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'Mr Smith Goes To Brussels': Third Country Lobbying and the Making of EU Law and Policy

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Abstract
The EU's openness towards stakeholders is central to the legitimacy of its law-making. With the rapid globalisation of EU legislative activities, openness towards actors from third countries requires analysis. With reference to the notion of 'lobbying', this article outlines a framework for identifying the role of third country actors in EU policy processes. The two arguments brought forward suggest that third country lobbying is facilitated by the openness of Union law- and policy-making, and that third country actors contribute to EU decision-making at all stages. The article concludes with a set of questions that third country lobbying raises concerning the EU's legitimate law-making authority in Europe and beyond.

Keywords: EU law-making, lobbying, third countries, openness, participation

I. INTRODUCTION

Openness has long provided one of the key responses with which the EU has attempted to enhance its democratic credibility and tackle a perceived lack of accountability. Despite its enduring importance, the meaning of the principle has remained ambiguous and difficult to distinguish from the related but distinct principle of transparency.[1] Yet, as recently argued by Alemanno, the Treaty of Lisbon updated the content of the principle of openness, which can no longer be understood as merely guaranteeing that information about public matters is freely available. The Treaty on the European Union (TEU), and especially its Article 11, links 'for the first time participation in decision-making to democracy', and accordingly, the principle of openness now 'covers various and broader forms of participation in the operations of EU institutions and imposes on them a prescriptive, proactive duty to seek broader participation from citizens and a diverse array of other

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[1] The two are often conflated in the literature. See eg D Curtin, *Executive Power of the European Union* (Oxford University Press, 2011), p 205; J Mendes, *Participation in EU Rulemaking* (Oxford University Press, 2011), p 113.

stakeholders in order to attain broader democratic objectives'.[2] In other words, openness in the sense of transparent and participatory procedures is an essential component of the EU's legitimate law-making authority.[3]

With the expansion of the Union's internal and external competences and deepening of economic integration, the exercise of its authority and powers has come to be felt not only within the EU but also beyond it.[4] As a result, EU institutions are not only contacted by those actors who physically reside or conduct business in the EU but are increasingly targeted by affected stakeholders worldwide. One way to prove that EU policy- and law-making is externally influenced through carefully crafted activities by third country actors is to look at the numbers of non-EU registrations in the EU's Transparency Register (TR). Set up in 2011, 9153 entities have registered to date.[5] The Register includes entries for non-EU actors from the BADIL Resource Center for Palestinian Residency and Refugee Rights to Airlines for America. Based on a search on the database, the number of non-EU actors, that is, registered entities with a head office outside the EU, totals 806, or some nine per cent of all registrations.[6] The largest representation comes from the US (322), but Swiss interests are also well represented (171). Other larger groups comprise actors from countries such as Canada, Turkey and Japan (24, 19, and 18 respectively) whereas a search on China returns with only five matches.

Many studies have been conducted on stakeholder representation and lobbying within the EU,[7] but little research has been done to consider lobbying activities from

[2] A Alemanno, 'Unpacking the Principle of Openness in EU Law, Transparency, Participation and Democracy' (2014) 39 (1) *European Law Review* 72, 89 & 90. For transparency and participation, see P Leino, *Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the 'Widest Possible'* (EUI Department of Law, 2014), Research Paper 3/2014.

[3] For democratic legitimacy and interest groups, see S Saurugger, 'Interest Groups and Democracy in the European Union' (2008) 31 (6) *West European Politics* 1274.

[4] Among others see: M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart Publishing, 2011); KE Jørgensen, KV Laatikainen (eds), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge, 2013); B Van Vooren et al (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013); D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2014); J Zeitlin (ed), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (Oxford University Press, 2015).

[5] http://ec.europa.eu/transparencyregister/info/homePage.do?redir=false&locale=en [accessed 28 January 2016].

[6] The search was conducted on 28 January 2016. A search for non-EU actors captures only those entities with a head office outside the EU. For instance, the American Chamber of Commerce (AmCham), which represents US interests in EU policymaking, has an office in Belgium, thus not being included in the number of registered *non-EU* entities.

[7] D Coen, 'Empirical and Theoretical Studies of EU Lobbying' (2007) 14 (3) *Journal of European Public Policy* 333; J Beyers et al, 'Researching Interest Group Politics in Europe and Elsewhere: Much We Study, Little We Know?' (2008) 31 (6) *West European Politics* 1103; D Coen and J Richardson (eds), *Lobbying the European Union: Institutions, Actors and Policy* (Oxford University Press, 2009); H Klüver, *Lobbying in the European Union. Interest Groups, Lobbying Coalitions, and Policy Change* (Oxford University Press, 2013).

outside the EU.[8] Given the rapid pace at which the EU develops its global identity and capabilities, the question of external lobbying and the EU's openness towards actors outside of EU territory can no longer be avoided. This article develops an analytical framework to assist in examining the role that third country actors play in EU law- and policy-making processes. It focuses on two questions: first, it asks why third country actors are, or would be, interested in shaping EU law and policy, involving themselves in European affairs, which are – theoretically at least – a concern of Europeans, and second, how the actors from countries outside Europe can make their views known to the EU.

At one level, the answer to the question of why third country actors seek a stake in EU regulation might be answered by a general description of how we live in an era of regulatory interdependencies spanning countries, regions and continents with the global financial crisis having only made policy interconnections more visible and pressing. As a result, public institutions such as legislatures and administrative officials as well as interest groups, corporations and social movements observe each other's ways of working across borders and engage in regulatory communication to advance common interests and address externalities. Given that those who communicate policy preferences across borders need resources, both material and human, such a general answer does not suffice. The analysis in this article takes as its starting point contemporary changes in the law and argues that the global reach of EU law has made Brussels an important target for third country actors that have the incentive to invest significant resources in attempting to influence regulatory action in the EU.

Assuming now that the answer to why third countries participate lies in the way in which the EU legislates and deals with its evolving global role, there remains a question of how and on what (legal) basis they participate. Besides the clear changes in the geographical scope of EU law, the other, earlier transformation concerns the EU's participatory practices. With the Lisbon Treaty now providing a constitutional basis for the inclusion of citizens and stakeholders (Article 11 TEU), it is clear that the Union's democratic ethos requires openness in the sense that those affected by the law are given an opportunity to have their say. Only by including widely can the EU claim legitimacy for the 'outputs' of the legislative process. This requirement is not only enabling but also constituting, for Article 11 places a proactive duty on the Commission to consult the affected parties. Does this premise hold in the situation where the EU increasingly captures a broader range of actors and interests? Can stakeholders from third countries take part in 'various and broader forms of participation' at the EU level? The argument advanced in this article is that the EU

[8] There is a handful of descriptive case studies on lobbying from non-EU member states: MG Cowles, 'The EU Committee of Am Cham: The Powerful Voice of American Firms in Brussels' (1996) 3 (3) *Journal of European Public Policy* 339; CR Pang, 'Policy Networks and Multiple Lobbying Strategies in EU Trade Policy-Making: A Korean Perspective' (2004) 2 *Asia Europe Journal* 429; Y Hamada, 'The Impact of the Traditional Business–Government relationship on the Europeanization of Japanese firms' (2007) 14 (3) *Journal of European Public Policy* 404; K Miard, 'Lobbying During the Revision of the EU Emissions Trading System: Does EU Membership Influence Company Lobbying Strategies?' (2014) 36 (1) *Journal of European Integration* 73.

not only allows participation of external actors, but that it also proactively fosters the acknowledgement of third country actors as the EU's stakeholders.

In delineating the important role of third country actors in the EU, the article deploys the notion of lobbying. According to EU vocabulary, lobbying covers all activities designed to influence – directly or indirectly – policymaking, policy implementation and decision-making in the EU institutions, no matter where they are carried out or which channel or method of communication is used.[9] Conceptually, the definition of lobbying includes any actor, including that of a third country actor, so long as it is engaged in activities designed to influence EU decision-making. Third country lobbying refers to efforts taken by actors outside the EU to influence the policy formulation and decision-making processes of European institutions.

