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Governmentality in EU External Trade and Environment Policy

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INTRODUCTION:
The Evangelical EU and Environmental Norm Export

1 The Evangelical EU: Trade, Environment, and Environmental Norm Export

The preamble of the Treaty on European Union (TEU)—one of the two constitutional documents of European Union (EU)[1] law—begins with a provocative definition of the relationship between Europe and the world. As the TEU would have it, the European project "Draw[s] inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, and the rule of law."

This casual preambular equation of European values and universal values is supplemented by a substantive provision, sometimes known as the TEU's "missionary principle,"[2] that obligates the EU to spread these European/universal values and interests beyond its borders:

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and development

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[1] For reasons of consistency and clarity, the term EU will be used throughout this dissertation, including in places where the acronym EC ("European Community") might be more technically appropriate.

[2] *See, e.g.,* Morten P. Broberg, "Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy," in *EU External Relations Law and Policy in the Post-Lisbon Era* 181 (Paul James Cardwell ed. 2012); Ester Herlin-Karnell, "The EU as a Promoter of Values and the European Global Project," 13(11) *German Law Journal* 1226 (2012).

of international law, including respect for the principles of the United Nations Charter.[3]

In this way, the TEU enshrines in European constitutional law the idea of an evangelical EU[4]: it encourages Europeans to think of 'their' values as 'universal', and legally obligates the EU to 'uphold and promote' them in the wider world.[5]

The 2001 Laeken Declaration on the Future of the European Union, which launched the EU's Constitutional convention,[6] discussed this evangelical activity in the context of the post-Cold War international constellation, elaborating in stirring language on the way in which Europe's leaders see the EU's "new role in a globalised world":

> What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions…
>
> Now that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation. The role it has to play is that of a power resolutely doing battle against all violence, all terror and fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a

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[3] Consolidated Version of the Treaty on European Union art. 3(5), Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU]. The other primary constitutional document is the Treaty on the Functioning of the European Union (TFEU), which sets out the day-to-day rules for the operation of the EU. Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C83) 47 [hereinafter TFEU].

[4] Laurens Ankersmit, Jessica Lawrence & Gareth Davies, "Diverging EU and WTO Perspectives on Extraterritorial Process Regulation," 21 *Minnesota Journal of International Law Online* 14, 56 (2012) ("The Treaties provide explicit support for an evangelical EU, seeking to spread its values and world view beyond its own borders").

[5] *See* Case C-366/10 *Air Transport Association of America et al. v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, at para. 101 [hereinafter *ATA* case] (asserting that the EU is legally bound by the values set out in Art. 3(5) TEU).

[6] The Future of the European Union, Laeken Declaration, SN 273/01 (Dec. 15, 2001). The Laeken Declaration led to the establishment of a Convention on the Future of Europe, which produced a Draft Treaty Establishing a Constitution for Europe. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1. The Constitution was never adopted because it was rejected by French and Dutch voters in 2005. However, its replacement, the Treaty of Lisbon, was inspired by the Constitutional document, and adopted many of its alterations to the TEU and TFEU. The Laeken Declaration is therefore an important part of the current European legal, institutional, and political landscape.

> way as to benefit not just the rich countries but also the poorest. A power
> seeking to set globalisation within a moral framework, in other words to
> anchor it in solidarity and sustainable development.[7]

Against this background, the EU has engaged in a wide range of activities designed to spread European/universal values and interests abroad. From democracy-promotion,[8] to providing financial and other support for regional integration efforts,[9] to human rights activism,[10] to technical assistance to third country bureaucratic bodies,[11] the long arm of the EU stretches around the 'wider world'. Two thematic areas that have been particularly prominent in the EU's evangelical activity are the promotion of 'free and fair' international trade, and the protection of the global environment—the 'sustainable development of the Earth'.

International trade is an important part of the EU's external policy. The EU has long been a strong supporter of liberalized international economic policy. Indeed, the European Union itself is justified on these foundations. International trade negotiations are one of the EU's most important manifestations as a global actor, and trade has shaped internal policy, as well. The need for common external representation in economic negotiations made trade one of the first areas to be promoted to the supranational level of EU government, both internally

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[7] Laeken Declaration, *supra* note 6, at 2.

[8] The 1989 Lomé IV agreement between the EU and the ACP countries (the African, Carribean, and Pacific Group) was one of the first multilateral agreements to contain political conditionality clauses. Fourth ACP-EEC Convention, signed at Lomé, 15 December 1989. Since 1999, the European Initiative for Development and Human Rights (EIDHR) has operated "in support of democratisation, the strengthening of the rule of law and the development of a pluralist and democratic civil society." Council Regulation (EC) No. 976/1999, laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, 29 April 1999, OJ L 120/8, at preamble.

[9] The EU supports regional integration, and has made this objective a part of its external policy. *See, e.g.,* European Commission, "Communication on European Community Support for Regional Economic Integration Efforts among Developing Countries, COM (1995) 219 final, Brussels, 16 June 1995; European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Regional Integration for Development in ACP Countries, COM (2008) 604 final/2, 6 October 2008. For an overview of the EU's policy in this area, *see* Mary Farrell, "EU Policy Towards Other Regions: Policy Learning in the External Promotion of Regional Integration," 16(8) *Journal of European Public Policy* 1165 (2009).

[10] The EU has undertaken a large number of human rights activities in the external policy realm. For a general overview, *see* Lorand Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements," 40(4) *Legal Issues of Economic Integration* 297 (2013); Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005); Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (2001); Karen E. Smith, "The EU, Human Rights and Relations with Third Countries: 'Foreign Policy' with an Ethical Dimension?" in *Ethics and Foreign Policy* 185 (Karen E. Smith & Margot Light eds. 2001).

[11] The EU runs a large number of technical assistance programs in various areas of its external policy. The Technical Assistance and Information Exchange (TAIEX) instrument, for example, is a program managed by DG Enlargement at the European Commission, which seeks to support partner countries in approximating, applying and enforcing EU legislation. *See* European Commission, "What is TAIEX?," *available at* http://ec.europa.eu/enlargement/taiex/what-is-taiex/index_en.htm (last accessed 15 August 2014).

and externally. In the years since its founding, the EU has negotiated large numbers of bilateral, regional and multilateral trade agreements with countries around the world. It was a key actor in the rounds of multilateral negotiations that led to the evolution of the WTO, and has been influential in the negotiations underway in the Doha Development Round. The EU continues to extend its economic reach to this day, promoting the expansion of international trade agreements under the aegis of the Global Europe Strategy.[12]

The EU's activities in support of liberalized international commercial relations have been very significant. The size of Europe's market and the volume of its cross-border trade make it an extremely important actor from the perspective of the international economy. Its status as one of the world's largest traders makes the EU an attractive partner for preferential trade agreements, an indispensible member of multilateral agreements, and a strong influence on global production patterns.[13] In addition, because of the strength of its markets and the size of its economy, the EU's internal regulatory structure influences the production decisions of companies around the globe—a state of affairs that Anu Bradford has recently dubbed "the Brussels effect."[14] Given its strength and commitment in this area, some have begun to speak of the EU, following Chad Damro, in terms of "market power Europe."[15]

In addition to its important place in the constellation of international trade, over the past several decades the EU has also emerged as a global leader in international environmental regulation.[16] The management of issues as diverse as climate change, biodiversity, and forestry have been influenced by EU efforts to promote its environmental norms abroad. Whether by engaging in multilateral negotiations with third states, toughening internal environmental rules, or participating in voluntary partnerships or technology transfer agreements, the EU has made a clear mark on the international environmental scene.

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[12] European Commission, *Global Europe: Competing in the World* (2006).

[13] The WTO estimates that the EU's total merchandise imports (excluding internal trade) were even larger than those of the US in 2011. WTO, *World Commodity Profiles 2011* (2012), available at http://www.wto.org/english/res_e/statis_e/world_commodity_profiles11_e.pdf (last accessed 15 August 2014).

[14] Anu Bradford, "The Brussels Effect," 107(1) *Northwestern University Law Review* 1 (2012).

[15] Chad Damro, "Market Power Europe," 19(5) *Journal of European Public Policy* 682 (2012) (arguing that "[t]he EU's identity, both historically and presently, is crucially linked to its experience with market integration"). Damro developed the term 'market power Europe' in contrast to Ian Manners's 'normative power Europe,' an idea coined ten years earlier as a way of describing how the EU's power in the international arena was based primarily on normative agenda-setting, rather than traditional forms of 'hard power' such as military or economic influence. Ian Manners, "Normative Power Europe: A Contradiction in Terms?" 40(2) *Journal of Common Market Studies* 235 (2002).

[16] The EU has not always played such leadership role. When environmental issues first became a major topic in international politics in the 1970s, it was the US that led the preparations for the 1972 UN Conference on the Human Environment, the 1973 Convention on Trade in Endangered Species (CITES), and the 1987 Montreal Protocol on Ozone Depleting Substances. For an in-depth analysis of the shift in environmental leadership, *see* David Vogel & R. Daniel Kelemen, *Trading Places: The US and EU in International Environmental Politics* (2007).

Europe's leadership on global environmental issues has even led some to argue that promoting environmental norms is an integral part of the EU's foreign policy identity.[17] Its central role in promoting sustainable development at the UN, its prominence in the creation of the international climate change regime, and its defense of biotechnology regulation, among many other activities, all lend support to the idea that the EU is an agenda-setter in global environmental politics. Given its notable attachment to these global environmental goals, some scholars have gone as far to argue that the EU should be understood as a "green normative power" that exercises influence internationally by promoting normative environmental goals.[18]

Whether one sees the EU as a 'market power' or as a 'green normative power' (or as something else entirely), trade and environment are both certainly 'values and interests' high on the EU's evangelical agenda. Moreover, in recent years the EU has attempted to integrate these concerns with one another, analyzing them through the broader interdisciplinary lens of 'sustainable development'. Recognizing the importance of the interface between trade and environmental concerns, the EU today has explicitly legislated for the integration of environmental values into the EU's external policies in general, and its trade policies in

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[17] *See, e.g.,* Susan Baker, "Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union," 16(2) *Environmental Politics* 297, 312 (2007) (arguing that the EU's "declaratory commitment to the promotion of sustainable development has acted as a constitutive factor determining the international identity of the EU"); Joyeeta Gupta & Michael Grubb, "Climate Change, Leadership and the EU," in *Climate Change and European Leadership* 3, 4 (Joyeeta Gupta & Michael Grubb eds. 2000) (noting that: "[a]bove all, the European Union sees itself as the historical, current and future leader" on climate change); John Vogler & Charlotte Bretherton, *The European Union as a Global Actor* 85-106 (2006) (considering how the EU came to be a leader in global environmental politics).

[18] As described in footnote 15, above, the idea of "normative power" was coined by Ian Manners as a way of describing how the EU's power in the international arena was based primarily on normative agenda-setting, rather than traditional forms of 'hard power' such as military or economic influence. Manners, *supra* note 15. Some environmental scholars have expanded on his ideas by asserting the notion of "green normative power," which describes normative power derived specifically from environmental leadership. *See, e.g.,* Baker, *supra* note 17, at 312 (noting that the EU's "declaratory commitment to the promotion of sustainable development" allows it "to act as a normative power (as opposed to military power) in international politics"); Paul Harris, "The European Union and Environmental Change: Sharing the Burdens of Global Warming," 17 *Colorado Journal of International Environmental Law & Policy* 309, 354 (2005) (arguing that by taking on a leadership role with respect to global climate change, the EU's "normative power will be increased"); Simon Lightfoot & Jon Burchell, "The European Union and the World Summit on Sustainable Development: Normative Power Europe in Action?" 43(1) *Journal of Common Market Studies* 75 (2005) (evaluating the EU's success as a green normative power with respect to its actions at the World Summit on Sustainable Development); John Vogler, "The European Contribution to Global Environmental Governance," 81(4) *International Affairs* 835, 841 (2005) (arguing that "the EU may be regarded as a disseminator of norms and as a body that incorporates others in its policies for sustainability"); Anthony R. Zito, "The European Union as an Environmental Leader in a Global Environment," 2(3) *Globalizations* 363, 369-72 (2005) (discussing the complexities of the EU's role as normative leader in the environmental field). *But see* Robert Falkner, "The Political Economy of 'Normative Power' Europe: EU Environmental Leadership in International Biotechnology Regulation," 14(4) *Journal of European Public Policy* 507, 508 (2007) (contending that the classification of the EU as a "green normative power" is ahistorical and dislocated from broader political-economic considerations); R. Daniel Kelemen "Globalizing European Union Environmental Policy," 17(3) *Journal of European Public Policy* 335 (2010) (noting the self-serving character of the EU's efforts to globalize its internal environmental regulations).

particular.[19] Today, the promotion of trade, the environment, and 'sustainable development' are an inseparable part of the EU's external relations policy.[20]

This dissertation will refer to the EU's evangelical activities in support of its trade/environment agenda as *environmental norm export*. It uses this term to denote a specific set of practices: measures employed by the EU that seek, through the vehicle of economic policy, to export European environmental norms to the 'wider world'. This category attempts to capture those instances in which the EU uses its economic power as leverage to influence environmental policies and practices—both of governments and individuals—in third states. Environmental norm export policies, in other words, represent the EU's attempt to do environmental work outside its borders using economic tools.[21]

This definition of environmental norm export policies entails several components. First, it refers only to activities taken by the EU as an actor—not by the Member States separately, or by individuals and groups within the EU. This is not to imply that these other actors do not engage in such activities, or to underplay the complexity of EU policy-making. Rather, the purpose of this limitation is to focus attention on one particular actor and to limit the scope of analysis to a reasonable degree.

Second, 'environmental norm export' refers only to measures that use *economic* policy to do environmental work. That is, the measures must implicate such things as trade agreements, import regulations, tariffs, or other economic policy measures. Measures that seek to protect

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[19] In 1997, Article 4 of the Treaty of Amsterdam amended the EC Treaty to state that: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities ... in particular with a view to promoting sustainable development." Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340/1). Now the integration requirement is included in article 207 of the Treaty on the Functioning of the European Union (TFEU). TFEU, *supra* note 3, at art. 207. The EU's current Sixth Environmental Action Programme (EAP) reinforces the importance of integration in all areas of EU policy, including trade and external relations. European Commission, Sixth Environmental Action Programme, 2002 OJ L242/1 [hereinafter 6th EAP]. For an extensive overview of the current law and policy of environmental integration in the field of EU foreign policy, *see* Gracia Marín Durán & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (2012).

[20] *But see* Lightfoot & Burchell, "The European Union and the World Summit on Sustainable Development," *supra* note 18, at 84 (presenting evidence that 'sustainable development' is nevertheless still associated with DG Environment, rather than DG Trade or DG Agriculture).

[21] To be sure, the EU is not the only economic power that engages in environmental value export. The United States, for example, also sometimes integrates environmental values into its trade policies. *See, e.g.,* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993); North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480; Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, U.S.-Mex., Nov. 16-18, 1993, T.I.A.S. No. 12,516; United States–Peru Trade Promotion Agreement, Washington, DC, 12 April 2006, entered into force 1 February 2009. *See generally* Sikina Jinnah & Julia Kennedy, "A New Era of Trade-Environment Politics: Learning from US Leadership and its Consequences Abroad," 12 *Whitehead Journal of Diplomacy & International Relations* 95 (2011) (discussing environmental provisions in US free trade agreements (FTAs)).

extraterritorial environmental interests by non-economic means do not fall within this definition.[22] This separation of the 'economic' and the 'non-economic' is, of course, entirely artificial, and itself the product of modernist ideology. In that sense, the distinction is somewhat problematic, tending to reinscribe other unhelpful dichotomies, such as those between public and private, between politics and business, between work and home, and so on. Nevertheless, the categorization is used here as a way of focusing attention on a particular subset of EU activities to which—partially as a result of the economic/non-economic dichotomy, which serves to depoliticize 'economic' activities—an interesting set of legal and political conflicts applies. In doing so, it endeavors to keep in mind the problematic nature of the distinction, and point out the ways in which it impacts the behavior of the various actors that populate its field of study.

Third, this investigation into 'environmental norm export' defines the term 'measures' broadly (within the already restricted focus on *economic* tools) as referring to any EU activity, from the passage of directives to the conducting of research activities. In doing so, it holds to the belief that 'law' and political activity work through a greater range of avenues than courtrooms and legislative chambers. As a corollary, therefore, 'environmental norm export' applies to all EU attempts to influence the behavior of non-EU nationals outside its borders, including the behavior of individuals, companies, governments, international organizations, and other actors.

Fourth, the definition of 'environmental norm export' policies encompasses only those policies that fall under the 'evangelical' umbrella—those that seek to affect policy, or to effect environmental or social change in third states, non-EU regions, or at the global level. This excludes policies designed exclusively to improve the environment *within* EU borders, to promote 'greener' behavior among European companies, or to promote eco-friendly values among EU nationals.

Fifth and finally, speaking of 'environmental norm export' policies does not entail any claim regarding the effectiveness of these measures. The point is *not* whether or not the EU is actually successful in generating social or behavioral change outside of its borders; the point is that it attempts to do so.

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[22] *See generally* Juan M. Amaya-Castro, *Human Rights and the Critiques of the Public/Private Distinction* (2010) (unpublished dissertation, on file with author) (problematizing the public/private and related dichotomies both in historical context and in contemporary law and legal scholarship).

The environmental norm export policies used by the EU are many and varied. They include such measures as the conclusion of international and bilateral economic agreements with environmental components and environmental agreements with economic components; unilateral import bans or increased tariff rates on products that are deemed damaging to the global environment; conditioning market access for third state producers on environmental criteria;[23] performing sustainability impact assessments before the conclusion of international projects; engaging in horizontal partnerships with third state and non-state actors; establishing environmental benchmarks and best practices standards for governments and businesses; and other tools and techniques that will appear throughout this dissertation.[24] Though they differ with respect to their enforceability, their reach, their breadth, and their impact, all of these techniques share the basic form of environmental norm export: they seek to use EU economic policy in the service of altering environmental behavior by non-EU actors outside the borders of the EU.

Why single out these environmental norm export policies for analysis? This dissertation argues that these policies provide significant insight into the EU's behavior with respect to the international, and reveal something interesting about the way it conceives of its role as a governing agent in that sphere. As will be explained below, examining the EU's actions in this field of practice—which represents a key part of the EU's external trade policy regime—using insights from Foucauldian governmentality theory highlights important elements of how the EU and the subjects and objects of its governmental activities understand the roles of government and of the governed, the appropriate aims and bounds of political action, the mechanisms that can and will accomplish these aims, and the nature of the EU and other actors on the international plane. In doing so, the dissertation hopes to fill a void in the scholarly landscape: investigation into the political, sociological, and ideological roots that and tensions that structure EU law and practice. Section 2 provides an overview of this gap, and how the remainder of this dissertation will attempt to address it. Section 3 then concludes with an outline of the structure of the dissertation as a whole.

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[23] Many such measures would fall under the umbrella of 'non-product-related production and process methods-based measures' or 'npr-PPMs' in the world of WTO law.

[24] For more on the specific techniques that the EU uses in this area, *see infra* Chapter 4, Section 2.

2 The Scholarly Landscape and its Missing Pieces

There is a wealth of literature on specific examples of EU environmental norm export (though other authors refer to these practices by other terms[25]), from the perspective of law, international relations, environmental science, economics, and other disciplinary areas. Much of this work is either 'practical' or 'diagnostic' in nature, consisting of attempts to assess the effectiveness of the EU's activities (whether EU policies actually make a difference 'on the ground' in increasing environmental protection outside its borders),[26] to suggest improvements in the design of EU trade/environment policies,[27] or to identify the causal factors that lead the EU to prioritize environmental protection in its foreign policy.[28] From the legal perspective, the primary debates have revolved around whether or not the EU's environmental norm export policies are legal (as a matter of European[29] and international law) and whether they are legitimate (as a matter of the politics of international practice).

The question of the 'legality' of the EU's environmental norm export policies largely concerns three factors: the appropriate boundaries of sovereign authority, the doctrine of extraterritoriality, and the notion of consent. The principles of sovereign equality of states

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[25] Joanne Scott, for example, following Judith Resnik, has referred to this practice as the 'migration' of EU norms abroad. Joanne Scott, "Extraterritoriality and Territorial Extension in EU Law," 61 *American Journal of Comparative Law* 87 (2013). Gráinne de Búrca has referred more generally to the "governance mode of foreign policy." Gráinne de Búrca, "EU External Relations: The Governance Mode of Foreign Policy," in *The EU's Role in Global Governance: The Legal Dimension* (Bart van Vooren, Steven Blockmans, & Jan Wouters eds. 2013). Others refer to the EU's 'normative power', its 'civilian power', its 'soft power', its 'structural power' and many other terms. *See also supra* notes 15 & 18.

[26] *See, e.g.,* Wyn Grant, Duncan Matthews & Peter Newell, *The Effectiveness of European Union Environmental Policy* (2000); Joanne Caddy, "Implementation of EU Environmental Policy in Central European Applicant States: the Case of EIA," in *Implementing EU Environmental Policy: New Directions and Old Problems* (Christoph Knill & Andrea Lenschow eds. 2000); Roy H. Ginsberg, "Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap," 37(3) *Journal of Common Market Studies* 429 (1999).

[27] *See, e.g., Trade, Health and the Environment: The European Union Put to the Test* (Marjolein B.A. van Asselt, Michelle Everson, & Ellen Vos eds. 2014) (discussing ways to improve the EU's methodology for balancing trade and non-trade issues in situations of uncertainty); J. Timmons Roberts, Bradley C. Parks & Alexis A. Vasquez, "Who Ratifies Environmental Treaties and Why?" 4(3) *Global Environmental Politics* 22, 45 (2004) (arguing based on the findings of a large-n study of environmental treaty ratification that if the EU and other OECD nations want poor countries to participate in environmental regimes, they "must help poor countries diversify their export profiles, strengthen their domestic political institutions, and mobilize 'homegrown' civil society groups"); Andrew Jordan, Rüdiger K.W. Wurzel & Anthony R. Zito, " 'New' Instruments of Environmental Governance: Patterns and Pathways of Change," 12(1) *Environmental Politics* 1 (2003) (introducing a volume empirically examining the patterns of use of new environmental policy instruments).

[28] This has been the thrust of a number of international relations studies on the subject. *See, e.g.,* Kelemen, "Globalizing European Union Environmental Policy," *supra* note 18 (providing a 'political economic' explanation); Steven P. Recchia, "International Environmental Treaty Engagement in 19 Democracies," 30(4) *Policy Studies Journal* 470 (2002) (arguing that "the strongest causal forces underlying collaborative democratic state behavior are the citizenry's postmaterial orientations and executive-centered political institutions").

[29] *See, e.g.,* Gareth Davies, " 'Process and Production Method'-based Trade Restrictions in the EU," in *Cambridge Yearbook of European Legal Studies* 69 (Catherine Barnard ed. 2008); Laurens Ankersmit, *Globalization and the Internal Market: Process-Based Measures within the EU Legal Order* (2014) (unpublished dissertation, on file with author).

and non-interference in the internal affairs of other states govern the question of legality from the perspective of international law. If states are equal sovereign territories, as traditional international law posits, then every state has the right to decide for itself how to regulate within its borders, and may not interfere in the internal affairs of others.[30] The state is the only entity with the legal authority to create and enforce law for its own nationals in its own jurisdiction.[31] Coercive 'interference' in the domestic affairs of other states, or 'extraterritorial' regulation in which one state attempts to regulate another state or its citizens, is therefore not permitted (except in limited circumstances).[32] Sovereign states can, however, bind themselves by agreeing to follow a particular rule or defer to a particular international decision-maker. The legality of the rule is then ensured by state consent. The EU's environmental norm export policies are therefore 'legal' in international law terms insofar as they either 1) do not 'regulate' extraterritorially or 'interfere' unacceptably in the

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[30] Of course, it is also important to remember here that the notion of sovereignty has not applied equally to all communities at all times. Historically, the extent to which a nation or people was considered to be 'sovereign' was tied up with colonial notions of cultural, racial, and economic superiority. As a result, 'sovereign' European states were often more than willing to intervene in the affairs of more 'primitive' peoples in support of their own interests or their self-assigned 'civilizing' mission. For a detailed discussion of the way that international law was historically applied outside Europe, *see* Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* 98-178 (2001). *See also* Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," 40 *Harvard International Law Journal* 1, 6 (1999) (describing the ways in which "sovereignty was constituted and shaped through colonialism").

[31] Joseph Story provided a canonical summary of the rule in his 1834 *Commentaries on the Conflict of Laws*:

> [N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others. … [F]or it would be wholly incompatible with the quality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories. It would be equivalent to a declaration, that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules, which none were bound to obey. The absurd results of such a state of things need not be dwelt upon.

Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* 21 (1834). *See also* Case of S.S. "Lotus" (France v. Turkey), Judgment No. 9, Sept. 7, 1927, P.C.I.J. Reports 1928, Series A, No. 10, at pp. 18-19 (holding that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State"). For a critique of the shifting boundaries of the concept of sovereignty in international law, *see* Tanja E. Aalberts, *Constructing Sovereignty between Politics and Law* (2012); Wouter Werner, "Speech Act Theory and the Concept of Sovereignty; A Critique of the Descriptivistic and the Normativistic Fallacy," in 14 *Hague Yearbook of International Law* 73 (2001).

[32] Traditionally, it was understood that a state's prescriptive jurisdiction was limited to persons, property and acts within its territory, and in some instances the acts of its nationals abroad. Today the scope of extraterritorial jurisdiction has expanded somewhat to include things like the active and passive personality principles, the effects doctrine, protective principle, and the ever-contested universality principle. *See* United Nations, Report of the International Law Commission, 58th Sess. (2006), Annex 3, p.516, 522, *available at* http://legal.un.org/ilc/reports/2006/2006report.htm (last accessed 15 August 2014). As the ILC notes, "[t]he common element underlying the various principles for the extraterritorial exercise of jurisdiction by a State under international law is the valid interest of the State in asserting its jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned." *Id.* at 521.

domestic affairs of other states; 2) fall into one of the 'exceptions' to the doctrine of extraterritoriality; or 3) are consented to by third states. At this point, the legality question becomes an exercise in attempting to determine the existence of state consent (most easily done in the case of, for example, a bilateral treaty), to establish the extent of (or lack of) interference or regulatory effect outside the EU's sovereign territory, and to discover whether or not one of the principles of extraterritorial jurisdiction might be stretched to cover the case at hand. These issues have spawned an extensive literature on appropriate boundaries of state sovereignty and the legality of 'ethical', 'value-oriented', or 'values-driven' foreign policy.[33]

The second question that has been frequently addressed in legal scholarship, that of 'legitimacy', is somewhat more convoluted. However, at least within the area of EU environmental norm export, it too revolves around a fairly limited set of discussions regarding the motivations behind and the coerciveness of the EU's actions. A number of commentators recognize the theoretical legitimacy of taking unilateral (that is, non-consensual) action to protect the global environment, on the grounds that doing so might contribute to a universal good.[34] However, even those who accept such action in principle may challenge the EU's motives in a particular case, alleging that its environmental norm export policies are not 'really' about protecting the global environment, but instead are a front for economic protectionism or some other self-serving goal.[35] Similarly, commentators may accept the idea of EU environmental norm export in theory, but reject it in practice on the grounds that a particular law was badly designed, has unintended consequences, or otherwise fails to support the cause of 'sustainable global development'.

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[33] *See, e.g.,* Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (2008); André Nollkaemper, "Rethinking States' Rights to Promote Extra-Territorial Environmental Values," in *International Law with a Human Face* 175 (Friedl Weiss, Erik M.G. Denters, & Paul J.I.M. de Waart eds. 1998); Austen L. Parrish, "Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes," 85 *Boston University Law Review* 363 (2005); Scott, "Extraterritoriality," *supra* note 25; Ambassador Michael Froman, US Trade Representative, Remarks at the Center for American Progress, "A Values-Driven Trade Policy" (18 Feb. 2014), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P (last accessed 15 August 2014).

[34] *See, e.g.,* Daniel Bodansky, "What's So Bad About Unilateral Action to Protect the Environment?" 11(2) *European Journal of International Law* 339 (2000); Gregory Shaffer & Daniel Bodansky, "Transnationalism, Unilateralism and International Law," 1 *Transnational Environmental Law* 31 (2012).

[35] Daniel Kelemen, for example, argues that "Given the EU's commitment to high standards and the exposure of European firms to international competition, it is in the competitive interests of the EU to support international agreements that will pressure other states to adopt similarly costly regulations." Kelemen, "Globalizing European Union Environmental Policy," *supra* note 18, at 336. Others emphasize the role of EU trade policy in pursuing geopolitical interests, such as continuing relationships with the former colonies in the 1950s or stabilizing the European neighborhood through the conclusion of preferential trade agreements. *See, e.g.,* Agata Antkiewicz & Bessma Momani, "Pursuing Geopolitical Stability through Interregional Trade: the EU's Motives for Negotiating with the Gulf Cooperation Council (GCC)," Centre for International Governance Innovation Working Paper No. 31 (2007).

Introduction

On the other hand, some challenge the EU's environmental norm export activities in principle by claiming that they are coercive, and therefore per se illegitimate—in effect, that they regulate what and where the EU has no business regulating, regardless of the purity of its goals. This argument might sometimes go so far as to invoke claims that the EU is engaging in 'neo-imperial' or 'neo-colonial' behavior.[36] Or it might stop at the point of claiming that the EU's activities are undemocratic or lack 'input legitimacy'.[37]

Of course, in practice the international legality and legitimacy analyses are complicated by history, political reality, and the indeterminate meaning of concepts such as 'intervention'[38] and 'coercion'.[39] Historically speaking, the extent to which states and peoples were considered to have 'sovereignty' or 'protection from intervention' was tied up with colonial notions of cultural, racial, and economic superiority, such that these terms often did not

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[36] *See, e.g.*, Paul Driessen, *Eco-Imperialism: Green Power, Black Death* (2005); Carmen G. Gonzalez, "Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade," 78(4) *Denver University Law Review* 979 (2001); Deepak Lal, "Eco-Fundamentalism," 71(3) *International Affairs* 515 (1995). As a caveat, however, it must also be noted that certain Western interests have also latched onto the anti-colonial angle as a way to promote their own agendas. For example, the National Foreign Trade Council—a US-based group that advocates on behalf of its 300 member companies in favor of open markets—has released a number of reports highlighting the disadvantages of extraterritorial social and environmental legislation on developing countries. See, e.g., National Foreign Trade Council, *'Enlightened' Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precaution-Based Standards on Developing Countries* (2004).

[37] The concepts of 'input' and 'output' legitimacy were developed by Fritz Scharpf to differentiate the problems of democratic legitimacy in the EU context. Input legitimacy concerns the process of rule formation, and asks whether it meets various procedural criteria such as the representation of stakeholders, transparency, and accountability. Output legitimacy, by contrast, focuses on questions of effectiveness and acceptance of the rule after it has been created. Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999). For issues related to the legitimacy of international trade/environment law, *see e.g.* Bodansky, "What's so Bad About Unilateral Action to Protect the Environment?" *supra* note 34; Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law," 93 *American Journal of International Law* 596 (1999); Laurence R. Helfer, "Nonconsensual International Lawmaking," 2008 *University of Illinois Law Review* 71 (2008); Elisa Morgera, "Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action," in *The Legal Dimension of Global Governance: What Role for the EU?* 196 (Bart van Vooren, Steven Blockmans & Jan Wouters eds. 2012); Shaffer & Bodansky, *supra* note 34. Gareth Davies, "International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism," 13(11) *German Law Journal* 1203 (2012).

[38] Common understandings of the appropriate boundaries of state action have shifted over time. The Lomé I Convention, for example, did not include human rights or sustainable development conditions because both the ACP states and the Commission believed that this would interfere in the internal affairs of the Parties. *See* T. King, "Human Rights in the Development Policy of the EC: Towards a European World Order?" 28 *Netherlands Yearbook of International Law* 51, 54 (1997). As noted above, however, a change subsequently occurred, and Lomé IV became one of the first Conventions to include ethical conditionality clauses. *See supra* note 8.

[39] Indeed, it is often possible to redefine a measure as either an exercise of Country A's sovereignty or an infringement of Country B's sovereignty. A given measure can frequently be recast as 'outwardly-directed' or 'inwardly-directed', depending on the needs of the argument. For example, a measure prohibiting the import of tomatoes produced using child labor could be characterized as 'outwardly-directed' or 'extraterritorial' by emphasizing that its primary aim is the protection of children in foreign states. However, it could be characterized as 'internally-directed' by refiguring the regulation as aimed at protecting domestic consumers from the moral taint of purchasing the products of child labor. *See also* Steve Charnovitz, "The Moral Exception in Trade Policy," 38 *Virginia Journal of International Law* 689, 695 (1998) (characterizing these types of measures as 'outwardly-directed', but recognizing the arbitrariness of this determination).

apply far beyond the borders of the European states and those they chose to recognize.[40] The meanings of concepts such as sovereignty, non-intervention, coercion, and so on are not fixed, but have shifted, both with respect to their scope and their depth, in response to changing geopolitical considerations and power structures. This is not a radical claim—as far back as 1923, the Permanent Court of International Justice stated in the *Nationality Decrees* case that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."[41] Indeed, the territoriality and extraterritoriality, and interference and non-interference, are perhaps better viewed, as Hannah Buxbaum argues, as legal constructs, or "claims of authority, or resistance to authority, that are made by particular actors with particular substantive interests to promote."[42]

In short, many pages have been devoted to these debates about whether particular environmental norm export policies are effective and well designed, what their purposes might be, whether they are permitted by international law, and whether they are legitimate with respect to their design, aims, and outcomes. These debates about effectiveness, aims, legality, and legitimacy have produced important analyses of the design and impact of EU environmental norm export policies. They have helped legislators to craft more targeted and efficient regulatory mechanisms. They have assisted policy makers in better defining environmental and economic goals and assessed progress toward them. They have aided international relations scholars in predicting when states will sign on to multilateral agreements and when they will go it alone. And they have helped society to ask hard questions about democracy, colonialism, and coercion. All in all, these studies and their outcomes have undoubtedly been of great use to those seeking to understand, critique, justify, and/or reform the EU's policies in this area.

Ultimately, however, most scholarship regarding EU environmental norm export does not penetrate very far below the level of policy design and analysis. Its goals are generally limited to identifying the 'causes' and 'effects' of these measures, or 'problems' and 'solutions' from the perspective of law, politics, environmental science, or economics. What is missing,

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[40] For a detailed discussion of the way that international law has historically applied to non-European states, *see* Koskenniemi, *The Gentle Civilizer of Nations*, *supra* note 30, at 98-178. Sundhya Pahuja provides an excellent overview of the entanglement of sovereignty, development, and colonialism. *See* Sundhya Pahuja, *Decolonizing International Law: Development, Growth, and the Politics of Universality* (2013). *See also* Anghie, *supra* note 30, at 6 ("sovereignty was constituted and shaped through colonialism").

[41] Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco*, PCIJ (1923) Series B, No. 4, 1, 24. For an elaborate discussion of the evolution of the 'non-interference' 'domestic jurisdiction' principles, *see* Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 61 (1963).

[42] Hannah L. Buxbaum, "Territory, Territoriality and the Resolution of Jurisdictional Conflict," 57 *American Journal of Comparative Law* 631, 635 (2009).

however, are more sustained analyses of how these terms themselves came to be defined: why some causes and connections seem reasonable, and others do not; why some effects are important, and others are not; which systemic quirks are 'bugs' and which are 'features'; which 'solutions' are possible, and which are not; and how we decide (or fail to decide) between them. Because it takes these definitional practices for granted, traditional scholarship tends to obscure the political, sociological, and ideological roots and tensions that structure this area of EU knowledge and practice. As David Kennedy once wrote, debates like the ones described above regarding consent, motives, and extraterritoriality "protect[] the discourse from having to assert its own normative theory."[43]

The insight that political behavior is shaped by language and social practice is not a new one. Constructivism has been a mainstay of international relations theory since Nicholas Onuf introduced it to the field in 1989 (though its roots in social theory go back much further).[44] The constructivist paradigm has many variants—some more radical than others—but all of which share a concern for the socially constructed character of international society. To put the point simply, one might usefully understand the constitutive nature of language in terms of framing theory. The primary point of framing analysis is that the same set of facts, statements, or issues can be viewed from a variety of perspectives, and construed through a variety of different narratives. As such, the social or linguistic frames that are used to understand facts, statements or issues is of critical importance. The use of particular frames can have dramatic political and practical effects, as they suggest certain readings of cause and effect, and thus encourage or make visible certain political possibilities while others are discouraged or made invisible. Whether one views a swampy piece of land as a 'mosquito breeding ground', a 'wetland watershed', or as 'undeveloped land', in other words, will lead to different conclusions regarding its value, the uses to which it can and should be put, and the forces that will drive its preservation or alteration.

From this perspective, focusing critically on the way that a given area of legal or political practice is structured by linguistic and social frames is essential for understanding how individuals and institutions perceive the world, and thus behave the way they do. In Foucauldian terms, which this dissertation will take up in its substantive chapters, these frames are known as 'discourses': a concept that refers to groups of statements and practices

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[43] David Kennedy, *International Legal Structures* 126 (1986).

[44] Nicholas Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (1989). Though Onuf is credited with reintroducing the term in the international relations field, 'constructivism' has a history spanning more than 60 years, with a pedigree that runs from mathematics, through philosophy, developmental psychology, philosophy of science, sociology and semiotics, postmodernism and anthropology, cognitive psychology, and so on.

that provide ways of representing or talking about particular topics at particular historical moments.[45] Discourse, as Foucault points out, defines and produces forms of 'knowledge' about the world and things in it. It bounds the ways that topics can be meaningfully discussed and acted upon.[46] And it does so in a historically contingent way, producing forms of knowledge about the world that differ from one era to the next.

The forms of knowledge that discourse produces are also bound up with relations of power. In Foucauldian analysis, knowledge about the world structures social conduct and regulation in practice, and therefore has a direct and productive relationship with the exercise of power. And vice versa: power structures knowledge because it has a direct influence on which forms of knowledge are treated as acceptable and applicable, and when and where they should be deployed. The two thus have something of a circular relationship that flows through society in a constant flux. As such, Foucault began to speak about 'power/knowledge' as a single construct, and argued persuasively for the indispensability of studying the form and function of power/knowledge relationships, and the effects of various power/knowledge constructs on social order. In particular, Foucault was concerned with how certain forms of power/knowledge come to be represented as 'truth', and how those 'truths' (or 'regimes of truth', as he came to call them) about society can be deconstructed and challenged.[47]

The near-absence of critical analysis from the field of study of EU environmental norm export is thus not without consequences. Declining to interrogate taken-for-granted forms of knowledge about society, government, and individuals means accepting the limits they impose.[48] This should be particularly troublesome for those who desire to articulate some form of resistance to the status quo distribution of power, as well as to those who would like to direct the status quo toward particular aims. The behavior of the EU and other actors is structured not only by 'values and interests', or by the voices of legislators and citizens, but also by and through the forms of knowledge that produce these values and interests, indicate the means and ends of government, and induce subjects to manage themselves in particular ways. Without some attempt at understanding the way that these forms of knowledge

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[45] *See* Stuart Hall, "The West and the Rest: Discourse and Power," in *Formations of Modernity* 275, 318 (Stuart Hall & Bram Gieben eds. 1992) ("A discourse is a way of talking about or representing something. It produces knowledge that shapes perceptions and practice. It is part of the way in which power operates. Therefore, it has consequences for both those who employ it and those who are 'subjected' to it.").

[46] Stuart Hall, "The Work of Representation," in *Representation: Cultural Representations and Signifying Practices* 1, 44 (Stuart Hall ed. 1997).

[47] *See generally* Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon trans. ed. 1980).

[48] *See* Martti Koskenniemi, "The Politics of International Law—20 Years Later," 20(1) *European Journal of International Law* 7 (2009).

construct our understandings of ourselves, our governments, and our goals, the realm of perceived political opportunity will remain limited, bounded by walls of ideology.

This dissertation attempts to speak to this gap in the literature. In doing so, it does not aim to duplicate the above work, or to provide a comprehensive overview of the EU's environmental norm export policies. Neither does it take a normative position on the desirability of these policies, whether in general or with respect to their application in particular cases. Rather, it takes a different track, seeking to examine the EU's practice in this area from the perspective of its *governing logics*. Instead of identifying 'causes and effects' or 'problems and solutions', it seeks to trace the knowledge complexes and ideologies that make some diagnostics and explanations seem more relevant, available, and accessible than others, and that make certain social and political configurations appear 'problematic' while others appear 'normal'. Its primary concerns are not whether the EU's policies are well formed, effective, legitimate, or legal, but rather what these policies reveal about the narratives and forms of knowledge that construct the EU as an actor, characterize and categorize its relationships with individuals, companies, and governments inside and outside of its borders, and delimit the appropriate aims and bounds of governmental activity.

The dissertation thus hopes to contribute to the project of critical analysis in two separate, but related ways. First, it aims to perform a 're-mapping' of the field of EU environmental norm export using tools drawn from Foucauldian and post-Foucauldian studies of governmentality. Governmentality is, among other things, a critical approach to political research.[49] Chapter 2 will explain in detail Foucault's thinking on this subject, and the methodology that this dissertation will adopt. Briefly, however, 'governmentality' entails the study of what Foucault called the 'art of government': how power/knowledge directs the conduct of individuals in particular historical and political contexts. In other words, how what we assume to be 'true' about the way that world does and should work directs and limits the behavior of governments and individuals. Governmentality, in this sense, is a sort of ethos that guides ideas about what government is, how it works, and who its subjects are.

Studies of governmentality are concerned with uncovering the rationalities that support particular configurations of power: that is, the political logics or forms of knowledge that guide the actions of the governing and the governed, both consciously and unconsciously. The purpose of such a perspective is to open up analytical possibilities for understanding the way that power and knowledge guide individual and institutional behavior, and to provide

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[49] William Walters & Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* 5 (2005).

critical insight into political practice. In order to unearth these rationalities, a focus on governmentality pays careful attention to the discourse, mechanisms, and standards of behavior through which government occurs, and the related identities that it produces.[50] Using the analytical tools developed by Foucault and expanded and elaborated by contemporary international relations and political science scholars, the dissertation will explore the practice of EU environmental norm export *not* by examining whether it is effective, legal, or legitimate, but rather by tracing how it reflects and produces certain understandings of what or who the EU is; how it relates to its Member States and third countries; and what the EU can and should do, when, to whom, for whom, and how.[51]

Methodologically and substantively speaking, governmentality works well for examining processes such as EU environmental value export that fall across or between national borders. To begin with, it does not rely on the state as the sole locus of power and authority. Instead, it sees complex formations in which various actors and agencies pursue their objectives using a variety of technologies and knowledge regimes. Second, its broad and multilayered conception of power is able to incorporate constructivist insights regarding identity and normative authority and stresses the importance of truth and knowledge regimes in the practice of government.

Along with its usefulness for the study of international and transnational perspectives, however, governmentality retains an orientation toward specificity, practicality, and context. While it views governmental power as structured by shared rationalities and techniques, it is at the same time always local, provisional, multiple and contested. This approach entails a focus on concrete practices, and as such is well-suited to empirical studies of particular configurations of power. As Sending and Neumann write: "Studying global governance through the lens of 'governmentality' enables us to study how different governmental rationalities are defined by certain rules, practices and techniques, and how such rationalities of rule generate specific action-orientations and types of actors."[52]

It is this combination of specificity with theoretical generality, a concern with context and an empirical focus, and an interest the rationalities and processes that link subjects with

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[50] The governmentality approach thus falls under the umbrella of 'post-structuralist discourse analysis'. Along with other post-structuralist theories, it emphasizes that language is constitutive—that it does not merely reflect the world, but builds it. However, it also goes further than some strands of discourse analysis in that it pays additional attention to the material and technological aspects of the art of government.

[51] *See infra* Chapter 2, Section 2 for a detailed analysis of the reasons why the governmentality approach is appealing and useful from the perspective of studying environmental norm export policies.

[52] Ole Jacob Sending & Ivor B. Neumann, "Governance to Governmentality: Analysing NGOs, states, and power," 50 *International Studies Quarterly* 651, 668 (2006).

government, broadly conceived, that account for the appeal of governmentality to international law and international relations scholars. And these traits are also what make the governmentality framework an excellent vehicle for analyzing the regime of practice that this thesis refers to as EU environmental norm export.

Second, the dissertation will elaborate some of the insights that it gains from this remapping exercise, arguing that looking at the EU through the governmentality lens allows a reassessment of its patterns and possibilities for political action in this field. In particular, and as will be examined in Chapters 3, 4, and 5, it will argue that the EU's policy-making in this area is guided simultaneously by two concurrent operating logics: a rights rationality, and a market rationality.[53] Briefly, the 'rights rationality' conceives of society as made up of citizens bearing rights and obligations, and government as the business of balancing these rights against those of other actors and creating an environment in which they can be fully realized. 'Market rationality', by contrast, conceives of society as made up of stakeholders who act in pursuit of their interests and assume responsibility for their behavior, and government as the business of efficiently managing the social and economic environment such that these individuals can pursue their interests securely and effectively.[54]

Both of these rationalities are complex, and contain within them a multiplicity of different political positions and theoretical orientations. Neither is necessarily 'better' or 'worse' from the perspective of particular political outcomes. Substantively, they are quite different, ascribing different purposes to government action, different motivations to individual behavior, and different tools to accomplish governmental goals. These differences structure the field of political possibility through the production of framing 'truths' about how the world works. As will be discussed in Chapters 3, 4, and 5, the knowledge that these rationalities produce and reflect has concrete effects, prompting governments to use different sets of techniques to interact with the world and the governed,[55] and triggers the formation of different identities (what Foucault calls 'subjectivities') on the part of both the EU and those with whom it interacts.[56]

These two broad rationalities of 'market' and 'rights' and the technologies and subjectivities with which they are associated exist alongside one another and interact in overlapping and complex ways. However, their co-existence is inherently uneasy or unstable because they stem

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[53] *See infra* Chapter 3.

[54] The content of and differences between these positions will be described in great detail *infra* Chapters 2, 3, 4, and 5.

[55] *See infra* Chapter 4.

[56] *See infra* Chapter 5.

from fundamentally different understandings of what government is and what it does, different forms of knowledge about the individual and society, and different impressions of what mechanisms are useful for governing that society.

This instability and multiplicity is extremely important from a practical perspective. Indeed, this dissertation argues that it is fundamentally politically productive because it creates opportunities for strategic action and resistance, even as the bounds of market and rights rationality also limit the perceived realm of political possibility. This instability or multiplicity has particularly interesting effects in the context of EU environmental norm export. As will be explored in Chapters 3, 4 and 5, it permits polyvocality, allowing the EU to simultaneously speak with both rights and market voices and act using both rights and market tools as context demands. This polyvocality is politically valuable, as it allows the EU to jump tactically between logical structures, eliding gaps and responding to challenges by switching back and forth between market and rights arguments.

This multiplicity and polyvocality of EU environmental norm export also structures political resistance, as it provides ready-made discourses for opponents to inhabit. It provides space for strategic political action and resistance not just on the part of the EU, but also on the part of those the EU attempts to govern. Chapter 5 concludes its discussion by briefly exploring the ways in which contestation and resistance against the EU's governmental constructions remain possible within this governmentality framework.

The dissertation will provide evidence for these claims by examining the operation of the rationalities, technologies, and subjectivities of EU governmentality in the context of concrete examples of environmental norm export policies. In particular, it selects three representative examples from recent practice: the EU's attempt to establish a greenhouse gas emissions trading scheme for all air transport operators doing business in Europe; the inclusion of an environmental title in the EU's free trade agreement with Colombia and Peru; and the EU's decision to impose a unilateral ban on trade in seals and seal products. Each of these three examples is an instance of the EU's trade/environment evangelism: its attempts to use its economic policy to do environmental work outside its borders. In each case, it is possible to see how the uneasy coexistence of the logics of market and rights is politically productive, providing space for polyvocality, strategy, contestation, and resistance.

The critical idea is that lying behind the EU's practices of environmental norm export are a series of normative presuppositions and knowledge/power constructs that guide and limit the behavior of the EU and other actors. The EU's activities are important not just from the perspective of whether or not they 'do something' about environmental and trade issues or

for state power, or whether they are 'right' or 'wrong' in a legal or political sense, but also because they are manifestations of deeply entrenched narratives about the EU's position vis-à-vis states, individuals, and other actors both inside its borders and in the wider world. Examining EU environmental norm export, that is, can provide insight into the epistemological and ontological frameworks that drive behavior in this contemporary political context. The objective of this dissertation is to contribute to the process of unearthing the 'truths' that guide EU action, and to suggest some of the ways in which this uncovering might be politically productive both for the EU and for those with whom it interacts.

3 A Brief Note on Methodology

This dissertation combines elements of both legal and political research. It therefore draws on methodological approaches from both of these fields. The dissertation makes use of standard legal research methods (generally speaking, literature and case law review), and as such makes use of a wide variety of scholarly articles and legal texts as the basis for its conclusions. In addition, however, it makes use of techniques drawn from the field of Foucauldian scholarship and critical discourse analysis.

The Foucauldian 'method' is fundamentally focused on uncovering the discourses, truth claims, material facts, and social norms that shape our understandings of what is reasonable, rational, normal, and real. Foucault himself was quite eclectic in his process (genealogy, archeology, etc.), seeking out data and theories as necessary to construct his arguments. His point was never to discover whether a particular regime is 'false' or 'backward' or 'good' or 'correct', but to identify and problematize the conditions and beliefs that allow particular forms of 'knowledge' to emerge and persist. Similarly, this dissertation is interested not in making normative claims about whether the EU 'should' or 'should not' engage in environmental norm export, but rather investigates how different types of 'knowledge' about the role and limits of government, the appropriate instruments for governmental action, and the drivers of human and institutional behavior structure the EU's activities.

In order to conduct this examination, this dissertation turns to historical as well as contemporary EU publications and scholarship. In examining these sources, it draws on principles of critical discourse analysis in order to trace the forms of knowledge that underlie text and behavior. Critical discourse analysis is not a single research approach, but rather an umbrella term for a variety of methods that share a similar perspective or strategy for studying discourse and text. Generally speaking, these methods share three indispensable concepts:

power, history, and ideology.[57] The focus in such analyses is on theorizing and describing not only the text itself, but also the social process and structures within which individuals create meaning in their interaction with the text. In the words of Ruth Wodak and Michael Meyer:

> In [critical discourse analysis] texts are seen as sites where discursive differences are negotiated; they are governed by differences in power which are themselves in part encoded in and determined by discourse and genre. Therefore texts are often sites of struggle in that they show traces of differing discourses and ideologies contending and struggling for dominance. A defining feature of [critical discourse analysis] is its concern with power as a central condition in social life, and its efforts to develop a theory of language which incorporates this as a major premise. Not only the notion of struggles for power and control, but also the intertextuality and recontextualization of competing discourses are closely examined.[58]

This approach seems particularly well-suited to the application of Foucauldian governmentality analysis in the legal field. Norman Fairclough, in particular, has made explicit the linkages between Foucualt's style of discourse analysis and critical discourse analysis.[59] Though there remain some points of divergence between the two styles (for example, as Fairclough points out, Foucault does not spend time analyzing real texts, but rather describes changes in social structures), they share similar preoccupations. In particular in the realm of law, where textual analysis is extremely important, supplementing Foucault's analyses of social practices with a critical focus on the text and the creation of meaning in relation to it seems immensely useful.

As noted above, the governmentality approach studies these rationalities of government by looking to the discourse and behaviors through which individuals express legal and political problems and aspirations. Governmentality studies are concerned with "the discursive field within which [governmental] problems, sites and forms of visibility are delineated and accorded significance."[60] Critical discourse analysis is particularly useful in this sense for

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[57] Ruth Wodak & Michael Meyer, *Methods of Critical Discourse Analysis* 2-3 (2001). Note that while Foucault himself declined to use the term 'ideology' to describe power/knowledge complexes, he did so out of a disagreement with the Marxist use of the term in the sense of 'false ideology'. The critical discourse analysis understanding of this term is generally speaking used in a sense that is much more akin to Foucault's notion of systems of knowledge than to Marxist doctrine.

[58] *Id.* at 11.

[59] Norman Fairclough, *Discourse and Social Change* 37 (1993).

[60] Rose & Miller, "Political Power Beyond the State," *supra* note 110, at 176.

examining both the symbolic and material output of these rationalities: texts, institutions, legal regimes, social relations, technologies, and so on.

In general, this dissertation will use these methods to examine a range of textual evidence from the legal and political world relating to EU environmental norm export policy. It draws on case law and legal submissions from the European Court of Justice (ECJ), the World Trade Organization (WTO) Dispute Settlement Body, and other courts; legislative and positioning documents from European political bodies (the Council, Commission, Parliament, and various sub-organs), EU Member States, international organizations, and third state governments; news articles regarding European policy decisions; and scholarship regarding EU history, contemporary EU practice, and legal and political analyses of EU behavior.

In this way, the dissertation hopes to construct a 'history of the present' that will help to reveal the forms of truth that structure relations of power and guide behavior with respect to EU environmental norm export.

4 Outline of the Dissertation

In order to perform the mapping exercise and discussion of consequences described above, the remainder of this dissertation will proceed as follows. First, Chapter 2 will explain and develop the theoretical framework of the dissertation. It will begin with an overview of Foucault's work, defining the terms and concepts that will structure subsequent chapters. In particular, it will provide a detailed account of governmentality and 'the international', tracing the historical progression of the art of government with respect to 'the global' and responding to some contemporary critiques of 'global governmentality' from the realm of international relations theory. The chapter concludes by explaining how Foucault's work and that of contemporary scholars will be used in the remainder of the dissertation, identifying the three governmentality 'themes' that will structure the discussion in Chapters 3, 4 and 5 (rationalities of government, technologies of government, and subjectivity) and the relationships among them.

Chapter 3 will then begin the mapping and empirical exercises that make up the heart of this dissertation by identifying and describing the two broad categories of governmental rationality that guide EU environmental norm export: rights rationality and market rationality. In order to provide additional insight into the complexity and multiplicity of these rationalities, Chapter 3 further identifies four 'ideal-typical' variants that exist within

these mentalities of government: *free market* market rationality, *human capital* market rationality, *sovereigntist* rights rationality, and *cosmopolitan* rights rationality. These ideal-typical variants have different orientations with respect to the appropriate balance between freedom and security, and their orientation toward the international, among other things. However, each pair of ideal-typical variants shares a basic understanding of the way that society operates, how individuals behave, and what the object or purpose of government should be. The chapter goes on to demonstrate how market and rights rationalities and their ideal-typical variants coexist *simultaneously* in EU political life, appearing in multiple, overlapping ways within the practice of EU environmental norm export. It then provides an extensive example of how these rationalities function in practice, taking as its illustrative case the EU's imposition of an emissions trading scheme (ETS) for airlines in 2011. Using this case study, it demonstrates how market and rights rationalities structure the arguments in the debates surrounding the ETS, but nevertheless offer enough flexibility to support multiple and mutually exclusive concrete policy outcomes, both from within and from outside their particular logical structures.

Chapter 4 will then expand the analysis, arguing that the presence of these rationalities is nevertheless not neutral, but has important effects in terms of the instruments or technologies that are used to govern. To begin with, it will argue that the rationalities of government described in Chapter 3 are associated with particular 'technologies of government'. Rights technologies are centralized, politicized, and formalized, and involve the use of instruments such as surveillance, policing, international law, and diplomacy: the techniques of 'government'. Market technologies, by contrast, are de-centered, de-politicized, and de-formalized, and involve technologies of agency and performance, non-state actors, and personal responsibility: the techniques of 'governance'. These technologies represent the concrete articulation or material dimension of governmentality, and both produce and are produced by the rationalities with which they are associated. As with market and rights rationalities, this chapter will demonstrate that market and rights technologies exist alongside one another, interacting in complex and overlapping ways. In order to do so, it will provide an overview of the EU's trade and environment 'toolbox'—the tools that it uses to export its environmental norms abroad. It will then turn to the chapter's case study, discussing the operation of government and governance techniques in the context of the EU—Colombia Peru Free Trade Agreement (FTA). Using this example, it demonstrates how the unstable coexistence of these technologies is politically useful, as it provides room for strategic governmental action through the instrumentalization of the distinction between 'government' and 'governance' techniques.

Chapter 5 then goes on to argue that a second way in which the presence of rights and market rationalities is non-neutral is that these mentalities of government entail the production of corresponding subjectivities (of both the governed and the governing). The chapter begins by arguing that the rights and market rationalities described in Chapter 3 and their associated technologies described in Chapter 4 combine to produce particular identities, which the dissertation terms the *citizen* and the *stakeholder*, respectively. As with the rationalities and technologies of government, these subjectivities exist alongside one another, interacting in complex and overlapping ways in the context of EU environmental norm export. In particular, Chapter 5 argues that these subjectivities exhibit three important characteristics: 1) they are multiple and multi-level; 2) they operate by producing 'others'; and 3) these 'othering' processes are relational, involving attempts to impose subjectivity, as well as contestation and resistance. The chapter then goes on to examine the operation of the subjectivities in practice, taking as its illustrative example the EU ban on the import and trade in seals and seal products and the associated dispute before the World Trade Organization (WTO). Along the way, it pays particular attention to the complexity and polyvocality of EU subjectivity, and the ways in which the coexistence of multiple identities permits certain political strategies, while closing off other avenues of action. In addition, it asserts that because subjectivities are not fixed, they are open to contestation. The identities that the EU assumes and assigns can always be appropriated, redirected, reshaped, contested and resisted in processes of tactical reversal.

Finally, Chapter 6 concludes the dissertation by revisiting the arguments made in Chapters 2 – 5. In doing so, it sets out the analyses and conclusions of the previous chapters as together providing an answer to the dissertation's primary research question: What does the practice of EU environmental norm export tell us about the way the EU perceives the role and limits of government, the means and ends of politics, and the drivers of human and institutional behavior?

Chapter 2

SETTING THE STAGE:
Foucault, Governmentality, and EU Environmental Norm Export

1 Introduction

This chapter explains and develops the theoretical and methodological framework of the dissertation. As described in Chapter 1, the dissertation examines the practice of European environmental norm export 'sideways' by exploring how it reflects and produces certain understandings of what the EU is, how it relates to its Member States and third countries, and what the EU can and should do, when, to whom, for whom, and how. It takes as its starting point Foucault's work on governmentality: his analysis of the state and power relations in modern society. By looking at EU environmental norm export from a governmentality perspective, the dissertation attempts to get beyond traditional understandings of power and the relationship between power and law, which focus attention on international legal arguments about consent and coercion, extraterritoriality and unilateralism, and legitimacy and protectionism.[1] Instead, it seeks to draw a new map of this legal terrain using tools developed by Foucault to examine the normative and ideological underpinnings of contemporary EU environmental norm export policy.

The purpose of Chapter 2 is to provide an in-depth explanation of the Foucauldian vocabulary and tools that are used throughout the rest of the dissertation, and subsequently to explain the methodology that it will employ. In order to give adequate background for a thorough understanding of these concepts, Section 2 will present Foucault's work in some detail, describing the historical and philosophical arguments from which his ideas developed. Before diving into this extended explanation, it is perhaps useful to highlight the most important terms that will be explored below. In the simplest language, these are:

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[1] *See supra* Chapter 1.

- *Governmentality*[2]: the 'art of government' or 'conduct of conduct'; how, when, and where power directs the behavior of individuals and other actors;
- *Rationalities of government*: the logics or truth regimes according to which government happens;
- *Technologies of government*: the means by which government happens;
- *Subjectivity*: the subject-positions or identities (of both the governed and the governing) that certain forms of government create and by which they are sustained.

To restate the topic of this dissertation in Foucauldian terms: this dissertation will read European environmental norm export as a regime of practice that entails particular rationalities of government, is associated with particular technologies of government, and that is intimately bound up with the production of subjectivity (of the EU, individuals, and other actors) at the international level. The idea here is not to develop a novel account of the global liberal order as a whole, but to apply Foucauldian insights regarding the relationship between rationalities of government, technologies of government, and subject formation to the discourses and practices of EU environmental norm export.

Two important caveats apply at this point: one regarding the nature of Foucault's investigations, and the other regarding how this dissertation uses (and occasionally abuses) Foucault. First, it is important to keep in mind here that Foucault's historical exegesis on governmentality (described at length below in Section 2) is the result not of an attempt to conduct a traditional historical analysis, but rather of an exploration of the sets of power relations and discursive and nondiscursive practices that characterized European—and in particular French—government over the course of the last several centuries. Foucault himself preferred to refer to his works not as 'histories', but as 'archaeologies', 'genealogies', and 'problematizations'.[3] As such, the reader should understand his discussion more as an essay on the contemporary 'art of governing' rather than as a description of historical 'facts'.[4]

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[2] As explained below, this dissertation uses the broad definition of governmentality to refer generally to the art of government, rather than the narrow definition that refers specifically to the art of liberal or neoliberal government. It will refer to the latter as liberal governmentality or neoliberal governmentality for the sake of clarity. *See infra* Section 2.1.

[3] *See* Thomas Flynn, "Foucault's Mapping of History," in *The Cambridge Companion to Foucault* 29, 43 (Gary Gutting ed. 2005) (describing how Foucault's focus on the history of "problems" rather than "periods" "frees [him] from the obligation to exhaustive research of the historical sources" because "he is warranted to consider only those events that are relevant to the problem at issue, its transformation and displacement, the strategies it exhibits, and the truth games it involves").

[4] Indeed, professional historians working in the fields Foucault describes have frequently taken issue with his descriptions of history. *See, e.g.,* Gary Gutting, *Michel Foucault's Archaeology of Scientific Reason* 175 (1989) (describing critiques of Foucault's *The Order of Things* by historians who "see it as a free-floating prose fantasy rather than a serious work of historical scholarship").

Second, while this dissertation adopts much of the terminology and concepts Foucault developed throughout his work, in particular in his later writings, it is not concerned with developing or critiquing Foucault's ideas *per se*. Instead, it applies a "toolbox" method, using Foucault's ideas as a jumping-off point for analyzing a particular historically and temporally contingent regime of practice. As Foucault himself wrote in a much-quoted passage:

> All my books ... are little toolboxes, if you will. If people are willing to open them and make use of such and such a sentence or idea, of one analysis or another, as they would a screwdriver or a monkey wrench, in order to short circuit or disqualify systems of power, including even possibly the ones my books come out of, well, all the better.[5]

The impact of this approach will become clear both in this chapter as well as throughout the remainder of the dissertation, as Foucault's work is continually supplemented by ideas from other scholars in areas such as international relations (both governmentality studies and social constructivist work), critical geography, and sociology and culture studies. These contemporary works have developed and applied the governmentality concept in a much broader sense than its original focus on the management of early modern European populations. Instead, they have developed what Kim McKee refers to as a "Post-Foucauldian governmentality" that operates as a method for examining the 'how' of governing, the discursive fields in which power is rationalized, and the interventionist practices of governmental actors.[6]

Jumping into the heart of the chapter, Section 2 begins with an overview of Foucault's work, explaining the concepts that will be used throughout the dissertation. Section 2.1 first gives an introduction to the concept of governmentality and its relationship to law. Section 2.2 then continues by providing a basic overview of Foucault's ideas regarding the transition from *raison d'État* to liberalism to neoliberalism. The section focuses, in particular, on Foucault's exploration of the international, the historical progression of the art of government with respect to the global, and the attitudes of *raison d'État*, liberal, and neoliberal governmentality toward the international realm. This section is quite elaborate in its description, as the application of Foucauldian governmentality theory to the international will serve as the primary theoretical foundation for the remainder of this dissertation. Section

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[5] Michel Foucault, "Des supplices aux cellules," *Le Monde*, 21 Feb. 1975, quoted in D. Eribon, *Michel Foucault* 237 (B. Wing trans. 1991).

[6] Kim McKee, "Post-Foucauldian Governmentality: What Does it Offer Critical Social Policy Analysis?" 29(3) *Critical Social Policy* 465 (2009).

2.3 then addresses some criticisms of Foucault's approach to the international (in particular the argument that there is no truly 'global governmentality' and the critique of Foucault's Eurocentrism), responding to these challenges as they apply in the context of analyzing EU environmental norm export.

Section 3 then develops the conceptual framework that will be used in the remainder of the dissertation. It begins by identifying the three governmentality 'themes' that will structure the discussion in Chapters 3, 4 and 5: rationalities of government, technologies of government, and subjectivities. Sections 3.2, 3.3, and 3.4 explain each of these themes in turn, focusing in particular on the relationships among them and the ways in which Foucault's key concepts structure the discussion. It also links each theme to the sets of practices that will be discussed in subsequent chapters, and briefly explains the appeal of governmentality for moving beyond old debates in these fields.

2 Governmentality

2.1 What is Governmentality?

Since the 1960s, Michel Foucault's work has had an extensive impact on scholarship in the social sciences and humanities. His analyses of discipline, *dispositif*, archeologies, power, knowledge, and subjectivity (among many other themes) have provided scholars and activists with an extraordinary set of resources for thinking and strategizing.[7] Because of the relative inattention of his major studies to the subjects of law and the international, however, for several decades his work had a somewhat more limited impact on the fields of law and international relations.[8]

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[7] The number of publications of and about Foucault's work is quite large. This chapter does not provide an overview of the entire corpus of his thought, but rather focuses on those writings most directly related to the theorization of state power in the modern age. As such, it will draw most directly on the following of his works: Michel Foucault, *The Order of Things* (1970); Michel Foucault, *Discipline and Punish: the Birth of the Prison* (Alan Sheridan trans. 1977); Michel Foucault, *The History of Sexuality Vol. 1: The Will to Knowledge* (Robert Hurley trans. 1978); Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (Colin Gordon trans. ed. 1980); Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975-1976* (David Macey trans. 2003); Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-1978* (Graham Burchell trans. 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-1979* (Graham Burchell trans. 2008); Michel Foucault, "The Subject and Power," 8(4) *Critical Inquiry* 777 (1982).

[8] Ben Golder, for example, notes that though critical scholars have found Foucault's methodology useful for their work, another vein of scholarship concluded that Foucault either "misunderstood modern law, that he was not interested in theorizing law or legal institutions, that he was in fact hostile to law or legal theory, or that he actively excluded a consideration of law from his wider project of analyzing power in modern society." Ben Golder, "Foucault and the Incompletion of Law," 21 *Leiden Journal of International Law* 747, 749 (2008).

In recent years, though, this has begun to change. Especially since the publication in the late 2000s in English of Foucault's lectures from the late 1970s and early 1980s at the Collège de France, lawyers and international studies scholars have uncovered a treasure trove of material relating to the idea of governmentality. Due to his death in 1984, Foucault was never able to develop his work on governmentality into a major publication. However, these lectures provide extensive insights regarding the rationalities and technologies of government, and the role of law in relation to power. As such, an ever-growing number of scholars have begun to study world politics and international legal arrangements from a governmentality perspective.[9]

The theoretical framework developed in this chapter will rely primarily on Foucault's later writings on governmentality, in particular his ideas regarding governmentality and the international. The first question to be asked, therefore, is: what is governmentality?

Governmentality, for Foucault, is a sort of ethos that guides ideas about what government is, how it works, and who its subjects are. It is "the conduct of conduct": that is, the way in which individuals and groups are guided to think and behave in certain ways. Foucault explains the use of "conduct" as playing upon the various meanings of the word:

> [T]he word "conduct" refers to two things. Conduct is the activity of conducting (*conduire*), of conduction (*la conduction*) if you like, but it is equally the way in which one conducts oneself (*se conduit*), lets oneself be conducted (*se laisse conduire*), is conducted (*est conduit*), and finally, in which one behaves (*se comporter*) as an effect of a form of conduct (*une conduite*) as the action of conducting or of conduction (*conduction*).[10]

It is not limited to the activity of the state, nor is it limited to the workings of law, the police, or any other agency that we normally associate with the idea of governing. Instead, in the broadest sense, 'government' is any purposeful attempt to guide the behavior of the governed according to particular ideals and for particular purposes. As Mitchell Dean famously defined it:

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[9] *See, e.g., Global Governmentality: Governing International Spaces* (Wendy Larner & William Walters eds 2004); *Globalization Under Construction: Governmentality, Law and Identity* (Richard Warren Perry & Bill Maurer eds. 2003); Michael Dillon & Julian Reid, *The Liberal Way of War: The Martial Face of Global Biopolitics* (2007); Iver B. Neumann & Ole Jacob Sending, *Governing the Global Polity: Practice, Mentality, Rationality* (2010); Julian Reid, *The Biopolitics of the War on Terror: Life Struggles, Liberal Modernity, and the Defence of Logistical Societies* (2006); William Walters & Jens Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (2005); Tanja Aalberts et al., Special Issue, "Symposium on Foucault," 25(3) *Leiden Journal of International Law* 603-682 (2012).

[10] Foucault, *Security, Territory, Population*, *supra* note 7, at 193.

