu/certificate_eccos/documents/2007July/ce_011.pdf).

Haas, Peter M. (1990), "Obtaining International Environmental Protection through Epistemic Consensus", *Millennium: Journal of International Studies*, Vol. 19, No. 3 (December), p. 347-363.

Hernández, Gleider I. (2012), "Non-state Actors from the Perspective of the International Court of Justice", in Jean d'Aspremont, ed., *Participants in the International Legal System. Multiple Perspectives on Non-state Actors in International Law*, Abingdon and New York, Routledge, p. 140-164.

Jacobs, Rebecca Elizabeth (2005), "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice", *Pacific Rim Law & Policy Journal*, Vol. 14, No. 1 (January), p. 103-128, <http://hdl.handle.net/1773.1/662>.

Jans, Jan, and Harryvan, Gertjan (2010), "Internal Review of EU Environmental Measures. It's True: Baron van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation", *Review of European Administrative Law*, Vol. 3, No. 2 (December), p. 53-65, <http://ssrn.com/abstract=1718325>.

Jinnah, Sikina (2011), "Climate Change Bandwagoning: The Impacts of Strategic Linkages on Regime Design, Maintenance, and Death", *Global Environmental Politics*, Vol. 11, No. 3 (August), p. 1-9, [http://dx.doi.org/10.1162/GLEP\\_a\\_00065](http://dx.doi.org/10.1162/GLEP_a_00065).

Lowe, Vaughan (2007), *International Law*, Oxford and New York, Oxford University Press.

Orlando, Emanuela (2013), "The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges", *Transworld Working Papers*, No. 21 (April), <http://www.transworld-fp7.eu/?cat=21>.

Osofsky, Hari M. (2010), "The Continuing Importance of Climate Change Litigation", *Climate Law*, Vol. 1, No. 1, p. 3-29, published also as *Washington & Lee Public Legal Studies Research Paper Series*, No. 2010-3 (30 December), <http://ssrn.com/abstract=1529669>.

Pallemaerts, Mark, ed. (2011), *The Aarhus Convention at Ten. Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Groningen, Europa Law Publishing.

Pattberg, Philipp (2010), "The Role and Relevance of Networked Climate Governance", in Frank Biermann, Philipp Pattberg and Fariborz Zelli, eds., *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, p. 146-164.

Peters, Anne, Koechlin, Anne, and Fenner Zinkernagel, Greta (2009), "Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion", in Anne Peters et al., eds., *Non-State Actors as Standard Setters*, Cambridge, Cambridge University Press, p. 1-33, [http://ius.unibas.ch/uploads/publics/9591/20100219154311\\_4b7ea37fbba74.pdf](http://ius.unibas.ch/uploads/publics/9591/20100219154311_4b7ea37fbba74.pdf).

Savaresi, Annalisa (2012), "EU External Action on Forests: FLEGT and the Development of International Law", in Elisa Morgera, ed., *The External Environmental Policy of the European Union. EU and International Law Perspectives*, Cambridge and New York, Cambridge University Press, p. 149-173.

Stripple, Johannes, and Lövbrand, Eva (2010), "Carbon Market Governance Beyond the Public-Private Divide", in Frank Biermann, Philipp Pattberg and Fariborz Zelli, eds., *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, p. 165-182.

Stripple, Johannes, and Pattberg, Philipp (2010), "Agency in Global Climate Governance: Setting the Stage", in Frank Biermann, Philipp Pattberg and Fariborz Zelli, eds., *Global Climate Governance Beyond 2012. Architecture, Agency and Adaptation*, Cambridge, Cambridge University Press, p. 137-145.

Trevisan, Jan, et al. (2012), *A Methodology to Assess Think Tanks in the Field of Climate Change*, Venice, International Center for Climate Governance, <http://www.thinktankmap.org/Page.aspx?Name=Documents>.

Unmüssig, Barbara (2011), *NGOs in the Climate Crisis. Processes of Fragmentation, Lines of Conflict, and Strategic Approaches*, Berlin, Heinrich Böll Stiftung, <http://www.boell.org/web/138-794.html>.

Wirth, David A. (2007), "The EU's New Impact on U.S. Environmental Regulation", *The Fletcher Forum of World Affairs*, Vol. 31, No. 2 (Summer), p. 91-109, [http://dl.tufts.edu/file\\_assets/tufts:UP149.001.00064.00010](http://dl.tufts.edu/file_assets/tufts:UP149.001.00064.00010).

## 2. Documents and Judicial Decisions

Berlin Administrative Court (2006), *Bundes für Umwelt- und Naturschutz Deutschland e.V. und Germanwatch e.V. v Bundesrepublik Deutschland*, VG 10 A 215.04, 10 January, unofficial English translation available at <http://www.climatelaw.org/cases/case-documents/germany/de-export-jan06-eng.doc>.

CCBA (2008), *Climate, Community and Biodiversity Project Design Standards*, 2nd edn, December, <http://www.climate-standards.org/ccb-standards>.

CCBA and CARE (2012), *REDD+ Social & Environmental Standards*, Version 2, June, <http://www.redd-standards.org/index.php?Itemid=185>.

ECJ (2008), *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie*, Case C-127/07, ECR I-9895, 16 December, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:62007j0127:en:not>.

ECJ (2011), *Air Transport Association of America and Others v Secretary of State for Energy and Climate*, Case C-366/10, 21 December, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:62010cj0366:en:not>.

