

The EU as a Global
Regulator for
Environmental Protection
A Legitimacy Perspective

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*Identifying and Mapping
the Legal Phenomenon
of Internal Environmental
Measures with Extraterritorial
Implications (IEMEI)s*

I. INTRODUCTION

THIS CHAPTER EXPLORES the legal phenomenon of IEMEIs by identifying their legal nature as a mechanism of EU external environmental action and by examining the regulatory techniques they incorporate in extending EU environmental legislation beyond EU borders. The purpose of this chapter is to identify IEMEIs as a manifestation of EU global regulatory power, adopted alongside different types of EU external relations tools. The chapter also seeks to map the legal features of the various examples of IEMEIs examined in this book, providing the foundation for their legal analysis in Parts II and III. In analysing the legal nature of IEMEIs the chapter draws attention to the fact that IEMEIs fit within, but also fall uneasily between, legal regimes in EU, national and international law, including WTO law. In addition to informing the analytical method of the book, the recurring theme of the interplay of multiple legal regimes is identified as critical to the legal understanding of IEMEIs.

The chapter proceeds in the following manner. Section II identifies the legal nature of IEMEIs as an emerging mode of EU external environmental action and explains the prevalence of IEMEIs in terms of the EU's environmental leadership ambitions. In doing so, it demonstrates how the interplay of governance frames relevant in the operation of IEMEIs informs and partly explains their proliferation. Section III further identifies the legal nature of IEMEIs by exploring features of their legal design and transnational operation. A closer look at these legal features further exemplifies the interplay of multiple legal regimes relevant for the analysis of IEMEIs. This is because IEMEIs make references to international standards and third country law in setting regulatory restrictions on the EU market and often make explicit links to legal developments

outside the EU. In light of the legal nature of IEMEIs, Section IV then explains the analytical approach of this book, in examining IEMEIs as a legal phenomenon that operates at the intersection of multiple legal regimes.

II. IEMEIs WITHIN THE BROADER CONTEXT OF EU EXTERNAL ENVIRONMENTAL ACTION

This section situates IEMEIs within the broader context of EU external environmental action. It explores the legal nature of IEMEIs, by identifying IEMEIs as one mode of pursuing external environmental action alongside the EU's multifaceted environmental action at the international level (Section II.A), and by considering the motivations of the EU in adopting IEMEIs for pursuing environmental leadership (Section II.B). This discussion demonstrates how multiple legal regimes, particularly in international environmental law and EU external relations law, are a critical part of the story in identifying the legal nature of IEMEIs and explaining their proliferation.

A. Different Modes of EU External Environmental Action and IEMEIs

The external environmental action of the EU is typically associated with different types of external measures regulating the relations of the EU with third countries in the international plane. The EU and its Member States usually promote and influence the development of international environmental law through active participation in Multilateral Environmental Agreements (MEAs).¹ This is where EU law ordinarily interacts with public international law in the environmental sphere. The EU, as a strong regulating bloc, usually seeks to gain 'first mover' advantages by setting out its position early in the process of multilateral agreements.² Its global leadership role in this field has thus been usually associated with a preference for multilateralism,³ which is also explicitly embedded in its environmental legal competence.⁴

¹G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart, 2012) 21–24.

²AR Zito, 'The European Union as an Environmental Leader in a Global Environment' (2005) 2 *Globalizations* 363.

³J Vogler and HR Stephan, 'The European Union in Global Environmental Governance: Leadership in the Making?' (2007) 7 *International Environmental Agreements: Politics, Law and Economics* 389; T Delreux, 'The EU as an Actor in Global Environmental Politics' in A Jordan and C Adelle (eds), *Environmental Policy in the EU, Actors, Institutions and Processes*, 3rd edn (Routledge, 2012).

⁴Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C326/47 (TFEU) Art 191(1).

In the public international law arena, the EU's environmental action extends further than the traditional sense of MEAs, encompassing a variety of external relations tools 'beyond multilateralism'.⁵ The EU often externalises its own environmental standards to third countries within bilateral and inter-regional agreements. Through 'environmental conditionality', the EU promotes its legal standards as a benchmark for development of third country law by providing incentives, usually relating to market integration, for 'voluntary' adoption of EU environmental standards.⁶ Ordinarily these incentives are demarcated in different types of consensual agreements developed in co-operation with third countries,⁷ unlike IEMEs, which are unilaterally adopted by the EU. Furthermore, EU practice includes incorporation of environmental integration clauses⁸ in various types of bilateral or regional agreements,⁹ as well as in the EU Generalised System of Preferences.¹⁰

Also at the level of international law, the EU has been attempting to 'green' WTO law.¹¹ On the one hand, the EU has sought through political negotiations to include provisions that would place MEAs and WTO law on an equal footing, in accordance with the principle of mutual supportiveness, albeit with little success.¹² On the other hand, the EU has been invoking environmental and other societal concerns in the WTO's dispute settlement system, including defending its domestic policies in disputes.¹³

In addition to these modes of EU external action that take place in the realm of public international law, the EU has been pursuing *external* environmental

⁵Marín Durán and Morgera (n 1 above) ch 7.

⁶M Montini, 'EC External Relations on Environmental Law' in J Scott (ed), *Environmental Protection: European Law and Governance* (OUP, 2009) 680.

⁷A prime example of the EU as direct 'rule exporter' is The Energy Community Treaty [2006] OJ L198/18.

⁸Environmental integration requirements are also included in the provisions governing EU external action, Consolidated Version of the Treaty on the European Union [2008] OJ C326/13 (TEU) Arts 21(2)(d), (f).

⁹For a comprehensive analysis of different types of agreements see Marín Durán and Morgera (n 1 above) chs 2, 4. See also G Marín-Durán, 'The Role of the EU in Shaping the Trade and Environment Nexus Multilateral and Regional Approaches' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP, 2013); E Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart, 2015) ch 5.

¹⁰Marín Durán and Morgera (n 1 above) ch 3.

¹¹DR Kelemen, 'Globalizing European Union Environmental Policy' (2010) 17 *Journal of European Public Policy* 335; Marín-Durán (n 9 above).

¹²Kelemen (n 11 above); Marín-Durán (n 9 above). See also R Eckersley, 'The Big Chill: The WTO and Multilateral Environmental Agreements' (2004) 4 *Global Environmental Politics* 24.

¹³For example, Panel Report on EC – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R adopted 29 September 2006; AB Report on EC – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R adopted 18 June 2014.

action through its *internal* measures. In fact, the EU's internal environmental policy has always been informed by strong external dimensions such as the international sustainable development agenda¹⁴ and international environmental treaties.¹⁵ Also, environmental measures have traditionally aimed at protecting the natural environment of the EU as well as the environment beyond EU borders, especially through the implementation of international conventions within the EU.¹⁶ Furthermore, the EU would usually adopt internal environmental measures on contentious issues, with the aspiration that by showing the rest of the world what can be achieved internally, the EU policy would then provide an example to be followed internationally. The EU would thus assume a directional leadership role, leading 'by example'.¹⁷ The success of this leadership mode has been called into question, because of challenges for the EU to achieve internal coherence and demonstrate credibility externally.¹⁸

Beyond such internal measures with external dimensions, in situations where cooperative regimes fail or are inadequate, the EU increasingly pursues global environmental protection through IEMEIs. IEMEIs involve the unilateral exercise of EU regulatory power in the form of market access requirements adopted in the absence of, or above, existing international standards. IEMEIs more directly and deliberately aim at instigating regulatory changes abroad and influencing third country and international policies. *IEMEIs are legally designed to unilaterally extend the territorial remit of EU legislation,¹⁹ by making access to the EU market conditional upon the basis of conduct or processes that take place abroad and explicitly linking their application to developments in third countries, or at the international level.* The book does not focus on measures that incidentally have extraterritorial implications but rather on measures legally *designed* to have extraterritorial legal impacts and regulatory effects. The effects of IEMEIs on international trade are key in achieving their regulatory goal by 'affecting the distribution of costs and benefits accruing from

¹⁴For example, Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 vol 1, Principle 4.

¹⁵For example, in regulating the protection of nature and biodiversity, the EU relied on many treaties such as the Convention on Wetlands of International Importance, 2 February 1971, 996 UNTS 245.

¹⁶JH Jans and H Vedder, *European Environmental Law*, 3rd edn (Europa Law Publishing, 2008) 31–35.

¹⁷Directional leadership consists of 'non-confrontational means of diplomacy, persuasion and argumentation': S Oberthür, 'The Role of the EU in Global Environmental and Climate Governance' in M Telo (ed), *The European Union and Global Governance* (Routledge, 2009) 195–96.

¹⁸B Kilian and O Elgström, 'Still a Green Leader? The European Union's Role in International Climate Negotiations' (2010) 45 *Cooperation and Conflict* 255; H Vedder, 'The Formalities and Substance of EU External Environmental Competence: Stuck Between Climate Change and Competitiveness' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012).

¹⁹J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

international trade'.²⁰ Notably, through IEMEs, the EU's approach is shifting from leadership by example, to structural or power-based leadership,²¹ which utilises EU market power to prompt regulatory changes in third countries.²² As demonstrated in Section III below, IEMEs combine features of coercion in the form of conditionality, with the possibility of exclusion from the EU market, as well as persuasion,²³ through cooperative elements, thus exhibiting a combination of structural and directional leadership in triggering regulatory changes. In this respect, IEMEs contribute to transnational processes of policy diffusion²⁴ through regulatory competition among trading partners,²⁵ as well as through different forms of regulatory co-operation.²⁶

Through such processes the EU exercises both normative power²⁷ and market power²⁸ in stimulating regulatory changes abroad in different ways.²⁹ Regulatory standards in IEMEs often act as 'norm catalysts' setting a baseline that creates incentives and affects the costs and benefits of analogous third country and international policies.³⁰ IEMEs can also influence multilateral regimes, in the

²⁰ Suttle identifies such measures as external trade measures that require special justification towards outsiders subject to them: O Suttle, 'Equality in Global Commerce: Towards a Political Theory of International Economic Law' (2014) 25 *European Journal of International Law* 1043.

²¹ This shift is demonstrated in how IEMEs influence regulatory approaches abroad in Section III below.

²² J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (OUP, 2011); J Scott, 'EU Global Action on Climate Change: Contingent Unilateralism and Regulatory Penalty Defaults' (2012) 2(1) *SADC Law Journal* 1; VL Birchfield, 'Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions' (2015) 22 *Journal of European Public Policy* 1276.

²³ AR Young, 'The European Union as a Global Regulator? Context and Comparison' (2015) 22 *Journal of European Public Policy* 1233.

²⁴ Policy diffusion is defined as 'the interdependent process that is conducive to the spread of policies' around the world, F Gilardi, 'Four Ways We Can Improve Policy Diffusion Research' (2016) 16 *State Politics and Policy Quarterly* 8.

²⁵ Regulatory competition arises when domestic decision-makers respond to regulatory decisions of other states either through a 'race to the bottom' by lowering their own standards to attract investment or more likely through a 'race to the top' whereby states raise their own standards in response to the more stringent policies of their trading partners. For an explanation of how regulatory competition leads to a 'race to the top' see David Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection' (1997) 4 *Journal of European Public Policy* 556. For a legal account of regulatory competition, see V Heyvaert, 'Regulatory Competition – Accounting for the Transnational Dimension of Environmental Regulation' (2013) 25 *Journal of Environmental Law* 1. For a perspective from political science, Young (n 23 above).

²⁶ Young (n 23 above).

²⁷ The EU is understood as a normative power by promoting and extending normative values such as democracy, the rule of law, sustainable development and good governance beyond its borders through different diffusion processes, usually of non-coercive nature: I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235.

²⁸ Due to the economic power of the single market, the EU's institutional features that render it akin to a regulatory state and interest contestation involved in the development of EU internal policies, the EU's market-related measures are often externalised through both coercive and persuasive means: C Damro, 'Market Power Europe' (2012) 19 *Journal of European Public Policy* 682.

²⁹ A rigid dichotomy between normative and market power is not always constructive, Birchfield (n 22 above).

³⁰ Scott, 'Territorial Extension' (n 19 above).

form of ‘uploading’ of EU rules to international regimes.³¹ The ways in which IEMELs affect third country practices and regulatory behaviour vary, and depend on the EU’s market power, the nature of the issue regulated, the EU’s regulatory capacity and the nature of the standards adopted.³² IEMELs may thus lead to ‘divergent convergence’³³ or mimesis³⁴ in certain areas; provide a ‘source of inspiration’ in others;³⁵ or trigger ‘reflection, debate and reform’.³⁶ This book does not examine the *actual* impact of EU legislation beyond its borders from an empirical perspective, but rather engages in a doctrinal and normative analysis of how EU legislation is designed to extend beyond EU borders and influence third country policies.