> Governmentality is any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests and beliefs of various actors, for definite but shifting ends and with a diverse set of relatively unpredictable consequences, effects and outcomes.[11]

This is not to imply that the state drops out of focus—indeed, governmentality retains a focus on the state as a privileged point of consolidation, strategy, and codification of the multitude of power relations making up a particular social space.[12] As Foucault describes the complex field of institutions that contribute to government:

> The form and the specific situations of the government of men by one another in a given society are multiple: they are superimposed, they cross, impose their own limits, sometimes cancel each other out, sometimes reinforce one another. It is certain that in contemporary societies the state is not simply one of the forms or specific situations of the exercise of power—even if it is the most important—but that in a certain way all other forms of power relation must refer to it. But this is not because they are derived from it; it is rather because power relations have come more and more under state control (although the state control has not taken the same form in pedagogical, judicial, economic, or family systems). In referring here to the restricted sense of the word "government," one could say that power relations have ben progressively governmentalized, that is to say, elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions.[13]

In short, from a governmentality perspective, the state is just one form that government takes in our modern system of social arrangements. Though it is a particularly important form, it is far from the only one existing in the vast field of calculations and interventions that make up the web of governmentality.

Governmentality is the government of human behavior. In Foucault's conception, it is 'rational' in the sense that it follows a particular organizing logic. It is diffuse because it

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[11] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 18 (2d ed. 2010).

[12] *See* Bob Jessop, "Constituting Another Foucault Effect: Foucault on States and Statecraft," in *Governmentality: Current Issues and Future Challenges* 56 (Ulrich Bröckling, Susanne Krasmann & Thomas Lemke eds. 2011).

[13] Foucault, "The Subject and Power," *supra* note 7, at 793.

operates at multiple levels and through multiple pathways in society. It is also 'moral', in the sense that it induces individuals to govern themselves according to its organizing logic. And because it works not just through coercion but also through self-government, it relies on the freedom of the governed to act and to choose.[14]

Governmentality as a conceptual framework examines the mechanisms and processes by which different governmental objectives are formed and pursued in order to control particular aspects of social reality. It is "understood in the broad sense of techniques and procedures for directing human behavior. Government of children, government of souls and consciences, government of a household, of a state, or of oneself."[15] In short, it is the way government happens.

Foucault used the term 'governmentality' in at least two senses: one broad, and one narrow. The broad definition of governmentality is the study of the 'art of government': how particular rationalities of government are pursued through particular techniques. It was the heading under which Foucault studied the history of government from the period of Ancient Greece through the emergence of neoliberalism in the 20th century. Various epochs throughout history have been characterized by different governmentalities—that is, different ideas about what government is for, about how to attain its designated ends, and about what kinds of governments and subjects are desirable.

Foucault's narrow definition of governmentality, by contrast, is as the particular form of government pursued in liberal and neoliberal societies. As will be explained in detail below, these forms of government have as their defining characteristics the targeting of the population as their proper object, and the emergence of political economy as their governing rationale.

This dissertation will use the term 'governmentality' in the broad sense, as referring to the combination of a particular rationale of government with particular techniques of government to produce particular subjectivities and a set of governmental effects. It will refer to the specifically liberal or neoliberal art of government described by Foucault as either 'liberal governmentality' or 'neoliberal governmentality', depending on the circumstances.

As we shall see, the idea of governmentality is enormously rich, entailing the study of the state, subjectivities, the production of truth, and mechanisms of power as historically

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[14] Dean, *Governmentality*, *supra* note 11, at 19-24.

[15] Michel Foucault, *Ethics: Subjectivity and Truth. Essential Works of Michel Foucault, 1954-1984*, vol. I, 84 (Paul Rabinow ed. 1997).

contingent products of shifting governmental logics. As such, it provides a particularly fruitful entry point for the study of social behavior, both of individuals and groups, at multiple levels.

One final question may occur to readers: where is the law in all of this talk of governmentality? Foucault himself did not devote a great deal of time or energy to discussing the law as such, though it does appear from time to time in his texts.[16] Indeed, he was careful to devote no special attention to law as being of any more importance to power relations than other forms of social and political activity. Nevertheless, Foucault's analytic devices and methods of interpretation are singularly useful for studying the effects of legal regimes.

The remainder of this dissertation will continually make reference to legal tools and legal argumentation. The law is certainly not the only means or mechanism by which governmentality functions. But it is an important one. Law is more than just the coercive command of the sovereign. As Mitchell Dean writes: "Law now needs no longer to be regarded as the archaic survival of sovereignty and its juridical and political institutions, and discipline no longer as the pre-eminent modern form of power."[17] Law is a discourse that speaks rationalities and produces subjectivities. It is a technique through which discursive distinctions are made, through which knowledge is crystallized, and through which government is inscribed on populations and individuals. It is a language in which government speaks.

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[16] A number of scholars have dealt in detail with this question of locating the law in Foucualdian theory. *See, e.g., Rethinking Law, Society and Governance: Foucault's Bequest* (Gary Wickham & George Pavlich eds. 2001); *Re-reading Foucault: On Law, Power and Rights* (Ben Golder ed. 2012); Ben Golder & Peter Fitzpatrick, *Foucault's Law* (2009); Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994); Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault," 18 *Oxford Journal of Legal Studies* 75 (1998). Within this literature, there exists a debate regarding the extent to which Foucault fails to take proper account of law's role in modernity (the 'expulsion thesis'), or 'misunderstands' law by equating it with coercive rather than productive forms of power. As Colin Gordon succinctly sums up the issue:

> A discussion of Foucault and law is almost routinely obliged, very much in the same way as a discussion of Foucault and gender, Foucault and geography or Foucault and post-colonial studies, to begin by acknowledging a widely held opinion that his work can be criticized for saying too little about law, or for belittling and disparaging the historical importance of law, its function in the constitution of modernity, and its constitutive and normative presence in social reality.

Colin Gordon, "Expelled Questions: Foucault, the Left and the Law," in *Re-reading Foucault: On Law, Power and Rights* 13, 13 (Ben Golder ed. 2012). While this author is skeptical with respect to these challenges, it is not necessary for this dissertation to take a position in this respect. Whether or not Foucault himself possessed a sophisticated understanding of law, it is certainly both possible and valuable to adopt the tools he developed as a method for understanding legal processes.

[17] Dean, *Governmentality, supra* note 11, at 36.

Law is one among a set of tools through which government acts and thinks. It is composed of regulations, standards, rules, and norms that seek to influence thought and behavior by means of introducing normalizing practices. Law is an instrument of governmentality. As Foucault describes:

> Undoubtedly, liberalism does not derive from juridical thought any more than it does from an economic analysis. It is not born from the idea of a political society founded on a contractual bond. Rather, in the search for a liberal technology of government, it emerged that the juridical form was a far more effective instrument of regulation than the wisdom or moderation of governors. Regulation has not been sought in the 'law' because of the supposedly natural legalism of liberalism, but because the law defines forms of general intervention excluding particular, individual, or exceptional measures, and because participation of the governed in the drawing up of the law in a parliamentary system is the most effective system of governmental economy. The *État de droit*, the *Rechtsstaat*, the *Rule of law*, and the organization of a 'truly representative' parliamentary system were therefore closely bound up with liberalism throughout the early nineteenth century, but just as political economy, employed first of all as a criterion of excessive governmentality, was not liberal either by virtue or nature, and even quickly led to anti-liberal attitudes (such as nineteenth century *Nationalökonomie* or twentieth century economic planning), so too democracy and Rule of law have not necessarily been liberal, nor has liberalism been necessarily democratic or bound to the forms of law.[18]

Law facilitates large-scale administration. It provides a general framework through which government can intervene in a quasi-neutral way to set the rules of the game for economic operations. It permits the governed, through parliamentary forms, to participate in their own government. It acts as a "coordinating point" for government. And it provides "instruments of review and mechanisms of accountability of government."[19]

The concern, from a governmentality perspective, is how law operates in particular regimes of practice; the forms of subject it constructs and by which it is constructed; the technologies it

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[18] Foucault, *Birth of Biopolitics*, *supra* note 7, at 321.

[19] Dean, *Governmentality*, *supra* note 11, at 145.

works with, through, and as; and its role in specific governmental programs.[20] And it is precisely these questions that this dissertation seeks to explore.

Approaching environmental norm export through the lens of governmentality involves revealing the particular rationalities and truth regimes, the techniques and subjectivities that guide the exercise of power. This is not only an academic or deconstructive exercise. As Walters & Haahr write, "Governmentality research is a critical, diagnostic practice because it seeks to make political reason more intelligible, and thereby more available to political practice."[21] Exploring the rationalities of government and its use of law therefore opens up space for thinking and acting within, against, and through them

2.2 Three Forms of Governmentality: *Raison d'État*, Liberalism, Neoliberalism

Governmentality is historically contingent. That is, different forms of governmentality have held sway at different times throughout history. In his lectures, Foucault identifies three forms of governmentality that have characterized the modern age: *raison d'État*, liberalism, and neoliberalism. Each of these forms of governmentality has its own logic or rationality regarding the purpose of government; involves a different idea of the relationship between 'freedom' and security'; has developed its own sets of techniques for producing these effects; and articulates its own 'truths' about what a proper subject of government should or does look like. This section will explain the differences among these forms.

Because this dissertation is primarily concerned with EU external relations, the discussion will concentrate on the international aspects of each form of governmentality. Foucault himself wrote of the international, though not extensively. The most comprehensive treatments are in his *Security, Territory, Population* and *Birth of Biopolitics* lecture series, in which he describes the changing position of the international in the movement from *raison d'État* to liberal governmentality.[22] Foucault's contribution makes a number of interesting points that will be illustrated below, and which form the basis of the theoretical framework used in this dissertation. However, his work will also be supplemented with the writings of more contemporary scholars in order to paint a fuller picture of governmentality and the international.

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[20] *Id.*, at 140.

[21] Walters & Haahr, *supra* note 9, at 6.

[22] *See* Foucault, *Security, Territory, Population*, *supra* note 7, at 285-361; Foucault, *Birth of Biopolitics*, *supra* note 7, at 53-61.

It is important to note at the outset that though they are presented as part of a chronology, these forms do not replace one another entirely as history moves forward, but rather evolve out of one another, and coexist within subsequent governmental assemblages.[23] In other words, in our contemporary society (which this dissertation, following Nikolas Rose, will refer to as one of 'advanced liberalism'[24]), one can find elements of all three of these governmentality paradigms operating in parallel—a point that will become very important in the remaining chapters of this dissertation. William Walters makes this point well:

> Governmentality does not exist in a pure form anywhere. When Foucault analyzes pastoralism, mercantilism, *raison d'état*, police or neoliberalism, he is drawing attention to particular kinds of political reasoning, to the emergence of particular knowledges an techniques for conducting conduct and governing the state. What he is not offering is a depiction of discrete systems of power. Instead, he is working with abstractions and analytics. These analytics in turn allow us to approach any particular practice or experience of governance and grasp it as a hybrid, a combination of different techniques, knowledges and rationalities.[25]

Similarly, as noted in the introduction, it is important to remember that Foucault's conceptual paradigm developed out of an investigation of the governmental transitions that took place in a particular context: that of modern Europe, and more specifically, modern France. Foucault's development of the governmentality concept is presented here in some detail in order to provide the reader with sufficient background material to understand the use of the terms '*raison d'État*', 'liberalism', and 'neoliberalism' in Chapters 3-6. However, the remainder of the dissertation uses Foucault's conceptual distinctions in a more general way, and disconnects them to a great degree from this historical specificity. In other words: the intention of this section is mainly to give the reader a sense of the differences among these three modes of governmentality, and to explore the ways in which political reason, governmental technologies, and subjectivities develop hand in hand.

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[23] These three types of governmentality do not simply follow one after the other in epochal terms, but are better understood—in Stephen Collier's terms—as 'topologies of power' that "examine[] how existing techniques and technologies of power are re-deployed and recombined in diverse assemblies of biopolitical government." Stephen J. Collier, "Topologies of Power: Foucault's Analysis of Political Government beyond 'Governmentality'," 26(6) *Theory, Culture & Society* 78, 79 (2009).

[24] The term 'advance liberalism' is used instead of 'neoliberalism' to reflect the fact that the current paradigm is not univocally neoliberal, but also contains the legacies of older paradigms.

[25] William Walters, *Governmentality: Critical Encounters* 40 (2012). *See also* Owen Parker, *Cosmopolitan Government in Europe* (2012); Coller, *supra* note 23; Doerthe Rosenow, "Decentering Global Power: The Merits of a Foucauldian Approach to International Relations," 23(4) *Global Society* 497, 508 (2009) ("[N]eoliberalism cannot be defined as a singular hegemonic project. Instead, one can recognise a multiplicity of different practices at different institutional sites.").

2.2.1 *Raison d'État*

From the 16th century to the 18th century, Foucault argues, the dominant 'art of government' in Europe, the mode in which conduct was conducted, was *raison d'État*. Under *raison d'État* political reason, priority was given to the strengthening of the state and its power "so that the state becomes sturdy and permanent, so that it becomes wealthy, and so that it becomes strong in the face of everything that may destroy it."[26] Particular policies were developed that correspond with this rationale, designed to reach this telos according to a particular logic of possibility (through what behavior and by what means these ends could and should be reached): mercantilism, the development of a police state, and the formation of a permanent army and diplomatic corps to maintain the balance of European power.[27]

In the world of *raison d'État*—exemplified by the Peace of Westphalia—the primary objective of the state is the preservation and perfection of the state itself. The old forms of universality imposed on Europe throughout the Middle Ages—Empire and church—have disappeared. Each state now exists only for itself. But each state also exists in a space of competition with a plurality of other states, which also seek to preserve and perfect themselves. This international space of competition is a "space of increased, extended, and intensified economic exchange"; "a space of monetary calculation, colonial conquest, and control of the seas."[28] Moreover, it is not a transitional space, a phase on the pathway toward some final empire. It is a fixed feature—a necessary condition.

The theoretical and analytical core of political reason under *raison d'État* is the notion of 'forces'. Forces, in this sense, encompass all of the capacities of the state—its economic, military, and demographic might. Forces are all of those things that increase the strength of the state and protect it from external harm. 'Force' is the rationale by which political life is organized. It is the way in which individuals think about government. Politics becomes concerned with "the employment and calculation of forces."[29] As a result, "the real problem of this new governmental rationality is not … just the preservation of the state within a general order so much as the preservation of a relation of forces; it is the preservation, maintenance, or development of a dynamic of forces."[30]

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[26] Foucault, *Birth of Biopolitics*, *supra* note 7, at 4.

[27] *Id.* at 5-12.

[28] Foucault, *Security, Territory, Population*, *supra* note 7, at 291.

[29] *Id.*, at 295.

[30] *Id.*, at 296.

In keeping with this political rationality of force, Foucault argues, the *raison d'État* world developed "two great assemblages" for organizing the state. The first was a permanent military-diplomatic apparatus, and the second was the appearance of the police. These two assemblages were tasked with maintaining the external relation of forces and the internal growth of forces without the break-up of the whole. They are linked by the principle of forces in a relationship that Foucault refers to as a "mechanism of security."

With regard to the external, military-diplomatic arena, the goal of the state was to "limit the mobility, ambition, growth, and reinforcement of all the other states as much as possible, but nonetheless leaving each state enough openings for it to maximize its growth without provoking its adversaries and without, therefore, leading to its own disappearance or enfeeblement."[31] This "system of security" entailed an objective of the balance of Europe. Europe, here, is defined as "a geographical region of multiple states, without unity but with differences between the big and the small, and having a relationship of utilization, colonization, and domination with the rest of the world."[32] Balance is defined as "the impossibility of the strongest state laying down the law to any other state."[33] Recognizing the differences in size and strength between the big and small states, this means that balance will be achieved through a calculation of relative forces and the formation, in response, of coalitions and alliances to prevent any one state or group from attaining an un-balanceable size. The purpose of this European balance is to strive toward universal peace, a peace founded on plurality. Obtaining this objective will "ensure the security in which each state can effectively increase its forces without bringing about the ruin of other states or itself."[34]

Foucault argues that in striving for this objective of peace, *raison d'État* makes use of three instruments, or techniques: war, a permanent military, and diplomacy. Though these instruments existed prior to *raison d'État*, this art of government directs them toward a new objective: the maintenance of the European balance, which will ensure security by promoting the objective of peace. War becomes an instrument of politics (pursuing balance and peace), rather than an instrument of law (pursuing right). Because the threat of imbalance is constant, it requires the establishment of a permanent military apparatus that involves the creation of a professional soldier class, a permanent armed structure, an infrastructure that can support extended war efforts, and knowledge of military strategy and tactics. This

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[31] *Id.*, at 296-97.

[32] *Id.*, at 298.

[33] *Id.*, at 299.

[34] *Id.*, at 300.

permanent military complex will ensure sufficient internal forces that can be deployed at any time through war to maintain the balance of Europe.

War, however, can also lead to imbalance through an increase or decrease in the size and territory of states, which would increase or diminish their potential reserve of forces. Thus, diplomacy is necessary to ensure that balance is re-established. Whereas previously diplomacy (like war) was linked to the rights of sovereigns, it is now founded on the rationale of balance. The establishment of a permanent diplomatic corps during this period results from "a conscious, reflected and absolutely permanent organization of a diplomacy through constant negotiation."[35] It is thus also concurrent with the development of the idea of a "society of nations."[36] This idea that European states are like individuals who come together in a society in a European space in turn gives rise to the law of nations.[37]

An internal policing assemblage complements the external military-diplomatic assemblage. These two assemblages of the *raison d'État* state are interlinked, as the need to maintain a balance among forces externally entails the need to manage forces internally. The task of maximizing internal forces is given to the policing apparatus: "the set of means by which the state's forces can be increased while preserving the state in good order."[38] The police assemblage seeks to maintain order—to direct individual activity to the task of developing the forces of the state. It carries out its work with respect to particular objects of governance. These primary objects of concern are the size of the population,[39] the necessities of life,[40] health,[41] the activities of the population,[42] and the circulation of goods.[43] These objects of police control are urban in nature, dealing with the coexistence of individuals in dense

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[35] *Id.*, at 303.

[36] *Id.*

[37] *Id.* In contemporary terms, this is the birth of the 'domestic analogy'.

[38] *Id.*, at 313. Foucault further notes that the project of police—unlike the theory of *raison d'État* or the apparatus of European equilibrium—did not take the same form, the same theoretical characteristics, or the same instruments in all the European states. Though the general objective—to increase the state's forces in such a way as to reinforce the order of the state—is the same, the specific application differs according to context. *Id.* at 316-19.

[39] *Id.*, at 322-23. As Foucault clarifies: "it is not the absolute number of the population that counts, but its relationship with the set of forces: the size of the territory, natural resources, wealth, commercial activities, and so on." *Id.*

[40] This includes basic needs such as the provision of food, clothing, housing, heating, and so on. This entails an agricultural policy, control on the marketing and circulation of food, and quality control. *Id.* at 323-24.

[41] The focus on health includes not just a concern for preventing epidemics and contagions, but also for environmental factors that may impact the prevalence of disease more generally, including air, water, urbanization, the widths of roads, emissions, and so on. *Id.*, at 324.

[42] This means preventing idleness, ensuring that those who can work are employed, and assuring a proper distribution of professions. *Id.*

[43] This includes a concern for the state of roads and waterways and the set of laws and regulations concerning the circulation of goods and people. *Id.*, at 325.

populations, and are specifically focused on the market. They are concerned with the relationship between populations and commodities in an urbanized world. Interestingly, the need for European balance also generates a concern for the functioning of the police in other states:

> One can only effectively maintain the balance and equilibrium in Europe insofar as each state has a good police that allows it to develop its own forces. There will be imbalances if the development between each police is not relatively parallel. Each state must have a good police so as to prevent the relation of forces being turned to its disadvantage, which consists in saying: In the end, there will be imbalance if within the European equilibrium there is a state, not my state, with bad police. Consequently one must see to it that there is good police, even in other states. European equilibrium begins to function as a sort of inter-state police or as a right. European equilibrium gives the set of states the right to see to it that there is good police in each state.[44]

In order to manage these areas effectively, the state develops a new form of knowledge—statistical sciences—that will enable the calculation of forces for the purposes of both policing and European equilibrium. Ultimately, the police apparatus links individual wellbeing with the strength of the state such that individuals pursuing their own interests will naturally contribute to the objectives of *raison d'État*.[45] The link between political reason and state form is clear here: if the role of government is to maximize state forces and prevent other states from encroaching on the domestic domain, then there must be a strong internal policing apparatus to marshal those forces, and a strong international military and diplomatic wing to keep others in check.

The operation of this police apparatus also, however, spurs resistance. This resistance saw the transformation of law from an instrument of state power into an instrument of state limitation. Thus, natural and constitutional law become an external check on the power of the state.[46] The subject of state power that develops out of this resistance is the contractarian citizen. Each citizen is conceived as being in possession of a sphere of rights into which neither the government nor his or her fellow citizens may intrude. These rights are protected through laws and the constitutions. The subject of this order is *homo juridicus*, the rights-

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[44] *Id.*, at 315.

[45] *Id.*, at 327.

[46] *Id.* at 323-326.

bearing legal subject of the state.[47] Similarly, the state itself (conceived as an 'individual' in the 'society of nations') becomes conceived in terms of a rights-bearing legal subject that can assert and defend its legal claims against others in the international sphere.

The functioning of the policing apparatus and the need for European balance are also intertwined with the development of *raison d'État*'s economic policy: mercantilism. Mercantilism is directed toward the rationality of strengthening the state. It seeks to do this by increasing the wealth of the state, and thus increasing its internal forces. This entails a focus on maximizing the internal population, which constitutes the source of manpower for agriculture and manufacture, ensuring that the population is able to work, and minimizing wages and commodity prices.[48] Mercantilism views the international in terms of a zero-sum game.[49] It thus seeks to win as much wealth as possible (in particular in the form of gold—of which there is a limited global supply) through exporting goods while giving away as little as possible in terms of import. This in turn feeds into the diplomatic and military policies by providing a source of funding that the state can use in its pursuit of European balance.[50]

To sum up: *raison d'État* political reason was primarily concerned with the forces (economic, military, and demographic) of the state. It conceived of the international as a plurality of states existing in a society in Europe. This objective of international policy was the maintenance of a balance of power in Europe, with the ultimate objective of ensuring perpetual peace. In order to achieve this objective, states employed war, diplomacy and international law. These activities were supported by an economic policy based on mercantilism and enforced by a police state concerned with controlling urban working populations and the circulation of commodities. The subjects of the order came, through resistance to this extensive police control, to be conceived as rights-bearing legal citizens. Individual rights came to act as a limitation upon the state by defining a legal boundary beyond which the actions of the state and other individuals were not permitted to reach. Rights and territory, sovereignty and balance, strength and control are the name of the game.

To put this into the terms that will be used in Chapters 3, 4, and 5:

> *Rationality*　　　　Strengthening the internal forces of the state; maintaining international balance; policing the boundaries between spheres of rights

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[47] For more on the topic of the *citizen* as subject of rights, *see* Chapter 5.

[48] Foucault, *Security, Territory, Population*, *supra* note 7, at 337.

[49] Foucault, *Birth of Biopolitics*, *supra* note 7, at 52-53.

[50] Foucault, *Security, Territory, Population*, *supra* note 7, at 102, 338.

Technologies	Mercantilism; police; permanent military and diplomatic forces; international law; statistics; bureaucracy
Subjectivity	The rights-bearing legal citizen; the rights-bearing legal state

Raison d'État governmentality has not vanished, but persists today alongside other forms of governmental reason in contemporary society. Chapter 3 will introduce the strand of contemporary governmentality that flows from this *raison d'État* mentality as 'rights rationality'—a type of reasoning about government and society that stems from a perception of the individual and the state as rights-bearing entities, and that concentrates on the task of protecting their separate spheres of rights and increasing the forces of the state through balancing, law, and mercantilism.[51] This rights mentality has today been joined, however, by a new form of reason that began to develop in the 18th century—one that Chapter 3 will term 'market rationality'.

2.2.2 The Physiocrats and the Transition to Liberalism

Foucault argues that the system of *raison d'État* begins to break down in the first half of the 18th century with the Physiocrats' critique of the police state.[52] In response to economic problems like the scarcity and the production of grains, the Physiocrats argued that the problem was not that wages were too high, but that they were too low. Whereas mercantilists believed that an abundant supply of cheap grain would result from ensuring that agricultural wages were as low as possible, the Physiocrats argued that prices must rise in order to inspire agricultural workers to produce in search of profit. The natural laws of the marketplace, they argued, would result in the formation of a natural price that would induce the production of additional grain when prices were high, and inspire withholding of grain when prices were low. Policing was not required: the natural order of the market would assure an abundance of commodities.[53]

These arguments entailed a number of shifts in economic and political thought. They relocated the focus of policy away from the urban and toward the countryside and land. They moved the site of analysis away from the circulation of goods in the market and the accumulation of gold and toward the production of goods. And they entailed a shift in

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[51] *See* Chapter 3.

[52] Physiocracy was an economic and cultural movement in France in the 18th century. Its proponents believed that agriculture was the only real way to secure the wealth of nations. Prominent among the physiocrats were François Quesnay, whose thought began the movement, and Anne-Robert-Jacques Turgot. For more on the movement, *see* Liana Vardi, *The Physiocrats and the World of the Enlightenment* (2012).

[53] Foucault, *Security, Territory, Population*, *supra* note 7, at 342-44.

economic emphasis away from selling goods that have been produced at the lowest cost possible, and toward a paradigm of greatest return. These shifts in emphasis, in turn, suggested a number of policy implications. To begin with, police control should be replaced by the natural regulation of the market. Second, population should not be maximized at all costs, but rather should be left to fluctuate relative to the amount of available work and resources. And third, mercantilism should be abandoned and trade between countries should be free.[54]

This third point, that trade between countries should be free, entailed an entirely new direction in thinking about the relationship between the state and the international. Rather than a zero-sum game, the international could now be conceived as a world of mutual enrichment. The end of trade is not the accumulation of the most possible gold, but rather the integration of countries into a mutually beneficial system of commerce. States still compete, but it is not the rivalry of forces imagined under *raison d'État*. Instead, state competition is replaced by the competition of individuals and companies.[55] The good of the whole is ensured not by police discipline, but rather by the natural operation of private interest.

This new art of government sketched by the *économistes*, as Foucault names them, was still in the realm of *raison d'État*. The objective remained maximizing the forces of the state "within an external equilibrium in the European space and an internal equilibrium in the form of order."[56] However, it modified the rationality of *raison d'État* in four important ways[57]:

1. It reconceived the economy as a "domain of naturalness" that is located in "civil society" rather than the state.[58]
2. It shifted the focus of government to the behavior of populations.
3. It indicated that the style of management should be *laissez-faire*, focused on protecting a zone of freedom for individuals within which the natural laws of the market can play out.
4. It reduced the role of the police to eliminating disorder, rather than disciplining the individual activity.

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[54] *Id.*, at 342-46.

[55] *Id.*, at 346.

[56] *Id.*, at 348.

[57] *Id.*, at 352-54.

[58] Civil society, for Foucault, is not "man's natural existence," but rather "the necessary correlate of the state": it is that thing that the state must manage. Civil society does not encompass the totality of 'things that are not the state'—it is neither "primitive nature" nor "a set of subjects indefinitely subject to a sovereign will and submissive to its requirements." Instead, it is that thing which the state has the responsibility of managing. *Id.* at 350.

This four modifications paved the way for the shift to the second major form of governmentality Foucault discusses: liberalism.

2.2.3 Liberalism

Raison d'État gave way in the mid-18th century to a new paradigm: the liberal art of government.[59] In the Foucauldian sense, the rationality of liberal governmentality consists of two interrelated concepts: the "self-limitation" of government action, and "the question of truth."[60] Self-limitation, which is imposed as a result of transactions between the governed and the governing, implies that government should be generally limited, that this limitation is de facto and a necessary component of attaining its objectives, and establishes a dividing line between what is to be done and what should not be done. As Foucault put it, under liberalism, "[t]he whole question of critical governmental reason will turn on *how not to govern too much.*"[61]

Proper governmental practice is divided from improper by examining whether a given action is 'excessive'. Whether or not an action is 'excessive' is determined with reference to the question of 'truth', which in this governmental order means the principles of political economy: the study of how to obtain "the simultaneous, correlative, and suitably adjusted growth of population on the one hand, and means of subsistence on the other."[62] Political economy produces 'truth' in the form of 'laws of nature' (e.g. people will move to where wages are highest), and explains that government practice can meet its objectives only by respecting these laws. Accordingly, governmental actions are 'legitimate' if their effect is to advance political economic objectives:

> Political economy reflects on governmental practices themselves, and it does not question them to determine whether or not they are legitimate in terms of right. It considers them in terms of their effects rather than their origins, not by asking, for example, what authorizes a sovereign to raise taxes, but by asking, quite simply: What will happen if, at a given moment, we raise a tax on a particular category of persons or a particular category of goods? What matters is not whether this is legitimate in terms of law, but

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[59] Foucault's use of liberalism means something different than the way the term is understood either in common parlance or political philosophy. It is neither a 'liberal' political position in the sense of party politics, nor the idea of 'liberty' or rights—though these concepts are related. Andrew Barry, Thomas Osborne, & Nikolas Rose, "Introduction," in *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* 1, 8 (Andrew Barry, Thomas Osborne, & Nikolas Rose eds. 1996).

[60] Foucault, *Birth of Biopolitics*, *supra* note 7, at 17.

[61] *Id.*, at 13 (emphasis added).

[62] *Id.*, at 14.

> what its effects are and whether they are negative. It is then that the tax in
> question will be said to be illegitimate, or, at any rate, to have no raison
> d'être.[63]

Success (effectiveness) in promoting political economic objectives (the maximization of wealth and human capital) as measured in terms of conformity with the laws of nature (economy, science) is the metric of good government. In this world, "the greatest evil of government, what makes it a bad government, is not that the prince is wicked, but that he is ignorant."[64] A legitimate government is therefore a government that employs "economic experts whose task is to tell the government what in truth the natural mechanisms are of what it is manipulating."[65]

The "discovery" of these natural mechanisms leads to a series of policy techniques. The first of these is the adoption of a strategy of *laissez-faire* with respect to the market. Liberalism posits the market as a space governed by natural laws—the laws of exchange. The market will regulate itself according to these laws, if permitted to do so. And this self-regulated market will naturally tend to produce wealth to strengthen the state.

This does not mean, however, that liberalism calls for the diminishment or elimination of government. Instead, it entails a redirection of government and the submission of the 'public' to the 'private' sphere. The task of liberal government is to produce freedom for the private sphere: "Freedom is something which must be constantly produced."[66] In the course of producing freedom, however, the government must intervene in society to establish limitations, controls, forms of coercion and so on that will enable the market to function according to its natural laws. This creates a paradox: as it produces freedom, liberal government also destroys it.

This principle of limiting freedom to ensure freedom is known in Foucauldian scholarship as 'security'. The security paradigm views individuals and the market as constantly exposed to danger, and thus as in need of protection to ensure that their freedom remains intact. As Foucault puts it, "control is no longer just the necessary counterweight to freedom ... : it

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[63] *Id.*, at 15.

[64] *Id.*, at 17.

[65] *Id.*

[66] *Id.*, at 65.

becomes its mainspring."[67] Liberalism's economy of power is entirely based on this balance between freedom and security.

The subject of liberalism is *Homo oeconomicus*. The liberal *homo oeconomicus* is a creature of exchange, of consumption, who acts according to natural laws governing market behavior. The economic individual, like the market, is therefore best left alone to pursue his or her own interests in the private sphere, without governmental intervention.

Internally, in sum, the logic of the public/private distinction is dominant as the state retreats from a sphere of individual freedoms within which the natural laws of the market are left to operate—it is a regime of *laissez-faire*. But these individual freedoms must be constantly produced: "Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etc."[68] Its interventions come in the form of providing security for the population and the market. These interventions are designed by reference to the natural laws of human behavior, and are testable on the basis of their effects on the market. The fundamental question is: "What is the utility of government and all actions of government in a society where exchange determines the true value of things?"[69]

Externally, the art of government is also reconceived according to the new governmental rationality. The international—like the internal market—is seen not as a zero-sum game, but as a space of mutual benefit. For the liberal art of government, "[t]he legitimate game of natural competition, that is to say, competition under conditions of freedom, can only lead to a dual profit."[70] Trade under conditions of individual (state) freedom is the path toward mutual enrichment for the European states. Moreover, this mutual enrichment requires the benefit of all: "the enrichment of one country, like the enrichment of one individual, can only really be established and maintained in the long term by a mutual enrichment."[71] Europe under the liberal art of government is a zone of collective enrichment: "either the whole of Europe will be rich, or the whole of Europe will be poor."[72]

This idea of a Europe of collective enrichment in turn gives rise to the idea of unlimited economic progress. European progress now replaces the idea of European balance as the

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[67] *Id.*, at 67.
[68] *Id.*, at 64.
[69] *Id.*, at 46.
[70] *Id.*, at 53.
[71] *Id.*, at 54.
[72] *Id.*

regulating ideal of international governance. However, a Europe of unlimited progress is also a Europe that requires an ever-increasing market, and thus leads to globalization, as well as a Eurocentric hierarchy among states:

> The unlimited character of the economic development of Europe, and the consequent existence of a non-zero sum game, entails, of course, that the whole world is summoned around Europe to exchange its own and Europe's products in the European market. … [T]he opening up of a world market allows one to continue the economic game and consequently to avoid the conflicts which derive from a finite market. But this opening of the economic game onto the world clearly implies a difference of both kind and status between Europe and the rest of the world. That is to say, there will be Europe on one side, with Europeans as the players, and then the world on the other, which will be the stake. The game is in Europe, but the stake is the world.[73]

This international rationality of liberal government is further demonstrated by, for example, the history of maritime law and anti-piracy action, which depicted the sea as a space of free competition, regulated by law, and necessary for the world market.[74] Another example is the projects for peace and international organization that begin to appear during the 18th century. These projects differed from the visions of the *raison d'État* world, being based on the idea of free exchange rather than balance. Immanuel Kant's vision of perpetual peace, for example, builds on the 'natural tendencies' of people to live separately from one another and engage in exchange. For Kant, the tendency to exchange leads to the formation of civil law, and the tendency of humankind to live in distinct regions creates a need for international law.[75] In addition, however, the combination of the two tendencies leads individuals to form commercial relationships and engage in cross-border trade. This causes the borders of each state to become "porous," resulting in a cosmopolitan law or commercial law.[76] As Foucault

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[73] *Id.*, at 55-56.

[74] *Id.*, at 55.

[75] Immanuel Kant, *Perpetual Peace* 143-157 (M Campbell Smith trans. 1917) [1795].

[76] In Kant's words, nature "unites nations whom the principle of a cosmopolitan right would not have secured against violence and war" by means of "an appeal to their mutual interests." Thus international law and perpetual peace come about because "[t]he commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation" and "states find themselves compelled—not, it is true, exactly from motives of morality—to further the noble end of peace and to avert war, by means of mediation, wherever it threatens to break out, just as if they had made a permanent league for this purpose." *Id.* at 157.

summarizes: "The guarantee of perpetual peace is therefore actually commercial globalization."[77]

Because it requires mutual enrichment and an international space of free commerce, the liberal international must be controlled in order to produce the conditions for free individuals and the free market to operate:

> There must be free trade, of course, but how can we practice free trade in fact if we do not control and limit a number of things, and if we do not organize a series of preventive measures to avoid the effects of one country's hegemony over others, which would be precisely the limitation and restriction of free trade?[78]

This leads to a situation in which liberal states must manage the international (and other states) such that it produces the necessary conditions for free competition. As Foucault writes in the manuscript for his 10 January 1979 lecture:

> [T]his self-limitation of governmental reason characteristic of 'liberalism' has a strange relationship with the regime of *raison d'État*.—The latter opens up an unlimited domain of intervention to governmental practice, but on the other hand, through the principle of a competitive balance between states, it gives itself limited international objectives.
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> –The self-limitation of governmental practice by liberal reason is accompanied by the break-up of these international objectives and the appearance of unlimited objectives with imperialism. *Raison d'État* was correlative with the disappearance of the imperial principle and its replacement by competitive equilibrium between states.
>
> Liberal reason is correlative with activation of the imperial principle, not in the form of the Empire, but in the form of imperialism, and this in connection with the principle of the free competition between individuals and enterprises.[79]

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[77] Foucault, *Birth of Biopolitics*, *supra* note 7, at 58.

[78] *Id.*, at 64.

[79] *Id.*, at 21.

In sum, the international conceived by liberal governmentality is a space of mutual enrichment, in which the law of commerce serves as the glue that binds the markets of the world to a perpetually progressing Europe. Domestically, public and private are strictly separated spheres, and the private should be left, to the extent possible, to the operation of the natural law of the market. Individuals and states are reconceived as free, economic actors rationally pursuing their interests according to the rules of political economy. The role of government is to secure this system.

Again, to summarize in the terms that will be used in Chapters 3, 4, and 5:

Rationality	Limited government to provide security; political economy; public/private distinction; *laissez-faire* in the private sphere of the free market
Technologies	Free and global markets; natural economic law; state regulation to protect the free market
Subjectivity	The freedom-bearing economic citizen; the freedom-bearing economic state

Liberalism, like *raison d'État*, has not vanished from the contemporary world. However, as Section 2.2.4 will explain, the market-based thinking that became dominant under the liberal governmental paradigm has altered over time with the advance of behavioralism, the extension of market principles beyond the private sphere, and the de-centering of the state.

2.2.4 Neoliberalism

The modern regime of neoliberal governmentality appeared sometime during the first half of the 20th century.[80] Before jumping into the discussion of neoliberal governmentality, it is first important to make some notes regarding the definition of neoliberalism that will be used in this dissertation. Foucault's use of the term is very specific, and differs somewhat from its use in popular parlance. The word 'neoliberalism' can be confusing to contemporary readers. As Thomas Boas and Joshua Gans-Morse pithily observe, "the term is effectively used in

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[80] For an interesting addition to Foucault's timeline that focuses on the transition from liberalism to neoliberalism in the writings of Ludwig von Mises and Friedrich von Hayek in the 1920s & 1930s, *see* Nicholas Gane, "The Emergence of Neoliberalism: Thinking Through and Beyond Michel Foucault's Lectures on Biopolitics," 31(4) *Theory, Culture & Society* 3 (2014).

different ways, such that its appearance in any given article offers little clue as to what it actually means."[81]

The word 'neoliberalism' as it is used in this dissertation is not a derogatory term. As Boas and Gans-Moore describe, 'neoliberalism' is "used frequently by those who are critical of free markets, but rarely by those who view marketisation more positively ... in part ... because neo-liberalism has come to signify a radical form of market fundamentalism with which no one wants to be associated."[82] As even *The Economist* put it in 2004, neo-liberalism is "regarded as a perversion, a pathology," and its adherents are vilified as "market-worshiping, nihilistic sociopaths to a man."[83] This "negative normative valence," as Boas and Gans-Morse put it, is unfortunate, as it dilutes the specificity of the term to the point that it is now used to refer fairly broadly to any processes or negative effects associated with contemporary capitalism. This dissertation uses the term in a much more specific (though still necessarily opaque) way, namely, to refer to a particular form of governmentality that privileges the extension of political-economic logic beyond the market sphere and induces subjects to manage themselves according to an entrepreneurial logic.[84] This is not necessary a 'good' or 'bad' thing from the perspective of any particular practical goal—one can equally oppose a piece of

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[81] Thomas Boas & Joshua Gans-Moore, "Neo-Liberalism: From New Liberal Philosophy to Anti-Liberal Slogan," 44(1) *Studies in Comparative International Development* 137, 139 (1009). *See also* Mitchell Dean, "Rethinking Neoliberalism,"50(2) *Journal of Sociology* 150 (2014) ("Neoliberalism ... is a rather overblown notion, which has been used, usually by a certain kind of critic, to characterize everything from a particular brand of free-market political philosophy and a wide variety of innovations in public management to patterns and processes found in and across diverse political spaces and territories around the globe."). Perhaps the best-known definition of neoliberalism is the Marxist one. As Marxist geographer David Harvey defines it, neoliberalism is:

> A theory of political economic practices that proposes that human well being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights, free market, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.

David Harvey, A *Brief History of Neoliberalism* 2 (2005). Harvey and other Marxists thus understand neoliberalism as an ideology that was developed by and serves the interests of a dominant capitalist class by structuring the state and public policy according to their own needs. Though this dissertation is sympathetic to the Marxist definition, it contends that neoliberalism is not—or not simply—class rule by another name. Rather, it refers to an elaborate set of new rationalities, identities, and technologies that come to characterize the art of government. These features may, indeed, be primarily focused on the functioning of the economy, and thus disproportionately beneficial to those poised to make the best use of economic power (that is, those in the current economic ruling classes). However, it is more than simply an extension or completion of capitalist hegemony—it is a new paradigm of governmental reason.

[82] Boas & Gans-Moore, *supra* note 81, at 138.

[83] "There's a Word for That: And We Want It Back," *The Economist*, 4 Nov. 2004, *available at* http://www.economist.com/node/3353324 (last accessed 15 August 2014).

[84] As Jamie Peck writes: "Pristine definitions of neoliberalism are ... simply unavailable; instead, concretely grounded accounts of the process must be chiseled out of the interstices of state/market configurations." Jamie Peck, *Constructions of Neoliberal Reason* 16 (2010).

legislation or a company's behavior, for example, either because it violates someone's rights (*raison d'État*) or because it is inefficient (neoliberalism), or both. It is, rather, about the type of political reason that forms the background against which such arguments are made; a paradigm, rather than a political slogan.

Foucault's neoliberalism continues many of the principles of liberal governmentality with some particular revisions. First, it makes the market the regulating principle underlying the state. The operation of the free market becomes not just the project of the state, but also the principle from which the state draws its legitimacy.[85] As a corollary of this shift, neoliberal governmentality de-centers the state, which now takes as its central task the expansion of the field of entrepreneurial activity, and seeks to regulate the population by enacting a political economy that produces the conditions for a competitive market.

Second, in contrast with liberalism, neoliberalism sees the notion of *laissez-faire* as naïve. For neoliberals, the market does not function naturally—there is a need to construct the conditions necessary for competitive behavior to occur.[86] There is no longer a sphere of the state and a sphere of the market, but rather one sphere governed by the market in which competition is produced by an active governmentality. Neoliberalisms's problem is not how to protect a free market within a political society, but rather "how the overall exercise of political power can be modeled on the principles of a market economy."[87] In this way, it breaks down the barriers between 'politics' and 'economics', between the 'public' and 'private' spheres, and instead promotes the application of economic analysis throughout all aspects of life.

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[85] Foucault, *Birth of Biopolitics*, *supra* note 7, at 84-85.

[86] *Id.*, at 120. Jamie Peck cites in this context a fascinating passage written by Milton Friedman in 1951:

> [The] fundamental error in the foundations of 19th century liberalism [was that it] gave the state hardly any other task other than to maintain peace, and to foresee that contracts were kept. It was a naïve ideology. It held that the state could only do harm [and that] laissez-faire must be the rule ... A new ideology must ... give high priority to limiting the state's ability to intervene in the activities of the individual. At the same time, it is absolutely clear that there are truly positive functions allotted the state. The doctrine that, on and off, has been called neoliberalism and that has developed, more or less simultaneously, in many parts of the world ... is precisely such a doctrine... [I]n place of the nineteenth century understanding that laissez-faire is the means to achieve [the goal of individual freedom], neoliberalism proposes that it is *competition* that will lead the way... The state will police the system, it will establish the conditions favorable to competition and prevent monopoly, it will provide a stable monetary framework, and relieve acute poverty and distress. Citizens will be protected against the state, since there exists a free private market, and the competition will protect them from one another.

Peck, *supra* note 84, at 3 (quoting Milton Friedman, "Nyliberalismen Og Dens Muligheter," *Farmund*, 17 Feb. 1951, pp.91-93).

[87] Foucault, *Birth of Biopolitics*, *supra* note 7, at 131.

Neoliberalism, to a much greater extent than liberalism, thus entails an extensive project of active government. It intervenes in the operations of the market to set the "rules of the game": the general, formal principles that will ensure fairness and full participation.[88] And it intervenes in society in order to produce the types of individuals and conditions necessary to sustain the competitive economy of the market. Neoliberalism continues to operate along the freedom/security paradigm. However, its drive for security is reinscribed within a fundamentally economic paradigm, as the need to create and sustain markets.

Third, neoliberalism reconceives of the individual not as a free and rational actor imbued with natural freedoms that ground and limit government, but as an entrepreneur who responds to various economic incentives and disincentives in the same way as any other business.[89] Neoliberal governmentality conceives of individuals as entrepreneurs not only within a marketplace, but of and for themselves.[90] The citizen is no longer the simple *homo oeconomicus* that acts rationally to maximize economic gain—the citizen is now a market in herself, seeking to become the best individual possible by means of improving her human capital. American neoliberalism, in particular, abandoned the separation between 'economic' and 'non-economic' activity, arguing that advanced behavioralist economics meant that it should be possible to read every form of human behavior as corresponding to an economy of satisfaction. According to the logic of human capital, labor was reconceptualized such that the individual does not trade time for wages, but rather trades her 'capital' (time, effort, desire, money, etc.) for a return on investment. Individuals invest in themselves (via education, specialization, improvements to appearance or strength, and so on) to increase their human capital. In return for putting their human capital on the marketplace, they receive an income. And they spend this income in order to produce their own satisfaction— whether in the form of wealth, leisure, fame, family, or any other metric.

Liberal and neoliberal forms of governmentality focus, in particular, on the freedom of the governed. In the classical liberal conception, this meant freedom from government: securing a zone of private freedom within which individuals could pursue their interests.[91] In the neo-liberal conception, by contrast, this freedom is not a freedom from government, but rather a freedom to be a risk-taking entrepreneur; to behave in a way that promotes neo-liberal governmental objectives. Liberal governments encourage subjectivities such as "the active jobseeker, the empowered citizen, the discerning consumer, the interested stakeholder, the

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[88] *Id.*, at 172-73.

[89] Jodi Dean, *Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics* 51-52 (2009).

[90] Foucault, *Birth of Biopolitics*, *supra* note 7, at 226.

[91] *Id.*, at 225.

informed investor, and so on."[92] In this new order, the subject of government is 'free' but is led to regulate his or her or its own actions in accordance with neoliberal political reason. Subjects are obliged to be free, are required to conduct themselves responsibly, and must account for their own choices in terms of costs and benefits.[93] The mantras of the day are 'self-improvement' and 'choice'—it is up to each individual to choose to live their lives in the way that will give them the maximum satisfaction.[94] Morality is redefined such that responsible subjects are those "whose moral quality is based on the fact that they rationally assess the costs and benefits of a certain act as opposed to other alternative acts."[95]

Governments and individuals interact in support of these entrepreneurial goals. Government seeks to maximize opportunities for individual self-improvement. This is best done through open, responsive, market-sensitive policies. Accordingly, rather than contractarian citizens, individuals are now 'stakeholders' in the governmental process.

The international, too, has shifted under neoliberalism. Just as neoliberalism has entailed the breakup of the boundaries between market and politics, and between public and private, in the domestic sphere, so too have these boundaries been affected at the international level. Talk of the 'decline of the state', 'globalization', and the rise of non-state actors are part of this picture. Mitchell Dean, for example, argues that the idea of globalization has been crucial to this reconceptualization of the international in neoliberal terms.[96] The idea of globalization is important because it links developments in communications, technology, trade, and politics to the transformation of the international sphere into a realm not just of states, but also of international governmental and non-governmental agencies, multinational corporations, non-governmental organizations, and transnational civil societies. Dean argues that this created a new problematic of security:

> A neo-liberal problematic of security would simultaneously argue that
> states have severely diminished capacities with regard to the management
> of their now 'unbound' national economies and demand that states reform
> as much of institutional and individual conduct as possible in order to

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[92] Walters & Haahr, *supra* note 9, at 13.

[93] The responsibility of the neoliberal subject "is to bring itself to labor in a self-enterprising fashion." Nicholas J. Kiersey, "Neoliberal Political Economy and the Subjectivity of Crisis: Why Governmentality is Not Hollow," 23(4) *Global Society* 363, 381 (2009).

[94] In neoliberalism, as Jonathan Joseph explains, "people are told to take charge of their own well-being and take rational decisions to avoid social problems like unemployment and poverty." Jonathan Joseph, "The Limits of Governmentality: Social Theory and the International," 16(2) *European Journal of International Relations* 223, 228 (2010).

[95] Lemke, T. "Foucault, Governmentality, and Critique," 14(3) *Rethinking Marxism: A Journal of Economics, Culture & Society* 49, 61 (2002).

[96] Mitchell Dean, "Governing Society: The Story of Two Monsters," 1(1) *Journal of Cultural Economy* 25, 31 (2008).

make their performance competitive and efficient and hence attractive to global capital and financial flows.[97]

This "performative contradiction of neo-liberalism" both denies and reaffirms the ability of the state to govern society.[98] The mantra of self-improvement applies here, just as it does for individual subjects: each state must improve itself by making rational choices that will maximize the opportunities of its citizen-entrepreneurs. Development is achieved by improving human capital and creating a regulatory environment ('rules of the game') that will attract international investment via good governance and the rule of law.

In sum, in the terms that will be used in Chapters 3, 4, and 5:

Rationality	Marketization of the state; creating and sustaining free markets; globalization; individual entrepreneurship; human capital
Technologies	State and non-state regulation to set the 'rules of the game'; experts; governance; performance benchmarks; self-management
Subjectivity	The interest-bearing entrepreneurial stakeholder; the interest-bearing entrepreneurial state

Contemporary governmentality, Chapter 3 argues, consists of two broad competing strands of thought. The first, 'rights rationality', draws on the *raison d'État* tradition described in Section 2.2.2. The second, 'market rationality', draws on the liberal and neoliberal traditions of market thinking described in Sections 2.2.3 and 2.2.4. This 'market rationality' stems from a perception of the individual as a creature of interests who acts as a cost-benefit maximizing stakeholder in society, and sees the role of government as efficiently managing society for the purpose of creating the necessary conditions for the operation of a competitive market, in which individuals can exercise free choice. As we shall see, the fact that both rights and market paradigms persist in our contemporary world creates interesting opportunities for political action, argumentation, and resistance.

2.3 Governmentality and the International: Critiques

Before closing this discussion of governmentality and the international, this section will address some critiques of applying Foucault's work in this context. As the number of studies

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[97] *Id.*
[98] *Id.*

of global governmentality have grown, so too have the number of scholars who have engaged in critical reflection on the use and misuse of the governmentality framework.[99]

To begin with, there has been some conflict regarding the extent to which Foucault's analysis of liberal and neoliberal governmentality can be applied directly to the international sphere as a whole. Some scholars see no difficulty in applying the governmentality analysis without alteration at the global level. Ronnie Lipschutz, for example, argues that, "the extension of this idea to the international arena is rather straightforward."[100]

Others, however, have questioned whether it is truly possible even to speak of a 'global governmentality'. There is, after all, no global equivalent of the state, and different countries and regions are surely operating under different forms of political reason. Jonathan Joseph, for example, argues from a Marxist perspective that "because the international domain is highly uneven, contemporary forms of governmentality can only usefully be applied to those areas that might be characterized as having an advanced form of liberalism."[101] As he explains:

> [W]hile the *nomos* of governmentality is attempting to extend and generalize itself from the advanced liberal societies to the rest of the world, the fact that the rest of the world does not enjoy the same conditions of advanced liberalism means that the *nomos* of governmentality has great difficulty turning itself into a world order. Under such difficult conditions,

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[99] This is, of course, not the only point on which Foucault's work has been criticized. A number of scholars criticize Foucault for what they see as his unacceptable moral relativism. Jürgen Habermas, for example, dismisses Foucauldian work because he believes its rejection of 'universal values' denies the prospect of a morality. *See* Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (F. Lawrence trans. 1990). Nancy Fraser has also taken up this tack, arguing: "Clearly what Foucault needs and needs desperately are normative criteria for distinguishing acceptable from unacceptable forms of power." Nancy Fraser, "Foucault on Modern Power: Empirical Insights and Normative Confusions," 3 *Praxis International* 272, 286 (1981). These critiques have always seemed somewhat odd to the author: does the fact that a moral system is a product of social construction and cannot claim to be 'objectively' true mean that it is any less 'real' or valuable for social and political life? In another vein, many commentators object to Foucault's anti-essentialist notion of the subject, according to which there is no such thing as a pre-social subject outside of society and discourse; no self-actuating subject ontologically prior to power relations. If there is no subject prior to power, the argument goes, how can resistance to power relations be possible? *See, e.g.*, Charles Taylor, "Foucault on Freedom and Truth," in *Foucault: A Critical Reader* 69 (David Couzens Hoy ed. 1986). Here too, though, the point seems overly structuralist: does the fact that one is never 'outside' of power or social construction mean that one cannot make choices, or shift within and through the social order? The dissertation will return to the notion of resistance in Chapter 5, Sections 2.3 and 3.4. For now, however, it is sufficient to note that the complexity of governmentality leaves ample space for post-structuralist strategic maneuvering.

[100] Ronnie Lipschutz & James K. Rowe, *Globalization, Governmentality and Global Politics, Regulation for the Rest of Us?* 15 (2005). *But see* Iver B. Neumann & Ole Jacob Sending, " 'The International' as Governmentality," 35 *Millennium: Journal of International Studies* 677, 678 (2007) ("it would be analytically unwarranted simply to extend [Foucault's] own analyses to the international").

[101] Joseph, "Limits of Governmentality," *supra* note 94, at 224. *See also* Jan Selby, "Engaging Foucault: Discourse, Liberal Governance, and the Limits of Foucauldian IR," 21(3) *International Relations* 324 (2007).

the attempted application of governmentality to other parts of the world soon reverts back to something more basic, or else is closer to what Foucauldians would call 'disciplinary power' rather than fully fledged liberal governmentality. Theorists of governmentality therefore have to be very careful to distinguish the governmentality present in advanced liberal societies from the attempts by liberal international institutions to spread these techniques elsewhere.[102]

As mentioned above, this dissertation uses the term 'governmentality' in the broad sense of any 'art of government', rather than the narrow sense of 'neoliberal government', as Joseph seems to imply. Additionally, it takes seriously the notion that governmentality should be understood as *plural*—that is to say, that multiple governmentalities operate alongside one another to produce contemporary social and political formations. As such, it reads Joseph's critique as rather pointing out the persistence of *raison d'État* forms of control within an increasingly 'advanced liberal' global paradigm—an argument with which it wholly agrees. Analysis of the shifts in these governmental paradigms, and whether or not advanced liberal governmentality is becoming the dominant 'art of government' throughout the world, is, ultimately, a question for another day.[103]

A second critique that must be addressed here is the postcolonial point that Foucault's discussion of international governmentality is decidedly Eurocentric. This Eurocentrism has both positive and negative implications. On the one hand, it is evidence of the fact that Foucault's work is highly contextualized. As William Walters writes: "In keeping with his methodological practice of the microphysics of power, the analysis of governmentality builds outward from localities. It starts with events, encounters, and inventions in particular places, under particular circumstances, investigating government in terms of empirical singularities."[104] In other words, Foucault is Eurocentric because he is talking about Europe.

On the other hand, however, it also reminds us that this analysis is centered very firmly within the experience of the modern West in general, and of France in particular. Stephen Legg, for example, has examined how colonialism is an 'absent presence' in Foucault's

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[102] Joseph, "Limits of Governmentality," *supra* note 94, at 224-225.

[103] Indeed, this question of norm transmission is a fascinating one. For one interesting take on the subject in the context of India and the dissemination of environmental norms, *see* Arun Agrawal, *Environmentality: Technologies of Government and the Making of Subjects* (2005).

[104] Walters, *Governmentality*, *supra* note 25, at 69.

work.[105] In particular, Foucault does not engage in any sustained way with colonialism as itself constitutive of European identity. But, as Gayatri Spivak wrote, "The colonizer constructs himself as he constructs the colony."[106] Europe's centrality reflected the peripheral nature of its colonies. The roots of political modernity lay in both internal European developments as well as in Europe's interactions with its others. Jordan Branch usefully terms this process "colonial reflection": "the reflection of practices used first in colonial areas onto European internal political arrangements."[107] As Branch points out, key elements of the international system—such as exclusive territoriality and linear divisions—were first deployed in colonial claims, and only subsequently consolidated in intra-European practices.[108] In other words, Foucault's Eurocentrism prevents him from seeing a significant part of how 'Europe' has been constructed.

Because this dissertation is concerned with EU governmentality—that is, the rationalities, subjectivities, and technologies of government developed in, for, and by the EU—it will not be called on to try to apply Foucault's ideas within different geographical and historical contexts. However, environmental norm export is a regime of practice that exists very much in relation with the wider world. The EU and its 'others' are in this sense certainly mutually constitutive. EU subjectivity is constructed partially through comparison with the EU's spatial, temporal, moral and technological others. EU technologies of government are applied to, adopted by, and resisted by third states. As such, the remainder of this dissertation attempts to pay careful attention to the way that the EU and its governmentality are shaped by these interactions.

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[105]   Stephen Legg, "Beyond the European Province: Foucault and Postcolonialism," in *Space, Knowledge and Power: Foucault and Geography* 265 (Jeremy W. Crampton & Stuart Elden eds. 2007). Despite his Eurocentric focus, however, many scholars have found it useful to apply Foucauldian themes and concepts to studies of the relationships between Europe and its colonies. *See, e.g.,* Ann L. Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (1995); *Foucault and Latin America: Appropriations and Deployments of Discourse Analysis* (Benigno Trigo ed. 2002); Joel Outtes "Disciplining Society Through the City: The Genesis of City Planning in Brazil and Argentina," 22(2) *Bulletin of Latin American Research* 137 (2003); Achille Mbembe, "Ways of Seeing: Beyond the New Nativism," 44(2) *African Studies Review* 1 (2001).

[106] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* 203 (1999).

[107] Jordan Branch, " 'Colonial Reflection' and territoriality: The peripheral origins of sovereign statehood," 18(2) *European Journal of International Relations* 277 (2012). *See also* Beate Jahn, *The Cultural Construction of International Relations: The Invention of the State of Nature* (2000).

[108] Branch, *supra* note 107.

3 Conceptual Framework: Rationalities, Technologies, and Subjectivities

3.1 Conceptual Framework

As discussed in Chapter 1, this dissertation will apply Foucauldian governmentality by breaking down its discussion into three broad 'themes' of analysis:

1. The 'truths' and rationalities that guide governmental and individual behavior;
2. The technologies or methods by which government is accomplished; and
3. The identities or subjectivities of both the governed and the governing that particular forms of governmentality create and that in turn help to reproduce them.

Foucault himself does not use this metric. His own work on the subject of governmentality largely consists of what Will Davies delightfully called "a brilliant if somewhat jumbled series of lectures in 1978-79."[109] It has proven useful, therefore, to organize this dissertation's study of governmentality into a somewhat more rigorous division of themes.

These three themes will structure the remainder of this dissertation, each forming the basis of a subsequent chapter. They are presented separately in the interest of clarity. However, it should be remembered that each of these themes is in reality intertwined with and inseparable from the other two. Echoes of each theme will therefore appear in discussions of the others, and each chapter, though focused on one element in particular, will refer to all three.

The remainder of this Section describes the conceptual framework, identifying the value of governmentality approach and the contours of the three themes. The substantive content of each theme, as well as the application of each to concrete cases of EU environmental norm export, will be explained in much greater detail in the subsequent three chapters.

3.2 Truth and Rationalities of Government

Because of its focus on the rationalities that underlie the practice of government, governmentality is a critical approach for researching legal and political activity. It seeks to identify the privileged objects on which government acts, and the variables by which it judges conduct. In doing so, its focus is on the ways we think about governing—our "mentalities of

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[109] Will Davies, "A Response to Nicholas Gane's 'The Emergence of Neoliberalism'," *Theory, Culture, and Society Blog*, 21 February 2014, *available at* http://theoryculturesociety.org/will-davies-responds-to-nicholas-ganes-the-emergence-of-neoliberalism/ (last accessed 15 August 2014).

government."[110] Understanding these mentalities or rationalities of government involves studying the ways in which political actors, citizens, organizations, and others think about why, how, when, and with respect to what government should happen. In Nikolas Rose and Peter Miller's terms:

> Modes of government may be analyzed, first of all, in terms of their *political rationalities*, the changing discursive fields within which the exercise of power is conceptualized, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familiar sectors.[111]

Rationalities of government are always dynamic and multiple. They are the "bodies of knowledge, belief and opinion in which we are immersed."[112] Particular mentalities of government are embedded in our language and practices, and draw upon the forms of knowledge present and privileged in our society. They are not innocent, but rather entail particular types of activity, and imply certain programs for guiding and reforming conduct.

From a governmentality perspective, therefore, rationalities of government are intimately related with the production of 'truth'. What we 'know' to be 'true' about society, the state, religion, science, human behavior, the natural world, and so on produces particular ideas about how we should govern ourselves and others. Different ontological and epistemological ideas of how the world works produce different rationalities with respect to how we should govern ourselves and others, what means we should use to do so, and what the ends of this government should be.

In particular, focusing on the rationalities of government entails an examination of what Mitchell Dean refers to as "the *episteme* of government."[113] The relevant questions here are:

> [W]hat forms of thought, knowledge, expertise, strategies, means of calculation, or rationality are employed in practices of governing? How does thought seek to transform these practices? How do these practices of

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[110] *See* Dean, *Governmentality*, *supra* note 11, at 24; Nikolas Rose & Peter Miller, "Political Power Beyond the State: Problematics of Government," 43(2) *British Journal of Sociology* 173 (1992).

[111] Rose & Miller, "Political Power Beyond the State," *supra* note 110, at 175.

[112] Dean, *Governmentality*, *supra* note 11, at 24.

[113] *Id.*, at 42.

> governing give rise to specific forms of truth? How does thought seek to render particular issues, domains and problems governable?[114]

The idea here is that categories such as 'the state', 'Europe', 'the citizen', 'the international', 'the environment', 'the economy' and so on should not be taken for granted.[115] Neither should their chosen projects, activities, or justifications. Instead, these categories, projects, and activities are ways of understanding the world that are attached to particular ideals of government. They are problems around which "different events and practices ... are apparently organized."[116] The manner in which these categories are imagined, produced, and limited produces a narrative about the way that we think and act with respect to them.[117] And that narrative is the rationality of government.

Investigating rationalities and regimes of truth is particularly interesting when it comes to analyzing the EU and its environmental norm export policies. For example, a governmentality approach need not assume the prior existence of 'the EU', 'the environment', 'third states', 'sovereignty', or any of the other categories at issue in these practices. Instead, it might inquire into how these categories are constructed and operationalized in an ongoing manner, by means of what regimes of truth, and in line with which rationalities.

Scholars working with governmentality have focused attention on the ways, for example, in which the idea of environmental protection is built around liberal and neoliberal biopolitical regimes of security.[118] They have linked the idea of development discursively with liberal and neoliberal economic models and with hierarchical norms of Western civilization.[119] And they

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[114] *Id.*

[115] Foucault explains that his choice of method is:

> obviously and explicitly a way of not taking as a primary, original, and already given object, notions such as the sovereign, sovereignty, the people, subjects, the state, and civil society, that is to say, all those universals employed by sociological analysis, historical analysis, and political philosophy in order to account for real governmental practice.

Foucault, *Birth of Biopolitics*, *supra* note 7, at 3.

[116] *Id..*

[117] *See* Dean, *Governmentality*, *supra* note 11, at 238.

[118] *See, e.g.,* Chris Methmann, "The Sky is the Limit: Global Warming as Global Governmentality," 19(1) *European Journal of International Relations* 69 (2013); Jo Goodie, "The Invention of the Environment as a Subject of Legal Governance," in *Rethinking Law, Society and Governance: Foucault's Bequest* 79 (Gary Wickham & George Pavlich eds. 2001).

[119] *See, e.g.,* Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (2d ed. 2011); Stoler, *supra* note 105.

have examined the way that the 'rule of law' concept is the product of neoliberal governmental rationalities.[120]

Chapter 3 will examine the EU's environmental norm export policies in terms of rationalities of government. As noted in Section 2, it will argue that EU governmental practice in this area can be interestingly understood as evoking two competing paradigms: a 'market' rationality and a 'rights' rationality. 'Market' rationalities, which are associated with the liberal and neoliberal governmentality paradigms, focus on efficiently managing society for the purpose of creating the necessary conditions for the operation of a competitive market, in which individuals can exercise free choice. 'Rights' rationalities, which maintain some links with earlier forms of *raison d'État* governmentality, focus on maintaining balance in the international realm, promoting domestic wellbeing, and fostering solidarity among citizens.

Both of these rationalities exist within our current 'advanced liberal' world. However, they differ in the way that they conceive of the role of government, the reasons for individual action, and the proper order of the international sphere. These rationalities are not homogenous, but contain within them multiple strands that take different positions with respect to the balance between freedom and security. In order to explain this point more fully, Chapter 3 identifies two ideal-typical positions within each strand: the 'free market' and 'development' strands within market rationality, and the 'sovereigntist' and 'cosmopolitan' strands within rights rationality.

'Market' and 'rights' rationalities are woven throughout EU policy generally, and environmental norm export policies specifically. They are the basic belief systems that structure arguments for and against specific governmental practices. They determine what legal and political argumentative positions will be cognizable, and which will not; what types of governmental activity are seen as possible or feasible and legitimate, and what types are not; and how individuals are perceived as subjects and objects of government. As Chapter 3 will argue, despite the fact that they rely on profoundly different governmental logics, these rationalities are not necessarily correlated with particular legal or policy outcomes. Rather, each of these rationalities is complex enough to permit the simultaneous existence of multiple political positions.

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[120] Nikolas M. Rajkovic, " 'Global Law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'Through' Law," 18 *European Journal of International Relations* 29 (2010).

3.3 Technologies of Government

Alongside its focus on the rationalities that produce and are produced by particular forms of government, governmentality also directs our attention to the mechanisms by which government occurs. These are "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions."[121] The mechanisms, procedures, legal regimes, instruments, and tactics that are collectively known as the technologies of government are the means by which governing is accomplished.[122]

These technologies work both on the population and the individual. They are the practices and procedures by which government orders the aggregate lives of the governed. They make rationalities operable; they are the material side of governmentality. Technologies are the means by which the aims, methods, and targets of government are inscribed on subjects (both the governed and the governing). And they are the measuring sticks by which subjects judge and evaluate their own actions—the means by which they self-govern.

These technologies are not neutral, but rather limit the perceived realm of possible actions, legitimizing and naturalizing particular behaviors, and de-legitimizing and de-naturlaizing others. Government, in this sense, is tracked into particular pathways by the technologies that it employs in pursuit of its ends. They are also linked to what Mitchell Dean calls the "fields of visibility of government": the way that particular rationalities of government make certain objects visible while hiding or obscuring others.[123] Census reports, maps, atmospheric pressure measurements, surveys, and so on are examples of technologies that serve both to facilitate the activity of government as well as to 'make visible' certain individuals, institutions, objects, and processes and 'make invisible' certain others.

The focus on technique expands the domain of government into the realm of objects and measurements. In addition to law and policing, government occurs by means of administrative forms, data collection, and balance of payments modeling. This highlights once again the way in which power is exercised by and through broad networks of institutions, practices, and knowledge creation. It allows a de-centering of the sovereign state as the sole locus of power and government, opening up the field to include the participation of international organizations, NGOs, standard-setting bodies, corporations, scientists, media, and other actors.

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[121] Rose & Miller, "Political Power Beyond the State," *supra* note 110, at 175.

[122] Dean, *Governmentality, supra* note 11, at 41-42.

[123] *Id.*, at 41.

Examining the mechanisms, technologies, or techne through which government occurs helps both to identify the rationalities according to which it operates and the subject positions that it hopes to inscribe. It points out the ways in which the means of government are not neutral, but are rather critically intertwined with shaping and rationalizing its ends. It offers a way to think about government not in institutional or state-centric terms, but rather in terms of concrete practices and the techniques that embody them. Examining techniques of government thus opens up the possibility of examining legal practices within the broader governmentality context of which they are a part, in a manner that more formal legal analysis does not allow.

This focus on techniques of government is particularly useful for studying the regime of legal and political practice that this dissertation refers to as EU environmental norm export. It draws attention to the concrete mechanisms—the knowledge regimes, systems of experts, treaties, diplomacies, and so on—that produce the EU and its targets as particular actors, disseminate governmental rationalities, and induce particular behaviors and conflicts.[124] It is also useful in that it moves beyond the traditional international law sticking points of sovereignty and consent, including them within the governmentality analysis as technologies that enable government "at a distance" even in the absence of formal mechanisms of regulation and enforcement.

The EU's environmental norm export policies make use of an interesting range of 'rights' and 'market' techniques. In dealing with transnational threats and spreading global economic norms, the EU has developed a complex set of mechanisms that seek to govern by linking different national systems to one another through treaties and aid regimes, directing the activities of private actors by managing incentives, and pressing for the incorporation of EU knowledge regimes in international organizations. Intertwined with these legal mechanisms, the EU employs statistical information, scientific studies, development indexes, labeling programs, along with a host of other methods in order to induce compliance from public and private actors outside of its borders. As Chapter 4 will argue, the simultaneous presence of these various technologies is significant, because they allow for multivocality and strategic political action that permit the EU to "govern at a distance."

3.4 Subjectivities and Self-Government

In addition to a focus on the rationalities and technologies of government, governmentality also directs attention to the formation of individual and collective identities or subjectivities.