The article includes a case study of the EU's chemicals regulation REACH. Considered to be the one of the most important pieces of EU legislation, REACH harmonised rules within the EU exerting the same obligations and incurring costs for global competitors worldwide, significantly shaping and conditioning the EU's relations with the wider world.[10] However, the suggested analytical framework is dynamic, open and flexible so as to allow new findings to emerge from scholarly inquiries on third country involvement in other policy sectors.

The subject matter of the article is highly timely and of relevance to current policy debates. In February 2014, the *Financial Times* reported that US companies feel that they are 'shut out of the regulatory process because the EU system can depend on closed consultations with local industry groups that make it difficult for outsiders to register their concerns', recommending openness and in particular adoption in Europe of rulemaking practices heavily modelled on the US notice and comment procedure.[11] The US opening was received by many with barely disguised scepticism,[12] but high-profile commentary suggests that the proposal did not go unnoticed by European leaders, and the horizontal Regulatory Cooperation Chapter is an important part of the ongoing negotiations between the EU and the US toward Transatlantic Trade and Investment Partnership (TTIP). Also, as the present focus is on the adoption of policies intended to regulate internal EU affairs, which may or may not have implications outside the EU, and clearly external measures such as the European Neighbourhood Policy are not considered here, the proposed framework contributes to the analysis of development of the EU's internal policy in a globalised regulatory environment. Finally, since there is very little research on third country lobbyists and practically no research tradition for the study of lobbying in EU legal studies, the article at hand, facilitating such engagement, hopefully, inspires further

[9] COM (2006) 194 final, *European Transparency Initiative*, Green Paper.

[10] D Vogel, *The Politics of Precaution: Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press, 2012).

[11] 'US pushes for greater transparency in EU business regulation' (*The Financial Times*, 23 February 2014) http://www.ft.com/intl/cms/s/0/6e9b7190-9a65-11e3-8e06-00144feab7de.html [accessed 28 January 2016].

[12] Ibid. The then trade commissioner Karel De Gucht called it 'impossible'.

work on the involvement of third countries in EU law- and policy-making and provides a new avenue for legal – or socio-legal – scholarship on lobbying.

The article is organised as follows. Part II sets the scene and clarifies the definitions that will be used in this article. Part III discusses the reasons that incentivise third country actors that lobby the EU. Part IV explains how external actors gain access to EU processes and demonstrates how third country actors lobby in all three policy-making stages, not only in law-making but also at the policy implementation and rule enforcement stages, creating an ongoing interaction between EU and third countries. This article does not seek to adopt a fully-fledged normative position on lobbying or determine whether third country lobbying is desirable or acceptable. However, acknowledging that external involvement does indeed raise questions concerning the EU's legitimate law-making authority in Europe and beyond, Part V concludes by discussing broader implications of third country lobbying and identifying a set of promising and unanswered questions for future research.

II. SETTING THE SCENE

The focus of this article is on 'third countries' and how they participate in EU decision-making. 'Third country' is used as a synonym for a non-EU country, and 'third country actor' refers to all actors from outside the EU. The terms 'third country', 'external' and 'non-EU' are used interchangeably. No typologies of third countries, based on case studies or statistical analysis, are provided at this stage as the article is exploratory and seeks to capture the complexity of the phenomenon and provoke interest in additional work on the topic. Here it suffices to note that third country actors have varying resources and motivations (eg the largest imposed costs of the new regulation) to influence EU action, and their success rates vary. The REACH case study presented later in this article highlights that among third country actors the US – 'Mr Smith' – enjoys a special relationship and leverage with the EU.[13]

Reflecting a multi-level approach in EU studies, a third country actor not only comprises state or regional levels, but also includes private actors such as corporations and non-governmental organisations (NGOs) based in third countries. Certainly there are significant differences within third countries between governmental, economic and civil society actors, and therefore when illustrating third country lobbying through examples below, the kind of actor in question is always clarified. A wide actor definition that covers many actor types is, however, necessary in order to capture the fact that governments and businesses often engage in concerted lobbying efforts. Companies might try to influence the EU directly, but

[13] The reference is to a film, a 1939 political comedy 'Mr. Smith Goes to Washington'. Here Mr Smith is a generic title, encompassing all non-EU actors. For an argument that a special relationship exists between the EU and the US, see eg E Jones, 'Debating the Transatlantic Relationship: Rhetoric and Reality' (2004) 80 *International Affairs* 595. The special role of the US in EU policy-making was also confirmed in the study analysing foreign interests in Commission consultations. It appeared that most 'foreign actors that participate in Commission consultations come from North America', see A Rasmussen and P Alexandrova, 'Foreign Interests Lobbying Brussels: Participation of Non-EU Members in Commission Consultations' (2012) 50 (4) *Journal of Common Market Studies* 614, p 622.

often it is more cost-effective to lobby through and with a national government. This is especially the case with export-oriented firms that face the threat of having to adjust their business practices to meet EU rules. Firms can either lobby a national government to align domestic legislation with EU law or convince it to join in lobbying the EU.[14] Joint action makes sense because the incentives of States and corporations are thought to be interlinked. States are concerned about the competitiveness of their firms and hence susceptible to industry pressure to respond, in one way or another, to regulatory misfit that exists between rules in different countries, causing costs for corporations.[15]

Third country actors may attempt to influence EU action through more than one forum at a time. An example of this was the US government's attempts to influence the Commission's proposals on the categorisation of endocrine-disrupting chemicals, both bilaterally and through the World Trade Organisation (WTO). Another interesting and topical example is provided by the TTIP negotiations that some have argued provide a new lobbying forum to the US to promote its interests as the EU drafts environmental measures.[16] Third country corporations sometimes seek mutually beneficial arrangements, such as affiliate memberships with European producer associations, to improve representation and strengthen their voice by building alliances. An example of this is the European Chemical Industry Council (CEFIC) which has three distinct groups of members, (corporate, federation and business), and three types of partnership (associated companies, affiliated associations and partners).[17] Both 'business' and 'partner' categories are open to non-EU actors, and the CEFIC represents several corporations with headquarters outside the EU. 'Business' covers sectoral businesses with a production base in Europe and a worldwide turnover in chemicals of less than one billion euros. 'Partner' is open to companies engaged in the production of chemicals in countries outside Europe in which the CEFIC has neither a member federation nor an associated federation.[18]

Third country lobbying is sometimes difficult to distinguish from domestic EU lobbying due to an increased number of grey areas created by the globalisation of business environments. Many chemical corporations are multinationals, with a head

[14] A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1, p 6.

[15] Ibid p 4. See also E Atikcan and A Chalmers, 'The Business of Internet Privacy: Interest Group Lobbying and the European Union's General Data Protection Regulation' (Paper presented to European Consortium of Political Research General Conference 26–29 August 2015, Université de Montréal) p 4 (on file with author).

[16] F Flues, 'Dirty deals: How trade talks threaten to undermine EU climate policies and bring tar sands to Europe' ('Dirty Deals') (*Friends of the Earth Europe*, July 2014), https://www.foeeurope.org/dirty_deals_170714 [accessed 28 January 2016].

[17] http://www.cefic.org/About-us/Our-Members/ [accessed 28 January 2016].