Overall, the EU’s global environmental leadership role is pursued through multiple channels of regulatory action, utilising its legal competences in different ways. In this respect, IEMELs are identified as a regulatory mechanism through which the EU pursues and influences global environmental governance, alongside other types of trade-related legal mechanisms.³⁷ IEMELs function as a supplementary mode of EU leadership, used in combination with other external relations tools, to stimulate regulatory changes in third countries and international regimes.³⁸ On the basis of this analysis, the following sub-section seeks to explain *why* the EU increasingly resorts to IEMELs in pursuing external action, demonstrating their legal nature as a legally hybrid mode of EU environmental action that simultaneously governs the EU internal market and the EU’s external relations.

B. Explaining the Recourse to IEMELs

EU unilateral action in environmental matters can be explained in different ways that demonstrate the legal character of IEMELs. Understanding the increasing

³¹ JB Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’ (2000) 27 *Ecology Law Quarterly* 1295.

³² A Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University Law Review* 1. See also D Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995) ch 8.

³³ D Levi-Faur and J Jordana, ‘Regulatory Capitalism: Policy Irritants and Convergent Divergence’ (2005) 598 *The Annals of the American Academy of Political and Social Science* 191.

³⁴ G Shaffer and D Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1 *Transnational Environmental Law* 31.

³⁵ Marín Durán and Morgera (n 1 above) ch 7.

³⁶ E Fisher, ‘The ‘Perfect Storm’ of REACH: Charting Regulatory Controversy in the Age of Information, Sustainable Development, and Globalization’ (2008) 11 *Journal of Risk Research* 541.

³⁷ On different kinds of trade-related mechanisms employed in EU external governance, see B Van Vooren, S Blockmans and J Wouters, *The EU’s Role in Global Governance: The Legal Dimension* (OUP, 2013); Axel Marx and others, *Global Governance through Trade, EU Policies and Approaches* (Edward Elgar, 2015); J Zeitlin, *Extending Experimentalist Governance? The European Union and Transnational Regulation* (OUP, 2015).

³⁸ Marín Durán and Morgera (n 1 above) ch 7.

recourse to IEMEs informs how IEMEs fit within the EU's multi-faceted external environmental action, and demonstrates the multiple frames of governance at play, informing and shaping EU policy choices. There are many explanations for the motives of the EU in unilaterally extending internal environmental measures beyond its borders, with these motives involving a 'gamut from idealism to self-interest, often intertwined in complex ways.'³⁹ The following analysis sets out four of the motives driving the proliferation of IEMEs, which in different ways highlight the multiple legal regimes relevant to the operation of IEMEs. The legal nature of IEMEs can be attributed to: avoiding complexities and shortcomings of public international law regimes; effectively addressing transboundary or global environmental problems; protecting competitive opportunities of domestic economic actors while avoiding WTO incompatibility; and side-stepping the EU's internal challenges for exercising external competence in multilateral regimes.

First, in light of slow progress under some international regimes, the EU is increasingly resorting to IEMEs as a way of filling environmental regulatory gaps. Because of their inherent transnational nature, some environmental problems are preferably addressed through cooperative action to achieve effective results.⁴⁰ Conversely, unilateral solutions to transboundary or global environmental problems are considered 'second-best'⁴¹ as they could undermine multilateral efforts or give rise to 'ecological imperialism'⁴² or 'protectionism'⁴³ and should thus be avoided.⁴⁴ However, unilateral measures may be necessary as the alternative is often 'pure inaction'.⁴⁵ The increasing prevalence of IEMEs is partly due to the shortcomings of multilateral regimes. These shortcomings include slow progress of international regimes, adoption of weak standards based on the lowest common denominator, and ineffective implementation of such standards.⁴⁶ Therefore, in situations of 'limp-wristed international progress', the EU is not willing to wait for international regimes to move forward, but

³⁹ Zeitlin (n 37 above) 8.

⁴⁰ E Hey, 'Common Interests and the (Re)constitution of Public Space' (2009) 39 *Environmental Policy and Law* 152.

⁴¹ D Bodansky, 'What's so Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339; LB de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11 *European Journal of International Law* 315.

⁴² B Jansen, 'The Limits of Unilateralism from a European Perspective' (2000) 11 *European Journal of International Law* 309; T Cottier and S Matteotti-Berkutova, 'International Environmental Law and the Evolving Concept of "Common Concern of Mankind"' in T Cottier, O Nartova and SZ Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (CUP, 2009).

⁴³ L Ankersmit, J Lawrence and G Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 *Minnesota Journal of International Law Online* 14.

⁴⁴ Rio Declaration (n 14 above) Principle 12.

⁴⁵ Bodansky (n 41 above).

⁴⁶ JE Alvarez, 'Multilateralism and its Discontents' (2000) 11 *European Journal of International Law* 393; Bodansky (n 41 above).

instead proceeds with unilateral measures.⁴⁷ The urgency of addressing global collective action problems, such as climate change, may thus justify a move away from consensual modes of governance in pursuing global public goods.⁴⁸

Second, the broad territorial scope of IEMEIs, covering activities and actors beyond the borders of the EU, is often justified as necessary to effectively tackle transboundary or global environmental problems, such as air pollution that ‘knows no boundaries’.⁴⁹ At least in principle, IEMEIs that also apply to processes occurring abroad circumvent ‘free rider’ problems⁵⁰ that could result in the creation of pollution havens or lead to carbon leakage.⁵¹ They aim to avoid situations whereby commercial activities transfer to countries with less stringent environmental or climate change policies, effectively relocating the problem to a different part of the world.

Third, by equally applying environmental process standards to foreign economic operators, IEMEIs are increasingly adopted as a more direct way of protecting the competitiveness position of EU domestic operators that would face additional costs in comparison with their international competitors,⁵² thereby levelling the playing-field.⁵³ ‘By putting pressure on other jurisdictions to adopt similar environmental standards and/or adopt corresponding international standards’, IEMEIs protect the competitiveness position of EU domestic industry, while avoiding WTO inconsistency.⁵⁴ However, when the EU uses IEMEIs to primarily protect domestic businesses, its action can be problematic from the perspective of third countries.⁵⁵

⁴⁷ HH Vedder, ‘Diplomacy by Directive? An Analysis of the International Context of the Emissions Trading Scheme Directive’ in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders* (Hart, 2011).

⁴⁸ N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *The American Journal of International Law* 1.

⁴⁹ Case C-366/10 *The Air Transport Association of America and others v The Secretary of State for Energy and Climate Change* (ATAA) EU:C:2011:637, Opinion of AG Kokott, para 154.

⁵⁰ Identified as an important challenge for protecting global public goods, G Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’ (2012) 23 *European Journal of International Law* 669.

⁵¹ This reason was identified in including international flights in the EU ETS, Directive 2008/101/EC 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 L8/3 (Aviation Directive) Recital 25.

⁵² Protection of domestic competitiveness is also identified as a motive of EU environmental leadership through MEAs, DR Kelemen and D Vogel, ‘Trading places: The Role of the United States and the European Union in International Environmental Politics’ (2010) 43 *Comparative Political Studies* 427.

⁵³ C Ryngaert and M Koekoek, ‘Extraterritorial Regulation of Natural Resources: A Functional Approach’ in Axel Marx and others (eds), *Global Governance through Trade, EU Policies and Approaches* (Edward Elgar, 2015).

⁵⁴ K Kulovesi, E Morgera and M Muñoz, ‘Environmental integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU’s 2009 Climate and Energy Package’ (2011) 48 *Common Market Law Review* 829, 889; Kelemen (n 11 above).

⁵⁵ Ryngaert and Koekoek (n 53 above).

Fourth, both in political and legal terms, IEMEs represent an alternative and perhaps more effective mode of pursuing environmental leadership, addressing some of the internal challenges the EU faces in acting internationally. Through internal measures, the EU can avoid the constitutional complexities associated with EU external competence, at least at an initial stage.⁵⁶ Despite not being particularly problematic in the environmental field,⁵⁷ external competence may still give rise to uncertainty as to the legal basis on which MEAs are based, and the exact scope that EU external competence covers,⁵⁸ given its shared nature.⁵⁹ The nature of IEMEs as domestic measures also side-steps some of the difficulties of exercising competence in mixed agreements to which both the EU and the Member States are parties,⁶⁰ specifically in terms of the EU speaking with a ‘single voice’ in environmental negotiations.⁶¹ To a certain extent, IEMEs can be seen as a way of first achieving internal coherence within the EU, which can then be projected more easily in multilateral fora as the EU’s negotiating position. Both EU Member States and industry are usually more willing to agree on stringent environmental standards domestically, knowing that they will automatically apply to non-EU actors, rather than to adopt strict domestic standards and go on to agree to less stringent, ‘watered down’ standards in multilateral fora. Therefore, in legally analysing IEMEs, the focus shifts from conventional issues on EU external environmental action regarding external competence and international representation of the EU, to the internal decision-making processes of the EU legal order where IEMEs are designed and adopted.

In summary, Section II has examined how IEMEs provide a different direction for EU environmental leadership that supplements multilateral efforts undertaken by the EU in the realm of public international law. It has sought to understand their increasing prevalence as a mode of pursuing environmental leadership, by identifying how multiple legal regimes influence the EU’s policy choices in simultaneously pursuing internal and external environmental action.

⁵⁶ ‘competence is the EU terms for “powers”, determining when the EU can act.’ J Vogler, ‘The External Environmental Policy of the European Union’ in Olav Schram Stokke and OB Thommessen (eds), *Yearbook of International Co-Operation on Environment and Development* (Earthscan, 2003) 65.

⁵⁷ TFEU Art 191(4); Vedder, ‘Formalities and Substance’ (n 18 above); Marín Durán and Morgera (n 1 above) ch 1.

⁵⁸ Geert de Baere, ‘International negotiations post Lisbon: a case study of the Union’s external environmental policy’ in P Koutrakos (ed), *The European Union’s External Relations A Year After Lisbon* (2011) *CLEER Working Papers TMC Asser Institut* 3/2011.

⁵⁹ TFEU Arts 4(2), 191(4).

⁶⁰ A Dashwood, ‘Mixity in the era of the Treaty of Lisbon’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World* (Hart, 2010).

⁶¹ de Baere (n 58 above); J Thomson, ‘A Member State’s Perspective on the Post-Lisbon Framework for the EU’s Representation in Multilateral Environmental Negotiations’ and M Buck, ‘The EU’s Representation in Multilateral Environmental Negotiations after Lisbon’ in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012).

The following section continues the identification of the legal nature of IEMEs by more closely examining examples of IEMEs and discerning key features of their legal design.

III. EXAMPLES OF IEMEs: MAPPING THEIR LEGAL FEATURES

This section maps the examples of IEMEs examined in this book, so as to provide a clearer functional understanding of their legal nature and impacts, and their extraterritorial character. The term ‘internal measures with extraterritorial implications’ may incorporate different kinds of measures,⁶² from purely unilateral and extraterritorial measures⁶³ to transnational regulation.⁶⁴ The scope of this book is narrower, focusing on unilateral process-based measures that regulate access to the EU market for goods and services by imposing conditions on procedures that partly take place abroad. They often manifest ‘territorial extension’ whereby the application of EU legislation is triggered by a territorial connection between the EU and the regulated activity, and takes into account conduct or circumstances partly taking place in third countries.⁶⁵ These measures are chosen as the focus of this book because they demonstrate this emerging legal phenomenon in the environmental field, they show a great variety of regulatory techniques employed in extending the regulatory remit of EU legislation, and they bring out a constellation of questions about the legitimacy of the EU’s action.

The examples examined in this book do not represent an exhaustive list of EU measures that could qualify as IEMEs. Rather, they provide a suitably wide sample, involving different policy areas and legal regimes at different stages of development and maturity. The various examples demonstrate the multi-faceted legal nature and features of IEMEs and provide evidence of the growing legal phenomenon of IEMEs. The IEMEs covered in this book consist of measures regulating: imports of products relating to the sustainability of biofuels,⁶⁶ the

⁶²For an overview of different kinds of global reach of EU law see E Korkea-Aho, “Mr Smith Goes To Brussels”: Third Country Lobbying and the Making of EU Law and Policy’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 1.

⁶³Particularly prevalent in financial regulation, see J Scott, ‘The New EU “Extraterritoriality”’ (2014) 51 *Common Market Law Review* 1343.

⁶⁴Such as the regulation of chemicals and GMOs, Korkea-Aho (n 62 above). See also J Scott, ‘From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction’ (2009) 57 *American Journal of Comparative Law* 897; Zeitlin (n 37 above).

⁶⁵Scott, ‘Territorial Extension’ (n 19 above).