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[124] *See* Andrew Barry, *Political Machines: Governing a Technological Society* 153-174 (2001) (describing the technologies through which the EU became constructed as the site of environmental action).

Recall that in Foucault's conception, government operates not only through coercion, but also through self-government. As a particular rationality of government and its forms of truth come to dominate discourse, individuals, groups, and governors are constructed as particular types of subjects.[125] The subjects suggested by these rationalities are expected to govern themselves and others in accordance with these rationalities. Government can thus take place "at a distance."[126]

There is no single universal subject of government. Rather, as Peter Miller and Nikolas Rose explain:

> [T]hose to be governed can be conceived of as children to be educated, members of a flock to be led, souls to be saved, or, we can now add, social subjects to be accorded their rights and obligations, autonomous individuals to be assisted in realizing their potential through their own free choice, or potential threats to be analysed in logics of risk and security.[127]

Governmentality is concerned with exploring the processes through which individuals and communities come to govern themselves in a particular mode. As Foucault explains, "rather than asking ourselves what the sovereign looks like from on high, we should be trying to discover how multiple bodies, forces, energies, matters, desires, thoughts and so on are gradually, progressively, actually and materially constituted as subjects."[128] The question to ask, then, is what form of identity does a particular act of government presume and construct both for the governed and for the governors?

> [W]hat forms of person, self and identity are presupposed by different practices of government and what sorts of transformation do these practices seek? What statuses, capacities, attributes and orientations are assumed of those who exercise authority (from politicians to bureaucrats to

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[125] Some Foucauldians distinguish between "1) 'subjectification' (*assujettissement*) or the ways that *others* are governed and objectified into subjects through processes of power/knowledge (including but not limited to subjugation and subjection since a subject can have autonomy and power relations can be revisited and reversed), and 2) 'subjectivation' (*subjectivation*) or the ways that individuals govern and fashion *themselves* into subjects on the basis of what they take to be the truth." Trent H. Hamann, "Neoliberalism, Governmentality, and Ethics," 6 *Foucault Studies* 38-39 fn 4 (2009). *See also* Alan Milchman & Alan Rosenberg, *The* Final *Foucault: Government of Others and Government of Oneself* (2008). Though these terms are helpful for distinguishing between different types of processes through which governmentality comes to be operationalized within the body of the subject, this dissertation largely avoids them, as this complex language may tend to confuse readers not versed in Foucauldian literature, and thus serve to obscure, rather than illuminate.

[126] Rose & Miller, "Political Power Beyond the State," *supra* note 110, at 180.

[127] Peter Miller & Nikolas Rose, *Governing the Present: Administering Economic, Social and Cultural Life* 9 (2008).

[128] Foucault, *Society Must Be Defended*, *supra* note 7, at 28.

> professionals and therapists) and those who are to be governed (workers, consumers, pupils and social welfare recipients)? What forms of conduct are expected of them? What duties and rights do they have? How are these capacities and attributes to be fostered? How are these duties enforced and rights ensured? How are certain aspects of conduct problematized? How are they then to be reformed? How are certain individuals and populations made to identify with certain groups to become virtuous and active citizens, and so on?[129]

These subjectivities are the mechanism through which self-government is promoted. They set the limits of acceptable behavior, legitimizing and normalizing certain actions and de-legitimizing other ways of being. Subjectivity is thus closely related with knowledge, truth, morality, and values.

The notions of freedom and responsibility are particularly important here. In order for power to function through the subject's own actions (as opposed to through coercion by outside forces), it is necessary that it is directed at a subject who will conduct itself and others in accordance with the dominant governmental reason.[130] To govern is "to structure the possible field of action of others."[131] The exercise of power—in whatever form—is in "guiding the possibility of conduct and putting in order the possible outcome."[132] In this way, it is "a question of government"; of "modes of action, more or less considered or calculated, … destined to act upon the possibilities of action of other people."[133] Thus, power in its productive form can be exercised "only over free subjects, and only insofar as they are free."[134] Power does not constrain subjects from above: it entices them to govern themselves, and as such is constitutive in a more dispersed way.

The self-governing subjects of government are in turn responsible for producing the modes of power that they are subject to. Subjects that have assumed a particular identity confirm and reproduce the truths and rationalities that framed their subjectivity. Governmental rationalities and subjectivity are thus mutually constitutive. They exist in relation with one another.

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[129] Dean, *Governmentality*, *supra* note 11, at 43.
[130] Foucault, "The Subject and Power," *supra* note 7, at 789.
[131] *Id.*
[132] *Id.*
[133] *Id.*, at 790.
[134] *Id.*

The notion of identity is particularly interesting in the case of the EU. An array of knowledge regimes, rationalities and techniques are continually deployed to construct the EU as a subject. Laws, discourses, economies, and knowledge complexes structure both the EU's perceived field of action and its relationships with Member States, third countries, and citizens.[135] The EU's relationships with these rationalities and technologies produce its subjectivity.

The practice of environmental norm export contributes to the production of specific EU identities by constructing or framing 'the environment', 'the economy', 'the international' and so on as objects of EU concern. Constructing these areas as the natural domain of EU policy in turn contributes to the formation of EU, Member State, citizen, and other subjectivities. The more these areas become self-evidently incorporated into the notion of EU subjectivity, the more the EU becomes understood as the natural locus of power regarding these themes. Knowledge produces identity, which in turn produces knowledge in a recursive loop.

The EU and the states, individuals, and organizations with which it interacts are all subjects that both produce and are guided by government. However, they are not singular or homogenous subjects: they adopt multiple subjectivities that overlap and intersect in different ways at different times. Focusing on the relationship between governed and governing elucidates the mechanisms by which power is produced and reproduced along particular trajectories. It brings notions of identity and subjectivity to the heart of the question of power. In doing so, it provides a critical hook for examining the EU's activities in the global realm that bypasses the questions of motive and legitimacy, and thereby suggests alternative sites for strategic resistance. As Chapter 5 will argue, the subjectivities produced and assumed by EU environmental value export are complex. Both market and rights discourses constitute the EU and those it 'sees' as subjects. The multiplicity of EU and individual subjectivity is important, as it structures the field of governmental action and provides particular pathways for coercion, self-government, and resistance.

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[135] *See also* Jens Henrik Haahr, "Open Co-Ordination as Advanced Liberal Government," 11(2) *Journal of European Public Policy* 209, 223-24 (2004).

Chapter 3

RIGHTS AND MARKET:
The Rationalities of EU Environmental Norm Export

1 Introduction

1.1 What are Rationalities of Government?

This chapter will begin the exploration of EU environmental norm export by examining the rationalities of government that drive this particular 'regime of practice'. As explained in Chapter 2, rationalities or mentalities of government are the historically contingent ways in which political actors, citizens, and organizations think about why, how, when, and with respect to what government should happen.[1] They are the modes of thinking by which we understand how the world works in terms of power relations. These rationalities are bound up with the question of 'truth'. What we 'know' to be 'true' about society, the state, religion, science, and so on, structures our ideas about how we can and should govern ourselves and others. These rationalities are more than "just ideologies"—they are part of the way we think and act, and of who we are.[2]

By examining the forms of thought, knowledge, and expertise that structure the governmental practice of EU environmental norm export, this chapter seeks to accomplish two related goals. First, it begins the project of 're-mapping the field' outlined in Chapter 1 by arguing that there are multiple, overlapping rationalities that structure the EU's policy in this area, and that particular legal and political arguments regarding environmental norm export can be understood along these lines. As noted in Chapter 2, our contemporary 'advanced liberal' governmentality is not singular, but rather consists of multiple conceptual frames, with neoliberalism coexisting along with legacies of older liberal and *raison d'État*

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[1] *See supra* Chapter 2, Section 3.2.

[2] Andrew Barry, Thomas Osborne, Nikolas Rose, "Introduction," in *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* 1, 7 (1996).

mentalities. As such, this dissertation speaks of plural *rationalities*, rather than a single *rationality* of government.[3] The task here is to examine how these different rationalities of government are combined in a 'topology of power' that guides the actions of the EU,[4] and to illustrate their functioning by means of identifying the operation of these 'rationalities' in the context of concrete instances of EU environmental norm export.

Second, this mapping exercise sets the stage for the argument that there are a variety of possibilities for political action and resistance both from within as well as from outside of these rationalities and their associated techniques and subjectivities. The rationalities described and traced in this chapter are not univocal or homogenous, and are not necessarily correlated with particular policy outcomes.[5] Rather, each of these rationalities is complex enough to permit the simultaneous existence of multiple political positions. As will be seen more clearly in Chapters 4 and 5, this contributes to the contention that due to the complexity of the governmentality landscape, the spaces between and within these rationalities provide room for political action and resistance.

To commence the mapping exercise, this chapter will argue that in examining the EU's environmental norm export practices, it is possible to discern multiple, overlapping rationalities of government. Drawing inspiration from Owen Parker's work on governmentality within the EU, it will divide these rationalities into two general categories: a 'market' rationality associated with the classical liberal and neoliberal traditions; and a 'rights' rationality that draws on the tradition of *raison d'État* thinking explained in Chapter 2.[6] While these rationalities are similar in that they are both situated in the same 'advanced liberal' world, they differ in the way that they conceive of 'freedom', identity, the role of government, and of the relationship between power and freedom.[7] As Foucault explained, the advanced liberal mentality recognizes "two absolutely heterogeneous conceptions of

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[3] *See also* William Walters, *Governmentality: Critical Encounters* 40 (2012); Owen Parker, *Cosmopolitan Government in Europe* (2012); Stephen J. Collier, "Topologies of Power: Foucault's Analysis of Political Government beyond 'Governmentality'," 26(6) *Theory, Culture & Society* 78 (2009); Doerthe Rosenow, "Decentring Global Power: The Merits of a Foucauldian Approach to International Relations," 23(4) *Global Society* 497, 508 (2009).

[4] Collier, *supra* note 3.

[5] As O'Malley, Weir, & Shearing point out: "[Foucault] repeatedly asserted that politics also is to be seen as a matter of struggle in which the outcome cannot be forecast because it is dependent upon the realization and deployment of resources, tactics and strategies in the relations of contest themselves." Pat O'Malley, Lorna Weir, & Clifford Shearing, "Governmentality, Criticism, Politics," 26(4) *Economy and Society* 510 (1997).

[6] *See also* Parker, *Cosmopolitan Government in Europe*, *supra* note 3 (distinguishing two forms of governmental rationality he refers to as the 'market' and 'legal' rationalities); Owen Parker, "A Foucauldian Perspective on the Ethics of EU(rope): Genealogies of liberal Government," in *Globalization and European Integration: Critical Approaches to Regional Order and International Relations* 70 (Petros Nousios, Henk Overbeek, & Andreas Tsolakis eds 2012).

[7] *See infra* Section 2.2.3.

freedom, one based on the rights of man, and the other starting from the independence of the governed."[8] The former conception sees freedom as the ability of an individual or society to exercise a set of pre-defined naturalized rights; the latter sees freedom as the ability of an individual to be unencumbered by government intervention in a broad and indistinct way. These two ambiguous conceptions of freedom, heterogenous yet coexistent and intertwined, are "a characteristic feature of ... nineteenth and twentieth century European liberalism."[9] And, as this chapter will argue, this logic can be extended to analyze twenty-first century advanced liberalism in the context of EU environmental norm export.

The 'rights' and 'market' rationalities defined in Sections 1.2 and 1.3 are, in that sense, mutually exclusive in their respective logics and worldviews. However, as will be demonstrated in Sections 2 and 3, they coexist in practice, where governed and governing subjects use them both in opposition in combination with one another, jumping back and forth between them to legitimize and naturalize their desired ends.

1.2 'Rights' Rationalities

'Rights' rationalities focus on maintaining balance in the international realm, promoting domestic wellbeing, and fostering solidarity among rights-bearing citizens. Their principal goals in the international realm are maintaining domestic power and sovereign rights, preventing disruptions in the global environment, and protecting the rights of domestic and/or global citizens. Domestically, their chief goal is maximizing the prosperity of the state and its citizens, safeguarding their rights, and ensuring solidarity.

Law plays a key role as the mechanism through which rights are protected and defined—it is an "expression of a collective will indicating the part of rights individuals have agreed to cede, and the part they wish to hold on to."[10] Good law is about respecting individual and collective rights and maintaining balance.

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[8] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-1979* 42 (Graham Burchell trans. 2008).

[9] *Id.* Foucault further notes:

> When I say two routes, two ways, two conceptions of freedom and of law, I do not mean two separate, distinct, incompatible, contradictory, and mutually exclusive systems, but two heterogenous procedures, forms of coherence, and ways of doing things. We should keep in mind that heterogeneity is never a principle of exclusion; it never prevents coexistence, conjunction, or connection. And it is precisely in this case, in this kind of analysis, that we emphasize, and must emphasize a non-dialectical logic if [we] want to avoid being simplistic.

Id.

[10] *Id.*, at 41.

Diplomacy and international law are mechanisms for asserting rights and resisting incursions by outside forces. 'Freedom' is defined in terms of sovereignty or rights—it is the pre-defined space within which government must not intrude. Governmental power is concentrated in the state, and is exercised in the form of policing and diplomacy.[11] As Michael Dean writes:

> Here one can imagine a kind of genealogy of this notion of international police from the European balance to the Monroe Doctrine in the early nineteenth century; from pronouncements of President Theodore Roosevelt on the role of the United States in its American sphere of influence to Carl Schmitt's description of the allied bombing of Germany in World War II as a police action; from current humanitarian interventions in 'failed or failing states' to the writings of contemporary radical theorists of 'Empire' and 'the camp' who claim that military intervention has become a police operation.[12]

'Rights' rationalities are preoccupied with questions about spheres of authority and balancing. They take up the issues of territoriality, human rights, sovereignty, governing principles and law, conceived in terms of rights.[13] As will be discussed in Chapter 4, their tools include diplomacy and international law, leadership, as well as policing techniques such as the use of surveillance, sanctions and military intervention. And as will be explored in Chapter 5, they operate through the construction of subjects of right (rights-bearing citizens) who organize themselves by reference to their own and others' rights and freedoms.

Within the broader category of 'rights' rationalities, as in the case of 'market' rationalities, there are many possible sub-positions regarding the appropriate scope of freedom and the problematic of security. As with the 'market' rationalities described above, this chapter will identify two ideal-typical positions within the 'rights' rationality spectrum. The first leans more heavily toward the 'freedom' side of the scale, envisioning the individual as exercising freedoms and rights within a fixed legal and political structure on the basis of equality with other individuals.[14] This will be termed the *sovereigntist* orientation within rights rationality. The second leans toward 'security', imagining the individual as a being who should be

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[11] Policing refers here not merely to the activity of a civil guard acting to prevent criminal behavior and promote order, but rather to a much broader array of activities attempting to intervene and discipline human behavior. *See* Chapter 2, Section 2.2.1.

[12] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 234 (2d ed. 2010). *See also* Mitchell Dean, *Governing Societies* (2007).

[13] *See, e.g.,* Dean, *Governmentality*, *supra* note 12, at 105 (noting that 'civil prudence' was a key feature of reason of state mentality, which today might mean guarding against the event that "the pursuit of the state's interests contravenes principles of law, human rights and global environmental values.").

[14] Dean speaks of this as the 'city-citizen' game model. *Id.*, at 99.

protected according to a universal or natural rights standard, whose welfare is to be addressed by the community, and who is integrated into society through improvement.[15] This will be termed the *cosmopolitan* orientation within rights rationality. While they differ in the relative emphasis that they place on notions such as the state, freedom, and security, both of these orientations draw on the same basic 'rights' rationality set of notions regarding what government can do, how, and to whom.[16]

1.3 'Market' Rationalities

'Market' rationalities, by contrast, focus on efficiently managing society for the purpose of creating the necessary conditions for the operation of a competitive market. As explained in Chapter 2, the task assumed by liberal and neoliberal rationalities of government is to create the conditions within which competitive conduct can occur.[17] Their focus is broad: government should use political economic and scientific analysis to maximize not merely monetary gain, but the general health and wellbeing of populations. Experts and technocrats therefore play an important role, as they are the ones who conduct these analyses and produce the knowledge on which government depends.[18] 'Market' rationalities measure success on the basis of the efficient and effective achievement of their ends.[19] They may lean toward the *laissez-faire* (as the 'naïve' liberal rationalities of the past), or the interventionist (in the more 'neoliberal' mode), taking to heart the notion that the sphere of free competition must be built, maintained, and defended. 'Freedom' here is understood in terms of the autonomy of the governed; the freedom to choose and compete in the market.

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[15] Dean speaks of this as the 'shepherd-flock' game model. *Id.*, at 100.

[16] These two alternate positions might be compared usefully with Koskenniemi's description of the apologetic and utopian arguments in traditional international law. While *sovereigntist*-oriented rights rationality might emphasize the importance of state consent in the formation of international law, *cosmopolitan*-oriented rights rationality would emphasize the importance of normative virtues or principles in grounding international action. As in Koskenniemi's argument, these rationalities ultimately collapse into one another as part of the same overarching governmentality. *See* Martti Koskenniemi, *From Apology to Utopia* (2d ed. 2006).

[17] *See* Chapter 2, Sections 2.2.3 and 2.2.4.

[18] On the importance of expertise in international law and politics, *see* David Kennedy, "Challenging Expert Rule: The Politics of Global Governance," 27 *Sydney Law Review* 1, 11 (2005); Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," 70 *Modern Law Review* 1 (2007); Jessica C. Lawrence, "The Structural Logic of Expert Participation in WTO Decision-Making Processes," in *Expert Participation in International Decision-Making Processes* (Monica Ambrus & Ellen Hey eds., forthcoming 2014) (discussing the role of expertise in the governing logic of the WTO); Oliver Kessler & Wouter Werner, "Expertise, Uncertainty, and International Law: A Study of the Tallinn Manual on Cyberwarfare," 26(4) *Leiden Journal of International Law* 793 (2013) (discussing the role of expertise in the international law of cyberwarfare).

[19] *See* Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* 2 (1999) (distinguishing "two dimensions of democratic self-determination, input-oriented authenticity (*government by the people*) and output-oriented effectiveness (*government for the people*)."); Giandomenico Majone, *Regulating Europe* (1996) (describing the EU as a 'regulatory State', drawing attention to the contrast between the EU's strong rule-making power and its relatively weak administrative infrastructure, and ultimately suggesting that its output legitimacy is conditional on efficiency).

'Law' is a tool used to set the 'rules of the game' needed for the fair operation of the market (ex: contract law, free movement law), and a means of ensuring security (ex: technical and sanitary standards).[20] The watchwords of good law are efficiency, effectiveness, and calibration.

Market rationalities recognize that power is exercised through a diversity of means that spread far beyond the state, including international organizations, non-governmental organizations, private actors, and expert bodies. As will be seen in Chapter 4, their tools include such diverse measures as regulations, indicators, expert analysis, and monitoring and standardization organizations. And as will be described more extensively in Chapter 5, they operate by constructing entrepreneurial subjects who will be responsible for themselves and seek to maximize their own interests and satisfaction so long as the right market conditions are in place.

The 'market' rationalities described here are not univocal or monolithic, but rather contain many possible variants that draw on the same basic system of political reason. In order to illustrate how different positions may be taken within this general mentality, this chapter will identify two distinct ideal-typical lines of argument that take opposing stands regarding the proper balance between governmental intervention and social and economic freedom.[21] Within market rationality, the first ideal-typical strand harkens back to a more classical liberal mentality, preferring the freedom of enterprise and reliance on privatization for the purpose of ensuring social stability.[22] This will be termed the *free market* orientation within market rationality. The second has more in common with neoliberal approaches (as defined in Chapter 2), and involves a greater focus on the need for intervention in support of development and social security in order to protect and improve the stock of human

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[20] Foucault in *The Birth of Biopolitics*, writes interestingly of advanced liberal law that it is the "terms of the game," "[a]n environmental technology whose main aspect [is]: the definition of a framework around the individual which is loose enough for him to be able to play." Foucault, *Birth of Biopolitics*, *supra* note 8, at 260-61.

[21] It would certainly be possible to identify many additional ideal-typical positions within the broader category of market rationality, and thereafter to identify sub-positions within these strands. However, at some point this becomes a fractal exercise—a sort of bottomless pit of specification. Instead, for the purposes of the argument contained herein, it is enough to indicate that multiple positions can refer to the same set of understandings regarding the who, what, how, and why of government, and to indicate two particularly potent possible positions that flow from this basis.

[22] This conception is most in line with the popular use of the term 'neoliberalism'. As David Harvey describes it, for example, neoliberalism is about "liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade." David Harvey, *A Brief History of Neoliberalism* 2 (2005). As explained in Chapter 2, however, it does not reflect the use of the word neoliberalism in Foucauldian scholarship, but is more akin to the 'naïve' *laissez-faire*-ism of the classical liberal era. *See supra* Chapter 2.

capital.[23] This will be termed the *human capital* orientation within market rationality. While they differ in the relative emphasis that they place on 'freedom', then, both the *free market* and *human capital* orientations draw on the same basic 'market rationality' ideas regarding the object and purpose of government.

A basic schema of these rationalities might be sketched thus:
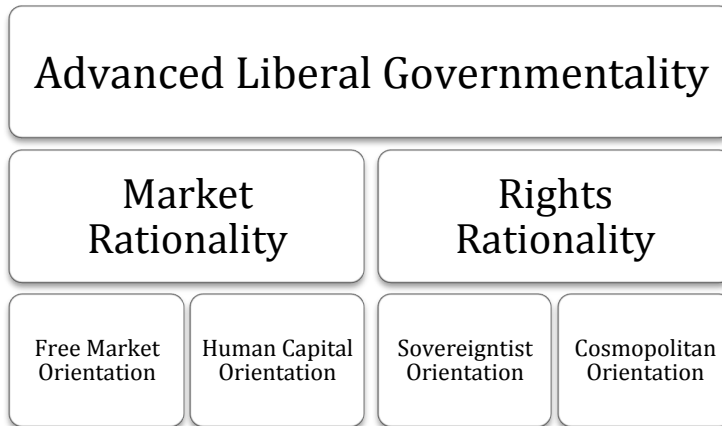
As this chapter will attempt to show, these rationalities are interwoven throughout discussions of EU law and policy in general, and environmental norm export in particular. They are the basic belief systems that structure legal and policy arguments for and against specific governmental practices. They determine what positions will be cognizable, and which will not; what types of governmental activity are seen as possible and legitimate, and what types are not; and how subjects and their behaviors (whether individuals, States, corporations, or otherwise) are understood and addressed. They act, in other words, as a sort of structural grid within which the dominant positions regarding government can all be articulated.[24]

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[23] Thus, as Foucault explains, in the advanced liberal context the problem of security is redefined as "the protection of the collective interest against individual interests." Foucault, *Birth of Biopolitics*, *supra* note 8, at 63. *Contra* David Harvey, this alternate conception of market rationality enables adherents to criticize policy recommendations that draw on free-market oriented market rationality from within a neoliberal perspective. *See* Harvey, *supra* note 22.

[24] This is not, of course, to say that no alternative positions exist. Certainly, it would be possible to argue outside positions, such as that EU environmental norm export is necessary in order to advance the coming of the kingdom of God, or that EU environmental norm export is an appropriate governmental action because it helps to protect the inherent worth of non-human animals. However, these remain marginal positions because they reflect mentalities of government different to the hegemonic advanced liberal order. As will be discussed in Chapter 6, it is certainly possible that such a counter-hegemonic position could come to dominate the field at

1.4 Chapter Outline

In order to demonstrate the existence and operation of these mentalities of government, the chapter will continue as follows. First, Section 2 will provide a general discussion of how the rights and market rationalities operate within the EU, looking first at EU history (Section 2.1), and subsequently at contemporary trade and environment practice (Section 2.2). Section 2.3 will more fully explain the meanings of both the market and rights rationalities and their *free market*, *human capital*, *sovereigntist*, and *cosmopolitan* variants by outlining ideal-typical position statements from each of these perspectives with respect to the subject of environmental norm export.

Section 3 will then give an extended example of how these rationalities function in practice. It will take as its illustrative example the EU's imposition of an emissions trading scheme (ETS) for airlines in 2011 and its subsequent fallout, selected as a topical case of EU environmental norm export. Using this case study, it will demonstrate how market and rights rationalities, in their different orientations, structure the discourse in that debate. The focus here will be on both specific legislative and legal texts as well as the broader political context in which these legal arguments are embedded. The idea here is twofold. First, the section seeks to make visible the ways in which variants of the market and rights rationalities structure the realm of perceived possibility with respect to the formation and (legal) contestation of the EU's policy choices. Second, it seeks to demonstrate the ways in which these profoundly different understandings of the art of government are nevertheless complex enough to support multiple policy outcomes from within their respective logics. Finally, Section 4 summarizes this chapter's argument and provides some concluding thoughts on the significance of these rationalities within the practice of EU environmental norm export.

2 Market and Rights Rationalities in EU Environmental Norm Export

2.1 The EU through the Market and Rights Lenses

2.1.1 EU History

As explained in Chapter 2, Foucault describes a genealogy of power in which the governmental rationality of *raison d'État* is gradually replaced during the eighteenth century by a governmentality based on liberalism, which in turn is significantly altered by the

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some point in the future—rationalities of government are, after all, historically contingent. However, at present, the discursive field is fairly well colonized by the advanced liberal rationalities discussed in this chapter.

development of a neoliberal governmentality after the Second World War.[25] However, these shifts do not mean that the older forms of governmental reason disappear—they continue to exist in the background, maintaining their distinct focus, but modified by their altered context. *Raison d'État*, classical liberal, and neoliberal influences are all on display in the history of the EU generally, and specifically in the field of international trade and environmental policy. And each of these strands continues to exert its influence in the form of the market and rights rationalities that structure contemporary EU discourse and behavior in this area.[26]

The development of liberal political rationality was critical to the project of European integration.[27] With liberalism came a rethinking of the international sphere as a space of mutual enrichment. Whereas under *raison d'État* the international was a space of national competition in a context of balance of powers, in which gains by one state could only come at the expense of another, the liberal mentality saw the international as a world in which states could specialize and trade to their reciprocal advantage.[28] This inspired the idea that Europe could be a zone of collective enrichment and mutual progress. In this vision, liberal government would ensure both freedom and security, leading to national prosperity through the market, and peace through trade. As Kant's famous view had it, perpetual peace would grow from the 'natural tendencies' of people to engage in exchange.[29] The rise of liberalism thus permitted the development of a new vision of a Europe united in pursuit of economic progress. As Foucault says:

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[25] *See* Chapter 2, Section 2.

[26] In examining the development of these rationalities in the history of the EU, this section draws on the excellent work of William Walters and Jens Hendrik Haahr, Bastiaan van Apeldoorn, and Owen Parker. *See* Bastiaan van Apeldoorn, "The Contradictions of 'Embedded Neoliberalism' and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits," in *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon* 21 (Bastiaan van Apeldoorn, Jan Drahokoupil & Laura Horn eds. 2009); Parker, *Cosmopolitan Government in Europe*, *supra* note 3; William Walters & Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* (2005).

[27] *See* Parker, *Cosmopolitan Government in Europe*, *supra* note 3; Walters & Haahr, *supra* note 26; Thomas Diez, "Speaking 'Europe': The Politics of Integration Discourse," 6(4) *Journal of European Public Policy* 598 (1999).

[28] The theories of Smith and Ricardo were strongly influential here. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* para. 4.9.53 (1776) ("Every man, as long as he does not violate the laws of justice, must be able to pursue his interest and bring his capital where he pleases.").

[29] As Kant wrote:

> The spirit of commerce, which is incompatible with war, sooner or later gains the upper hand in every state. As the power of money is perhaps the most dependable of all the powers (means) included under the state power, states see themselves forced, without any moral urge, to promote honourable peace and by mediation to prevent war wherever it threatens to break out.

Immanuel Kant, *Perpetual Peace* 157 (M Campbell Smith trans. [1795] 1917). *See also* Chapter 2, Section 2.4.4.

> [T]his may be the first time that Europe appears as an economic unit, as an economic subject in the world, or considers the world as able to be and having to be its economic domain. ... Europe is now in a state of permanent and collective enrichment through its own competition, on condition that the entire world becomes its market.[30]

The shift toward thinking Europe in this new way did not, of course, happen all at once, or unproblematically. The so-called 'first wave of globalization' in the late 1800s was short-lived and uneven.[31] Similarly, early twentieth century dreams of an economic union were no match for the resurgence of nationalism and the outbreak of two world wars.[32] After the second World War, however, the liberal fantasy of a peaceful Europe bound by economic ties re-emerged.

Both market and rights rationalities are identifiable at this stage. The founding of the European Coal and Steel Community (ECSC) in 1951 followed more closely the ideals of market rationality.[33] The ECSC aimed at achieving peace in Europe through limited economic integration in the areas of coal and steel. According to the Schumann Declaration, the "pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe."[34] Such economic entanglement would, in a decidedly Kantian frame, "make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible."[35] This plan, which formed the basis of the Treaty of Paris establishing the ECSC the following year, succeeded in setting up the first supranational government body in Europe. In the process, it succeeded in visualizing Europe (that is, in making Europe 'legible' in James Scott's sense of the word[36]) in a new way that was the provenance of the High Authority, not the individual states. As Walters and Haahr point out, it did so by relying on a liberal framework that drew heavily on the authority of planners, experts, engineers, and

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[30] Foucault, *Birth of Biopolitics*, *supra* note 8, at 55.

[31] *See* Kevin H. O'Rourke & Jeffrey G. Williamson, "When Did Globalization Begin?" 6(1) *European Review of Economic History* 23 (2002).

[32] *See, e.g.,* Count Richard Nikolaus Coudenhove-Kalergi, *Pan-Europe* (1926) (which argued for a European union as a means of preventing war from breaking out again between the nation-states and of responding to increased competition from the US).

[33] Walters and Haahr usefully link the birth of the ECSC with the high modernist principles that held sway during this era. *See* Walters & Haahr, *supra* note 26, at 21-39. *See also* James Scott, *Seeing Like a State* (1998).

[34] Schumann Declaration, 9 May 1950, *available at* http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last accessed 15 August 2014).

[35] *Id.*

[36] *See* Scott, *supra* note 33.

technocrats.[37] Monnet's plan for the ECSC was steeped in market rationality: "the High Authority was ... committed not just to removing tariffs, unfair subsidies and ending quotas on trade in the areas of coal and steel, but the enhancement of competition in a properly transnational common market."[38] This liberal rationality served as the platform on which the ECSC could stand to see Europe as a governable space.

However, rights rationality was also evident during the early post-war period. Owen Parker, for example, argues that rights rationality was evident in the idea of building "a common citizenship, a broader social contract between the governed and government; a de- (or perhaps re-) territorialisation of human rights as a response to the anti-human(ist) horrors of war and particularly Nazi totalitarianism and the holocaust."[39] The founding of the Council of Europe with its human rights and democratization mandate in 1949 might be evidence of this.[40] It is important to note, however, that though these notions maintain the *raison d'État* focus on rights, solidarity, and sovereignty, they are transformed by their liberal context. Indeed, even at their inception they were construed as being important not merely for their own sake, but also to facilitate social and economic progress. Article 1(a) of the Statute of the Council of Europe, for example, identifies its purposes as both "safeguarding and realising the ideals and principles which are [its Members'] common heritage" and "facilitating their economic and social progress."[41]

The presence of both market and rights rationalities continues to be evident throughout the next several decades of European integration. In the intervening years between the 1951 Treaty of Paris and the 1957 Treaty of Rome, members of the ECSC continued to discuss further integration. Plans for a European Defence Community were scrapped due to shifts in the political winds.[42] In the wake of this defeat, an Intergovernmental Committee under the chairmanship of Belgian Foreign Minister Henri-Paul Spaak developed a report that laid the basis for the Treaty Establishing the European Economic Community (Treaty of Rome). This Report, in classical liberal fashion, distinguished between measures affecting the functioning

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[37] Walters & Haahr, *supra* note 26, at 32-33.

[38] *Id.* at 33.

[39] Parker, *Cosmopolitan Government in Europe*, *supra* note 3, at 53. In support, he cites Winston Churchill's Zurich speech of 1946, which called for the construction of a "United States of Europe" built on "an enlarged patriotism and common citizenship." *Id.* (quoting A Boyd & F Boyd, "Winston Churchill's Speech at Zurich, 19 September 1946," in *Western Union* (1948)).

[40] Parker, *Cosmopolitan Government in Europe*, *supra* note 3, at 53.

[41] Statute of the Council of Europe, 5 May 1949, CETS No. 001, at Art. 1(a).

[42] For further reading on the EDC, *see* Edward Fursdon, *The European Defence Community: A History* (1980).

of the common market, which would require supranational integration, and more 'general matters', which would remain in the hands of the nation states.[43]

The Treaty of Rome, following the Spaak Report, aimed primarily at the establishment of a common market. Article 2, which sets out its purpose, is a beautiful example of market rationality:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.[44]

Freedom and security, here, are to be achieved through economic growth within a peaceful and competitive Europe. As Philip Manow, Armin Schäfer, and Hendrik Zorn describe it, "the political economy of the [Treaty of Rome] came close to the ordoliberal conception that Hallstein, Bohn and Müller-Armack had promoted in the negotiations: the ECJ guarded competition, non-discrimination and market opening, while blocked decision making in the Council shielded against interventionist temptations."[45] The ultimate goal was a sort of dual system: a supranational economic constitution protected from local politics, and multiple social policies formed by domestic political legislation. Thus from the beginning, the European project purposefully excluded social issues from its integrationist objectives, a setup that Fritz Scharpf has famously termed the 'decoupling' of the social and economic spheres.[46]

As a consequence of this design, the legitimacy of the EEC came from its usefulness for the pursuit of economic growth and peaceful competition. Government took place by means of guaranteeing individual freedom within the competitive market. The 'four freedoms'

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[43] Report of the Heads of Delegations to the Ministers of Foreign Affairs presented to the Intergovernmental Committee established by the Messian Conference, Apr. 21, 1956 [the 'Spaak Report'].

[44] Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11 (effective 1 Jan. 1958 [*hereinafter* Treaty of Rome], at Art. 2.

[45] Philip Manow, Armin Schäfer, and Hendrik Zorn, "European Social Policy and Europe's Party Political Center of Gravity, 1957-2003," in *MPIFG Discussion Paper* 22 (2004).

[46] Fritz W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity," 40 *Journal of Common Market Studies* 645 (2002). Fascinatingly, this distinction parallels a broader distinction that Sundhya Pahuja identifies between economic and non-economic matters in international governance. This distinction, she argues, explains the highly differentiated institutional and voting structures in, on the one hand, economic organizations like the IMF and, on the other hand, political organizations like the UN General Assembly. *See* Sundhya Pahuja, *Decolonizing International Law: Development, Growth, and the Politics of Universality* (2013).

contained in the Treaty of Rome (free movement of goods, capital, services, and labor) existed to further the cause of market integration. As Walters and Haahr write:

> Freedom has become a tool, a technology for the achievement of specific governmental objectives, such as stability, development and rising standards of living. These objectives have replaced individual freedom as political imperatives: it is not liberty which defines the borders and forms of political authority and government. It is the objectives of harmonious economic development, balanced expansion, stability, raised living standards and 'closer relations' between member states.[47]

As Owen Parker points out, even the Treaty of Rome's creation of the European Social Fund—a nod in the direction of solidarist legalism—was ultimately justified on the grounds that it was necessary "to improve employment opportunities for workers and to contribute to the raising of their standard of living."[48] All in all, the EEC Treaty created a world in which commercial policy was supranationalized, while social protection was by and large left to the Member States.[49] The EU derived its legitimacy from being an effective technocrat: its legitimacy was rooted in its ability to produce regulatory policies that responded to the needs of an integrated economic space within Europe.

The ECJ's early jurisprudence was an important part of this project, and clearly manifests the market rationality that pervaded these early years. It is well known that the Court's interpretation of the 'negative integration' free movement rules as having direct effect and primacy helped to transform the Treaty of Rome from an intergovernmental agreement into an economic constitution.[50] In Parker's words, "the ECJ has interpreted the formalised treaties in such a way as to promote a market rationality further than many of the initial

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[47] Walters & Haahr, *supra* note 26, at 45.

[48] Treaty of Rome, *supra* note 44, at Art. 3(i).

[49] *See* van Apeldoorn, *supra* note 26, at 21. As Parker explains:

> Government at the European level is, in accordance with the ordo-liberal preference, to be conducted in the name of the economy—now a *European* economy—and notions of freedom are important only to the extent that they permit economic growth. On the other hand, juridical or social-contractarian conceptions of freedom remain the preserve of the member states and are worked out in the inherently *political* constitutional-democratic processes of social/welfare policy making according to the particular contingent preferences and political traditions of the member states' governments.

Parker, *Cosmopolitan Government in Europe*, *supra* note 3, at 59.

[50] On the ECJ's contribution to the development of the economic constitution, *see* E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution, *American Journal of International Law* 1 (1981); G.F. Mancini, "The Making of a Constitution for Europe," 26 *Common Market Law Review* 595 (1989); Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (1999).

proponents of the Rome treaty had anticipated."[51] Indeed, Gráinne de Búrca argues, though social, environmental, and other policy concerns made appearances in the Court's jurisprudence, they were generally conceived as either 'exceptions' to market-integration norms, or as political supplements to market liberalization goals.[52]

The early days of the EU thus exhibited a fairly strong vision of market rationality. As Walter Hallstein wrote in 1972:

> The basic law of the European Economic Community is liberal. Its guiding principle is to establish undistorted competition in an undivided market. Where rules are necessary to achieve this, they are rules to make freedom possible. For—to adopt a quotation from Kant—even freedom is 'not the natural condition of man'.[53]

Though presented as a natural condition under conditions of globalization, the common market, in its original formation, was not a natural occurrence. It was something artificial, that had to be created by the Treaties, and was in need of constant governmental maintenance.[54] The hosts of reports, regulations, directives, Treaty revisions, court judgments, institutional arrangements and so on that have followed have all, in a sense, been directed at this grand project of market construction.

This project was put to the test during the crises of European capitalism and integration of the 1980s. During that period, competing visions of Europe again came to the fore to contest the direction that the EU should take. Bastiaan van Apeldoorn argues that the 'completion of the internal market' and relaunching of these processes by the Single European Act (SEA) was mediated through "three contending responses or transnational strategic projects":

> In the *neo-mercantilist conception*, the project of European integration was first of all conceived as one of creating a big home market—supported by an active industrial policy if necessary protected by European tariff walls—in which 'European champions' would be able to confront successfully the American and Japanese competition. The *neoliberal project*, on the other hand, emphasized the free market aspects of the internal market, a free

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[51] Parker, *Cosmopolitan Government in Europe*, *supra* note 3, at 50.

[52] Gráinne de Búrca, "The Constitutional Challenge of New Governance in the European Union," 56(1) *Current Legal Problems* 403 (2003) (but pointing out the existence of alternative strands of social constitutionalism, as well).

[53] Walter Hallstein, *Europe in the Making* 29 (1972).

[54] *See also* Walters & Haahr, *Governing Europe*, *supra* note 26, at 49 ("One of the peculiar features of the common market is its *artificiality*, its manifestly constructed nature.").

market that should be open to and fully integrated into the emerging global economy. In contrast, the *social democratic project*—as in particular promoted by then Commission President Jacques Delors—sought to protect and consolidate the 'European social model' in a supranational regulatory framework.[55]

As the struggle played out, van Apeldoorn describes how the neoliberal and neo-mercantilist factions—both espoused by coalitions of large enterprises that divided according to whether they served primarily European or international markets—dominated the debate.[56] The compromise, or 'synthesis' of these two positions is what van Apeldoorn dubs "*embedded neoliberalism*": a term that refers to "the role of the state in sustaining and reproducing markets by in effect protecting society from the destructive effects of the self-regulating market."[57]

The four trajectories van Apeldoorn identifies (neo-mercantilism, neoliberalism, social democracy, and embedded neoliberalism) are strongly inscribed within their advanced liberal context. All seek to 'complete the internal market', though they would pursue this goal according to different paths. Each is also easily identified with one of the rationalities described in this chapter. The 'neo-mercantilist' strategy draws on the *sovereigntist* rights rationality, justifying its policy platform on the need for a strong Europe that can protect European rights and compete effectively against rival powers in a global marketplace. The 'neoliberal' strategy, by contrast, draws on the *free market* market rationality, exhibiting concern primarily for eliminating obstructions to competition and global market integration. The 'social democratic project' is consistent with the *cosmopolitan* rights rationality, which focuses on building solidarity through protecting citizens' rights. And the synthesis van

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[55] Van Apeldoorn, *supra* note 26, at 23.

[56] *Id.*

[57] *Id.* at 24-25. The idea of embeddedness here is drawn from the work of Karl Polanyi, who argued generally that the pursuit of economic policy had led to the 'disembedding' of the market from the social, and that if modern societies want to survive and prosper, it will be necessary to 're-embed' the market such that it is subordinate to social needs. Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944). Van Apeldoorn updates this idea for the neoliberal era. As he describes it:

> The term 'embedded' in embedded neoliberalism thus refers to what Polanyi called the *principle of social protection* 'aiming at the conservation of man and nature as well as productive organization' whereas neoliberalism is associated with the *principle of economic liberalism* 'aiming at the establishment of a self-regulating market'. It is these two opposing principles that embedded neoliberalism seeks to combine but it does so ... in a way that in the end fully subordinates the principle of social protection to that of economic liberalism.

Van Apeldoorn, *supra* note 26, at 25.

Apeldoorn refers to as 'embedded neoliberalism' is a perfect example of the *human capital* market rationality described in Section 1.

The rise of van Apeldoorn's "embedded neoliberalism" demonstrates how over time the market rationality basis of the EU has swung away from a liberal *free market* orientation and toward a *human capital* orientation. As Peter Lindseth writes:

> From this perspective, the aim of integration is not simply to construct competitive markets—the old ordo-liberal aspiration. It is also to increase regulatory capacity of Europeans to address complex challenges (for example, in the environment, food safety, or the financial markets) whose effects are no longer confined within national boundaries, and which have the potential of imposing negative externalities on the residents of adjacent Member States.[58]

Current EU policy regarding external action, trade, and environment generally, and environmental norm export specifically, provides clear evidence of this shift.[59] As will be seen in Section 2.1.2, the post-Lisbon agenda is thoroughly steeped in this *human capital*-oriented rhetoric. It also, however, continues to exhibit signs of *free market* market mentality, of *sovereigntist* rights rationality, and of *cosmopolitan* rights rationality.

2.1.2 Contemporary EU Trade & Environment Policy

The incorporation of environmental concerns into EU trade agreements finds its basis in the EU's founding treaties. Article 3 of the post-Lisbon Treaty on European Union (TEU) sets out the primary purpose of the EU, establishing that "[t]he Union's aim is to promote peace, its values and well-being of its peoples."[60] It is to pursue this objective through a range of internal techniques (creating an area of freedom, security and justice[61]; an internal market[62]; and an economic and monetary union[63]), as well as a particular set of external measures designed to "uphold and promote its values and interests and contribute to the protection of

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[58] Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* 8 (2010).

[59] As a case in point, the European Commission recently hosted a conference entitled "Applying Behavioral Insights to Policy-Making: Results, Promises and Limitations," designed to test the usefulness of behavioral economics for consumer protection law. "Applying Behavioural Insights to Policy-making: Results, Promises and Limitations," Conference Program, 30 September 2013, *available at* http://ec.europa.eu/dgs/health_consumer/information_sources/docs/30092013_programme_en.pdf (last accessed 15 August 2014).

[60] Consolidated Version of the Treaty on European Union, 30 March 2010, 2010 OJ (C 83) 13 [*hereinafter* TEU], at Art. 3.

[61] *Id.*, at Art. 3(2).

[62] *Id.*, at Art. 3(3).

[63] *Id.,* at Art. 3(4).

its citizens," including by "contribut[ing] to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance of international law, including respect for the principles of the United Nations Charter."[64] The specific tasks of EU external action are elaborated in TEU Art. 21, which enumerates a long list of regulatory and political goals.[65]

What rationalities guide the mix of policy programs contained in Article 21? That is, how is the relationship between freedom and security conceived? What is the role of the governed and the governing? On the one hand, it is easy to read these goals as reflecting market rationality. 'Freedom' appears in the guise of the 'fundamental freedoms', the rule of law,[66] consistency and coherence,[67] principles of international law, multilateral cooperation, 'good global governance', and the promotion of free trade—all goals that seek to create and maintain the 'rules of the game' that will protect the freedom of entrepreneurial subjects in the international competitive market. 'Security' appears as the desire to prevent countries and individuals from disrupting or dropping out of the international competitive market. From this market perspective, preserving peace, preventing conflicts, and strengthening international security are necessary for maintaining the integrity of the international system. Protecting the environment and natural resources is important because it affects both the wellbeing of populations—a primary concern in terms of the broadly conceived market and the growth of human capital—and the availability of inputs for production. Promoting development and human rights, ending poverty, and assisting those affected by natural or man-made disasters are necessary interventions to ensure that individuals do not drop out of the market due to severe handicaps, and instead remain free to compete.

It is also possible, however, to read some of these goals as reflecting rights rationality. The Article presents freedom not only as the freedom to compete, but additionally as the preservation of the EU's right to act within its sphere of competence, and the maintenance and strengthening of international law. It is protecting the human rights of the governed, especially children's rights, against incursions by overreaching states. Security, likewise, is also

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[64] *Id.,* at Art. 3(5).

[65] *Id.* at Art. 21.

[66] On the international rule of law as liberal governance, *see* Nikolas M. Rajkovic, " 'Global Law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'Through' Law," 18 *European Journal of International Relations* 29 (2012).

[67] For more on the importance of consistency and coherence in EU external affairs, *see* Simon Duke, "Consistency, Coherence and European Union External Action: The Path to Lisbon and Beyond," in *European Foreign Policy: Legal and Political Perspectives* 15 (Panos Koutrakos ed. 2011); Marise Cremona, "Coherence in European Union Foreign Relations Law," in *European Foreign Policy: Legal and Political Perspectives* 55 (Panos Koutrakos ed. 2011).

defined as acting against international forces that might weaken the EU or disrupt the balance of the international system, and providing protection for EU citizens and sometimes citizens of third states. There is a clear appeal to European distinctiveness, as articulated in references to the EU's "values", its "own creation, development and enlargement," and its "integrity." And there is an emphasis on the EU as a global leader, not only "developing relationships" and "building partnerships," but acting to "safeguard" and "protect" stability, and "foster," "help," "assist," and "promote" the development of third states and their citizens.

Article 21 TEU reflects these competing narratives, as well as the much-heralded move from the EU as 'economic community' to the EU as a 'community of values'. Trade remains a particularly important component of the EU's international activity, and the Lisbon Treaty continues the drive toward a more harmonized external trade policy. Under the new regime, all trade—including services trade, trade-related intellectual property rights, and foreign direct investment—is exclusive EU competence, and there is no longer a requirement that agreements be ratified by national parliaments. The only exceptions to this rule involve policies relating to cultural and linguistic diversity and effective national health, education and social policies.[68] Moreover, trade now occupies a place in the same EU external action heading as other external policy objectives such as humanitarian aid and development.

Trade is also joined by 'environment' as a key issue in the EU's post-Lisbon foreign policy. Between the 1970s and the 1990s the EU gradually gained the power to act in international environmental negotiations.[69] Today, Article 11 TFEU directs the EU to integrate environmental considerations throughout EU policy: "Environmental protection requirements must be integrated into the definition and implementation of the Union's

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[68] Consolidated Version of the Treaty on the Functioning of the European Union, 30 March 2010, 2010 OJ (C83) 47 [hereinafter TFEU], at Art. 207.

[69] Between 1957 and 1972, environmental policy was only a marginal topic at the European level. The Treaty of Rome makes no mention of environmental policy. What little environmental regulation there was came primarily as a reaction to possible market distortions caused by Member State policies. For an overview of early European environmental policy, *see generally* Philipp M. Hildebrand, "The European Community's Environmental Policy, 1957 to '1992': From Incidental Measures to an International Regime?," in *Environmental Policy in the European Union: Actors, Institutions, and Processes* 19 (Andrew Jordan ed. 2002). John McCormick, *Environmental Policy in the European Union* (2001). Beginning in the 1970s, the Member States determined that economic growth would no longer be the single focus of the EC. EC external environmental competence was recognized by the ECJ in the AETR judgment of 1971, which created the doctrine of implied powers. 22/70, Commission v. Council ("AETR"), 1971 E.C.R. 263. And in 1973, the Commission adopted the first Environmental Action Programme (EAP). European Commission, First Environmental Action Programme, 1973 OJ (C 112) 1. The first EAP provided two primary arguments for EC action in the environmental field: preventing distortions of the internal market that could be caused by Member State environmental action, and public concern over environmental matters. While environmental policy was now on the agenda, therefore, it was still couched in an economically oriented framework. Environmental competence was ultimately formalized by the Single European Act (SEA). European Commission, Single European Act, 30 O.J. (L 169) 1 (1987).

policies and activities, in particular with a view to promoting sustainable development."[70] This environmental integration requirement is one of the oldest integration clauses in EU primary law,[71] and has had a significant impact with respect to both internal and external EU policy.[72] Externally, the EU has incorporated environmental clauses in a great number of its agreements with third countries, regions, and international organizations. These include association agreements,[73] partnerships and cooperation agreements, fisheries agreements, agreements relating to transport, and many others. The 2006 Global Europe Strategy, which outlines the EU's priorities in the realm of trade policy, strengthens this focus on environmental integration by making it a systematic part of the EU's external economic affairs.[74]

As its competence increased, the EU began to display a desire for leadership in the international environmental field. This desire is particularly evident in the discourse of European leaders. For example, Annex II of the 1990 Presidency Conclusions of the European Council meeting in Dublin, titled "The Environmental Imperative," states that: "There is … an increasing acceptance of a wider responsibility, as one of the foremost regional groupings in the world, to play a leading role in promoting concerted and effective action at global level."[75] Romano Prodi argued in 2000 that Europe "must aim to become a global civil power at the service of sustainable global development."[76] Similarly, the European

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[70] TFEU, *supra* note 68, at Article 11.

[71] It was introduced into the Treaty of the European Community (EC Treaty) via the Single European Act (SEA) in 1986, Article 130r(2) of which stated that environmental requirements *shall* be a component of the EC's other policies. The Maastricht Treaty strengthened the environmental integration requirement by stating in Article 130r(2) that environmental protection requirements *must* be integrated in other EC policies.

[72] On the internal dimension, *see* Nele Dhondt, *Integration of Environmental Protection into Other EC Policies–Legal Theory and Practice* (2003); *Environmental Policy Integration–Greening Sectoral Policies in Europe* (Andrea Lenschow ed. 2002). On the external dimension, *see* Gracia Marín Durán & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (2012).

[73] *See, e.g.,* Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 2010 OJ (L108) 3, at Arts. 2 (defining the scope of the agreement as including environmental considerations in the transport sector), 7 (on environmentally-friendly transport policies), 15 (on emissions standards), 21 (on drawing up plans for environmental protection in transport), 61(2) (respecting environmental standards in transport), 88(2) (calling for environmental integration across all cooperation areas), 94 (on environmental protection in the industrial sector), 108 (on protecting the environment in transport), 109 (on protecting the environment in energy policy), 111 (general environmental cooperation clause), 115 (on financial cooperation and the environment). Other Association Agreements contain similar provisions. *See, e.g.,* Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, 2013 OJ (L278) 16; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, 2009 OJ (L107) 166.

[74] European Commission, "Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy," COM (2006) 567 [*hereinafter* Global Europe Strategy]; *see also* Marín Durán & Morgera, *supra* note 72, at 57.

[75] Conclusions of the Presidency (1990), The European Council meeting in Dublin, 25-26 June 1990, Annex II: The Environmental Imperative, SN/60/1/90. *See also* R. Daniel Kelemen, "Globalizing European Union Environmental Policy," 17 *Journal of European Public Policy* 335 (2010).

[76] Romano Prodi, "2000-2005: Shaping the New Europe," Speech 00/41 to the European Parliament, Starsbourg, 15 February 2000.

Commission's Communication "20 20 by 2020: Europe's Climate Change Opportunity," emphasizes Europe's leadership role six separate times in its eleven pages of text.[77]

The call for external environmental leadership has also been taken up by the 7th Environmental Action Programme (EAP), which sets out the framework for Union environmental policy making for the period ending in 2020.[78] The 7th EAP establishes environmental action as an important component of EU external policy, stating:

> Many environmental challenges are global and can only be fully addressed through a comprehensive global approach, while other environmental challenges have a strong regional dimension. This requires cooperation with partner countries, including neighbouring countries and overseas countries and territories.[79]

It also places specific emphasis on trade, noting its support for the aim "to transform the global economy into an inclusive and green economy in the context of sustainable development and poverty reduction."[80] The EU's 2006 Sustainable Development Strategy also clearly states that environmental objectives should be incorporated into the EU's bilateral and inter-regional agreements:

> The Commission and Member States will increase efforts to make globalization work for sustainable development by stepping up efforts to see that international trade and investment are used as a tool to achieve genuine global sustainable development. In this context, the EU should be working together with its trading partners to improve environmental and social standards and should use the full potential of trade or cooperation agreements at regional or bilateral level to this end.[81]

Moreover, the Global Europe Strategy pledges that the EU will work actively to incorporate environmental principles in its FTAs:

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[77] European Commission, "Communication: 20 20 by 2020: Europe's Climate Change Opportunity," COM (2008) 30.

[78] Decision No. 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', 2013 OJ (L 354) 171 [7th EAP].

[79] *Id.* at para. 31.

[80] *Id.* at paras. 32.

[81] European Council, 10917/06, Presidency Conclusions, Review of the EU Sustainable Development Strategy (EU SDS)–Renewed Strategy, Brussels 26 June 2006, at 21.

In terms of content, new competitiveness-driven FTAs would need to be comprehensive and ambitious in coverage, aiming at the highest possible degree of trade liberalisation of services and investment. ...

In considering new FTAs, we will need to work to strengthen sustainable development through our bilateral trade relations. This could include incorporating new co-operative provisions in areas relating to labour standards and environmental protection.[82]

The EU's new 7th Environmental Action Programme is an excellent place to see market and rights rationalities at play in current EU external trade and environment policy. The 7th EAP is replete with market rationality. It conceives of the risks posed by environmental problems as scientific challenges to the effective functioning of the global system:

Global systemic trends and challenges, related to population dynamics, urbanisation, disease and pandemics, accelerating technological change and unsustainable economic growth add to the complexity of tackling environmental challenges and long-term sustainable development. Ensuring the Union's long-term prosperity requires taking further actions to address those challenges.[83]

It several times contextualizes environmental protection as essential for economic growth. For example, the Union's environmental initiatives are to "provide a stable environment for sustainable investment and growth."[84] Environmental policies are perceived as "a sound investment for the environment and human health, as well as for the economy."[85] And climate change initiatives are presented as economic boons:

There is significant scope for reducing GHG emissions and enhancing energy and resource efficiency in the Union. This will ease pressure on the environment and bring increased competitiveness and new sources of growth and jobs through cost savings from improved efficiency, the commercialization of innovations and better management of resources over their whole life cycle.[86]

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[82] Global Europe Strategy, *supra* note 74, at 11-12.
[83] 7th EAP, *supra* note 78, at para. 7.
[84] *Id.* at para. 8.
[85] *Id.* at para. 26.
[86] *Id.* at para. 24.

Market rationality concepts appear throughout the 7th EAP. The word "efficient" (or some variant thereof) appears *80 times* in this 30 page document. It speaks of "maximizing the benefits" of EU environmental legislation, improving the "knowledge and evidence base" for EU environmental policy, protecting the Union's "natural capital", providing better "incentives" for environmental protection, and insists that "[a]ll measures, actions and targets set out in the 7th EAP shall be proposed and implemented in accordance with the principles of smart regulation."[87] This type of discourse stems from the market rationality view that the role of government is to act efficiently and effectively, and based on sound data, for the purpose of protecting and enhancing the entrepreneurial opportunities of the governed. Environmental regulation, in this view, is about *smart and efficient management*, not about *safeguarding rights*. Indeed, the word "rights" appears only once in the text—and then only in reference to "intellectual property rights."[88]

Rights rationality also makes an appearance, though its presence is quite subdued in comparison with the overwhelming market rationality of the 7th EAP. There is some discussion of international cooperation with third states and in the context of traditional international treaties (rather than, for example, encouraging cross-border collaboration between environmental professionals—a market-style activity that is also present).[89] There is one reference to "reducing inequality,"[90] but otherwise the terms 'equality', 'liberty', 'sovereignty' and 'human rights' are entirely absent from the text. The word 'justice' appears twice in the form of "access to justice," the ability of individuals to pursue their claims in court (although the second instance is immediately followed by a sentence on the promotion of non-judicial dispute resolution for environmental disputes).[91]

2.2 Environmental Norm Export through the Market and Rights Lenses

2.2.1 Introduction

As demonstrated in the previous section, current EU external policy articulates trade and environment as interlinked concerns. There are several forces driving these linkages. Concerns that a strict focus on economic growth will undermine environmental protection;

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[87] *Id.* at Art. 2.

[88] The word "right" does appear four additional times, however it is only used in the sense of 'correct', as in the "right conditions" or the "right framework."

[89] *See, e.g., Id.* at para. 31.

[90] *Id.* at Annex para. 10.

[91] *Id.* at Annex para. 62, 65.

concerns that a failure to focus on sustainability will harm long-term economic prospects; concerns that environmental policy must take economics and efficiency into account; and concerns that environmental protection will undermine the EU's economic power all contribute to the sense that these issues are entangled. These positions reflect distinct understandings of the ways in which various rationalities come together in the EU's international trade and environmental policies. In order to better illustrate the functioning of these rationalities within the context of EU environmental norm export, Sections 2.2.2 and 2.2.3 describe a set of ideal-typical positions from the perspective of the market and rights rationalities, and their internal variations.

The point of providing these ideal-typical positions is twofold. First, this section seeks to continue the mapping exercise that is the objective of Section 2 by better explaining the logic of the rationalities identified in Section 1 with respect to environmental norm export. Second, however, it also hopes to begin the process of illustrating the complexity and flexibility (perhaps even indeterminacy) of these rationalities by demonstrating how multiple policy outcomes can be reached from within each of the ideal-typical variants. For practical purposes, what this means is that the same substantive political program can be reached from the perspective of two very different rationalities, but the *reason* each of these rationalities supports the program will be different. This point is important because it demonstrates that political action for or against a particular outcome is possible both from within and from outside each of these rationalities.

2.2.2 EU Environmental Norm Export in 'Market' Rationality

To begin with, what might the 'market' story about EU environmental norm export entail? The 'market' story about EU environmental norm export focuses on constructing competitive markets, efficiently managing development, and securing the health and wellbeing of populations. Its goal is constructing healthy markets and populations, evaluated in terms of efficiency and effectiveness. There are both pro- and anti-environmental norm export arguments present within this paradigm, turning on the questions of whether the EU is actually engaging in efficient and effective protection of the global and European markets and whether it is in fact improving wellbeing with its policies, both of which reflect the deeper question of where the line between freedom and security should be drawn.

The first set of arguments—relating to effective management of the global market—begin from the premise that the government's task is to ensure the conditions for competition. Under a market rationality, government should set the 'rules of the game' that is played in the competitive market, ensure that they are followed, and provide some basic set of support to

prevent players from 'cheating' or from dropping out of the game due to poverty or injury.[92] Stemming from this premise, however, there may be disagreement among different market rationality positions regarding what those conditions might be, and what types of intervention would be effective in producing them. In particular, there may be differences regarding the appropriate balance between freedom and security that should prevail in the market. A *free market* perspective oriented toward a more classical liberal mentality might lean toward the 'freedom' end of the spectrum, whereas a *human capital* perspective that sees collective welfare as a more important part of the overall picture (and is more inclined to count human and natural capital among economic resources) might lean toward the 'security' end of the spectrum when it comes to trade and environment issues.

Human Capital Reading

A positive, *human capital*-oriented reading of EU environmental norm export might argue that though international trade and globalization are good because they produce reciprocal gains, it is important to ensure that global markets are free and fair, so that unscrupulous players do not undermine the security of the game by 'cheating' or taking advantage of 'global governance gaps'.[93] The 'sustainable development' paradigm is the perfect instrument for assuring security as well as market freedom, as it allows for the reconciliation of environmental protection and competitiveness.[94] Unfortunately, from this perspective, there is no global regulator that can intervene in all the necessary places (though the WTO, the web of international, multilateral, and bilateral investment treaties, and international environmental regulations do play a role)[95] The work of non-state actors like international NGOs and socially minded businesses can help to fill governance gaps, but so far their efforts have proven insufficient to the task. In this environment, large markets like the EU can step

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[92] *See* Foucault, *Birth of Biopolitics*, *supra* note 8, at 259-260. As Foucault explains, preventing individuals or groups from dropping out of the game is beneficial for all, because it increases overall market participation and creates additional opportunities for competitive growth. The level of protection, however, should be designed in such a way as to encourage market participation and permit maximum freedom of choice for individual players of the game.

[93] *See, e.g.,* John Ruggie, "Trade, Sustainability and Global Governance," 27 *Columbia Journal of Environmental Law* 297 (2002) (arguing that innovative methods are needed to "bridge two kinds of global governance gaps proliferating around us": "the gaps between the scope and complexity of the challenges we face, including environmental threats, and the institutional means through which we strive to deal with them"; and "a growing imbalance in global rulemaking" that favors "global market expansion" over "equally valid social objectives").

[94] *See* Edith Vanden Brande, "Green Civilian Power Europe?" in *Europe's Global Role: External Policies of the European Union* 157 (Jan Orbie ed. 2008).

[95] Doerthe Rosenow argues convincingly that "The WTO is an excellent example of the necessity of active governance in neo-liberal logic." At the heart of its mission is the decidedly neoliberal goal of establishing a single level playing field for trade, ensuring that the rules of the game are followed through the operation of the Dispute Settlement Body, and assisting players that fall below a determined threshold to ensure that they are not prevented from re-entering the game (via such mechanisms as differentiated obligations for developing countries and the provision of technical assistance). Rosenow, *supra* note 3, at 504.

in to act as proxy global regulators, helping to ensure that the market functions efficiently, and without unfair practices or risks to global health and security. This perspective might see the spread of EU environmental norms as good for the EU because it protects the global market from abuse; good for businesses and consumers (that is, market participants, envisioned as 'stakeholders'[96]) because it establishes a fair playing field and security with respect to the rule of law; and good for third states, because everyone benefits from a strong and fair global marketplace.[97] From this perspective, EU environmental norm export is also good for developing countries, because they are assured of an international marketplace that is free, fair, and responsive to concerns about the need for sustainable development, which increases freedom by providing additional security and preventing their citizens from dropping out of the game due to environmental injury.[98]

With respect to whether the EU's environmental norm export policies are in fact improving the welfare of global populations, a *human capital* market rationale might argue that EU environmental action helps to ensure the security of populations and improve human capital in the EU and third states by preventing environmental harm. Global environmental problems like climate change affect the lives and health of both EU and non-EU citizens, and can only be effectively addressed on a transnational or international basis.[99] Therefore, any intervention in support of climate change mitigation should bring global benefits.[100] Such a

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[96] For more on the subjectivity of the 'stakeholder' *see infra* Chapter 5, Section 1.3.

[97] Susan Baker argues that beginning with the 4th EAP (1987-1992) there was an idea that ecological modernization would improve the competitive position of the internal market, and that this position was to be maintained globally through the internationalization of environmental standards. Susan Baker, "Environmental Values and Climate Change Policy," in *Values and Principles in European Union Foreign Policy* 77, 82-84 (Sonia Lucarelli & Ian Manners eds. 2006).

[98] In this sense, developing countries might be said to benefit from a sort of global 'California effect' in which producers find it more efficient to manufacture one environmentally-friendly version of their product than to create multiple production lines to take advantage of weaker standards in some countries. *See* Dan Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* 248-70 (1995). Indeed, as noted in Chapter 1, Anu Bradford has referred to this as a global 'Brussels effect'. Anu Bradford, "The Brussels Effect," 107(1) *Northwestern University Law Review* 1 (2012).

[99] An evaluation of the EU's 6th Environmental Action Plan, for example, notes that "[i]n order to achieve development that is truly sustainable, the EU must not only address the environmental, social and economic impacts of its policies within its borders, but must also consider impacts outside its borders." Camilla Adelle et al., *The External Dimension of the Sixth Environmental Action Program: An Evaluation of Implementing Policy Implements*, Report for the IBGE-BIM, IEEP, London v (2010).

[100] Eyal Benvenisti, for example, argues:

> Obviously states that regulate public goods unilaterally do so not out of purely altruistic motives. They have strong self-interest in preventing human trafficking into their borders or in reducing global warming, and they are willing to bear the associated economic burdens. To achieve both ends, they aim to regulate also the activities of foreign actors *worldwide*: the more stakeholders follow suit the more successful the regulation will be; similarly, if foreign competitors also comply with the regulation, the economic burden will be shared rather than born only by the regulating state.

position might be supported with scientific data demonstrating that environmental issues pose serious risks to the health and welfare of populations, and thus to their ability to participate fully and freely in the market economy. Economic development requires the development of human capital. And developing human capital entails protecting populations from environmental and other harms to wellbeing that might cause them to be unable to compete effectively.

Negative positions on environmental norm export from the perspective of *human capital*-oriented market rationality might result from the belief that the EU fails to be effective in promoting the wellbeing of populations. For one thing, the EU's policies privilege environmental protection over alternative forms of development that may have a bigger effect on welfare. This could harm particular populations, and the lack of empirical analysis into case examples might be proof of the EU's recklessness in this regard. For another, they may not be precisely calibrated to achieve welfare gains in as efficient a manner as possible. Command and control legislation is often compared unfavorably with market mechanisms in this respect.

Free Market Reading

The *free market* strand of market rationality would be less concerned with securing human capital and more concerned with the efficient operation of the global market. From within this perspective, a positive reading of EU environmental norm export might focus on questions of 'market failure' such as information asymmetries or environmental externalities, arguing that unilateral EU action is necessary in order to address such distortions and inefficiencies.

On the other hand, a negative, *free market* reading of EU environmental norm export might argue that though it is indeed true that interventions into the global marketplace are necessary in order to ensure the conditions for fair competition, the EU's chosen policies are the wrong tools for the job. Or worse, the EU may be acting with protectionist intent: using these policies in order to intervene on behalf of its own economy, rather than to uphold the rules of the game. This is unfair, and a distortion of the market. Indeed, it is essentially neo-mercantilist. The rules of the game need to be set, but intervening in support of, or even 'leveling the playing field' to protect domestic producers is bad for all parties involved.

Eyal Benvenisti, "Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?" in *International Law-Making: Essays in Honour of Jan Klabbers* 3 (Rain Liivoja & Jarna Petman eds. 2013).

International trade produces benefits by exploiting the natural differences among countries, not by getting rid of them.[101]

From both market perspectives, environmental regulation is not something that necessarily exists in opposition to protection of the competitive market, but rather as part of the same continuum of rational biopolitical government. Barring major technological innovation, failure to ensure adequate environmental security will ultimately undermine the ability of the free market to function, as inputs dwindle and human capital is adversely affected. The objective is therefore to balance the need for security and the management of risk to populations against the imperatives of free competition. The proper balance between security and freedom will provide the most effective and efficient framework for the market. Whether this results in a pro- or anti-environmental norm export position will turn on empirically grounded arguments regarding the efficiency and effectiveness of these policies.

2.2.3 EU Environmental Norm Export in 'Rights' Rationality

The picture according to the rights rationality looks different than that from within the market rationality. Here, the EU is a sovereign government in competition for power and influence in the international realm. It shares with the market rationality a concern for the wellbeing of populations, and seeks to protect EU citizens and businesses and ensure their competitiveness in international markets. However, the focus here is not on the market itself, but rather on promoting EU power within those markets, and safeguarding the rights of the EU, its Member States, its citizens, and global citizens in the international sphere.

Sovereigntist Reading

From the *sovereigntist* side, environmental norm export might be seen as a tool for the promotion of EU prosperity because it ensures that EU actors are not put at a disadvantage by adhering to higher standards than their competitors.[102] It can be a shield against incursions of EU rights by international coalitions or states with weaker environmental rules, who might spark a 'race to the bottom' or curtail EU regulatory prerogatives.[103] Or it could

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[101] *See generally* David Ricardo, *On the Principles of Political Economy and Taxation* (1817).

[102] Daniel Kelemen, for example, explains the EU's interest in international environmental politics as the product of "regulatory politics": a desire to promote the competitive interests of the EU by supporting international environmental rules that would 'level the playing field' for EU producers burdened by higher domestic regulatory standards and shield the EU from legal challenges before international trade bodies. Kelemen, *supra* note 75, at 336.