EPA (2009), *Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act*, 7 December, <http://www.epa.gov/climatechange/endangerment>.

FCPF (2010), *Incorporating Environmental and Social Considerations into the Process of Getting Ready for REDD plus*, <http://www.forestcarbonpartnership.org/sites/fcp/files/Documents/tagged/FCPF%20FMT%20Note%202010-9%20SESA%20Guidelines%2003-07-10.pdf>.

FIELD (2011), *Advisory opinion on climate change damage. Round table 28 October Summary report*, <http://www.field.org.uk/news/advisory-opinion-climate-change-damage>.

Gold Standard Foundation (2012), *The Gold Standard*, Version 2.2, June, <http://www.cdmgoldstandard.org/project-certification/rules-and-toolkit>.

IACHR (2005), *Petition Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (Inuit Petition), 7 December, <http://www.inuitcircumpolar.com/index.php?ID=316>.

Nigeria Federal High Court (2005), *Gbemre v Shell*, Suit FHC/B/CS/53/05, 14 November, <http://www1.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html>.

OHCHR (2009), *Report on the relationship between climate change and human rights*, A/HRC/10/61, 15 January, <http://undocs.org/A/HRC/10/61>.

UN General Assembly (1992), *Institutional arrangements to follow up the United Nations Conference on Environment and Development*, A/47/49, 22 December, <http://undocs.org/A/RES/47/191>.

UN General Assembly (2004), *We the peoples: civil society, the United Nations and global governance. Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, A/58/817, 11 June, <http://undocs.org/A/58/817>.

UNFCCC (2006), *Report of 1st session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol. Addendum*, FCCC/KP/CMP/2005/8/Add.1, 30 March, <http://unfccc.int/resource/docs/2005/cmp1/eng/08a01.pdf>.

UNFCCC (2008), *Report of the 13th session of the Conference of the Parties. Addendum*, FCCC/CP/2007/6/Add.1, 14 March, <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf>.

UNFCCC (2011), *Report of the 16th session of the Conference of the Parties. Addendum*, FCCC/CP/2010/7/Add.1, 15 March, <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

UNFCCC (2012), *Climate Change, Carbon Markets and the CDM: A Call to Action*, Report of the High-Level Panel on the CDM Policy Dialogue, <http://www.cdmpolicydialogue.org/report>.

UNFCCC (2013), *Report of the 18th session of the Conference of the Parties. Addendum*, FCCC/CP/2012/8/Add.1, 28 February, <http://unfccc.int/resource/docs/2012/cop18/eng/08a01.pdf>.

UN-REDD Programme (2012), *Social and Environmental Principles and Criteria*, [http://www.un-redd.org/Multiple\\_Benefits\\_SEPC/tabid/54130/Default.aspx](http://www.un-redd.org/Multiple_Benefits_SEPC/tabid/54130/Default.aspx).

US District Court Northern District of California (2009), *Friends of the Earth Inc. et al. v Spinelli et al.*, Case No. C 02-4106 JSW, 6 February, [http://www.eenews.net/public/25/12455/features/documents/2009/02/06/document\\_pm\\_02.pdf](http://www.eenews.net/public/25/12455/features/documents/2009/02/06/document_pm_02.pdf).

US Supreme Court (2007), *Massachusetts v Environmental Protection Agency*, 549 US 497, 2 April, <http://www.supremecourt.gov/opinions/06pdf/05-1120.pdf>.

US Supreme Court (2009), *Connecticut v American Electric Power*, 582 F.3d 309, 2d Cir. 2009, 21 September, [http://ag.ca.gov/globalwarming/pdf/AEP\\_decision.pdf](http://ag.ca.gov/globalwarming/pdf/AEP_decision.pdf).

US Supreme Court (2011), *American Electric Power v Connecticut*, 564 US ---, 20 June, <http://www.supremecourt.gov/opinions/10pdf/10-174.pdf>.

### 3. Treaties

1992 United Nations Framework Convention on Climate Change (UNFCCC), Rio de Janeiro, 9 May, [http://unfccc.int/key\\_documents/the\\_convention/items/2853.php](http://unfccc.int/key_documents/the_convention/items/2853.php).

1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto, 11 December, [http://unfccc.int/key\\_documents/kyoto\\_protocol/items/6445.php](http://unfccc.int/key_documents/kyoto_protocol/items/6445.php).

1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June, <http://www.unece.org/env/pp/treatytext.html>.

## THE PROJECT

In an era of global flux, emerging powers and growing interconnectedness, transatlantic relations appear to have lost their bearings. As the international system fragments into different constellations of state and non-state powers across different policy domains, the US and the EU can no longer claim exclusive leadership in global governance. Traditional paradigms to understand the transatlantic relationship are thus wanting. A new approach is needed to pinpoint the direction transatlantic relations are taking. TRANSWORLD provides such an approach by a) ascertaining, differentiating among four policy domains (economic, security, environment, and human rights/democracy), whether transatlantic relations are drifting apart, adapting along an ad hoc cooperation-based pattern, or evolving into a different but resilient special partnership; b) assessing the role of a re-defined transatlantic relationship in the global governance architecture; c) providing tested policy recommendations on how the US and the EU could best cooperate to enhance the viability, effectiveness, and accountability of governance structures.

## CONSORTIUM

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