⁶⁶Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L140/16 (Renewable Energy Directive (RED)); Directive 2009/30/EC amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC [2009] OJ L140/88 (Fuel Quality Directive (FQD)).

legality of timber and timber products,⁶⁷ and illegal, unregulated and unreported fishing (IUU).⁶⁸ The book also examines measures on the export side of trade on the treatment of waste electrical and electronic equipment (WEEE)⁶⁹ and ship recycling.⁷⁰ Furthermore, the book examines the inclusion of aviation emissions in the EU Emissions Trading System (EU ETS).⁷¹

The mapping of these select IEMELs in this section is undertaken by exploring features of IEMELs that demonstrate their varying unilateral nature and extraterritorial effects. The analysis focuses on two inter-related regulatory techniques through which the EU extends the regulatory remit of its domestic environmental measures to processes occurring partly abroad. First, it highlights features of the legal design of IEMELs as trade restrictions that regulate access to the EU market on the basis of processes that take place partly abroad (Section III.A). Second, it explores features of their legal design concerning compliance by third countries through features of ‘contingent unilateralism’,⁷² flexibility and equivalence that link to, and implicate, legal developments outside EU borders (Section III.B). This categorisation is not the only way of analysing process-based measures⁷³ that exhibit territorial extension.⁷⁴ However, unpacking these two regulatory techniques and identifying their varied features is a useful exercise in further understanding the legal nature and functioning of IEMELs and how they may affect third country actors, directly or indirectly. These features demonstrate the variety of legal mechanisms employed by the EU in unilaterally regulating environmental problems, which extend beyond exportation of EU-set standards in a rigid manner and exhibit relative unilateralism. These regulatory techniques also demonstrate how IEMELs operate across multiple legal regimes by explicitly and variously incorporating international standards and making references to third country law and international developments in their legal design.

⁶⁷ Regulation (EU) 995/2010 laying down the obligations of operators who place timber and timber products on the market (Timber Regulation) [2010] OJ L295/23.

⁶⁸ Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286/1 (IUU Regulation).

⁶⁹ Directive 2012/19/EU on waste electrical and electronic equipment (WEEE) [2012] OJ L197/38.

⁷⁰ Regulation (EU) 1257/2013 on Ship Recycling [2013] OJ L330/1.

⁷¹ Aviation Directive (n 51 above); Consolidated Version of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32.

⁷² J Scott and L Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469; Scott, ‘Territorial Extension’ (n 19 above).

⁷³ See L Ankersmit, *Green Trade and Fair Trade in and with the EU: Process-based Measures within the EU Legal Order* (Cambridge University Press, 2017) Ch 1 (Ankersmit categorises process-based measures into three categories depending on how rules regulate trade: country-based, producer-based and consumer-based rules).

⁷⁴ Scott, ‘Territorial Extension’ (n 19 above) 107 (Scott analyses the different ‘spheres of regulatory intervention’, taking into account third country circumstances at the level of specific transactions; firms; third countries; or the entire globe).

A. Access to the EU Market on the Basis of Environmental Regulatory Requirements

This section focuses on the legal mechanisms used to regulate access to the EU market on the basis of environmental regulatory restrictions on processes that partly take place abroad. IEMEIs make such conduct subject to the same or equivalent environmental standards as apply to similar conduct carried out in the EU, possibly to avoid WTO inconsistency. The legal design of IEMEIs as regulatory restrictions that determine access to the EU market operates in two ways. First, certain IEMEIs regulate conduct abroad by making access to the EU market conditional on the basis of how production, harvesting or waste treatment processes take place in third countries. Second, other IEMEIs regulate conduct occurring outside EU borders by attaching economic obligations to such conduct. ‘Regulating’ conduct is understood here broadly to include both ‘command and control’ measures as well as economic incentive instruments.⁷⁵ It also covers situations where the EU may not be directly imposing its own environmental standards on actors in third countries, but still ‘indirectly assert[s] authority over’ processes that take place abroad.⁷⁶ Notably, ‘regulating’ processes abroad does not mean that the EU imposes restrictions on how conduct takes place abroad in the form of enforcement through sanctions for non-compliance, even when not accessing the EU market.⁷⁷ IEMEIs thus incentivise rather than compel specific behaviour.⁷⁸

Nonetheless, the effects of such EU market-related measures for third countries can be far-reaching in practice. Through ‘unilateral regulatory globalization’, the EU is sometimes able to ‘externalize its laws and regulations outside its borders through market mechanisms’,⁷⁹ giving rise to a ‘Brussels effect’.⁸⁰ EU market-related measures create incentives for non-EU operators to comply with EU standards if they want to trade with the EU, which may lead to changes in private behaviour more generally. Non-EU economic operators may change their business practices to match EU regulatory standards across their entire

⁷⁵ R Baldwin, M Cave and M Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (OUP, 2011) ch 7.

⁷⁶ D Augenstein, ‘The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon’ in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012) 283.

⁷⁷ R Howse and D Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ (2000) 11 *European Journal of International Law* 249.

⁷⁸ Ankersmit, Lawrence and Davies (n 43 above).

⁷⁹ Bradford (n 32 above) 3. See also V Heyvaert, ‘Globalizing Regulation: Reaching Beyond the Borders of Chemical Safety’ (2009) 36 *Journal of Law and Society* 110; Y Naiki, ‘Assessing Policy Reach: Japan’s Chemical Policy Reform in Response to the EU’s REACH Regulation’ (2010) 22 *Journal of Environmental Law* 171.

⁸⁰ Bradford (n 32 above). On the relationship between territorial extension and the Brussels effect, see J Scott, ‘The Global Reach of EU Law: Is Complicity the New Effects?’ in J Scott and M Cremona (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, forthcoming).

production irrespective of its ultimate market ('de facto Brussels effect').⁸¹ In turn, domestic industry may, albeit not always, urge third country governments to change their regulatory policies to be similar to those of the EU, thus leading to formal changes in third country law ('de jure Brussels effect').⁸² In this way the EU is using the 'lure of its green markets' as leverage for compliance and regulatory change elsewhere,⁸³ often influencing the relations of the EU with third countries in different ways.⁸⁴

(i) *Regulating Conduct Abroad: Process Standards*

In examining how process standards are employed in the different IEMEs, the analysis unpacks two distinct features. First, it explores different types of process standards in IEMEs, and second, how these standards are utilised as market access conditions in regulating trade with third countries. These features demonstrate how the EU's regulatory approach expands beyond direct exportation of standards set by the EU as mandatory conditions for market access, but often incorporates international and third country standards that create incentives through qualified trade restrictions.

There are different levels⁸⁵ or shades⁸⁶ of unilateral measures: ranging from purely unilateral measures that incorporate policies not recognised internationally, through measures that incorporate international policies, and unilateral trade measures, to measures that merely enforce internationally agreed norms.⁸⁷ This book adopts a broad definition of unilateralism that covers different degrees of unilateral action by the EU. IEMEs constitute a non-consensual mode of governance in the sense of third countries not consenting to the specific policy, specific type of trade-restrictive measure, or specific type of enforcement method. Even 'merely' enforcing international standards can raise concerns for third countries, as states usually strive to strike a balance between substance and enforcement in international negotiations; unilateral enforcement may have influenced third countries not to agree to international standards.⁸⁸ All kinds of

⁸¹ Bradford. See also AR Young, 'Political Transfer and "Trading Up"?: Transatlantic Trade in Genetically Modified Food and US Politics' (2003) 55 *World Politics* 457.

⁸² Bradford (n 32 above). Also see Young, 'Political Transfer' (n 81 above).

⁸³ D Vogel, 'Trading Up and Governing Across: Transnational Governance and Environmental Protection' (1997) 4 *Journal of European Public Policy* 556; Bradford (n 32 above); Scott, 'EU Global Action' (n 22 above).

⁸⁴ Including the relations of the EU with the UK following Brexit: I Hadjiyianni, 'The UK and the World: Environmental Law' in A Biondi and P Birkinshaw (eds), *Britain Alone, The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer Law International, 2016).

⁸⁵ Bodansky, 'What's so bad about unilateral action' (n 41 above).

⁸⁶ De Chazournes (n 41 above).

⁸⁷ Bodansky, 'What's so bad about unilateral action' (n 41 above); de Chazournes (n 41 above); Scott, 'Territorial Extension' (n 19 above).

⁸⁸ K Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581.

unilateral measures can be problematic from a legitimacy point of view. None should be either outright prohibited or allowed.⁸⁹ Rather they should be accompanied by different kinds of safeguards to guard against abuse of power, which may occur at different stages. With purely unilateral measures for example, abuse can occur at the formulation stage of the measure and therefore input on and consideration of third country impacts when designing the regulatory measure become critical. For unilateral measures that enforce international norms, the implementation and enforcement stages become crucial in ensuring that regulatory discretion in enforcing standards is sufficiently controlled, including through the protection of procedural rights of complying actors.

(a) Different Types of Process Standards

IEMEs that make market access conditional on the basis of how processes take place abroad impose different kinds of standards, varying from standards unilaterally set by the EU, equivalent standards, third country domestic requirements, or international standards, which are often combined within single legislative measures. IEMEs thus exhibit a great variety in legal terms, often avoiding imposing purely unilateral EU standards.

First, some types of IEMEs require third country operators to comply with *standards set by the EU* in its internal legislation. This is the case with the sustainability criteria for biofuels under the Renewable Energy Directive (RED), which impose requirements on production processes when biofuels are imported into the EU.⁹⁰ The sustainability criteria aim to regulate transboundary greenhouse gas (GHG) emissions and combat climate change, as well as to affect land use decisions and protect biodiversity in third countries.⁹¹ The criteria impose restrictions on the origin of biofuels harvested on specific types of land.⁹² EU legislation unilaterally links these types of land with sustainability criteria for the production of biofuels in the form of trade restrictions. It sometimes refers to international definitions of different types of land,⁹³ while also setting new definitions.⁹⁴ The criteria also stipulate specific amounts of GHG emission savings, set unilaterally by the EU.⁹⁵ The criteria have been revised to

⁸⁹B Cooreman, *Global Environmental Protection Through Trade, A Systematic Approach to Extraterritoriality* (Edward Elgar, 2017).

⁹⁰RED (n 66 above) Arts 17–18; FQD (n 66 above) Arts 7(b)–7(d). However, the criteria do not constitute mandatory market access conditions, as discussed below in this section.

⁹¹Scott, ‘Multi-Level Governance’ (n 22 above).

⁹²RED (n 66 above) Arts 17(3)–(5).

⁹³Biodiverse forests are defined in accordance with the Food and Agriculture Organisation’s definition used for the Global Forest Resource Assessment, RED (n 66 above) Art 17(3), Recital 69.

⁹⁴In relation to highly biodiverse grasslands: RED (n 66 above) Art 17(3)(c); Regulation (EU) 1307/2014 on defining the criteria and geographic ranges of highly biodiverse [2014] OJ L351/3.

⁹⁵RED (n 66 above) Art 17(2).

address concerns from indirect land use change (ILUC),⁹⁶ by imposing a limit on first-generation biofuels produced from crops or agricultural land,⁹⁷ and by prompting Member States to promote advanced biofuels,⁹⁸ which can produce greater emissions reduction and do not compete with food crops.⁹⁹ Apart from process standards, the Directive imposes reporting obligations on the European Commission in reviewing impacts from biofuel production, relating to environmental concerns, labour exploitation and increases in food prices.¹⁰⁰ Instead of imposing EU-set labour and environmental standards abroad that would have raised WTO compatibility questions,¹⁰¹ these obligations incorporate third country and international law in the reporting and reviewing system,¹⁰² thus implicating international legal regimes in their legal design. In principle, future revisions of the criteria should take into account impacts of EU domestic policies on legal, policy and social developments outside the EU.¹⁰³

Second, some IEMELs require compliance with *EU-equivalent process standards*. For example, the WEEE Directive specifies that WEEE shipped from the EU to third country facilities should be treated under conditions that 'are equivalent to the requirements of the Directive'.¹⁰⁴ The EU's regulatory requirements on WEEE aim to contribute to sustainable production and consumption through prevention of WEEE and through re-use, recycling and other forms of recovery of WEEE.¹⁰⁵ In relation to exports of WEEE in particular, the Directive aims to fight illegal exports of WEEE and treatment of such wastes in suboptimal conditions in third countries. Even though EU waste treatment conditions are not imposed on third country facilities, equivalence is unilaterally determined by the EU,¹⁰⁶ thus determining the conditions in which waste treatment takes place in third countries, at least in relation to EU waste. Equivalence is also relevant in proving compliance and is further discussed in Section III.B below.