[103] Nikolas Lavranos, for example, argues that the ECJ wants to "protect the autonomy of the Community legal order from international law interferences, in particular, pre-accession treaties," and that it does so by relying on the concepts of the "very foundations of Community legal order" and "hypothetical incompatibilities" developed to flesh out Article 307 EC (351 TFEU) in the *Kadi* and *BITs* judgments. This allows the ECJ to act as the "gatekeeper" for international law in the EU. As he explains:

serve to increase EU power and influence globally while legitimizing closer integration internally.[104] Leadership on issues such as the environment is often described as an EU alternative to 'hard power'. Because the EU has little in the way of military strength, the argument goes, it must exercise power through other channels: notably 'soft power', 'civilian power', or 'normative power'.[105]

Moreover, the *sovereigntist* branch of rights rationality might see it as the right of the EU to use the means at its disposal to promote environmental norm export, regardless of whether the action conforms to standards of efficiency, effectiveness, or scientific authority (as would be the case with the market rationalities described in Section 2.3.2). Sovereign action needs no external justification: the EU and its Member States are entitled to decide for themselves what level of environmental protection to pursue, and to encourage other countries to follow their lead.[106]

Sovereigntist thinking could also lead, however, to a stance against environmental norm export. From the *sovereigntist* perspective, the EU's efforts to spread its environmental norms might be deemed inapt if they harmed the EU's rights in the international arena or decreased its rightful authority in some other way. 'Soft power' is good, but should not be pushed too far or too recklessly, or the EU risks losing moral authority. Additionally, the primary focus of the EU should be the EU—resources might be better spent dealing with problems 'at home' rather than wasted on supporting third states (as in the *raison d'État* paradigm).

> [T]his enables the ECJ to protect its leading role in determining exclusively the institutional balance of powers between the EC and its Member States—with a natural trend of favouring the expansion of the EC's competences. ... [And] essentially means that the ECJ is keeping out any international obligation, which is not fully compatible with the Community legal order. This boils down to imposing Community law values on third states, international treaties, and international law in general.

Nikolas Lavranos, "Protecting European Law from International Law," 15 *European Foreign Affairs Law Review* 265, 282 (2010). *See also* F. Snyder, "The Gatekeepers: The European Courts and WTO Law," 40 *Common Market Law Review* 313 (2003).

[104] *See* Vanden Brande, *supra* note 94, at 176. As von Bogdandy wrote in 2000: "the Common Market is exhausted as a vision for further integration ... human rights, by contrast, provides a most intriguing prospect." Armin von Bogdandy, "The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union," 37 *Common Market Law Review* 1307 (2000).

[105] Ian Manners, "Normative Power Europe: A Contradiction in Terms?" 40(2) *Journal of Common Market Studies* 235 (2002).

[106] *See* Rosenow, *supra* note 3, at 510 ("If an action is sovereign, it does not need external justification."). Doerthe Rosenow gives the example of an *Amicus Curiae* submission by several anti-GM NGOs to the WTO Appellate Body in support of the EC's position in *EC–Biotech*. The brief argues that the EC moratorium represents an "expression of political intent by autonomous sovereign states," and that the moratorium is "not a matter for WTO scrutiny," because this would imply an "inappropriate interference with the political process internal to the EC." *Id.* (quoting Alice Palmer (on behalf of 15 NGOs), *Request for Permission to Submit Information to the Panel by the Following Non-Parties (Amicus Curiae Submission)* (2004), 3.1.1 (80).

Sovereigntist-oriented rights rationality thinking might also conclude that EU environmental norm export is illegitimate because it infringes on the sovereignty of third states. The EU has no legal or democratic basis for imposing environmental rules outside of its borders. International law regarding territoriality should be respected, and should be used to resist the EU's attempts to impose its authority on other actors. Rules regarding sovereignty and territoriality protect the rights of the EU as well as third states, and should not be lightly violated. The EU's environmental norm export policies amount to illegitimate global policing, and this disciplinary force must be countered by reference to higher principles of law.[107]

Cosmopolitan Reading

By contrast, the *cosmopolitan* argument in favor of EU environmental norm export might see it as the duty of the EU to try to protect the environment in third states, because EU leadership in this area is essential for safeguarding the rights of both EU and global citizens. Every person has an intrinsic right to a clean and healthy environment, as well as to higher standards of living, and the EU must act in solidarity with the peoples of the world to ensure the promotion of these goals. The fact that other countries are not willing or able to respect, protect, and promote their citizens' rights is not a reason for inaction. A third state's sovereignty is not legitimate if it does not act for the benefit of its peoples.[108] Pluralism is not a relevant argument: all people have the same rights, and the EU should act to promote what it knows to be the universally applicable truth. The EU should use its 'soft power' and act as a global leader that can guide the international flock toward the recognition and implementation of 'universal' values such as, in Ian Manners's estimation, sustainable peace, freedom, democracy, human rights, rule of law, equality, social solidarity, sustainable development and good governance.[109]

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[107] Michael Merlingen and Rasa Ostrauskaite argue along these lines against EU aid to police forces in third states: "like other forms of development aid, police aid inscribes the recipients in structures of discipline and normalization." Michael Merlingen and Rasa Ostrauskaite, "Power/Knowledge in International Peacebuilding: The Case of the EU Police Mission in Bosnia," 30 *Alternatives: Global, Local, Political* 297 (2005).

[108] Anne Orford has written a brilliant analysis of this issue in the context of the Responsibility to Protect. *See* Anne Orford, "Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect," 30 *Michigan Journal of International Law* 981 (2009).

[109] Manners identifies these as the "nine normative principles" of EU external action. Ian Manners, "The Normative Ethics of the European Union," 84(1) *International Affairs* 45, 46 (2008). He provides a strong defense of this position:

> The creative efforts and longer-term vision of EU normative power towards the achievement of a more just, cosmopolitical world which empowers people in the actual conditions of their lives should and must be based on more universally accepted values and principles that can be explained to both Europeans and

Cosmopolitan rationality could also lead to a position against environmental norm export, however. From the *cosmopolitan* perspective, the EU's efforts to spread its environmental norms could be read as an attempt to unilaterally impose its particular values on trading partners: an action tantamount to colonialism. Other states should be involved in decision-making about the 'common good', and it is both incorrect and arrogant for the EU to assume that it knows what is best for third countries. The EU should act in solidarity with global citizens, supporting their rights to choose their own destinies, not attempt to coerce them onto a single path. This is anti-democratic and a violation of their rights.

2.2.4 Conclusion

The spectrum of 'rights' rationales described above focus on the key questions of balance, rights, and sovereignty. In contrast with the 'market' rationales, they are not primarily concerned with questions of efficiency, effectiveness, and scientific evidence, but rather see governmental action as legitimated by its political, normative and legal basis. However, it is crucial to remember that they also exist within the context of advanced liberalism. They differ from traditional expressions of sovereignty and right, therefore, in that they are generally circumscribed within a framework of limitation developed according to liberal norms. Doerthe Rosenow gives an excellent example drawn from the world of WTO law:

> The decisive difference between the traditional sovereign decision on the exception, and the relationship of sovereignty and the exception in the

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non-European alike. In this respect I share the commitment ... to ensuring that the EU's relations with the rest of the world are based on more transparent normative ethics that accommodate the social rights and perceptions of the member states with those of the EU and its citizens, together with the universal individual rights of non-Europeans, no matter where one might live.

Id. at 60. This *cosmopolitan*-oriented rights rationality sees the legitimacy of EU external action as derived from its normative virtue. As Manners writes, this entails "ensuring that the EU is not simply promoting its own norms, but that the normative principles that constitute it and its external actions are part of a more universalizable and holistic strategy for world peace." *Id.* at 56. Manners traces the origin of these values within different ethical traditions, particularly a neo-Aristotelian virtue ethics that urges the EU to "lead by example" and a European neo-Kantianism that emphasizes "the establishment of law, including both rights and duties, in the pursuit of the common good" and "being reasonable in world politics." *Id.* at 57-58. However, he also attempts to link them to a consequentialist account that he sees as suggesting a "do no harm" principle in EU external relations. As he puts it, this involves "ensuring that the EU thinks reflexively about the impact of its policies on partner countries and regions, in particular through encouraging local ownership and practicing positive conditionality," which entails "trying to act by ensuring that 'progress is rewarded with greater incentives and benefits [and] an even deeper relationship." *Id.* at 59. This is a fascinating account of consequentialism that emphasizes the effectiveness of EU action in leading the downtrodden toward a predefined universal social good. Another example might be Javier Solana's statement in 2007: "The peaceful unification of our continent has been our great achievement, and now our main challenge is to act as a credible force for good. From a continental agenda, we should move to a global agenda. From building peace in Europe to being a peace-builder in the world." Javier Solana, "Countering Globalization's Dark Side," *Europe's World*, policy dossier (2007), *available at* www.consilium.europa.eu/ueDocs/CMS_Data/docs/pressdata/EN/articles/96791.pdf (last accessed 15 August 2014).

case of the WTO is that any sovereign suspension of circulation is accepted by the international community of states only if it is temporary and provisional. If a sovereign state wants to belong to this community, it is forced to justify its action, with this justification being accepted and finally integrated into the norm. The unlimited exercise of sovereignty cannot be tolerated among WTO Members, because it leads to a standstill of circulation; a "freezing"; a slow-down that is inefficient and a "hindrance to progress." It disrupts the continuity of movement and can therefore be accepted only from the perspective of liberal governance if its appropriateness can be justified and if it is not "excessive."[110]

In the world of EU environmental norm export, this means that even arguments from a 'rights' perspective—whether for or against the EU's policies—will generally be tested against 'market' rationality criteria. *Sovereigntist* or *cosmopolitan* deviations from market rationality principles will thus also be judged on the basis of their efficiency, effectiveness, and conformity with scientific findings. This amounts to a sort of proportionality assessment: actions in keeping with 'rights' rationality will be seen as more or less legitimate the closer or farther they stray from 'market' rationality ideals.

As Sections 2.2.2 and 2.2.3 have demonstrated, it is possible to analyze EU environmental norm export from the perspectives of both market and rights rationalities. Moreover, within these broader logical structures one can identify multiple and opposing argumentative positions depending on particular understandings of the proper relationship between freedom and security, expected outcomes, and the relative emphasis placed on various themes. As a result, particular rationalities are not necessarily correlated with particular policy outcomes. It is the logic behind the decisions that differs, not necessarily the decisions themselves.

As will be demonstrated in Section 3, concrete legal and policy arguments for and against EU environmental norm export policies might be drawn either from within or from outside of each of these rationalities. A *sovereigntist* argument for the EU emissions trading scheme can be countered with a *sovereigntist* argument against it, or by making reference to an alternate narrative, such as that provided by the *human capital* strand of market rationality. Similarly, a *human capital* argument for EU emissions trading scheme can be supported by *cosmopolitan* or *free market* arguments. Different positions may seem more or less relevant depending on the

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[110] Rosenow, *supra* note 3, at 510-511.

perspectives of the parties. However, it is important to distinguish between these strands, as they actually stem from very different understandings of the way government should and does work, by and for whom it should operate, who it should see as its subjects and objects, and what the appropriate mechanisms for doing governmental work should be.

In order to illustrate the functioning of the market and rights rationalities and the ideal-typical positions described above in practice, Section 3 will provide an extended example drawn from the EU's ongoing (though now stalled) program of establishing an emissions trading scheme for the airline industry.

3 The EU Emissions Trading Scheme for the Airline Industry

3.1 The EU ETS for Air Transport and its Discontents

The EU is well known for its strong position with respect to global climate change. It has fought for international agreement on the Kyoto Protocol, pledged to achieve substantial cuts in EU emissions of greenhouse gases, and funded scientific studies regarding mitigation, adaptation, and technological development.[111] Climate change and policy are mentioned 116 times in the 7th EAP's 30 pages.[112] Indeed, in the mid-2000s, the European Commission went so far as to claim that tackling climate change was the central policy challenge facing Europe in the twenty-first century.[113]

In keeping with this focus, in 2003 the EU began to develop an emissions trading scheme as a means of fulfilling EU and Member State obligations under the Kyoto Protocol for combating climate change.[114] The ETS seeks to reduce greenhouse gas emissions by creating a European market for emissions allowances. According to the Directive establishing the ETS, the allowance system was to be a part of "a comprehensive and coherent package of policies" to be implemented "across all sectors of the European Union economy, and not only within the industry and energy sectors, in order to generate substantial emissions reductions."[115] The

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[111] *See* Andrew Jordan, Dave Huitema & Harro van Asselt, "Climate Change Policy in the European Union: An Introduction," in *Climate Change Policy in the European Union: Confronting Dilemmas of Mitigation and Adaptation?* 3, 6 (Andrew Jordan et al. eds. 2010). Jordan, Huitema & van Asselt also argue, however, that the EU's efforts with regard to climate policy should be taken with a grain of salt. In particular, they point to the EU's continued status as one of the world's biggest emitters of greenhouse gasses, and the fact that EU action on climate change issues does not always live up to its rhetoric. *Id.* at 6-7.

[112] 7th EAP, *supra* note 78.

[113] Jordan, Huitema & van Asselt, *supra* note 111, at 6.

[114] Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC, 2003 OJ (L 275) 32.

[115] *Id.* at Recital 23.

initial Directive specified in particular that the Commission should consider how and whether to include the "transport sector" in the ETS in the future.[116]

Accordingly, after investigating the issue, in 2008 the Council adopted a Directive extending the ETS to the air transport sector.[117] This was partially spurred by the EU's adoption, also in 2008, of a complex package of climate measures that aims to reduce emissions by 20% from 1990 levels by 2020.[118] The 2008 Directive obliges all air transport undertakings that operate flights to or from an airport in the EU to purchase allowances for the total amount of greenhouse gasses emitted during the entire length of the flight, from take-off to landing, irrespective of whether a part of that flight occurred over the high seas or in the airspace of a third country.[119] The airlines will have to report their total emissions on an annual basis, and may then purchase additional credits for emissions that exceed their total amount of permits, or sell their leftover emissions permits if they have not used up their total allowances.

The extension of the EU ETS to the air transport sector elicited a huge amount of comments, positive and negative, from EU and international actors. 26 of the 36 members of the International Civil Aviation Organization (ICAO) governing council adopted a non-binding working paper calling on the EU to exempt international airlines from its emissions rules and arguing that the ETS violates international law.[120] A so-called 'coalition of the unwilling' issued a joint declaration stating their intent to:

> 5. *Oppose* the EU's plan to include all flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system... which is inconsistent with applicable international law;

> 6. *Urge* the EU and its Member States to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system;

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[116] *Id.* at Art. 30(2)(a).

[117] Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 OJ (L 8) 3.

[118] *See* "20 20 by 2020," *supra* note 77.

[119] There are exceptions for special flights, listed in Annex I of the Directive. The scheme actually extends beyond EU borders to include the members of EEA EFTA (Iceland, Norway, and Lichtenstein). *See* EEA Joint Committee Decision No. 6/2011 (amending EEA Annex XX), 2011 OJ (L 93) 35; EEA Joint Committee Decision No. 43/2011 (amending EEA Annex XX), 2011 OJ (L 171) 44.

[120] International Civil Aviation Organization, Working Paper, "Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and its Impact," 194th Council Session, C-WP/13790, 17 October 2011 [hereinafter ICAO ETS Working Paper]. The statement was supported by 26 countries, including the US, Brazil, China, India, Japan and Russia.

7. *Urge* the EU and its Member States to work collaboratively with the rest of the international community to address aviation emissions;

8. *Intend to continue* to work together to oppose the imposition of the EU ETS.[121]

In addition to this joint declaration, the US government stated that it "continue[d] to have strong legal and policy objections to the inclusion of flights by non-EU air carriers in the EU ETS" and that it would take appropriate action at the level of ICAO to oppose the scheme's application to international flights from and to the EU.[122] A draft law before the US Congress[123] would make it illegal for US airlines to comply with the directive, which congressmen characterized as a "tax grab by the European Union."[124] China and India also indicated that they did not intend to abide by the EU emissions regulations, and would seek to pressure the EU to exempt international carriers.[125]

In addition to this diplomatic anti-ETS campaign, the Air Transport Association of America (ATA), a US aviation trade organization, along with a number of individual airlines such as American Airlines and United Airlines took further steps, bringing a challenge to the law and its subsequent implementing measures in the UK.[126] A number of interveners were permitted to join the case, including the International Air Transport Association and the National Airlines Council of Canada in support of the airlines; and a number of environmental organizations such as the Aviation Environment Federation, WWF-UK, and the European Federation for Transport and Environment in support of the Secretary of State for Energy and Climate Change.

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[121] *Id. See also* Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS, 21-22 Feb. 2012 [hereinafter Moscow Declaration].

[122] "US voices 'objections' to EU aviation emissions ruling," *Euractiv*, 22 December 2011, *available at* http://www.euractiv.com/transport/us-voices-objections-aviation-emissions-ruling-news-509893 (last accessed 15 August 2014).

[123] HR 2594, 112th Congress, "European Union Emissions Trading Scheme Prohibition Act of 2011," 31 Oct. 2011 [*hereinafter* US ETS Prohibition Act]. At the time of writing, the proposed legislation has passed the House of Representatives, but still requires approval by the Senate.

[124] Statement by US Republican Transportation Committee Chairman John Mica. *Quoted in* "Opposition Rising to European Emissions Trading Scheme," *National Business Aviation Association*, 31 October 2011, *available at* http://www.nbaa.org/ops/environment/eu-ets/20111031-opposition-rising-to-eu-ets.php (last accessed 15 August 2014).

[125] Ewa Krukowska, Liza Lin, & Karthikeyan Sundaram, "China, India Mount Opposition Against EU Aviation Carbon Curbs," *Bloomberg News*, 4 January 2012, *available at* http://www.bloomberg.com/news/2012-01-04/india-china-mount-opposition-against-eu-imposing-carbon-curbs-on-airlines.html (last accessed 15 August 2014).

[126] R (on the application of Air Transport Association of America Inc) v. Secretary of State for Energy and Climate Change [2010] EWHC 1554 (Admin).

The complainants alleged that the Directive was contrary to international law for three general reasons. First, they argued that the legislation applied extraterritorially and was thus in violation of customary international law principles regarding jurisdiction, the Chicago Convention (to which the EU is not a party, though all of its Member States are), and the Open Skies Agreement between the EU and the US. Second, they argued that the Directive was a unilateral attempt to address climate change and was therefore in violation of the Kyoto Protocol, which established a regime for multilateral solutions. Third, they argued that the Directive amounted to an illegal tax or charge prohibited by the Chicago Convention and the Open Skies Agreement. The UK High Court referred certain questions in the case to the ECJ for an interim ruling on these points.

Both the Advocate General and, subsequently, the ECJ, upheld the validity of the Directive, arguing that the EU legislator did not act *ultra vires* in extending the application of the directive to the distance covered by planes flying over the high seas or the territories of third states.[127] So long as the flight was destined for or originated from an airport within the territory of the EU, the Court found that the EU had sufficient territorial jurisdiction to impose a greenhouse gas emissions trading requirement. While the ECJ held—contrary to the Advocate General—that individuals within the EU could rely on customary international law in cases in which that law was sufficiently precise in granting individual rights, the EU had not acted extraterritorially, and was therefore not in violation of any of the principles cited by the airlines. Additionally, the Advocate General and the Court agreed that the provisions in the Kyoto protocol regarding multilateralism were inapplicable in this case, as were the provisions in the Chicago Convention and the Open Skies Agreement regarding impermissible taxes and charges.

Following the positive ruling, the EU ETS was set to begin operation in 2012.[128] During the first year, air carriers were required to register with monitoring bodies and track their emissions on flights that leave from or arrive at EU airfields. The first batch of allowances were to be credited to aircraft operators on 28 February, and the first reporting requirement was to be due by March 2013. In April 2013, however, the EU temporarily suspended enforcement of the EU ETS for flights operated in 2010, 2011, and 2012 to or from non-EU

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[127] *See* Case C-366/10 *Air Transport Association of America et al. v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, at para. 101 [hereinafter ATA case]

[128] European Commission, Press Release, "Emissions Trading: Partial Activation of the Union Registry for Airlines," MEMO/12/52, 30 January 2012, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/52&format=HTML&aged=0&language=EN&guiLanguage=en (last accessed 15 August 2014).

countries.[129] The legislation continued to apply, however, for intra-European flights. The delay was purportedly meant to allow time for ICAO to reach a global agreement on aviation emissions.

In the meantime, the European Commission held an 'online public consultation' from 21 June to 13 September 2013, carried using the "General principles and minimum standards for consultation of interested parties by the Commission," in which it asked "all stakeholders—including public authorities from third countries—on their views concerning the scope of regional and global [market-based measures] MBMs."[130] The Commission reports that the public consultation "confirms strong support for MBMs from public authorities, NGOs and the airlines. All respondents favour MBMs for the aviation sector ..."[131] Airline respondents focused in particular on "administrative simplicity and political acceptability, as well as environmental effectiveness and avoiding discrimination on routes and between operators," while public authorities and NGOs were concerned with "covering meaningful emissions, administrative simplicity and political acceptability."[132]

In October 2013 the ICAO Assembly did, in fact, agree to develop a global market-based mechanism by 2016, to be applied beginning in 2020.[133] Countries or groups of countries (like the EU) were permitted under this regime to implement interim measures. In response, the European Commission has proposed amending the EU ETS such that beginning in 2014, it would apply only to those portions of flights that take place in European airspace.[134] Before making this proposal, the Commission requested an Impact Assessment. The Impact Assessment showed that adapting the EU ETS would be "feasible at low administrative costs," and would lead to "significantly greater overall environmental benefits" if combined with a global market-based mechanism.[135] Ultimately, the EU ETS has been amended such that for the period 2013-2016, only emissions from flights within the European Economic Area fall under the EU ETS.[136] Under the amended rules, the Commission must report to

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[129] Decision No. 377/2013/EU ("Stop-the-clock" Decision), 2013 OJ (L 113) 1.

[130] Proposal for a Directive amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, COM/2013/0722 final [hereinafter 2013 Commission Proposal], at para. 2.

[131] *Id.*

[132] *Id.*

[133] ICAO, Report of the Executive Committee on Agenda Item 17, A38-WP/430, October 2013.

[134] 2013 Commission Proposal, *supra* note 130, at para. 2.

[135] *Id.*

[136] European Parliament and Council Regulation 421/2014/EU amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, 2014 OJ (L 129) 1, at Art. 1(1).

the Parliament and Council on the results of the 2016 ICAO Assembly, and propose measures taking into account international developments to go into effect beginning 2017.

3.2 Market Rationality in the EU ETS Debates

It is particularly easy to read reflections of market rationality in the EU ETS. In a nutshell, the ETS for air transport is concerned with alleviating the threat posed by climate change, which it perceives as a significant risk to the wellbeing of the population. The risk here is not presented in terms of a risk to individual rights or to justice, but rather an evidence-based risk to the effective functioning of the global system. The EU ETS seeks to manage these risks in a way that provides maximum freedom and flexibility for entrepreneurial actors. As Directive 2003/87/EC, the original legislation establishing the broader EU ETS, puts it: the purpose of the emissions trading scheme is to prevent "dangerous anthropogenic interference with the climate system"[137] and "contribute to fulfilling the commitments of the European Community and its Member States [under the Kyoto Protocol] more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment."[138] This is market rationality writ large: government must intervene on behalf of the security of the population, but should design regulation in such a way as to interfere as little as possible with the functioning of the competitive market.

Following along this path, the language of Directive 2008/101/EC, which amends the original ETS directive to include the airline industry, is replete with references to efficiency, the competitive market, expert evidence and the health of populations. It states that the purpose of the ETS is "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner."[139] It acts in pursuit of the EU's obligations under the United Nations Framework Convention on Climate Change to "stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[140] It makes reference to "the latest scientific findings"[141] and "[r]ecent Community research"[142] regarding climate change, which show that it poses "serious risk to ecosystems, food production and the attainment of sustainable development and of the Millennium Development Goals, as well as to human health and

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[137] Directive 2003/87, *supra* note 114, at Recital 3.

[138] *Id.*, at Recital 5.

[139] Directive 2008/101, *supra* note 117, at Recital 1.

[140] *Id.* at Recital 2.

[141] *Id.* at Recital 3.

[142] *Id.* at Recital 19.

security."[143] In light of these risks, it speaks of the need for an "effective, efficient and equitable response" to climate change,[144] and emphasizes the importance of the precautionary principle in EU environmental policy. The 2013 changes proposed by the Commission similarly emphasize cost effectiveness, market-based mechanisms, and involved the conducting of an Impact Assessment and public consultation with 'stakeholders'.[145]

With regard to the specifics of the ETS scheme, it justifies its inclusion of all flights arriving or departing from the EU as necessary "to avoid distortions of competition and improve environmental effectiveness."[146] It specifies a harmonized methodology for allotting permits "[i]n order to avoid distortions of competition."[147] It explains that one Member State should be responsible for each aircraft operator "[i]n order to reduce the administrative burden on aircraft operators"[148] And it exempts small carriers "[i]n line with the principle of better regulation" and "[t]o avoid disproportionate administrative burdens."[149]

The techniques it seeks to employ include a variety of centralized, decentralized, voluntary, research, and market methods.[150] It hopes to implement the ETS's market-based mechanism as one part of a "comprehensive package" of measures that also includes operational and technological instruments like improvements in air traffic management and research into new technologies.[151] It mentions the development of monitoring plans[152] and research into "the formation of contrails and cirrus clouds and effective mitigation measures, including operational and technical measures."[153]

The Directive maintains a global perspective with respect to the ETS for air transport. Recognizing the entanglement of competitive markets, it emphasizes "the need to undertake overall emission reductions for all industrialized countries."[154] It suggests that "The Community and its Member States should ... encourage third countries to take equivalent measures."[155] Where third countries do adopt their own measures, it instructs the

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[143] *Id.* at Recital 3.

[144] *Id.* at Recital 4.

[145] 2013 Commission Proposal, *supra* note 130, at para. 2.

[146] Directive 2008/101, *supra* note 117, at 16.

[147] *Id.* at Recital 20.

[148] *Id.* at Recital 26.

[149] *Id.* at Recital 18.

[150] For more on the relationship between rationalities and technologies of government, *see* Chapter 4, Section 1.

[151] Directive 2008/101, *supra* note 117, at Recital 13.

[152] *Id.* at Recital 15.

[153] *Id.* at Recital 19.

[154] *Id.* at Recital 7.

[155] *Id.* at Recital 17.

Commission to "provide for optimal interaction between the Community scheme and that country's measures."[156] Furthermore, it exhibits a concern for the global effects of the legislation. The European Council, for example, noted that "in a global context of competitive markets the risk of carbon leakage is a concern that needs to be analyzed and addressed urgently in the new Emissions Trading System Directive, so that if international negotiations fail appropriate measures can be taken."[157]

All in all, the Directive mentions efficiency 7 times, effectiveness 7 times, competition 5 times, and optimal regulation 3 times. Each regulatory choice that it makes is justified by reference to efficiency, effectiveness, risk, and science. This rationality is reinforced by the inclusion of a review mechanism directing the Commission to re-examine the functioning of the ETS as applied to the aviation industry after several years of operation.[158] During this review, the Commission is instructed to consider "the implications and impacts of this Directive as regards the overall functioning of the Community scheme," "the functioning of the aviation allowance market, covering in particular any possible market disturbances," "the environmental effectiveness of the Community scheme," "the impact of the Community scheme on the aviation sector, including issues of competitiveness," as well as technical developments and other criteria of effectiveness.[159]

The Directive's approach to regulation is thus striking in its adherence to market logic, in terms of its primary concerns, its means of justifying government action, and its methods of verifying the outcomes of these interventions. The goal of the legislation is to balance the need to manage the risk posed by climate change against the need to preserve and protect the functioning of the competitive market. The criteria by which success or failure are to be judged are efficiency, effectiveness, and scientific accuracy. The Directive is careful to point out that the EU's motives are related to combating climate change and protecting the market, and that its chosen measures will be effective in meeting its welfare and efficiency goals.

In the process, and as will be analyzed more fully in Chapter 4, the governmental tasks set by the EU ETS are to be performed through a range of 'market' technologies, including monitoring, surveillance, scientific assessment, technological development, and market mechanisms. Additionally, as will be explored in the discussion of subjectivity in Chapter 5, the Directive continually re-inscribes the EU as the appropriate (most efficient and effective)

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[156] *Id.* at Recital 17.
[157] *Id.* at Recital 25.
[158] *Id.* at para. 4.
[159] *Id.*

entity for governing carbon emissions within Europe; constructs climate change as an appropriate object of government; and situates itself as a uniquely rational actor with the power to 'optimize interactions' with third states that choose a similar regulatory path, as well as with 'stakeholders' who support market-based mechanisms.

Many of the challenges to the EU's legislation also reflect the prevailing market rationality. While they generally recognize the need for action to mitigate the risk posed by global climate change,[160] these objections contend either that the EU's assessment of the proper line between security and freedom has tilted too far in the direction of the former, leading to unnecessary and therefore improper distortions of the competitive market, or that the EU is engaging in poor science or poor economics.

With regard to the question of regulatory intent, the anti-EU ETS position questions whether the ETS for airline emissions is potentially protectionist rather than the legitimate outcome of a rational market-oriented program. One concern in this vein regards the use of funds collected in connection with the ETS. For example, the proposed US "European Union Emissions Trading Scheme Prohibition Act of 2011" complains that "[t]here is no assurance that ETS revenues will be used for aviation environmental purposes by the European Union member states that will collect them."[161] Another regards a general fear that backsliding on free trade obligations and the unfair protection of domestic producers will be justified on the grounds of climate change. China's draft climate change law, for example, reportedly states in direct reference to the EU ETS that it "objects to other countries and areas using climate change as an excuse to conduct protectionism in trade."[162]

With regard to the efficiency and scientificity of the EU's scheme, anti-ETS arguments include concerns that incoherence in national climate policies will lead to inefficiency; that onerous legislation will have an unnecessarily injurious impact on the aviation market; and that the ETS has not adequately taken the different needs and contexts of developing countries into account. An ICAO working paper examining the EU ETS, for example, raises several of these points:

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[160] ICAO, for example, consistently maintains that it "[r]ecogniz[es] that international aviation's growth makes it necessary to address the long-term growth of Greenhouse Gas (GHG) emissions that contribute to global climate change." ICAO ETS Working Paper, *supra* note 120.

[161] US ETS Prohibition Act, *supra* note 123, at §2(6).

[162] Zachary Shahan, "Carbon Pricing & Trading News from Australia, California, China, South Korea, & More," *Cleantechnica.com*, 16 May 2012, *available at* http://cleantechnica.com/2012/05/16/carbon-pricing-trading-news-from-australia-california-china-south-korea-more/ (last accessed 15 August 2014).

3.1 The EU's unilateral inclusion of aviation into the EU ETS does not take into account different social and economic circumstances of different States, in particular developing States, and will curb the sustainable growth of international aviation.

3.2 In the absence of a global framework for MBMs [Market-Based Measures], there is a likelihood of similar competing schemes being introduced by other States (some as a retaliatory measure), bringing about a chaotic situation adversely affecting the sustainability of air transport.

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3.4 Inability to develop complementary national, regional and global endeavours on the basis of collaboration and mutual agreement will negatively impact our capacity to address aviation emissions effectively.[163]

The Moscow Declaration prepared by the "coalition of the unwilling," similarly, points out that while it "[s]tress[es] the importance of the Kyoto Protocol to its Parties," it objects that "the inclusion of international civil aviation in the EU-ETS leads to serious market distortions and unfair competition."[164]

The justifications and criticisms described here make sense only from within the particular market-oriented perspective regarding how, when, and why government should act. Discussions about whether the EU ETS as applied in the air transport sector are motivated by legitimate scientific or economic calculations, or whether they seek to protect EU businesses from the market; whether the ETS will result in effective and efficient management of the risk posed by climate change, or will lead to market inefficiencies and collective action failures; whether the regulation will help or harm sustainable development in third states: these debates all presume that the task of government is to manage risk and ensure security while acting to support the competitive market, and that interventions should be designed with efficiency, effectiveness, and scientific data in mind. The conflicts here are not about 'rights' or 'sovereignty'—they are about whether the planned intervention is targeted, efficient, effective, and well calibrated to its context.

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[163] ICAO ETS Working Paper, *supra* note 120, at paras. 3.1-3.4.
[164] Moscow Declaration, *supra* note 121, at pmbl.

3.3 Rights Rationality in the EU ETS Debates

Alongside the market rationality debates described in the previous subsection, arguments stemming from rights rationality can also be detected in the struggle over the EU ETS. From a *sovereigntist* rights perspective, the Directive itself makes several references to the EU's 'right' or responsibility to act in this field, noting that "the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all states," and that the EU Member States "reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory."[165]

Similarly, the EU has several times expressed its position that the ETS does not exceed the EU's right to regulate, or interfere with the rights of third countries. In a statement of reservation to ICAO, for example, the EU representative submitted that the legislation "did not contain any provision contrary to international law, nor did it infringe the sovereign rights of third countries."[166] Similarly, in the *ATA* case, the Court affirmed that the directive cannot extend the application of the greenhouse gas emissions trading scheme to "aircraft registered in third states that are flying over third States or the high seas"[167] because the EU must respect international law in the exercise of its powers. However, it found that in this case there was no infringement because "European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union."[168]

The notion of sovereign right here is used as a shield against potential objections by third states or international organizations. The EU asserts a legal right to act that stems not from the effectiveness, efficiency, or scientific accuracy of its objectives, but rather from its sovereign legitimacy. Though the sovereign right is circumscribed here by market rationality limitations (such as non-discrimination), within these bounds the EU asserts "unlimited jurisdiction."[169]

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[165] Directive 2008/101, *supra* note 117, at Recital 9.

[166] International Civil Aviation Organization, Summary Minutes of the Second Meeting, 194th Council Session, C-MIN 194/2, 2 November 2011, at para. 26.

[167] ATA case, *supra* note 127, at 122

[168] *Id.*, at 123

[169] *Id.*, at 123

Objections to the EU's scheme have also been brought on the grounds of *sovereigntist* rights rationality. Regardless of the effectiveness, efficiency, or scientific necessity of applying the EU ETS to the air transport sector, many third countries contend that the application of the scheme to portions of flights that take place outside EU airspace is a violation of their sovereign right to regulate. This was one of the primary contentions in the *ATA* case, which referenced both customary law and treaties. As the US "Emissions Trading Scheme Prohibition Act of 2011" objected:

> The European Union's extraterritorial action is inconsistent with long-established international law and practice, including the Chicago Convention of 1944 and the Air Transport Agreement between the United States and the European Union and its member states, and directly infringes on the sovereignty of the United States.[170]

Similarly, an ICAO Working Paper states strongly that "[t]he inclusion of international civil aviation in the EU ETS violates the cardinal principle of state sovereignty laid down in Article 1 of the Chicago Convention."[171]

Supporters of EU protectionism may also be operating according to rights rationality. Protecting domestic businesses at the expense of free trade harkens back to mercantilist theories that emphasize the need to promote local industry in order to grow the national economy. Where the concern is with strengthening the EU in comparison with other states, the underlying belief is that government should act to ensure the prosperity of the EU, regardless of effects on the competitive market *per se*. In the advanced liberal context, of course, the operation of the competitive market is generally seen as the pathway to prosperity. However, the concern from the perspective of rights rationality is with domestic prosperity, not with the market as such.

There are also hints of the *cosmopolitan* branch of the rights rationality present in the arguments regarding the EU ETS for airlines. This comes most particularly in the form of claims that the EU is, and wishes to be, a global leader in the field of climate change regulation, which it perceives as a universal good. Directive 2008/101/EC makes several references to this narrative. It emphasizes that the EU "made a firm independent commitment for the EU to reduce its greenhouse gas emissions"[172] It notes that the

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[170] US ETS Prohibition Act, *supra* note 123, at §2(3).
[171] ICAO ETS Working Paper, *supra* note 120, at para. 2.2.
[172] Directive 2008/101/EC, *supra* note 117, at Recital 4.

European Parliament "urged the EU to maintain its leading role in the negotiations with a view to establishing a post-2012 international framework on climate change and to maintain a high level of ambition in future discussions with its international partners"[173] And it further suggests that "the Community scheme may serve as a model for the use of emissions trading worldwide."[174] By setting high standards and encouraging third states and the global community to join it, the EU attempts to 'lead by example' in climate policy.[175]

The 'leadership' position implies that the EU is a moral leader in this field; that it is engaging in a superior style of regulation that others should emulate. This also implies a sense of care for the rights of the other, and a concern with respect to the regulatory policies chosen by third states. EU leadership, under *cosmopolitan*-oriented rights rationality, is a matter of demonstrating and encouraging others to follow along the path toward improvement for all.

Opposing states and businesses have also constructed the application of the EU ETS to air transport as un-*cosmopolitan* in its approach because it relies on coercion rather than leadership. The Moscow Declaration, for example, underlines "the lack of a constructive dialogue to address the concerns of the non-EU States."[176] The "European Union Emissions Trading Scheme Prohibition Act of 2011," the US bill that attempted to make participation in the EU ETS illegal under US law, similarly complained that "[t]he European Union's action undermines ongoing efforts at the International Civil Aviation Organization to develop a unified, worldwide approach to reducing aircraft greenhouse gas emissions and has generated unnecessary friction within the international civil aviation community as it endeavors to reduce such emissions" and argued that the EU "should instead work with other contracting states of the International Civil Aviation Organization to develop such an approach."[177] The ICAO Working Paper also expresses a concern with leadership on the aviation emissions issue, noting that "ICAO is recognized by all to play a leadership role in matters related to aviation and environment," and that therefore "[t]he introduction of these

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[173] *Id.* at Recital 6.

[174] *Id.* at Recital 17.

[175] *See, e.g.,* Kati Kulovesi, " 'Make your own special song, even if nobody else sings along': International aviation emissions and the EU Emissions Trading Scheme," 2(4) *Climate Law* 535 (2011) ("The inclusion of aviation emissions in the EU ETS reflects the EU's traditional desire to lead the global battle against climate change by its own example"); Sebastian Oberthür & Claire Roche Kelly, "EU Leadership in International Climate Policy: Achievements and Challenges," 43(3) *International Spectator* 35, 36 (2008) ("The EU has pursued a 'soft' leadership strategy [in international climate change policy]. In addition to relying on its general political and economic weight, the EU has generally exerted 'directional leadership', primarily based on soft power resources, which means 'leadership by example', diplomacy, persuasion and argumentation.").

[176] Moscow Declaration, *supra* note 121, at pmbl.

[177] US ETS Prohibition Act, *supra* note 123, at §2(4)-(5).

regional schemes affecting international aviation without ICAO's concurrence undermines ICAO's leadership position."[178]

The justifications and concerns raised under the rights paradigm differ significantly from those raised under the market paradigm with respect to their basic assumptions regarding the object and purpose of government. Here, the questions are whether the EU is acting within its sovereign right to regulate, or whether it is violating the sovereign rights of third states by applying the aviation scheme to portions of flights that take place outside of its borders; whether the EU is demonstrating leadership or coercion when it seeks to export its norms outside of its borders; whether the EU is strengthening itself at the expense of other actors; and whether the values the EU protects are truly universal. The overriding concerns are with the rights and authority of states as 'global citizens' and the rights of individuals both within and outside of the EU that will be affected by the EU ETS. The legitimacy of extending the EU ETS to the air transport sector, including its incorporation of emissions that take place outside EU borders, hangs not on questions of efficiency, effectiveness, or science, but rather on questions of right, stemming either from sovereignty, or universal truth.

3.4 Rationalities and their Effects in the EU ETS Debates

As demonstrated in Sections 3.2 and 3.3, both market and rights rationalities (in all four of their ideal-typical variations) can be identified in the discourse surrounding the development, implementation, and response to the EU's emissions trading scheme for the air transport sector. These rationalities structure the debate by determining what types of arguments will be cognizable and which will not, and by providing a set of analytical criteria upon which the appropriateness of the EU's actions will be judged.[179] As can be seen from the examples above, these market and rights rationalities exist alongside one another in contemporary political debates, and are used in multiple, overlapping ways. Despite the fact that they stem from fundamentally different assumptions about the appropriate role of and limitations to government, the EU and other subjects affected by the EU ETS regime jump back and forth between market and rights rationalizations, using both sets of logic to support their policy positions. The implications of this simultaneous presence of both market and rights rationalities will be expanded upon in Chapters 4 and 5, which will discuss the political and

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[178] ICAO ETS Working Paper, *supra* note 120, at para. 4.2.

[179] As explained in Section 1, these rationalities permit only particular sets of arguments to be recognized as reasonable and relevant. It would be perfectly possible to argue for or against the ETS from the perspective of how well it corresponded to religious scripture, or whether it adequately accounted for the subjective wellbeing of non-human animals. However, in the advanced liberal paradigm that currently dominates Western thought, these are not considered particularly pertinent criteria for assessing legislation. The reason is not because these are less desirable criteria as such, but rather because they are not part of the analytical framework provided by the advanced liberal rationality of government.

discursive impact of their coexistence. For now, however, it is hoped that this Chapter adequately demonstrated the fact that the EU holds two broad sets of beliefs about government that coexist in its environmental norm export policies.

In addition, these rationalities are not necessarily correlated with any one particular policy outcome, but are complex, and can therefore support a number of concurrent positions with respect to a given political question. Both proponents and opponents of the EU ETS for air transport made use of arguments stemming from each of these rationalities and several of their ideal-typical strands. From the perspective of *free market* market rationality, supporters and opponents of the EU ETS disagreed over whether the EU legislation was correcting market distortions (for example by preventing 'carbon leakage') or creating market distortions (for example by shielding EU businesses from the operation of the market). From the perspective of *human capital* market rationality, supporters and opponents disagreed over whether the ETS would help to build human capital (for example by preventing climate change-related harm to populations) or decrease human capital (for example by failing to effectively calibrate its policy with respect to the needs of developing countries). From the perspective of *sovereigntist* rights rationality, there was disagreement over whether the EU was acting within its sovereign right, or was exceeding its rights and interfering with the sovereignty of third states. And from the perspective of *cosmopolitan* rights rationality, pro- and anti-ETS arguments erupted over whether the EU was engaging in global leadership to further a universal good, or whether it was acting unilaterally to coerce other countries for its own very non-universal purposes.

These debates provide a very clear example of how the different rationalities structure arguments about particular policies, and how they can even be used to counter or to supplement one another. Indeed, they are even sometimes used to elide gaps or to overcome deadlocks in the rationalizations provided by other rationalities. For example, the *sovereigntist* argument about whether it is the EU's 'right' to regulate in this way is an argument about where the boundaries of the sphere of rights of one actor (the EU) ends, and the sphere of rights of another (the US, third countries, the ICAO, and so on) begins. This rights rationality legitimizes and justifies the ETS in the mind of the EU, and de-legitimizes it in the minds of its opponents: a stalemate. At the same time, however, the parties make reference to market paradigms to assert the effectiveness of their positions—for example, that the EU ETS is appropriate because it is scientifically and economically sound. This implies that there is an over-riding logic by which the ETS can be deemed acceptable or not *regardless* of whether there is a 'right' to regulate. It is not about rights, it is about sound management—the market rationality test of governmental behavior. Depending on which paradigm the EU operates

under, it is called on to behave in correlated ways, presenting itself as a different type of actor with different responsibilities and different motivations for governing.

This raises another point about the multiple, overlapping presence of rights and market rationalities in advance liberal society: that the coexistence of these paradigms is uneasy, because at root they represent profoundly different ways of understanding what government is or should be, what it does or should do, and who its proper subjects and objects should be or are. This instability is a fundamental part of the picture of advanced liberal governmentality, a point to which the dissertation will return and expand upon in Chapters 4 and 5.

4 Conclusion

Using the Foucauldian methodology described in Chapter 2, this chapter began the project of mapping the field of EU environmental norm export. Its objective was to uncover the topography of the discursive field in which arguments about norm export are framed. Specifically, it argued that discussions of this regime of practice are structured according to an advanced liberal schema that recognizes two different articulations of the meaning of 'freedom': a market rationality that focuses on the independence of the governed, and a rights rationality that focuses on the inherent rights of citizens and sovereigns. Within these two differing paradigms, it argued that there are multiple available positions that differ with respect to where they would draw the line between freedom and security. It identified two ideal-typical positions within each of these rationalities in order to demonstrate how occupying different points on the freedom/security scale could result in different policy choices while still drawing on the same basic logic regarding how government can and should function. Within the market rationality stream, it highlighted a freedom-oriented position that would focus primarily on allowing the market to function without government interference, and a security-oriented position that would focus primarily on social protection as necessary for ensuring the availability of human and natural capital. It termed these the *free market* and *human capital* orientations, respectively. With respect to rights rationalities, it identified a freedom-oriented perspective focusing on sovereignty, and a security-oriented perspective focusing on universal norms and solidarity. It termed these the *sovereigntist* and *cosmopolitan* orientations, respectively.

The chapter then went on to analyze the ways in which these different orientations structure the debates regarding EU policy generally, and environmental norm export in particular. In doing so, it first set out several hypothetical arguments from each ideal-typical position

regarding EU environmental norm export, then illustrated how the positions could be identified within the debates regarding the EU's extension of the ETS to the air transport industry.

In addition to this mapping exercise, the chapter sought to make several additional points. First, it sought to demonstrate not merely the existence of these different rationalities of government, but also that they exist alongside one another, and interact in multiple, overlapping ways. Second, it sought to show that this is nevertheless an uneasy coexistence, because these rationalities actually reflect profoundly different understandings of what government is, what it does, and who its proper subjects and objects are. Third, it argued that this is sometimes difficult to see, because these rationalities are complex and multivocal, and one can reach the same policy outcome from multiple different pathways, albeit with very different logical predicates. Fourth, it sought to emphasize that because of their multiplicity, these rationalities support many opportunities for political action and resistance both from inside and from outside of their particular structure. However, as will be argued in Chapters 4 and 5, the choice of a paradigm is not neutral, but rather entails the use of particular mechanisms or technologies for developing and implementing governmental programs and monitoring governmental effects, and the adoption or projection of particular subjectivities or identities by the parties involved.

Chapter 4

GOVERNMENT AND GOVERNANCE: The Technologies of EU Environmental Norm Export

1. Introduction

1.1 What Are Technologies of Government?

Alongside its focus on the rationalities that produce and are produced by particular forms of government, governmentality also directs our attention to the mechanisms by which government occurs. Governmental technologies are the means by which rationalities of government are deployed, and by which governing is accomplished.[1] They are "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions."[2] Technologies of government are the vector by which the decisions and actions of individuals, groups, organizations, populations, and states come to be understood, articulated, and regulated in relation to a particular rationality of government. They are the practices and procedures by which government orders the lives of the governed, and by which the governed come to govern themselves. These technologies are not neutral, but act as a condition of government, opening up certain possibilities for action and limiting others. The instruments that government employs in pursuit of its ends reflect its underlying rationality of political reason and understanding of subjectivity.

These technologies are linked to what Mitchell Dean calls the "fields of visibility of government": the way that particular rationalities of government make certain objects visible

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[1] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 41-42 (2d ed. 2010). Thus, the word 'technology' implies much more than a 'technical device' or artifact—it is also the forms of knowledge, skill, evidence, calculations, and so on that are needed to create and operate physical, political, social, and legal machines.

[2] Nikolas Rose & Peter Miller, "Political Power Beyond the State: Problematics of Government," *The British Journal of Sociology* 271, 273 (2010).

while hiding or obscuring others.[3] Census reports, maps, atmospheric pressure measurements, surveys, and so on are examples of technologies that serve both to 'make visible' certain individuals, institutions, objects, and processes and facilitate the activity of government.[4]

This focus on technologies is essential because it brings an element of materiality to the study of power—it expands the domain of government into the realm of objects, measurements, and instruments. In addition to law and policing, governing occurs by means of administrative forms, data collection, and balance of payments modeling. This highlights once again the way in which power is exercised by and through broad networks of institutions, practices, and knowledge creation. Examining the multiple and complex means through which government happens allows a de-centering of the sovereign state as the sole locus of power and government, opening up the field to include analyses of the governmental work of international organizations, NGOs, standard-setting bodies, corporations, scientists, media, experts, and other actors.[5]

As described in Chapter 2, the technologies or mechanisms that government employs are intrinsically correlated with the rationalities according to which it operates (for example, political economic analysis is related to liberal forms of governmentality). Examining the mechanisms, technologies, or instruments through which government occurs, therefore, helps to make visible its rationalities and reveal the subjectivities that it relies on and perpetuates.

This focus on techniques of government is useful for studying EU environmental norm export. It draws attention to the concrete mechanisms—the knowledge regimes, systems of experts, treaties, diplomacies, and so on—that produce the EU and its targets as actors, disseminate rationalities, and induce particular behaviors and conflicts. It is also useful in that it moves beyond the traditional international law sticking points of sovereignty and consent to show the ways in which these technologies enable government "at a distance." The focus on technologies reveals that traditional 'command-and-control'-style legal intervention is not the only way that the 'conduct of conduct' happens, and thereby rearticulates the EU's evangelical activity as a form of government. As Rose and Miller point out:

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[3] Dean, *Governmentality*, *supra* note 1, at 41.

[4] On this point, *see also* James Scott, *Seeing Like a State* (1998); Bruno Latour, *Science in Action* (1987) (discussing the notion of 'inscription devices').

[5] *See supra* Chapter 2, Section 2.1.

> Through an analysis of the intricate inter-dependencies between political rationalities and governmental technologies, we can begin to understand the multiple and delicate networks that connect the lives of individuals, groups and organizations to the aspirations of authorities in the advanced liberal democracies of the present. [6]

To that end, this chapter hopes to accomplish a number of things. First, it seeks to demonstrate that the rights and market rationalities identified in Chapter 3 are associated with particular technologies of government. These technologies represent the concrete manifestation, or the material dimension of governmentality, and both produce and are produced by the rationalities with which they are associated. Second, it shows that as with the market and rights rationalities discussed in the last chapter, market and rights technologies exist alongside one another, interacting in complex and overlapping ways in the context of advanced liberalism. This focus on complexity is intended, broadly, to allow for some precision in describing the practices addressed in the chapter, and to counter reductionist tendencies to paint contemporary politics with a broad neoliberal brush, and to maintain a focus on the diversity and heterogeneity of power relations.

Third, the chapter argues that the focus on complexity is additionally important because it reveals something interesting about the interaction between these technologies of government: namely, that their coexistence is sometimes uneasy or unstable, because market and rights technologies draw on and produce fundamentally different rationalities of government. This instability has interesting effects with respect to EU environmental norm export because it allows the EU to act in multiple, sometimes conflicting, ways and provides opportunities for strategic governmental behavior and resistance. For example, as will be described in the case study provided in Section 3, where 'sovereignty' creates barriers to actions that are perceived as 'political' exercises of extraterritorial 'government', these sovereign barriers can be avoided by making use of 'de-politicized' 'universal' 'governance' technologies.

1.2 Rights Technologies

Rights technologies are the set of tools associated with the *raison d'État*-style rights rationality that persists within contemporary advanced liberalism. They are what some might think of as the 'traditional' techniques of government: law, policing, and bureaucracy. They are hierarchical, state-centered, political, and formal. They 'see' territory, citizens, and borders,

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[6] Rose & Miller, "Political Power Beyond the State," *supra* note 2, at 175.

and are concerned with the relations among them. They are they techniques by which the rights rationality 'does government'.

As described in Chapter 2, Foucault identifies three "practices" of the state that characterize the *raison d'État* era:

(1) *Mercantilism*: which consisted of mercantilist economics, but also more generally of the principle that the state must enrich itself in terms of monetary accumulation, increasing population, and maintaining competition with foreign powers;

(2) *Police*: which entailed the unlimited regulation of a country in order to promote the goals of state growth and enrichment;

(3) *Permanent military and diplomatic forces*: which could maintain the sovereign independence of the state and the balance of power in Europe.[7]

Each of these practices involved the development of corresponding technologies for carrying out the business of government.

The mercantilist philosophy of national growth and organization, for example, precipitated the development of modern bureaucratic techniques. *Raison d'État* government was made possible by the accumulation of large amounts of facts about the population of the governed. It involved the collection of statistics, accounting requirements, tax returns, censuses and surveys, the investigations of Victorian social reformers, records kept by police forces and schools, calculations of gross national products, growth rates, inflation, and so on.[8] These facts were used to mobilize populations for the benefit of the state—to increase its human and material wealth, to prevent the spread of disease and disorder, and to help maintain the balance of international power. They enabled the operation of government by the construction of a system of knowledge that sent detailed flows of information up and down a hierarchical network.

The police state required the development of a set of institutions focused on surveillance and disciplining the population. This consisted, specifically, in growing the population of the state; ensuring that sufficient food and other necessities of life were available; taking steps to protect public health; managing the economic activity of the population; and ensuring the circulation of goods.[9] These tasks involved the establishment of various bureaucratic and

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[7] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-1979* 5 (Graham Burchell trans. 2008).

[8] Rose & Miller, "Political Power Beyond the State," *supra* note 2, at 283; Andrew Barry, *Political Machines: Governing a Technological Society* (2001).

[9] Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-1978* 323-26 (Graham Burchell trans. 2007).

regulatory institutions (for example, the development of an agricultural policy and mechanisms for inspecting the quality of foodstuffs), schemes for ensuring good behavior (work houses, the suppression of vagrancy), as well as policies designed to ensure the smooth functioning of commerce (expansion of transportation networks, the regulation of commerce).[10] Its techniques, therefore, focused on institutionalization, regulation, inspection, and discipline.

The operation of the police state also spurred the development of oppositional legal technologies. In particular, the eighteenth century saw the transformation of law from an instrument of state power into an instrument of state limitation. Whether natural or constitutional, law and rights became the external check on the power of the state.[11] Courts, law, and rights thus became a prime technique of government that managed the balance of power between states, groups, and individuals during this era.

The permanent military and diplomatic apparatus that maintained sovereign independence and the balance of power also entailed its own set of technologies. In the external field, which was viewed as a space of political and economic competition, states would "seek to assert themselves in a space of commercial competition and domination, in a space of monetary circulation, colonial conquest, and control of the seas."[12] Sovereign equality and competitive equilibrium defined the international sphere that existed among the great European powers. With respect to other parts of the world, the approach was characterized primarily by calculations of usefulness to the project of national growth; other lands were viewed either as sources of goods and resources or as captive markets for domestic products. The techniques associated with this paradigm include war, diplomatic engagement, the development of a law of nations, and colonialism.[13]

1.3 Market Technologies

The rise of liberalism and neoliberalism entailed the development of new technologies. In the liberal paradigm of governmentality, the focus shifted from government to governance; from formal mechanisms like law and bureaucracy to informal mechanisms like benchmarks and impact assessments; from states to a wider range of state and non-state actors; and from hierarchical forms of control to horizontal ones. In other words, market technologies are *de-centered*, *de-formalized*, and *de-politicized* in comparison with rights technologies.

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[10] *Id.*, at 323-326.

[11] Foucault, *Birth of Biopolitics*, *supra* note 7, at 7-9.

[12] Foucault, *Security, Territory, Population*, *supra* note 9, at 291.

[13] Foucault, *Security, Territory, Population*, *supra* note 9, at 301-6.

Scholars such as Thomas Lemke, William Walters, Bal Sokhi-Bulley, and Erik Swyngedouw associate advanced liberal market rationality with the birth of the notion of 'governance'.[14] And indeed, this term seems to evoke the attitude of market rationality toward regulatory technologies. Historically, the word 'governance' was used as little more than a synonym for 'government'. Over the last two decades, however, it has attained a new life as a distinct marker in political and academic discourse. The so-called 'new governance' literature argues that the nature of political rule has undergone fundamental changes in the modern world.[15] In particular, governance theorists argue that the state is no longer the sole point of hierarchical authority. Instead, political authority is now plural, polycentric, multilevel, and horizontal. Beyond this shared standpoint, the term is now used in a number of different legal and political contexts, including "international relations (global governance), development policy (good governance), European Union studies (multilevel or European governance), finance and management (corporate governance), and at many levels of public policy (e.g. urban governance)."[16] Each of these contexts uses the term somewhat differently to analyze the specific features of its subject matter. However, all share several broad thematic commitments. The idea of market rationality's 'governance' talk is well-summarized by Thomas Lemke:

> Seen from the perspective of an analytics of government, the governance discourse represents a particular 'art of government' that is firmly rooted within a liberal concept of the state. It stresses political consensus, mutual accommodation and collective problem solving and searches for mechanisms that foster coordination, cooperation and harmonization. The governance discourse translates fundamental antagonisms and political oppositions into modes of articulation of different interests. It conceives of strategic confrontations as diverse 'inputs' to reach a decision or to carry

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[14] Bal Sokhi-Bulley, "Government(ality) by Experts: Human Rights as Governance," 22 *Law & Critique* 251 (2011); Thomas Lemke, "Foucault, Governmentality, and Critique," 14(3) *Rethinking Marxism: A Journal of Economics, Culture & Society* 49, 58 (2002); Erik Swyngedouw, "Governance Innovation and the Citizen: The Janus Face of Governance-beyond-the-State," 42 *Urban Studies* 1991, 1998 (2005); William Walters, "Some Critical Notes on 'Governance'," 73 *Studies in Political Economy* 27 (2004). *But see* Jim Jose, "A (con)fusion of discourses? Against the Governancing of Foucault," 16(5) *Social Identities* 689 (2010) (arguing against the tendency of scholars to confuse the terms 'governance' and 'governmentality').

[15] The literature on governance is incredibly vast. Indeed, there is even a major international journal that has thus far published 26 volumes titled simply '*Governance*'. A few major works include: *The Tools of Government: A Guide to the New Governance* (Lester M. Salamon ed. 2002); Vasudha Chhotray & Gerry Stoker, *Governance Theory: A Cross-Disciplinary Approach* (2010); Anne Mette Kjaer, *Governance* (2004); Jon Pierre & B. Guy Peters, *Governance, Politics, and the State* (2000); Jon Pierre, *Debating Governance: Authority, Steering and Democracy* (2000).

[16] Walters, "Critical Notes," *supra* note 14, at 28.

> out a programme. In this conceptual frame, conflicts are not regarded as a threat to social order, but as a means of social progress.

The movement from government (rights rationality) to governance (market rationality) involves several distinct features. First, market rationality governance discourse is *de-centering* because it moves away from a singular focus on the state, emphasizing networked rule and the rise of non-state actors. Where rights rationality 'government' discourse referred to hierarchical processes carried out by centralized authorities, 'governance' refers to horizontal processes of steering, coordination, and networks. When it began to appear in World Bank publications in the 1990s, the term 'governance' was associated primarily with the politics of development—in particular, the development of the post-colonial world.[17] It was both a way of talking about the abilities of governments within states and a way of characterizing international relations that could encompass not only sovereign states, but also NGOs, international organizations, multinational corporations and other non-state actors.

Market rationality and its governance discourse shift away from viewing states as the sole locus and hierarchical peak of governmental activity, and instead focus on horizontal networks that include both state and non-state actors. In particular, this has involved the appearance of a number of new actors on the governmental scene.[18] Erik Swyngedouw usefully describes a "three-fold reorganization" under market rationality that involves:

(1) "the externalisation of state function through privatisation and deregulation (and decentralisation)" and the concomitant involvement of non-state, civil society and market-based actors in regulation and government;

(2) "the up-scaling of governance whereby the national state increasingly delegates regulatory and other tasks to other and higher scales or levels of governance (such as the EU, IMF, WTO and the like)"; and

(3) "the down-scaling of governance to 'local' practices and arrangements that create greater local differentiation combined with a desire to incorporate new social actors in the arena of governing."[19]

As ideas about the 'who', 'where' and 'how' of governing have moved out, up, and down, there has been an overall transition from "statist command-and-control systems to horizontal

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[17] Anthony Pagden, "The Genesis of 'Governance' and Enlightenment Conceptions of the Cosmopolitan World Order," 50(155) *International Social Science Journal* 7 (1998).

[18] *See* Lemke, "Foucault, Governmentality, and Critique," *supra* note 14, at 58.

[19] Swyngedouw, *supra* note 14, at 1998.

networked forms of participatory governance."[20] Partnerships are key to this ideal, which seeks to manage the pool of resources and stakeholders that is its notion of society.[21] This is by no means to argue that from a market rationality perspective the state is 'dead' or somehow no longer relevant or important. Indeed, the state remains conspicuously important, playing a central role in the formation and coordination of institutional and regulatory configurations.[22] The result, rather, is a "complex hybrid form of government/governance" that exists under advanced liberal governmentality.[23]

In addition to the move from government, the province of only sovereign states, to governance, performed by a plurality of actors, the de-centering tendencies of market rationality have also had an effect on the space of government. Whereas rights rationality focused on the operation of spheres of right and territory, market rationality embodies a more fluid approach to these demarcations. As Andrew Barry writes:

> Traditionally, the space of government has been conceived in terms of a relation between a national population and a national territory. 'Societies' and 'economies' have been contained within the territorial boundaries of the nation-state. [Now], however, ... government operates not just in relation to spaces defined and demarcated by geographical or territorial boundaries but in relation to zones formed through the circulation of technical practices and devices. Practices of government are as much oriented toward the problems of defending, connecting and reconstructing such technological spaces, as with older concerns with the defence and demarcation of physical territory.[24]

The dimension of de-centralization thus implies both a shift away from the state and toward a multiplicity of actors, as well as a shift away from territory and toward zones defined by practical, technical, and scientific efficiency.

Second, market rationality's governance discourse is *de-politicizing*, focusing on process and procedure, rather than substance and politics.[25] Historically, the development of the idea of

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[20] *Id.* at 2002.

[21] Jens Henrik Haahr, "Open Coordination as Advanced Liberal Government," 11(2) *Journal of European Public Policy* 209, 216 (2004).

[22] As Bob Jessop writes, the state assumes a new role as "meta-governance, i.e., coordinating different forms of governance and ensuring a minimal coherence among them." Bob Jessop, "Capitalism and its Future: Remarks on Regulation, Government and Governance," 4(3) *Review of International Political Economy* 561, 574 (1997).

[23] Haahr, *supra* note 21, at 216.

[24] Barry, *supra* note 8, at 2-3.

[25] As Nadia Urbinati describes it:

'governance' occurred very much in opposition to a notion of 'government', and was intended to separate a set of universalized, politically neutral values from a separate domain of culturally specific, politically relevant ones.[26] As such, 'governance' discourse is characterized by an "antipolitical politics."[27] As Thomas Lemke writes:

> The caricature of a time when states were 'whole' (and not yet 'fragmented' and 'decentered') serves as a background for the claim of a decisive historical break: The diagnosis of a growing complexity of the social world—the globalisation of financial and other markets, the importance of informational and communication technologies, the appearance of new forms of production etc.—is linked to an idea of the 'end of politics', to a 'post-ideological' world order that is no longer governed by fundamental conflicts and oppositions. In this view, governance is about steering and regulating a world without radical alternatives, it is animated by the search for 'rational', 'responsible' and 'efficient' instruments of problem management.[28]

Governance—and in particular the notion of 'good governance'—is offered up as a set of neutral, universally applicable procedural norms that all states and non-state actors should undertake to uphold in order to improve the efficiency and legitimacy of government.[29] The

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> Governance entails an explicit reference to 'mechanisms' or 'organized' and 'coordinated activities' appropriate to the solution of some specific problems. Unlike government, governance refers to 'policies' rather than 'politics' because it is not a binding decision-making structure. Its recipients are not 'the people' as a collective political subject, but 'the population' that can be affected by global issues such as the environment, migration or the use of natural resources.

Nadia Urbinati, "Can Cosmopolitical Democracy Be Democratic?" in *Debating Cosmopolitics* 67, 80 (Daniele Archibugi ed. 2003).

[26] *Id.*

[27] Walters, "Critical Notes," *supra* note 14, at 33-37; Paul Hirst, "Democracy and Governance," in *Debating Governance: Authority, Steering, and Democracy* 13, 14 (Jon Pierre ed., 2000); Chantal Mouffe, *On The Political* 103-7 (2005).

[28] Lemke, *supra* note 14, at 55.

[29] Bal Sokhi-Bulley excellently analyzes the Commission's 2001 White Paper on European Governance in this context, highlighting the ways in which the EU equates itself with universal norms, in support of its evangelical activities:

> The White Paper states that governance means: 'rules, procedures and behaviour that affect the way in which *powers* are exercised at the European level, and particularly as regards *openness, participation, accountability, effectiveness* and *coherence*'. These terms are identified as the 'principles of *good* governance' and so the Paper gives the distinct impression that *European* governance is *good* governance. A later report of the Commission makes this point explicitly: analyzing public opinion on the White Paper, it determines the general response to be supportive of the 'five principles definition' of *EU* governance as *good* governance. Furthermore, a dichotomy is drawn between 'good' and 'bad' governance in a report by a working group with pre-dates the White Paper. 'Bad' governance, or 'absence of good governance', is

enemies of governance are not old ideological bogeymen like fascism, communism, and so on. Instead, they are the universalized, "seemingly apolitical foes such as corruption, disorder, distrust, political alienation, bad governance, and so on."[30]

Third, market rationality's governance discourse is *de-formalizing*, in that it focuses on complexity, fluidity, flexibility and informal mechanisms, rather than on simple, formal, codified, institutional ones. The shift to informal, flexible mechanisms is grounded in a particular narrative of social change that emphasizes the complexity of contemporary society.[31] Governance scholars frequently refer to globalization, the growth of financial and economic markets, 'revolutions' in the worlds of information and communications technologies, mass migration, and cultural transformations that have drawn attention to issues such as equality, environmentalism, democracy, human rights, and local autonomy.[32] Market rationality, in this sense, is associated with the rise of what scholars have referred to as "managerialism": an approach that suggests political and international problems should be resolved via 'compliance-oriented' expert and technical interventions.[33]

This market rationality understanding is perpetuated by means of market technologies. What are the specific means by which this 'governance' is accomplished? Mitchell Dean usefully identifies two different types of technologies that are characteristic of market rationality: technologies of agency and technologies of performance.

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evidenced according to this report in 'our partner countries in the developing world'. These 'others' do not share in the kind of positive, progressive governance that the EU promotes.

Sokhi-Bulley, *supra* note 14, at 254 (citations omitted).

[30] Walters, "Critical Notes," *supra* note 14, at 37.

[31] *Id.*, at 30.

[32] *Id.*

[33] Martti Koskenniemi's description of the 'managerialist' approach to international law fits perfectly into this narrative:

> I am particularly thinking of the kind of 'managerialism' that suggests that international problems—problems of 'globalization'—should be resolved by developing increasingly complicated technical vocabularies for institutional policy-making. One encounters this often in the suggestion to replace international law's archaic *mores* by a political science-inspired language of 'governance', 'regulation', or 'legitimacy'. The managerial approach is critical of the formal aspects of the legal craft that it often sees as an obstacle for effective action. Its preference lies with informal 'regimes' and its focus is on (the fact of) 'compliance' rather than (normative) analysis of what there is to comply with. Managerialism wants to realize 'actors'' (often identified as billiard-ball states) more or less unproblematic 'interests'. For it, the objectives of institutional action are given and the only remaining questions concern their manner of optimal realization.

Martti Koskenniemi, "The Politics of International Law—20 Years Later," 20(1) *European Journal of International Law* 7, 15 (2009).

Technologies of agency are "technologies that seek to enhance or deploy our possibilities of agency"; that is, to make individual actors responsible for their own self-management.[34] Technologies of agency appear in numerous forms. First, they can be seen in the growth of privatization and contracting, or what has been referred to as the 'new contractualism'.[35] The logic of contractualization is one of privatization, horizontal bargains, and flexibility. This contractual logic emphasizes the entrepreneurial nature of individuals and groups. It is de-centering in that it requires subjects to mold themselves along the lines indicated by their own contractual agreements. It is de-politicizing in that it transforms the practice of governing into a process of negotiation between 'stakeholders'. As Dean notes, "[o]ne of the key features of the logic of contractualization is that once its ethos of negotiated intersubjectivity is accepted, then all criticism becomes simply a means to retooling and expanding the logic of contract."[36] And it is de-formalizing in the sense that a contract is a flexible, individualized mechanism that can be tailored specifically to the needs of its context.

Second, technologies of agency include what Barbara Cruikshank dubbed "technologies of citizenship," and Jens Henrik Haahr refers to as "technologies of involvement."[37] This includes the techniques of self-esteem, empowerment, consultation, and negotiation that seek to mobilize individuals and groups to self-govern in fields as diverse as community development, social and environmental impact studies, health promotion campaigns, teaching, community policing, and so on.[38] It also includes instruments such as 'voice', 'participation', and 'representation' by which the claims of individuals or groups are taken into account in decision-making processes. Such technologies conceive of the governed as 'stakeholders', engaging them as active, free, responsible, and informed consumers of governmental products, members of self-managing communities, or agents capable of controlling their own risks.[39] These technologies of involvement are de-centering because they seek to spread the task of government across a wide range of subjects. As William Walters writes, "Governance has legitimated a notable widening of the public arena, whether at national levels, where the consultation of a whole range of actors now subjectified as 'communities', 'partners' and 'stakeholders' has become obligatory, or within international

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[34] Dean, *Governmentality, supra* note 1, at 196.

[35] Anna Yeatman, "Interpreting Contemporary Contractualism," in *Governing Australia* 227 (M. Dean & B. Hindess eds. 1998).

[36] Dean, *Governmentality, supra* note 1, at 196.

[37] Haahr argues that his term is better suited to the study of governmentality at the supranational level, where "subjects more frequently appear as associations, agencies or institutions than as individuals." Haahr, *supra* note 21, at 217-18.