[18] Whilst the CEFIC represents third country firms towards the EU, it also provides the Commission with input to conduct reciprocal trade negotiations with third countries. See A Poletti et al, 'WTO Judicial Politics and EU Trade Policy: Business Associations as Vessels of Special Interest?' (2015) *British Journal of Politics and International Relations*, doi: 10.1111/1467-856X.12071 [first published online 1 June 2015].

office in a non-EU country and branches and subsidiaries within the EU.[19] Even domestic EU corporations may be external in the sense that they are owned and operated by non-EU actors. Furthermore, and as mentioned above as regards the CEFIC, the membership strategy of some EU based business associations is to allow third country actors to be affiliated members. Finally, EU-based consultancies and other corporate lobbyists do not solely act on behalf of EU interests but have high numbers of clients that come from outside the EU.[20] These issues inevitably raise the question of whether it is possible to accurately identify non-EU actors and distinguish the representation of internal EU interests from that of external interests. These issues relate not only to feasibility of the research design but, more importantly and urgently, they also reveal the lack of scholarship in this area. The need for research in territorial and cross-border aspects of lobbying is underlined by the fact these questions cannot be answered by reference to existing models of EU lobbying.[21] As will be demonstrated below, attempts to explain why and how third country actors lobby the EU from the perspective of existing studies on EU lobbying give at best an incomplete understanding of the broader dynamics of lobbying efforts that cross borders and continents.

In 2006, the EU adopted a new chemicals regulation REACH (registration, evaluation, authorisation, and restriction of chemicals).[22] REACH established the 'no data no market' rule (Article 5) which means that chemical substances can enter the EU market only on the condition that EU regulators have information on the safety of the substances. REACH requirements apply to products produced within the EU as well as those manufactured elsewhere but imported into the EU. However, companies established outside the EU do not directly incur obligations under REACH, and the responsibility for fulfilling REACH requirements falls on the importer established in the EU or on the so-called 'only representative' of a non-EU manufacturer. The fact that almost one fifth of REACH registrants are 'only representatives' acting on behalf of non-EU companies highlights the global scope of the Regulation in practice. The importance of REACH for third countries is also illustrated by the fact that between 2004 and 2011 it was the most discussed EU measure at the WTO Technical Barriers to Trade (TBT) Committee (27 times).

[19] For multinationals and EU lobbying see A Hadjikhani and PN Ghauri, 'Multinational Enterprises and their Lobbying Activities in the European Union' in L Oxelheim (ed), *Corporate and Institutional Transparency for Economic Growth in Europe* (Elsevier, 2006).

[20] According to data collected in the early 2000s, consultants 'service national clients from within the EU (50.2%), as well as non-European customers, i.e. non-European nationals and global actors (70.9%)'. See C Lahusen, 'Moving into the European Orbit. Commercial Consultants in the European Union' (2003) 4 (2) *European Union Politics* 191, p 199.

[21] That EU studies on lobbying do not sufficiently address the questions that arise in connection with non-EU lobbying is acknowledged but not explicitly spelt out in the existing literature. When studying Japanese lobbying in the EU, Hamada, for instance, places Japanese lobbying 'in the context of transnational relations', Japanese lobbyists hence being the 'prime example of transnational actors and an important element in the process of internationalization', see note 8 above p 406.

[22] European Parliament and Council Regulation (EC) No 1907/2006 [2006] OJ L 396/1.

Furthermore, by 2011 at least 34 WTO Members, including developing countries, had expressed specific trade concerns about the Regulation.[23]

REACH also provides a useful case study because it has figured prominently in articles analysing the transfer of European rules. That Korea's new chemicals regulation is known as 'K-REACH' indicates the influence that REACH has on chemical safety reforms in the wider world. However, emulation does not constitute the only response to the EU's chemicals legislation, and the literature on rule transfer has been limited to the extent that it has virtually solely focused on the impact of the EU on other countries and has not accounted for regulatory movements prompted by REACH that have flowed in opposite directions from non-EU countries to the EU.[24]

III. WHY: INCENTIVES OF THIRD COUNTRY ACTORS TO INFLUENCE EU LAW AND POLICY

In EU studies lobbying, the question about incentives is answered with a story of supply and demand. Starting with the latter, it is commonly held that the EU itself creates demand for lobbying to take advantage of the expertise and experience of those affected by its measures. In addition to the expertise necessary for the exercise of the EU's competences, the consultation of organised interests is also important as it adds to the democratic legitimacy of Union policies. In order to enhance both its expertise and legitimacy, the EU has created a range of mechanisms to consult organised interests at every level of decision-making.[25] What we do not know is whether those mechanisms are equally open and available to external actors as well. I return to this below. On the supply side, it is assumed that the attractiveness of the EU for lobbyists, both domestic and external, increases in direct proportion to the increase in size and power of the EU and that the affected actors are themselves tempted to offer their contribution to mitigate the possible adverse impact of the proposed rules on their activities. Available empirical evidence supports the observation that supply (lobbying)

[23] L Kogan, 'REACH Revisited: A Framework for Evaluating whether a Non-Tariff Measure Has Matured into an Actionable Non-Tariff Barrier to Trade' (2013) 28 (2) *American University International Law Review* 489, pp 501 & 663.

[24] In addition to the literature mentioned in notes 4 & 14 above, see also J Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 *American Journal of Comparative Law* 897; K Biedenkopf, 'Assessing Possibilities for Enhanced EU-South Korea Cooperation on Chemical Regulation' in A Marx et al (eds), *EU-Korea Relations in a Changing World* (Leuven Centre for Global Governance Studies, 2013); M Rousselin, 'Constraint and Consent in the Transfer of European Rules: The Case of China' (2014) 19 (1) *European Foreign Affairs Review* 121; Y Naiki, 'Assessing Policy Reach, Japan's Chemical Policy Reform in Response to the EU's Reach Regulation' (2010) 22 (2) *Journal of Environmental Law* 171; A Bradford, 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' (2014) 42 *International Review of Law and Economics* 158.

[25] R Eising, 'Interest Groups in EU Policy-Making' (2008) 3 (4) *Living Reviews in European Governance*, doi: 10.12942/lreg-2008-4.

increases as a response to regulation, and corporate lobbying is especially driven by EU regulation.[26]

This existing lobbying literature does not differentiate between external and internal lobbying, which is why the present contribution focuses on determining whether the EU's evolving internal and external competences have resulted in increased lobbying activities by third country actors. The EU's external presence has been widely discussed in recent years. Damro, who has coined the term 'Market Power Europe', argues that the size of the EU's internal market gives weight to its attempts to induce external actors to behave in a way that generally accommodates or meets EU rules.[27] Bradford on the other hand deploys the term 'Brussels Effect' to describe the EU's ability to 'externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards'.[28] Both emphasise that although market size may be necessary to explain the EU's global regulatory clout, it is not the only factor. For instance, Bradford argues that the Brussels Effect occurs on three conditions, and the large domestic market is only one of them. The other two are the EU's strong regulatory capacity and the fact the EU primarily regulates consumer markets, product or food safety as prime examples. Unlike in regulation of mobile targets such as capital, corporations cannot move consumers to another jurisdictions in a bid to escape strict rules.[29]

Whilst both strands of scholarship have furthered our understanding of the EU's role as a global regulator, this article suggests that neither provides an analysis of how this global role is actually operationalised in EU legislative outputs that extend to govern the conduct of actors outside the EU. Also, although Bradford acknowledges that the Brussels Effect will increase the attractiveness of the EU for lobbyists,[30] her main focus is 'reluctant emulation by market participants'.[31] However, as already argued above, emulation is not the only possible reaction. Before assessing the ways in which external actors may try to counterbalance the EU's global regulatory role, this section examines how the EU deploys three legislative strategies to trigger the external application of its rules.

The nature and extent to which EU measures affect interests outside the EU varies. Reflecting this varying intensity, the global influence of EU law can be categorised into three main groups: extraterritoriality, territorial extension and border crossing transnationalisation. Extraterritoriality means that EU law applies to conduct taking

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[26] See R Eising, 'Institutional Context, Organizational Resources and Strategic Choices: Explaining Interest Group Access in the European Union' (2007) 8 *European Union Politics* 329; L Cram, 'The EU Institutions and Collective Action: Constructing a European Interest?' in J Greenwod and M Aspinwall (eds), *Collective Action in the European Union: Interests and the New Politics of Associability* (Routledge, 1998).

[27] C Damro, 'Market Power Europe: Exploring a Dynamic Conceptual Framework' (2015) 22 (9) *Journal of European Public Policy* 1336.

