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Externalizing EU law, policy and values

Europe's global identity, mechanisms of rule transfer and case studies on illegal logging and Bosnia and Herzegovina

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Management summary

Written as the basis for the conceptual framework of an interdisciplinary research project on the external effects of EU law, this working paper provides an overview of several important literature lines on the external affairs of the EU. In addition to describing these literature lines, the paper will apply the insights from the various perspectives to two case studies: the EU's external efforts to combat illegal logging and the EU's recent approach to the ongoing integration process of Bosnia and Herzegovina. The paper aims to move beyond the distinctions between scholarly disciplines by incorporating insights from the legal, political science, public administration and international relations disciplines to describe how the EU can impact legal orders across the globe through its various powers. First, the debate in international relations on the identity and power sources of the EU will be presented. Important contributions on the role of the EU as a normative power and the EU as a market power will be summarized in this section. Moreover, the section will also elaborate on the EU's recent activities in security and defense, with special attention being devoted to the EU's civil and peace-keeping missions under the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP). The question to what extent the EU could be considered a military power in addition to its economic weight and normative power will be considered in particular.

After this relatively broad debate on the role of Europe in the world, an approach focused on concepts describing the specific mechanisms of rule transfer available to EU policy makers will be presented. It will firstly be argued that the EU's internal regulation can achieve external effects through its market power. The pressure the EU can apply to third state market operators and – indirectly – third state governments to comply with the EU standard to retain market access has been coined the Brussels Effect. EU policy makers may also decide to move one step further by designing internal legislation in such a way that external market parties fall under the scope of EU measures through the extraterritorial application or territorial extension of the EU's norms. Should the EU choose to incorporate extraterritorial application in a measure, no territorial connection to the EU is needed at all for it to the application and enforcement of this measure. An example is jurisdiction based on the principle of nationality. More common, however, are norms which do require some form of territorial connection with the EU, even if this connection may at times be tenuous. The effects-based doctrine of competition law, which requires that the effects of anti-competitive behavior occur at least partially on the EU market, is a clear example of such a 'territorial extension' of a European norm to undertakings and conduct which could potentially be located outside the EU.

Subsequently, the contributions from the political sciences and public administration on the EU's conditionality policies and several social mechanisms of policy diffusion will be discussed. Under conditionality policies the EU aims to introduce a carrot and stick approach to rule transfer and European integration, based on the grant of rewards in return for reforms by a third state. After the arguably successful implementation of conditionality in the accession policy of the 90's, the technique has also become an important element in for instance the EU's more recent approach towards its Mediterranean neighborhood. Furthermore, EU diplomacy may contribute to the rule transfer through what is known in the policy diffusion literature as negotiation and socialization strategies. Through negotiation, EU officials actively attempt to influence the rational decision-making process of other actors, while socialization pertains more to the normative example the EU may pose for other actors or the naming and shaming tactics the EU may employ. Moreover, when employing what has been dubbed spurred emulation, the EU may influence rule-making in other states or international organizations through technical and/or financial assistance. This process is distinct from conditionality strategies, however, as instead of a reward-sanction based structure it focuses on support and assistance for other actors. Finally, an interlude will be presented on a concept developed in comparative law: the legal transplant. The strength of this legal transplant literature is that it inter alia *describes the roles of domestic rule-makers, internal motivations for rule transfer and the role of norm entrepreneurs in the*

diffusion of rules between legal orders. It thereby provides the important nuance that, in addition to the EU's own efforts in external affairs, the domestic legal and political processes of a recipient state remains of vital importance to the eventual transfer of a rule.

In the analysis of the illegal logging and Bosnia and Herzegovina case studies, it will be seen that the EU applies a multitude of mechanisms in both areas. For illegal logging, the EU utilizes a combination of negotiation strategies through agreements, territorially extended measures and a strong focus on the Brussels effect of its market power. In Bosnia and Herzegovina, the conditionality strategy of the Stabilization and Association Process takes center stage and is complemented by attempts to induce spurred emulation through technical assistance. Both cases rely on the values and market power underpinning the EU, illustrating how both the Market Power Europe and Normative Power Europe perspectives are relevant. The EU's comprehensive approach to Bosnia and Herzegovina furthermore includes both a civilian and a peace-keeping mission to promote and ensure stability, illustrating the EU's fledgling involvement in security affairs. After these applications of the presented concepts, the concluding section of the paper will include several recommendations to consider for the subsequent development of the project.