[38] Barbara Cruikshank, "Revolutions Within: Self-Government and Self-Esteem," 22(3) *Economy and Society* 327 (1993); Barbara Cruikshank, "The Will to Empower: Technologies of Citizenship and the War on Poverty," 23(4) *Socialist Review* 29 (1994).

[39] Dean, *Governmentality*, *supra* note 1, at 196.

fora."[40] They are de-politicizing because while they emphasize the need for participation and inclusion, they do so in the name either of a narrow, instrumental conception of democracy that is valued only insofar as it provides further legitimation for good governance,[41] or in the name of political consensus and problem-solving.[42] Again, in Walters's words: "it is a narrow and tightly circumscribed form of agency which governance accords to its subjects."[43] Finally, these technologies of involvement are de-formalizing because they emphasize individual self-management and informal knowledge transfer among stakeholders rather than public law or bureaucracy as the mechanism of choice for governing 'at a distance'.

Technologies of performance, by contrast, are "the plural technologies of government designed to penetrate the enclosures of expertise fostered under the welfare state and to subsume the substantive domains of expertise (of the doctor, the nurse, the social worker, the school principle, the professor) to new formal calculative regimes."[44] This involves the development and mobilization of performance indicators and checks that impose parameters for self-assessment and encourage particular behaviors. Technologies of performance include the development of 'indicators', 'best practices' and 'benchmarks' for encouraging appropriate action, and the deployment of mechanisms such as 'transparency', 'accountability' and 'auditing' for assessing compliance. These technologies of performance become indirect means of managing agencies, professionals, groups, and individuals 'at a distance' by "ensuring performance in the form of efficiency, effectiveness or quality, measured in terms of production, productivity or satisfaction."[45] They are de-centering because they ask subjects of government (including states) to perform the work of governing by developing, applying, and enforcing performance standards against themselves and one another. They are de-politicizing because they appear to offer a less political and more technical basis for reforming

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[40] Walters, "Critical Notes," *supra* note 14, at 34.

[41] Hirst, *supra* note 27, at 14; Walters, "Critical Notes," *supra* note 14, at 34.

[42] William Walters argues that this focus on consensus results from the "assimilationist tendency" of governance: "Where many political discourses seek to articulate a field of antagonistic forces as agents of political transformation, governance seeks to implicate them as 'partners' in a game of collective self-management and modulated social adjustment." Walters, "Critical Notes," *supra* note 14, at 35. Other scholars also emphasize the importance of consensus in discussions of governance. De Alcántara, for example, notes that " 'governance' involves building consensus, or obtaining the consent or acquiescence necessary to carry out a programme, in an area where many different interests are in play." Cynthia Hewitt de Alcántara, "Uses and Abuses of the Concept of Governance," 50(155) *International Social Sciences Journal* 105, 105 (1998).

[43] Walters, "Critical Notes," *supra* note 14, at 36.

[44] Dean, *Governmentality*, *supra* note 1, at 197.

[45] Haahr, *supra* note 21, at 218. In the new language of governance, these techniques encompass what might be termed the "output legitimacy" of governmental processes.

the behavior of states and other actors.[46] And they are de-formalizing because they encourage constant revision and reform, micro-level surveillance,[47] and flexibility.

These market technologies of agency and performance instrumentalize individual and group consent and monitoring as a technique of government. When stakeholders participate in government via mechanisms such as contract, 'empowerment', and voice, they enter into the position of being regulators of their own behavior. Technologies of agency seek to create responsible individual and group stakeholders who are expected to be able to rationally calculate their own range of risks and rewards and to optimize their own entrepreneurial activities, and who expect others to do the same.[48] Meanwhile, technologies of performance provide individuals and groups with standards by which to measure their own and other peoples' performance. This encourages self-management of risk, prudence, and responsibility. As part of this process, market technologies tend to reduce problems such as global poverty or environmental harm to evidence of the need for governance reform. If only governance structures were better designed, the argument goes, such problems could be resolved.[49] Unlike with the rights technologies described above, "[g]overnance discourse will not concede that its 'others' may have interests that are fundamentally incompatible or antagonistic to the

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[46] *See also* Walters, "Critical Notes," *supra* note 14, at 34.

[47] Larry Catá Backer has written interestingly of the impact of surveillance as a technique of global governance. While formal surveillance by state and police apparatuses is associated with rights-oriented forms of governmentality, micro-level surveillance performed by individuals, experts, and private companies becomes a de-formalized market technique of government. As he writes:

> Surveillance is a flexible engine. It can be used to decide what sorts of fact constitute information, to determine what sorts of information ought to be privileged and which do not matter, to gather that information, to empower people or entities to gather information, and to act on the information gathered. ... In its transnational form it can be used to construct a set of privileged information that can be gathered and distributed voluntarily by private entities on the basis of systems created and maintained by international public or private organizations as an alternative to formal regulation and to provide a means of harmonizing behavior without law. Surveillance in its various forms provides a unifying technique with which governance can be effectuated across the boundaries of power fractures without challenging formal regulatory power or its limits. It avoids the barrier between the public and private spheres; it substantially increases the regulatory palette of states without the complications of the usual limitations of public formal lawmaking—especially those of accountability and transparency.

Larry Catá Backer, "Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes," 15(1) *Indiana Journal of Global Legal Studies* 101, 103-4 (2008).

[48] Dean gives as an example the government of "targeted populations": "populations that manifest high risk, or are composed of individuals deemed at risk," such as "[v]ictims of crime, smokers, abused children, gay men, intravenous drug users, the unemployed, indigenous people and so on." Dean, *Governmentality*, *supra* note 1, at 196. The object of employing technologies of agency to these groups is "to transform their status, to make them active citizens capable, as individuals and communities, of managing their own risk." *Id.* at 197.

[49] This faith in procedural solutions could be seen as one of the driving factors behind the movements toward using labels to encourage responsible consumption; reforming accounting practices to include environmental externalities as part of the balance sheet; and requiring regulators to hold environmental consultations and perform environmental impact assessments before enacting new policies.

present order of power, that their 'exclusion' is a structural effect rather than a remediable anomaly, or that inclusion would imply a fundamental reordering of this system."[50] Rather, they flatten all subjects into stakeholders whose interests may or may not have been efficiently and effectively taken into account.

To sum up:

Market Technologies	Rights Technologies
• Governance	• Government
• De-centralized (state + other 'stakeholders')	• Centralized (states)
• Technocratic	• Political
• Horizontal, participatory, networked	• Hierarchical, top-down, command-and-control
• Informal, flexible, ad hoc	• Formal, inflexible, codified
• Tools: Experts, networks, accounting, performance benchmarks, self-management	• Tools: Law, courts, policing, statistics, bureaucracy, rights

1.4 Chapter Outline

The rights and market technologies described in Sections 1.2 and 1.3 exist alongside one another in advanced liberal society. Indeed, as was the case with the rights and market rationalities described in Chapter 3, and as will be demonstrated in the subsequent sections of this chapter, they interact in multiple, overlapping ways. However, as will be explored in Section 3, their coexistence is sometimes uneasy or unstable because they stem from different governmental rationalities and produce different governmental effects. This instability, however, is also productive, as it allows for polyvocality in EU environmental norm export practices, and provides opportunities for strategic action, as will be explored below.

The remainder of this chapter will be organized as follows. First, Section 2 will make the argument that it is possible to identify both market and rights technologies in the EU's environmental norm export practices. In order to do so, it will provide an overview of the EU's trade and environment 'toolbox'—the legal and policy tools that it uses to export its environmental norms abroad. In particular, it will explore five representative tools from this

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[50] Walters, "Critical Notes," *supra* note 14, at 36. *See also* Mouffe, *supra* note 27, at 106 (noting the failure of governance models to recognize agonism or conflict as inherent to political life); Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth, and the Politics of Universality* (2011) (describing the universalization of development discourse).

toolbox (multilateral agreements, unilateral import restrictions, environmental conditionality, sustainability impact assessments, and horizontal and voluntary partnerships). These practices involve the use of rights technologies, as described in Section 1.2: diplomatic pressure, surveillance, policing, international law, and courts. They also, simultaneously, rely on the types of market technologies described in Section 1.3: networking, benchmarks, stakeholder involvement, public accounting, and good governance. Sections 2.1 through 2.5 will examine how each of the selected examples from the EU's trade and environment toolbox makes use of rights and market technologies to promote the EU's environmental norms abroad. For the sake of clarity, these five examples will be presented in order from the most 'rights'-oriented tool to the most 'market'-oriented tool. The idea here is to give a sense of the way in which market and rights techniques differ from one another, to provide concrete evidence of their presence in EU environmental norm export practices, and to demonstrate their coexistence and multiplicity. Section 2.7 will conclude by discussing the relevance of this coexistence and multiplicity from the perspective of advanced liberal governmentality.

Section 3 will then turn to this chapter's case study, discussing the operation of these technologies in the context of the recently concluded EU–Colombia Peru Free Trade Agreement (FTA).[51] Sections 3.1 and 3.2 discuss the EU–Colombia Peru FTA, explaining in detail the technologies of government it employs and how these technologies can be divided into market and rights techniques, respectively. Following this, Section 3.3 explores the implications of this analysis, arguing that the coexistence of these market and rights technologies permits the EU to act in multiple, complex ways with respect to the FTA, and provides room for strategic governmental action by instrumentalizing the distinction between 'government' and 'governance' techniques.

Finally, Section 4 summarizes the chapter's arguments, and provides some concluding thoughts on the significance of these technologies within the context of EU environmental norm export.

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[51] Trade Agreement Between the European Union and its Member States, of the One Part, and Colombia and Peru, of the Other Part, 21 Dec. 2012, 2012 OJ (L 354) 3 [hereinafter EU–Colombia Peru FTA].

2. The EU's Trade and Environment Toolbox

2.1 Multilateral Agreements

The EU's various environmental norm export practices span across a wide range of policy techniques. Perhaps the highest profile tool in the EU's trade and environment toolkit is the linking of these issues through multilateral environmental agreements (MEAs). The EU is a strong supporter of MEAs, and frequently asserts its commitment to multilateralism.[52] The EU is a party to a number of international environmental treaties—it is a signatory to more than 60 MEAs, ranging from the Convention on Biological Diversity[53] to the UN Framework Convention on Climate Change.[54] In this sense, the EU's global environmental agenda is, as John Vogler notes, "overwhelmingly multilateral."[55] Indeed, Chapter 11.3 of the EU's 5th Environmental Action Programme (EAP) notes that "unilateral use of trade instruments for environmental purposes should be avoided in principle."[56] Or, as the 7th EAP puts it, the EU is committed to "engaging in existing and new multilateral and other relevant processes, in a more consistent, proactive and effective way, including through the timely outreach to third countries and other stakeholders."[57]

The EU has backed up this commitment to multilateralism with arguments at the WTO, where it has stated on several occasions that MEAs, and not unilateral trade-related environmental measures (TREMs) or sanctions, are the preferred method of pursuing international environmental goals. The EU's position in the *Shrimp/Turtle* case, for example, was that "as a general principle, it was not acceptable for a state to impose restrictions on trade in order to force other states to adopt certain measures or face economic sanctions which included the withdrawal of rights enjoyed under the WTO Agreements."[58] In other words: "The appropriate way for Members concerned with the preservation of globally shared environmental resources to ensure such preservation is through internationally agreed

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[52] *See, e.g.,* Sibylle Scheipers & Daniela Sicurelli, "Normative Power Europe: A Credible Utopia?," 45 *Journal of Common Market Studies* 435, 441-444, 447-448 (2007) (describing the EU's commitment to multilateralism in the context of the ICC negotiations, the development of the Kyoto Protocol).

[53] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79.

[54] United Nations Framework Convention on Climate Change, 29 May 1992, 1771 UNTS 107 (entered into force Mar. 24, 1994).

[55] John Vogler, "The European Contribution to Global Environmental Governance," 81(4) *International Affairs* 835, 838 (2005).

[56] Resolution of the Council and the Representatives of the Governments of the Member States on a Community programme of policy and action in relation to the environment and sustainable development, 1993 OJ (C 138) 1.

[57] Decision No. 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', 2013 OJ (L 354) 171 [7th EAP], at Annex para. 106.

[58] Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (15 May 1998), at para. 355.

solutions. Measures taken pursuant to such multilateral agreements would in general be allowed under the chapeau of Article XX."[59]

Many MEAs of which the EU is a part make use of TREMs. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), for example, obliges its signatories to prohibit or regulate trade in listed endangered species, and threatens trade restrictions as a consequence of non-compliance.[60] The Montreal Protocol requires the regulation of trade in ozone-depleting substances between member countries and a ban on trade between Parties and non-Parties to the treaty, and further provides for the imposition of trade sanctions against violators.[61] The Basel Convention, similarly, regulates the movement of hazardous wastes across borders, imposing standards for 'environmentally sound management' as prerequisites for allowing exports to a country.[62] And the Rotterdam Convention regulates the import and export of certain hazardous chemicals and pesticides based on the prior informed consent principle.[63]

Since 1998, the EU has made it a priority to promote compliance with MEAs by developing countries.[64] According to the Thematic Strategy for the Environment and Sustainable Management of Natural Resources, including Energy (ENRTP), which elaborates on how funds should be spent under the Development Cooperation Instrument:

> Through the ENRTP, the EU will have dedicated resources to help developing countries and partner organisations address environmental and natural resource management issues and meet their obligations under MEAs and to take international policy leadership in areas such as curbing climate change, tackling land degradation and desertification, biodiversity protection and sound management of chemicals and wastes. Failure to take international action in these areas would have a disproportionate effect on the poor in developing countries, who are particularly reliant on the

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[59] *Id.* at para. 72.

[60] Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES], 3 March 1973, 993 UNTS 243, at Arts. II(4), III, IV(1)-(6), V, VI(1)-(6), VIII(1), VIII(6), XIV(1).

[61] Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept 1987, 1522 UNTS 3 (entered into force Jan. 1, 1989).

[62] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 1673 UNTS 57.

[63] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 Sept. 1998, 2244 UNTS 337; EU implementing legislation is Council Decision No. 2006/730/EC (Rotterdam Convention), 2006 OJ (L 299) 23; and European Parliament and Council Regulation 689/2008/EC concerning the export and import of dangerous chemicals, 2008 OJ (L 204) 1.

[64] Camilla Adelle et al., Institute for European Environmental Policy, *The External Dimension of the Sixth Environmental Action Programme: An Evaluation of Implementing Policy Instruments* 34 (2010).

> sustainable management of natural resources, including water and energy, for their livelihoods and whose health suffers disproportionately from pollution.[65]

In order to do so, the ENRTP Thematic Strategy focuses on "promoting implementation of EU initiatives and internationally agreed commitments" and "strengthening environmental governance and EU leadership."[66] Activities in this field include emphasizing coordination among donors (including NGOs, international organizations, and states),[67] support for institutional capacity building, support in developing national strategies,[68] technical assistance,[69] funding for developing country participation in international conferences,[70] and monitoring and assessment programs.[71]

The EU also helps to fund MEAs and support developing countries in fulfilling their obligations through its contributions to the Global Environment Facility (GEF). The Global Environment Facility, created in 1991, operates "as a mechanism for international cooperation for the purpose of providing new and additional grant and concessional funding to meet the agreed incremental cost of measures to achieve agreed global environmental benefits."[72] Though the EU is not a member (since it is not a state), the Commission has co-financed GEF projects, coordinated projects among the Member States, and taken other initiatives.[73]

Further, the EU has been involved in attempts to 'green' the WTO framework. Though efforts to make the precautionary principle a part of WTO law have (at least partially) failed,[74]

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[65] European Commission, *Thematic Strategy for the Environment and Sustainable Management of Natural Resources, including Enerty (ENRTP)*, 4 (2007) [hereinafter *ENRTP Thematic Strategy*]. For specifics on the implementation of the ENRTP, *see* European Commission, *2011-2013 Environment and Natural Resources Thematic Programme: Strategy Paper & Multilateral Indicative Programme* (2010) [hereinafter *2011-2013 ENRTP Strategy Paper*].

[66] European Commission, *ENRTP Thematic Strategy*, *supra* note 65, at 1.

[67] European Commission, *2011-2013 ENRTP Strategy Paper*, *supra* note 65, at 12.

[68] As the Commission notes, "national environmental strategies of all kinds are frequently not updated, and ignored in the preparation of development strategies on which the allocation of development assistance is based. The EU therefore has a role in piloting environmental actions and introducing new ideas and approaches." *Id.*, at 11.

[69] European Commission, *ENRTP Thematic Strategy*, *supra* note 65, at 8.

[70] *Id.*, at 19 ("Support will be provided for: ... the Secretariats of MEAs to fund developing country participation in meetings and aspects of their agreed work programmes that fall outside core operations and therefore rely on donor funding.").

[71] *Id.*, at 19 ("Support will be provided for: ... enhanced global and regional environmental monitoring and assessment, and to help developing countries participate in the work and use the results in policy-making.").

[72] Global Environment Facility, *Instrument for the Establishment of the Restructured Global Environmental Facility* 12 (2011), *available at* http://www.thegef.org/gef/sites/thegef.org/files/publication/GEF_Instrument_Oct2011_final_0.pdf (last accessed 15 August 2014).

[73] European Commission, *ENRTP Thematic Strategy*, *supra* note 65.

[74] Appellate Body Report, *European Communities–Measures Concerning Meats and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R (16 January 1998). The precautionary principle (or at least a narrow version of it) is, however, present in the TBT.

the EU continues to be actively involved in discussions at the WTO Committee on Trade and Environment.[75] During Doha, as Bretherton and Vogler point out:

> [The EU has] single-handedly attempted to place the trade-environment relationship on the negotiating agenda. There is some evidence that sustainability commitments have allowed environmental and even animal rights provisions to be inserted into the preparation of trade negotiations and actions—a process enabled by significant backing from some Member States and from 'civil society' groups … . There have also been less obvious actions such as the re-definition of harm in anti-dumping action. Previously there had been an exclusive focus on injury to producers, but 'Community interest' has been re-defined to include environmental harm.[76]

This focus on diplomacy, international law, and consensual efforts reflects the rights rationality preoccupation with sovereignty and formal law. These treaties and their TREMs are the tools of a hierarchical, centralized authority. They rely on the governments of individual countries to assume responsibility for risks, and impose the mandated requirements and restrictions. This involves not only the promulgation of laws, but also their enforcement by means of state-centric authorities. Surveillance and policing thus also play an important role in the EU's international environmental affairs. Customs officials are enlisted as enforcers of the international regimes banning trade in endangered species, hazardous chemicals, ozone-depleting substances, and so on. Formalized legal structures are in place to impose sanctions on states that fail to meet the designated criteria.

However, market techniques are present here as well. For example, the EU's commitment to promote these MEAs and their TREMs via coordinated development assistance, 'good governance' programs, and technical assistance all rely on horizontal, de-centered, de-formalized mechanisms of enforcement and monitoring. The 7th EAP's insistence that multilateral efforts are useful because they are efficient (rather than because they are necessary for ensuring that sovereign rights are not violated), for example, is a clear example of market rationalization. The 7th EAP also makes several mentions of the need for

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[75] WTO Ministerial Decision on Trade and Environment, adopted in Marrakesh on 17 April 1994 in WTO Secretariat, *The Legal Texts—The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999).

[76] John Vogler & Charlotte Bretherton, *The European Union as a Global Actor* 104 (2006).

consistency and coordination among MEAs, and the necessity of adding to them effective targets and indicators—the drive toward efficiency and benchmarking in action.[77]

2.2 Unilateral Import Restrictions

Unilateral import restrictions are another tool that the EU has used to export environmental norms.[78] Under the framework of the common commercial policy, the EU has on several occasions adopted unilateral measures aimed at protecting the environment in third states. These include import restrictions on threatened species of flora and fauna and 'immoral' goods such as products derived from seals,[79] whales,[80] cat and dog fur,[81] pelts from animals caught using leg-hold traps,[82] wild fauna and flora,[83] and certain types of timber.[84] They also include import restrictions imposed as part of the EU's internal environmental legislation, such as the strict chemical safety rules imposed by the REACH program,[85] mandatory recycling requirements,[86] and renewable energy standards.[87]

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[77] 7th EAP, *supra* note 57, at Annex para. 106.

[78] The EU is, of course, not the only regulator to have done this. US restrictions on tuna and shrimp caught in ways that harm dolphins and sea turtles and Canada's arrest of a Spanish fishing vessel in 1995 are prime examples. *See* Belina Anderson, "Unilateral Trade Measures and Environmental Protection Policy," 66 *Temple Law Review* 751 (1993); Dan Bodansky, "What's So Bad About Unilateral Action to Protect the Environment?" 11(2) *European Journal of International Law* 339 (2000); Allen L. Springer, "The Canadian Turbot War with Spain: Unilateral State Action in Defense of Environmental Interests," 6 *Journal of Environment and Development* 27 (1997). Some developing states have also taken up the mantle of global regulator of environmental issues. Chile, for example, has adopted measures intended to protect migratory stocks of swordfish in the South Pacific. *See* Marcos Orellana, "The Swordfish Dispute Between the EU and Chile at the ITLOS and the WTO," 71 *Nordic Journal of International Law* 55 (2002).

[79] Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom, 1983 OJ (L 091) 30; European Parliament and Council Regulation 1007/2009/EC on trade in seal products, 2009 OJ (L 286) 36. *See infra* Chapter 5.

[80] Council Regulation 348/81/EEC on common rules for imports of whales and other cetacean products, 1981 OJ (L 039) 1.

[81] European Parliament and Council Regulation 1523/2007/EC banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, 2007 OJ (L 343) 1.

[82] Council Regulation 3254/91/EEC prohibiting the use of leghold traps in the Community and the introduction into the community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, 1991 OJ (L 308) 1. EU has not implemented because it has concluded agreements with Canada, Russia, and the US that say the regulation will not be implemented so long as they act in accordance with the agreements.

[83] Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein, 1997 OJ (L 61) 1.

[84] Council Regulation 3062/95/EC on operations to promote tropical forests, 1995 OJ (L 327) 9; European Parliament and Council Regulation 995/2010/EU laying down the obligations of operators who place timber and timber products on the market, 2010 OJ (L 295) 23. The 2010 regulation explicitly addresses concerns located outside EU territory, by prohibiting the marketing of timber harvested illegally in third countries, and requires operators on the market to identify from whom they have obtained the timber, where the timber originates from and to check if the previous timber operator has fulfilled its obligations under the regulation.

[85] European Parliament and Council Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2006 OJ (L 396) 1.

[86] Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste, 1994 OJ (L 365) 10.

[87] Directive 2009/28/EC of the European Parliament and of the Council on the promotion of energy from renewable sources and amending and subsequently repealing directives 2001/77/EC and 2003/30/EC, 2009 OJ (L 140) 16.

As Dan Bodansky points out, the unilateral nature of these initiatives is not an all-or-nothing question, but rather more or less.[88] The EU's ban on the import of seal products (which will be discussed in Chapter 5), for example, is a paradigmatic case of a particularly 'unilateral' initiative. Many of the types of seals included in the ban are not threatened species, and are not protected internationally. The policy of seal protection and the ban instated to enforce it are unilateral acts. On the other end of the spectrum lie unilateral import bans imposed to enforce internationally agreed regulatory norms. Here, the policy is multilateral—only the enforcement mechanism is unilateral. An example of this is the imposition of trade measures against countries that violate CITES or other MEAs.

One particularly interesting example of a recent unilateral EU import restriction is the EU Forest Law Enforcement Governance and Trade (FLEGT) initiative.[89] FLEGT was launched in 2003 as a follow-up to the 2002 World Summit on Sustainable Development.[90] It seeks to protect global forests by stopping the flow of illegally harvested timber from third countries into the EU. The initiative uses a licensing system to certify that timber imported into the EU has been harvested in conformity with the national legislation of the source country, and restricts the import of non-licensed timber. In other words, the EU imposes unilateral import restrictions in order to assist in the extraterritorial enforcement of third state laws on forest governance. The key instrument for executing this program is the adoption of Voluntary Partnership Agreements (VPAs) with countries that choose to participate.[91] These VPAs are "tailor-made to national requirements," which, in the Commission's view, "explains their success, but of course means they remain complex and time-consuming to establish."[92]

Unilateral import rules like the seals ban or the FLEGT program act as vectors for environmental norm export in several ways. To begin with, they seek to 'lead by example' by establishing the EU's commitment to environmental and animal welfare standards.[93] Second, they encourage a certain degree of harmonization of requirements through mechanisms such

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[88] Bodansky, *supra* note 78, at 342.

[89] Council Regulation 2173/2005/EC on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 2005 OJ (L 347) 1.

[90] European Commission, "Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan," COM (2003) 251 final, at 3.

[91] As of this writing, six countries have signed a VPA with the EU (Cameroon, the Central African Republic, Ghana, Indonesia, Liberia, and the Republic of the Congo), while nine more countries are in negotiations, and an additional 11 have expressed an interest in concluding VPAs. EU FLEGT Facility, "Voluntary Partnership Agreements," *available at* http://www.euflegt.efi.int/vpa (last accessed 15 August 2014).

[92] European Commission, *2011-2013 ENRTP Strategy Paper*, *supra* note 65, at 11.

[93] As Dan Bodansky writes, "another less pejorative term for unilateralism is *leadership*." Bodansky, *supra* note 78, at 340.

as the 'California effect' or 'Brussels effect',[94] whereby producers might choose to alter all of their product lines to conform with the strict environmental standards of large importers rather than splitting production into 'more' and 'less' environmentally damaging lines. Third, they encourage producers in third states to conform to EU standards, which can be an especially powerful instrument (amounting to de facto legislation) where the EU is the primary market for the products in question.[95]

In many ways, these unilateral import restrictions belong in the 'rights' toolbox. To begin with, like the MEAs discussed above, import restrictions are clearly the tool of a centralized government. They imply collectivized, rather than individualized, notions of risk. The responsibility for 'protecting' society from threats (moral, health-related, environmental, or otherwise) is placed on a centralized, hierarchical authority. They are enforced by surveillance and policing mechanisms (including customs offices and courts),[96] and are formalized in inflexible legal instruments. Moreover, they rely on a conception of regulators as atomistic, sovereign entities that are entitled to act inflexibly, without consultation or negotiation, when it comes to the management of goods and people within their sovereign territory. In addition, mercantilist tendencies are on view in some of these import restrictions, which sometimes face allegations of protectionism.

However, unilateral import restrictions also make use of market technologies. New model restrictions such as the FLEGT initiative, for example, demonstrate a concern with flexibility, horizontal partnership, and coordination. FLEGT's VPAs are thoroughly steeped in market rationality. Even traditionally framed unilateral import restrictions such as the ban on seal products, however, make use of market techniques. A number of these import restrictions were developed in response to scientific studies and stakeholder initiatives, and rely for their enforcement not only on customs officials, but also on information provided by NGOs,

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[94] Anu Bradford, "The Brussels Effect," 107(1) *Northwestern University Law Review* 1 (2012).

[95] As the Commission explained in its proposal for a 7th Environmental Action Programme:

> The EU should also leverage its position as one of the largest markets in the world to promote policies and approaches that decrease pressure on the global natural resource base. This can be done by changing patterns of consumption and production, as well as ensuring that trade and internal market policies support the achievement of environmental and climate goals and provide incentives to other countries to upgrade and enforce their environmental regulatory frameworks and standards.

European Commission, "Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020: 'Living Well, within the Limits of Our Planet'," COM (2012) 710 final, at para. 98.

[96] As Timothy Luke points out, disciplinary power can be seen as a foundational feature of environmentalism because it is what reconfigures and re-imagines sites as in need of intervention. Timothy W. Luke, "The (Un)Wise (Ab)use of Nature: Environmentalism as Globalized Consumerism," 23 *Alternatives: A Journal of World Policy* 175 (1998).

standard-setting organizations, and other non-state actors.[97] This brings non-state actors into the fold, creating a more horizontal structure than might otherwise be expected in the case of unilateral regulatory action.

2.3 Environmental Conditionality

Another linking technique the EU utilizes is applying environmental conditions to its trade and economic relations with third states.[98] Tony Killick has defined conditionality as "a set of mutual arrangements by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of financial assistance."[99] 'Conditionality' includes both 'negative' and 'positive' forms. Negative conditionality involves the imposition of punishments or sanctions for violations of the conditional norms. Positive conditionality involves the granting of benefits as an incentive or reward for fulfilling the conditional norms.[100]

Environmental conditionality emerged as a force in the 1980s. In its initial form, it involved imposing environmental conditions on development projects that were to be funded by donor organizations such as the World Bank. Later, such conditionality was extended to the receipt of additional types of sectoral development aid.

Environmental conditionality appears in various guises in many EU external policy instruments. EU Association Agreements,[101] the European Neighbourhood Policy,[102] and the

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[97] The seals regime, for example, includes an exception permitting the import and sale of seal products derived from qualifying indigenous community and marine resource management hunts. However, it does not establish a review mechanism that can issue the 'attesting document' necessary to qualify for this exception. Instead, it leaves it to private actors to apply as 'recognised bodies' for this purpose. Commission Regulation 737/2010/EU laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, 2010 OJ (L 216) 1, at Art. 6.

[98] *See generally* Karen E. Smith, *The EU, Human Rights and Relations with Third Countries: 'Foreign Policy' with an Ethical Dimension?, in* ETHICS AND FOREIGN POLICY 185 (Karen E. Smith & Margot Light eds. 2001) (describing the linkage of trade and human rights in EU foreign policy since the 1980s).

[99] Tony Killick, *Aid and the Political Economy of Policy Change* 6 (1998).

[100] Of course, it is often difficult to distinguish positive from negative conditionality—when should the removal of a benefit be considered a punishment, as opposed to simply the decision not to grant a reward?

[101] The EU's Association Agreements are international agreements concluded by the EU with the aim of establishing a framework for the conduct of bilateral relations. Such agreements normally focus on trade liberalization, but a number also include environmental chapters. *See, e.g.,* Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, 2002 OJ (L 352) 3, at Art. 28; Euro-Mediterranean Agreement Establishing an Association Between the European Community and its Member States, of the One Part, and the People's Democratic Republic of Algeria, of the Other Part, 2005 OJ (L 265) 2, at Art. 52.

[102] The EU revised the European Neighbourhood Policy (ENP) in 2011. European Commission, "A New Response to a Changing Neighbourhood," COM (2011) 303 final. The ENP features a number of environmental and energy policy goals, including "Regional Electricity Markets, Energy Efficiency and Renewable Energy Sources," and "Environmental Governance" among its five "flagship initiatives."

Energy Community South East Europe Treaty,[103] for example, all include environmental conditionality measures as incentives or prerequisites for economic benefits. Perhaps the most extensive and well-known instance of environmental conditionality in the EU's external trade relations framework lies in its General System of Preferences Plus (GSP+).

The EU's GSP+ is a positive conditionality program that aims to promote "sustainable development and good governance" in "vulnerable countries" by providing additional tariff preferences to countries that fulfill certain requirements.[104] Although there is no expectation that this preferential economic treatment be reciprocated, the GSP+ regime only applies when a developing country has ratified and effectively implemented 27 international agreements on labor standards, the environment, sustainable development, good governance and human rights.[105]

Countries that desire to apply for participation in the GSP+ regime must provide the Commission with comprehensive information concerning their ratification of these 27 conventions, national legislation and measures undertaken to effectively implement their requirements, and a commitment to fully comply with the monitoring and review mechanisms enshrined in the agreements.[106] Once it receives a request for participation, the Commission must examine it "taking account of the findings of the relevant international organizations and agencies."[107] The GSP regulation also includes a suspension clause whereby

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[103] The ECSEE Treaty, which aims to establish a single and comprehensive regulatory framework for trading electricity and gas across South East Europe and the EU, obliges Parties wishing to trade energy with the EU to implement certain environmental provisions within their national legislation. The Energy Community Treaty, 2006 OJ (L 198) 18, at Arts. 12-16.

[104] The new GSP+ system replaces the old pre-2005 3-part GSP regime. The old regime came under fire in 2003, when India brought suit against the EU alleging that conditioning the GSP scheme on the adoption of certain drug policies was incompatible with WTO rules. Ultimately, GSP Drugs was found to be discriminatory and thus in violation of WTO law. Panel Report, *European Communities–Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/R (2003); Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (2004) [*EC–Tariff Preferences*]. In light of the *EC–Tariff Preferences* case and the desire of internal EU actors to reform the GSP system, a new scheme was subsequently developed. As the Commission described its motivations: "[I]t is universally recognised that sustainable development involves a variety of aspects, such as respect of fundamental human and labour rights, good governance and environmental protection." European Commission, "Proposal for a Council Regulation Applying a Scheme of Generalised Tariff Preferences," COM (2004) 699 final, at 3.

[105] Council Regulation 732/2008/EC applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011, 2008 OJ (L 211) 1 [*hereinafter* GSP Regulation]. The seven environmental agreements are: the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); the Stockholm Convention on Persistent Organic Pollutants (POPs Convention); the Convention on Trade in Endangered Species (CITES); the Convention on Biological Diversity (CBD); the Cartagena Protocol on Biosafety (Biosafety Protocol); and the Kyoto Protocol to the UN Framework Convention on Climate Change (Kyoto Protocol). *Id.* at Annex III.

[106] *Id.*, at Art. 8(1)(a).

[107] *Id.*, at Art. 10(1). These would include the findings and recommendations of the MEA compliance mechanisms attached to the Basel Convention, the Montreal Protocol, the Biosafety Protocol, the Kyoto Protocol, and CITES; the country's self-reports to the

GSP+ preferences may be suspended if a beneficiary country "no longer incorporates" the 27 conventions or if they are "not effectively implemented."[108] Moreover, GSP (not plus) benefits can be suspended in the event of "the serious and systematic infringement of the objectives of regional fishery organisations or arrangements of which the Community is a member concerning the conservation and management of fishery resources."[109]

The GSP+ requirements have not been without effect: Gracia Marín Durán and Elisa Morgera have calculated that the GSP system has been influential in accelerating the ratification of the two most recent MEAs included in the 27 required conventions: the 2001 Stockholm Convention on Persistent Organic Pollutants (ratified by 9 additional countries); and the 2000 Cartagena Protocol on Biosafety (ratified by 4 additional countries).[110] Similarly, a report commissioned by the EU found that the GSP+ arrangement had prompted *de jure* implementation of environmental conventions in its three examined cases, but had been less successful in the area of labour requirements.[111]

As with the tools discussed in the previous two sub-sections, the GSP+'s environmental conditionality regime includes elements of both rights and market techniques. Market technologies are evident in the GSP+ system's linkage of environment, development, and good governance. From a market perspective, EU environmental norm export is not just about protecting the environment in third states, but also about exporting principles that conform to a particular idea of good governance. The European Commission has defined good governance as involving six issue "clusters": support for democratization; promotion and protection of human rights; reinforcement of the rule of law; enhancement of the role of civil society; public administration reform; and decentralization.[112] The Commission further identified six "guiding principles" for pursing these 'good governance' goals: participation and ownership; equity; organizational adequacy; transparency and accountability; conflict prevention; and anti-corruption.[113] These 'good governance' tools are very much a part of the

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MEAs' Conferences of the Parties (COPs); and general recommendations issued by the COPs. For more regarding the procedure for evaluating environmental compliance under the GSP+ scheme, *see* Gracia Marín Durán & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* 162-5 (2012).

[108] GSP Regulation, *supra* note 105, at Art. 10(2). The presence of this suspension clause might be thought to indicate negative conditionality. However, it may be argued that the GSP+ program nevertheless uses only positive conditionality because it conditions only 'additional benefits' on compliance with these 27 conventions.

[109] *Id.*, at Art. 15(1)(e).

[110] Marín Durán & Morgera, *supra* note 107, at 168.

[111] Michael Gasiorek et al, Centre for the Analysis of Regional Integration at Sussex, *Mid-term Evaluation of the EU's Generalised System of Preferences: Final Report* 154-64 (2010).

[112] European Commission, *Handbook on Promoting Good Governance in EC Development and Co-operation* 8 (2004).

[113] *Id.* at 17-26.

market toolkit. They make use of technologies of agency (e.g., 'participation and ownership') and performance (e.g., 'transparency and accountability'), and aim at de-politicizing the proposed interventions by focusing on procedural reforms.

Rights technologies are also prominently on display. To begin with, some scholars have argued that environmental conditionality requirements reflect mercantilist tendencies insofar as they employ unilateral preferential trade schemes to protect national economies.[114] The protectionist tendencies of these programs are evidenced by the fact that the GSP+ is limited only to those countries that pose little danger to the competitiveness of EU industry. The system is quite discretionary: the EU is solely responsible for defining what countries count as "vulnerable" for the purposes of eligibility for the GSP+ scheme,[115] and is not required to consult with international bodies regarding the possible suspension of benefits under the program.[116] This flexibility is a good example of the usefulness of the coexistence of rights and market technologies, as it shows how the EU is able to jump strategically between different paradigms in order to achieve its preferred outcomes.[117]

Second, a number of commentators associate environmental conditionality clauses with neo-imperialism.[118] The idea, here, is that the GSP+'s conditionality clauses effectively require "vulnerable" countries to give up their regulatory autonomy in exchange for economic assistance. These analyses do not argue that the EU intends to repeat the nineteenth century, but rather suggest that there is more going on between the EU and third states than simple horizontal networking. Domination, control, surveillance, and policing in a hierarchical

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[114] *See* Marion Traub-Werner, "Free Trade: A Governmentality Approach," 39 *Environment and Planning A* 1441, 1448 (2007).

[115] GSP Regulation, *supra* note 105, at art. 8(2). "Vulnerable country" is defined as: (1) one that does not meet the criteria for full graduation and is thus not listed in Annex I; and (2) one whose GSP-covered imports into the Community represent less than 1% of the total GSP-covered imports into the Community.

[116] Fascinatingly, Marín Durán and Morgera express a perfectly market-style critique of the current GSP system's rights-oriented features. They refer to this lack of a consultation requirement as "regrettable" and intimate that it stems from "a desire by the EU (and the Commission in particular) to retain greater room for manoeuvre in relation to suspension."

> Ultimately, the extent to which the arrangement would (or would not) gain international legitimacy largely depends on whether, in practice, its functioning is firmly anchored on international standards, its implementation is open and transparent, and the legal nexus between the EU's own decisions on eligibility and the assessments of competent international monitoring bodies is upheld.

Marín Durán & Morgera, *supra* note 107, at 164, 172.

[117] *See infra* Section 3.4.

[118] *See, e.g.,* D. Wadada Nabudere, *The Lomé Convention and the Consolidation of Neo-Colonialism* (1975); *Empire's New Clothes: Unveiling EU Enlargement* (Jôsef Böröcz & Melinda Kovács eds. 2001); Ole Waever, "Imperial Metaphors: Emerging European Analogies to Pre-Nation-State Imperial Systems," in *Geopolitics in post-Wall Europe: Security, Territory and Identity* (Ola Tunander et al. eds. 1997).

sense are also evident.[119] Paul Collier, in this vein, argues that "the extension of the practice of conditionality from the occasional circumstances of crisis management to the continuous process of general economic policy-making has implied a transfer of sovereignty which is not only unprecedented but is often dysfunctional."[120] As Homi Bhabha pithily summarizes the issue: "When global government is conducted in terms of coercive conditionality, it is difficult to enter into equitable negotiations with one's allies or one's enemies."[121]

2.4 Sustainability Impact Assessments

One of the most ubiquitous tools in EU's trade and environment toolbox is the Sustainability Impact Assessment (SIA). The European Commission introduced SIAs for EU trade agreements in 1999, in response to criticism of the EU's trade liberalization policies.[122] SIAs are now performed for all major trade negotiations, including WTO talks, Economic Partnership Agreements, and bilateral deals. According to the Commission, SIAs have two primary purposes:

- to integrate sustainability into trade policy by informing negotiators of the possible social, environmental and economic consequences of a trade agreement;

- to make information on the potential impacts available to all actors (NGOs, aid donors, parliaments, business etc.).[123]

Trade SIAs are undertaken once the Council gives the European Commission a mandate to conduct a trade negotiation. These Assessments are built around the "three pillars of sustainability—economic, social and environmental."[124] They analyze potential trade impacts both in the EU and in third states. In particular, they are often used to provide guidance regarding the possibility of accompanying measures (a.k.a. 'flanking measures') that can help "to maximize the positive impacts of the trade negotiations in question, and to reduce any

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[119] As Jonathan Joseph writes, in some ways, "we might be entitled to conclude that the new governmentality looks rather like the old imperialism." Jonathan Joseph, "The Limits of Governmentality: Social Theory and the Interantional," 16(2) *European Journal of International Relations* 223, 238 (2010).

[120] Paul Collier, "Learning from Failure: the International Financial Institutions as Agencies of Restraint in Africa," in *The Self-Restraining State: Power and Accountability in New Democracies* 319 (Andrea Schedler, Larry Diamond, and Marc Plattner eds. 1999).

[121] Homi K. Bhabha, *The Location of Culture* xvi (1994).

[122] Thomas F. Ruddy & Lorenz M. Hilty, "Impact Assessment and Policy Learning in the European Commission," 28 *Environmental Impact Assessment Review* 90, 94 (2008) (describing the Commission's commitment to undertake SIAs as the result of a concession made by European Trade Commissioner Paul Lamy in 1999 to allay civil society resistance to trade agreements).

[123] European Commission, *Handbook for Trade Sustainability Impact Assessment* 7 (2006) [hereinafter *SIA Handbook*], *available at* http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf (last accessed 15 August 2014).

[124] *Id.*, at 8.

negative impacts."[125] They SIA methodology also includes 'ex-post monitoring' of trade agreements after they are in place that might include monitoring and assessment, comparing initial predictions with actual outcomes, evaluating the agreement according to performance benchmarks, and making further recommendations relating to implementation problems.[126]

SIAs are performed by independent external consultants, who are required to "work in a transparent and rational manner and base their findings on scientific evidence."[127] They are to be transparent, carried out in cooperation with third country partners and in coordination with EU Member State experts and European Parliament members, and should include "external consultations" in which "all stakeholders" and "given an opportunity to take part in the analysis of issues and impacts."[128] The results of all trade SIAs are made public.

It is interesting to note that strategic environmental assessment has become not just a tool of environmental policy, but of 'good governance' more generally. The European Commission identified "improving governance" as a strategic objective in 2000,[129] and linked trade end environmental policy to this goal. The Commission explains that "trade can and should contribute to growth in ways that dovetail with the requirements of good governance and the principles of sustainable development."[130] SIAs contribute to "international, European and national governance" by "ensuring EU policies are more coherent" through "open, consultative processes involving stakeholders and third countries in the EU's analysis of its trade policy.[131]

SIAs and other forms of strategic environmental assessment are a prime example of a market technology.[132] Their emphasis on good governance, transparency, networks, non-governmental actors, and benchmarking clearly place them in the market toolbox. They

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[125] *Id.*, at 7.

[126] *Id.*, at 23, 36.

[127] *Id.*, at 8.

[128] *Id.* The *SIA Handbook* further explains that consultations with "the widest possible range of stakeholders" should include the use of email and dedicated websites, international expert networks, civil society dialog meetings, and attendance at relevant conferences. *Id.* at 9. This is a particularly strong example of de-centered governance because of its link to the NGO world. As Jody Emel notes, there are now more than 100,000 environmental NGOs worldwide that are working to regulate and manage nature. Jody Emel, "An Inquiry into the Green Disciplining of Capital," 34 *Environment and Planning* 827, 829 (2002).

[129] The EU is not the only actor to jump on the SIA bandwagon. Canada, Norway and the US all carry out National Environmental Reviews focused on internal effects; the United Nations Environment Program and World Wildlife Fund also have their own SIA process. Commission, *SIA Handbook*, *supra* note 123, at 10.

[130] *Id.*, at 6.

[131] *Id.*, at 9.

[132] *See also* Caroline Scott, "Governmentality and Strategic Environmental Assessment: Challenging the SEA/Good Governance Nexus," 13(1) *Journal of Environmental Assessment Policy and Management* 67 (2011) (examining the operation of SEAs in the Scottish context).

utilize technologies of agency—including contractualism (e.g., outsourcing SIAs to expert consultants) and involvement (e.g., consultations with 'stakeholders', third country governments, and national experts)—and technologies of performance—including evaluation via the use of benchmarks, transparency, and ex-post monitoring. They are de-centering because they are conducted by and with non-state actors and experts; de-formalizing because they are flexible and case-specific; and de-politicizing because they attempt to avoid political objections like charges of anti-environmentalism[133] or encroachments on sovereignty[134] through procedural reform. Indeed, this purported technocratic universalism provides much of their appeal.

Some elements of rights techniques appear as well. In particular, SIAs are mandatory, providing some degree of formalization, and are overseen by a centralized authority, which means they are not thoroughly or entirely de-centered.

2.5 Horizontal and Voluntary Partnerships

One final example of an instrument in the EU's trade and environment toolbox is the formation of horizontal and voluntary partnerships with third states, NGOs, businesses, and other 'stakeholders'. Cooperative partnerships have become a key feature of EU external policy in several areas. The European Commission, for example, has referred to political dialogue with third states as the primary instrument for the promotion of good governance.[135] Along these lines, the EU has established a Green Diplomacy Network that seeks to "promote the use of the EU's extensive diplomatic resources (diplomatic missions, development cooperation offices) in support of environmental objectives, orchestrating campaigns and demarches that bring the EU message to third parties all over the world,

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[133] The Commission argues that SIAs can help to overcome the objections of civil society, which "has actively sought more public debate on trade policy, especially since the failed WTO ministerial meeting in Seattle (1999)." Commission, *SIA Handbook*, *supra* note 123, at 7.

[134] The Commission notes that third country governments are also concerned by the use of SIAs:

> Third country governments ... are very sensitive to the sovereignty issue of a study which assesses impacts outside the EU. They often fear protectionist motives on the part of the European Commission and expect clear messages from it on the use and goals of Trade SIAs. They have to be associated from the beginning of the Trade SIA process as key players facilitating the consultation process abroad. Debate on Trade SIAs should also involve legislators and civil society of third countries.

Id., at 24.

[135] European Commission, *Communication from the Commission tot he Council and the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Governance in the European Consensus on Development—Towards a Harmonized Approach within the European Union* 17 (2006).

gathering also our partners' views."[136] It also sits on numerous international commissions, participates in MEAs and the WTO Trade and Environment Committee, and engages in dialogue with countries, businesses, NGOs, and individuals across the globe.

The purpose of these initiatives is to use persuasion, learning, and individual responsibility as strategies for promoting environmental protection. Many of these partnership agreements take place between the EU and third states. As the Commission explains its proposal for a 7th Environmental Action Plan:

> In order to increase the EU's effectiveness in addressing regional and global environmental and climate challenges, [the EU will focus on] … Engaging with partner countries in a more strategic way. This should involve focusing cooperation: 1) with strategic partners on the promotion of best practice in domestic environment policy and legislation and convergence in multilateral environmental negotiations; 2) with countries covered by the European Neighbourhood Policy on gradual approximation with key EU environment and climate policy and legislation on strengthening cooperation to address regional environmental and climate challenges; 3) with developing countries to support their efforts to protect the environment, fight climate change and reduce natural disasters, and implement international environmental commitments as a contribution to poverty reduction and sustainable development.[137]

Cooperation with NGOs and other stakeholders is also an important part of the EU's external trade and environment program. This includes cooperating with non-state actors in order to pursue input-oriented reforms in third states, perform monitoring and assessment tasks, and provide information and benchmarks to political actors, as well as cooperating with private actors on issues related to environmental harm caused by EU businesses abroad and EU consumption at home. One particular area of growth in EU activity is in the area of voluntary public-private partnership initiatives. These include the promotion of Corporate Social Responsibility (CSR), labeling schemes, the establishment of best practices codes and benchmarks, and other similar programs.

The EU's policy regarding CSR is an interesting example of such a public-private governance partnership. The European Commission defines CSR as "a concept whereby companies

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[136] European Commission, *Working Guidelines for the "Green Diplomacy Network"* (2003)
[137] European Commission, *7th EAP Proposal*, *supra* note 95, at para. 100.

integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis."[138] A 2001 Green Paper describes the relevance of CSR for external environmental policy thus:

> Through transboundary effects of many business-related environmental problems, and their consumption of resources from across the world, companies are also actors in the global environment. They can therefore pursue social responsibility internationally as well as in Europe. For example, they can encourage better environmental performance throughout their supply chain within the IPP [Integrated Product Policy] approach and make larger use of European and international management and product-related tools. Investment and activities of the companies on the ground in third countries can have a direct impact on social and economic development in these countries.[139]

Because of CSR's voluntary nature, the Commission has not adopted a proposal for legislative measures. Nevertheless, it has attempted to support CSR initiatives by enhancing CSR's political visibility and encouraging European businesses to take on CSR commitments.[140] This policy has led to the adoption of several Communications related to CSR, the setting up of a 'stakeholder forum', and the launch of the European Alliance for CSR.[141]

Market techniques are evident in these various cooperative and voluntary initiatives. Partnerships with NGOs, businesses, and other actors are de-centering insofar as they rely on non-state behavior and influence. CSR and other mechanisms rely very strongly on horizontal arrangements and self-management to reach their goals.[142] They are de-formalizing

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[138] European Commission, "Green Paper Promoting a European Framework for Corporate Social Responsibility," COM (2001) 366 [hereinafter *CSR Green Paper*], at 1.

[139] *Id.*, at 15. *See also* European Commission, "Communication on Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility," COM (2006) 136, at 4.

[140] COM (2006) 136, *supra* note 139.

[141] The Commission has also proposed that environmentally responsible business practices be a key focus of the 7th Environmental Action Plan. European Commission, *7th EAP Proposal*, *supra* note 95, at para. 99.

[142] Interestingly, the predominant narrative of CSR in Europe is that it is good for both the corporation and the community—that it is "good for business and good for the economy." Steen Vallentin & David Murillo, "Governmentality and the Politics of CSR," 19(6) *Organization* 825, 826 (2011). As Vallentin & Murillo write:

> Prior to the emergence of the competitiveness agenda, government intervention in CSR would routinely be associated with undue and potentially harmful interference imposing additional costs on business. But now government increasingly works to help private companies identify/create and act upon strategic

in the sense that CSR, cooperation agreements, and other instruments in this category are flexible, created on a case-by-case basis, rather than as the result of some codified legislative formula. And they are de-politicizing because they encourage 'capacity building', good governance, and individual 'responsibility' over substantive or collective policy shifts.[143] Further, they frequently incorporate benchmarking, self-assessment, transparency, individual risk assumption, and other techniques of agency and performance described in the previous sections. Each person or company is made responsible for the consequences of its own behavior. These atomistic units are obliged to manage their lives and profits by exercising choice.

In some cases, rights techniques also make an appearance. In cases of intergovernmental cooperation, for example, sovereignty, consent, and hierarchical government come into play. Governments might mandate or set the criteria for labeling schemes,[144] and best practices and benchmarks may be researched and promulgated by a centralized authority.[145] The particular mix of market and rights techniques involved in an individual case of cooperative or voluntary agreement will vary depending on the degree of involvement of states, the degree of formalization, and the degree to which they rely on procedural and technical, rather than substantive, interventions.

2.6 Market and Rights Technologies in Action

As the above examples demonstrate, the EU uses a wide variety of techniques to engage in environmental norm export activities. Each of these instruments exhibits characteristics of both rights and market technologies (though some may draw much more from one rationality than another). The important thing to take away from this analysis is the recognition that these techniques coexist, overlap, and combine in the daily practice of EU

> opportunities in their environment—not to put social or environmental constraints on them, and this is, we argue, indicative of emerging neoliberal tendencies in governmental approaches to CSR.

Id.

[143] On the dangers of depoliticizing CSR, *see* Sumantra Ghoshal, "Bad Management Theories Are Destroying Good Management Practices," 4(1) *Academy of Management Learning & Education* 75 (2005); Gerard Hanlon & Peter Fleming, "Updating the Critical Perspective on Corporate Social Responsibility," 3(6) *Sociology Compass* 937 (2009); Ronen Shamir, "Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility," 6 *Annual Review of Law and Social Science* 531 (2010).

[144] The EU, for example, has developed rules for organic and eco labels. Council Regulation 834/2007/EC on organic production and labeling of organic products and repealing Regulation (EEC) No 2092/91, 2007 7OJ (L 189) 1; European Parliament and Council Regulation 66/2010/EC on the EU Ecolabel, 2010 OJ (L 27) 1.

[145] The European Commission, for example, publishes large amounts of environmental 'best practices' reports. For a few examples, see the Commission's 'best practices' page related to its 'green capital' initiative: European Commission, "Best Practices Publications," *available at* http://ec.europa.eu/environment/europeangreencapital/about-the-award/policy-guidance/best-practice-publications/ (last accessed 15 August 2014).

government. Market and rights rationalities are not just 'different perspectives' on government, or narratives that are strategically deployed when talking to 'different audiences'—though this is also part of the picture. They exist within the same cognitive frame: *they are both, simultaneously, perceived as 'true'.*

This coexistence persists despite the fact that market and rights rationalities offer fundamentally different paradigms. The EU demonstrates, in its deployment of market and rights techniques, that it sees government *both* as a centralized hierarchical sovereign law-maker, *and* as a coordinator of horizontal stakeholder networks. It treats third states *both* as sovereign entities whose rights must not be infringed, *and* as nodes in a network of global governance that must learn and adapt to international best practices and expert data. It regulates as though individuals are *both* rights-bearing citizens whose spheres of autonomy must be protected and limited through law *and* as though they are interest-maximizing stakeholders whose free choice will lead them to make economically appropriate decisions in a properly calibrated regulatory framework.

This paradoxical coexistence of the rights and market rationalities within the context of advanced liberal governmentality is productive. Because it simultaneously holds two opposing sets of beliefs about the nature of government, the drivers of individual behavior, and the appropriate role and limits of regulation, the EU is able to speak and behave in a complex, polyvocal way with respect to its environment and trade policy without seeming to contradict itself. It can assert—and believe—that multilateralism and respect for sovereign rights is a sine qua non of international relations, at the same time as it attempts to alter international behavior through unilateral programs like the emissions trading scheme (ETS) discussed in Chapter 3. It can express its belief in the efficacy of labels in steering consumers toward preferred behavior, while at the same time believing that only import bans will prevent individuals from purchasing morally repugnant products.

The implications of this polyvocality will be explored further in the context of the EU–Colombia Peru FTA in Section 3, and again in Chapter 5. However, it should already be evident that the EU's advanced liberal governmentality with its coexisting rights and market rationalities has interesting implications for the practice of environmental norm export, allowing it to act simultaneously on the basis of multiple, sometimes conflicting, beliefs about the subjects, objects, and limits of government.

3. Environmental Norm Export in the EU—Colombia Peru FTA

3.1 The EU—Colombia Peru FTA

3.1.1 The EU, the Andean Community, and the EU—Colombia Peru FTA

Having set out the theoretical map in Section 1, and taken a tour through the EU's trade and environment toolkit in Section 2, Section 3 will now turn to this chapter's case study: the EU's FTA with Colombia and Peru.

The road to the FTA between the EU and Colombia and Peru has been long and hard. Two points should be emphasized at the outset regarding the development of the Agreement. First, the EU–Colombia Peru FTA should be viewed in the context of the EU's extensive and continuing political and economic engagement with the Andean Community (CAN), a primary focus of which has been the encouragement of regional integration in Latin America.[146] Colombia and Peru are not major markets for the EU, together accounting for only 0.6% of EU exports. The choice to pursue a trade agreement, therefore, stems more from the EU's political commitments than from the expectation of significant growth.[147] Indeed, the EU is also pursuing further engagement with Colombia, Peru, and the other CAN countries through a Political Dialogue and Cooperation Agreement (PDCA), which has not yet been ratified.[148]

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[146] The EU's current Regional Strategy Paper for the Andean Community (2007-2013) identifies 3 focal areas for cooperation activities with CAN: regional economic integration, social and economic cohesion, and the fight against illicit drugs. European Commission, "Andean Community Regional Strategy Paper 2007-2013," 12 April 2007, E/2007/678, at 21. Some have criticized the EU's behavior in this area as coercive. María García, for example, argues: "The EU has promoted integration in [Latin America] through covert and overt means, not least by making economic negotiations contingent on further integration. In so doing, the EU has attempted to enforce its preference for a world of regions on other actors and to exact behavioural changes from them." María García, "The European Union and Latin America: 'Transformative Power Europe' Versus the Realities of Economic Interests," *Cambridge Review of International Affairs* (published online 2012), *available at* http://dx.doi.org/10.1080/09557571.2011.647762 (last accessed 15 August 2014).

[147] European Parliament, Directorate-General for External Policies, Policy Department, *European Union: Trade Agreement with Colombia and Peru* 5 (2012) [*Colombia Peru FTA Study*], at 5.

[148] Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), of the other part, signed 15/12/2003, awaiting ratification. This Agreement emphasizes the parties' "commitment to work together in pursuit of the objectives of poverty eradication, social justice and cohesion, equitable and sustainable development, including aspects of vulnerability to natural disasters, environmental conservation and protection of biodiversity, strengthening the respect for human rights, democratic institutions and good governance and the progressive integration of Andean countries into the world economy," "the need to deepen the process of regional integration, trade liberalisation and economic reform within the Andean Community," and "the need to

Second, it is important to note that this FTA was a 'second choice' agreement: the EU's preference was to negotiate a region-to-region agreement with CAN. CAN is one of the oldest regional organizations in Latin America, originally based on the Cartagena Agreement of 1969, which established the "Andean Pact" between Chile, Colombia, Bolivia, Peru, and Ecuador. In this early form, the Andean Pact focused almost exclusively on economic integration, though little was accomplished during the first 20 years of its existence. The organization has been bedeviled by internal conflict. Chile left the Pact in 1976. Venezuela became the Pact's sixth member in 1973, but departed in April 2006 over a disagreement with CAN member states that were negotiating and/or concluding free trade agreements with the US. Bolivia was also on the verge of leaving in 2006, but eventually decided to remain a member. The organization's roster is therefore now made up of Colombia, Bolivia, Peru, and Ecuador. CAN's current institutional incarnation stems from the 1996 Trujillo Protocol. This new organizational form created a set of common Andean institutions and paved the way for extending the integration agenda beyond purely trade-related matters.[149]

The EU has been involved in sub-regional activities since the 1970s, and since the early 1980s in negotiations with CAN. Beginning in 1983, the Andean Community Cooperation Agreement established a Joint European Community—Andean Community Committee to discuss cooperation between the EC and CAN. Early efforts generally focused on supporting the Andean integration process through technical assistance and institution building. The EC and CAN agreed on a Framework Cooperation Agreement in 1993, which was strengthened by the Andean Community Cooperation Agreement of 1996.[150] In 2003, the EU and CAN adopted the PCDA mentioned above, which is still awaiting final ratification.[151] Article 2 of the PCDA states the Parties' desire to work toward "creating conditions under which ... a feasible and mutually beneficial Association Agreement, including a Free Trade Agreement, could be negotiated between them," and Articles 3 and 6 refer to cooperation on policy areas including sustainable development. Despite this official declaration, negotiations over such an agreement have been rocky. In 2004, the Heads of

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promote sustainable development in the Andean region through a development partnership involving all relevant stakeholders, including organised civil society and the private sector." *Id.* at pmbl.

[149] For example, it led to the adoption of decisions to elect the members of the Andean Parliament directly and to facilitate the free movement of persons through the introduction of an Andean passport and the possibility of using national identification documents for intra-regional travel.

[150] Joint Declaration Political Dialogue Between the European Union and the Andean Community, 30 June 1996, Rome, PRES/96/191, *available at* http://europa.eu/rapid/press-release_PRES-96-191_en.htm (last accessed 15 August 2014).

[151] European Commission, "Proposal for a Council Decision on the signature of a Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries, the Republics of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela, of the other part," COM (2003) 695 final.

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State and Government of the EU and the Andean Community declared that the conclusion of an Association Agreement (including an FTA) had become a "common strategic objective," but the EU was prevented from moving ahead by a de facto moratorium on new FTA negotiations that was intended to stimulate the completion of the Doha round. The 2006 departure of Venezuela threw another wrench in the works. Negotiations with the EU re-started in 2007, but were subsequently suspended due to continuing internal disputes within CAN. Bolivia then withdrew from the negotiations. In January 2009, Ecuador also suspended its participation in the FTA negotiations. Despite all of this upheaval, the remaining members—Colombia and Peru—pressed ahead and eventually completed a deal with the EU.[152]

The EU FTA with Colombia and Peru was eventually signed in 2012. Because both Colombia and Peru were already participants in the EU's GSP+ program, they already had tariff-free access to the EU market for almost all product lines.[153] In this sense, the FTA does not represent a great leap forward for Colombia or Peru in terms of market access for goods.[154] However, the EU has modified its GSP+ scheme such that from 2013 onward, it is more tightly focused on granting preferential access to least developed and middle-income countries. As a result, Colombia is now excluded from GSP+ eligibility and Peru would have had to reapply to participate in the new scheme. Both countries were therefore in danger of losing their benefits and duty-free access unless they agreed to the provisions of a replacement FTA.[155] Despite the fact that market access for goods from Colombia and Peru is not substantially altered, the FTA does add a number of new benefits for the Andean countries in the realm of services, government procurement, and SPS measures, and will particularly benefit exports of fruit and shrimp. The EU benefits by receiving reciprocal tariff reductions, which were not required under the GSP+ program.[156]

3.1.2 Trade and Environment in the EU—Colombia Peru FTA

The FTA incorporates environmental considerations from the outset. To begin with, before the finalization of the Treaty text, the Commission requested a sustainability impact assessment on the economic, social and environmental effects of a trade agreement with

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[152] The FTA does include an accession clause that would allow other members of CAN to join if they so choose. EU—Colombia Peru FTA, *supra* note 51, at Art. 329.

[153] Peru, Ecuador, and Bolivia continue to be eligible for the new GSP + program.

[154] It does, however, provide for lower tariffs on a few important products such as bananas, grapes and shrimp. European Parliament, *Colombia Peru FTA Study*, *supra* note 147, at 5.

[155] *Id.*, at 23.

[156] In particular, the EU sectors that stand to benefit most are machinery, transport equipment (including automobiles), chemicals, and services. *Id.*, at 5.

CAN.[157] The SIA was performed by outside experts—from the Center for Economic Policy Research and Manchester University—and involved extensive consultations with stakeholders in the EU and CAN. With regard to the potential environmental impacts of an EU-CAN trade agreement, the SIA reached four main conclusions. First, it found that any increases in greenhouse gas emissions resulting from such an agreement would not significantly impact climate change. Second, it noted that the predicted growth of the agricultural sector in the Andean countries could lead to additional pressure on land and water resources. Third, it highlighted the potential for increased pollution as a result of increases in Andean mining activities, large-scale agricultural production, and other sectors. And fourth, the SIA cautioned that a trade agreement could have a negative impact on deforestation and biodiversity due to the predicted expansion of the agricultural and timber industries.[158]

The Commission responded to these concerns by noting that the potential expansion of biofuels was not a significant problem because Colombia and Peru already enjoyed duty free access to the EU market under the GSP+ program, and that deforestation was "not likely to become a main source of environmental pressure" because tariff levels for forestry products were already low.[159] As such, it recommended the inclusion in the FTA of "a set of sustainability criteria for environmentally sensitive goods"; a "trade and sustainable development chapter"; and an "institutional framework for the monitoring of the social and environmental outcomes of the trade agreement."[160] In addition, the Commission recommended the inclusion of "a number of measures in the cooperation sector," including "support for capacity building," "provision of technical assistance," "industrial cooperation," "corporate social responsibility," specific cooperation in various sectors, and the establishment of a "policy dialogue."[161] It also, however, stressed that it is "the governments of Andean countries which have the prime responsibility for strengthening of their national and regional legislations in this area."[162]

The European Parliament subsequently commissioned a study by external experts from the Overseas Development Institute, the University of Cambridge, and the London School of Economics, which focused on the revised FTA with Colombia and Peru. This study examined the potential impact of the agreement on trade, the environment, and the

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[157] CEPR & Manchester University, *EU–Andean Trade Sustainability Impact Assessment* 6 (2009) (study funded by the Commission).

[158] *Id.*, at 84-88.

[159] European Commission, *Commission Services Position Paper on the Trade Sustainability Impact Assessment (SIA) of the Multiparty Trade Agreement with Andean Countries* 5 (2010) [hereinafter *Position Paper on Andean SIA*].

[160] *Id.*, at 6.

[161] *Id.*, at 7.

[162] *Id.*, at 8.

prospects for CAN integration, paying particular attention to the concerns of stakeholders such as labor rights and environmental NGOs and EU businesses.[163] Both reports were made publicly available in order to increase transparency, "serve as an orientation tool for Andean negotiators," and provide "a useful secondary source of information for stakeholders and civil society in both regions."[164] Interestingly, the Parliament study notes that "[m]ost if not all of the earlier concerns expressed by civil society have been addressed during the course of negotiations, although perhaps not to their full satisfaction."[165]

The Commission's recommendations were largely incorporated into the final text, which includes a number of references to environmental protection, and sets up various mechanisms for capacity building, cooperation, monitoring and enforcement, and so on.

The preamble to the FTA states that the Parties are "committed to implementing this Agreement in accordance with the objective of sustainable development, including, the promotion of economic progress, the respect for labour rights and the protection of the environment, in accordance with the international commitments adopted by the Parties."[166] This is to be achieved by, among other things, promoting trade and foreign direct investment in environmental goods and services,[167] promoting best business practices regarding corporate social responsibility,[168] and ensuring a "high level" of environmental protection in accordance with the provisions of MEAs and national law.

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[163] European Parliament, *Colombia Peru FTA Study*, *supra* note 147. The study summarizes stakeholder views thus:

> Stakeholder views on the Agreement have tended to be dominated by the advocacy of civil society NGO coalitions (of EU and CAN NGOs), which have adopted critical positions. These have centred on human rights, sustainable development and some trade-related issues such as the asymmetric nature of market opening. Business interests in the EU as well as in Colombia and Peru have been supportive or very supportive of the Agreement, especially the EU services sector.

Id. at 6-7.

[164] European Commission, *Position Paper on Andean SIA*, *supra* note 159, at 2.

[165] European Parliament, *Colombia Peru FTA Study*, *supra* note 147, at 7.

[166] EU–Colombia Peru FTA, *supra* note 51, at pmbl.

[167] *Id.*, at Art. 271(2). EGS are defined as goods and services that serve an environmental protection function, such as environmental technologies, renewable energy, energy-efficient products and services, and so on. The liberalization of trade in EGS is also a goal of the current round of WTO negotiations. The Doha Round Ministerial Declaration of 2001 (paragraph 31(iii)) authorized EGS negotiations, and Member States agreed at the WTO Fourth Ministerial in Cancún in 2003 to reduce and/or eliminate "tariffs and nontariff bariers to environmental goods and services." Negotiations on one or more lists of EGS are being carried out in various WTO fora, but there has as yet been little progress, as countries disagree strongly about the particular goods and services that should be included on the list of EGS.

[168] *Id.*, at Art. 271(3).

Environmental protection is integrated into the main body of the FTA via general exceptions to the commitments on goods,[169] services,[170] capital movements,[171] and government procurement.[172] The government procurement title further permits procuring Parties to "prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment."[173] And the title on intellectual property notes that "[t]he Parties recognise the need to maintain a balance between the rights of intellectual property holders and the interest of the public, particularly regarding education, culture, research, public health, food security, environment, access to information and technology transfer."[174]

The bulk of the environmental clauses in the FTA, however, are contained in Title IX, which focuses specifically on trade and sustainable development. The title begins by citing several international instruments as background context, including the Rio Declaration, Agenda 21, the Millennium Development Goals, and the Johannesburg Declaration on Sustainable Development and its Plan of Implementation.[175] It then reaffirms the commitment of the Parties "to sustainable development, for the welfare of present and future generations," and their agreement "to promote international trade in such a way as to contribute to the objective of sustainable development and to work to integrate and reflect this objective in their trade relationship."[176]

Title IX recognizes each Party's sovereign "right to regulate," and specifically affirms that "Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party."[177] However, it directs each Party to "strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection."[178] This "high level" is

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[169] *Id.*, at Art. 106(1)(b) (providing an exception for measures "necessary to protect human, animal or plant life or health, including those environmental measures necessary to this effect").

[170] *Id.*, at Art. 167(1)(b) (providing an exception for measures "necessary to protect human, animal or plant life or health, including those environmental measures necessary to this effect").

[171] *Id.*

[172] *Id.*, at Art. 174(b) (providing an exception for measures "necessary to protect human, animal or plant life or health, including the respective environmental measures"). Note the looser construction of "respective environmental measures" in comparison with the "measures necessary to this effect" language in the goods, services, and capital movements exceptions.

[173] *Id.*, at Arts. 181(6).

[174] *Id.*, at Art. 196(3).

[175] *Id.*, at Art. 267(1).

[176] *Id.*, at Art. 267(1).

[177] *Id.*, at Arts. 268, 277(4).