[28] Bradford see note 14 above p 3.

[29] Ibid p 17.

[30] Ibid p 54.

[31] Ibid p 9.

place abroad. The unilateral application of EU rules concerning the protection of animals during transport to the part of the journey occurring on third country territory is an instructive instance of legislation regulating the conduct outside of EU borders.[32] Another recent and controversial example concerns ongoing negotiations towards a Financial Transaction Tax (FTT) at EU level. A group of 11 Member States is using the enhanced cooperation mechanism under the EU treaties to legislate on a FTT, which would impose a worldwide charge of 0.1 per cent on stock and bond trades and 0.01 per cent on derivatives transactions.[33]

When looking at these concrete examples, the label 'extraterritorial' seems to offer only a partial insight into the measures in question. Indeed, Scott has argued that a more complete picture would require the consideration of what she calls a 'trigger'.[34] This is a legislative technique designed to trigger the application of EU law beyond Union borders. In the case of the FTT, the trigger would be extraterritorial as neither a territorial nor a national connection with the EU is required in order to trigger the application of its rules abroad. At other times, for instance in the animal transport, the EU relies on a territorial trigger (transport begins on EU territory) but defines the content of legislation so that it nonetheless regulates conduct outside the EU. EU legislation does not automatically apply to the conduct of foreign actors. In both cases triggers are formulated as contextual standards, requiring a case-by-case assessment of the circumstances of application as well as being contingent on third country regulation. If the EU finds third country regulation sufficient, it can decide not to apply its own rules.[35] This places an obligation upon the EU to collaborate with third countries before applying EU measures to foreign conduct, hence carving up novel spaces for third country actors to engage with the EU in the contextualisation and elaboration of these standards.

Aside from these headline-grabbing EU measures, extraterritorial laws (or measures with such triggers) are exceptional in the EU. Indeed, recent research has suggested that it would be more accurate to refer to situations in which EU law influences international actors as a 'territorial extension' of EU law. This second variant of a global EU law covers practices that enable the EU to '"touch" activities that are not centered upon the territory of the EU and to shape the focus and content of third country and international law'.[36] The territorial extension of EU law comprises, for instance, attempts by the EU to regulate activities outside its own

[32] The extraterritorial element was subsequently endorsed by the Court in *Zuchtvieh-Export GmbH v Stadt Kempten,* C-424/13, EU:C:2015:259.

[33] For the FTT see J Scott, 'The New EU Extraterritoriality' (2014) 51 *Common Market Law Review* 1343. See also B Van Vooren, 'Global Implementation of the Financial Transaction Tax: Utopia or Opportunity to Reform the International Financial Legal Order' in D Kochenov and F Amtenbrink (eds), *The EU and the International Legal Order* (Cambridge University Press, 2013).

[34] Ibid (Scott).

[35] Scott calls these 'contingency' and 'contextuality' mechanisms. Ibid pp 1365–1370.

[36] J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87, 88. See also J Scott, 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17 *Cambridge Yearbook of European Legal Studies* 92. Vedder refers to the same phenomenon as the 'extraterritorial protective level', see H Vedder, 'Diplomacy by Directive?

territory in order to protect the environment and promote sustainable development in third countries, especially in developing countries.[37]

To give an example of the dynamics inherent in the territorial extension of EU law, consider the EU's biofuels regime, especially the Renewables Directive.[38] Biofuels are transport fuels derived from biomass. By providing a renewable alternative to fossil fuels, biofuels reduce greenhouse gas emissions and improve the security of fuel supply. However, biofuels have raised widespread concerns for their negative impact on food security and the environment since they increase competition for land. To ensure that biofuels reduce greenhouse gas emissions without adversely affecting the environment or social sustainability, the EU has defined a set of sustainability criteria to ward off such threats.[39] As a considerable proportion of EU biofuels is produced in third countries and imported to the EU, the EU has, in effect, created and 'endorsed an ecosystemic conservation approach outside the EU'.[40]

Thirdly, EU internal market rules have an impact on third countries. As such, EU rules are not aimed at regulating third country conduct but in practice they do so as entry to the EU market is conditioned on compliance with product requirements. REACH provides a good illustration of this. As a law, it is neither extraterritorial, nor does it have a territorial extension. Rather, it could most accurately be described and operationalised as an instance of a border crossing transnational law. REACH has, as noted above, transboundary effects, for its provisions apply to both types of chemical substances: those produced and traded within the EU as well as those manufactured elsewhere but subsequently imported for use in the EU.

REACH legislation incurs significant financial costs and other compliance consequences on a diverse array of actors, including those abroad. According to recent US estimates, the regulatory costs of complying with REACH have added an estimated 22.2 per cent on top of the tariff on chemicals exported to the EU from the US.[41] More than the other two examples this third instance of EU law as a border crossing law links its effects to the EU's market power. The EU is a large market generating 23.7 per cent of the world's GDP, making it misguided or downright foolish for third countries not to pay close attention to its regulatory vision and market developments. In other words, the more the country has economic ties with

(F'note continued)
An Analysis of the International Context of the Emissions Trading Scheme Directive' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders* (Hart Publishing, 2011), p 115.

[37] Note also that with the coming into force of the Lisbon Treaty, EU external action as a whole is now expressly linked to environmental protection and sustainable development, see Article 21 TEU.

[38] Directive (EC) No 28/2009 [2009] OJ L 140/16.

[39] GM Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing, 2012), p 269.

[40] N Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press, 2014), p 303.

[41] See United States International Trade Commission, 'Trade Barriers That U.S. Small and Medium-sized Enterprises Perceive as Affecting Exports to the European Union', (March 2014) Investigation No. 332-541, USITC Publication 4455.

the EU (the more it sells goods and services to the European market), the more EU measures are at risk of adversely impacting the country in question.

The above categorisation of the three ways in which EU law has external effects shows how ingeniously the EU uses legislative rules to shape its relations with third countries as well as how closely this creative use of legal rules is tied to the EU's market power. It is the combination of (semi)-extraterritorial effects of EU law associated with the 'force' of the large internal market that accounts for and explains the majority of situations where third country actors are incentivised to influence EU law- and policy-making. Of course, the risk of overlooking particularities of different policy sectors lies in the simplification that is necessary to make the argument. Despite this limitation, the categorisation provides a helpful overview of different instances where non-EU interests are affected by measures that have been proposed or taken by the EU, thus catalysing non-EU lobbying.

IV. HOW: THREE CONTEXTS IN WHICH THIRD COUNTRY ACTORS INFLUENCE THE EMERGENCE AND DEVELOPMENT OF EU LAW AND POLICY

Where EU measures have an impact on third countries due to market entry regulations or as a result of extended territorial reach covering foreign conduct, third country actors rely on a host of different strategies to influence the EU, ranging from domestic adaptation to preventive action and direct confrontation. Domestic adaptation occurs especially in situations in which the EU's trading partners choose to align their legislative requirements with the EU to help local companies export goods to Europe. Intended to alter the domestic regulatory environment, the adoption or emulation of EU rules by third countries does not as such seek to influence future EU action. In those instances where third country actors (countries, multinationals) enjoy market leverage themselves, the approach that the actor takes is often assertive and directly targets EU law- and policy-makers.

This section considers these direct ways in which third country actors might attempt to respond to the global influence that EU rules have. It demonstrates that there is a diversity of access points to the EU, and that third country lobbyists can influence the EU in many ways. Since stakeholder involvement is not regulated in a uniform manner, and the ways in which lobbyists engage the EU vary depending on the stage of the decision-making process, attention must be placed on the different stages of the law- and policy-making cycle. There are three contexts: creation, implementation and enforcement. Although this categorisation may not accurately reflect all the twists and turns of the actual policy-making process, it is informative to the extent that it reveals how lobbying continues throughout the policy process and is stronger than perhaps usually expected towards the end of the process.

In the sections below, third country lobbying is discussed within these three stages of the policy process and contextualised with respect to REACH law- and policy-making.