⁹⁶ DA Farber, 'Indirect Land Use Change, Uncertainty, and Biofuels Policy' (2011) *University of Illinois Law Review* 381, 389 (ILUC concerns situations where 'use of cropland for biofuels raises food prices and increases the incentive to convert forests and grasslands to crop production, thereby releasing stored carbon and decreasing future carbon sequestration').

⁹⁷ Directive 2015/1513/EU amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2015] OJ L239/1 (ILUC Directive) Art 2.

⁹⁸ *ibid*, Art 2(2)(iv).

⁹⁹ Advanced biofuels count twice towards the target of biofuel use, RED (n 66 above) Art 21(2).

¹⁰⁰ On food prices RED (n 66 above) Arts 17(7), 23(2); on ILUC Arts 19(6), 23(8). On concerns raised by biofuels production, see Robert Edwards and others, 'Biofuels in the European Context: Facts and Uncertainties' (European Commission Joint Research Centre, 2009).

¹⁰¹ EB Lydgate, 'Biofuels, Sustainability, and Trade-Related Regulatory Chill' (2012) 15(1) *Journal of International Economic Law* 157.

¹⁰² Reviewing third country compliance and implementation of international labour, social and environmental conventions, RED (n 66 above) Art 17(7).

¹⁰³ Particularly on food prices in relation to which the Commission may take 'corrective action', RED (n 66 above) Art 17(7).

¹⁰⁴ WEEE Directive (n 69 above) Art 10(2).

¹⁰⁵ *ibid*, Recital 6.

¹⁰⁶ *ibid* Art 10(3).

Third, certain IEMEs impose restrictions on processes abroad *on the basis of third country or international law*. For example, the Regulation on IUU fishing (IUU Regulation) requires fishing activities which result in fishery products being exported to the EU – wherever these may occur, including in the high seas and in maritime waters of coastal states¹⁰⁷ – to be carried out in accordance with legality requirements of the flag state of the fishing vessel, and in accordance with international standards on conservation and management.¹⁰⁸ The IUU Regulation aims to fight IUU fishing, which constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources¹⁰⁹ and can have detrimental socio-economic effects on fishermen that abide by regulatory requirements on conservation and management of fisheries resources.¹¹⁰ While the Regulation does not impose EU fishing standards,¹¹¹ it requires third countries to have specific kinds of measures in place through the definition of ‘unregulated’ fishing,¹¹² and to ensure enforcement of and compliance with such standards.¹¹³ In effect, the IUU Regulation imposes a robust regime in unilaterally enforcing existing third country obligations to prevent illegal fishing under international law¹¹⁴ by restricting access to the EU market,¹¹⁵ thus giving teeth to loosely defined, or insufficiently enforced, international obligations. While the incorporation and strengthening of international obligations in the EU Regulation may make it seem less contentious, the unilateral enforcement of international standards in the form of market access conditions in the IUU Regulation can give rise to comparable effects and raise similar legitimacy concerns about how the EU unilaterally determines the enforcement of and compliance with such international obligations by third countries in practice.¹¹⁶ In fact, the ‘confusing, three-pronged definition of IUU fishing’ as established internationally complicates even further the unilateral imposition of restrictions on IUU fishing by the EU, given that it has to unilaterally determine at which point the third country fails to meet its international obligations.¹¹⁷

¹⁰⁷ IUU Regulation (n 68 above) Recital 7.

¹⁰⁸ *ibid*, Arts 2(2)(a), 12(3).

¹⁰⁹ *ibid*, Recital 3.

¹¹⁰ *ibid*, Recital 6.

¹¹¹ However there is still uncertainty as to whether the IUU Regulation goes beyond international standards when determining if a third country has fulfilled its flag-state obligations: ER van der Marel, ‘An Opaque Blacklist: the Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation’ in L Martin, C Salonidis and C Hioureas (eds), *Natural Resources and the Law of the Sea, Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Juris, International Law Institute, 2017).

¹¹² *ibid* Art 2(4).

¹¹³ *ibid* Art 20; M Tsamenyi and others, ‘The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective’ (2010) 25 *The International Journal of Marine and Coastal Law* 5.

¹¹⁴ IUU Regulation (n 68 above) Recital 1; EM Basse, ‘Environmental Reviews and Case Studies: The Legal Design of Sustainability Criteria on Biofuels Used by the European Union’ (2013) 15 *Environmental Practice* 50.

¹¹⁵ For example, IUU Regulation (n 68 above) Arts 31(3), (6).

¹¹⁶ van der Marel (n 111 above).

¹¹⁷ *ibid*, 255.

In a different way, the EU Timber Regulation, which forms part of a wider EU initiative on Forest Law Enforcement, Governance and Trade (FLEGT),¹¹⁸ requires that only legally harvested timber and timber products can enter the EU market. The Regulation forms part of a wider package of measures to support global efforts in the fight against illegal logging, which poses a significant threat to forests as it contributes to the process of deforestation and forest degradation.¹¹⁹ It regulates market access, not by reference to EU legality standards, but by reference to legality standards of the country of origin of timber. In this way, the Timber Regulation renders the legal landscape of the third country an intrinsic part of the legal design of the EU measure, thus vicariously enforcing third country laws,¹²⁰ rather than imposing its own rules.¹²¹ By using third country law as the starting point in influencing third country developments, the Timber Regulation creates space for third countries to advance their own regimes, while respecting their sovereignty, rendering EU unilateral action less contentious.¹²² Incorporation of international standards or deference to third country law, however, does not alleviate the concerns that the EU's unilateral action through trade restrictions may give rise to or provide all the answers about how to control the interaction between different levels of governance.

Additionally, within a single measure, the EU can impose *both* EU and internationally agreed process standards. The Ship Recycling Regulation imposes requirements for ship recycling to occur in 'safe and environmentally sound facilities', including those located in third countries, when they receive EU ships.¹²³ The extension of EU law in this case is thus not based on a territorial trigger, but rather on the nationality of the flag under which the ship operates. The requirements of the EU Regulation largely incorporate standards agreed under the Hong Kong Convention on Ship Recycling,¹²⁴ which could contribute

¹¹⁸For an overview of FLEGT, see C Overdevest and J Zeitlin, 'Forest Law Enforcement Governance and Trade (FLEGT): Transnational Dynamics of an EU Experimentalist Regime' in J Zeitlin (ed), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (OUP, 2015). See also the EU FLEGT Facility: <http://www.euflegt.efi.int/home>.

¹¹⁹Timber Regulation (n 67 above) Recital 3.

¹²⁰C Ryngaert, 'Whither Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects' in C Ryngaert, EJ Molenaar and S Nouwen (eds), *What's Wrong with International Law?* (Brill, 2015).

¹²¹Ryngaert and Koekoek (n 53 above).

¹²²E Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP, 2013); E Morgera and K Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change' in Inge Govaere and SP Ghent (eds), *EU Management of Global Emergencies, Legal Framework for Combating Threats and Crises* (Martinus Nijhoff, 2014).

¹²³Ship Recycling Regulation (n 70 above) Arts 13, 15.

¹²⁴Hong Kong International Convention on the Safe and Environmentally Sound Recycling of Ships, 19 May 2009 (not yet in force) SR/CONF/45; UD Engels, *European Ship Recycling Regulation: Entry-Into-Force Implications of the Hong Kong Convention* (Springer, 2013).

to justifying their extraterritorial impact,¹²⁵ but also go beyond such standards in some respects.¹²⁶ The purpose of this Regulation is also to reduce disparities between operators in the Union, in OECD countries and in relevant third countries in terms of health and safety at the workplace and applicable environmental standards. It aims to direct ships flying the flag of an EU Member State to ship recycling facilities that practise safe and environmentally sound methods of dismantling ships instead of directing them to substandard sites as is sometimes currently the practice.¹²⁷ While the Ship Recycling Regulation is meant to facilitate the early ratification of the Hong Kong Convention,¹²⁸ its effectiveness in creating incentives and impetus for ratification of the Convention is doubtful.¹²⁹ By creating a sub-division of recognised foreign ship recycling facilities, the Ship Recycling Regulation might have the effect of making the Convention redundant, and imposing the EU's own standards on third country facilities could instead hinder ratification of the Convention.¹³⁰ Furthermore, the Ship Recycling Regulation deviates from the Basel Ban,¹³¹ which prohibits hazardous waste from being sent to non-OECD countries, even though the relationship between the two international regimes is not conclusively settled.¹³² While the Ship Recycling Regulation puts in place standards that will not come into force under international law for a long time, it also highlights the limitations of unilateral regulation in addressing such a transboundary problem, which requires coordination of different international regimes to avoid fragmentation and circumvention of international standards through illegal practices.

The discussion above demonstrates that IEMELs avoid rigidly exporting EU-set process standards abroad, but rather they often refer to international and third country standards, thus exhibiting different degrees of relative unilateralism and showing how different legal regimes are inherent in the design of these IEMELs. IEMELs implicate third country and international legal regimes by changing the regulatory landscape and by assuming a role in the enforcement of pre-existing obligations. At the same time, as further demonstrated below,

¹²⁵ T Ormond, 'Enforcing EU Environmental Law Outside Europe? The Case of Ship Dismantling' (2009) 1 *Review of the Environmental Law Network International* 13, cf MN Tsimplis, 'Recycling of EU Ships: From Prohibition to Regulation?' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 415, 433.

¹²⁶ For example, in relation to waste treatment, Commission, 'Requirements and procedure for inclusion of facilities located in third countries in the European List of ship recycling facilities – Technical guidance note under Regulation (EU) No 1257/2013 on ship recycling' (Communication) [2016] OJ C128/1; M Galley, *Shipbreaking: Hazards and Liabilities* (Springer International, 2014).

¹²⁷ Ship Recycling Regulation (n 70 above) Recital 5.

¹²⁸ Ship Recycling Regulation (n 70 above) Recital 5. Especially given the Convention's demanding ratification conditions, Hong Kong Convention (n 124 above) Art 17.

¹²⁹ Tsimplis (n 124 above).

¹³⁰ *ibid.*

¹³¹ Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57; Basel Ban Amendment 1995 Conference Decision II/12; Ship Recycling Regulation (n 70 above) Recital 27, Art 27.

¹³² Engels (n 124 above); Galley (n 126 above) 199.

the EU unilaterally turns such standards into market access requirements that impose different kinds of obligations on foreign operators, outside and beyond international regimes.

(b) Regulating Trade: Mandatory and Non-Mandatory
EU Market Access Conditions

Process standards for conduct that takes place abroad are used as market access conditions by IEMEs in different ways, as *mandatory* conditions or as *non-mandatory*, *partial* restrictions to the EU market. Also, IEMEs impose obligations on foreign actors *directly or indirectly*. The ways in which market access restrictions based on process standards apply to third country actors may influence how those actors come within the scope of EU law or have access to the EU courts,¹³³ as well as determine the trade-restrictiveness of these measures under WTO law.¹³⁴

IEMEI standards are often legally designed as *mandatory conditions for access to the EU market*. This is the case with the IUU Regulation, the Timber Regulation and the Ship Recycling Regulation. Under the IUU Regulation, access of fishing vessels to EU ports is subject to authorisation, which includes an obligation to have a catch certificate on board the fishing vessel,¹³⁵ which has been validated by an eligible flag state.¹³⁶ The IUU Regulation contains far-reaching enforcement measures for excluding illegal fishery products from the EU market and ensuring *direct* compliance both by fishing vessels and flag states.¹³⁷ Fishing vessels can be included in the Community IUU vessel list when there is information about the vessel engaging in IUU fishing and the flag state fails to investigate and take enforcement measures against it.¹³⁸ Flag states that fail to take action to prevent, deter and eliminate IUU fishing may be identified by the Commission as ‘non-cooperating’ countries whose products and catch certificates are not accepted in the EU market, thus banning fishery products caught by vessels flying the flag of a blacklisted country.¹³⁹ A third country is identified as non-cooperating ‘if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing.’¹⁴⁰ The procedure by which a third

¹³³ Chapter 4, Section II.

¹³⁴ Chapter 5, Section II.B and Chapter 6, Sections II.B.(ii) and III.B.(ii).

¹³⁵ IUU Regulation (n 68 above) Arts 7(1), 12.

¹³⁶ *ibid* Arts 12(2), 20.

¹³⁷ Products not accompanied by catch certificates will be refused importation: *ibid* Art 18. Also, if not complying with the Regulation, fishing vessels may be included in the EU’s IUU Fishing vessel list and flag-states may be included in the list of non-cooperating countries: *ibid* Arts 27, 33.

¹³⁸ IUU Regulation (n 68 above) Art 27.

¹³⁹ *ibid*, Arts 31, 33, and 38. For example, Commission Implementing Decision (EU) 2017/889 of 23 May 2017 identifying the Union of the Comoros as a non-cooperating third country in fighting illegal, unreported and unregulated fishing [2017] OJ L135/35.