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1. Introduction[1]

The European Union (EU) has developed into a powerful entity capable of influencing its environment beyond its territorial borders. Coupled with its status as an economic heavyweight, the EU can utilize its substantial powers in areas ranging from internal market law to human rights issues and its steadily developing foreign policy to alter the conduct of states, international actors and individuals.[2] These powers may generate effects both in third country legal orders and in international law. Although the literature on EU external effects and the international relations of the EU is substantially large, it is divided over several research disciplines and largely analyzed in a diffuse nature. Different literature lines from *inter alia* law, the political sciences, public administration and international relations have created numerous, and sometimes partially overlapping descriptions of the external effects of EU law and policy. Therefore, the aim of this working paper is to provide an overview of the existing literature on the external effects of EU law, the global identity of the EU, issues of extraterritoriality and the mechanisms by which rule transfer to third state parties or the international level takes place. As such, the working paper forms an intermediate step between the original project proposal and the final conceptual framework which will guide the writing process of the future contributions to the project. After describing various prevalent concepts, the paper will also present two case studies that illustrate the application of these concepts. These case studies show the dynamic nature of EU external effects and how several processes are jointly applied.

Before turning to the content of the literature on external effects of EU law, the paper will first provide a short introduction into the project. Section two will briefly outline the history of the project and its aims and relevance. Subsequently, section three to five will summarize the insights from several influential literature lines from various disciplines. Section three is devoted to the insights of the international relations discipline on the global identity and power basis of the EU. Prominent scholars from this discipline have argued that the EU can be conceptualized as either a market power[3] or a normative power.[4] Some scholars have gone further by discussing the EU's military power identity – or the lack thereof.[5] Their contributions provide valuable insights into the EU's intrinsic motivations and capabilities to act in a certain way in the international scene and thus provide a good starting point for the discussion of the external effects of EU law. Section four will have a more instrumental focus, describing several mechanisms of rule transfer which exist and can be employed by the EU. These mechanisms range from internal legislative action to direct diplomatic pressure and supportive action on part of the EU. Several methods exist for EU legislation to generate an impact abroad. Firstly, the section will discuss what has been described as the Brussels

[1] This contribution is part of the RENFORCE/CLEER project The External Effects of EU law, coordinated by Dr. Ingrid Koning, Assistant Professor at the Molengraaff Institute for Private Law and participant in the RENFORCE research group of Utrecht University. The author is grateful to Prof. Cedric Ryngaert, Prof. Linda Senden and Dr. Ingrid Koning for their valuable comments on earlier versions of this paper. For more information on the project, please see: http://renforce.rebo.uu.nl/en/bouwsteenprojecten/externe-effecten-van-eu-recht/

[2] For an example of an optimistic approach to the EU as a global superpower, in particular in the civilian and economic areas, see: A. Moravcsik, Europe: the quiet superpower, French Politics, volume 7, issue 3/4 2009, pp.403-422

[3] C. Damro, Market power Europe, *Journal of European Public Policy,* volume 19, issue 5 2012, pp.682-699

[4] I. Manners, Normative Power Europe: a contradiction in terms? *Journal of Common Market Studies,* volume 40 issue 2 2002, pp.235-258

[5] During the Cold War the absence of credible European military power was for instance seen by some authors as a factor seriously hindering the potential for the then European Community to exert pressure in its external dimension. See for instance the work by Bull: H. Bull, Civilian Power Europe: A Contradiction in Terms?, *Journal of Common Market Studies*, volume 21, issue 2 1982, pp. 149–64. In more recent times, the careful development of several military instruments through the Common Security and Defence Policy (CSDP) has drawn renewed attention. See for a critical approach to these developments for instance: W. Wagner, The democratic control of military power Europe, *Journal of European Public Policy,* volume 13, issue 2 2006, pp.200-216