A. *Making the law*

The process leading up to the adoption of legislation is usually considered the most crucial stage for exerting influence, when those who will be affected by the proposed rules attempt to influence policy-making in order to advance their interests.[42]

At this stage, public consultation is the most important institutional mechanism through which the affected stakeholders provide input and the most effective tool for third country actors to have their voice taken into account in the EU decision-making process. According to Article 11(3) TEU, the Commission is obliged to consult with 'the parties concerned'; a broad formulation that seemingly encompasses stakeholders irrespective of their country of origin or current geographical location and indicates that public consultations are open to actors no matter where they are in the world. This understanding receives support from Commission policy documents. In a White Paper on European Governance, the Commission committed itself to 'improve the dialogue with governmental and non-governmental actors of *non-member countries* when developing policy proposals with an international dimension'.[43] The Commission's minimum standards for consultation state that '[d]epending on the issues at stake, consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations, undertakings and associations of undertakings, the individual citizens concerned, academics and technical experts, *and interested parties in third countries*'.[44] Participation by third country actors is made easy by posting consultations on the Commission's 'Your Voice in Europe' website and allowing electronic submission of comments and lobbying briefs.

Besides public consultation, the EU collects information and input through an impact assessment (IA). IAs are carried out in respect of Commission initiatives that are expected to have significant direct economic, social or environmental impacts.[45] The updated impact assessment guidelines, adopted as part of the 2015 EU Better Regulation Guidelines, stress the importance of assessing whether the proposal increases the coherence of EU action with international standards, including WTO rules, and contributes to greater regulatory convergence.[46] The Guidelines are accompanied by more specific 'Better Regulation Toolbox' standards.[47] These identify 'third countries' as one of the six main categories of potentially affected groups; the other five being citizens, consumers, workers, enterprises and public

[42] S Hix, *The Political System of the European Union* (Palgrave Macmillan, 2005).

[43] COM (2001) 428 final, *European Governance*, White Paper, p 22 (emphasis added).

[44] See COM (2002) 704 final, *Towards a reinforced culture of consultation and dialogue – general principles and minimum standards for consultation of interested parties by the Commission*, p 4 (emphasis added).

[45] Initiatives include legislative proposals, non-legislative initiatives that define future policies or implementing measures and delegated acts.

[46] COM (2015) 215 final, *Better Regulation Guidelines*, pp 23 & 32.

[47] http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf [accessed 28 January 2016].

authorities,[48] and the IA final report should 'list positive and negative impacts, direct and indirect, intended and unintended, including those outside the EU'.[49] There is an obligation of consultation in respect of all IAs, and this consultation must meet the Commission's 'minimum standards' on consultation, which were described above. Particularly mentioned are third country operators in respect of which the Commission is obliged ensure that they are given equal opportunities to express their views.[50]

Direct but less formal ways of lobbying include face-to-face meetings or teleconferences, typically with Commission officials.[51] As of December 2014 Commission officials of sufficient seniority (Commissioners, Cabinet members and Directors-General) must publish information on meetings held with lobbyists on the respective Directorate General's website supplying information on the date, location and subject matter of the meeting.[52] Spontaneous encounters that are of a purely private or social character, such as workshops, sporting events or formal functions, fall outside these disclosure rules. It is not necessary for lobbyists to register in the EU's Transparency Register in order to meet with EU officials but registration is encouraged and recommended.[53] Does the registration duty concern third country actors? The Transparency Register has a wide scope, and all organisations and self-employed individuals, irrespective of their legal status, engaged in activities falling within the scope of the register (ie engaged in efforts to influence EU policy- and decision-making) are expected to register.[54] By looking merely at the definition, no difference is found between EU and third country actors, and the duty to register appears to apply to both. Registration is, however, limited territorially. Third country governments and other international intergovernmental organisations as well as their diplomatic missions are exempt from registration. This exemption also applies to the Commission disclosure rules, which means that details of meetings that high-ranking Commission officials have with these actors need not be disclosed. On the other hand, the territorial exception only applies to public authorities or organisations, so that other third country actors, such as industry

[48] Ibid p 97.

[49] Ibid p 47.

[50] Ibid p 155.

[51] For third country lobbyists, the most important institutional targets are the Commission and the EP. In this respect, the patterns of external lobbying do not differ from those of domestic lobbying. Research has shown that the national profile of Council policy-making weakens its attractiveness for third countries. That the actor outside the EU does not have its own Member State with which to work on EU matters – lack of a political patron – explains the early interest by US firms in direct organised interest representation in the EU. See also Cowles note 8 above.

[52] C(2014) 9048 final, *COM Decision of 25.11.2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals*.

[53] The EP supports registration by issuing access badges to registered lobbyists to parliamentary premises.

[54] Article 7 of the Interinstitutional Agreement between the EP and the Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation [2014] OJ L 277/11.

representatives and NGOs, do not benefit from the exemption and are expected (but not required) to sign the register.[55]

Preparation of REACH in the early 2000s was accompanied by unprecedented volumes of lobbying, both inside and outside the EU. There were approximately 6400 contributions to the REACH consultation held between 7 May and 10 July 2003.[56] The interest that both the global chemicals industry and NGOs showed in the text is not difficult to understand given the content of the Commission proposal.[57] A truly revolutionary change proposed during the preparation of REACH related to reversal of the burden of proof as to safety. Prior to this proposal, chemicals regulation worldwide had relied on authorities to prove that a given substance was dangerous or detrimental to the health and safety of the public or to the environment.[58] The REACH proposal included provisions that would have rendered this arduous task a curiosity of legal history by denying businesses entry to the European market unless they could produce solid data to prove that their substances were safe.[59] Publication of the REACH proposal in 2003 set in motion one of the most colossal lobbying campaigns in the history of EU law-making.[60] However, according to Fisher, the most 'striking feature' of REACH lobbying was not its scope nor its intensity but the fact that 'it did not remain within EU borders but also involved transnational actors'.[61] Ten non-EU states submitted comments in the public consultation process, as did numerous third country corporations.[62] Several studies have reported that the US industry in particular lobbied the EU, either directly or through enlisting US government officials. Through lobbying by chemical multinationals,

[55] Ibid Article 15. When discussing concrete examples of third country lobbying below, I indicate whether or not the actor (company, NGO) has registered with the TR.

[56] http://ec.europa.eu/environment/chemicals/reach/background/internet_cons_en.htm [accessed 16 February 2016].

[57] COM (2003) 644 final, *Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (Reach), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC) on Persistent Organic Pollutants*.

[58] COM (2001) 88 final, *Strategy for a future Chemicals Policy*.

[59] Article 5 REACH.

[60] D Pesendorfer, 'European Environmental Policy Under Pressure: Chemicals Policy Change Between Antagonistic Goals' (2006) 15 (1) *Environmental Politics* 95; T Persson, 'Democratising European Chemicals Policy: Do Consultations Favour Civil Society Participation?' (2007) 3 (3) *Journal of Civil Society* 223; JP Montfort, 'The Commission White Paper on a Strategy for a Future EU Chemicals Policy: The View of European Companies of American Parentage' (2003) 23 (2) *Risk Analysis* 399.

[61] E Fisher, '"The 'perfect storm" of REACH: charting regulatory controversy in the age of information, sustainable development, and globalization' (2008) 11 *Journal of Risk Research* 541, p 547. Interestingly, it is suggested that foreign opposition to REACH helped Europeans to stick to it and gave the EU an opportunity to defend its authority and legitimacy as a global regulator. See V Heyvaert, 'Globalizing Regulation: Reaching Beyond the Borders of Chemical Safety' (2009) 36 (1) *Journal of Law and Society* 110, p 113.