[178] *Id.*, at Art. 268.

defined as "consistent" with a list of Multilateral Environmental Agreements (MEAs), which the Parties commit to "effectively implement in their laws and practices:

- The Montreal Protocol on Substances that Deplete the Ozone Layer;
- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
- The Stockholm Convention on Persistent Organic Pollutants;
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- The Convention on Biological Diversity, and its Cartagena Protocol on Biosafety;
- The Kyoto Protocol to the United Nations Framework Convention on Climate Change;
- The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.[179]

With the exception of the Rotterdam Convention, all of these MEAs are also required to be ratified and effectively implemented by participants in the EU's GSP+ program, in which Colombia and Peru are participants (until the entry into force of the FTA). The MEA provision also reiterates the language of the GATT Article XX Chapeau, stating that any environmental measures taken for the purpose of implementing the listed MEAs "shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade." Additionally, the Title contains specific commitments regarding biological diversity,[180] trade in forest products,[181] trade in fish products,[182] and climate change.[183]

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[179] *Id.*, at Art. 270(2). The Agreement also provides a mechanism by which the Parties can amend the list.

[180] *Id.*, at Art. 272 (containing hortatory language regarding the importance of biodiversity, and reaffirming the Parties' commitments under the CBD). Interestingly, Marín Durán and Morgera note that the language of the FTA regarding genetic resources and benefit sharing goes beyond the letter of the CBD by 'recognising' the Parties' obligation to obtain the 'prior informed consent' of the holders of traditional knowledge. Marín Durán & Morgera, *supra* note 107, at 126.

[181] EU–Colombia Peru FTA, *supra* note 51, at Art. 273 (reaffirming the Parties' commitments to CITES, and urging–in non-binding language–the parties to strengthen forest certification and management mechanisms).

[182] *Id.*, at 274 (containing hortatory language regarding the importance of conserving fish stocks and cooperating within regional fish management organizations, and one agreement of the Parties "to ensure that vessels flying their flags conduct fishing activities in accordance with the rules adopted within the RFMO, and to sanction vessels under their domestic legislation, in case of any violation of the said rules").

[183] *Id.*, at Art. 275 (containing hortatory language regarding the importance of climate change, and reaffirming the idea of 'common but differentiated responsibilities' for developed and developing states, as well as an agreement that "the Parties will promote the sustainable use of natural resources and will promote trade and investment measures that promote and facilitate access, dissemination and use of best available technologies for clean energy production and use, and for mitigation of and adaptation to climate change").

In addition to its requirement that the Parties uphold their obligations under the MEAs listed above, the FTA also contains additional rules related to the need to uphold internal standards of protection. To this end, the Parties are forbidden to "encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws... or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment."[184] In addition, the Parties are prohibited from failing "to effectively enforce [their] environmental and labour laws through a sustained or recurring course of action or inaction."[185] Interestingly, though the labor protection section contains an affirmation that "the comparative advantage of any Party should in no way be called into question" by the requirement to uphold labor standards, the environmental section does not.[186]

The EU–Colombia Peru FTA also deals with the design and implementation of environmental measures. To begin with, the Parties "recognise the importance, when preparing and implementing measures aimed at protecting health and safety at work or the environment which affect trade between the Parties, of taking into account scientific and technical information and relevant international standards, guidelines or recommendations."[187] Nevertheless, the text also enshrines the precautionary principle, noting that "where there are threats of serious or irreversible damage, the lack of full scientific certainty should not be used as a reason for postponing protective measures."[188] With regard to implementation of the provisions in Title IX, the Parties agree to "review, monitor and assess the impact of the implementation of this Agreement on labour and environment."[189] Further, the Parties agree to consult with the public—in the form of domestic labor and environment or sustainable development committees or groups—in implementing Title IX.[190]

Finally, the FTA with Colombia and Peru provides for continuing cooperation between the Parties in relation to trade and environment issues. In particular, it identifies a number of possible points of cooperation, including: evaluating the impacts of the Agreement;

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[184] *Id.*, at Art. 277(1).

[185] *Id.*, at Art. 277(2). This requirement is qualified somewhat by the subsequent Article, which states that "The Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfillment of the obligations undertaken under the Title." *Id.* at 277(3).

[186] This is in contrast to the EU–South Korea FTA, which does contain such a note in the environment section. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the Other Part, 1 July 2011, 2011 OJ (L 127) 1, at Art. 13.2(2).

[187] EU–Colombia Peru FTA, *supra* note 51, at Art. 278.

[188] *Id.*

[189] *Id.*, at Art. 279.

[190] *Id.*, at Art. 281.

monitoring and effective implementation of MEAs; conducting studies related to levels and standards of environmental protection; activities related to climate change, biodiversity, forest and fishery products; and the exchange of information regarding corporate social responsibility.[191]

The FTA further establishes a number of institutional mechanisms intended to promote the sustainable development goals defined in Title IX. To begin with, each Party commits to establishing an administrative contact point for the purpose of communications regarding trade-related aspects of sustainable development, and jointly to establish a Sub-Committee on Trade and Sustainable Development.[192] The Sub-Committee, which consists of 'high-level representatives' from the EU, Colombia, and Peru, is charged with various follow-up tasks, including producing recommendations, encouraging cooperation, and promoting 'rule of law' aspects such as transparency and public participation. The Sub-Committee is also tasked with convening a public meeting with civil society and stakeholders once per year.[193] Disputes regarding the interpretation or implementation of Title IX are not subject to the normal dispute settlement rules of the FTA, but instead are to be dealt with first, by means of consultations within the Sub-Committee,[194] and second, if after three months these consultations are unsuccessful in resolving the issue, by a Group of Experts convened to examine the matter.[195] The Group of Experts (drawn from a list submitted by the Parties) can then issue recommendations, though these are not strictly binding and no sanction is available to assure enforcement.[196] A study commissioned by the Parliament also notes that there is scope for the European Parliament to play an additional role in monitoring compliance with the sustainable development provisions, via mechanisms such as MEP visits.[197]

Following the finalization of the text, the FTA experienced some additional pushback. In particular, the European Parliament expressed its concern that not enough was being done in the area of human rights, labor, and environmental standards. The situation of trade unionists in Colombia was cited as a particular sticking point. This prompted the Parliament

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[191] *Id.*, at Art. 286. The FTA's two limited references to corporate social responsibility as areas for cooperation are quite weak. This is contrary to the position of the European Parliament, which has indicated that "corporate social and environmental responsibility must become an integral part of the European Union's trade agreements." European Parliament resolution of 25 Nov. 2010 on Corporate Social Responsibility in International Trade Agreements (2009/2201(INI)), paras. 7-8.

[192] EU–Colombia Peru FTA, *supra* note 51, at Art. 280.

[193] *Id.*, at Art. 282.

[194] *Id.*, at, Art. 283.

[195] *Id.*, at Art. 284.

[196] This lack of enforcement mechanisms can be contrasted with the situation in the Canada-Colombia Labour Cooperation Agreement (side agreement to FTA), and the US–Colombia FTA, both of which provide for certain enforcement capabilities. Canada-Colombia Labour Cooperation Agreement, 21 Nov. 2008; U.S.-Colombia Trade Promotion Agreement, 22 Nov. 2006.

[197] European Parliament, *Colombia Peru FTA Study*, *supra* note 147, at 51.

to delay approval of the FTA, and to issue a resolution in June 2012 calling on the Andean countries "to ensure the establishment of a transparent and binding road map on human, environmental and labour rights."[198] The Parliament finally gave its consent to the Treaty in December 2012, following the presentation of these 'roadmaps' to the International Trade Committee.[199] Trade barriers between the EU and Peru were provisionally lifted beginning 1 March 2013,[200] and between the EU and Colombia beginning 1 August 2013.[201] Full application of the agreement must continue to wait until all EU Member States have ratified the agreement.

3.2 Market and Rights Technologies in the EU—Colombia Peru FTA

3.2.1 Rights Technologies in the EU—Colombia Peru FTA

The mix of measures included in the EU–Colombia Peru FTA range across a broad spectrum of tools from the EU's trade and environment toolkit discussed in Section 2. SIAs, multilateral agreements, conditionality, and horizontal and voluntary partnerships all make appearances in this agreement. This section will demonstrate how the mechanisms by which the EU seeks to export its environmental norms to Colombia and Peru draw on both market and rights techniques in order to achieve their regulatory objectives. In so doing, as stated above, it hopes to both provide convincing evidence of the coexistence of market and rights rationalities and their corresponding technologies in the EU's environmental norm export practices, and to show how these technologies interact in multiple, overlapping ways that permit strategic behavior.

Rights techniques are present throughout the EU–Colombia Peru FTA. To begin with, the form of a treaty is, in itself, a rights technique. Treaties, as international law, are formal mechanisms of international government. They rely on diplomatic institutions to negotiate and obtain formal consent for their contents. They are mandatory, consented to and

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[198] European Parliament Resolution, P7_TA(2012)0249, 13 June 2012, 2013 OJ (C 332 E) 52, On the EU Trade Agreement With Colombia and Peru, at recital G.

[199] European Parliament, Press Release, "MEPs Back Two Major Pacts With Latin America," 11 Dec. 2012, *available at* http://www.europarl.europa.eu/news/en/news-room/content/20121207IPR04407/html/MEPs-back-two-major-pacts-with-Latin-America (last accessed 15 August 2014). Colombia's 'roadmap' consisted of the submission to the European Parliament of a portion of the Colombian President's four-year 'National Development Plan', which sets out the administration's plan of government from 2010-2014. The Plan was attached 'Annex 1' to a letter from Colombia's ambassador to the EU. Letter from Rodrigo Rivera, Ambassador of Colombia to the European Union, to Martin Schulz, President of the European Parliament (26 Oct. 2012), *available at* http://www.colombia-eu.org/uploads/Modules/Mediaroom/carta-y-plan-de-accion.pdf (last accessed 15 August 2014).

[200] European Commission, Press Release, IP/13/173, "EU Trade Agreement With Peru Goes Live–Colombia's Next in Line," 28 Feb. 2013, *available at* http://europa.eu/rapid/press-release_IP-13-173_en.htm (last accessed 15 August 2014).

[201] European Commission, Press Release, IP/13/749, "EU-Colombia Trade Agreement Takes Effect on 1 August," 26 July 2013, *available at* http://europa.eu/rapid/press-release_IP-13-749_en.htm (last accessed 15 August 2014).

overseen by centralized, hierarchical authorities, and are concerned with sovereignty and rights. Treaties such as this FTA are political agreements between sovereign regulators who expect one another (rather than the governed themselves) to assume responsibility for risks. They accept implicitly the notion of sovereignty, the legitimate division of power between sovereign authorities, and the right and duty of each sovereign to care for its own citizens. The FTA's confirmation of each Party's sovereign "right to regulate," and affirmation that "Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party"[202] are emblems of the treaty's concern with sovereignty and centralized, hierarchical government.

Mercantilist reasoning is also on display to a certain degree. To begin with, the idea that trade agreements such as this are beneficial due to their effect on exports and domestic production (rather than imports and domestic consumption) is one that stems from mercantilist economic reasoning. The concern that production facilities will move from one state to another, or that domestic industry will be undercut by poor environmental standards or tax incentives abroad reflect a typically mercantilist vision of the role of producers in supporting the strength of the state. If the rationale for including environmental rules in a trade agreement is to protect domestic industry from competition abroad or to enact the preferences of domestic citizens (as opposed to 'correcting market failures' or 'securing the protection of human capital'), then they represent an instance of a mercantilist rights technology. The history of the FTA's development supports this protectionist interpretation, as it only came about after the EU pronounced Colombia ineligible for the GSP+ program due to its economic growth, and required the extension of reciprocal benefits in order to maintain tariff free market access. As such, the FTA grew out of concern that the EU's economy would be harmed by the continued extension of unilateral benefits, and that it therefore needed to protect its interests by requesting additional concessions.

Finally, policing also plays a role in the EU–Colombia Peru FTA. The parties to the treaty have agreed to oversee the FTA's implementation by means of formal surveillance, including through such mechanisms as customs procedures at the border, and the establishment of administrative contact points. Diplomacy will play a role here, as well, in the form of continued 'high level meetings' in the context of the Sub-Committee and visits by European Parliamentarians. Violators of the rules set down in the treaty will be disciplined by means of consultations with the Sub-Committee and recommendations by the Group of Experts.

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[202] EU–Colombia Peru FTA, *supra* note 51, at Arts. 268, 277(4).

These diplomatic enforcement mechanisms are meant to respect the political sovereignty of the parties to the agreement.

3.2.2 Market Technologies in the EU—Colombia Peru FTA

Alongside the rights technologies described above, the EU–Colombia Peru FTA also incorporates a host of market mechanisms that seek to perform a different type of governmental work with respect to the EU's environmental norm export project. These techniques are de-centered, de-formalized, and de-politicized, and rely on technologies of agency and performance to perform the work of government through horizontal, individualized practices of self-regulation. Several of the techniques the FTA uses to incorporate environmental values were discussed in Section 2's typology of EU external policy tools.

The Commission's SIA and Parliament's study, for example, both sought to bring the comments and concerns of 'stakeholders' into the negotiating process, thereby de-centering the business of government. This horizontalization happened in several ways, including through the delegation of responsibility for drafting the reports to external experts; the solicitation of NGO, business, and scientific comments regarding the impacts of the agreement; the back-and-forth exchange between stakeholders and the Commission; and the publication of the results, which sought to engage the broader public. De-centering practices are also evident in the FTA's continual assertions of the importance of stakeholder participation in the implementation process. It emphasizes the need for expert scientific and technical input during the preparation of implementing measures[203]; the importance of public consultations in the form of domestic labor and environment or sustainable development committees or groups[204]; and the need for an objective Group of Experts (rather than a 'panel of judges' or similar construction) to examine matters in dispute between the treaty parties.[205]

These mechanisms can be read as technologies of agency, contractualizing the exchange of knowledge and expertise, institutionalizing methods for deliberation and participation, and involving stakeholders such that they become the authors of their own governance. They can also be read as technologies of performance, as they employ expert knowledge to set the baselines against which individuals, businesses, NGOs and states are called on to measure and adjust their behavior. Their emphasis on data collection, benchmarks, transparency, and

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[203] *Id.*, at Art. 278.
[204] *Id.*, at Art. 281.
[205] *Id.*, at Art. 284.

post-agreement monitoring and assessment makes them important instruments of governance through performance standards.

De-formalizing market techniques are also abundant. Examples include the promotion of best business practices regarding corporate social responsibility[206]; continuing cooperation between the Parties on evaluating the impacts of the Agreement, monitoring and effective implementation of MEAs, conducting studies related to levels and standards of environmental protection, activities related to climate change, biodiversity, forest and fishery products; and the exchange of information regarding corporate social responsibility[207]; and the overall structure that permits each party to regulate as they choose, but only so long as those regulations are consistent with the responsibilities outlined in the listed MEAs and do not entail a lowering of standards for the purpose of securing additional investment. Here, too, the emphasis is on horizontality, individual responsibility for risk management, partnerships, and expertise.

Finally, it is also easy to point out the ways in which the techniques selected by the FTA's drafters attempt to de-politicize its environmental requirements. To begin with, the bulk of Title IX is focused on procedural reforms (participation, transparency, monitoring, accountability, and so on) rather than substantive requirements. The commitments embodied in the agreement rely for their justification on the technocratic universalism of the good governance project. Where legislative reforms are required (for example, in order to implement the treaty itself or the listed MEAs), the FTA makes no mention of the specific means by which this should be done, but leaves the details up to the contracting parties.

3.3 Technologies and their Effects in the EU—Colombia Peru FTA

Market and rights rationalities and their associated technologies coexist in the EU–Colombia Peru FTA. As addressed in Section 2.6, however, this coexistence is uneasy because it requires the simultaneous belief in two distinct 'truths' about the nature of government, the drivers of human and state behavior, and the appropriate aims and limits of regulatory authority. This duality is significant because the concurrence of the rights and market rationalities allows the EU to speak polyvocally with respect to environmental norm export,

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[206] *Id.*, at Art. 271(3).

[207] *Id.*, at Art. 286. The FTA's two limited references to corporate social responsibility as areas for cooperation are quite weak. This is contrary to the position of the European Parliament, which has indicated that "corporate social and environmental responsibility must become an integral part of the European Union's trade agreements." European Parliament resolution of 25 Nov. 2010 on Corporate Social Responsibility in International Trade Agreements (2009/2201(INI)), paras. 7-8.

and to engage in strategic governmental behavior by switching between market and rights technologies in pursuit of its political objectives.

In the context of the EU–Colombia Peru FTA, this allows the EU to believe at the same time that it both *is* and *is not* acting in order to protect the environment in Colombia and Peru, appeasing civil society groups and the European Parliament with the FTA's environment chapter, while simultaneously reassuring those concerned with the infringement of sovereign authority that little legally enforceable regulation is occurring, and all the while maintaining its image as a normative global actor.[208] The use of rights technologies permits the belief that the treaty's trade and environment provisions are 'consensual', that they respect 'sovereignty', that there is no 'extraterritorial government' occurring,[209] and that each party retains full 'regulatory sovereignty'.[210] From this perspective, the EU is a sovereign entity that respects the division of rights and authority between itself and other sovereign entities—in this case Colombia and Peru—in the international community.

On the other hand, the use of market technologies permits the EU to argue that the treaty's trade and environment provisions require 'good governance' and will set the basis for "structural reforms" in Colombia and Peru[211] by promoting "internationally agreed best practices while securing a transparent, non-discriminatory and predictable environment for operators and investors via a mediation mechanism designed to address non-tariff barriers and—if necessary—an advanced bilateral dispute settlement mechanism."[212] Here, the EU–Colombia Peru FTA is seen as a powerful tool that will not only deregulate trade between the parties, but will also lead to 'structural reform' and contribute to sustainable development and good governance in Peru and Colombia.[213] At the same time, these 'structural reforms'

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[208] *See also* Sokhi-Bulley, *supra* note 15, at 253. ("The EU-context on which I focus is especially interesting because the Union *conceals governmentality* by speaking of rights in an apolitical language of *governance*. This is significant because it presents an unproblematic image of the EU as an international actor that promotes and protects human rights.")

[209] "Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party." EU–Colombia Peru FTA, *supra* note 51, at Art. 277(4).

[210] "Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection..." *Id.*, at Art. 268.

[211] On the occasion of the signature of the agreement, EU Trade Commissioner Karel de Gucht stated that: "The agreement establishes a foothold for European business in this rapidly growing area and an anchor for further structural reforms in both countries." European Commission, "EU Signs Comprehensive Trade Agreement with Colombia and Peru," 26 June 2012, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=810 (last accessed 15 August 2014).

[212] *Id.*

[213] A nice illustration of this is the European Parliament's initial resistance to the FTA, which lifted after Colombia and Peru presented the International Trade Committee with "roadmaps for implementing labour and environmental standards." Parliament was convinced by this demonstration that the FTA's social and environmental provisions were in fact solid enough to move forward with the deal. European Parliament, "MEPs Back Two Major Pacts with Latin America," *supra* note 199.

are not seen as unacceptable extraterritorial action because they are simply 'apolitical' good governance, which, 'objectively' speaking, all states should conform to in any case.

The point here is not to argue whether the agreement 'is' or 'is not' an example of extraterritorial regulation in the legal sense, or whether it 'does' or 'does not' actually help the environment in an empirical sense. Rather, it is to point out that because of the coexistence of these two fundamentally distinct sets of governmental techniques, the EU can simultaneously believe: a) that the agreement does nothing to affect the 'regulatory sovereignty' of its trading partners; and b) that the agreement will have substantial effects in promoting 'good governance' and 'structural reforms' within their borders.

The EU is able to speak in this doubled way, in part, because the idea of 'regulatory sovereignty' is one that applies primarily in the context of rights technologies. Direct policing and enforcement activities are, indeed, excluded from the FTA's trade and environment provisions. These would be perceived as violations of sovereignty, and as such are excluded both by general international legal norms regarding extraterritoriality,[214] as well as by the terms of the treaty itself.[215] Objections on the grounds of 'regulatory sovereignty' do not, on the other hand, apply nearly as neatly in the context of market technologies. Performing impact assessments, sharing 'best practices' information, 'continuing cooperation', and so on are not generally perceived as violations of sovereignty. These techniques are not rights technologies of 'government', but market technologies of 'governance', and as such do not provoke 'rights'-based objections in the same way, or with the same degree of force.

Indeed, it might be argued that the turn to market-based 'governance' mechanisms (including the reliance on procedural rather than substantive norms, the emphasis on experts analysis and benchmarking, the participation of stakeholders, and the horizontal sharing of best practices information) is quite strategic, from a governmental perspective, as it is able to circumvent third state objections on sovereignty grounds to actions that are perceived as 'political' exercises of extraterritorial government (such as the enactment of the EU emissions trading scheme for the air transport sector discussed in Chapter 3). Because they are de-politicized and rely on techniques of agency and performance, rather than command and policing, 'governance' technologies, unlike their 'rights' counterparts, can regulate 'from a distance' by influencing the choices of the governed regarding how to conduct themselves. As European Commission President Barroso said in a speech in Colombia on 12 December 2013:

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[214] *See* Chapter 1.
[215] EU–Colombia Peru FTA, *supra* note 51, at Art. 268.

There is no doubt that trade liberalization offers opportunities. But these opportunities, obviously, must be taken advantage of. And the responsibility for success falls on the business community, as well as implying an important role for the authorities.

The government can implement policies to facilitate the necessary restructuring and productivity improvements. But it is the companies that must take advantage of this perspective of long-term viability and productivity growth.

...

[F]ree and fair trade is not an end in itself, as only democratic societies can truly prosper, fostering a more sustainable model of growth based on transparency, responsibility, equality and respect for the environment.

It has to do with, in short, every person's ability to lead a fulfilling life. And this is the foundation of our relationship: to make a tangible contribution to the lives of our citizens.[216]

The governmentality analysis articulated in this dissertation prompts a reassessment of the idea that 'governance' activities are neutral, non-invasive, do not conduct the conduct of others, and/or do not represent the flow of governmental power. Rather, they belong to a governmental mode that relies on market rationality mechanisms (technologies of agency and performance, de-centralized, de-politicized, and de-formalized techniques) to encourage its subjects to govern themselves in accordance with the standards it sets. Even where rights techniques are not (or not yet) in play, other forms of government may be taking place. SIAs, benchmarks, expert studies, and other pre-agreement activity that makes use of technologies of agency and performance *are already* part of market government. Though they do not make use of formal legal requirements or policing and enforcement techniques, they begin the process of environmental norm export by inviting third states, NGOs, businesses, individuals, and the EU itself to accept particular sets of de-politicized standards and adjust their behavior accordingly. They produce 'truths' that structure subsequent discourse and behavior. These techniques are certainly not always effective—but then again, neither are rights-based forms of government through law and policing. The argument here is not that

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[216]   José Manuel Durão Barroso, President of the European Commission, "Discurso del Presidente Barroso en la Cámara de Comercio de Bogotá," 12 Dec. 2013 (translation by the author), *available at* http://europa.eu/rapid/press-release_SPEECH-13-1069_es.htm (last accessed 15 August 2014).

these technologies are 'good' or 'bad' in a normative sense, but simply that we should also think of these interventions as techniques of governing according to a market paradigm, not simply as 'neutral', de-politicized activities. In other words, even if *governance* is not *government*, it is still *governmentality*.

The upshot, then, is that even where there is consent, and where there are no formal legal mechanisms of regulation and enforcement, governmental activity can still be taking place. The coexistence of rights technologies and market technologies means that the EU can simultaneously state that Colombia and Peru are sovereign entities who bear sole responsibility for enacting substantive legislation within their borders, and at the same time attempt to set the standards for what it means to govern legitimately, effectively, and efficiently, as well as how individuals and businesses should conduct themselves, through the use of market techniques.

There are, of course, many other opportunities for political action and resistance that exist alongside the example given in this section. The coexistence of multiple, overlapping, and fundamentally distinct technologies of government provides opportunities for strategic behavior on the part of all parties. As such—and the dissertation will return to this point in Chapter 5—it is greatly useful for those who wish to understand or intervene in the political discussion to be aware of the various rationalities and technologies at play. Just as the EU's discourse can employ the polyvocality of governmental technologies to its advantage, so too can other parties participating in the debate. The parallel presence of these two types of governmental technologies can be politically productive from multiple perspectives, allowing actors to slip from one paradigm to the other in their attempts to achieve particular goals.

4. Conclusion

Using the methodology described in Chapter 2, and building on the rationalities of government outlined in Chapter 3, this chapter continued the project of re-mapping the field of EU environmental norm export by extending the analysis of market and rights rationalities into the material realm of governmental practice. Specifically, it argued first that there exist distinct technologies of government that are associated with the rights and market rationalities identified in Chapter 3. Rights technologies, which draw on and in turn produce rights rationalities, make use of formal, political, centralized modes of authority including mercantilist mechanisms of surveillance, international law and diplomacy, and disciplinary policing. Market technologies, which draw on and in turn produce market rationalities, make

use of de-formalized, de-politicized, and de-centralized modes of authority including technologies of agency and technologies of performance.

Second, as with market and rights rationalities, the chapter argued that market and rights technologies exist alongside one another, interacting in overlapping and complex ways in the context of advanced liberalism. Section 2 sought to demonstrate this by, first, delving into the EU's environmental norm export 'toolbox' and investigating five different techniques of linking trade and environment from the perspective of market and rights technologies. Section 3 then continued this work by analyzing a concrete example of EU environmental norm export in the form of the EU's recent conclusion of an FTA with Colombia and Peru, identifying multiple instances of rights and market technologies in the Agreement's trade and environment Title.

Third, the chapter argued that despite the fact that market and rights technologies exist alongside one another in the practice of EU environmental norm export, their coexistence is sometimes uneasy, because they stem from fundamentally different rationalities of government. This uneasiness, though, can be productive, and has interesting effects in the context of EU environmental norm export. As Sections 2.6 and 3.3 argued, the simultaneous presence of rights and market technologies allows the EU to speak with multiple voices in the context of the FTA with Colombia and Peru, arguing both that the FTA respects regulatory sovereignty, and that it will be transformative in terms of exporting good governance norms to third countries. This polyvocality, it went on to argue, can be politically strategic, as it allows governmental activity to take place in the de-politicized limbo of 'governance' without coming up against sovereignty-based objections to 'government'. Governance, though, is far from neutral. Rather, it is a form of market governmentality that attempts to conduct the conduct of its subjects 'from a distance' by setting the benchmarks against which they should measure themselves and encouraging them to manage themselves accordingly, and by making use of their own free choice to do so.

As argued in this chapter, these market mechanisms have practical effects and constitute a form of governmental activity vis-à-vis third states. Chapter 5 will continue along this path, going on to argue that rights and market rationalities and the technologies they employ have important effects from the perspective of the identities or subjectivities of the governments and governed they constitute.

Chapter 5

Chapter 5

CITIZENS AND STAKEHOLDERS:
The Subjectivities of EU Environmental Norm Export

1 Introduction

1.1 What are Subjectivities?

Chapter 3 argued that there are two overarching rationalities of government that coexist in advanced liberal governmentality: a market rationality and a rights rationality. These rationalities structure political discourse in the EU generally, and in the context of EU environmental norm export specifically. Chapter 4 went on to argue that these rationalities of government are reproduced by means of particular sets of mechanisms or technologies, and illustrated how the coexistence of multiple sets of governmental technologies provides opportunities for polyvocality, which works in interesting ways to assist the EU in reaching its political goals. This chapter will conclude the mapping exercise and further the strategic action argument by demonstrating that the rationalities described in Chapter 3 and the technologies described in Chapter 4 also have fundamental effects on another aspect of society: subjectivities.[1] It will argue that different understandings of government have an effect on, in Foucault's words, "the different modes by which, in our culture, human beings are made subjects."[2]

There is no single universal subject of government. Rather, as Peter Miller and Nikolas Rose explain:

> [T]hose to be governed can be conceived of as children to be educated, members of a flock to be led, souls to be saved, or, we can now add, social

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[1] As Foucault notes, these processes "entertain complex and circular relations" with one another. Michel Foucault, "The Subject and Power," 8(4) *Critical Inquiry* 777, 782 (1982).

[2] *Id.*, at 777.

subjects to be accorded their rights and obligations, autonomous individuals to be assisted in realizing their potential through their own free choice, or potential threats to be analysed in logics of risk and security.[3]

This means that subjects are constructed within and through the very rationalities that seek to govern them. Rationalities, technologies, and subjectivities are wholly entwined with one another. As a particular rationality of government and its 'truths' about the world come to dominate discourse, subjects (whether individuals or states or other groupings) begin to understand themselves and their behavior—that is to say, become 'subjectified'—in accordance with its norms. Government can thus take place "at a distance,"[4] relying on subjects to govern themselves. Subjectivities can, in this sense, be thought of as a type of technology—as "technologies of the self," so to speak—that bring together the government of others and the government of one's self.[5] In Foucault's words:

> This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word "subject": subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to.[6]

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[3] Peter Miller & Nikolas Rose, *Governing the Present: Administering Economic, Social and Cultural Life* 9 (2008).

[4] Nikolas Rose & Peter Miller, "Political Power Beyond the State: Problematics of Government," 43(2) *British Journal of Sociology* 173, 180 (1992).

[5] As noted in Chapter 1, some Foucauldians distinguish between "1) 'subjectification' (*assujettissement*) or the ways that *others* are governed and objectified into subjects through processes of power/knowledge (including but not limited to subjugation and subjection since a subject can have autonomy and power relations can be revisited and reversed), and 2) 'subjectivation' (*subjectivation*) or the ways that individuals govern and fashion *themselves* into subjects on the basis of what they take to be the truth." Trent H. Hamann, "Neoliberalism, Governmentality, and Ethics," 6 *Foucault Studies* 38-39 fn 4 (2009). *See also* Alan Milchman & Alan Rosenberg, *The Final Foucault: Government of Others and Government of Oneself* (2008). Though these terms are helpful for distinguishing between different types of processes through which governmentality comes to be operationalized within the body of the subject, this dissertation largely avoids them, as this complex language may tend to confuse readers not versed in Foucauldian literature, and thus serve to obscure, rather than illuminate, its argument.

[6] Foucault, "The Subject and Power," *supra* note 1, at 781. Foucault explains the operation of subjectivities by reference to what he calls "pastoral power." *Id.* at 783. *See also* Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-1978* 125-130, 184-185 (Graham Burchell trans. 2007). Historically, this was a form of power focused on individual salvation, that cared for individuals during the course of their lives, and that "cannot be exercised without knowing the inside of people's minds, without exploring their souls, without making them reveal their innermost secrets." Foucault, "The Subject and Power," *supra* note 1, at 783. Foucault claims that this "power technique," which originated in old Christian institutions, has been revived in the modern Western state in a non-ecclesiastical form. This "new form of pastoral power" parallels older forms, but differs from them in several important

Foucault himself once spoke of this process as consisting of three "modes of objectification which transform human beings into subjects": (1) "the modes of inquiry which try to give themselves the status of sciences"; (2) "dividing practices"; and (3) "the way a human being turns himself into a subject."[7] Generally speaking, one might say these three 'modes' correspond to the techniques of (1) expertise and production of truth; (2) disciplining the individual by means of categorization and surveillance; and (3) the internalization of governing norms by individuals.

Subjectivities are the different understandings of human nature and social existence suggested by particular rationalities of government. These subjectivities construct and are constructed by government. They are ways of understanding the individual subject and the subject's relation to society. As such, they are the glue that binds governmentality together—the basis for the rationalities of government, the mechanism by which technologies of agency and performance operate, and the underlying foundation of governmental programs. This leads to a paradoxical relationship between rationalities and subjectivities: rationalities assert subjectivities as the pre-existing truths on which they are founded, while at the same time constructing individual subjects in accordance with their terms. In other words, governmentality is simultaneously *normative*—making claims about how individuals and groups *should* behave—and *ontological*—making claims about how individuals and groups *do* behave.

Various rationalities of government presuppose and instantiate their own normative and ontological visions of the subject. The first task of this chapter, then, will be to identify which subjects are produced by and through the operation of EU environmental norm export policies. It is to ask, with Mitchell Dean:

> [W]hat forms of person, self and identity are presupposed by different practices of government and what sorts of transformation do these practices seek? What statuses, capacities, attributes and orientations are

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ways. First, it has become secularized. Its objective is "no longer a question of leading people to their salvation in the next world but rather insuring it in this world." *Id.* at 784. It is the task of the modern pastoral state to ensure health, well-being, security, stability, and so on, at the aggregate level. Second, it has become de-centralized. Whereas the original pastoral power was the domain of the church, the new pastoral power can be exerted by the state and its police apparatus, by private ventures, by the family, and so on. And third, it has become implicated with the production of two types of knowledge: "one, globalizing and quantitative, concerning the population; the other, analytical, concerning the individual." *Id.* Pastoral power relies on subjectivity. As Ben Golder explains, it is "a technique of political individualization—the production and conduct of governable identities through the deployment of truth, the truth of the subject." Ben Golder, "Foucault and the Genealogy of Pastoral Power," 10(2) *Radical Philosophy Review* 157, 173 (2007). It works because subjects buy into the forms of knowledge that it produces.

[7] Foucault, "The Subject and Power," *supra* note 1, at 778.

assumed of those who exercise authority (from politicians to bureaucrats to professionals and therapists) and those who are to be governed (workers, consumers, pupils and social welfare recipients)? What forms of conduct are expected of them? What duties and rights do they have? How are these capacities and attributes to be fostered? How are these duties enforced and rights ensured? How are certain aspects of conduct problematized? How are they then to be reformed? How are certain individuals and populations made to identify with certain groups to become virtuous and active citizens, and so on?[8]

By examining the forms of subjectivity or identity that flow from and in turn structure the governmental practice of EU environmental norm export, this chapter seeks to accomplish several goals. First, as noted above, it continues the 're-mapping the field' project begun in Chapters 3 and 4 by arguing that the rationalities and their associated technologies that drive the EU's policy in this area are also correlated with particular forms of subjectivity. Second, it demonstrates that, as with the rationalities and technologies described in the previous chapters, these subjectivities coexist alongside one another, interacting in complex and overlapping ways in the context of advanced liberal governmentality. The task is to examine how these different subjectivities both structure and are structured by the regime of practice under investigation. This chapter will delve into these interrelated questions in order to explore subjectivity as it relates to EU behavior in the context of environmental norm export. It will examine the identities of the governed and governing implied by the discourse, and discuss how they function to create expectations about rights, duties, capacities, and conduct—how they structure the field of thought and action that seems possible in a governmental context. In doing so, it will seek to uncover how the EU's policies presume and construct the subjects who both produce and are guided by government.

Third, the chapter describes how as with the rationalities and technologies described in Chapters 3 and 4, the coexistence of these multiple subjectivities is sometimes uneasy because they stem from fundamentally different norms and ontologies regarding human nature and social existence. This uneasiness is important because it is also politically productive, providing possibilities for EU polyvocality and strategic political action within and between these conflicting but concurrent subjectivities. This strategic deployment of subjectivity is not neutral, but rather has important effects in guiding and limiting the perceived possibilities for argument and action in concrete political contexts. Because these

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[8] Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 18, 43 (2d ed. 2010).

subjectivities are always subject to contestation, however, these limitations are themselves ultimately always open to challenge and resistance.

Two caveats apply at this point. First, it is important to remember that even within the broadly drawn map of subjectivities presented in this chapter, no subject or identity is ever fully constituted or stable. The forms of identity presupposed by particular rationalities of government are not equivalent to the 'real' or 'given' identity of the individual (if such a thing can be said to exist at all). Particular persons or groups can conform more or less closely to the capacities, qualities, and attitudes called for by particular rationalities. The subjectivities that accompany different forms of governmentality are mechanisms that set the limits of acceptable behavior and self-government. Individuals, however, may still resist these modes by failing to internalize governmental norms, or by adopting alternative subjectivities.[9] A particular form of governmentality is successful to the extent that individuals come to identify with and experience themselves through the attributes, capacities, qualities and statuses it assigns.[10]

Second, it should be remembered that although this chapter will refer to the EU and its 'identity' in the aggregate, the EU should not be thought of as a singular or homogenous subject. This is true first in the sense that the EU is not a 'thing in itself', but is rather a complex association of subjects (individuals and states) that occupy a particular community, and second in the sense that the EU as an aggregate adopts multiple identities that overlap and intersect in different ways at different times.

Focusing on the relationship between government and subject elucidates the mechanisms by which power is produced and reproduced along particular trajectories. It brings notions of identity and subjectivity to the heart of the question of power. In doing so, it provides a critical hook for examining the EU's activities in the global realm that moves beyond the questions of motive and legitimacy, and thereby suggests alternative sites for critical analysis.

1.2 The Subject of Rights: the Citizen

In keeping with the structure set out in Chapters 3 and 4, this Section argues that there are two broad categories of subjectivity that encapsulate the market and rights rationalities that structure EU behavior with respect to environmental norm export. These two identities will

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[9] Laclau and Mouffe, for example, argue helpfully that because identities are discursively constructed, there always exist alternative constructions that challenge currently hegemonic notions, and thereby offer possibilities for change. Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* 41-42 (1985). Furthermore, hegemonic constructions themselves are unstable and internally contested, giving rise to even more opportunities for change.

[10] *See* Dean, *Governmentality*, *supra* note 8, at 44.

be termed the *citizen* and the *stakeholder*.[11] Though they may both exist in the same time, place, and even within the same individual or group, these subjects are entirely distinct from one another. As Foucault says, they are "absolutely heterogeneous" and "have an essentially different relationship with political power."[12]

The subject of rights—the *citizen*—is the more familiar of the two subjectivities, from the perspective of political theory. This is the republican citizen understood in the classical sense laid down in documents like the US Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen. The "Men" who are "created equal," and "endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the Pursuit of Happiness."[13] Or, as the Declaration of the Rights of Man and of the Citizen puts it:

1. Men are born and remain free and equal in rights. ...

2. The aim of all political association is the preservation of the natural and imperscriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

3. The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.[14]

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[11] *See also* Owen Parker, "A Foucauldian Perspective on the Ethics of EU(rope): Genealogies of liberal Government," in *Globalization and European Integration: Critical Approaches to Regional Order and International Relations* 70 (2012) (referring to these subjects as the 'entrepreneur' and the 'citizen'); Catherine Needham, *Citizen-consumers: New Labour's Marketplace Democracy* 15 (2003) (proposing two models of citizenship: the 'citizen-consumer', who is self-regarding, has preferences shaped reflexively, is accountable to the market, voices her preferences by complaining, is loyal to the political community because of common citizenship, and has an instrumental attitude toward politics; and the 'participatory citizen', who is community-regarding, has preferences shaped by deliberation; is politically accountable, voices her preferences through discussion; is loyal to the political community because of promotional advertising, and has a non-instrumental attitude to politics).

[12] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-1979* 276 (Graham Burchell trans. 2008).

[13] US Declaration of Independence, 4 July 1776.

[14] Declaration of the Rights of Man and of the Citizen, 26 August 1789, Articles 1-4. The gendered subject is most definitely intended: the French National Assembly adopted an entirely separate declaration on the Rights of Woman and Citizen.

5. Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. ...

This is the contractarian citizen, who forms a government by ceding some of 'his' rights to the collective. It is *homo juridicus*, the legal subject of the state. In both the US and French cases, subjects of rights are "Men" who are "born and remain free and equal in rights."[15] The subject of rights is free because it has liberty, and this liberty has a transcendental source. Its rights are abstract and universal. The scope of its individual liberty extends to everything that does not injure anyone else's rights or liberty. The individual, participating in government, is the source of legitimate sovereignty, and 'his' rights are the check on its exercise. These subjects of rights are equal to one another in terms of their citizenship, and equal before their government. The subject of rights is a sovereign individual, and a member of a political community. The political community is perceived as filled with subjects, each with its own inviolable sphere of rights pressed up against those of its neighbors. Government (in the form of the social contract) is there to ensure that individuals are able to exercise their rights, and to promote the common good. This may require subjects to cede some of their rights to others or the collective in the interest of harmony or security. It may also require intervention in order to ensure security or common freedom. The proper form of government for these subjects of rights is some approximation of a constitutional democracy.

The 'subject of rights' in this chapter will generally be referred to as the '*citizen*'. Within the broad category of the 'subject of rights', however, there exist many different figures that appear in different incarnations depending, *inter alia*, on their perception of the proper balance between the free exercise of rights and the problematic of security, their orientation toward collectivism, and their perspective on the international. For example, the *sovereigntist* rights rationality described in Chapter 3, with its focus on national prosperity, might inculcate subjectivities such as the *patriot* or the *democrat*. Similarly, the *cosmopolitan* rights rationality, with its focus on international unity, might suggest subjectivities such as the *global citizen* or the *subject of human rights*. The different types of subjectivities that exist within the broad category of 'the *citizen*' are myriad. However, they all share a common link in that they

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[15] Again, the gender pronoun should not go unnoted.

perceive the individual normatively and ontologically as a rights-bearing subject linked to other individuals and to society by (positive and/or natural) law.

The point here is not to identify all of the guises in which the subject of rights might appear, but to give an impression of the basic forms that 'the *citizen'* might take, and to emphasize the profound distinction between subjects of rights and market subjects—between *citizens* and *stakeholders*.

1.3 The Market Subject: the Stakeholder

In contrast with the subject of rights, the market subject associated with liberal and neoliberal governmentality is primarily a participant in political-economic processes. It is the *homo economicus*: the human being as a fundamentally economic (that is, cost-benefit maximizing) subject.[16] Though they share an emphasis on an economic understanding of human beings, liberal and neoliberal ideology differ with respect to their idea of the key element of human interaction. For classical liberalism, the foundational notion was exchange. As discussed in Chapter 2, this meant that the market should be a space of autonomy (*laissez-faire*) in which individuals would increase efficiency by making their exchanges under conditions of freedom.[17] For neoliberalism, by contrast, the foundational notion is competition. And as discussed in Chapter 2, this meant that the market should no longer be left to its own devices, but rather must be produced constantly by the state via regulation of the conditions of the market.[18]

With the shift from liberalism to neoliberalism, therefore, came a shift in the anthropology of "homo economicus" from a creature of exchange to a creature of competition.[19] The creature of exchange, the *'worker'* of classical liberalism, is a figure to be analyzed in terms of a utilitarian theory of needs.[20] That is, the worker's manner of behavior can be understood in terms of the utilitarian exchange of labor for wages, and wages for consumable goods.

The creature of competition, on the other hand, extends this utilitarian logic far beyond simple exchange in the marketplace. Neoliberalism reconceives all of human activity—not just activity in the market—as driven by the allocation of scarce resources (time, money, attention

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[16] As Frederic Jameson writes: " 'The market is in human nature' is the proposition that cannot be allowed to stand unchallenged; in my opinion, it is the most crucial terrain of ideological struggle in our time." Frederic Jameson, *Postmodernism; Or, the Cultural Logic of Late Capitalism* 263 (1991).

[17] *See supra* Chapter 2, Section 2.2.3.

[18] *See supra* Chapter 2, Section 2.2.4.

[19] *See* Jason Read, "A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity," 6 *Foucault Studies* 25, 28 (2009).

[20] *See* Trent Hamann, "Neoliberalism, Governmentality, and Ethics," 6 *Foucault Studies* 37, 53 (2009).

span, and so on) in pursuit of personal satisfaction (whether in the form of status, love, money, pleasure, or any other goal). Importantly, this moves away from a notion of "labor" and the "worker," and toward a notion of "*human capital.*"[21] Any activity that increases an individual's capacity or resources (from education to migration to plastic surgery) is an investment in human capital. Salary or wages and general satisfaction are reconceptualized as a return on the investment of that human capital. Consumption itself is reconceptualized as an investment in human capital.[22] Thus, as Foucault writes, "Homo economicus is an entrepreneur, an entrepreneur of himself."[23]

This entrepreneurial subject is an atom of self-interest, fully responsible for his or her own choices. Responsibility is purely individual: those who fail to succeed in this order have no one to blame but themselves. Social and economic effects are de-politicized. Technologies of agency and involvement such as self-help, personal improvement, voice, negotiation, and privatization are legion.[24] And technologies of performance such as indicators and benchmarks provide the measuring sticks by which subjects are called to self-assess.[25] Pierre Bourdieu, for example, describes this new subjectivity in the context of the workplace:

> Competition is extended to individuals themselves, through the individualization of the wage relationship: establishment of individual performance objectives, individual performance evaluations, permanent evaluation, individual salary increases or granting of bonuses as a function of competence and of individual merit; individualized career paths; strategies of 'delegating responsibility' tending to ensure the self-exploitation of staff who, simple wage laborers in relations of strong hierarchical dependence, are at the same time held responsible for their sales, their products, their branch, their store, etc. as though they were independent contractors. This pressure toward 'self-control' extends

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[21] There is a fascinating link here between neoliberalism and Marxist thought. As Jason Read explains, Marx and the neoliberals agree that classical liberal economic theory, by ignoring production, failed to examine the details of how capital is created. However, where Marx went on to see labor as a sphere of exploitation, neoliberals deal with this problem by erasing the difference between 'worker' and 'capitalist' with their theory of 'human capital'. Read, *supra* note 19, at 31. In other words, under neoliberalism, we are all capitalists.

[22] Hamann, *supra* note 20, at 53.

[23] Foucault, *Birth of Biopolitics*, *supra* note 12, at 226.

[24] *See* Chapter 4, Section 1.3. *See also* Sam Binkley, "The Work of Neoliberal Governmentality: Temporality and Ethical Substance in the Tale of Two Dads," 6 *Foucault Studies* 60 (2009) (examining the self-production of neoliberal subjectivity through an analysis of the popularity of self-help blockbuster *Rich Dad/Poor Dad*); Barbara Cruikshank, "Revolutions Within: Self-Government and Self-Esteem," 22(3) *Economy and Society* 327 (1993); Barbara Cruikshank, "The Will to Empower: Technologies of Citizenship and the War on Poverty," 23(4) *Socialist Review* 29 (1994).

[25] *See* Chapter 4, Section 1.3.

> workers' 'involvement' according to the techniques of 'participative management' considerably beyond management level. All of these are techniques of rational domination that impose over-involvement in work (and not only among management) and work under emergency or high-stress conditions. And they converge to weaken or abolish collective standards or solidarities.[26]

The market subject is regulated in his or her entrepreneurial capacity, with a view to producing additional 'choice' or 'human capital'. The new entrepreneurial subject is a '*stakeholder*', rather than a '*citizen*', and desires to be included in governing decisions as such—to the extent that they have some impact on its individual interests. The task of the entrepreneurial subject is not to benefit the state, or to exercise individual rights, but to pursue self-interest:

> Not only may each pursue their own interest, they must pursue their own interest, and they must pursue it through and through by pushing it to the utmost, and then, at that point, you will find the elements on the basis of which not only with the interest of others be preserved, but will thereby by increased.[27]

Interest, investment, and competition are the watchwords of neoliberal subjectivity. The role of the state, therefore, is to channel individual interest by means of strategic interventions into the conditions of the market. Since individuals 'choose' rationally on the basis of cost benefit analysis with regard to maximizing their interests (broadly conceived),[28] regulation should proceed by making desirable activities easy or inexpensive, and undesirable activities costly.[29] Government thus operates by manipulating interests and desires through strategic

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[26] Pierre Bourdieu, "The Essence of Neoliberalism," *Le Monde Diplomatique*, December 1998 (Jeremy J. Shapiro trans.), *available at* http://mondediplo.com/1998/12/08bourdieu (last accessed 15 August 2014).

[27] Foucault, *Birth of Biopolitics*, *supra* note 12, at 275.

[28] Where rationality could be defined as broadly as neoliberal economist Gary Becker posits: as the choices of actors whose conduct "accepts reality" by responding systematically to environmental variables. Gary Becker, "Irrational Action and Economic Theory," 70(1) *Journal of Political Economy* 153, 167 (1962).

[29] *See* Read, *supra* note 19, at 29. The idea of the "nudge" is a perfect example of this model of government according to neoliberal principles. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008). So too is the recent shift in migration law in the United States away from 'detention and deportation' and toward 'attrition through enforcement'—that is, the idea that strict enforcement of laws such as requiring social security numbers or identification for renting housing, sanctions on employers who hire undocumented workers, and so on will cause undocumented persons to leave a particular state because the 'cost' of 'doing business' there is too high. Kris W. Kobach, "Attrition Through Enforcement: A Rational Approach to Illegal Immigration," 15 *Tulsa Journal of Comparative and International Law* 155 (2008).

management, rather than by upholding rights and obligations, and re-positions much of what was formerly understood as social and political within the domain of self-governance.[30]

The freedoms or rights of the market subject (unlike the subject of rights) are not transcendental, universal, or abstract, but primarily instrumental: entrepreneurial subjects possess rights insofar as and to the extent that it is useful and efficient for them to do so. In other words, rights are means for the achievement of specific governmental ends. The task of government is to serve as *referee* to individual market players. It is to provide the conditions necessary for the operation of the market, within which individual entrepreneurial subjects make their own free choices regarding the investment of their human and other capital. It must seek therefore maximize individual freedom. But the referee must also direct this freedom in pursuit of countervailing (evidence-based, expertly crafted) governmental security objectives, such as the need for public order or the management of the life and health of the population. The government of the entrepreneurial subject is required to be expert, effective, and nondiscriminatory.

The 'market subject' in this chapter will generally be referred to as the '*stakeholder*'. However, as with the subject of rights, within the broad category of market subjectivity there exist a multitude of different figures that combine different elements of the tendencies described above. For example, *free market*-oriented market rationality might produce subjects such as the *worker* and *capitalist* of classical liberal origin, while *human capital*-oriented market rationality might be associated with subjects such as the *social investor* or the *self-improver*. As with the subjects of rights, the potential variations within the broad category of market subjects are countless. However, they all share a common link in that they perceive the individual both normatively and ontologically as an interest-pursuing subject linked to other individuals and to society by (political-) economic interaction.

Again, the point here is not to identify all of the guises in which the market subject might appear, but to give an impression of the basic forms that 'the *stakeholder*' might take, and to emphasize the profound distinction between subjects of rights and market subjects—between *citizens* and *stakeholders*.

1.4 Chapter Outline

In the introduction to her edited volume *Europe and the Other and Europe As the Other*, Bo Stråth writes of Europe as "a discourse which is translated into a political and ideological

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[30] *See* Hamann, *supra* note 20, at 40.

project."[31] "If Europe has a meaning," she provocatively writes, "it is as a political programme"[32] Chapters 3 and 4 attempted to describe the ways in which this political program that is the EU can take on various forms and projects according to the particular rationalities driving governmental decision-making. As these rationalities play out, the political program of Europe also entails the formation of certain identities among those who produce and are subject to it. Europe's identity is bound up with the way individuals both within and outside the EU imagine Europe, and understand themselves.[33] As individuals internalize these subjectivities they help, in turn, to perpetuate the rationalities from which they stem, as they guide governors and governed to conduct themselves in accordance with particular types of knowledge about the way the world does and should work. In this sense, even speaking of 'the EU' in the first place is not innocent, but is rather a political act that helps to inscribe the notion of a bounded and distinct 'Europe' into individual consciousness.[34]

Having described in Section 1 the basic forms of the rights and market subjectivities, which this chapter refers to as the *citizen* and the *stakeholder*, Section 2 will continue by providing a general overview of the authors and objects of the EU's environmental norm export policies with a focus on subjectivity. The goals here are twofold. First, Section 2 seeks to continue the mapping exercise outlined in Chapter 1 by arguing that, as with the rights and market rationalities and technologies described in Chapters 3 and 4, these subjectivities coexist alongside one another in the realm of EU policy in general, and in the context of EU environmental norm export in particular. These subjectivities are interrelated, non-exclusive, and appear in complex ways within the regime of practice analyzed in this dissertation.

Second, Section 2 sets the stage for Section 3.4's argument regarding the implications of the coexistence of market and rights subjectivities by identifying some of the strata along which they subdivide one individual or group from another. In particular, it makes three basic points regarding the production of subjectivities in the EU. First, Section 2.1 argues that these subjectivities are multiple and multi-level, existing within and across several 'levels' of government. The EU is bound up with the production of subjectivities among the governed

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[31] Bo Strâth, "Introduction: Europe as a Discourse," in *Europe and the Other and Europe as the Other* 13, 14 (Bo Strâth ed., 4th ed. 2010).

[32] *Id.*

[33] This is not unique to the European context: as Benedict Anderson famously wrote, all nations are imagined communities. Benedict Anderson, *Imagined Communities* (1991).

[34] *See, e.g.,* David Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia* 33-81 (1998) (describing the discursive move exhibited in this type of statement as "ontopological" in that it both presumes and constructs a natural, territorially defined entity that is hierarchically superior to alternative notions).

and governing inside its borders, in the interactions between internal and external politics, and with respect to governed and governing outside its borders. And at each of these levels, the subjectivities produced are not simple, but are rather multiple, coextensive, and overlapping. Second, Section 2.2 argues that the production of these multi-level subjectivities involves processes of division and 'othering'—that is, of defining an 'other' in comparison with the European 'self'. These 'others' can be geographical, cultural, or temporal, among other things. Finally, third, Section 2.3 argues that the production of these multiple subjectivities, which entail the designation of 'others', also produce identities *for* these 'others', though these subjectivities, too, may be contested. Each of these elements of subjectivity is important for understanding the way that stakeholders and citizens coexist within EU environmental norm export practice, and for understanding the impact of these processes.

Section 3 will then provide a concrete example of how these subjectivities appear in practice. It will take as its example the EU's recently adopted ban on the import and trade in seals and seal products—a final topical illustration of contemporary practices of EU environmental norm export. Focusing on the ongoing *EU–Seals* dispute before the WTO, it will explore the ways in which the EU and third state subjects are constituted in and through these discussions.[35] Section 3.1 will begin by introducing the background of the ban on seal products. Section 3.2 will then turn to an explanation of how the EU and its others appear as both *citizens* and *stakeholders* in this example of EU environmental norm export. In particular, it will reflect on the identities implied by statements of the various EU agencies and bodies responsible for drafting the seals legislation, statements made by EU representatives and those of its opponents in the *EU–Seals* case currently making its way through the WTO, as well as various sources outlining the objections of third states to the EU's activities in this area. Finally, Section 3.3 will turn to the implications of the presence of these multiple, overlapping subjectivities in EU environmental norm export. It will argue that these subjectivities are politically productive, in that they allow for strategic action on the part of the EU and its others even as they limit the perceived possibilities for political action. However, it will also argue that because these subjectivities are always subject to contestation, these limitations are themselves ultimately always open to challenge and resistance.

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[35] Panel Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, 25 November 2013 [hereinafter *EU–Seals* Panel Report].

Finally, Section 4 summarizes the arguments made in this chapter, and offers some concluding thoughts on the significance of these subjectivities for the practice of EU environmental norm export.

2 Citizens and Stakeholders in EU policy

2.1 Subjectivity as Multiple and Multi-Level

How does EU policy conceive of the subject? The answer to this question is not simple, but rather multiple and multi-level. It can be answered by reference to EU citizens, to EU Member States, to different institutional components of EU government, to the 'EU' conceived as a whole, to the 'European Neighborhood', to developing countries, or to third states more generally, among other categories. And within these categories, identities are unstable, and can exist alongside one another, overlap with one another, and even be in conflict with one another—sometimes within the selfsame person or entity.

At each of these levels, however, both market and rights subjectivities are visible. The *stakeholder* and the *citizen* appear alongside one another within the internal EU context, in the interaction between EU internal and external policy, and in the EU's relations with the wider world. The point here is to emphasize that though this dissertation is focused primarily on the relationship between EU external policies and third states, internal and inter-institutional politics also play an extremely important role in defining the EU's policy positions. As such, they help to constitute identity by marking a distinction between the EU and third states. In this context, the EU might appear as a leader, a protectionist, a populist, a globalizer, a free trader, or any number of other positions depending, in part, on the outcome of these internal struggles. These identities, in turn, play a role in defining the subject-positions through which the EU will interact with third states and their nationals.

Stakeholders and Citizens inside the EU: The 'Demos' Debates

One of the most conspicuous places in which the drama of subjectivity can be seen to play out in the EU is with respect to the internal debates over the meaning of European citizenship. Europeans have historically understood their identity in relation to national original. 'European-ness' is sometimes seen as in tension with nationality, sometimes as supplemental to nationality, and sometimes as a possible replacement for nationality, or some parts thereof.[36] Joschka Fischer once wrote that the challenge is to find a balance

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[36] Strâth, *supra* note 31, at 14.

between a 'Europe of nation-states' and a 'Europe of citizens.'[37] But what is a 'Europe of citizens'? Who are these individual subjects that are governed by the EU? And what type of Europe is required to govern them?

William Walters and Jens Henrik Haahr argue persuasively that the notion of European citizenship initially displayed a very strong orientation toward viewing individuals as *stakeholders* in the European project.[38] The original Rome treaty makes no mention of 'citizenship'—a category that was left within the purview of national governments. It does, however, include several other subject categories divided on the basis of economic and social interest. As discussed in Chapter 3, the four freedoms were paramount in terms of individual rights. But they are intended specifically to promote the rights and benefits of economic citizens, for economic purposes.[39] These freedoms and entitlements are not broad-based assertions of right against government authority, but instead are limited claims of freedom in the context of economic productivity. The right to freedom of movement, for example, is really a "right to seek employment,"[40] and is valid only insofar as it does not conflict with other governmental considerations.[41]

Similarly, early social programs were directed at the individual not as a *citizen* participant in a social contract, but as an economic *stakeholder*. Benefits and social security, for example, were provided primarily as a support for the freedom of movement of workers.[42] Article 193 provides that:

> There shall hereby be established an Economic and Social Committee with consultative status.
>
> The Committee shall be composed of representatives of the various categories of economic and social life, in particular, representatives of

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[37] Joschka Fischer, *Vom Staatenverbund zur Föderation* (speech at Humboldt University on 12 May 2000), Frankfurt 2000.

[38] William Walters & Jens Henrik Haahr, *Governing Europe: Discourse, Governmentality and European Integration* 47 (2005).

[39] *See* Chapter 3, Section 2.1.1.

[40] *Id.*

[41] Consolidated Version of the Treaty on the Functioning of the European Union, 30 March 2010, 2010 O.J. (C83) 47 [*hereinafter* TFEU], at Art. 45(3) (Freedom of movement shall be "subject to limitations justified on grounds of public policy, public security or public health").

[42] *See Id.* at Art. 48 ("The European Parliament and Council ... shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers").

> producers, agriculturalists, transport operators, workers, merchants, artisans, the liberal professions and of the general interest.[43]

The rights and entitlements of subjects, as described in these paragraphs, are related not so much to their intrinsic characteristics as individuals or democratic citizens, but rather to their participation in economic processes.[44] This is true of many subjects of European social policy, which covers primarily matters relating to labor, unemployment, workers' rights, industrial health and safety, and nondiscrimination, rather than the traditional domains of social policy at the national level: social protection, basic income support, and income redistribution.[45]

The *stakeholders* to whom these rights and freedoms are granted are portrayed as the objects, rather than the authors, of governmental activity. The Treaties call on Member States for help in setting and maintaining the conditions necessary for the development of entrepreneurial actors. For example, Member States are to establish programs to foster and encourage individuals to seek employment across borders by the establishment of a young workers' exchange program[46] and the "abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."[47] Ensuring these entrepreneurial rights is important not because they are "inherent" or "natural" or "unalienable" to the "citizen," but because they are instrumental for securing the governmental objective of freedom of movement for workers, and thus the broader political program of economic integration.

The form of government required to administer these stakeholders is not a democratic representative of citizens, but an efficient referee of a regulated economy—flexible, expert, and effective.[48] Such a government is a facilitator of individual entrepreneurial activity—not the

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[43] Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11 (effective 1 Jan. 1958) [*hereinafter* Treaty of Rome], at Art. 193.

[44] Walters & Haahr, *Governing Europe*, *supra* note 38, at 47-48.

[45] Majone, for example, has proposed an EU 'regulatory model' of social policy that draws its legitimacy from resolving problems created by market failures, rather than from traditional social policy concerns such as redistribution. The EU's legitimacy, according to this arguments, rests on the separation of redistribution from efficiency, and an exclusive focus on the latter. Thus, the EU engages in social policy only to the extent that it enhances economic efficiency. Giandomenico Majone, *Regulating Europe* (1996). There are, of course, redistribution programs that do exist at the EU level—notably with regard to agricultural policy and territorial inequalities. However, even these redistributive programs are inter-state and sectoral, rather than focusing on income groups.

[46] TFEU, *supra* note 41, at Art. 47.

[47] *Id.*, at Art. 45(2).

[48] Michael A. Peters has written usefully about what he terms 'third way governmentality'—the governmental structure associated with the so-called 'third way' politics of the 1990s, particularly in the UK. He argues that 'third way' governments like that of Tony Blair inspired a shift in the subjectivity of the governed toward an understanding of citizenship based around a flexible consumer orientation. This new figure of the citizen-consumer, in turn, required new forms of government, and thereby inspired changes in funding, the public-private balance, and systems of accountability. Michael A. Peters, "Education, Power and Freedom: Third Way

embodiment of the collective social contract that binds individuals together on the basis of group identity or rights protection. It is a government concerned not with substantive equality, but with non-discrimination. It is a government whose legitimacy is founded in expertise and effectiveness, not in representativeness and democracy. It is, in other words, a referee, setting and enforcing rules to ensure maximum efficiency and fair play.

Since these early days as a market institution, however, the perceived problem of the 'democratic deficit' has led to a number of changes in EU policy.[49] Most importantly, from the perspective of EU citizenship, is the attempt beginning in the Amsterdam Treaty to define a 'political identity' for the EU and to formulate new sets of rights for individuals living in the EU. The idea of drafting a Charter of Basic Rights was to push the ECJ and other European institutions beyond the narrow confines of the 'four freedoms' of market participation and to articulate a social vision of Europe. The Lisbon period has promised a new model of social policy that focuses on social exclusion.[50] In other words, these changes have sought to produce and engage not just *stakeholders* in the European project, but also European *citizens*.

Jürgen Habermas has been a prominent theoretical backer of the project of a constitutional, social Europe populated by *citizens*. Habermas argues that it is necessary to build a 'constitutional patriotism' that would inscribe many features of the nation-state at the EU level and in order to counter the extremes of a market-oriented Europe. He writes:

> [The neoliberal] conception of freedom is linked with a normatively
> diminished conception of the person. The concept of the person as a

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Governmentality, Citizen-Consumers and the Social Market," 2 *Contemporary Readings in Law and Social Justice* 15, 25-29 (2010). In a similar vein, Needham writes of "Labor's new marketplace democracy," which remodels the relationship between state and citizen along consumerist lines:

> To claim that citizens are being treated as consumers is to say that the government-citizen relationship is replicating patterns of choice and power found in the private economy. The consumer is primarily self-regarding, forms preferences without reference to others, and acts through a series of instrumental, temporary bilateral relationships. Accountability is secured by competition and complaint, and power exercised through aggregate signaling.

Needham, *supra* note 11, at 6.

[49] *See, e.g.,* Frank Decker, "Governance Beyond the Nation-State: Reflections on the Democratic Deficit of the European Union," 9(2) *Journal of European Public Policy* 256 (2002); Giandomenico Majone, "Europe's 'Democratic Deficit': The Question of Standards," 4(1) *European Law Journal* 5 (1998); Thomas W. Pogge, "Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit," 5(2) *Journal of Political Philosophy* 163 (1997).

[50] For an assessment of EU social policy in the Lisbon period, *see* Mary Daly, "Whither EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process," 37 *Journal of Social Policy* 1 (2007).

> "rational decider" is not only independent of the idea of the moral person who determines her will through an insight into what is in the interests of all those affected; it is also independent of the concept of the citizen of a republic, who participates in the public practice of self-legislation under equal rights. Neoliberal theory deals with private subjects who "do and permit what they will" according to their own preferences and value orientations within the limits of legally permissible action. They are not required to take any mutual interest for one another; they are thus not equipped with any moral sense of social obligation. The legally requisite respect for private liberties that all competitors are equally entitled to is something very different from the equal respect for the human worth of each individual.[51]

In Habermas's view, then, the stakeholder subjectivities created by market rationalities are fundamentally incompatible with the pursuit of democratic ideals, which find their roots in a sense of solidarity and community. Europe, he argues, needs more than just market sensibilities to hold itself together: it needs *citizens*, bound together in a social contract.

The form of government required to administer these *citizens* is quite different than that required to administer *stakeholders*. It requires opportunities for individual democratic participation. It values culture, affect, and the creation of a 'demos'. It derives its legitimacy not from efficient and effective management, but from its representation of the shared commitments of the governed. It is concerned with equality rather than nondiscrimination, and with democracy rather than expertise. It is not just a referee: it is the democratic representative of a polity.

Both the *stakeholder* and *citizen* are present today within the internal EU context. Though the general trend over the last decade has been a shift away from the former set of subjectivities and toward the latter, the EU also retains a strongly market-based relationship with the individuals it governs.[52]

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[51] Jürgen Habermas, *The Post-National Constellation: Political Essays* 94 (2001).

[52] Van Apeldoorn, for example, argues that Lisbon's social policies should still be read primarily in neoliberal terms:

> The Lisbon Agenda thus tends to define 'the social' mainly in terms of the adaptability of the labour force to the exigencies of competitiveness in a globalized world economy. ... Combining competitiveness and social cohesion thus involves a shift from the 'old' idea of supranational market-*correcting* regulation (as advanced by the Delorist social democratic project) towards a market-*enabling* strategy.

EU Subjectivity Inside-Out: Institutional Politics and External Policy

In addition to these internal debates regarding the nature of the EU as a governor and the nature of the individuals that it governs, subjectivity is also constructed in the space between the EU's internal institutional politics and its external policy projects. Indeed, some commentators contend that inter-institutional politics at the EU level have been particularly important in the context of EU environmental norm export. And the subjectivity map is equally complex and multiple at this 'inside-out' level.

One argument along these lines highlights the role of the European Parliament in the formation of EU external trade/environment policy. As the Parliament's authority has increased, it has attempted to introduce social and environmental themes into the EU's external trade relations policies.[53] As described in Chapter 4, for example, it was the European Parliament that continuously spoke out against the conclusion of the EU–Colombia Peru FTA, refusing to give its consent to the legislation without assurances that strong labor and environmental protections were in place.[54] This has had an impact on the way that the EU presents itself internationally. Through these insertions, as Karen Smith argues, topics such as "respect for human rights [are] already felt to form part of the EU's international identity."[55] R. Daniel Kelemen, too, notes that "it does seem likely that the EU's desire to establish an identity and a reputation as a 'normative power' encouraged EU leadership on global environmental issues."[56] A number of scholars have argued that this bullish attitude toward social and environmental conditionality is the result of the Parliament's struggle for influence against the other European institutions. Foreign policy is one place where the Parliament is able to raise its profile on popular issues and imprint itself

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Bastiaan van Apeldoorn, "The Contradictions of 'Embedded Neoliberalism' and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits," in *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon* 21, 29 (Bastiaan van Apeldoorn, Jan Drahokoupil & Laura Horn eds. 2009) (references omitted).

[53] Flavia Zanon makes this argument quite pointedly:

> The promotion of human rights and the rule of law … is a matter on which the [EP] can easily build an internal consensus and show significant cohesion, enhancing its chances of playing a more effective role within the EU … [The] promotion of these values generally meets public opinion's concerns and allows the body to mobilize media attention, reinforcing the possibility of making its voice heard.

Flavia Zanon, "The European Parliament: An Autonomous Foreign Policy Identity for the European Parliament?," in *The Role of Parliaments in European Foreign Policy: Debating on Accountability and Legitimacy* 16 (E. Barbe & A. Herranz, eds. 2005); Karen E. Smith, "The EU, Human Rights and Relations with Third Countries: 'Foreign Policy' with an Ethical Dimension?" in *Ethics and Foreign Policy* 185 (Karen E. Smith & Margot Light eds. 2001).

[54] *See* Chapter 4, Section 3.1.

[55] Smith, *supra* note 53, at 203.

[56] R. Daniel Kelemen, "Globalizing European Union Environmental Policy," 17(3) *Journal of European Public Policy* 335 (2010).

as a representative of the concerns of EU citizens—as is perhaps visible in the case study regarding the ban on seal products discussed below.[57] As the entity on which many place their hopes for overcoming the EU's internal 'democratic deficit', it makes sense that the Parliament would take a *citizen*-oriented position that emphasizes the EU's culture, rights, and leadership. It positions itself as a representative of the will of the people, rather than as the efficient manager of their economic interests.

Other scholars highlight the role of the European Commission in shaping the EU's policies 'inside-out'. Unlike the Parliament, the Commission is often seen as occupying a more *stakeholder*-oriented market-sensitive outlook.[58] This has had an influence on the Commission's external role, as well. Andreas Dür and Hubert Zimmerman argue that the Commission's internal power is enhanced by the successful conclusion of trade agreements, which leads it to push for the start of trade negotiations.[59] In the environmental field, Hans Vedder argues that the Commission's central role in ensuring undistorted competition in the internal market has contributed to its preference for market mechanisms in the fight against climate change.[60]

In addition to providing a stage for inter-institutional politics, EU external policy can also be perceived as a useful space for performing European identity for both internal and international audiences. Internally, for example, external policy has sometimes been used as a rallying point for pro-EU forces.[61] Anand Menon recently published a study of the EU's security and defense policy (ESDP) in which he noted that there is a tendency to see the ESDP program as being as much about integration as it is about security. As he notes, "ideas for institutional engineering [in ESDP] are sometimes dominated as much by attitudes toward integration as by military capabilities."[62] In Menon's estimation, it is those Member States who are enthusiastic about integration—not those who actually conduct military operations—that tend to favor ESDP. The purpose of the ESDP, in other words, is to affirm

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[57] *See infra* Section 3.