¹⁴⁰ IUU Regulation (n 68 above) Art 31(3).

country is identified as such involves the issuance of a formal warning in the form of a ‘yellow card’¹⁴¹ before the more restrictive ‘red card’ is issued, which formally places a third country on the list of non-cooperating countries.¹⁴² A third country is removed from the blacklist if the Commission is satisfied that the situation that warranted the listing is remedied, including taking into consideration ‘whether the identified third countries concerned have taken concrete measures capable of achieving a lasting improvement of the situation.’¹⁴³ The blacklist of non-cooperating countries thus aims to incentivise third countries to change their legislative and regulatory framework, while doing so through the enforcement of existing international obligations rather than EU-set standards.¹⁴⁴ The actual effect of the IUU Regulation on global efforts to fight IUU fishing, however, is not straightforward.¹⁴⁵

Mandatory conditions for access to the EU market take a different form under the Timber Regulation, which imposes a due diligence obligation on operators placing timber on the EU market for the first time. Operators are required to provide information on the imported timber,¹⁴⁶ to carry out a risk assessment evaluating the risk of illegal timber in their supply chain¹⁴⁷ and take risk mitigation steps when the risk of illegality is found to be non-negligible.¹⁴⁸ Notably, the Timber Regulation sometimes *directly* imposes due diligence obligations on non-EU actors when they are the first to place timber in the EU market. The due diligence obligations increase the administrative burden for producers, which can be more difficult to fulfil for producers from developing countries.¹⁴⁹ Even in situations where non-EU suppliers are not the ones placing timber products on the EU market, the Timber Regulation requires them to provide information about their harvesting processes to the operator.¹⁵⁰ Due diligence is of growing importance in the EU, leading to mandatory due diligence obligations in other policy areas.¹⁵¹ Furthermore, the EU’s FLEGT

¹⁴¹ *ibid*, Art 32(1).

¹⁴² For an overview of implementation measures against third countries, see https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf.

¹⁴³ IUU Regulation (n 68 above) Art 34.

¹⁴⁴ Cooreman (n 89 above) 215.

¹⁴⁵ ER Van der Marel, ‘Problems and Progress in Combatting IUU Fishing’ in R Caddell and EJ Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019).

¹⁴⁶ Timber Regulation (n 67 above) Art 6(1)(a).

¹⁴⁷ *ibid* Art 6(1)(b).

¹⁴⁸ *ibid* Art 6(1)(c).

¹⁴⁹ Ryngaert and Koekkoek (n 53 above).

¹⁵⁰ Timber Regulation (n 67 above) Art 6(1)(a).

¹⁵¹ Due diligence obligations will be imposed on companies importing minerals to the EU, Press Release, ‘Conflict minerals: MEPs secure mandatory due diligence for importers’: <http://www.europarl.europa.eu/news/en/news-room/20160615IPR32320/conflict-minerals-meps-secure-mandatory-due-diligence-for-importers>.

initiative has influenced regulatory changes abroad on the legality of timber, particularly prompting the adoption of US legislation.¹⁵² The cumulative effect of these unilateral measures ensures that illegal timber is not diverted to other major wood markets due to lack of regulation, at least in the EU and the US.¹⁵³

Mandatory restrictions on trade are also imposed in export measures. The Ship Recycling Regulation requires ship recycling facilities (SRFs) to apply to be included in the ‘European list’ of authorised facilities that can receive EU-flagged ships for disposal.¹⁵⁴ In this way, it imposes *direct* obligations on foreign facilities if they want to receive EU ships. Although the primary aim of export waste treatment standards is to ensure that EU ships are not recycled in facilities with lower standards, their operation restricts the possibilities for third country facilities to receive business from the EU and thus has the potential to influence their practices more generally. In particular, the technical and economic ‘non-divisibility’ of the standards imposed on SRFs,¹⁵⁵ such as those relating to the design and construction of facilities,¹⁵⁶ could lead to third country facilities expanding EU standards to the entirety of their business, extending to all ships received in that facility. In turn, this could lead to regulatory reforms in ship recycling countries and stimulate developments internationally by prompting other countries to ratify the Hong Kong Convention. However, such implications in relation to ship recycling may be realistically hampered. As EU requirements do not apply to ships flying the flag of a non-EU country, the EU Ship Recycling Regulation creates a non-level playing-field internationally and raises significant implementation challenges. As a result, ships may change flags before disposal (‘out-flagging’), rendering the Regulation ineffective, or shipowners may avoid registering their ships under EU flags altogether. This demonstrates the ineffectiveness of flag-state jurisdiction and the challenges for unilateral standards to effectively alter environmental practices and approaches abroad. Conversely, under the EU’s Regulation on authorising ship inspection societies, which could also be classified as an IEMEL, authorisation is determined on the basis

¹⁵²C Overdevest and J Zeitlin, ‘Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector’ (2014) 8 *Regulation and Governance* 22.

¹⁵³Overdevest and Zeitlin, ‘FLEGT’ (n 118 above).

¹⁵⁴Ship Recycling Regulation (n 70 above) Art 13. The first facilities authorised were in the EU while applications from third country facilities have been gradually approved. Authorisation is still ongoing for more facilities, pending site inspections, Commission Implementing Decision 2016/2323/EU establishing the European List of ship recycling facilities pursuant to Regulation (EU) 1257/2013 on ship recycling [2016] OJ L345/19; Commission Implementing Decision (EU) 2018/1906 amending Implementing Decision (EU) 2016/2323 to update the European List of ship recycling facilities established pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council [2018] OJ L310/29.

¹⁵⁵Bradford (n 32 above) 17, (non-divisibility occurs when ‘the exporter has an incentive to adopt a global standard whenever its production or conduct is non-divisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets’).

¹⁵⁶Ship Recycling Regulation (n 70 above) Art 13.

of their overall environmental and safety performance, including classification of non-EU ships.¹⁵⁷ Such a broad scope of ‘regulatory intervention’ at global level has not been adopted in the Ship Recycling Regulation,¹⁵⁸ showing how the extension of EU legislation abroad is already constrained in certain ways, in line with relevant international regimes, in this case the Hong Kong Convention.

Beyond mandatory conditions on trade, certain IEMEIs *partially and indirectly restrict access to the EU market* through an ‘incentive-based market approach’.¹⁵⁹ Such IEMEIs do not entirely close off the EU market to non-complying third country operators or products, but rather reduce the incentives for EU operators to trade with non-complying products or operators.¹⁶⁰ Examples of such legislation include the sustainability criteria for biofuels. Non-complying biofuels are not excluded from the EU market altogether, but compliance is required for energy from biofuels to count towards the obligation of achieving the target for biofuel use in transport, and for EU operators to be eligible for funding for consumption of biofuels.¹⁶¹ It is thus more attractive for EU operators to trade with producers that satisfy the sustainability criteria.

Similarly, treatment of WEEE outside the EU has to take place in equivalent conditions¹⁶² in order for it to count towards the recovery targets imposed on EU Member States under the Recast WEEE Directive.¹⁶³ The criteria for determining equivalence are currently being developed by the Commission in a delegated act. Strengthened recovery targets imposed on EU Member States reduce the incentives for EU exporters, who are the ones required to prove equivalence of WEEE treatment in third countries, in order to export waste to facilities that do not meet equivalent standards. Although indirectly restricting the EU market, these IEMEIs function on the basis of a similar logic to mandatory market access conditions and give rise to comparable kinds of implications in influencing business practices in third country facilities and potentially influencing international regulatory regimes. The key difference between the design of IEMEIs in the form of direct or indirect obligations on third country actors is the fact that when third country actors are directly affected by EU acts, they are more likely to be able to rely on enforcement mechanisms in the EU¹⁶⁴ and may become ‘subjects’ rather than merely ‘objects/addressees’ of EU law.¹⁶⁵ The trade-restrictive effects, however, are largely similar.

¹⁵⁷ Regulation (EC) 391/2009 on common rules and standards for ship inspection and survey organisations [2009] OJ L131/11, Arts 14(1)(1), 2(c).

¹⁵⁸ Scott, ‘Territorial Extension’ (n 19 above) 101.

¹⁵⁹ Morgera and Kulovesi (n 122 above).

¹⁶⁰ Basse (n 114 above).

¹⁶¹ RED (n 66 above) Art 17(1).

¹⁶² WEEE Directive (n 69 above) Art 10(2).

¹⁶³ *ibid* Art 11.

¹⁶⁴ See Chapter 4.

¹⁶⁵ E Korkea-aho, ‘Evolution of the Role of Third Countries in EU Law – Towards Full Legal Subjectivity?’ in S Bardutzky and E Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar, 2017) 211.

Overall, process standards in IEMEs create different kinds of incentives for third country operators to change their practices, and influence regulatory behaviour in third countries and internationally by linking to third country and international regimes and using access to the EU market to instigate changes. These incentives do not always amount to outright restrictions on the EU market or exportation of EU-set standards. Beyond process standards, regulating conduct abroad through IEMEs also manifests in the form of economic incentive obligations.

(ii) *Regulating Conduct Abroad: Economic Instruments*

A different way in which the EU may unilaterally regulate conduct abroad is by making access to the EU market conditional on fulfilling economic obligations. Economic instruments seem to cause greater political backlash and international resistance to the EU's unilateral extension of internal legislation. EU unilateral action may thus be subject to additional political and legal constraints that dictate the kinds of regulatory mechanisms it can employ. However, even 'unsuccessful' use of market access requirements in IEMEs can influence international developments, demonstrating how IEMEs can have implications beyond EU borders in different ways.

The most prominent example of unilateral regulatory extension through an economic instrument is the inclusion in the EU ETS of domestic and international flights departing from or arriving at EU airports.¹⁶⁶ This unilateral measure was adopted by the EU to address the increasing climate change impact of aviation emissions which falls outside the scope of the UNFCCC framework,¹⁶⁷ and which has been the subject of slow progress under the International Civil Aviation Organization (ICAO). The territorial extension of the Aviation Directive is particularly exhibited in the calculation of allowances to be surrendered by airlines, which is based on the whole journey, 'taking into account' those parts that take place beyond EU borders.¹⁶⁸ Although the Directive does not impose any 'concrete rule' on airlines when flying outside EU airspace,¹⁶⁹ it requires the surrendering of ETS allowances for those parts of the journey as well.¹⁷⁰ These obligations are *directly* imposed on third country airlines that would incur a penalty if they failed to surrender allowances¹⁷¹ and could also potentially be banned from the EU.¹⁷² These are significant obligations for foreign airlines that

¹⁶⁶ Aviation Directive (n 51 above).

¹⁶⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148, Art 2(2).

¹⁶⁸ Opinion of AG Kokott (n 49 above) para 147.

¹⁶⁹ *ibid.*

¹⁷⁰ BF Havel and JQ Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space Law* 3.

¹⁷¹ Aviation Directive (n 51 above) Art 16(3); Morgera and Kulovesi (n 122 above).

¹⁷² Aviation Directive (n 51 above) Arts 16(5)–16(12).

could not realistically avoid airports in the EU in light of its significance as an important economic market.

The EU's unilateral action in this field caused considerable reaction in different parts of the world, from both industry and third countries,¹⁷³ claiming that it infringed the sovereignty of third countries by regulating conduct that occurred within their airspace and thus presented controversial extraterritorial elements.¹⁷⁴ Such situations usually either lead to lobbying and changes in third country policies, or to pressures in altering or repealing the extraterritorial policy through mobilisation of industry, third countries and international organisations as part of a 'recursive process'.¹⁷⁵ In this case, the EU provisionally backed out by suspending the application of the Directive to international flights, pending developments within the ICAO.¹⁷⁶ As further discussed in Section III.B below, the EU's unilateral action was a 'decisive factor' in influencing developments in the ICAO, which had been stagnant for years.¹⁷⁷

A different kind of economic instrument, in the form of a ship recycling fund, has been considered in relation to the enforcement of the Ship Recycling Regulation. In light of significant implementation challenges and 'out-flagging' practices in this sector, such a mechanism could contribute to increasing the effectiveness of the process standards discussed above by expanding the scope of coverage of ship recycling requirements to non-EU ships. The initial proposal for a ship recycling fund, in the form of an annual levy paid by all ships calling at EU ports, was met with resistance from the international community and was rejected by the European Parliament.¹⁷⁸ Instead, the Ship Recycling Regulation requires the Commission to report on the 'feasibility of a financial instrument that would facilitate safe and sound ship recycling' by the end of December 2016.¹⁷⁹ A new report has been published suggesting the use of a ship recycling licence for ships calling at EU ports, accompanied with fees to 'serve capital accumulation with the aim to cover the revenue gap between sound and unsound recycling'.¹⁸⁰ The capital amount would only be paid to the final ship-owner after proving that the ship had been recycled at a facility included in the 'European list'. In its Report in August 2017, the Commission opted not to adopt a ship

¹⁷³ For an overview of international reactions see Morgera and Kulovesi (n 122 above).