[62] Other third country governments besides the US were Australia, Canada, China, Israel, Japan, Mexico, Singapore, Switzerland and Thailand.

many of the original provisions, including the reversal of the burden of proof, were weakened in 2006 when REACH was enacted by EU legislators.[63]

Creative use of IAs was also central to REACH lobbying efforts. By hiring consultants to produce rival IAs, chemical corporations managed to exaggerate the costs and business risks of the Commission's REACH proposals, thus influencing perceptions of EU law-makers. In addition, companies demanded, and were given, a new EU IA with special emphasis on the effects on the industry and the market environment.[64]

Not all legislative lobbying on REACH by third country actors was driven by market considerations. Environmental NGOs and other public interest actors also followed the process closely and mobilised civil society actors to contact EU decision-makers and speak in favour of REACH.[65] Support for REACH transcended borders: a declaration to endorse REACH was submitted to the Commission with the backing of 60 US organisations and more than 10,000 US citizens.[66] This went some way towards providing counterforce to the overrepresentation of business interests in the US REACH policy. The general public was denied the opportunity to contribute to the official US policy whilst US government officials and the industry closely coordinated their efforts to maximise joint impact on EU policy.[67]

To recap, the applicable rules and established practices at the law-making stage do not distinguish between EU and third country actors. Rather the principles that apply to pre-legislative consultations and cost/benefit and impact analyses are open to third country actors. By making it possible to make submissions electronically, barriers to participation are low. This helps third country lobbyists to use the opportunities to participate that are provided to them.[68] Processes at the policy- and law-making stages are premised on the idea of openness, which is territorially blind.

B. Implementing the law

The adoption of legislation is not an end but rather a beginning. With an ever-increasing number of EU measures requiring the specification and adoption of additional technical standards, the natural pre-legislative emphasis of lobbying

[63] *A Special Interest Case Study: The Chemical Industry, The Bush Administration, and European Efforts to Regulate Chemicals* (April 1, 2004), prepared for Rep. Henry A. Waxman. US House of Representatives Committee on Government Reform – Minority Staff. Special Investigations Division; J Scott, 'REACH and the Evolution of EU Administrative Law' (2009) Paper presented to Comparative Administrative Law Conference May 7–9, 2009 Yale Law School (on file with author).

[64] Ibid ('Waxman Report') p 14. See also KE Smith et al, '"Working the System" – British American Tobacco's Influence on the European Union Treaty and Its Implications for Policy: An Analysis of Internal Tobacco Industry Documents' (2010) 7 (1) *PLos Medicine* 1, p 9.

[65] *'Could Try Harder'. A mid-term report on the European Commission's environmental record*, a review produced by the Green 10, a group of leading environmental NGOs active at EU level, http://www.env-health.org/IMG/pdf/24-_G10_-_Could_Try_Harder_-A_mid-term_report_on_the_European_Commission_s_environmental_record_REPORT.pdf [accessed 28 January 2016].

[66] Persson see note 60 above, p 229.

[67] 'Waxman Report' see note 63 above, p 15.

[68] See also A Berman, *Taking Foreign Preferences into Account: The Rulemaking Processes in the United States and the European Union* (GlobalTrust, 2015), Working Paper WPS 2015-03.

efforts has begun to shift. The implementation stage is an increasingly important platform from which to influence EU policy.[69] Due to the discretion left open by legislation, it may be necessary for lobbyists to continue defending earlier positions or initiate new strategies to reclaim lost ground. In addition to being in a position to influence rule development and interpretation, third country actors reap other tangible benefits from participation at the implementation stage. A major challenge for businesses operating outside the EU but manufacturing goods for export to Europe is keeping abreast of EU internal market rules, especially those concerning product requirements. Regular liaison and communication with EU authorities through lobbying adds to the knowledge that companies need to stay on top of complying with internal market rules.

Third country actors seek to influence the interpretation and application of EU rules through two institutional avenues, indicating two important loci for EU rule-making. The first target is the Commission. Third country lobbyists attempt to gain insider access to Commission expert groups within which they can influence the preparation of legislative proposals or delegated acts and their implementation. Although most expert group members are European, international participation is permitted and, in some cases, encouraged. In 2008, a Japanese representative was involved in the work of the Commission-led REACH Implementation Project RIP 3.8 that was set up to assist in implementing the Chemicals Regulation. The work of this group included clarifying the interpretation of Article 7(1) of REACH. Due to potential trade-distorting effects, the interpretation had to take into account the interests of the EU's trading partners. Although a final deal was formally struck between the Commission and Member States (or some of them, as a group of six Member States refused to accept the chosen interpretation), at least one country outside the EU was involved as an early negotiator in REACH implementation. The role played by Japan seems to have been motivated by a desire to secure and stabilise statutory interpretation for exporting goods to the EU.[70]

Lobbyists have also shown an increasing interest in the comitology committees that assist the Commission in executing its implementing powers by giving an opinion on draft implementing measures before they are adopted. Committees include representatives from all EU Member States and are chaired by a Commission official. Comitology can provide third country lobbyists with convenient access to a large number of EU decision-makers, including the Commission, EU Member States and the European Parliament. However, the domination of sectoral organisations within the comitology system[71] can mean that

[69] Note that the focus here is on centralised implementation, where the Commission adopts either delegated or implementing acts pursuant to Articles 290 and 291 of the TFEU. The transposition of EU directives into national legislation is not considered here.

[70] E Korkea-aho, 'Laws in Progress? Reconceptualizing Accountability Structures in the Era of Framework Laws' (2013) 2 (2) *Transnational Environmental Law* 363.

[71] This is due to the technical issues handled by the committees and the derived need for expert knowledge. See RW Nørgaard et al, 'Lobbying in the EU Comitology System' (2014) 36 (5) *Journal of European Integration* 491.

third country lobbyists may have to coalesce interests with European interest groups in order to make their voice heard.[72]

In addition to the Commission and the avenues it provides, the incremental internationalisation of EU agencies presents novel opportunities for third country lobbyists.[73] Formal channels of communication between EU agencies and international counterparts have been institutionalised through memoranda of understanding that, for instance, the regulatory authorities of Australia, Canada, Japan and the US have signed with the European Chemicals Agency (ECHA).[74] New relationships are not restricted to bureaucratic agency–agency relations. Especially interesting for third country actors are those agencies that are mandated to give scientific advice to EU institutions. Public consultations that the agencies' scientific committees are required (by express provisions of the law) to organise in order to receive public feedback on their draft opinions provide a vehicle for the communication of interests and issues that impact actors in third countries.[75] For instance, REACH obliges the ECHA to place committee opinions on its website with an invitation for interested parties to comment. The term 'interested party' is not defined in REACH,[76] thus allowing previously unforeseen actors, such as non-EU NGOs and businesses, to enjoy procedural rights that are equal to the procedural rights of EU citizens or businesses. Participation is not restricted by geographical location as comments can be submitted online through the ECHA website.

In some policy sectors, EU agencies are responsible for adopting lower level guidance and, in this role, they are monitored closely by third countries.[77] In 2012 the EU adopted the new Biocidal Products Regulation (BPR) that forms part of the EU's chemicals regime. Shortly after, the ECHA drafted guidance on biocides legislation to explain how to fulfil the information requirements set by the

[72] This may well change soon as the Commission has proposed a four-week public consultation period for both delegated and implementing acts. See COM (2015) 215 final, *Better regulation for better results – an EU agenda*.

[73] For EU agencies' international activities, see eg Ott et al, 'European Agencies on the Global Scene: EU and International Law Perspectives' in M Everson et al (eds), *EU Agencies in Between Institutions and Member States* (Kluwer Law, 2014); M Groenleer and S Gabbi, 'EFSA in the International Arena: Caught in a Legal Straightjacket – Or Performing an Autonomous Role?' in A Alemanno and S Gabbi (eds), *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority* (Ashgate, 2014).

[74] These cooperation agreements can be found at: http://echa.europa.eu/about-us/partners-and-networks/international-cooperation/cooperation-with-peer-regulatory-agencies [accessed 28 January 2016].