[58] It should be noted, however, that the Commission is also plagued by internal divisions among the various Directorates. DG Trade, for example, has been seen as more market-oriented and globally focused, whereas DG Agriculture has defended the protectionism of the EU's southern Member States. *See* Jan Orbie, "The European Union's Role in World Trade: Harnessing Globalisation?" in *Europe's Global Role: External Policies of the European Union* 35, 48 (Jan Orbie ed. 2012).

[59] Andreas Dür & Hubert Zimmermann, "Introduction: The EU in International Trade Negotiations," 45(4) *Journal of Common Market Studies* 771, 777 (2007).

[60] Hans Vedder, "The Formalities and Substance of EU External Environmental Competence: Stuck Between Climate Change and Competitiveness," in *The External Environmental Policy of the European Union: EU and International Law Perspectives* 11, 23 (Elisa Morgera ed. 2012).

[61] *See, e.g.,* Chris Patten, *Not Quite the Diplomat: Home Truths about World Affairs* 148-9 (2005) (identifying the EU's enlargement to Turkey as a source of internal spiritual and moral renewal).

[62] Anand Menon, "Empowering Paradise? The ESDP at Ten," 85(2) *International Affairs* 227, 241 (2009)

the EU's actorness, rather than to accomplish a particular security goal. Christopher Bickerton argues that the EU's mission in Bosnia, *Althea*, is a striking example of this trend.[63] Bickerton tellingly describes how the then-High Representative for Common Foreign and Security Policy, Javier Solana, gave the commander of the *Althea* mission only one piece of advice on how to organize the intervention: that the mission should "make a difference" and be "new and distinct."[64] An important goal of the ESDP mission, in this reading, was to serve "the ontological purpose of building the EU's international identity."[65]

In a similar vein, EU environmental norm export policies might also serve both internal and external policy ends. In addition to its position as 'moral leader', the EU also appears in its external environmental policy as self-interested, concerned with protecting its own rights and competitiveness. Environmental norm export policies might involve an appeal to European distinctiveness, its own "values," and its "integrity." They might entail a concern for the support of EU 'workers' who may be harmed if international producers are not required to meet the same environmental standards as Europeans. Daniel Kelemen, for example, explains the EU's environmental leadership as the product of 'regulatory politics': a desire to promote the competitive interests of the EU by supporting international environmental rules that would 'level the playing field' for EU producers burdened by higher domestic regulatory standards and shield the EU from legal challenges before international trade bodies.[66] They may also involve a desire for a form of international governance that can protect the EU's right to act within its own sphere of competence by maintaining and strengthening international law and safeguarding and protecting stability. Or these policies may stem from 'enlightened self-interest' and the belief that support for the 'rules of the game' such as the rule of law,[67] consistency and coherence,[68] principles of international law, multilateral

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[63] Christopher J. Bickerton, "Functionality in EU Foreign Policy: Towards a New Research Agenda?," 32(2) *Journal of European Integration* 213, 223 (2010)

[64] *Id.* (quoting D. Leaky, "ESDP and Civil/Military Cooperation: Bosnia and Herzegovina," in *Security Europe? Implementing the European Security Strategy*, 59, 64 (A. Deighton & V. Mauer eds. 2006)).

[65] *Id. See also* Damien Helly, "Assessing the Impact of the European Union as in International Actor," in *Securing Europe? Implementing the European Security Strategy*, 79, 84, 100, 101 (A. Deighton & V. Mauer eds. 2006); Ulrike Guérot, "State-Building and the EU's Supranational Momentum," *European Council on Foreign Relations*, 8 Feb. 2008, *available at* http://www.ecfr.eu/content/entry/commentary_state_building_in_the_eu_and_kosovo (last accessed 15 August 2014) (arguing that the EU "should let Kosovo be the catalyst for more creativity about what we want to achieve with the EU").

[66] Kelemen, *supra* note 56, at 336.

[67] On the international rule of law as liberal governance, *see* Nikolas M. Rajkovic, " 'Global Law' and Governmentality: Reconceptualizing the 'Rule of Law' as Rule 'Through' Law," 18 *European Journal of International Relations* 29 (2012).

[68] For more on the importance of consistency and coherence in EU external affairs, *see* Simon Duke, "Consistency, Coherence and European Union External Action: The Path to Lisbon and Beyond," in *European Foreign Policy: Legal and Political Perspectives* 15 (Panos Koutrakos ed. 2011); Marise Cremona, "Coherence in European Union Foreign Relations Law," in *European Foreign Policy: Legal and Political Perspectives* 55 (Panos Koutrakos ed. 2011).

cooperation, 'good global governance', and the promotion of free trade will ultimately entail a bigger, more competitive, and more productive market for all.

The EU as Multiple Subject: the Many Faces of EU External Policy

The EU's subjectivity also plays out on another level: that of external policy vis-à-vis third states. In the international context, it becomes evident how not only individuals and institutions, but also the EU and the other states with which it interacts are constructed as subjects through the governmental rationalities that structure their behavior. As it turns toward the external realm, the EU presents many faces that can shift depending on the party being addressed, the issue being discussed, and the perspective of the EU and its interlocutor. The EU and those it addresses are conceived both as *citizens* and *stakeholders*, as rights-bearing members of the world community, and as interest-maximizing entrepreneurs in a global market of exchange.

One area in which the EU has defined its subjectivity particularly clearly is in the context of EU membership candidacies. Where other countries seek to become part of the EU, they must present themselves as conforming to a set of European standards, primarily those set out in the Copenhagen criteria. The Copenhagen criteria spell out what the EU is, or desires to be. These were not the only possible criteria that could have been chosen. Interestingly, Thomas Risse argues that the EU's Copenhagen criteria are an example of a "sacred identity," a term coined by sociologists Shmuel Eisenstadt and Bernhard Giesen in 1995. As Risse describes:

> [S]*acred* identity constructions [] contain strong differences between the in-group and the out-group and this metacontrast implies strong negative evaluations toward the "others." But sacred identities include the possibility that members of the out-group convert to the "right cause" or the "true faith" and, thus, become part of "us." The EU's Copenhagen criteria constitute a typical example of a sacred identity. Democracy, human rights, the rule of law, and the market economy are considered superior to other political, economic, and social orders and they are constitutive for the EU. But other countries can convert by becoming liberal democracies and opening up their economies and then gain membership in the club.[69]

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[69] Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres* 27-28 (2010).

Milja Kurki argues that the EU's external policy strongly reflects a market mindset: "Coinciding with the push for a new model of active European citizenship within the borders of the expanded Union, the European Union's external policies too have turned to the facilitation of the emergence of self-sufficient, innovative, critical, and entrepreneurial citizens and civil society organizations in the Union's 'neighborhood' and 'third countries'."[70]

The multiplicity of the EU's external subjectivity will be further demonstrated in Section 3, in the context of the *EU–Seals* WTO dispute. For now, however, the primary point is to emphasize that the EU's subjectivity is a complex phenomenon—one that is constructed across multiple levels of governmental activity, and by a wide array of individual, institutional, state, and intergovernmental actors. Both the *citizen* and the *stakeholder* appear at each of these levels, simultaneously shaping the EU's 'knowledge' about individual and state behavior, and the appropriate means and ends of government. Section 3 focuses on one limited case study of the way that these subjectivities play out in EU environmental norm export policy. However, it should not be forgotten that market and rights rationalities and their accompanying subjectivities are not static or simple, but are continually produced in the EU's advanced liberal governmentality, in the uncountable micro-interactions that take place among individuals, institutions, states, and organizations every day.

2.2 Subjectivity as Relational: the Production of 'Others'

In addition to being multiple and multi-level, subjectivities also entail processes of 'othering'. The formation of the EU's internal or external subjectivity always entails the creation of differentiated 'others'. Identities are built on difference.[71] It would make no sense to speak of an "I" if this did not imply a contrast with something or someone else (for instance, in the standard but immediately clear example of master/slave). These identities and their others are thus "radically interdependent": they are foundationally linked in a deep ontological

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[70] Milja Kurki, "Governmentality and EU Democracy Promotion: The European Instrument for Democracy and Human Rights and the Construction of Democratic Civil Societies," 5 *International Political Sociology* 349, 349 (2011) (citations omitted).

[71] Foucault identifies differentiation as one of the key aspects of subject-formation. As he says, an analysis of power requires an understanding of:

> *The system of differentiations* which permits one to act upon the actions of others: differentiations determined by the law or by traditions of status and privilege; economic differences in the appropriation of riches and goods, shifts in the processes of production, linguistic or cultural differences, differences in know-how and competence, and so forth. Every relationship of power puts into operation differentiations which are at the same time its conditions and its results.

Foucault, "The Subject and Power," *supra* note 1, at 792. *See also* William E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* (1991); Iver B. Neumann, *Uses of the Other: 'The East' in European Identity Formation* (1999); R.B.J. Walker, *Inside/Outside: International Relations as Political Theory* (1993).

sense.[72] These 'others' are not (or at least, not only) 'enemy images'.[73] Rather, they exist in vast differential and relational systems of meaning that help to construct subjectivity through shifting chains of inference. Such identity matrices can become quite complex, and invoke 'others' that exist in hierarchical forms, geographical forms, cultural forms, and temporal forms, among many others.

Us and Them: Europe's Geographical Others

With regard to external policy, some of the most commonly investigated 'others' of Europe are its geopolitical neighbors, friends, and rivals. Many international relations scholars, political scientists, anthropologists, and historians have written of attempts to construct a European identity in opposition to or in contrast with places like Russia,[74] the United States,[75] Turkey,[76] 'the East',[77] and the Balkans,[78] to name just a few. Geographical othering has been a fundamental aspect of constructing national identities in modern nation states. In order to pacify the domestic sphere and secure both internal unity and external security, states have historically imposed strong identity markers to distinguish the internal territory from the external.[79] 'Europe' in this sense, has long been constructed as a realm of safety, civilization, and prosperity in contrast with the violence, barbarism, poverty, or difference of the rest of the world. 'European identity', in many ways, has been built on these geopolitical constructs, and they remain influential—as we will see below in Section 3's case study of the

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[72] *See* David Campbell, *Politics without Principle: Sovereignty, Ethics and the Narratives of the Gulf War* 95 (1993); Thomas Diez, "Europe's Others and the Return of Geopolitics," 17(2) *Cambridge Review of International Affairs* 319, 322 (2004).

[73] Thomas Diez, for example, identifies four strategies of constructing 'self' and 'other', which include the representation of the other as an *existential threat*, as *inferior*, as *violating universal principles*, or as simply *different*. Thomas Diez, "Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe'," 33(3) *Millennium: Journal of International Studies* 613, 628-29 (2005).

[74] *See* Iver B. Neumann, "Russia as Europe's Other," 6(12) *Journal of Area Studies* 26, 28 (1998) (arguing that "the treatment of Russia is necessarily also an active part of the identity formation whereby Europe is being constructed and reconstructed").

[75] *See* John Borneman, "Is the United States Europe's Other?," 30(4) *American Ethnologist* 487, 488 (2003) (arguing that a "new form of subjectivity, the 'European', which looks more fragmented and incoherent the closer one gets to it, is nonetheless increasingly taking definition against the cultural practices of members of a particular other country, the United States"); Robert Kagan, *Paradise and Power* (2003).

[76] *See* Sabine Strasser, "Europe's Other: Nationalism, Transnationals and Contested Images of Turkey in Austria," 10(2) *European Societies* 177, 185 (2008) (arguing that "cultural anxieties concerning EU enlargement and anti-Turkish Muslims resentments have been shaping Turkey as 'Europe's other' during the preparation of EU accession negotiations").

[77] *See* Edward Said, *Orientalism* (1977).

[78] *See, e.g.,* Andrew Hammond, "Introduction," *The Balkans and the West: Constructing the European Other, 1945-2003* xi, xi (Andrew Hammond ed. 2004) (noting that "by the early 1990s [the Balkans] were already being reviled as an irredeemable other of Western civilization"); Maria Todorova, *Imagining the Balkans* 3 (2009) (stating that the fact that "the Balkans have been described as the 'other' of Europe does not need special proof"); K.E. Fleming, "Orientalism, the Balkans, and Balkan Historiography," 105(4) *American Historical Review* 1218 (2000) (arguing that the Balkans, because of its "simultaneous proximity and distance ... (the point of reference, geographical and cultural, being Western Europe), the sense that they somehow constitute the 'outsider within'," constitutes an 'other' to Europe—though perhaps not the 'other' of Said's *Orientalism*).

[79] *See* Diez, "Europe's Others," *supra* note 72, at 323.

EU–Seals WTO dispute, in which the image of Europe as a 'civilized' society was used to justify its desire to ban imports of seal products in light of the 'barbarism' of seal hunting.

Now and Then: Europe's Past as Temporal Other

Since the birth of the European Communities, however, Europe has also begun to define itself in opposition to another 'other': the temporal other of Europe's own past. This is explicitly referenced in the preamble of the TEU, which recalls "the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe."[80] Ole Waever has been particularly influential in describing this shift. As he wrote: "Europe's 'other' … is today not to a very large extent 'Islamic fundamentalism', 'the Russians' or anything similar—rather Europe's other is Europe's own past which should not be allowed to become its future."[81] Europe, that is, defines itself not just in contrast to a barbaric or violent or impoverished geographical outside, but also by holding up the example of the modern, prosperous, peaceful EU against the Europe of the great wars of the first half of the twentieth century. It is no great task to think of many instances in which calls for European integration are couched in terms of the need to avoid a retreat to the past. To give just one example, Joschka Fischer's argument in his famous Humboldt University speech in 2000 included the following passage:

> Fifty years ago almost to the day, Robert Schuman presented his vision of a 'European Federation' for the preservation of peace. This heralded a completely new era in the history of Europe. European integration was the response to centuries of a precarious balance of powers on this continent which again and again resulted in terrible hegemonic wars culminating in the two World Wars between 1914 and 1945. The core of the concept of Europe after 1945 was and still is a rejection of the European balance-of-power principle and the hegemonic ambitions of individual states that had emerged following the Peace of Westphalia in 1648, a rejection which took the form of closer meshing of vital interests and the transfer of nation-state sovereign rights to supranational European institutions.[82]

Some thinkers have argued that Europe's 'shift' toward temporal othering has been overall a hopeful phenomenon, as it is self-reflexive, and does not draw such strong 'friend/enemy'

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[80] Consolidated Version of the Treaty on European Union, 30 March 2010, 2010 O.J. (C 83) 13 [*hereinafter* TEU], at pmbl.

[81] Ole Waever, "Insecurity, Security and Asecurity in the West European Non-war Community," in *Security Communities* 90 (E. Adler & M. Barnett eds. 1998).

[82] Fischer, *supra* note 37.

distinctions as geographical othering. Thomas Diez, in particular, argues that temporal othering is "more open, geographically and culturally," and therefore provides "an opportunity to articulate spatial or cultural difference without the articulation of existential threats, because the main existential threat is related to the self."[83] Unfortunately, he continues, Europe has recently experienced a return to older-style geopolitical line-drawing:

> What we have been witnessing since the 1990s with the Maastricht Treaty and the end of the Cold War is a move from the construction of European identity through a temporal othering, which is not tied to fixed geographical borders and does not thematise territory explicitly, to the increasingly widespread construction of 'Europe' through practices of othering, in which identity, politics and geography are intimately linked with each other, and which can therefore be called 'geopolitical' otherings.[84]

He attributes this shift to the politicization of the notion of 'Europe' brought about by the end of the Cold War and Turkey's quest to join the EU, as well as to territorial fears linked to the attacks of 9/11 and the 2004 Madrid bombings that raised fears of the need to be secured from threats of 'Islamism' and illegal immigration.

Forward and Backward: Progressive Europe, Backward Others

Of course, temporal othering and geographical othering can also go hand in hand. European views of 'developing states', for example, invoke both notions of temporal and geographical difference, distinguishing an economically 'developed' Europe from a set of impoverished 'backward' third states.[85] And, indeed, any situation that evokes comparisons with Europe's

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[83] Diez, "Europe's Others," *supra* note 72, at 332.

[84] *Id.*, at 331.

[85] Historically, the idea of 'backwardness' propped up colonial-era discourses about Europe's place in the 'hierarchy of civilizations'. Martti Koskenniemi, *The Gentle Civilizer of Nations* (2001). Antony Anghie has written persuasively of the consequences of this view:

> [T]he characterization of non-European societies as backward and inferior played a large role in justifying both the conquest of these peoples and the civilizing missions undertaken by European powers—quite often acting in the name of the 'international community'—to remedy backwardness and barbarity.

Antony Anghie, "Civilization and Commerce: The Concept of Governance in Historical Perspective," 45(5) *Villanova Law Review* 887, 888 (2000). In exporting their economic, moral, and political values abroad, the European nations also constructed and developed their own identities. As Gayatri Spivak wrote, "[t]he colonizer constructs himself as he constructs the colony." Gayatri Chakrovarty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* 203 (1999). Europe's centrality reflected the peripheral nature of the colonies. The roots of political modernity lay in both internal European developments as well as in interactions with Europe's others. Jordan Branch usefully terms this process "colonial reflection": "the reflection of practices used

real or imagined past (with respect to economics, war, law, or nationalism, to name just a few examples) may be painted with the brush of the temporal/geographical other. In 2002, for instance, Romano Prodi compared the history of Bosnia and Herzegovina to "a potted version of Europe's own."[86] These temporal/geographical others can appear threatening to an advanced liberal Europe existing in what it perceives to be a 'globalized' world order, where threats can pour across borders in the blink of an eye. In a world where financial crises, disease, and war can move from 'backward' nations into Europe, these temporal others can quickly become geopolitical threats that must be addressed by European action or European intervention.

This temporal and geographical othering thus constructs the EU as being in the midst of a process of ongoing development.[87] This progress narrative inscribes a Europe in transition, evolving, reaching toward a hierarchically superior future.[88] As Habermas wrote in 2001 in a piece for *New Left Review*:

> What forms the common core of a European identity is the character of the painful learning process it has gone through, as much as its results. It is the lasting memory of nationalist excess and moral abyss that lends to our present commitments the quality of a peculiar achievement.[89]

This lends European identity an air of hierarchy: though modern Europe originated from a dark past, it *does* and *continues to* progress both culturally and practically. This progress narrative is evident, for example, in the preamble to the TEU, which refers to "a new stage in the process of European integration," the "construction of the future Europe," the promotion of "economic and social progress," "sustainable development," "advances in economic integration," "parallel progress in other fields," "the progressive framing of a common defence policy," promoting "peace, security and progress in Europe and in the

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first in colonial areas onto European internal political arrangements." Jordan Branch, " 'Colonial Reflection' and Territoriality: The Peripheral Origins of Sovereign Statehood," *European Journal of International Relations* (2011). Today the concept of 'backwardness' persists, albeit in a post-colonial context. For an in-depth look at the effects of the idea of 'backwardness' and 'development' in the contemporary international landscape, *see* Sundhya Pahuja, *Decolonizing International Law* (2011).

[86] Diez, "Europe's Others," *supra* note 72, at 327 (quoting Romano Prodi, "Europe beyond the Borders, Europe from Below," speech, Sarajevo, 6 April 2002).

[87] Walters & Haahr, *Governing Europe*, *supra* note 38, at 53.

[88] *See* Thomas Skouteris, *The Notion of Progress in International Law Discourse* (2009).

[89] Jürgen Habermas, "Why Europe Needs a Constitution," 11 *New Left Review* 5, 21 (September-October 2001).

world," continuing "the process of creating an ever closer union," and "advanc[ing] European integration."[90]

This European progress narrative applies in many areas of EU subject-formation. J. Marhsall, for example, argues that the EU affirms its culture as superior to that of the culturally 'backward' United States by means of elaborate references to the US's continued implementation of the death penalty.[91] Sibylle Scheipers and Daniela Sicurelli, similarly, describe how the EU othered the US in 'progress narrative' terms in the context of the negotiations over the International Criminal Court (ICC).[92] In particular, the EU contrasted its multilateralism with US unilateralism, its defense of international law with the US's attempts to undermine it, and its diplomatic tactics against the military tactics employed the US:

> In sum, the EU depicts itself as a multilateral actor in international relations who uses mainly diplomatic means and instruments to reach its objectives and whose main goal is to further international law. This positive self-representation stands in sharp contrast to the description of the US as a unilaterally acting military power that considers itself to be above international law.[93]

Interestingly, they characterize this position as involving a progress metaphor:

> [T]he relation between 'self' and 'other' that emerges with regard to the EU and the US in the statements quoted above is one of the 'other' as 'less' in the sense of lagging behind. The US is depicted as the *laggard*, whereas the EU holds the *vanguard* position in establishing the ICC.[94]

Citizens and Stakeholders and Others

Whether geographical, temporal, hierarchical, cultural, or making reference to narratives of progress, the 'others' of Europe are crucial to the production of subjectivity, allowing the EU to define itself and its citizens as an 'I' in contrast with an outside. This othering might imply inferiority, or it might rely on simple difference. And as discussed in Section 2.1, these

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[90] TEU, *supra* note 80, at pmbl.

[91] *See, e.g.,* Joshua Micah Marshall, "Death in Venice: Europe's Death-Penalty Elitism," 223(5) *The New Republic* 12 (2000).

[92] Sibylle Scheipers & Daniela Sicurelli, "Normative Power Europe: A Credible Utopia?," 45 *Journal of Common Market Studies* 435, 441-444 (2007).

[93] *Id.* at 444.

[94] *Id.* at 443-444.

'othering' processes and the subjectivities they create are themselves multiple, and multi-level. A single European identity construct can exist in relation to a multiplicity of others, and those others can be painted with multiple different brushes by the EU, depending on the time, place, and issue under discussion.

Where subjects are *citizens*, these self/other dichotomies will focus on divisions of right, power, and hierarchical authority. These might include such forms as: citizens/non-citizens; civilized/barbaric; legal/illegal; and so on. Progress will mean greater protection of rights, morality, democracy, and so on. Where subjects are *stakeholders*, by contrast, these dichotomies will focus on divisions of interest, economy, efficiency, and expertise. These might include such forms as: rational/irrational; evidence-based/unscientific; efficient/inefficient; and so on. Progress will mean greater reliance on expertise, more opportunities for human capital development, fewer barriers to exchange.

As will be seen more extensively in Section 3's case study on the *EU–Seals* WTO dispute, the EU acts as both a *citizen* and a *stakeholder* with respect to the other parties in the case. In doing so, it simultaneously paints them and their policies as 'others' to the EU. Whereas the EU is a good protector of its democratic citizenry, those challenging the EU's policies are invading its sovereign rights. Whereas the EU is constructing its policies on the basis of evidence, those challenge the EU's policies are unscientific in their approach. In inhabiting these *citizen* and *stakeholder* roles, therefore, the EU also assigns roles to those with whom it interacts, reading them as specific types of 'others' in opposition to the EU's self.

2.3 Construction and Contestation

The third and final point that this section seeks to make about European subjectivity is that in addition to being multiple and multi-level, and as such creating multiple selves in contrast with multiple others, subjectivity is also *inter*-subjective. That is to say, subjectivities are developed relationally, in the interactions between and among parties, rather than unilaterally. As discussed in Section 2.2, the development of subjectivity entails the *naming* of the various others it produces. As the EU constructs subjectivities through its external policy, it simultaneously assigns corollary subjectivities to those with whom it interacts. For example, if the EU is a global 'leader', acting as the representative of universal values, this implies a whole set of complementary identities, such as the 'follower', the 'student', the 'false leader', and so on. If it is a 'sovereign', then this implies the existence of other 'sovereigns'. If the EU is 'developed', this implies that there exist 'un-developed' and 'developing' states that do and should seek to become more like the EU. Some of these identities require the conception of a past and future (into which students can be led, and in which 'development' can occur),

whereas some are static (the eternal existence of sovereigns). Some imply a hierarchy (leader/student, or developed/developing), whereas some do not (equal sovereigns). However, all carry with them a set of assumptions about the drivers of individual behavior, the proper role of government, and the role of the EU in global society.

A fascinating example of this can be seen in a 2012 article from *This is Africa* reporting on an interview with EU Trade Commissioner Karl de Gucht. Speaking about the importance of EU-Africa Economic Partnership Agreements (EPAs), Mr. De Gucht paints a picture of EU-Africa relations that fits neatly into the pastoral mode:

> While the success of the EPAs should have obvious economic implications for Europe, they "are more important for Africa than for Europe," he argues. "That doesn't mean I don't believe in doing it—because I believe that Africa, finally, should have a sustained take-off—but the idea that we need the African market to develop and to recover is not necessarily true, because of the kind of products that we export. They can export much, much more to Europe than we can the other way."

> But to get agreements signed and ratified, Europe needs to push to prove the benefits of free trade. ... Mr. De Gucht says African governments "have to get acquainted with the reasoning that it's only by competition that they will make progress; that an industry cannot develop from infancy to maturity on its own, it can only do so with competition."

> ...

> The "best pupils," he says, "will realise that there are a certain number of ingredients, like state of the art services and logistics that they need to develop their economy, and to get that knowledge, one way or another, that will have to come from us."

> Here, African governments can learn a lesson from China, which opened up market access in the logistics sector because it "immediately understood that on logistics they needed us; that they could only export those products with our help," he says.

> But while different regional groupings are showing differing levels of ambition, Mr De Gucht hopes that over the next decade the agreements

> will converge in an increasingly broad framework—"Because it's the ambitious model that will deliver, and countries need to realise that," he says. "But probably better for them to realise that by themselves than we tell them—because if you tell that too loudly then you are considered to be lecturing, and that's certainly not what I want to do."[95]

Mr. De Gucht, here, clearly views the EU as a teacher, who seeks to lead African 'pupils' toward the promised land of economic development. The EU, he argues, is a selfless actor that receives comparatively little in return for the conclusion of EPAs, unlike Africa, which "can export much, much more to Europe than we can the other way." Africa deserves salvation, in the form of "a sustained take-off." But African governments are hindered from achieving this goal by their own failure to "get acquainted with the reasoning that it's only by competition that they will make progress," and by their resistance to "lecturing." The EU, ultimately, is portrayed as economically advanced, expert, selfless teachers, in contrast with African governments, which are economically backward, amateur, obstinate pupils. Along the way, De Gucht constructs African governments and businesses in line with market subjectivity, as the purpose of government is to support *stakeholders* in their quest for the development of industry under competitive conditions.

As the EU defines subjectivity by creating others, therefore, it simultaneously labels or names these others as subjects in their own right. This naming, however, takes place with respect to others who may have very different ideas about their own subject-positions. Third states and individuals may behave in multiple ways with respect to the subjectivities that the EU seeks to inscribe: they might adopt them as their own, alter them to fit their ideas, turn them back on the EU, or reject the EU's labels altogether. As the article quoted above notes, "Mr De Gucht has a reputation as a straight-talking politician, and this didactic style has occasionally ruffled feathers, with the Congolese government declaring him persona non grata in 2010 after critical comments he made in the European Parliament."[96] Contestation over these subjectivities, therefore, is a constant part of the process.[97]

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[95] Eleanor Whitehead, "Africa: Karl de Gucht, European Trade Commissioner," *This is Africa*, 1 May 2012, *available at* http://allafrica.com/stories/201205291155.html?viewall=1 (last accessed 15 August 2014).

[96] *Id.*

[97] For an interesting discussion of the transmission of and resistance to environmental subjectivities, *see* Paul Hanna, Katherine Johnson, Paul Stenner, & Matt Adams, "Foucault, Sustainable Tourism, and Relationships with the Environment (Human and Nonhuman)," *Geojournal* (2014), published online, *available at* http://link.springer.com/article/10.1007/s10708-014-9557-7 (last accessed 15 August 2014).

Where the EU constructs itself as a 'moral leader' or 'representative' of universal norms in its environmental norm export policies, it simultaneously constructs other states as either 'inferior' or in violation of universal principles—as students to be developed, taught or led, or as delinquents that are purposefully straying from the correct path (and vice versa). The states to which these labels are applied, however, may challenge the EU's characterization of their subjectivity. Instead, they may argue that they and the EU are each sovereigns, entitled to administer their jurisdictions in accordance with the will of the people; or that the EU is not a 'leader', but rather a self-interested 'protectionist' looking out for number one.

As a result of these many complexities, it is doubtless safe to say that in its external policies, the post-Lisbon EU can be seen simultaneously to occupy a number of different subjectivities.[98] Some of these construct it along the lines of the subject of rights, the *citizen*; some construct it along the lines of the market subject, the *stakeholder*. As will be seen in the case study in Section 3, these subjectivities are complex, construct the EU's opponents as 'others', and are in turn resisted by those 'others' in a number of interesting ways.

3 The EU Ban on Trade in Seal Products: Subjectivities in Context

3.1 Morals, Traditions, and Science: the EU Ban on Trade in Seal Products

In order to demonstrate the operation of the *citizen* and *stakeholder* subjectivies in the context of EU environmental norm export, it is useful to examine in depth an example of contemporary EU practice in this area. As such, this Section offers a reading of the recent *EU–Seals* WTO dispute from the perspective of governmental subjectivities. To begin at the beginning, then, where did the EU's ban on seal products come from?

Over the past several decades, the EU has adopted a wide variety of laws concerning the protection of animals. These include standards regarding the welfare of farm animals,[99]

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[98] As Manners & Whitman write: "the international role constitution of the EU is a mixture of role representations which sometimes reinforce each other and other times contradict each other." Ian Manners & Richard Whitman, "The 'Difference Engine': Constructing and Representing the International Identity of the European Union," 10(3) *Journal of European Public Policy* 380, 384 (2003).

[99] Council Directive 98/58/EC concerning the protection of animals kept for farming purposes, 1998 OJ (L 221) 23; Council Decision No. 78/923/EEC concerning the conclusion of the European Convention for the protection of animals kept for farming purposes, 1978 OJ (L 323) 12. On organic farming, *see* Council Regulation 834/2007/EC on organic production and labeling of organic products and repealing Regulation (EEC) No 2092/91, 2007 7OJ (L 189) 1; Commission Regulation 889/2008/EC laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labeling of organic products with regard to organic production, labeling and control, 2008 OJ (L 250) 1.

regulations ensuring the security of animals during transport,[100] and rules attempting to minimize animal suffering during slaughter.[101] Specific EU requirements provide for additional protections for calves,[102] pigs,[103] laying hens[104] and broilers.[105] There are also distinct regulations regarding the protection of animals used for scientific purposes,[106] zoo animals,[107] and wild animals.[108]

Several of these rules go significantly beyond the protection commonly afforded in third states. The 2012 EU ban on 'battery cages' for egg-laying hens, for example, provides substantially more protective than standards in most other countries.[109] This high level of animal protection is enshrined in the treaties, which explicitly recognize animals as sentient beings. TFEU Article 13 requires that:

> In formulating and implementing the Union's agricultural, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.[110]

As discussed in Chapter 4, a number of the EU's animal welfare policies have an impact on trade.[111] For example, the EU has banned the import and trade of dog and cat fur[112] and products derived from whales,[113] citing ethical concerns. The EU has also adopted import

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[100] Council Regulation 1/2005/EC on the protection of animals during transport, 2005 OJ (L 3) 1.

[101] Council Regulation 1099/2009/EC on the protection of animals at the time of killing, 2009 OJ (L 303) 1.

[102] Council Directive 2008/119/EC laying down minimum standards for the protection of calves, 2009 OJ (L 10) 7.

[103] Council Directive 2008/120/EC laying down minimum standards for the protection of pigs, 2009 OJ (L 47) 5.

[104] Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens, 1999 OJ (L 203) 53.

[105] Council Directive 2007/43/EC laying down minimum rules for the protection of chickens kept for meat production, 2007 OJ (L 183) 19.

[106] Directive 2010/63/EU of the European Parliament and Council on the protection of animals used for scientific purposes, 2010 OJ (L 276) 33.

[107] Council Directive 1999/22/EC relating to the keeping of wild animals in zoos, 1999 OJ (L 94) 24.

[108] Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein, 1997 OJ (L 61) 1.

[109] Council Directive 1999/74/EC, *supra* note 104, at Art. 5.

[110] TFEU, *supra* note 41, at Art. 13.

[111] *See* Chapter 4, Section 2.3.

[112] European Parliament and Council Regulation 1523/2007/EC banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, 2007 OJ (L 343) 1.

[113] Council Regulation 348/81/EEC on common rules for imports of whales and other cetacean products, 1981 OJ (L 039) 1.

restrictions on pelts from animals caught using leg-hold traps.[114] Furthermore, the EU's Strategy for the Protection and Welfare of Animals 2012-2015 specifically encourages animal welfare evangelism:

> A level playing field on animal welfare is important at international level to ensure global competitiveness of EU operators. ...
>
> For that purpose the Commission will:
>
> - continue to include animal welfare in bilateral trade agreements or cooperation forums to increase the strategic opportunities for developing more concrete cooperation with third countries;
>
> - remain active in the multilateral arena ... ;
>
> - examine how animal welfare could be better integrated in the framework of the European neighbourhood policy;
>
> - organise when appropriate major international events aimed at promoting the Union's view on animal welfare.
>
> Such actions are opportunities to share the EU's understanding of animal welfare at global level. It is therefore important to make an optimal use of available resources dedicated to international activities on animal welfare to match these challenges and to enhance their contribution to the competitiveness of European livestock producers in a globalised world. ...
> [115]

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[114] Council Regulation 3254/91/EEC prohibiting the use of leghold traps in the Community and the introduction into the community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, 1991 OJ (L 308) 1. EU has not implemented because it has concluded agreements with Canada, Russia, and the US that say the regulation will not be implemented so long as they act in accordance with the agreements.

[115] European Commission, "European Strategy for the Protection and Welfare of Animals 2012-2015," Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM (2012) 6, at p.10. Similarly, the Community Action Plan on the Protection and Welfare of Animals 2006-2010 notes that "animal welfare must not be neglected, as it may constitute a comparative advantage for the European Union, on condition, however, that the Union ensures, in an open market, that all animals and meat imported from third countries meet the same welfare requirements as apply within the Union." European Commission, "Community Action Plan on the Protection and Welfare of Animals 2006-2010," Communication from the Commission to the European Parliament and the Council, COM (2006) 13 final.

Thus, it was not entirely out of character when in 2009, the European Union adopted a ban on the sale or import of seals and seal products.[116] This ban, which affects both the internal and external markets, covers items such as seal skins, seal furs, seal blubber and meat, seal bones, and products derived from seals such as gloves, soap, margarine, and omega-3 oil and pills.[117]

The seals regulation also contains three exceptions to this general ban. First, it permits the marketing of products that result from subsistence hunts traditionally conducted by Inuit or other indigenous communities ('IC hunts').[118] Second, it allows products that result from hunts conducted for the sole purpose of the sustainable management of marine resources ('MRM hunts').[119] And third, it exempts the import (but not sale) of seal products intended exclusively for the personal use of travelers and their families.[120]

The EU-wide ban was adopted following decades of campaigning by animal rights advocacy groups, which argued that the killing of seals by hunters is "barbaric."[121] In response to public pressure and celebrity ad campaigns, the EU had already adopted a ban on seal products derived from whitecoat (newborn harp seals) and blueback (young hooded seals) seals in 1983.[122] However, animal rights advocates argued that the 1983 measure (the so-called 'Brigitte Bardot Directive') was ineffective and insufficient for halting the trade in seal products.[123] As a result, both Belgium and the Netherlands adopted bans on trade in seal products in 2007.[124] These national laws created barriers to the free movement of goods,

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[116] European Parliament and Council Regulation 1007/2009/EC on trade in seal products, 2009 OJ (L 286) 36 [*hereinafter* 2009 Seals Regulation]; Commission Regulation 737/2010/EU laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, 2010 OJ (L 216) 1 [*hereinafter* 2010 Seals Implementing Regulation].

[117] For a list of categories in which seal products might appear, *see* European Commission, Technical Guidance Note Setting Out an Indicative List of the Codes of the Combined Nomenclature that May Cover Prohibited Seal Products, 2010 OJ (C 356) 42 44.

[118] Specifically, it permits "The placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence ... where such hunts are part of the cultural heritage of the community and where the seal products are at least partly used, consumed or processed within the communities according to their traditions." 2010 Seals Implementing Regulation, *supra* note 116, at para. 3.

[119] *Id.* at Art. 5.

[120] *Id.* at Art. 4.

[121] "EU ban looms over seal products," *BBC News*, 5 May 2009, *available at* http://news.bbc.co.uk/2/hi/europe/8033498.stm (last accessed 15 August 2014); Ian Traynor, "Europe votes to ban seal product trade," *Guardian*, 5 May 2009, *available at* http://www.guardian.co.uk/environment/2009/may/05/eu-bans-seal-products (last accessed 15 August 2014).

[122] *See* Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom, 1983 OJ (L 091) 30.

[123] Laura Nielsen, "Emotional and Legal Stakes Are High in the Seals Dispute," 14(4) *Bridges* 9 (2010), *available at* http://ictsd.org/i/news/bridges/98808/ (last accessed 15 August 2014).

[124] Germany also intended to adopt a similar act. *See* European Commission, "Proposal for a Regulation of the European Parliament and Council concerning trade in seal products," COM (2008) 469 final [*hereinafter* Commission Seals Proposal], at 6. Some 30 other

fragmenting the EU's internal market. However, rather than challenging the measures before the European Court of Justice (ECJ), the EU took the opportunity to implement harmonizing legislation. This chain of reasoning is described in Regulation 1007/2009:

> In response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals and the possible presence on the market of products obtained from animals killed and skinned in a way that causes pain, distress, fear and other forms of suffering, several Member States have adopted or intend to adopt legislation regulating trade in seal products by prohibiting import and production of such products, while no restrictions are placed on trade in these products in other Member States.
>
> There are therefore differences between national provisions governing the trade, import, production and marketing of seal products. Those differences adversely affect the operation of the internal market in products which contain or may contain seal products, and constitute barriers to trade in such products.
>
> ...
>
> The measures provided for in this Regulation should therefore harmonise the rules across the Community as regards commercial activities concerning seal products, and thereby prevent the disturbance of the internal market in the products concerned, including products equivalent to, or substitutable, for seal products.[125]

Harmonization of EU Member States' treatment of seal products was broadly consistent with more general EU goals. Article 13 TFEU, as noted above, specifies that "in formulating and implementing the Union's ... internal market ... policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals

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countries—including the United States, Mexico, Italy and Croatia—have also banned trade in seal products, for similar reasons. Traynor, *supra* note 121.

[125] 2009 Seals Regulation, *supra* note 116, at paras. 5-8.

... ."[126] And the ECJ has recognized the protection of animal welfare as a "legitimate objective in the public interest."[127]

Initially, the European Commission had turned down a 2006 appeal by Parliament Members to ban seal products,[128] arguing that the species was not endangered and the 1983 ban on the importation of seal pup skins was sufficient to address welfare concerns.[129] The Commission's subsequent 2008 proposal was not for a total ban, but rather a regulation that would have imposed animal welfare requirements as a condition for gaining market access to the EU.[130] This measure would have involved certification and labeling schemes. The Parliament, however, rejected these provisions in the Council's proposed amendment, opting instead for a total ban.

Public opinion in Europe also seemed generally in favor of an EU-wide ban. The European Commission noted in its original proposal that "many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing," and that it had received "a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions."[131] As Labor MEP Arlene McCarthy, who helped draft the seals regulation, stated: "the vast majority of people across Europe are horrified by the cruel clubbing to death of seals and this law will finally put an end to the cruel cull of nearly 300,000 seals a year."[132]

The regulation was ultimately adopted by the European Parliament with wide support: the final vote was 550 in favor and 49 against, with 41 abstentions.[133]

As a result of the 2009 ban, several seal product exporting states—most importantly Canada, Norway, Iceland, and Namibia—voiced complaints with the World Trade Organization (WTO). These countries considered that the EU regulation is inconsistent with its

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[126] TFEU, *supra* note 41, at Art. 13.

[127] *See* Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handels & Zuchtvieh-Kontor v Hauptzollamt Hamburg-Jonas* [2008] ECR I-69, at para. 22.

[128] European Parliament Declaration 38/2006 (425 signatories).

[129] Helena Spongenberg, "European Commission Rejects Seal Trade Ban," *EUObserver*, 26 January 2007, *available at* http://euobserver.com/news/23356 (last accessed 15 August 2014).

[130] Commission Seals Proposal, *supra* note 124, at 12, 20-21 (Arts. 4-5).

[131] Commission Seals Proposal, *supra* note 124, at 2.

[132] "EU ban looms over seal products," *supra* note 121.

[133] *Id.*; Traynor, *supra* note 121.

commitments under the General Agreement on Tariffs and Trade (GATT), the Agreement on Agriculture, and the Agreement on Technical Barriers to Trade (TBT).[134] After several consultations, Canada and Norway pressed on and requested that the WTO establish a dispute settlement panel with respect to the complaint.[135] Iceland and Namibia requested to participate in the Panel's proceedings as third parties.[136]

As a result of this conflict, for the last several years, the two sides of the dispute have been engaged in a significant legal, political, and public relations contest. The EU has sought to defend its position on three primary grounds: that the seal hunt violates standards of animal welfare, that the European public finds sealing morally objectionable, and that the EU's ban meets the formal criteria of legitimacy at the WTO.

First, the EU argues that seal hunting is inhumane, and that it should be banned in order to ensure the protection of animal welfare.[137] To support this contention, it commissioned a scientific study by the European Food Safety Authority, which assessed "the animal welfare aspects of the killing and skinning of seals" and "the most appropriate killing methods which reduce unnecessary pain, distress and suffering."[138] The study concluded (in painful detail)

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[134] European Communities–Measures Prohibiting the Importation and Marketing of Seal Products (Request for the Establishment of a Panel by Canada), WT/DS400/4, 14 Feb. 2011; European Communities–Measures Prohibiting the Importation and Marketing of Seal Products (Request for the Establishment of a Panel by Norway), WT/DS401/5, 15 March 2011.

[135] Canada also requested a panel to assess the compatibility of the still-effective Belgian and Dutch measures with the EU's WTO obligations. *See* European Communities–Certain Measures Prohibiting the Importation and Marketing of Seal Products (Request for the Establishment of a Panel by Canada), WT/DS369/2, 14 February 2011. However, at this time both the Netherlands and Belgium have agreed to repeal their measures or amend them so that they become limited to implementing the provision of the EU Regulation. If they do so, Canada's complaint against them will likely be withdrawn. If they do not, the case will likely be heard by the same panel as the broader dispute with the EU. *See* Dispute Settlement Body, Minutes of Meeting, 25 March 2011, WT/DSB/M/294 [*hereinafter* DSB Meeting Minutes 25 March 2011], at paras. 65-66.

[136] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 72.

[137] In its first written submission to the WTO Panel in the seals case, the EU notes that:

> The EU public's moral concerns [regarding sealing] find adequate support in qualified scientific opinions, according to which:
> - Canada's and Norway's sealing regulations fail to prescribe a humane killing method;
> - there are inherent obstacles which render it impossible to effectively employ humane killing methods on a consistent basis; and
> - there is evidence that, largely as a result of those inherent obstacles, even the inadequate killing methods prescribed by Canada's and Norway's regulations are not effectively and consistently applied in practice.

First Written Submission by the European Union, European Communities–Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400, WT/DS401 (21 Dec. 2012) [*hereinafter* EU First Written Submission], at para. 3.

[138] European Food Safety Authority, "Scientific Opinion of the Panel on Animal Health and Welfare on a request from the Commission on the Animal Welfare aspects of the killing and skinning of seals," 610 *The EFSA Journal* 1, 3 (2007).

that though "[m]any seals can be, and are, killed rapidly and effectively without causing avoidable pain, distress, fear and other forms of suffering, using a variety of methods that aim to destroy sensory brain functions," there is also "strong evidence that, in practice, effective killing does not always occur," that "[m]onitoring each seal to ensure death or unconsciousness before bleeding-out is not always carried out effectively," and that "[b]leeding-out stunned seals to ensure death is frequently not carried out in some hunts."[139] The EU also cited other veterinary reports condemning Canadian and Norwegian hunting practices.[140] Public campaigning by activists had its effect, as well. As the AP reported, "French President Nicolas Sarkozy has assured [Brigitte] Bardot that 'everything would be done' during the French presidency of the European Union to adopt a law banning imports of seal products in the EU."[141] In addition to these concerns, the EU argued that Canada's and Norway's hunting regulation were deficient and failed to ensure seal welfare.[142] Even if Canada and Norway were to adopt adequate guidelines for the killing of seals, however, the EU argued that the conditions under which Norwegian and Canadian hunts are conducted mean that it would be impossible to adequately implement and enforce them.[143]

Second, the EU contends that the majority of the EU public is morally opposed to seal hunting.[144] The Commission has asserted on multiple occasions that the measures "respond to concerns about the killing of seals and their commercialization which are widely held in the EU, as confirmed by the overwhelming support for the legislation in the EU Member States and the European Parliament."[145] Its first support for this claim is that the seals regime is democratically legitimate, having been "adopted in accordance with a democratic and open legislative process by the European Parliament and the EU Council, two representative political institutions."[146] Second, it argues that the vast majority of Europeans support the regulation, a claim that it backs up by the citing voting records of the European Parliament and EU Council,[147] Member State rules,[148] polling data.[149] For example, a public consultation

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[139] *Id.* at 94.

[140] EU First Written Submission, *supra* note 137, at paras. 92-97.

[141] "Bardot hails EU push to ban seal products," *Sydney Morning Herald*, 24 July 2009, *available at* http://www.smh.com.au/news/environment/conservation/bardot-hails-eu-push-to-ban-seal-products/2008/07/24/1216492602435.html (last accessed 15 August 2014).

[142] EU First Written Submission, *supra* note 137, at paras. 112-121, 171-175.

[143] *Id.* at paras. 122-169, 176-188.

[144] "The EU Seal Regime seeks to address deep and longstanding moral concerns of the EU public with regard to the presence on the EU market of seal products." Further, "The IC exception and the MRM exception are based on moral grounds." EU First Written Submission, *supra* note 137, at paras. 2, 4.

[145] European Commission, "Commission reaction to the request for consultations from Canada and Norway on the EU's legislation on seals," 3 November 2009, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=479 (last accessed 15 August 2014).

[146] EU First Written Submission, *supra* note 137, at para. 189.

[147] *Id.* at para. 189, footnotes 286 & 287.

conducted between December 2007 and February 2008 via the Commission's Interactive-Policy Making tool received 73,153 answers, the vast majority of which were in favor of a ban or limitation on sealing.[150] Further, a Danish study prepared at the request of the Commission noted that "public perception of seal hunting at large is against seal hunting for principle reasons," and as a result "extensive information campaigns will be needed to obtain public acceptance of a distinction between 'good' and 'bad' seal products."[151] Exceptions for IC hunts are also justified, in the EU's opinion, by reference to morals, as "It would be morally wrong to endanger the subsistence of the Inuit and other indigenous communities by prohibiting the placing on the market of seal products resulting from hunts traditionally conducted by those communities."[152]

Third, the EU contends that its ban is "non-discriminatory,"[153] "not protectionist,"[154] does not create unnecessary obstacles to trade, and is therefore permissible under WTO law.[155] In its proposal regarding the regulation, for example, the EU Commission argued that it would not violate WTO law because it fell under "Article XX(a) of the General Agreement on Trade and Tariffs [*sic*] (GATT), under which the adoption or enforcement by any contracting party of measures necessary to protect public morals is allowed provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination."[156]

Canada, Norway, Iceland, and Namibia have countered with an array of reasons why the EU ban should be disallowed. These include: (1) that the seal hunts are necessary for ecological health; (2) that they comply with strict animal welfare standards; (3) that sealing is essential

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[148] *Id.* at para. 190, 193.

[149] *Id.* at paras. 191, 194.

[150] European Commission, Directorate-General Environment, "Assessment of the potential impact of a ban of products derived from seal species" 4-5 (2008), *available at* http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf (last accessed 15 August 2014) (Danish study prepared at the request of the European Commission).

[151] EU First Written Submission, *supra* note 137, at para. 5.

[152] *Id.* at para. 4. *See also EU–Seals* Panel Report, *supra* note 35, at para. 7.254.

[153] Darren Ennis, "EU says seal ban takes account of WTO obligations," *Reuters*, 5 May 2009, *available at* http://uk.reuters.com/article/2009/05/05/us-eu-canada-trade-sealban-idUKTRE54452720090505 (last accessed 15 August 2014).

[154] "Commission reaction," *supra* note 145.

[155] "The EU Seal Regime is neither protectionist nor discriminatory. ... Nor does the EU Seal Regime create unnecessary obstacles to trade." EU First Written Submission, *supra* note 137, at para. 5.

[156] Commission Seals Proposal, *supra* note 124, at 8. While a full discussion of the EU's legal position before the WTO is beyond the scope of this section, its basic argument is: 1) that the TBT does not apply to the seals regime because it is not a technical regulation; 2) that if the TBT does apply, the IC and MRM exceptions are consistent with TBT Article 2.1 because they are not discriminatory, with TBT Article 2.2 because the law is not more trade restrictive than necessary to achieve its legitimate objective, and with the requirements of TBT Articles 5.1.2 and 5.2.1; 3) that the seals regime does not violate any GATT provisions, and that even if it does, it is justified under either GATT XX(a) or XX(b); and 4) that the measure does not violate GATT XXIII(b) or the Agreement on Agriculture. EU First Written Submission, *supra* note 137, at paras. 195-628.

for the economic health and development of rural communities; (4) that seal hunting is an important cultural tradition; and (5) that the ban interferes with their WTO-protected right to trade freely; and (6) that the ban is de facto discriminatory and hypocritical.

First, they argue that sealing is ecologically sustainable, and in some places even a necessary tool for managing wildlife. This position is supported, they submit, by scientific assessment. Each country insisted that hunts are guided by principles of sustainable ecosystem management, meet internationally determined standards for wildlife management, and are routinely monitored to ensure compliance.[157] Canada, for example, defended its hunt on the grounds that: "[t]he Atlantic harp seal population was healthy and abundant. It was currently estimated at around 9.1 million animals, which was more than four times what it had been in the 1970s, while supporting high harvest levels over much of that period."[158] Iceland also attested to the sustainability of sealing: "The seal populations around Iceland were subject to management and their existence was not threatened in any way."[159] Norway noted that its hunt was "sustainable" and "founded in science": "none of the species hunted by Norway were endangered and were not listed by CITES. The Norwegian quotas for its seal catch were set in line with advice from the International Council for the Exploration of the Sea, and the catch in recent years had been well below the total allowable catch."[160] And Namibia described its seal hunt as conducted with careful regard to ecological health:

> The harvesting of seals in Namibia was done in line with the Marine Resources Act of 2000, and was harvested in the presence of a fisheries inspector. Moreover, Namibia took cognizance of the UN Code of Conduct for Responsible fisheries whenever seals were harvested. It was worth noting that the principle of sustainable management was also taken into consideration whenever seals were harvested. This was in line with the [Food and Agriculture Organization] Code of Conduct for responsible Fisheries, which was contained in the Constitution of the Republic of Namibia, Chapter 11, Article 95. ...
>
> The seal population in Namibia had grown to enormous numbers over the years and consumed high qualities of fish, such as hake and sardines, which were of high commercial importance to the fishing sector. In

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[157] *EU–Seals* Panel Report, *supra* note 35, at paras. 7.181-7.245 and accompanying footnotes.

[158] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 70.

[159] *Id.*, at para. 72.

[160] *Id.*, at para. 87.

addition, seal harvesting interactions which caused heavy losses to the line fish industry were occurring frequently. Therefore, Namibia needed to keep the seal population in balance. Regular aerial surveys were conducted to ensure that the population did not decline to endangered levels.[161]

Second, these states contested the EU's argument that the seal hunt is inhumane, citing scientific data, their adherence to international standards of animal welfare, deficiencies in the EU's studies, and strict regulation as proof. Canada and Norway argued before the Panel that the EU's evidence of inhumane treatment was "speculative,"[162] unscientific, based on advocacy reports rather than objective data, and authored by non-experts.[163] Instead, both countries cited their own studies showing that the hunts were conducted humanely.[164] Canada stated that its seal hunt is "strictly regulated and guided by rigorous animal welfare principles that were internationally recognized by virtually all independent observers."[165] The Canadian Ambassador to the EU lamented:

> The sealing issue is another classic example … [the Regulation was adopted] even though the evidence is there that seals can be hunted humanely, and that the Canadian hunt is well regulated. And it doesn't matter. They go ahead and say, "Well, public opinion wants us to do that." Well, we say, "Wait a minute. That's not the way the international trading system works. We have rules. Importation bans, et cetera, have to be based on fact, on need, and have to be proportionate." And so we are constantly, in the European Union, challenged by this tendency to legislate by consensus, rather than based on science or evidence.[166]

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[161] Dispute Settlement Body, Minutes of Meeting, 21 April 2011, WT/DSB/M/295, at para. 68.

[162] *EU–Seals* Panel Report, *supra* note 35, at footnote 259 ("Canada has called into question the evidence relied upon by the European Union as 'speculative' and of questionable relevance").

[163] *See, e.g., EU–Seals* Panel Report, *supra* note 35, at footnote 245 (recounting the complainants' arguments that "video evidence is of limited value," that one EU-cited study was "framed as an advocacy document rather than an objective scientific paper," that the authors of studies cited by the EU "do not have extensive experience or expertise in seals," that studies cited by the EU were "organized and funded by NGOs opposed to the Canadian commercial seal hunt," that studies cited by the EU lacked "original empirical research" and had not been peer reviewed, that studies cited by the EU "lack scientific methodology and are the basis for erroneous conclusions by the European Union," and so on).

[164] *See, e.g.,* First Written Submission by Norway, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400, WT/DS401, 19 November 2012 [*hereinafter* Norway First Written Submission], at Section II.

[165] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 70.

[166] Foreign Affairs, Trade and Development Canada, Transcript, "Interview with Amb. Ross Hornby on Canada-European Union Relations," 3 June 2009, *available at* http://www.international.gc.ca/cip-pic/discussions/eu-ue/video/hornby.aspx?lang=eng&view=d (last accessed 3 January 2010).

Norway gave assurances that it "took animal welfare very seriously. The Norwegian hunt was subject to strict, detailed regulation regarding the killing of animals, training of marksmen, surveillance and monitoring, which was strictly enforced and ensured high animal welfare standards. Studies by the European Food Safety Authority and Consultancy within Engineering, Environmental Science and Economics confirmed that the Norwegian hunt conformed to the highest standards."[167] Namibia also made its case for the 'humanity' of its seal hunts:

> [The representative of Namibia] said that Namibia's seal harvest was labelled "inhumane" by animal activists. However, the Ministry of Fisheries and Marine Resources responsible for seals had, on several occasions, asked for public opinion on a more "humane" way of harvesting, but to date no animal rights organization had come up with an alternative method. He said that he believed that Namibia had the most ethical laws of harvesting seals.[168]

As Mattias Ahren of the Sammi Council, an NGO representing Sammi organizations in Finland, Russia, Norway and Sweden summed up the argument: "I think it's complete hypocrisy, in European factory farms animals suffer much more than the seals we kill. ... It's just populist, it makes no sense, it's not that seals are becoming extinct."[169]

Third, several of the complaining states argue that sealing is important for the economic health and development of rural coastal communities, which have few other options for earning income. Canada noted that: "the Canadian seal harvest helped to provide thousands of jobs in Canada's remote coastal and northern communities where few economic opportunities existed."[170] As Canadian Trade Minister Day put it: "The Canadian seal hunt is a legitimate economic pursuit, and the EU's decision to ban the importation of seal

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[167] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 87. *See also* Norway First Written Submission, *supra* note 164, at para. 18.

[168] Dispute Settlement Body, Minutes of Meeting, 21 April 2011, WT/DSB/M/295 [*hereinafter* DSB Meeting Minutes 21 April 2011], at para. 69.

[169] Andrew Willis, "Little support for EU seal ban up north," *euobserver.com*, 13 May 2011, *available at* http://euobserver.com/9/32332 (last accessed 15 August 2014).

[170] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 70.

products is based neither on science nor on facts."[171] Norway pointed out that "The hunt was … a sustainable part of the livelihood of coastal communities"[172] Namibia, too, argued that:

> The seal industry was very important in terms of employment and GDP contribution to Namibia's economy. Employees in the seal sector were all Namibians and had acquired harvesting skills as per the Marine Resource Act of 2000. It was important to note that, those that were doing the harvesting normally underwent training as to how to harvest and handle the seals during the harvesting season. Indirect employments were also created from other workplaces such as shops, tannery and manufacturers, specialized in manufacturing and exporting for international designers. It was also important to note that there were two factories which processed the seal oil for local consumption. …
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> … The Government's main objective for all fisheries sectors was to utilize the country's marine resources on a sustainable basis and to develop industries based on them in a way that ensured their lasting contribution to the country's economy and overall development objectives. Seals were considered as a natural resource from which Namibians could derive economic benefits through consumptive and non-consumptive use.[173]

Seal hunting was important to Namibia and needed to be defended, the representative pointed out, because the government "had a responsibility towards its citizens in terms of creating jobs that were sustaining families."[174]

Fourth, Namibia, Norway, and Canada contend that sealing is part of the cultural heritage of their populations, and should therefore be allowed to continue. Namibia contended that "the exploitation of the Cape fur seals along the Namibian coast represented one of the oldest commercial utilization forms in the region and dated back to the 17th century."[175] Norway's submission to the WTO Panel emphasized the long history of the Norwegian hunt, which dates back thousands of years.[176] An Inuit delegation from Canada's Nunavut territory

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[171] Foreign Affairs, Trade and Development Canada, Press Release, "Canada Requests WTO Consultations on EU Seal Products Ban," 2 November 2009, *available at* http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/327.aspx?view=d (last accessed 15 August 2014).

[172] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 87.

[173] DSB Meeting Minutes 21 April 2011, *supra* note 168, at paras. 68-69.

[174] *Id.*, at para. 68.

[175] *Id.*, at para. 67.

[176] Norway First Written Submission, *supra* note 164, at para. 42.

opposed the ban despite the exception for hunts conducted by indigenous communities. Delegation member Joshua Kango said the 1983 ban on importing whitecoat and blueback seal pelts had "hit the Inuit hard," despite its exemption clause: the exemption "didn't stop the market collapse, and the hardship and the suicides that followed throughout our communities."[177] The Honourable John Duncan, Canadian Minister of Indian Affairs and Northern Development, stated that: "Taking the European Union to the World Trade Organization is important for the Inuit. ... Inuit who live in isolated communities where economic opportunities are very limited depend on the seal hunt to maintain their culture and quality of life."[178] And, most graphically, Canadian Governor General Michaëlle Jean took a bite out of a raw seal heart to demonstrate her solidarity with Inuit sealers—a move which was subsequently criticized as "disgusting," "bloodlust," "bizarre" and "Neanderthal."[179]

Fifth, the complaining states argue that the EU has no business intervening in their domestic affairs in order to try to obliterate the seal hunt. Rather, these countries contend that they have a "right to trade" that is protected under the WTO covered agreements. The Honourable Leona Aglukkaq, Canadian Minister of Health and Minister responsible for the Northwest Territories, Nunavut and Yukon, stated that: "Our government is taking this case to the World Trade Organization to protect the right of Inuit people to sell products from their traditional, sustainable seal hunt."[180] As Norway asserted, with the support of Iceland: "this dispute was not just about seal products, but more importantly about a Member's right, under the WTO Agreements, to trade in the marine resources it chose to harvest in a sustainable manner."[181] There remain European customers who would choose to buy seal products if they were permitted to do so—such as kilt makers, who use seal skins in the production of sporrans[182]—and the EU regulation therefore impedes the right of the complaining states to trade freely with willing customers.

Finally, Canada and Norway claimed that the EU ban is hypocritical and discriminatory and as such in violation of WTO law. In particular, they argued that the exceptions for IC and

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[177] "EU ban looms over seal products," *supra* note 121.

[178] Foreign Affairs, Trade and Development Canada, Press Release, "Harper Government Continues to Stand Up for Canadian Seal Industry," 11 February 2011, *available at* http://www.international.gc.ca/media_commerce/comm/news-communiques/2011/061.aspx?view=d (last accessed 15 August 2014).

[179] "Governor General's seal snack sparks controversy," *CBC News*, 26 May 2009, *available at* http://www.cbc.ca/news/canada/story/2009/05/26/jean-seal.html (last accessed 15 August 2014).

[180] "Harper Government Continues to Stand Up for Canadian Seal Industry," *supra* note 178.

[181] DSB Meeting Minutes 25 March 2011, *supra* note 135, at para. 86, 72.

[182] *See* Steven McKenzie, "Kilt makers monitor WTO hearing on EU sealskin ban," 25 March 2011, *available at* http://www.bbc.co.uk/news/uk-scotland-highlands-islands-12864583 (last accessed 15 August 2014).

MRM hunts were unfairly drafted and applied. First, they argued that the exceptions treated Norway and Canada less favorably than other foreign and domestic producers of seal products such as Finland and (especially) Greenland. As a result of the EU ban, they argued, the total number of seal imports had not gone down significantly, because the IC exception continued to allow massive imports from Greenland. Moreover, they argued that this was evidence of EU hypocrisy, since the EU did not care about whether seals were *actually* hurt during IC hunts, but only focused on the *potential* for inhumane treatment in commercial hunts.[183] This is evidenced by the fact that the EU does not require labeling of products that contain seal.[184] Instead, they argued, the EU should have put in place across-the-board welfare standards that both commercial and IC hunts would have to meet.[185]

In 2013, the *EU–Seals* case resulted in a Panel ruling that found the EU's ban on seal products to be in violation of its non-discrimination obligations under the TBT and GATT, largely because of the way that the seal ban's exception for indigenous hunts was applied so as to treat seal products from Greenland more favorably than those from Canada and Norway.[186] All three parties to the case appealed the decision, and in 2014 the WTO Appellate Body—though it corrected many legal points made by the Panel—eventually agreed with the assessment that that the EU's ban was in violation of the WTO's most favored nations provisions because of its advantageous treatment of Greenland.[187]

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[183] As Norway argued, "seal products may be placed on the EU market whether or not they are derived from seals killed inhumanely, for instance, through being drowned in nets, as occurs in Denmark (Greenland)." Norway First Written Submission, *supra* note 164, at para. 10.

[184] *Id.* at para. 11.

[185] *EU–Seals* Panel Report, *supra* note 35, at paras. 7.246-7.250.

[186] *Id.* A full analysis of the Panel's legal reasoning is beyond the scope of this Chapter. In sum, however, the Panel determined that the EU seals regime is a technical regulation and thus subject to the disciplines of the TBT. The Panel held that the EU had violated TBT Article 2.1's non-discrimination requirements because it treated imported seal products from Norway and Canada less favorably than domestic seal products and seal products originating in Greenland. However, it found that the EU had not violated TBT Article 2.2 because its ban on seal products fulfills the legitimate objective of protecting public morals, and because no reasonably available alternative measure was demonstrated that would have made an equivalent or greater contribution to that objective. The Panel also found that the EU had violated the GATT's non-discrimination provisions (Articles I:1 and III:4), and that although the EU's measure was provisionally justifiable under Article XX(a)'s public morals exception, it did not meet the requirements of Article XX's *chapeau* because of its lack of even-handedness. *Id.*

[187] Appellate Body Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014). Again, a full analysis of the Appellate Body's legal reasoning is beyond the scope of the Chapter (though it is quite fascinating in this case, and well worth an extended read). In short, the Appellate Body reversed the Panel's finding that the EU seals regime was a 'product requirement' falling under the TBT, but declined to complete the analysis of whether the seal product ban might be an 'associated process and production method', which would also be subject to TBT disciplines. It then held that the EU was in violation of GATT Article I:1 because the EU did not "immediately and unconditionally" extend the same advantages to seal products of Norwegian and Canadian origin as it did to seal products from Greenland. Finally, the Appellate Body agreed with the Panel that while the EU's measure could be provisionally justified under GATT Article XX(a)'s public morals exception, it did not meet the requirements of the *chapeau*. *Id.*

3.3 Citizens and Stakeholders in the Seal Products Ban

3.3.1 The EU as Democratic Representative of European *Citizens*

The *EU–Seals* case and associated discourse contain a treasure trove of references to subjectivity. These range from the EU as a democratic representative of and protector of the interests of EU citizens, to the EU as a leader of global citizens, to the EU as setting the rules of the game for global stakeholders, or as ensuring free competition. These subjectivities come from both *citizen* and *stakeholder* models, again demonstrating the coexistence of the market and rights rationalities of government within the EU's advanced liberal governmentality. They are also productive, leading the EU to characterize itself and its goals—as well as those of Canada and Norway—along the lines suggested by these subjectivities.

First, in the context of the ban on seal products, the EU sometimes constructs its subjectivity as that of a democratic representative of the will of its *citizens*. European citizens want a ban on seal hunting. Representatives of the EU have frequently stated the fact that according to polls, the vast majority of European citizens are in support of the ban on seal hunting, which they find cruel and unnecessary. The existence of widespread public campaigning and the Commission's receipt of massive amounts of letters and petitions provides further evidence of this popular will.[188] The fact that the European Parliament—widely understood to be the most 'democratic' organ of the EU's governance structure—adopted the measure by such a wide margin serves as additional proof of its democratic origins.[189] So does the fact that the regulation was adopted by legitimate representative institutions.[190] As a sovereign regulatory power and representative of democratic will, the EU has both the right and the duty to legislate in support of the desires of its *citizens*, whether or not they are 'efficient' or 'scientific'.

As explained above in Section 2.2, the EU's construction of itself as the democratic representative of the will of its citizens also entails the production of 'others'. The 'others' against which the EU constructs its 'self' here, are geographical and legal others: third states and their citizens. That is, they are other 'sovereigns' and their 'citizens', over whom the EU does and should have no say, and who in turn do and should have no say over the way the EU regulates within its own jurisdiction (echoing the *sovereigntist*-oriented rights rationality discussed in Chapter 3). Those who would interfere with the EU within its proper regulatory sphere are illegitimate regulators and violators of the EU's rights. EU *citizens* have determined

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[188] Commission Seals Proposal, *supra* note 124, at 2.

[189] "EU ban looms over seal products," *supra* note 121; Traynor, *supra* note 121.

[190] EU First Written Submission, *supra* note 137, at para. 189.

that it is immoral to participate in the trade in seal products, therefore no other state should have the right to force them to do otherwise.

As described in Section 2.3, however, the construction of these subjectivities is relational. The 'others' to whom the EU assigns the subjectivities of 'illegitimate regulator' and 'rights violator' contest the labels it applies to them, as well as the subject position that the EU attempts to take for itself. This contestation takes place both from within the *citizen* paradigm, as well as externally, from within the *stakeholder* paradigm.

From within the subjectivity of rights, Canada, Norway, and other opponents of the EU ban have spent a great deal of effort trying to emphasize their own subjectivity as equal sovereign rights holders and as the legitimate representatives of the democratic will of their own citizens. Their 'cultural heritage' arguments, for example, make explicit reference to the unique culture of each country's citizens, and emphasize the illegitimacy of the EU's attempts to interfere with the democratically sanctioned choices of *their* citizens. It is the EU, in this narrative, who is overstepping its bounds as a sovereign representative, acting as an 'illegitimate regulator' and 'rights violator'.

At the same time, however, Canada, Norway, and the other complainants contest the EU's position externally, from the perspective of market subjectivity. In this vein, they criticize the EU for its 'populism', and its willingness to indulge the emotional or irrational desires of the European public in spite of the clear scientific evidence pointing to sustainable and efficient management of seal populations, and the damage to competition. In this vision, the EU, which should act as an efficient and effective manager as well as stakeholder in the global marketplace, is instead acting unscientifically and inefficiently, creating barriers to competition, and therefore governing illegitimately—skewing the game, rather than acting as a neutral referee.

3.3.2 The EU as a Leader of Global *Citizens*

Second, in the context of the ban on seal products the EU sometimes sees itself as a global leader; the representative of a universal morality whose responsibility is to lead others to the right path. According to this *cosmopolitan*-oriented rights rationality thinking, the EU understands that the killing of seals in the manner used in modern hunts is morally wrong, according to universal norms. The language of the TEU is helpful here: seals "*are* sentient beings" and their welfare must therefore be protected.[191] This is not an *opinion*, but a moral *truth*. The EU, as a representative of the moral vanguard, should do its best to demonstrate

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[191] TFEU, *supra* note 41, at Art. 13 (emphasis added).

correct action to others and to persuade them to abandon their immoral practices. The EU has quite actively embraced the identity of global leader with respect to the question of protecting the welfare of seals in this case. The implication is that (in keeping with the evangelical sentiment expressed in the new Animal Welfare Strategy) the EU should work to spread its progressive message—whether through dialogue, refusal to participate in this morally objectionable trade, or other means—in order to contribute to the cause of global moral improvement and demonstrate that it is itself a good global citizen.