¹⁷⁴ Case C-366/10 *The Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATAA)* EU:C:2011:864.

¹⁷⁵ Shaffer and Bodansky (n 34 above) 41.

¹⁷⁶ K Kulovesi, "'Make your Own Special Song, Even if Nobody Else Sings Along": International Aviation Emissions and the EU Emissions Trading Scheme' (2011) 2 *Climate Law* 535.

¹⁷⁷ Birchfield (n 22 above).

¹⁷⁸ Commission, 'An EU Strategy for Better Ship Dismantling' (Communication) COM(2008) 767 final.

¹⁷⁹ Ship Recycling Regulation (n 70 above) Art 29.

¹⁸⁰ Commission, Final Report, 'Financial instrument to facilitate safe and sound ship recycling': http://ec.europa.eu/environment/waste/ships/pdf/financial_instrument_ship_recycling.pdf.

recycling licence instrument for the moment. The Commission cited opinions of stakeholders on both sides and justified its ‘inaction’ by the need for further analysis as to the legal compatibility of this financial instrument with EU and international law, particularly WTO law.¹⁸¹

Beyond their legal design as market access requirements, the next sub-section shows how IEMEs link the application of market access requirements to legal developments outside the EU through flexible clauses. These features demonstrate further how IEMEs aim to ‘to galvanise or incentivise regulatory or normative engagement elsewhere’¹⁸² and how multiple legal regimes are implicated in their operation.

B. Compliance with IEMEs: ‘Contingent Unilateralism’, Flexibility and Equivalence

Within trade-related measures that incorporate environmental restrictions for access to the EU market, the EU increasingly employs novel regulatory techniques in conditionally and flexibly applying IEMEs to third countries.¹⁸³ These techniques are manifested in different kinds of clauses that determine the application of IEMEs to third countries on the basis of legal regimes beyond EU law. These techniques qualify the unilateral nature of IEMEs by reference to international developments and alleviate the trade-restrictive effects of IEMEs through flexible clauses regarding compliance that demonstrate the influence of WTO law on IEMEs.¹⁸⁴ These clauses show that IEMEs are not only EU-contained measures but directly implicate other legal orders as they are designed to catalyse legal developments in a unique way that links to third country regimes and international developments. The EU is innovative and employs different kinds of techniques to avoid purely exporting its own unilaterally-determined standards. However, the use of such flexibility, contingency and equivalence clauses gives rise to different kinds of questions and does not completely alleviate legitimacy concerns or answer legal questions about how to control unilateral regulatory power at the intersection of multiple regimes.

The compliance features of IEMEs are examined through clauses providing for conditional application of EU measures (Section B.(i)), alternative or supplementary modes of compliance with EU legislation (Section B.(ii)), and equivalence with EU requirements (Section B.(iii)). In contentious areas where international consensus is difficult to reach, IEMEs often render application of EU legislation ‘contingent’ upon legal developments in third countries or upon

¹⁸¹ Report from the Commission to the European Parliament and Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling COM(2017) 420 final.

¹⁸² Scott, ‘Multi-Level Governance’ (n 21 above).

¹⁸³ Scott, ‘Territorial Extension’ (n 19 above) 116–17.

¹⁸⁴ See Chapter 6, Section III.B.(ii).

bilateral or international agreements in order to incentivise regulatory changes abroad.¹⁸⁵ Through market access requirements, IEMEIs sometimes function as ‘penalty defaults’ that induce the cooperation of third countries or prompt them to adopt and adjust their own policies by ‘sanctioning non-cooperation’¹⁸⁶ through EU market power.¹⁸⁷ Flexibility clauses within IEMEIs also take the form of possibilities to use private certification or organisations in complying with EU requirements, which may prompt developments outside the EU by private actors, thus triggering the creation of transnational governance frameworks. These clauses can be explained as ‘escape routes’¹⁸⁸ by way of either ‘escaping’ the obligations imposed by EU legislation or using different avenues for securing access to the EU market.

(i) Conditional Application of EU Measures

Certain IEMEIs apply provisionally, providing the possibility to disapply EU legislation in light of international developments.¹⁸⁹ This is done with the continued presence of the unilateral IEMEI, which functions as a penalty default, threatening to apply in case an international agreement is not reached.¹⁹⁰ This regulatory approach is observed in areas where international agreements are on-going and specifically in relation to climate change policy, within the EU’s cornerstone ETS.¹⁹¹ Due to the overwhelming international resistance to the aviation regime, the EU has reconsidered including shipping emissions in the EU ETS. Instead, it opted for a less controversial and less economically burdensome Monitoring Reporting and Verification (MRV) mechanism applicable to ships arriving and departing from EU ports.¹⁹² The EU’s MRV system has been instrumental in driving international developments under the IMO with the ‘threat’ of including the shipping sector in the EU ETS post-2020 if an international agreement is not reached in the International Maritime Organization (IMO).¹⁹³ Sufficient action by the IMO at the international level had been specifically identified by the European Parliament as ‘a prerequisite for the Union not to act further on the inclusion of the maritime sector within the EU ETS’.¹⁹⁴ While the IMO has

¹⁸⁵ Scott, ‘Territorial Extension’ (n 19 above).

¹⁸⁶ G De Búrca, RO Keohane and C Sabel, ‘Global Experimentalist Governance’ (2014) 44 *British Journal of Political Science* 477, 478.

¹⁸⁷ Scott, ‘EU Global Action’ (n 22 above); Zeitlin (n 37 above).

¹⁸⁸ Scott, ‘EU Global Action’ (n 22 above).

¹⁸⁹ Scott ‘Territorial Extension’ (n 19 above) 116–17.

¹⁹⁰ *ibid*; Zeitlin (n 37 above).

¹⁹¹ For more examples under the EU ETS see Scott, ‘EU Global Action’ (n 22 above).

¹⁹² Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L123/55.

¹⁹³ Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63.

¹⁹⁴ European Parliament, Committee on the Environment, Public Health and Food Safety, Compromise Amendments, Report, on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, Recital 2b(new).

recently reached an ‘initial strategy’ to reduce CO₂ emissions, it has not yet put in place concrete rules.¹⁹⁵ It therefore remains to be seen whether the EU would resort to a market-based mechanism on shipping emissions and how this would interact with the IMO strategy.

Furthermore, the initial inclusion of aviation emissions in the EU ETS was explicitly linked to developments at the international level, providing the possibility for revising the scheme in case an international agreement was reached.¹⁹⁶ Responding to the international reaction to the inclusion of aviation emissions in the EU ETS, the EU suspended the application of the Aviation Directive, by temporarily excluding international flights from the regime. This suspension was provisional, providing that the default position after a specific time period would be for the full scope of the Directive to automatically resume to cover international flights, unless further action was taken to continue this suspension.¹⁹⁷ The possibility to resume the application of the EU ETS to international flights has functioned as a ‘stick’ in urging for a global agreement to be reached.¹⁹⁸ Beyond ‘serving as a model’ for how aviation emissions could be regulated through carbon trading,¹⁹⁹ it also exerted pressure on the international community through ‘bargaining with the possibility of exclusion’ from the EU market.²⁰⁰

After the conclusion of a global market-based mechanism under ICAO in 2016, which aims to stabilise CO₂ emissions at 2020 levels through an offsetting system²⁰¹ which is less stringent than the EU Directive,²⁰² the EU has opted to continue excluding international emissions from the EU ETS. This exclusion has again been formulated in ‘contingent’ terms, at the insistence of the European Parliament. International emissions from aviation are only provisionally excluded until 2023, while the Commission is expected to report on progress of implementation of the ICAO mechanism and action by third countries on this issue, the EU institutions will then determine, once more, whether to continue

¹⁹⁵ Initial IMO Strategy on Reduction of GHG Emissions from ships, https://unfccc.int/sites/default/files/resource/250_IMO%20submission_Talanoa%20Dialogue_April%202018.pdf.

¹⁹⁶ Directive 2003/87/EC (n 71 above) Art 25(a)(2).

¹⁹⁷ Decision 377/2013/EU, derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2013] OJ L113/1; Regulation (EU) 421/2014 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 L129/1.

¹⁹⁸ Birchfield (n 22 above).

¹⁹⁹ Aviation Directive (n 71 above) Recital 17.

²⁰⁰ Birchfield (n 22 above); Kulovesi (n 176 above).

²⁰¹ At ICAO’s 39th Assembly in September 2016, agreement on a new global market-based measure (GMBM) was reached to offset CO₂ emissions from international flights post 2020, <http://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-international-aviation-emissions.aspx>.

²⁰² It provides for voluntary adoption in the first two phases and includes exemptions from the agreement and for the distribution of offsetting obligations among airlines.

suspending the full scope of the Aviation Directive or revert back to its original scope.²⁰³

While ‘freezing’ the full scope of the EU ETS to exclude international aviation emissions may be interpreted by some as a failure of the EU to regulate this issue globally, it has significantly influenced international developments in dynamic and complex ways. At the same time, the EU has insisted on the inclusion of aviation emissions in the linking of the EU ETS with the Swiss carbon trading system,²⁰⁴ demonstrating its commitment to addressing aviation emissions beyond EU borders, through different channels of governance.²⁰⁵ The interaction between EU unilateral action and the developments in ICAO demonstrate how IEMEI

s are part of a reciprocal ‘dynamic process of action and reaction’ within a wider regime of transnational legal processes.²⁰⁶

(ii) Alternative or Supplementary Modes of Compliance

Given the far-reaching obligations imposed on economic operators by IEMEI

s, certain IEMEIs provide for alternative or supplementary routes of compliance with EU market access requirements that particularly influence compliance by third countries.²⁰⁷ This feature is a critical component of the Timber Regime and the sustainability criteria for biofuels. Compliance modes in these regimes manifest in two different ways: on the one hand, through bilateral agreements with the EU, thus implicating other kinds of EU external relations tools; and on the other hand, through private certification.

(a) Bilateral Agreements

Under the Timber Regulation, one of the ‘green lanes’ for access to the EU market is through a FLEGT licence, available for countries that have concluded a bilateral Voluntary Partnership Agreement (VPA) with the EU.²⁰⁸ FLEGT

²⁰³ Regulation (EU) 2017/2392 amending Directive 2003/97/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based mechanism from 2021 [2017] OJ L350/7, Art 7(1). This Report is meant to be detailed, covering the progress in international negotiations, domestic measures taken by third countries and the implications of reservations by third countries. Additionally, it is meant to examine the overall environmental integration of global market-based mechanism, including its ambition in relation to the goals under the Paris Agreement, the level of participation, enforceability, transparency, penalties for non-compliance, processes for public input, quality of offset credits, MRV of emissions, registries, accountability and rules on the use of biofuels.

²⁰⁴ Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems [2017] OJ L322/3, Chapter III.

²⁰⁵ The success of the extension of the EU ETS to aviation emissions beyond the EEA in this case may, however, be partly due to the consent-based nature of the linkage with the Swiss system.

²⁰⁶ Shaffer and Bodansky (n 34 above) 41.

²⁰⁷ Ryngaert and Koekoek (n 53 above).

²⁰⁸ Timber Regulation (n 67 above) Art 3.

licences guarantee access to the EU market, as timber is thereby considered to have been legally harvested rather than requiring individual verification under the due diligence obligation of the Timber Regulation.²⁰⁹ Despite incentives to conclude VPAs prior to the Timber Regulation,²¹⁰ it was only after the adoption of the Regulation restricting access to the EU market, that conclusion of VPAs expanded,²¹¹ showing the strong incentivising function that compulsory, trade-restricting IEMELs can have.²¹² The IEMEL – that is the Timber Regulation – was adopted to complement the existing EU regulatory framework and get the FLEGT regime off the ground, functioning as a necessary component in the form of a penalty default to incentivise third countries to conclude VPAs. Notably, this trade-restrictive measure was desired by partner countries, like Indonesia, making the Timber Regulation a special case among the other examples of IEMELs examined in this book. The Timber Regulation was viewed as an effective way of preventing VPA countries from being undercut by trade diversion to competitors that did not comply with the EU's requirement on legality of timber.²¹³

Through VPAs, the EU is engaged in a more cooperative approach, prompting legal developments in third countries by developing legality frameworks for timber jointly with third countries.²¹⁴ Local actors, including civil society, both participate in the formulation of the legality regimes in third countries and have a role in the oversight and implementation of the agreement.²¹⁵ The VPA process can significantly improve forest governance in third countries, sometimes even in trading with other countries. This, in turn, can contribute to the engagement of these third countries with international regimes on sustainable forest management by 'building consensus from the bottom up'²¹⁶ and possibly lay the

²⁰⁹ A Savaresi, 'EU External Action on Forests: FLEGT and the Development of International Law' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP 2012); Overdevest and Zeitlin, 'Assembling an Experimentalist Regime' (n 152 above).