[75] See eg *Committee for Socio-economic Analysis (SEAC) Response to comments on the SEAC draft Opinion on the Annex XV dossier proposing restrictions on Lead and its compounds* (European Chemicals Agency, 13 March 2014), http://echa.europa.eu/documents/10162/48628bb4-c419-4663-a1af-59d6b97ae360 [accessed 28 January 2016].

[76] Scott see note 24 above, p 929.

[77] For agency guidance more generally, S Vaughan, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015) 17 *Cambridge Yearbook of European Legal Studies* 66.

new legislation.[78] Japan and the US contacted the Commission about potential barriers to trade triggered by the provisions for treated articles in the BPR. Focusing on the specific interpretation formulated in agency rule-making activities, Japan and the US requested the EU to 'correct' the interpretation put forward in the ECHA guidance document. Subsequently, the Commission gathered EU biocides authorities to discuss the concerns that were brought to its attention, inviting both Member States and 'stakeholders' outside the EU to come forward with their views and ideas on how to resolve the issue.[79]

In implementation, just as in the law-making stage, third country actors are not prevented by any formal constraints from contributing their knowledge, perspectives and techniques, and can influence comitology committees or participate in agency working groups or decision-making procedures in the same manner as EU actors. Material is available online to allow up-to-date monitoring of the policy process, and comments can be submitted electronically without incurring the costs or complications of travelling or sending paper copies. Lobbying in implementation yields tangible benefits. Although the legal text of REACH has not been formally amended, it is interpreted in a manner that generally satisfies or accommodates the preferences and concerns of third countries.

C. Enforcing the law

Finally, third country actors can attempt to shape EU policies in enforcement. As the term 'enforcement' can refer both to (national) administrative authorities in verifying compliance with the law as well as judicial enforcement, ie adjudication, I discuss both briefly.

1. Administrative enforcement

EU law is enforced through domestic administrative mechanisms. Hence, it falls upon national authorities to ensure that, for instance, REACH is duly and correctly enforced. Although enforcement patterns are determined by the national system in which the enforcement of EU law takes place, and Member States' (procedural) autonomy is an important element of the EU legal system, national administrative systems must meet EU standards, thus reducing national idiosyncrasies. The resulting multi-level structure makes lobbying on administrative enforcement both important and difficult. It is important as divergent standards in enforcement between Member States can have negative trade implications. For instance, the Asia–Pacific Economic Cooperation (APEC) forum has raised concerns over the trade-distorting effects of REACH enforcement, and especially regarding the situation where disagreement over the definition of an 'article' in the Regulation has led

[78] http://echa.europa.eu/guidance-documents/guidance-on-biocides-legislation [accessed 28 January 2016].

[79] Both citations are from 'Biocides stakeholders want further clarification on treated articles' (*Chemical Watch*, 17 March 2014) http://chemicalwatch.com/18734/biocides-stakeholders-want-further-clarification-on-treated-articles [accessed 28 January 2016].

to a situation in which six EU Member States apply different standards from the rest.[80] The disagreement relates to the guidance document in the preparation of which Japan was involved. Lobbying on administrative enforcement is also difficult, as third country actors may have to simultaneously influence many levels. Increased coordination between EU competent authorities, often in the form of semi-permanent networks and collaborative platforms attended by EU and Member State authorities, is thus likely to be welcomed by third countries.

Working under the auspices of the ECHA, the Forum for Exchange of Information on Enforcement (Forum), which coordinates enforcement under REACH, is one of these networks connecting EU and Member State levels. Comprising Member State authorities and up to five members chosen on the basis of their expertise, the Forum coordinates common projects and evaluates and recommends good practice. Stakeholders, both internal and external, can attend meetings as observers, though this requires an invitation from a member of the Forum or the ECHA Management Board. Currently, one interest group, the Only Representatives Organisation, participates as a registered stakeholder in the work of the Forum with a view to representing non-EU interests.[81] As previously noted, manufacturers established outside the EU can nominate a so-called only representative located within the EU to carry out the required registration of their substances that are imported into the EU.[82] The Only Representatives Organisation is a professional body for these EU-only representatives, and according to its website it 'represents the interests of only representatives and non-EU manufacturers'.[83]

As with non-EU participation in implementation, the involvement of third country actors in administrative enforcement performs a double function. It enables them to influence enforcement practices and to access relevant information from different sources. Benefits of increased information sharing occur not only for third countries. The experience of external stakeholders helps the EU adopt the most suitable course of action in enforcement, enabling it to learn from and respond to the needs of different actors including those 'using' EU norms from abroad.

2. *Judicial enforcement*

Third country interests can also be fed into the EU policy process through litigation in which case third country actors attempt to influence EU decision-makers through the courts. Lobbying does not target the judiciary. Rather, by involving the courts,

[80] 'Apec seeks answers on SVHC notification', (*Chemical Watch*, 10 February 2012) http://chemicalwatch.com/9932/apec-seeks-answers-on-svhc-notification [accessed 28 January 2016]. For the controversy, see Korkea-aho note 70 above. The disagreement over the interpretation of an 'article' has recently been decided by the Court of Justice. See *FCD and FMB v Ministre de l'Écologie, du Développement durable et de l'Énergie (SVHC case),* C-106/14, EU:C:2015:576.

[81] http://echa.europa.eu/documents/10162/13577/forum_registered_en.pdf [accessed 28 January 2016].

[82] Article 8(1) REACH.

[83] For association see http://www.onlyrepresentative.org/about-oro [accessed 28 January 2016]. The ORO has registered with the TR.

non-EU actors affected by the EU law aim at putting pressure on policy makers. It is not the swiftest strategy to gain access to the policy process but, as shown below, this strategy, which elicits much debate both in the EU and internationally, provides a key additional mechanism in situations where third country interests have been excluded from the decision-making process or where other avenues of access have been exhausted. The case presented below is not from REACH but is discussed here as it highlights how lobbying through courts can also be initiated by actors from outside the EU.

In 2010, a coalition of US aviation industry groups raised a legal challenge before UK courts arguing that the European Emission Trading System (ETS) was illegal under international agreements and customary international law as it required foreign airlines, operating out of European airports, to pay for emissions produced during the entire flight, including those emitted outside EU airspace. The UK court referred the question to the Court of Justice, which confirmed the validity of the ETS with international law.[84] Much of the commentary about this case has analysed the ruling as a paradigmatic example of the global reach of EU environmental law.[85] More neglected has been how this battle also demonstrates how non-EU actors can use enforcement to claim stakeholder status in EU policies. The way in which the legal battle has continued to unfold makes the point about the significance of this case from a lobbying through courts perspective. Following the judgment, the Commission decided to postpone the application of the scheme for flights operated in 2012 from or to third countries. This move was said to be justified by the need to allow time for the International Civil Aviation Organization (ICAO) Assembly to conclude a global agreement on the matter. Agreement was reached in October 2013 to develop an appropriate measure by 2016 and apply it by 2020. Meanwhile, countries are permitted to apply interim measures. The EU's interim measures are modest: in the period 2013–2016, only emissions from flights within European airspace fall under the EU ETS.[86] Judicial lobbying paid off.[87]

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[84] *Air Transport Association and Others v Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864. American Airlines and United Airlines have registered with the TR, unlike the Air Transport Association of America and Continental Airlines.

[85] Note though that AG Kokott explicitly rejected claims of extraterritoriality on the basis that no concrete rule exists regarding the conduct of flights outside EU airspace. See Opinion of Advocate General Kokott in *Air Transport Association*, C-366/10, EU:C:2011:637, point 147.

[86] See 'Reducing emissions from aviation' (*European Commission*) http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm [accessed 28 January 2016].