The 'othering' that takes place here is of a temporal and cultural sort. Third states who fail to conform are either laggards whose moral values have not yet advanced to the point where they recognize the correct way to respond to this issue, or sinners who should not be permitted to benefit financially from their immoral ways. The use of words such as 'cruel' and 'barbaric' activate this temporal and cultural othering that marks the EU as morally developed, and renders the complaining countries as morally 'backwards'. In its opening statement before the Appellate Body, for example, the EU argued that the seal ban was based on "the core principle of the moral doctrine of 'animal welfarism', which is largely predominant in *modern* societies."[192] The implication here is that any who disagree with the EU's position can only be doing so because they are insufficiently enlightened in comparison with EU citizens, who are fully in support of the ban.

Opponents to the EU's ban on seal products have challenged these subject positions, both internally, from within the perspective of a subjectivity of rights, and externally, from the perspective of market subjectivity. From within the subjectivity of rights, Canada, Norway, and their supporters have also attempted to present themselves as global leaders and good global citizens with respect to the issues in this case. They make several references, for example, to the need to protect the rights of indigenous peoples to their livelihoods, which they argue the EU regulation makes insufficient allowance for, as it privileges certain groups of indigenous persons over others. The EU is not a moral leader, the argument goes, because it fails to take into account the important interests of first nations peoples. The 'colonialist' implication is here thrown back on the EU, as a way of demonstrating its moral failure. There are also several references to the need to make special allowances to help secure the rights of impoverished peoples, who are the individuals most directly affected by the ban. Here, too, the EU fails to be a moral leader because it puts the interests of European consumers ahead of those of subsistence hunters. Further, the EU is unsuccessful in

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[192] Opening Oral Statement by the European Union, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, AB-2014-1, AB-2014-2/DS400, DS401, 17 March 2014, at para. 17 (emphasis added).

promoting the values of its citizens, as it hypocritically continues to allow seal-harming products from IC and MRM hunts rather than imposing and across-the-board labeling standard. The EU is right to act as a representative of the interests of citizens, from this standpoint, but it is wrong in defining whose interests it represents (only those of the EU, not those of the world), in selecting which interests to champion (particular EU interests, rather than universal values), or in failing to uphold the values of its citizens.

Canada, Norway and other opponents of the EU's seals regulation have also brought challenges from the perspective of the *stakeholder* paradigm. From this standpoint, the EU seems to be governing based on 'emotional', 'unscientific' and 'populist' reasoning, interfering with the 'scientific', 'sustainable', and 'well-regulated' policies of the seal hunting states.[193] This is a sort of reverse temporal othering in which the EU is presented as atavistic and 'backward': advanced societies rely on science and expertise—not 'non-expert' 'advocacy' papers—in order to effectively and efficiently manage the market for the benefit of stakeholders, and do not bow to 'populist' whim. Moreover, the EU's unbalanced implementation of its rules indicates partiality and a lack of transparency for producer and consumer stakeholders. Because the EU fails to adhere to these standards of modern governance, it is not at the moral vanguard, but is rather a false and irrational misleader, governing according to unscientific, outdated ideas about what government should do, and for whom. This is not efficient, rational refereeing—it is unscientific populism.

3.3.3 The EU as Setting the Rules of the Game for Global *Stakeholders*

A third subjectivity that the EU sometimes seems to adopt in the context of the ban on seal products is that of a referee of the international system, imposing efficient, scientific rules to ensure its smooth functioning as a platform for the sustainable development of all stakeholders. From this perspective, the EU argues that seal hunting is inhumane, as proven by science, and is contrary to principles of sustainable development. Rather than being morally or culturally wrong, it is a scientifically provable, empirical fact that sealing is in conflict with the principles of scientific sustainable harvesting methods (and thus indefensible from a *human capital*-oriented market rationality perspective). The EU should and does act as a referee responsible for ensuring the smooth operation of the international

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[193] For another example of such an argument, one could cite Japan's arguments before the International Court of Justice in July 2013 that Australia's anti-whaling laws are "emotional," that they "politicis[e] science," and are part of a "civilising mission and moral crusade" that is out of place in the modern world, and which violate its right to conduct scientific research regarding whaling. "Japan Attacks Australian Role in Whaling 'Moral Crusade'," 3 July 2013, *The Guardian*, available at http://www.guardian.co.uk/environment/2013/jul/03/japan-australian-role-whaling-crusade (last accessed 15 August 2014).

marketplace for the benefit of all *stakeholders*, and therefore must discourage this unscientific behavior by making it more costly or less profitable.

From this perspective, third states that oppose the ban are 'othered' as being irrational and backward because they are not regulating in accordance with empirically demonstrable scientific principles, such as the appropriate standards for protecting animal welfare. Third states and their expert managers should logically take heed of the evidence presented by the EU, and accept the ban on trade in seal products as not only appropriate for the Europe, but also as a baseline rule for the global marketplace.

From within the perspective of stakeholder subjectivity, the opponents of the EU's seals regulation have challenged the EU's credentials as a manager by presenting their own expertise regarding sustainable development. The arguments here are twofold. First, the EU is factually incorrect regarding the sustainability of seal hunts. Its science is wrong, or biased, and therefore cannot form the basis of good policy. Second, the EU is factually incorrect regarding the drivers of sustainable development in impoverished areas—for example in Namibia and in remote areas of the Canadian north—and as a result its ban on trade in seal products is negatively impacting this goal. The most important goal, from this perspective, is to maintain steady income streams in these regions. As the representative from Namibia stated, "The Government's main objective ... was to utilize the country's marine resources on a sustainable basis and to develop industries based on them in a way that ensured their lasting contribution to the country's economy and overall development objectives."[194]

From a rights perspective, Canada, Norway, and other opponents criticized the EU ban on seal products as infringing on their right to regulate in the interest of their citizens. By adopting such a ban, the EU is harming citizens over whom it has no jurisdiction— illegitimately regulating those over whom it should have no legal authority. Moreover, the version of sustainable development to which the EU subscribes is not universal—each sovereign state should have the ability to choose its own path in accordance with the desires of its own citizens, or, from a more global perspective, to protect the rights of indigenous persons over those of seals.

3.3.4 The EU as Ensuring Free Competition among *Stakeholders*

Finally, the EU sometimes speaks as a referee of the competitive system who would ensure that market failures do not negatively impact the free market. From this perspective, the EU's task is to prevent regulation from overly burdening market participants. EU animal welfare

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[194] DSB Meeting Minutes 21 April 2011, *supra* note 168, at paras. 68-69.

policy, at least according to the new Animal Welfare Strategy, must take into account the need to set and enforce fair rules for the international market. As it notes: "A level playing field on animal welfare is important at international level to ensure global competitiveness of EU operators."[195] Other states, that is, must not be allowed to 'cheat' by violating the basic rules to which other market participants have agreed. Within the EU, as well, there was a need for market harmonization. Individual state bans within the EU were fragmenting the internal market.[196] The ban on seal products is neither discriminatory nor protectionist, and is therefore a legitimate act in pursuit of effectively and efficiently managing the European and global markets.

From within a *stakeholder* perspective, both Canada and Norway are keen to adopt the identity of fair capitalist competitors in the global marketplace. They note their own effective, scientific, and expert-driven regulatory practices, and challenge the EU's claims of non-discrimination. Interestingly, they point out the fact that the ban negatively affects EU stakeholders by preventing those individuals who would continue to buy seal products (such as Scottish kilt makers) from doing so. In addition, opponents to the EU seals regulations make numerous references to their 'right to trade', as protected by WTO law, and even made mention of the rights of EU citizens to trade with whomever they choose. The EU's protectionism is unfair and a burden on the free market.

From a rights perspective, opponents of the ban point to the needs of their own citizens, and claim that the EU's ban steps over the bounds of its legitimate authority. The fact that in practice it permits products of IC hunts only from Greenland, and that MRM hunts from countries like Finland will have an advantage under the rules in comparison to those of Norway are further evidence of this partiality.

3.4 Power, Strategy, and Resistance: Subjectivities and EU Environmental Norm Export

The uneasy coexistence of both market and rights subjectivities—the citizen and the stakeholder, the representative government and the market referee—can create interesting paradoxes in the arguments presented by the parties. For example, in the *Seals* dispute, where the EU articulated a subject position as a representative of the values of its citizens, one of the grounds on which Canada, Norway and other opponents of the EU's ban on seal products contested the regulation was that the EU's ban was 'populist', 'irrational' and 'not

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[195] COM (2012) 6, *supra* note 115, at 10.
[196] 2009 Seals Regulation, *supra* note 116, at paras. 5-8.

scientific'. The implication being that the rule is illegitimate because it merely expresses the (irrational/partial/non-objective) moral or cultural preferences of the people. On the other hand, however, opponents of the ban also argue that it violates their own rights as representatives of the values of their citizens, and that their 'cultural heritage' is a legitimate reason for maintaining pro-sealing regulations. When set side by side, it is clear that there is a contradiction here: it is inconsistent to be both for and against the idea that citizens' cultural or moral preferences can legitimate governmental behavior. However, because both entrepreneurial subjectivity (the *stakeholder*) and the subjectivity of rights (the *citizen*) hold resonance within contemporary advanced liberal governmentality, they can both be perceived as simultaneously valid subject positions. Government can address both citizens and stakeholders, even if the coexistence of these subjectivities nevertheless provokes inconsistent arguments.

Similarly, the EU defended the IC exception to the seal products ban on the grounds that IC hunts are factually distinct from commercial hunts. In support of this 'fact', it enlisted expert opinions and scientific documentation. But when Canada and Norway challenged the IC exception in the seal regulation as being unfairly and unscientifically designed and applied, the EU could nevertheless defend it on moral grounds, stating that it was morally wrong to harm the livelihoods of indigenous peoples. Because of the simultaneous coexistence of these subjectivities, the EU can believe that it is both a *citizen* and *stakeholder* simultaneously, deploying arguments from both the market and rights paradigms.

As a result, this uneasiness is politically productive. Even as market and rights subjectivities guide the behavior of governed and governing along certain lines, limiting and conditioning their perceived fields of possible and legitimate action, the presence of multiple subjectivities also provides strategic opportunities. As demonstrated above, this uneasy coexistence permits polyvocality: it allows the EU to speak with several different voices at once. It can simultaneously claim to be acting on behalf of EU citizens, global citizens, EU stakeholders, and global stakeholders. Because it speaks with multiple voices, the EU is able to jump back and forth between subjectivities in order to press for particular outcomes. As demonstrated above, the EU can shuffle back and forth between citizen and stakeholder identities in order to achieve political goals and avoid challenges from political opponents. Not only can it speak simultaneously to both stakeholders and citizens, it can also shift between them in order to bolster or avoid opposition.

Finally, it is also apparent from the examples above how subjectivity is not simply a one-way street, but is contested by those who are defined reflexively by the EU's self-positioning.

When the EU acts with respect to Canada, Norway and the other states on the opposition side of the seals dispute, it defines subjectivities for these states and their citizens. It views them variously as citizens, stakeholders, global, and local. However, these subjectivities are not necessarily *successful* in colonizing the mentalities of those to whom they are addressed. Canada, for example, may refuse to recognize itself as a *stakeholder*, instead insisting on its rights as democratic representative of its *citizens*. Norway may refuse to recognize itself as a *citizen*, instead insisting that its behavior reflects the expert, scientific, and responsible government of *stakeholders*. Within the EU, too, various facets of government may inhabit different subjectivities. The Parliament sometimes seems to have a more *citizen*-influenced subjectivity than the Commission, for example, such as when it insisted on the need for a full ban on seal products, rather than a labeling scheme.

Such strategic forms of resistance are what Foucault called the "tactical reversal" of mechanisms of power. No one version of any one strand of political reason or subjectivity completely colonizes the field of play. Rather, particular structures are filled with internal challenges and conflicts. For Foucault, power is not something that one side 'has' and another side 'lacks'. Rather, power and resistance flows are everywhere. Foucault himself is worth quoting at length here:

> It seems to me that power *is* 'always already there', that one is never 'outside' it, that there are no 'margins' for those who break with the system to gambol in. But this does not entail the necessity of accepting an inescapable form of domination or an absolute privilege on the side of the law. To say that one can never be 'outside' power does not mean that one is trapped and condemned to defeat no matter what.

> I would suggest rather ...: (i) that power is co-extensive with the social body; there are no spaces of primal liberty between the meshes of its network; (ii) that relations of power are interwoven with other kinds of relations (production, kinship, family, sexuality) for which they play at once a conditioning and a conditioned role; ... (iv) that their interconnections delineate general conditions of domination, and this domination is organised into a more-or-less coherent and unitary strategic form; that dispersed, heteromorphous, localized procedures of power are adapted, re-inforced and transformed by these global strategies, all these being accompanied by numerous phenomena of inertia, displacement and resistance; hence one should not assume a massive and primal condition of

domination, a binary structure with 'dominators' on the one side and 'dominated' on the other, but rather a multiform production of relations of domination which are partially susceptible of integration into overall strategies; ... (iv) that there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power; hence, like power, resistance is multiple and can be integrated into global strategies.[197]

While this may at first glance seem like a monolithic determinism on Foucault's part, it is also freeing, as it means that there is always another facet of power or resistance that may be inhabited. Traditional hierarchies of power are merely historically contingent configurations of power *relations*. Though they may appear static, power relations are actually processes of continual struggle, with 'power' appearing on both sides of the divide. As Mitchell Dean explains, power is, in this sense, "more like a duel than a total system of subordination," the result of "the incessant cut and thrust of relationships of resistance and power."[198] It is not nihilism to presume that power is inescapable if one also recognizes its contingency and malleability.

If power is understood relationally, and as historically contingent upon different states of disequilibrium, then resistance is always already a part of every power structure. As Foucault himself famously wrote: "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power."[199] So while power itself is inescapable, particular configurations of power are not. Internal relational struggles can be instrumentalized to perpetuate or to combat particular arrangements of power relations.[200] Such critical interventions come from 'within' and 'between' particular constellations of power, and can challenge them to varying degrees. Analyzing the rationalities on which power relations are founded is valuable for this type of

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[197] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, 141-42 (Colin Gordon trans. ed. 1980).

[198] Mitchell Dean, *Governing Societies* 9 (2007).

[199] Michel Foucault, *The History of Sexuality Vol. 1: The Will to Knowledge* 95 (Robert Hurley trans. 1978).

[200] *See Id.* at 120-140.

contestation and resistance because it helps to identify their points of constitution and, thus, their possible lines of fracture.[201]

Of course, such strategies of "tactical reversal" are not entirely satisfying for those who would seek more radical change (including the later Foucault himself[202]). To begin with, they may seek specific political outcomes but leave in place the broader systems of power/knowledge that structure political rationality more generally.[203] Even where critical interventions aim at overturning existing configurations of power relations altogether, however, they do so from a responsive position—as forces that resist some assertion of power. Their agendas are set negatively, by that which they seek to challenge. In this way, the limits of resistance are already constituted by the dominant regime—power and freedom are co-constitutive.[204] Political contestation and resistance cannot escape social construction, or the omnipresence of power relations.[205] As Foucault wrote, though, it is not so much about not being governed, but rather about "the art of not being governed *quite so much.*"[206]

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[201] Kevin Thompson, "Forms of Resistance: Foucault on Tactical Reversal and Self-Formation," 36 *Continental Philosophy Review* 113, 119 (2003).

[202] *Id.*, at 120.

[203] Foucault, for example, dismisses the discourse of 'sexual liberation' as being complicit in the strategies of power it seeks to subvert. Foucault, *History of Sexuality*, *supra* note 199, at 159.

[204] Thompson, *supra* note 201, at 120, 122. Foucault's later work articulates a second mode of resistance to power that is somewhat more radical than the project of 'tactical reversal'. This type of resistance is founded in the notion that the subject is never fully constituted by power. Through critique, Foucault believed, it might be possible to promote new forms of subjectivity that are not beholden to existing patterns of power relations. A number of contemporary scholars have taken hold of this idea of resistance through a critical practice of the self. For some interesting discussions of this possibility, *see id.*; Sergei Prozorov, *Foucault, Freedom and Sovereignty* (2007); J. Rajchman, *Michel Foucault: The Freedom of Philosophy* (1985).

[205] As a result, they must themselves always remain contingent and open to contestation, as they will undoubtedly bring with them their own new or recycled mechanisms of subordination. Sundhya Pahuja expresses a similar sentiment in the conclusion to her recent study of the language of development in international law:

> [We must not] succumb to the siren song of the neo-Kantians, searching for 'genuine' universals by which to recalibrate our normative compass. No matter how progressive, enlightened or right the possessors of such values may seem to be, the universalisation of particular values and their institutionalisation through the machinery of international law will only serve to (re)produce a transformative violence in the name of new gods. But neither should we embrace nihilism, and indeed, an absolutely asserted lack of values itself becomes a kind of absolute foundation. Rather, I urge a certain politics of recuperation in which we do not negate the nation, the international, or indeed 'law', as foundational entities or grounds on which political community can stand, but instead ask what becomes politically possible when we recall the contingency of those categories, and pay attention to the political-economic structures which shape their current, ostensibly universal forms.

Pahuja, *supra* note 85, at 260.

[206] Michel Foucault, "What is Critique?," in *The Politics of Truth* 29 (1997).

So what does all of this mean for the possibilities for contestation and resistance with respect to EU environmental value export? As argued throughout this thesis, though the market and rights rationalities and their associated technologies and subjectivities delimit the boundaries of governmental action, there remains much room for strategic behavior and political action. Once one realizes that power/knowledge is relational and contingent, the imaginative space of resistance opens up in innumerable ways. Rationalities of government are not the same as political programs. Instead, each paradigm of governmental rationality permits a multiplicity of different political positions, and allows for a great deal of internal variation depending on the emphasis placed on freedom, the international, the problematic of security, and other factors. Chapter 3 provided specific examples of this by articulating how different 'ideal-typical' positions within rights and market rationality might argue for or against particular political outcomes. As noted in the introduction, specific goals such as 'decreasing carbon emissions', 'making sure trade does not damage the environment', or 'protecting seals' can be articulated using a variety of different vocabularies and logics, and as such could be realized (albeit for different reasons, using different technologies, and producing different identity constructs) within each of the rationalities described in this dissertation.

The danger here, of course, is that embracing particular logics of governmental reason is not a neutral activity, but entails a whole host of follow-on effects in terms of the technologies that are employed to accomplish the chosen ends, the projected identities of the governed and governing, and the means and ends by which future interventions should be developed and judged. Once a movement adopts a particular logic, it becomes difficult to extricate political activity from its embrace.[207] Even a critical attitude toward the contingency of the 'knowledge' espoused by a rationale may not shield its adoptees from cooptation.

4 Conclusion

Two subjectivities—the *citizen* and the *stakeholder*—exist alongside one another in contemporary advanced liberal society. These subjectivities are multiple and multi-level, and they entail the production of 'others' in a relational process involving naming and contestation. These subjectivities interact in multiple, overlapping ways. However, their coexistence is sometimes uneasy or unstable because they stem from and produce very different governmental rationalities. This instability, though, is politically productive, as it

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[207] Sundhya Pahuja's recent work *Decolonising International Law* provides an excellent example of this. Her book describes how the demands of third world communities throughout the twentieth century have been continually rearticulated through the language of 'development', which has come to act as a universal frame for cognizing the needs, desires, and teleologies of non-Western states. Pahuja, *supra* note 85.

provides opportunities for polyvocality and strategic governmental action. Moreover, it also provides opportunities for resistance both from within and between these paradigms.

This chapter brings to a close the substantive heart of the dissertation, which focused on mapping and articulating the consequences of the rationalities, technologies, and subjectivities of EU environmental norm export. Chapter 6 will conclude with some summary thoughts on the governmentality of this regime of EU practice.

Chapter 6

CONCLUSION:
Governmentality and EU Environmental Norm Export

Environmental evangelism—the desire to spread EU environmental norms abroad—is not an inconsequential facet of European external action, but rather appears as a significant feature of contemporary EU trade policy. Indeed, the European Commission's DG-Trade Management Plan for 2014 sets out two 'general objectives' for the year, in which environmental norm export plays a conspicuous role:

1. "Contribute to European smart, inclusive and sustainable growth by ensuring the best trade conditions and opportunities for EU operators, workers and consumers"; and

2. "Foster sustainable economic, social and environmental development, in particular for developing countries."[1]

The idea that international and transnational economic policy is a tool for doing environmental work abroad is a relatively recent one, and one that has come to particular prominence in the EU. Throughout the EU's external policy, economic instruments are employed to encourage the spread of environmental norms in third states. Bilateral trade agreements, the GSP+ program, multilateral environmental and trade conventions, unilateral import bans, environmental tax regimes, sustainability impact assessments, benchmarking and best practices initiatives, expert analyses and corporate social responsibility programs are all employed in various ways to oblige, incentivize, and encourage conformity to the EU's global environmental vision.[2]

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[1] European Commission, *Management Plan 2014: Directorate-General for Trade* 6-7 (2014).

[2] For an extended discussion of the instruments the EU uses to effectuate its environmental norm export policies, *see* Chapter 4, Section 2.

The EU's environmental norm export activities have not been uncontroversial. States, individuals, and organizations have challenged the EU's various trade/environment policies, arguing that they are coercive, unfair, over-reaching, or inefficient. Meanwhile, these policies also raise a number of questions from the perspective of legality and political theory. Scholars have assessed the conformity of this behavior with EU and international law, investigated its democratic legitimacy, and examined the effectiveness of EU policies in contributing to environmental protection and trade liberalization.[3]

This dissertation has taken a different track. Rather than asking what the law says about the EU's behavior, whether the EU should or should not engage in environmental norm export, or whether the particular mix of policy instruments the EU has employed are the best means of accomplishing its goals, the dissertation has turned its attention back on the EU itself. Its primary research question is not normative, but instead a reflexive one: What does the practice of EU environmental norm export tell us about the way the EU perceives the role and limits of government, the means and ends of politics, and the drivers of human and institutional behavior?

In order to answer this question, the dissertation turned to Foucauldian governmentality studies. Taking advantage of the recent translation into English of Foucault's lectures from the late 1970s and early 1980s,[4] and the subsequent renewal of interest and attention to his theories of governmental power (particularly in international relations circles), the dissertation has used the governmentality method as a 'toolbox' from which it drew a number of research themes and questions. In doing so, it adopted a three-part schema for exploring the 'art of government' or 'conduct of conduct' (how, when, and where power directs the behavior of individuals and other actors) in the EU's environmental norm export policies, focusing in turn on:

1. *Rationalities of government*: the logics or truth regimes according to which government happens;
2. *Technologies of government*: the means or instruments by which government happens; and
3. *Subjectivities*: the subject-positions or identities (of both the governed and the governing) that government creates and by which it is sustained.

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[3] For more on the current landscape of scholarship regarding environmental norm export, *see* Chapter 1, Section 2.

[4] In particular, Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-1978* (Graham Burchell trans. 2007); Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-1979* (Graham Burchell trans. 2008).

Each of these 'themes' emphasizes a different aspect of how power structures behavior along particular lines. However, they are all inter-related in a fundamental sense, and are actually inseparable from one another. For example, it is because subjects accept particular regimes of truth that they conform their conduct to them, and this conforming behavior affirms the belief that particular types of interventions are appropriate for governing those subjects.[5]

In investigating the interplay of these three themes, the first task that this dissertation set itself was to map the field of practice of EU environmental norm export from a governmentality perspective. In order to do so, it examined the legal and political discourse of the EU and those affected by its policies. By studying legal cases, statements by officials, legislative documents, press releases, and other representative documents, the dissertation was able to identify a number of themes that revealed the rationalities, technologies, and subjectivities that underlie contemporary EU activity in this area.[6]

This mapping project resulted in the claim that there appear to be two broad political logics that structure EU environmental norm export: a rights rationality and a market rationality. The rights rationality draws on older themes of *raison d'État* governmentality. It conceives of society as made up of rights-bearing citizens and government as the business of balancing these rights against those of other actors and strengthening the forces of the state. Market rationality, by contrast, draws on newer governmental forms of liberalism and neoliberalism. It conceives of society as made up of stakeholders who act in pursuit of their interests, and government as the business of efficiently managing the social and economic environment such as to produce the competitive market. These rationalities coexist within contemporary EU governmentality (which this dissertation, following Nikolas Rose, termed 'advanced liberalism').[7] This means that both regimes of knowledge about human and institutional behavior are held to be 'true' simultaneously: government is about law and rights, *and* it is about efficient management of the marketplace.

These rights and market rationalities are not monolithic, but instead contain within them numerous variations or 'ideal-typical' positions that have different orientations with respect to such themes as the problematic of security, freedom, and the international. In particular, Chapter 3 set out four 'ideal-typical' positions that appear in the legal and political discourse

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[5] For an in-depth discussion of Foucault's theory and these three themes, *see* Chapter 2, Sections 2 and 3, respectively.

[6] Here it is important to emphasize once more that these rationalities, technologies, and subjectivities are entirely contingent—they are a product of their own historical, geographical, and sociological moment. Other governmentalities have existed in the past, and others will no doubt develop in the future.

[7] The term 'advanced liberalism' is used instead of 'neoliberalism' to reflect the fact that the current paradigm is not univocally neoliberal, but also contains the legacies of older paradigms.

surrounding EU environmental norm export. Within rights rationality, the *sovereigntist* strand emphasizes the autonomy of the subject, while the *cosmopolitan* strand emphasizes the need to protect the common good and the wellbeing of citizens. Within market rationality, similarly, the *free market* orientation emphasizes the freedom of actors within the market sphere, while the *human capital* orientation emphasizes the need to protect and improve the competitive market and those who act within it.

Rationalities of government are important because they delimit the perceived range of possibility of governmental action. That is, they make certain actions and responses seem viable, reasonable, and likely to produce desirable effects, and others seem absurd, unreasonable, or ineffectual. At the same time, as seen in more detail in Chapters 4 and 5, they are critical in determining the technologies and subjectivities that structure the EU's governmental relationships, suggesting particular methods of governing in relation to the management of particular types of subjects.

In order to illustrate the functioning of the market and rights rationalities and their ideal-typical positions in practice, Chapter 3 provided an extended discussion of the EU's ongoing program of establishing an emissions trading scheme (ETS) for the airline industry, demonstrating how all four of the ideal-typical positions were on display in the discourse surrounding the EU ETS. From a *sovereigntist* perspective, for example, the EU argued that it was its legitimate right to regulate as it saw fit within its borders, given that "the legislation does not contain any provisions contrary to international law, nor does it infringe any sovereign rights of third countries."[8] From a *cosmopolitan* perspective, the EU argued that the ETS was meant to contribute to the common good of humanity by fighting climate change, and that its goal was to spur global action through EU leadership. From a *free market* perspective, the EU argued that the wide net of the ETS was necessary to prevent distortions of the market by 'cheaters' that would impede free competition, and that it would seek "to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner."[9] From a *human capital* perspective, the EU argued that its ETS scheme contributed to sustainable development, was based on "the latest scientific findings,"[10] and would address

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[8] International Civil Aviation Organization, Summary Minutes of the Second Meeting, 194th Council Session, C-MIN 194/2, 2 November 2011, at para. 26.

[9] Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 OJ (L 8) 3, at Recital 1.

[10] *Id.*, at Recital 3.

"serious risk to ecosystems, food production and the attainment of the Millennium Development Goals, as well as to human health and security."[11]

This analysis of the ETS generated two important conclusions. First, it demonstrated how neither the market nor the rights perspective is necessarily correlated with specific policy positions, but can rather support a number of concurrent positions on a given political question. In order to illustrate this, Chapter 3 identified not only pro-EU ETS positions from each of the four ideal-typical variants, but also challenges to the EU's scheme from within each of these rationalities. For example, *sovereigntist* rights rationality could just as easily be used to oppose the EU ETS (because it seeks to regulate the behavior of non-citizens) as to support it (because of the EU's right to regulate within its borders). This demonstrates that these rationalities of government are not political programs: they are beliefs regarding the 'truths' that underlie individual and governmental behavior. When the EU argues from a *human capital* perspective that the ETS is based on scientific evidence, for example, it implicitly asserts that conformity with scientific expertise is the appropriate metric for judging the legitimacy of legislation. When it argues from a *sovereigntist* perspective that the ETS does not violate international law, it implicitly asserts, by contrast, that legal right is the appropriate criteria for judging the legitimacy of legislation. These underlying 'truths' can lead to multiple political outcomes—'science' or 'law' can support various goals. However, they also make fundamentally different claims about why and how power functions, and structure argumentation along different pathways of power and resistance.

Second, the analysis of the ETS demonstrated that despite the fact that rights and market rationalities stem from fundamentally different assumptions about the appropriate role and limits of government, they coexist *simultaneously* in the EU's environmental norm export discourse. The EU presented the ETS as legitimate based on *both* sovereign right *and* scientific necessity; as properly designed *both* because of its conformity with international law *and* because of its efficiency and effectiveness; and as appropriate *both* because of the need for global leadership *and* the need to prevent market distortions. This coexistence is important, as demonstrated in Chapters 4 and 5, because it permits a legally and politically productive *polyvocality* within EU discourse.

Following its discussion of the ETS, the dissertation went on to argue in Chapter 4 that market and rights rationalities are associated with particular sets of technologies that make up the material side of governmental practice. It described rights technologies as including the

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[11] *Id.*

'traditional' tools of *government*: law, policing, and bureaucracy. Market technologies, by contrast, it associated with the 'modern' tools of *governance*: scientific expertise, benchmarking, incentives, and self-management. Whereas rights technologies tend to be centralized in hierarchical states, formally expressed in law, and manifestly 'political'; market technologies tend to be de-centralized across state and non-state institutions, de-formalized and expressed in 'best practices' documents and through flexible mechanisms, and appear as a-political 'science' or 'good governance' principles.

These technologies conform to the underlying 'truths' implied by rationalities of government. Legal and bureaucratic instruments are appropriate tools for a rights rationality that sees the role of the state as building its forces and protecting its own rights and the rights of its citizens. Similarly, scientific expertise and flexible market-based mechanisms are appropriate tools for a market rationality that sees governing as concerned with enhancing freedom in the marketplace and protecting the competitive environment.

In order to demonstrate how rights and market technologies operate in the EU's environmental norm export policies, Chapter 4 examined the trade/environment mechanisms of the EU–Colombia Peru FTA, a recent EU trade agreement with a prominent 'sustainable development' chapter. Through this study, it identified both rights instruments (such as the treaty format, policing by customs officials, and affirmations of each country's 'right to regulate'), and market instruments (such as the use of Sustainability Impact Assessments, stakeholder participation, and expert panels) at work in the text of the agreement.

Tracing the functioning of these rights and market mechanisms led to the dissertation's third important conclusion: that the simultaneous presence of rights and market rationalities and techniques in the EU–Colombia Peru FTA permits a polyvocality in EU discourse, and that this polyvocality (while uneasy) is legally and politically productive. In the context of the EU–Colombia Peru FTA, for example, it allows the EU to assert at the same time that it both *is* and *is not* acting in order to protect the environment in Colombia and Peru, appeasing civil society groups and the European Parliament with the FTA's environment chapter, while reassuring those concerned with the infringement of sovereign authority that little legally enforceable regulation is occurring, and all the while maintaining its image as a normative global actor. The use of rights technologies permits the belief that the treaty's trade and environment provisions are 'consensual', that they respect 'sovereignty', that there is no 'extraterritorial government' occurring, and that each party retains full 'regulatory sovereignty'. From this perspective, the EU is a sovereign entity that respects the division of

rights and authority between itself and other sovereign entities—in this case Colombia and Peru—in the international community.

On the other hand, the use of market technologies permits the EU to argue that the treaty's trade and environment provisions require 'good governance' and will set the basis for "structural reforms" in Colombia and Peru by promoting "internationally agreed best practices while securing a transparent, non-discriminatory and predictable environment for operators and investors via a mediation mechanism designed to address non-tariff barriers and—if necessary—an advanced bilateral dispute settlement mechanism."[12] Here, the EU—Colombia Peru FTA is seen as a powerful tool that will not only deregulate trade between the parties, but will also lead to 'structural reform' and contribute to sustainable development and good governance in Peru and Colombia. At the same time, these 'structural reforms' are not seen as unacceptable extraterritorial action because they are simply 'apolitical' good governance, which, 'objectively' speaking, all states should conform to in any case—not out of legal obligation, but out of 'common sense'. Fundamentally, this allows *government* to take place behind the screen of *governance*, obscuring the workings of power.

This simultaneous construction of the EU's environmental norm export activities as both conforming to international law norms and respecting sovereignty, *and* as leading to structural reform and good governance in third states is enabled by the polyvocality of the EU's discourse. This polyvocality opens up a complex arena of governmental play that creates opportunities for strategic political action as the EU and other actors jump back and forth between these discourses to justify particular outcomes.

Following this examination of the EU—Colombia Peru FTA, Chapter 5 went on to discuss the subjectivities associated with the rights and market technologies identified in Chapters 3 and 4. It defined two broad categories of subjectivity (of individuals, organizations, states, and other actors) that exist within EU political discourse: the *citizen* (the subject of rights) and the *stakeholder* (the market subject). The *citizen* is reminiscent of the classical concept of the individual subject; the actor imbued with rights and duties; the contractarian citizen who forms a government by ceding some of 'his' rights for the purpose of the common good. The *stakeholder*, by contrast, is a rational interest-maximizer; the entrepreneur seeking to increase

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[12] On the occasion of the signature of the agreement, EU Trade Commissioner Karel de Gucht stated that: "The agreement establishes a foothold for European business in this rapidly growing area and an anchor for further structural reforms in both countries." European Commission, "EU Signs Comprehensive Trade Agreement with Colombia and Peru," 26 June 2012, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=810 (last accessed 15 August 2014).

its (human) capital; the stakeholder who needs government to facilitate the competitive environment.

These subjectivities are both produced by and in turn justify the rationalities to which they are related. For example, if it is 'true' that subjects are rights-bearing citizens, then they will act in order to exercise and protect their rights, and the objective of the state to which they have ceded some of these rights should be to help them do so, by providing courts, securing borders, and so on. Similarly, these subjectivities suggest which governmental technologies will be useful and appropriate, and which will not. If it is 'true' that subjects are interest-maximizing stakeholders, then management can proceed by means of information campaigns, labeling initiatives, and incentivizing socially beneficial behaviors—more formal policing techniques are unnecessary and inefficient.

Chapter 5's discussion emphasized in particular the complex nature of subjectivity. First, it pointed out that subjectivity is multiple and multi-level, existing within and across different 'levels' of society and government. In the EU context, one might point to the individual, the Member States, different branches of EU government, or the EU as a whole in the international sphere. At each level, *citizen* and *stakeholder* subjectivities are at play, shaping 'knowledge' about government and individuals, and thus action as well. Second, it pointed out how the production of these multi-level subjectivities involves processes of division and 'othering'. The 'others' to the subject's 'self' can be geographical, cultural, or temporal, among other things. For example, when the EU defines itself as a 'leader' in the global environmental field, it is by definition defining others as 'laggards' or 'pupils' who need the leadership it provides. Third, the chapter discussed how the deployment of subjectivities to 'others' is itself part of a discursive struggle, as the 'others' may accept or contest their characterization. Opponents of EU environmental norm export may, for example, portray *themselves* as the 'real' leaders on sustainable development issues, challenge the EU's right to define 'progress', or adopt the subjectivity of 'efficient managers' in order to define the EU as an 'inefficient populist'.

In order to demonstrate how rights and market subjectivities function in EU environmental norm export policies, the dissertation examined the EU's ban on the import and trade in seals and seal products, in particular in the context of the recent *EU–Seals* dispute before the WTO. Through this study, it identified the simultaneous operation of both *citizen* (for example, the EU as the democratic protector of its citizens' rights to their moral choices) and *stakeholder* (for example, the EU as efficient manager of scientifically justified market corrections) subjectivities in the EU's discourse. It also spelled out the ways in which these

subjectivities 'othered' the EU's opponents in the seals dispute as 'barbaric', 'backward', 'over-reaching' into the EU's sphere of rights, and 'unscientific' in their approach.

This examination brought the dissertation to its fourth and final conclusion regarding the operation of governmentality in EU environmental norm export: that the multiplicity and polyvocality of EU discourse also provides opportunities for 'the governed' to act strategically, challenging the EU's activities, its use of particular technologies, and its identity from both within and between market and rights rationalities. With respect to the *EU–Seals* case, the EU's opponents contested the EU's characterizations of itself as *good citizen* and *rational stakeholder*, and its characterizations of Norway and Canada as *bad citizens* or *irrational stakeholders*. Though they used similar discourse, variously referencing sovereignty, indigenous rights, science, and the free market, they were able to inhabit multiple positions within the rights and market paradigms that allowed them to justify their own political behavior.

The dissertation referred to this type of contestation as the "tactical reversal" of mechanisms of power. Governmentality structures our understandings of ourselves and our government in deep and significant ways. However, this does not mean that it is monolithically determinate. If power is understood relationally, and as historically contingent, then resistance is always already a part of every power structure. Internal relational struggles can be instrumentalized to perpetuate or contest particular configurations of power relations. When the EU engages in environmental norm export, therefore, it is not a given that it will be successful either in attaining its immediate political goals or in transmitting governmental norms to third states and their citizens. There will always be space for contestation and resistance from within and between its rationalities, technologies, and subjectivities.

To return to the dissertation's primary research question, then: What does the practice of EU environmental norm export tell us about the way the EU perceives the role and limits of government, the means and ends of politics, and the drivers of human and institutional behavior? It tells us that the contemporary EU is a complex actor driven by two simultaneously held yet fundamentally distinct sets of beliefs regarding the 'true' role of government, the 'best' instruments for accomplishing its goals, and the 'true' drivers of subjects' behavior. The first holds that society is an accumulation of rights-bearing citizens, and that government's role is to protect the common good by securing those rights through law, policing, and bureaucracy. The second holds that society is made up of entrepreneurial stakeholders, and that government's role is to manage the competitive marketplace in which they function through incentivizing proper behavior, preventing market failures, and assisting in the production of human capital.

As the market and rights paradigms interact with one another, they produce an interesting combination of effects. The EU's environmental norm export policies generate not just 'environmental protection' or 'liberalized trade rules', but also the limits, rationalizations, means, and subjects of governmental activity. The rationalities the EU, governors, and the governed inhabit limit the perceived field of political possibility by designating certain behaviors and effects as reasonable, justifiable, and comprehensible, and designating others as unreasonable, illegitimate, and nonsensical. At the same time, the complexity of the simultaneously rights- and market-oriented governmentality of the EU is politically productive, providing opportunities to leverage the coexistence of market and rights regimes in order to obscure the operation of political power. As it is deployed in practice, the EU's behavior also produces 'others', and encourages third states and their inhabitants to adopt the same governmental rationalities, subjectivities, and technologies. However, just as it produces opportunities for the EU, the complexity of advanced liberal governmentality also produces opportunities for resistance and contestation by those with whom the EU interacts.

With respect to contemporary debates in EU policy, this means that--contrary to some common themes in scholarly writing—the EU and can neither be summed up as 'just a market' looking to extend its reach through the imposition of neoliberal norms, nor as 'just a federal sovereign' seeking to protect global and/or European rights. Rather, the Foucauldian governmentality analysis in this dissertation shows that the evangelical EU draws on multiple sets of rationalities, technologies, and subjectivities in forming and justifying its policy choices. And as a corollary, that other actors draw on multiple governmental logics in accepting and contesting the EU's activities and assertions. This dissertation sets out a more complicated and nuanced picture of the EU's vision of itself and its goals; one that ultimately seeks to provide a better understanding of the functioning of power in this area. Though the discussion here has been limited to the field of EU environmental norm export, the same governmentality toolkit could usefully be applied to investigate other areas of EU policymaking. Indeed, it is not difficult to imagine that there are many realms in which the EU, its subjects, and its others find themselves immersed in multiple discourses, neither entirely classical nor entirely neoliberal, but rather speaking, acting, and knowing *between* rights and market.

List of Abbreviations

ATA	Air Transport Association of America
CAN	Andean Community
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSR	Corporate Social Responsibility
EAP	Environmental Action Programme
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
ENRTP	Thematic Strategy for the Environment and Sustainable Management of Natural Resources, including Energy
EPA	Economic Partnership Agreement
ESDP	European Security and Defense Policy
ETS	Emissions Trading Scheme
EU	European Union
FLEGT	EU Forest Law Enforcement Governance and Trade Initiative
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEF	Global Environment Facility

Abbreviations

GHG	Greenhouse Gasses
GSP	Generalised System of Preferences
IC	Indigenous Community
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
IMF	International Monetary Fund
MBMs	Market-Based Measures
MEA	Multilateral Environmental Agreement
MEP	Member of Parliament
MRM	Marine Resource Management
NGO	Non-Governmental Organization
PDCA	Political Dialogue and Cooperation Agreement
REACH	EU Registration, Evaluation, Authorisation and Restriction of Chemicals Programme
SEA	Single European Act
SIA	Sustainability Impact Assessment
TBT	Agreement on Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
TREMs	Trade-Related Environmental Measures
UK	United Kingdom
UN	United Nations

US   United States

VPA   Voluntary Partnership Agreement

WTO   World Trade Organization

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Samenvatting

Milieuevangelisatie – de drang om Europese milieunormen naar het buitenland te verspreiden – is geen onbeduidend onderdeel van Europees extern beleid, maar juist een belangrijk onderdeel van het hedendaagse Europese handelsbeleid. Het Bestuursplan van het DG Handel van de Europese Commissie voor 2014, bijvoorbeeld, stelt twee algemene doelstellingen waarin het exporteren van milieunormen een belangrijke rol speelt:

1. "Bijdragen aan een slimme, inclusieve en duurzame groei in Europa door de beste handelsvoorwaarden en mogelijkheden te creëren voor Europese bedrijven, arbeiders en consumenten"; en
2. "Duurzame economische, sociale en milieuontwikkeling aan te moedigen, in het bijzonder voor ontwikkelingslanden." [1]

Het idee dat internationale en transnationale economische politiek een middel is voor milieubescherming in het buitenland is relatief nieuw, en heeft zich in het bijzonder ontwikkeld binnen de Europese Unie. In het gehele externe beleid van de Europese Unie worden economische middelen gebruikt om milieunormen te verspreiden in andere landen. Bilaterale handelsverdragen, het GSP+ programma, multilaterale handelsverdragen, handelsembargo's, belastingmaatregelen, milieueffectbeoordelingen, expertbevindingen, en programma's voor het bevorderen van maatschappelijk verantwoord ondernemen worden op verschillende manieren gebruikt om anderen aan te moedigen, te prikkelen of te dwingen zich te houden aan Europese milieunormen.

Deze milieuevangelisatie is niet onomstreden. Staten, individuen en organisaties hebben zich tegen het Europese milieu/handelsbeleid verzet, betogend dat dit beleid verplichtend, oneerlijk, onevenredig of inefficiënt is. Tegelijkertijd werpt dit soort beleid ook juridische en politiek-theoretische vragen op. Onderzoekers hebben de houdbaarheid van dit beleid aan internationaal recht en democratische legitimiteit getoetst en de effectiviteit van Europees beleid gericht op milieubescherming en handelsliberalisatie onderzocht.

Dit proefschrift neemt een ander perspectief. In plaats van de vraag te stellen wat het recht zegt over Europese milieuevangelisatie, of zich te vragen of de EU wel of niet zijn normen zou moeten exporteren, en met welke beleidsinstrumenten, richt dit proefschrift zich op de EU zelf. De hoofdvraag is dan ook niet normatief, maar reflexief: Wat zegt de praktijk van

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[1] European Commission, *Management Plan 2014: Directorate-General for Trade* 6-7 (2014). [mijn vertaling].

Europees milieuevangelisatie ons over hoe de EU de rol van de overheid ziet en wat de grenzen aan die rol zijn, het doel en de middelen van politiek, en de drijfveren van menselijk en institutioneel gedrag?

Om deze vraag te beantwoorden maakt dit proefschrift gebruikt van Foucauldiaanse studies in 'bestuurlijkheid' of 'bestuurspraktijken' (*gouvernmentalité* of *governmentality)*. Dit proefschrift gebruikt de bestuurspraktijkenmethode (door Foucault ontwikkeld aan het eind van de jaren zeventig en begin jaren tachtig en recentelijk weer onder de aandacht zijn gekomen van o.a. onderzoekers in de internationale betrekkingen) als een middel om een aantal onderzoeksthema's en vragen te ontwikkelen. Het proefschrift gebruikt daarbij een driedelig schema voor het ontwaren van 'de kunst van het besturen' of 'het dirigeren van gedrag' (hoe, waar en wanneer macht het gedrag van individuen en andere actoren beïnvloedt) in het Europese milieunorm exportbeleid:

1. Rationaliteit van het besturen: de logica of waarheidsregimes van het bestuur;
2. Bestuurstechnieken: de middelen of instrumenten van het bestuur;
3. Subjectiviteiten: the subjectposities of identiteiten (van zowel het bestuur als de bestuurssubjecten) dat het bestuur creëert en door welke het wordt onderhouden.

Elk van deze 'thema's' benadrukt een ander aspect van hoe macht gedrag langs bepaalde lijnen structureert. Desalniettemin is elk thema in fundamentele zin aan de anderen gerelateerd, en zijn ze dus eigenlijk niet van elkaar te scheiden. Omdat subjecten bepaalde waarheidsregimes accepteren, bijvoorbeeld, conformeren zij zich naar hen, en dit gedrag bevestigt het geloof dat bepaalde interventies geschikt zijn bij het besturen van deze subjecten.

Bij het onderzoek naar de wisselwerking van deze drie thema's, is de eerste taak van dit proefschrift het in kaart brengen van de praktijk van het exporteren van milieunormen door de EU vanuit een bestuurspraktisch perspectief. Om dit te bereiken wordt het EU juridisch en politiek discours onderzocht en zij die erdoor worden geraakt. Door middel van de bestudering van juridische uitspraken, standpunten van overheidsfunctionarissen, wetsteksten, persberichten, en andere documenten, identificeert dit proefschrift een aantal thema's die de rationaliteit, bestuurstechnieken en subjectiviteiten blootleggen die ten grondslag liggen aan de huidige activiteiten van de EU op dit gebied.

Dit overzicht resulteert in het standpunt dat er grosso modo twee politieke logica's zijn die de export van milieunormen structureren: een *rechten-rationaliteit* en een *markt-rationaliteit*. De rechten-rationaliteit komt voort uit oudere thema's van *raison d'État-bestuurspraktijken.* Deze

rationaliteit beziet de samenleving als een die bestaat uit burgers met rechten en de overheid als het instrument om deze rechten tegen elkaar af te wegen. De markt-rationaliteit, daarentegen, put uit nieuwere vormen van liberalisme en neoliberalisme. Het beziet de samenleving als een die bestaat uit belanghebbenden die hun belangen najagen en een overheid die als taak heeft de socio-economische ruimte efficiënt te beheren zodat er een concurrerende markt ontstaat. Deze rationaliteiten bestaan naast elkaar in het huidige EU-bestuursprakijk (en zal hierna aangeduid worden met de term 'advanced liberalism' naar Nikolas Rose). Dit betekent dat beide kennisregimes van menselijk en institutioneel gedrag tegelijkertijd als 'waar' worden bevonden: bestuur gaat over rechten en het recht, *en* over het efficiënt beheren van markten.

Deze rationaliteiten zijn niet monolithisch, maar bevatten verschillende variaties of 'ideaaltypische' posities die elk weer verschillende oriëntaties hebben ten aanzien van thema's zoals veiligheid, vrijheid en het internationale. In het bijzonder zet dit proefschrift zet vier 'ideaaltypische' posities uiteen die in het juridische en politieke vertoog rondom de milieunormenexport van de EU een rol spelen. Binnen de rechten-rationaliteit benadrukt de *soevereiniteitsbenadering* de autonomie van het subject, terwijl de *kosmopolitische benadering* de nadruk legt op de noodzaak om het gemeenschappelijke en het welzijn van alle burgers te beschermen. Binnen de markt-rationaliteit benadrukt de *vrije markt benadering* de vrijheid van actoren op de markt, terwijl de *menselijk kapitaal benadering* de noodzaak om marktwerking en zij die actief zijn op de markt te beschermen benadrukt.

Bestuursrationaliteiten zijn belangrijk omdat zij de beoogde mogelijkheden voor overheidsingrijpen afbakenen. Zij zorgen ervoor dat sommige handelingen haalbaar, redelijk, en nuttig lijken, terwijl andere handelingen absurd, onredelijk en ineffectief ogen. Tegelijkertijd zijn ze zeer belangrijk in het bepalen van de technieken en subjectiviteiten die de overheidsrelaties van de EU structureren, door bepaalde bestuursmethoden ten opzichte van bepaalde subjecten te suggereren.

Om het functioneren van de markt- en rechten-rationaliteiten en hun ideaaltypische posities in de praktijk te illustreren, analyseert dit proefschrift de EU's CO2 emissiehandelssysteem (ETS) voor de luchtvaartindustrie, waarbij alle vier de verschillende ideaaltypische posities zichtbaar zijn. De *soevereiniteitsbenadering* is zichtbaar, bijvoorbeeld, wanneer de EU beargumenteert dat de EU het recht heeft om de maatregelen te nemen binnen de grenzen van de EU omdat "de regelgeving geen bepalingen bevat die in strijd zijn met internationaal

recht, noch in strijd met de soevereine rechten van andere staten".[2] Vanuit de *kosmopolitische benadering* heeft de EU beargumenteerd dat de ETS bedoeld was om bij te dragen aan het gemeenschappelijke belang voor de mensheid van het tegengaan van klimaatverandering en dat het hierin een leidende rol wil spelen. Vanuit het perspectief van de *vrije markt* heeft de EU beargumenteerd dat de reikwijdte van de ETS noodzakelijk is om markverstoringen van 'valsspelers' tegen te gaan en dat het erop uit is om "de vermindering van broeikasgassen te bewerkstelligen op een economisch efficiënte manier".[3] Vanuit het perspectief van *menselijk kapitaal*, beargumenteert de EU dat ETS bijdraagt aan duurzame ontwikkeling, gebaseerd op "de laatste technologische ontwikkelingen"[4] en bijdraagt aan het tegengaan van "een serieus risico voor ecosystemen, voedselproductie en het bereiken van de Millenniumdoelen , alsmede risico's voor de volksgezondheid en veiligheid."[5]

Uit de analyse van de ETS kunnen twee belangrijke conclusies worden getrokken. Ten eerste blijkt dat noch het markt perspectief noch het rechten perspectief een noodzakelijke correlatie vertoont met bepaalde beleidsstandpunten, maar dat zij gelijkgestemde standpunten innemen bij een bepaald politiek vraagstuk. Ter illustratie laat dit proefschrift zien dat er niet alleen pro-EU standpunten uit elk van de ideaaltypische varianten valt af te leiden, maar ook dat deze positie vanuit deze ideaaltypische varianten valt te bestrijden. De *soevereiniteitsbenadering* kan bijvoorbeeld worden gebruikt om zowel de EU ETS te bestrijden (omdat het gedrag van niet-burgers wordt gereguleerd) als om de EU ETS te verdedigen (omdat de EU het recht heeft regels te maken binnen haar grenzen). Hieruit volgt dat deze rationaliteiten geen politieke programma's zijn: zij zijn belevingen van 'waarheden' die ten grondslag liggen aan het gedrag van overheden en individuen. Wanneer de EU vanuit een *menselijk kapitaalbenadering* beargumenteert dat de ETS gebaseerd is op wetenschappelijk bewijs, impliceert het daarmee dat dat wetenschappelijke kennis een geschikte maatstaf is voor het toetsen van de legitimiteit van regelgeving. Wanneer de EU vanuit een *soevereiniteitsbenadering* beargumenteert dat de ETS het internationaal recht niet schendt, impliceert het daarmee dat dat juridische rechten een geschikte maatstaf is voor het toetsen van de legitimiteit van regelgeving. Deze onderliggende 'waarheden' kunnen leiden tot verschillende politieke uitkomsten – 'wetenschap' of 'het recht' kunnen verschillende doelen dienen. Desalniettemin maken zij wel fundamenteel verschillende aanspraken over waarom

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[2] International Civil Aviation Organization, Summary Minutes of the Second Meeting, 194th Council Session, C-MIN 194/2, 2 November 2011, at para. 26. [mijn vertaling – JCL]

[3] Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, 2009 OJ (L 8) 3, at Recital 1. [mijn vertaling – JCL]

[4] *Id.*, at Recital 3. [mijn vertaling – JCL]

[5] *Id.* [mijn vertaling – JCL]

en hoe macht werkt, en structureren zij argumenten langs verschillende wegen van macht en weerstand.

De tweede belangrijke conclusie die kan worden getrokken uit de analyse van de ETS is dat de verschillende rationaliteiten *tegelijkertijd* naast elkaar kunnen bestaan, ondanks het feit dat zij voortkomen uit fundamenteel verschillende aannames over de rol van de overheid en de grenzen aan overheidsmacht. De EU stond de ETS voor als legitiem op grond van zowel soevereine rechten als wetenschappelijke noodzakelijkheid; als geschikt op grond van zowel het internationale recht als effectiviteit; als nodig op grond van zowel de noodzaak voor mondiaal leiderschap als de noodzaak om marktverstoringen tegen te gaan. Deze gelijktijdigheid is belangrijk, zo wordt betoogt in Hoofstuk 4 en 5, omdat het een juridisch en politiek productieve polyvocaliteit mogelijk maakt binnen het discours van de EU.

Dit proefschrift beargumenteert verder dat de markt- en rechten-rationaliteiten kunnen worden geassocieerd met verschillende technieken waaruit het materiele aspect van bestuurspraktijken bestaat. Rechten-technieken bestaan uit de 'traditionele' overheidsgereedschappen: het recht, de bureaucratie en handhaving. Markt-technieken, daarentegen, worden gevormd door 'moderne' gereedschappen van *governance*: wetenschappelijke kennis, prikkels, zelfbestuur en benchmarking. Terwijl rechten-technieken vaak gecentraliseerd zijn in staten met een hiërarchische structuur, formeel zijn vastgelegd in wetgeving en overduidelijk 'politiek' zijn, zijn markt-technieken meer gedecentraliseerd en verspreid over zowel overheidsinstellingen als private organisaties, informeel, en uitgedrukt in 'best practices' door middel van flexibele mechanismen en doen zich voorkomen als a-politiek 'wetenschap' of 'good governance' beginselen.

Deze technieken conformeren zich naar de onderliggende 'waarheden' die worden verondersteld door bestuursrationaliteiten. Juridische en bureaucratische instrumenten zijn geschikt gereedschap voor een rechten-rationaliteit dat in de staat een rol weggelegd ziet voor het beschermen van zijn eigen recht en dat van haar burgers. Wetenschappelijke expertise en flexibele markt mechanismen zijn op dezelfde manier geschikt gereedschap voor de markt-rationaliteit die in bestuur een rol ziet weggelegd voor marktvrijheid en het beschermen van vrije concurrentie.

Om aan te tonen hoe rechten- en markt-technieken opereren in de export van milieunormen analyseert dit proefschrift de handel/milieu mechanismen van de EU in het vrijhandelsakkoord met Colombia en Peru, waarin een belangrijk onderdeel over duurzaamheid gaat. Middels deze analyse worden zowel rechten-instrumenten geïdentificeerd in het akkoord (zoals het gebruik van een verdrag, controles door douane-agenten, en de

bevestiging van het recht om regelgeving te maken) als markt-instrumenten (zoals het gebruik vamen van 'Sustainability Impact Assessments, deelname door belanghebbenden, en het gebruik maken van expertpanels).

De manier waarop deze markt- en recht-mechanismen functioneren leidt tot een derde belangrijke conclusie: de gelijktijdige aanwezigheid van zowel rechten- als markt-rationaliteiten en technieken in het vrijhandelsverdrag met Colombia en Peru maakt een polyvocaal EU-discours mogelijk dat weliswaar ongemakkelijk ligt, maar zowel juridisch als politiek productief is. In de context van dit vrijhandelsakkoord leidt dit er bijvoorbeeld toe dat de EU kan zeggen dat het *zowel* handelt *als* niet handelt om het milieu te beschermen in Colombia en Peru, waardoor aan de ene kant maatschappelijke organisaties en het Europees Parlement worden gerustgesteld door het milieuhoofdstuk, en aan de andere kant anderen worden gerustgesteld door de aspecten van het akkoord die de soevereiniteit van die landen bekrachtigen, terwijl op hetzelfde moment de EU zijn imago als normatief leider in de wereld kan behouden. Het gebruikmaken van rechten-technieken maakt het geloof mogelijk dat de milieu- en handelsaspecten van het verdrag 'consensueel' zijn, dat zij 'soevereiniteit' respecteren, dat zij niet leiden tot extraterritoriaal bestuur, en dat beide partijen volledige wetgevingssoevereiniteit behouden. Vanuit dit perspectief bezien, is de EU een soevereine entiteit die de verdeling van rechten en autoriteit tussen haarzelf en andere soevereine staten in de internationale gemeenschap respecteert.

Aan de andere kant maakt het gebruik van markt-technieken het mogelijk voor de EU om te beargumenteren dat de milieuhandelsaspecten van het verdrag 'good governance' nodig hebben en de basis moeten vormen voor 'structurele hervormingen' in Colombia en Peru door het voorstaan van "internationaal erkende *best practices* terwijl een transparant, niet-discriminerend en voorspelbaar klimaat wordt geschapen voor investeerders en ondernemingen via een arbitragemechanisme waarmee handelsbelemmeringen kunnen worden aangepakt."[6] Daarmee wordt het verdrag niet alleen als een belangrijk instrument gezien om de handel te liberaliseren, maar ook om structurele hervormingen te realiseren en bij te dragen aan duurzame ontwikkeling en 'good governance' in Peru en Colombia. Tegelijkertijd worden deze 'structurele hervormingen' niet gezien als een onacceptabele extraterritoriale bemoeienis omdat zij simpelweg worden beschouwd als iets a-politieks, iets waar 'objectief' gezien alle staten naar zouden moeten streven omdat dit 'vanzelfsprekend' is.

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[6] Ter gelegenheid van de ondertekening van het Akkoord, stelde EU handelscommissaris Karel de Gucht dat: "Het akkoord vormt een bruggenhoofd voor Europese handelaren in dit snelgroeiende gebied en een anker voor verdere structurele hervormingen in beide landen." European Commission, "EU Signs Comprehensive Trade Agreement with Colombia and Peru," 26 June 2012, *beschikbaar in* http://trade.ec.europa.eu/doclib/press/index.cfm?id=810 (laatst bezocht op 15 August 2014). [mijn vertaling – JCL]

Fundamenteel bezien laat dit *overheidsbestuur* toe achter het gordijn van *governance* waarmee machtsstructuren worden verholen.

De polyvocaliteit van het discours van de EU maakt het mogelijk dat de EU's milieunormen export kunnen worden gezien als zowel in lijn met het internationale recht dat de eerbiediging van soevereiniteit verzekert als leidend tot structurele hervormingen en 'good governance' in andere landen. Deze polyvocaliteit veroorzaakt complexe vormen van overheidsbestuur waarbij strategische mogelijkheden voor politieke actie ontstaan doordat de EU en andere actoren van beide discoursvormen gebruik maken om bepaalde uitkomsten te rechtvaardigen.

Vervolgens analyseert het proefschrift de subjectiviteiten die kunnen worden geassocieerd met markt- en rechten-rationaliteiten. Het definieert twee brede categorieën van subjectiviteit (van individuen, organisaties, staten, en andere actoren) die bestaan binnen het politieke discours van de EU: *de burger* (de rechthebbende) en de *belanghebbende* (de marktdeelnemer). *De burger* voert terug op het klassieke concept van de onderdaan; de actor met rechten en plichten; de burger met het 'sociale contract' waarmee een overheid wordt gevormd door het afstaan van bepaalde rechten voor het gemeenschappelijk belang. *De belanghebbende*, daarentegen, komt op voor het eigen belang, is rationeel, en handelt om zijn eigen menselijk kapitaal te vergroten; de belanghebbende heeft de overheid nodig om een concurrerende omgeving te scheppen.

Deze subjectiviteiten komen zowel voort uit de rationaliteiten waar zij aan zijn gerelateerd en dienen als een rechtvaardiging voor die rationaliteiten. Als het bijvoorbeeld 'waar' is dat onderdanen rechten hebben, dan zullen zij daarnaar handelen, zowel in het uitoefenen als het beschermen van die rechten, en het doel van de overheid aan wie zij een deel van die rechten hebben afgestaan is om het uitoefenen en beschermen van rechten mogelijk te maken door voor rechtbanken, grenzen *etc.* te zorgen.   Tegelijkertijd geven deze subjectiviteiten aan welke overheidstechnieken zinvol en geschikt zijn en welke niet. Als het 'waar' is dat onderdanen op eigenbelang uit zijn dan kan overheidsbestuur volstaan met informatiecampagnes, etiketteringsvoorschriften, en sociaal nuttig gedrag stimuleren en zijn andere meer formele vormen van overheidsgezag onnodig en inefficiënt.

Dit toont eens te meer het complexe karakter aan van subjectiviteit. Ten eerste benadrukt deze discussie dat subjectiviteit in meervoud en op vele niveaus plaats vindt, bestaand binnen en over meerdere niveaus in de samenleving en de overheid. In de context van de EU kan men naar het individu, de lidstaten, verschillende onderdelen van het Europese bestuur of de EU als geheel op het internationale toneel kijken. Op elk niveau zijn de subjectiviteiten van

de *burger* en die van de *belanghebbende* actief, waardoor kennis over overheid en individuen en daarmee gepaard gaande activiteiten gevormd. Ten tweede laat deze discussie zien hoe de vorming van deze subjectiviteiten op meerdere niveaus een proces tot stand brengen van verdeling en '*othering*'. De 'anderen' (ten opzichte van het subjectieve 'zelf') kunnen o.a. geografisch, cultureel, tijdelijk of anderszins bepaald zijn. Als de EU zichzelf 'leiderschap' toekent op het gebied van milieubescherming, schrijft het anderen de rol van 'leerling' of 'achterblijver' toe die het leiderschap van de EU nodig hebben. Ten derde laat deze discussie zien hoe het gebruikmaken van subjectiviteiten naar anderen in zichzelf een onderdeel is van een discursieve strijd, omdat anderen de hun toegeschreven rol niet accepteren of bestrijden. Tegenstanders van milieunorm export door de EU, kunnen *zichzelf* bijvoorbeeld een rol toeschrijven als de 'echte' leiders op het gebied van duurzaamheid, en daarmee het recht van de EU om 'ontwikkeling' te definiëren, of kunnen een subjectiviteit aannemen als 'efficiënte managers' om daarmee de EU weg te zetten als een 'inefficiënte populist'.

Dit proefschrift analyseert het Europese importverbod op zeehondenproducten en meer in het bijzonder het handelsconflict hierover in de context van de WTO om te laten zien hoe de subjectiviteiten van rechten en de markt functioneren binnen het milieunormen export beleid van de EU. Deze studie identificeert de werking van de subjectiviteit *burger* (bijvoorbeeld, de EU als democratische beschermer van het recht van haar burgers over het uiten van hun eigen morele opvattingen) en de subjectiviteit *belanghebbenden* (bijvoorbeeld, de EU als efficiënte manager van wetenschappelijk verantwoorde marktcorrecties) in het discours van de EU. Dit proefschrift beschrijft ook de manieren waarop deze subjectiviteiten de tegenstanders in het conflict over zeehondenproducten een rol als 'barbaars', 'achterlijk' en 'overdrijvend' en 'onwetenschappelijk' in hun benadering zijn en op deze wijze '*otheren*'.

Deze analyse brengt dit proefschrift tot haar vierde en laatste conclusie over de werking van de bestuurspraktijken van de EU milieunorm export: de veelvuldigheid en polyvocaliteit van het EU discours biedt ook mogelijkheden voor hen die bestuurd worden door de EU om strategisch te handelen, de EU's activiteiten, technieken en identiteit te bestrijden vanuit zowel de markt-rationaliteit als van de rechten-rationaliteit. In de WTO zaak over het verbod op zeehondenproducten bijvoorbeeld, bestrijden de tegenstanders van het verbod het zelfbeeld van de EU als *modelburger* en *rationele belanghebbende* en het beeld dat de EU schept van Noorwegen en Canada als *slechte burgers* en *irrationele belanghebbenden*. Ook al maken beide partijen gebruik van eenzelfde discours (met referenties naar soevereiniteit, inheemse rechten, wetenschap, de vrije markt) zijn zij allebei in staat om verschillende stellingen in te nemen binnen de paradigma's van rechten en markt waarmee zij hun eigen politieke gedrag kunnen rechtvaardigen.

Dit proefschrift noemt deze vorm van strijd de "tactische omkering" van machtsmechanismen. Bestuurlijkheid structureert ons begrip van onszelf en onze overheid op een manier die ver gaat en significant is. Echter, bestuurlijkheid is niet monolithisch en/of bepaald. Als macht als relationeel wordt gezien, en als historisch contingent, dan is weerstand altijd een onderdeel van iedere machtsstructuur. Interne relationele strijd kan worden geinstrumentaliseerd om bepaalde vormen van machtsrelaties te laten voortbestaan of te bestrijden. Wanneer de EU overgaat tot milieunorm export bijvoorbeeld is het dus nog niet gegeven dat het succesvol zal zijn in het bereiken van haar politieke doelen of in het verspreiden van haar normen naar andere landen en de burgers in die landen. Er is altijd ruimte voor politieke strijd binnen deze rationaliteiten, technieken en subjectiviteiten.

Terugkerend naar de hoofdvraag van dit proefschrift: Wat vertelt de praktijk van Europees milieuevangelisatie over hoe de EU de rol van de overheid ziet en wat de grenzen aan die rol zijn, de doel en de middelen van politiek, en de drijfveren van menselijk en institutioneel gedrag? Het vertelt ons dat de EU in zijn huidige vorm een complexe actor is die tegelijkertijd gedreven door twee fundamenteel tegengestelde overtuigingen over de 'ware' rol van de overheid, de 'beste' instrumenten om haar doelen te bereiken, en de 'ware' drijfveren achter het gedrag haar onderdanen. De eerste van deze overtuigingen stelt dat de samenleving bestaat uit een samenvoeging van burgers met rechten, en dat het de rol van de overheid is om het gemeenschappelijk belang te beschermen door deze rechten veilig te stellen middels recht, handhaving en bureaucratie. De tweede overtuiging stelt dat de samenleving bestaat uit ondernemende belanghebbenden, en dat de rol van de overheid is om een competitieve marktplaats te beheren waarin deze belanghebbenden functioneren middels het stimuleren van het juiste gedrag, het voorkomen van marktfalen, en het ondersteunen van de productie van menselijk kapitaal.

De interactie tussen de paradigma's van de markt en van rechten zorgt voor een interessante combinatie van effecten. Het beleid van de EU gericht op milieunormenexport zorgt niet alleen voor 'milieubescherming' of 'handelsliberalisatie' maar genereert ook de grenzen, rationalisaties, middelen en onderwerpen van bestuurlijk handelen. De rationaliteiten waarbinnen de EU opereert stellen de grenzen van wat politiek haalbaar is, door bepaalde handelingen te benoemen als redelijk, te rechtvaardigen, begrijpelijk, en anderen als onredelijk, illegitiem en onbegrijpelijk. Tegelijkertijd is de complexiteit van de op rechten en op de markt gerichte bestuurspraktijken politiek productief omdat mogelijkheden worden gecreëerd om de gelijktijdigheid van deze twee rationaliteiten te gebruiken om de werking van politieke macht te verdoezelen. In de manier waarop dit in de praktijk wordt toegepast produceert de EU een beeld van 'de ander', en moedigt het niet EU-landen en hun burgers

aan om dezelfde rationaliteiten, subjectiviteiten, en technologieën aan te nemen. Echter, op dezelfde wijze worden ook de mogelijkheden tot weerstand en tegenspraak ontwikkeld voor hen met wie de EU interacteert.

Ten aanzien van tegenwoordige debatten over EU beleid, kan de EU noch worden samengevat als 'gewoon een markt' die zijn invloed probeert uit te breiden door het verspreiden van neoliberale normen, noch als 'gewoon een federale soeverein' die erop uit is Europese en/of mondiale rechten te beschermen. Wat een Foucauldiaanse analyse van bestuurlijkheid en bestuurspraktijken laat zien is dat het evangelische van de EU gebaseerd is op meerdere rationaliteiten, technieken en subjectiviteiten in het formuleren en rechtvaardigen van beleidskeuzes. Bovendien wordt zichtbaar hoe andere actoren gebruik maken van vele van dezelfde bestuursrationaliteiten om EU-handelen te omarmen en/of te weerstaan. Dit proefschrift beschrijft aldus een complexer en meer genuanceerd beeld van hoe de EU zichzelf en haar doelen ziet; een beeld die hopelijk leidt tot een beter inzicht in hoe macht opereert. Ook al heeft deze analyse zich beperkt tot de export van milieunormen, deze bestuurlijkheids-analyse kan worden toegepast op meerdere aspecten van EU beleid. Aldus is het niet onmogelijk om een voorstelling te maken van hoe de EU, en haar subjecten, en haar 'anderen', zichzelf ondergedompeld bevinden in meerdere discours, die noch helemaal klassiek zijn noch helemaal neoliberaal, maar die in feite spreken, handelen, en weten, *tussen* rechten en de markt.