²¹⁰ Prior to the Timber Regulation, third countries had other incentives under the FLEGT regime, including getting priority assistance for modifying their forest management frameworks, Marín Durán and Morgera (n 1 above) ch 7.

²¹¹ The EU has concluded VPAs with six countries to date (Ghana, Cameroon, Republic of Congo, Central African Republic, Liberia, Indonesia), while it is in negotiations with nine more (Democratic Republic of Congo, Gabon, Côte d'Ivoire, Malaysia, Thailand, Laos, Vietnam, Guyana, Honduras), EU FLEGT Facility: <http://www.euflegt.efi.int/vpa>.

²¹² Savaresi (n 209 above); Overdevest and Zeitlin, 'Assembling an Experimentalist Regime' (n 152 above).

²¹³ C Overdevest and J Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2018) 12 *Regulation and Governance* 64.

²¹⁴ Morgera and Kulovesi (n 122 above).

²¹⁵ The implementation of VPAs is overseen by a Joint Implementation Committee with members representing the EU and the VPA partner country. For example, VPA between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union [2014] OJ L150/252, Art 14.

²¹⁶ Marín Durán and Morgera (n 1 above) ch 7.

ground for the development of related international regimes.²¹⁷ The conclusion of bilateral agreements is also provided for in relation to sustainable biofuels.²¹⁸ However, this possibility has not materialised yet, as the main compliance method utilised in this context is instead private certification schemes, discussed next.²¹⁹

(b) Private Certification and Monitoring

Alternative or supplementary modes of compliance are also provided in relation to biofuels and timber through possibilities to use private schemes. These could alleviate the trade-restrictive effect of the obligations imposed on non-EU economic operators. Under the Renewable Energy Directive, producers of biofuels can verify compliance through private voluntary certification schemes that are benchmarked against the ‘meta-standard’ of the sustainability criteria.²²⁰ If the Commission accepts the scheme as a qualifying standard, then producers can conclusively verify compliance with the criteria. In this way, the unilateral IEMEI incorporates existing certification schemes into its regulatory approach as well as prompting the creation of new ones. It can thus influence the regulatory approaches of third countries and possibly promote global harmonisation of standards.²²¹ However, promoting the use of private certification generates questions about the appropriateness of these schemes to ensure sustainability of biofuels.²²² Notably, the certification system ‘places great faith in the contribution that independent auditors can make’ in verifying the systems of economic operators,²²³ while the independence of these auditors is generally problematic and difficult to ensure.²²⁴ Additionally, this approach raises concerns about the EU outsourcing its responsibility to ensure compliance with EU law to private actors.²²⁵ Such outsourcing or delegation to private actors usually carries a

²¹⁷ For example REDD+, Savaresi (n 209 above); Morgera and Kulovesi (n 122 above).

²¹⁸ Renewable Energy Directive (n 66 above) Art 18(4).

²¹⁹ The bilateral route, adopted in relation to timber, could be beneficial for enforcing the sustainability criteria: JC Westberg and FX Johnson, ‘The Path Not Yet Taken: Bilateral agreements to Promote Sustainable Biofuels under the EU Renewable Energy Directive’ (2013) *Stockholm Environmental Institute Working Paper 41/2013*.

²²⁰ J Lin, ‘Environmental Regulation of Biofuels: Limits of the Meta-Standard Approach’ (2011) *5 Carbon and Climate Law Review* 34.

²²¹ For example in relation to the Indonesian Sustainable Palm Oil Scheme: J Lin, ‘Transnational Environmental law in Action: The European Union’s Sustainable Biofuels Experiment’ (2013) *University of Hong Kong Faculty of Law Research Paper 2013/034*.

²²² *ibid.*

²²³ Scott, ‘Multi-Level Governance’ (n 22 above).

²²⁴ Lin, ‘Environmental Regulation of Biofuels’ (n 220 above).

²²⁵ ClientEarth, ‘Achieving credible EU-wide verification of biofuel sustainability’ (November 2013): <http://www.clientearth.org/reports/131114-climate-and-forests-credible-verification-of-biofuel-sustainability.pdf>.

negative connotation, as private regulatory actors are generally considered less legitimate.²²⁶ However, there is evidence of biofuel certification schemes increasingly striving for legitimacy, such as the Roundtable on Sustainable Palm Oil,²²⁷ particularly through input by multiple stakeholders in their decision-making processes and through increased transparency.²²⁸ At the same time, the EU regulatory framework has sought to adapt to concerns raised by the use of private certification and concerns about the independence of auditors involved. In the revised version of the RED, additional obligations have been imposed on the Commission to report on approved certification schemes, particularly regarding their independence, transparency, stakeholder involvement and robustness.²²⁹

The Timber Regulation also provides for use of private schemes and organisations. First, it provides for certification schemes or other third-party verified schemes for assessing and dealing with the risk of illegal logging.²³⁰ Second, it provides for the use of monitoring organisations (MOs) as a ‘supplementary’ route for complying with the due diligence obligation. MOs provide and maintain due diligence systems that can be used by operators in complying with the Timber Regulation,²³¹ while both the obligation of due diligence and liability remain with the operator. Such MOs have to be established in the EU²³² and fulfil certain criteria²³³ to be recognised by the Commission in a delegated act, not yet adopted.²³⁴ The due diligence system offered by MOs may also incorporate certification schemes, which are indirectly reviewed in the recognition process of MOs.²³⁵ The potential influence of the Timber Regulation is significant and ‘has already spurred institutional developments by private actors in creating legality verification and certification schemes’.²³⁶ While such certification schemes

²²⁶ Y Naiki, ‘Trade and Bioenergy: Explaining and Assessing the Regime Complex for Sustainable Bioenergy’ (2016) 27 *European Journal of International Law* 129; J Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation and Governance* 137.

²²⁷ Naiki (n 226 above); G Schouten and P Glasbergen, ‘Creating Legitimacy in Global Private Governance: The Case of the Roundtable on Sustainable Palm Oil’ (2011) 70 *Ecological Economics* 1891.

²²⁸ Naiki (n 226 above).

²²⁹ RED (n 66 above) Art 18(6). See Consolidated Version Commission Directive 2015/1513 amending Directive 98/70/EC and RED, [2015] OJ L239/1. A consolidated version of the Renewable Energy Directive is available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:02009L0028-20151005>.

²³⁰ Timber Regulation (n 67 above) Art 6(1)(b) and 6(1)(c); Commission Regulation (EU) 607/2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations [2012] OJ L177/16.

²³¹ Timber Regulation (n 67 above) Art 4(2).

²³² Commission Delegated Regulation (EU) 363/2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations [2012] OJ L115/12, Art 5.

²³³ *ibid* Arts 6–8.

²³⁴ Timber Regulation (n 67 above) Art 8(2); Regulation 363/2012 (n 232 above).

²³⁵ Overdeest and Zeitlin, ‘Assembling an Experimentalist Regime’ (n 152 above).

²³⁶ Overdeest and Zeitlin, ‘FLEGT’ (n 118 above) 149.

provide novel ways of achieving and proving compliance with EU requirements, they can also raise important concerns that relate to the nature of private certification, as evidenced by the use of forest certification standards in the context of VPAs, where compliance is conclusively assumed. For example, the definition of legal timber in the VPA with Indonesia has developed into an auditable forest certification standard. Its use has raised significant concerns regarding the quality of auditors and audits involved and the ability of such a standard to deal with issues about land use by indigenous peoples in third countries.²³⁷

Overall, private certification provides novel ways in which transnational governance can emerge, providing flexibility in complying with regulatory requirements. At the same time, it comes with varied risks, such as lack of transparency and independence of auditors, which call for enhanced monitoring.

(iii) Equivalence

A different kind of ‘contingency’ and flexibility manifests itself in the design of IEMEIs through equivalent requirements of environmental protection in third countries. Instead of exporting EU standards, this feature leaves room for discretion and variation of third country standards as long as they meet an equivalent level of protection. However, equivalence can have different meanings and is ultimately determined by the EU Commission. Equivalence involves determinations about the adequacy of third country law and can raise questions about respecting the sovereignty of third countries in setting their own regulatory standards.

First, equivalence can be imposed at country-level, as illustrated in the Aviation Directive.²³⁸ Airlines departing from countries with legislation reducing the climate change impact of flights may, where necessary, be exempted from the EU ETS, after consultation with the third country.²³⁹ In particular, when a third country adopts measures that have ‘an environmental effect at least equivalent’ to that of the Aviation Directive,²⁴⁰ the Commission should ensure the ‘optimal interaction’ between such third country measure and the EU ETS.²⁴¹ This conditionality link triggers consultations and directly implicates the legal regimes applicable in third countries, while the EU unilateral measure may still be applied in case the EU is not satisfied.

Second, equivalence is imposed directly on third country economic operators, specifically within the export IEMEIs that impose conditions on how processes take place in third country facilities. As mentioned above, under the WEEE Directive, waste exported to third country facilities should take place in equivalent conditions determined on the basis of criteria set by the Commission.²⁴²

²³⁷ Overdeest and Zeitlin, ‘Implementing FLEGT VPAs in Indonesia and Ghana’ (n 213 above).

²³⁸ Scott, ‘Territorial Extension’ (n 19 above) 110.

²³⁹ Directive 2003/87/EC (n 71 above) Art 25(a).

²⁴⁰ Aviation Directive (n 51 above) Recital 17.

²⁴¹ *ibid.*

²⁴² WEEE Directive (n 69 above) Art 10(3).

Additionally, the Ship Recycling Regulation requires third country facilities that receive EU ships to demonstrate that waste management facilities carry out waste recovery or disposal operations in accordance with broadly equivalent human health and environmental standards.²⁴³

There are therefore variations of equivalence incorporated in different IEMEs that display a spectrum of coerciveness, some being more flexible, while others require almost the same level of protection to be achieved by the third country itself or by the individual third country operators. In extending EU domestic legislation abroad, there may be legal requirements stemming from different applicable legal regimes that determine the lawful application of IEMEs in practice. WTO law encourages flexibility of unilateral measures as long as they do not essentially require the adoption of the same policy by a third country.²⁴⁴ Equivalence decisions under EU law may be subject to judicial review before the Court of Justice of the European Union (CJEU), which may annul equivalence decisions that do not ensure a similar level of protection in third countries, as was the case in relation to data protection requirements.²⁴⁵ At the same time, equivalence has become increasingly relevant when determining whether EU legislation applies to processes taking place in third countries with the result that it is sometimes ‘read into’ legislation by the CJEU, even when not provided explicitly, as a mechanism for avoiding a conflict of norms with third country legislation.²⁴⁶

Overall, flexibility and conditionality features exhibit a mixture of unilateralism and cooperation.²⁴⁷ By promoting development of bilateral and international agreements, the EU is viewed as a ‘co-creator’ of third country policy rather than an ‘exporter’ of its own standards.²⁴⁸ These regulatory techniques demonstrate the readiness of the EU to respond and adapt to developments in third countries and international regimes, but at the same time they can raise different kinds of concerns about the EU’s unilateral action through IEMEs. As already seen, clauses linking to developments beyond EU borders are used in different ways: as negotiating tools; as incentives for concluding bilateral agreements and advancing international regimes; and as catalysts for the development of private regimes. They all contribute in different ways to creating a dynamic relationship between EU unilateral measures and legal developments in third countries, also highlighting how multiple legal regimes are inherently relevant for the operation of IEMEs.

²⁴³ Ship Recycling Regulation (n 70 above) Art 15(5).

²⁴⁴ See Chapter 6.

²⁴⁵ Case C-362/14 *Maximilian Schrems v Data Protection Commissioner*, EU:C:2015:650.

²⁴⁶ Case C-424/13 *Zuchtviieb-Export GmbH v Stadt Kempten* EU:C:2015:259, para 54; See Chapter 4, Section III.D; I Hadjiyianni, ‘The Role of Domestic Courts in Global Environmental Governance: Judicial Review of Extraterritoriality by the Court of Justice of the European Union’ (2018) *EU Working Paper MWP/RNS/2018/*.

²⁴⁷ Scott, ‘Territorial Extension’ (n 19 above) 114.

²⁴⁸ Morgera (n 122 above).