[87] In another high-profile case involving non-EU interests being affected by EU legislation, a group of product manufacturers and traders of various nationalities as well as an association representing the interests of Canadian Inuits, challenged the EU regulation that permits placing seal products on the European market only where they result from hunts traditionally conducted by Inuit and other indigenous communities contributing to their subsistence. EU courts dismissed the challenge on formal grounds that the applicants did not satisfy the requirement of individual concern. See *Inuit Tapiriit Kanatami and Others v Parliament and Council*, T-18/10, EU:T:2011:419; *Inuit Tapiriit Kanatami and Others*, C-583/11 P, EU:C:2013:625 as well as *Inuit Tapiriit Kanatami and others*, T-526/10, EU:T:2013:215. In June 2014, WTO dispute settlement appellate body ruled that the EU import ban for seals was justified on moral grounds. Subsequently the EU adopted a new proposal that took into

From a strictly formal point of view, this ruling affirms the procedural lesson mentioned above. Any natural or legal person, irrespective of nationality or residence, can challenge EU measures: as provided by Article 19(3) TEU, actions can be 'brought by a Member State, an institution or a natural or legal person'. For third country actors no procedural hurdles stand in the way of securing stakeholder status through adjudication. Or perhaps a more accurate way to make the same argument is to say that no difference in treatment exists. Direct actions – those brought by individuals, companies or organisations against EU decisions or actions – are difficult to bring before the EU courts due to the hurdle of proving an individual and direct concern (Article 263(4) Treaty on the Functioning of the European Union (TFEU)), a hurdle that exists for both EU and non-EU actors.

Third country actors can also intervene in a pending case before the EU courts under the same conditions as domestic EU actors. This has recently been confirmed by the General Court (GC). In this case, the ECHA attempted to argue that since the applicant for leave to intervene (New Japan Chemical) was not established in the EU, it had no direct and existing interest in the case. The GC reasoned that non-EU establishment is not as such an obstacle to intervention and proceeded to grant leave to intervene on the basis that the contested decision directly affects the economic situation of the applicant.[88] The interesting exception to procedural openness is the European Ombudsman (EO) whose territorial competence is determined by the country of residence or domicile. The EO can be called on to examine complaints from EU citizens and residents of Member States. Similarly, only businesses, associations or other bodies with a registered office in the Union can address their complaints to the EO. However, it can make an own-initiative report in those cases where the scope of review is territorially limited.[89]

Although third parties affected by EU law may pursue their claims with procedural simplicity within the EU legal order, the decisions of the EU courts have not allowed much of a role for third country interests.[90]

V. CONCLUSIONS AND DIRECTIONS FOR FUTURE RESEARCH

Whilst the primary aim of this contribution was to capture the broader dynamics of third country lobbying and to delineate a framework for further study on the topic, some preliminary conclusions can be drawn. First, Union policies are premised on active, broad and non-discriminatory participation of stakeholders in law-making, policy implementation, and enforcement. Setting aside a long-standing and

(F'note continued)
account the WTO decision. See, COM (2015) 45 of 6 February 2015, *Commission Proposal for a Regulation to amend Regulation 1007/2009 on trade in seal products*.

[88] Order of the President of the Fifth Chamber of the GC in *Hitachi Chemical Europe GmbH and others v ECHA*, T-135/13, EU:T:2013:716, para 11. New Japan Chemical is not registered with the TR.

[89] See eg Decision of 25 June 2013 in case OI/3/2013MHZ.

[90] In addition to the cases discussed in Part IV.C.2 above, as well as in notes 32, 84 & 87 above; see also *Poulsen and Diva Navigation Corp*., C-286/90, EU:C:1992:453; *Ebony Maritime SA*, C-177/95, EU:C:1997:89, or *Leonid Minin*, T-362/04, EU:T:2997:25.

predominantly sceptical discussion about the desirability or delivery of such premises,[91] it is significant that these premises are not relevant only internally, that is, no differentiation is made between EU and non-EU participants or stakeholders. Neither primary EU law, the analysed secondary law (REACH), nor relevant policy documents restrict participation to internal EU actors or include provisions requiring a third country actor to prove a European 'interest' or 'connection', for instance residence, in order to contribute to public consultations, to become a member of the ECHA working group or to intervene in court proceedings.

Not only does openness serve to ensure that third country actors are not put in a disadvantageous position, but open and accessible processes also encourage and incentivise actors beyond the EU to become involved in shaping EU policies. Besides the incentive structure identified by the analysis above, that is, the ability of EU law to have (semi)-extraterritorial effects coupled with the EU's market power, its openness towards stakeholders constitutes an additional incentive. Namely, the EU has, both politically and legally, built an open regulatory architecture allowing and even encouraging the acknowledgement of third country actors as the EU's stakeholders. REACH lobbying has offered multiple examples of how third country actors were referred to and treated as stakeholders by EU institutions. Interestingly, the EU appears to follow this well-trodden path since it has been argued that the openness of the Commission and the EP was instrumental in the creation of internal interest group structures in the EU.[92] A point of interest for future research is to assess whether the global reach of EU law, together with the EU's territorially blind stakeholder policy, is creating a global EU civil society, comprising those affected by EU measures in the wider world.

Second, the law-making stage is not the only or even the most important place to promote non-EU interests. This paper provides evidence from REACH policy-making that third country actors lobby in all three policy-making stages, not only in law-making but also at the policy implementation and rule enforcement stages. Future research should investigate whether and under what conditions this finding can be confirmed in other policy fields as well.[93] It might be argued that REACH is a special case and no similar findings can be expected to occur in other sectors. However, REACH is believed to have instigated a new lobbying culture in the EU,[94] and at least it should be tested whether similarities could be found elsewhere. One may also consider whether any divergences exist between EU and third country

[91] Since the publication of a White Paper on European Governance, discussion on the question has grown exponentially. See COM (2001) 428 final, see note 43 above. For the literature, see eg B Kohler-Koch and C Quittkat, *De-Mystification of Participatory Democracy: EU-Governance and Civil Society* (Oxford University Press, 2013); S Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar, 2006); S Smismans, 'New Modes of Governance and the Participatory Myth' (2008) 32 *West European Politics* 874.

[92] D Coen, 'Business Lobbying in the European Union', in Coen and Richardson (eds), *Lobbying the European Union: Institutions, Actors and Policy* (Oxford University Press, 2009), p 146.

[93] Further research is also needed on lobbying patterns of different third country actors, eg whether governments are active in law-making but less so in implementation and enforcement.

[94] Fisher note 61 above, p 547.

lobbyists in their tendency to continue lobbying in post-legislative stages. For instance, would it be possible to argue that third country actors approach EU agencies more easily because they have experience of similar lobbying in their own countries?

To conclude, in the era of international institutions and transnational actors few would question the significance of third country lobbyists in EU decision-making processes. Few would object to the EU's openness as a general premise, either. What is more difficult to determine is the extent to which the EU should be open to external interests. The concrete examples included in this article, such as the intimate links between businesses and the US government in REACH lobbying and the uses and abuses of IAs by multinationals, certainly raise doubts about the legitimacy of external lobbying, and given that lobbying is always an effort to influence legislation, about the legitimacy of the EU's lawmaking authority. Should we monitor and control the access of third country lobbyists to the political process in the EU, and can we do this without undermining the positive contribution they have to offer?

This more normative question of how open the EU should be can in turn be broken down into several difficult but critical questions to be considered in future research. How do we know and decide who is affected by the activities of the EU? What is the legitimate extent to which 'Mr Smith' should be able to influence EU law and policy? Should third country actors be more included in policy-making in areas strongly influencing them? How much information should be disclosed to them and at what point? Should third country lobbying interests be subject to more disclosure than EU lobbying interests? To what extent, if any, should law and policy-making practices remain territorially bounded in order to avoid the capture of EU policymaking by powerful foreigners, whether multinationals or governments?

One final caveat with regard to the aim of this article is worth stating again here. When dealing with a complex phenomenon covering not only a diversity of geographical areas and policy sectors but also different areas of disciplinary focus, there is no easy way past limitations in the ability to provide a complete account of what is happening. However, this article has hopefully furnished the beginnings of an analytical framework and imaginative space from which to start formulating answers to the questions posed above and working towards a more fully developed narrative of third country lobbying in the EU.