To conclude, Section III has demonstrated how the EU employs novel regulatory techniques that usually avoid outright exportation of its domestic standards but rather dynamically link to international and third country legal regimes. The features of IEMEs examined here provide insight as to their relative and qualified ‘unilateral’ and extraterritorial nature and their trade-restrictive effects, which are particularly relevant for their legal analysis under EU law and WTO law due to legal obligations under these regimes that relate to these features. These features provide evidence of the influence of WTO law on the legal design of IEMEs which avoid being purely unilateral or extraterritorial. Furthermore, the structure of IEMEs in imposing obligations directly or indirectly on different kinds of third country actors are catalytic in examining the legal position of third country actors in the EU legal order that are more likely to be protected when IEMEs directly apply to them. While the relative unilateral and extraterritorial nature of IEMEs may make them less contentious at first sight, they still raise important legitimacy questions about the exercise of EU regulatory power beyond its borders, particularly relating to how the EU unilaterally asserts its regulatory authority and exercises discretion across legal regimes in adopting and implementing IEMEs.

The discussion in this section has shed light on the legal nature and effects of IEMEs in third countries so as to identify the different ways in which multiple legal regimes influence and determine the transnational operation of IEMEs. It has acknowledged the range of features and functions of IEMEs that do not exclusively aim to regulate the external relations of the EU but rather regulate the internal market by imposing obligations on both domestic and third country actors in a variety of ways, while at the same time explicitly aiming to influence third country practices and regulatory approaches. This influence is not a simple one-way export of EU standards however; it involves a complex interplay of norm development in multiple legal spheres triggered by EU internal action. The legal analysis of IEMEs thus necessarily involves overlapping governance frameworks as their operation starts within the EU law framework and extends to public international law and beyond. The interplay of governance frameworks applying to IEMEs accordingly characterises the legal analysis of IEMEs. In this respect, this book analyses IEMEs as a legal phenomenon that operates across multiple legal regimes, which determine their legal functioning in different ways.

IV. ASSESSING IEMEs AS A LEGAL PHENOMENON AT THE INTERSECTION OF MULTIPLE LEGAL REGIMES

The chapter has so far identified the project of this book by situating IEMEs within the broader context of EU external environmental action, explaining their legal nature and features, and demonstrating their characteristic operation across legal and governance frames. Given the interplay of multiple frames in

which IEMEs operate, the book explores IEMEs in multiple legal regimes in legally analysing this emerging phenomenon. This is a necessary methodological step in analysing IEMEs legally, in light of the different legal requirements they are subject to and the ways in which overlapping legal regimes influence their formulation and determine their application. The book develops an analytical framework which can be applied in examining the legitimisation of the unilateral exercise of transnational power, in particular in cases where multiple legal regimes are applicable, but none of them provides a complete legal framework. It tests this by examining the respective roles of EU law and WTO law as the central and most elaborate legal regimes relevant to providing appropriate legitimacy mechanisms to control IEMEs. This section justifies this analytical methodology. It does so by drawing out the types of legal regimes relevant for the analysis of IEMEs and by identifying the functions of these regimes in influencing and determining the legal functioning of IEMEs.

There are at least four legal regimes relevant to the operation of IEMEs. First, *EU law* – as the home legal system from which IEMEs originate – is necessarily pertinent for their analysis.²⁴⁹ As a mode of EU external environmental action, IEMEs firstly operate within EU constitutional and external relations law. Beyond conventional issues in this field concerning the competence of the EU and its international representation, IEMEs also implicate areas of EU law that have been less explored in relation to EU external action. Particularly, they raise ‘transnationalised’ questions in EU administrative law about controlling the unilateral exercise of regulatory power, given that IEMEs bring third country actors within the scope of application of EU law and within the internal decision-making processes of the EU legal order.

Second, because IEMEs regulate transboundary and global environmental problems, most of which are subject to existing international regimes, and affect the relations of the EU with third countries, *public international law* is also relevant for their analysis. As examined in Section III.B, international law regimes are implicated in IEMEs that explicitly link the application of IEMEs to legal developments in international regimes in dynamic ways. At least two branches of public international law are relevant. First, public international rules on jurisdiction that determine the authority of states to regulate specific activities are pertinent for understanding the extraterritorial nature of IEMEs and their permissibility.²⁵⁰ Second, subject-specific international treaty regimes could also be relevant, depending on the policy area. Such regimes can impose additional conditions on the legality of IEMEs, for example, limits to regulating matters in the high seas or in relation to flag-state jurisdiction. They can also embody

²⁴⁹ Member State legal regimes may also become relevant, particularly for the implementation and enforcement of IEMEs.

²⁵⁰ Chapter 2, Section III.A.(ii).

rules that require the EU to consult with and consider the effects of its internal measures on third countries.²⁵¹

Third, because of their nature as trade-restrictive measures, IEMEs fall under the remit of *WTO law*, which governs trade relations between the EU and third countries. Through its operation, WTO law affects national regulatory approaches, including those of the EU and provides a forum of interaction among trading partner governments in a multilateral context. Its legal requirements delimit the scope of permissible EU unilateral action and provide parameters that control the ways in which the EU regulates trade.

Fourth, IEMEs also implicate the *domestic legal orders of third countries* to which they apply. This is done in different ways depending on the legal design of IEMEs, which may explicitly incorporate third country legal regimes in setting process standards, as explained in Section III.A, and in creating dynamic transnational regulatory interactions with third countries in co-creating and co-developing environmental regimes, as explained in Section III.B. The domestic legal orders of third countries are also implicated by the ways in which they are influenced through the application of IEMEs to third country activities and third country actors.

The multiple legal regimes set out above influence and determine the legal operation of IEMEs in inter-related ways. First, IEMEs are subject to legality requirements under these different regimes. Requirements stemming from EU law, public international law and WTO law mostly relate to whether the EU has the authority and jurisdiction to regulate specific processes. In this respect, much of the existing legal scholarship on such measures has mainly focused on the permissibility of such measures. It has focused particularly on the notion of extraterritoriality in terms of jurisdiction and competence, under EU law²⁵² and international law,²⁵³ questioning whether territoriality is still appropriate for delimiting the permissible scope of application of domestic measures.²⁵⁴ Existing scholarship has also examined the legality of unilateral trade-related, process-based measures to pursue non-trade objectives, particularly under WTO law.²⁵⁵

²⁵¹ Such as the FAO Code of Conduct for Responsible Fisheries and International Action Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated Fishing; S Cassese, 'A Global Due Process of Law?' in G Anthony and others (eds), *Values in Global Administrative Law* (Hart, 2011).

²⁵² Ankersmit, Lawrence and Davies (n 43 above); Ankersmit (n 73 above).

²⁵³ Ankersmit, Lawrence and Davies (n 43 above); JA Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) 59 *Corporate Social Responsibility Initiative Working Paper* 59/2010; S Battini, 'Globalisation and Extraterritorial Regulation: An Unexceptional Exception' in G Anthony and others (eds), *Values in Global Administrative Law* (Hart, 2011).

²⁵⁴ Scott, 'Territorial Extension' (n 19 above); Ryngaert (n 120 above); A Hertogen, 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emissions Trading System' (2012) 1 *Transnational Environmental Law* 281.

²⁵⁵ E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (OUP, 2009); MA Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 23 *Review of European, Comparative and International Environmental Law* 302.

Second, an inter-related, derivative function of these multiple legal regimes is evident in how *ex ante* they influence the formulation of IEMEs in different ways. IEMEs are often designed to meet legality requirements within applicable regimes, particularly under WTO law.²⁵⁶ Different requirements under multiple legal regimes can thus partly explain the legal design and nature of IEMEs. These regimes also explain the recourse to IEMEs in terms of the EU avoiding complexities associated with such regimes in effectively achieving environmental goals. This is particularly the case in relation to the failures of multilateral treaty regimes, as outlined above in Section II.B.

Third, given that IEMEs operate across established legal regimes and institutional frameworks, multiple legal regimes, in combination, provide mechanisms to regulate and control the exercise of EU regulatory power beyond EU borders. This is because these regimes determine the legal parameters for the adoption and implementation of IEMEs in third countries. They also provide different kinds of legal mechanisms that protect the rights and interests of those affected by regulatory power, but who are situated outside the EU, and thereby create transnational accountability avenues. Particularly, dispute settlement avenues, specifically in the WTO and in the EU legal order, provide significant mechanisms for controlling the EU's regulatory power. The multiple legal orders implicated in the operation of IEMEs, are thus also relevant as the legal regimes within which to seek answers about how legally hybrid measures like IEMEs are regulated and can be controlled.

Different legal regimes may be relevant for the legal analysis of distinct examples of IEMEs depending on their legal design and how they fit within the pre-existing regulatory framework. In examining IEMEs as an emerging legal phenomenon, this book focuses on the legal regimes of EU and WTO law in doctrinally analysing the role of overlapping legal orders in legitimising IEMEs. The book also briefly examines international jurisdictional rules that could influence and determine the legal functioning of IEMEs. As demonstrated in Chapter two, these public international law rules fall short of providing appropriate and sufficient legitimacy mechanisms.²⁵⁷ The book does not examine the role of domestic third country legal regimes, bilateral agreements and bespoke subject-specific international regimes for analysing and legitimising IEMEs. These regimes would be particularly relevant for future research extended through empirical studies on individual third countries or through a case-study approach on specific policy areas and examples of IEMEs, where third country legal regimes and subject-specific international regimes may play a critical role.

This book deliberately focuses on the EU and WTO legal regimes, which broadly apply to different kinds of IEMEs as EU trade-related measures, consistently determining the legal functioning of IEMEs as a legal phenomenon. Also, these two legal orders have particular relevance in exemplifying

²⁵⁶ Chapter 5.

²⁵⁷ Chapter 2, Section III.A.(ii).

legitimacy norms that can contribute to enhancing the legitimacy of IEMEs.²⁵⁸ They provide primary sources of legal control and significant avenues for controlling the EU's power. EU and WTO law have elaborate regimes, backed up by developed dispute settlement regimes that can provide third country actors with possibilities for controlling the EU's extension of its regulatory power. In pragmatic terms, EU decision-making is largely influenced by EU law considerations and in terms of external considerations, the WTO legal disciplines are very much dominant. The dominance of a trade liberalisation regime in the EU's considerations can be problematic. However, as Part III of the book demonstrates, the WTO also bears significant potential for controlling the EU's global regulatory power, requiring it to take into account third country interests in different ways.

Furthermore, due to the legally hybrid nature of IEMEs that operate at the intersection of established jurisdictional frames of legal analysis, a combination of legal regimes is required for analysing and legitimising IEMEs. In this respect, the EU and WTO legal orders provide a good combination for testing this analytical approach and exploring the extent to which the exercise of EU regulatory power beyond EU borders through IEMEs is legally controlled. While some IEMEs have been examined within either EU law²⁵⁹ or WTO law,²⁶⁰ this book examines how *both* legal regimes in combination can control EU transnational regulatory power through IEMEs as it is exercised at the interconnection of these regimes. While the permissibility of unilateral, process-based measures has been discussed under either EU law or WTO law, this has been done in a piecemeal way to date. This book fills a gap in the existing literature by assessing how these two regimes can together control the extraterritorial reach of EU environmental law, examining important interactions between different legal orders. It shows how EU and WTO law could respectively address different aspects of the legality and legitimacy of IEMEs through procedural and substantive requirements on how regulatory power can lawfully be exercised. Legal requirements in EU, international and WTO law are often inter-connected. They sometimes defer to each other or can be contradictory. Analysing IEMEs under only one of these relevant legal systems would provide an incomplete picture of the function of applicable law to analyse and legitimise IEMEs.

In examining IEMEs through these two legal lenses, the book focuses on the role of these regimes in both *enabling* the adoption of such measures – by providing the legal basis and normative justification for the adoption of IEMEs – and also *constraining* IEMEs – by imposing checks that discipline how EU regulatory power is exercised. This distinction of the role of law in legitimising the EU's global regulatory power is further developed from a normative perspective in Chapter two and from an evaluative perspective in Parts II and III.

²⁵⁸ Chapter 2, Section IV.C.

²⁵⁹ With a focus on internal market, competence and state aid, Ankersmit (n 73 above).

²⁶⁰ Cooreman (n 89 above).

The rest of the book builds on the identification of the legal phenomenon of IEMEs, their legal nature and the multiple legal regimes involved in their operation as explored in this chapter. Chapter two develops a framework for analysing IEMEs by identifying mechanisms for legitimising regulatory power exercised across pre-defined territorial jurisdictions and established legal regimes. In this respect, the book also contributes to broader normative understandings of legitimacy and accountability about the exercise of regulatory power across legal boundaries, and in the absence of authorisation or consent from those affected by such power. Parts II and III of the book then examine the respective roles of EU law and WTO law in relation to this theoretical legitimacy framework through legal analysis of IEMEs under these two regimes. They show that these two regimes, acting in combination, bear great potential in legitimising IEMEs by controlling the exercise of EU regulatory power beyond EU borders.