effect:[6] the external impact of internal European legislation through the EU's market size, preference for stringent production standards and external market parties' dependence on access to the EU market. This may cause external market parties to adhere to European norms, thereby making local norms obsolete. In some cases – for instance when conflicting norms exist – third country legislators may even be forced to change their domestic norms to ensure EU market access for their companies.[7] The section will furthermore discuss legal contributions on the options for the EU to unilaterally regulate its external interests through extraterritorial norms or territorially extended measures.[8] In addition to these internally oriented, mainly legal processes, contributions from the political sciences and public administration have emphasized the importance of EU diplomatic and supportive action to achieve external effects for its internal rules and values. A substantial body of literature exists on the successes and limitations of the EU's various conditionality policies.[9] The requirement for acceding countries to transplant the EU *acquis* into their legal systems is perhaps the most famous, but certainly not the only usage of conditionality by the EU. Another important and widely discussed example is the European Neighbourhood Policy (ENP), which attempts to transplant the success of accession policy to the new eastern and southern countries neighboring the EU, yet excludes the accession incentive.[10] Beyond conditionality strategies, the EU may rely on diplomatic pressure and supportive action to diffuse its rules and values. Diplomatic tactics may range from rational negotiation strategies to normative socialization strategies, as has been described in the policy diffusion literature.[11] Furthermore, the EU may support the emulation of rules and values by third countries through technical and financial assistance; a process that has been dubbed 'spurred emulation'.[12] Finally, section five will round up the literature study of this working paper by presenting an interlude based on a comparative legal perspective, which uses the terminology of legal transplants. As the legal transplant literature focuses in large part on the adopting state, this branch of literature forms an interesting extra perspective into the process of rule externalization. An important side-note here is that the paper makes no claim of being entirely comprehensive. The literature is simply too expansive for a single working paper to take into account. Nevertheless, the working paper brings together several of the more dominant approaches to the study of EU external relations in current legal and social science academia.

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[6] A. Bradford, The Brussels effect, *Northwestern University Law Review,* volume 107, issue 1 2012, pp.1-67. The Brussels effect has been derived from an earlier concept named the California effect, as will be elaborated on below. See: D. Vogel, Trading up and governing across: transnational governance and environmental protection, *Journal of European Public Policy,* volume 4, issue 4 1997, pp.556-571

[7] S. Princen, Exporting Regulatory Standards: the cases of trapping and data protection, in: M. Knodt, S. Princen, Understanding the European Union's External Relations, London & New York, 2003, pp.142-157

[8] Territorially extended measures may apply beyond the EU's borders but require a link to the EU's territory for their application. The distinction between extraterritorial jurisdiction and beyond-borders extended jurisdiction with a – however tenuous it may be – territorial link was first made in J. Scott, Extraterritoriality and Territorial Extension in EU Law, *American Journal of Comparative Law*, volume 62, issue 1 2014, pp.87-126

[9] A few notable examples include F. Schimmelfennig, EU political accession conditionality after the 2004 enlargement: consistency and effectiveness, *Journal of European Public Policy,* volume 15, issue 6 2008, pp.918-937, F. Schimmelfennig, U. Sedelmeier, Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe, *Journal of European Public Policy*, volume 11, issue 4 2004, pp.661-679 and L. Bartels, The WTO enabling clause and positive conditionality in the European Community's GSP program, *Journal of International Economic Law,* volume 6, issue 2 2003, pp.507-532

[10] See for instance J. Kelley, New wine in old wineskins: promoting political reforms through the new European Neighbourhood Policy, *Journal of Common Market Studies,* volume 44, issue 1 2006, pp.29-55

[11] See for a good overview T.A. Börzel, T. Risse, Diffusing (inter-) regionalism, KFG Working Paper, 2009, retrieved on 05-04-2015 from: http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_7.pdf

[12] It should also be noted that entirely voluntary emulations that occur without EU involvement also exist. These will not be the primary focus of this paper, however, as it mainly focuses on the role of the EU in achieving external effects for its rules and values. See for the spurred emulation concept: T. Lenz, Spurred emulation: the EU and regional integration in Mercosur and SADC, *West European Politics,* volume 35, issue 1 2012, pp.155-173

After this literature overview, the illegal logging policy area and the EU-Bosnia and Herzegovinian relationship will be utilized to illustrate how the described concepts are applicable to recent issues in EU external relations. In section six the illegal logging policy area will be discussed, which contains a variety of mechanisms of rule transfer, ranging from internal legislation aimed to unilaterally impose due diligence requirements on all producers and traders of wood products, supportive EU measures, an apparently conscious attempt of the EU to utilize its market power through the Brussels effect and persuasion strategies. EU relations with Bosnia and Herzegovina will be the subject of section seven. The EU's relations with Bosnia and Herzegovina are characterized by an extensive use of conditionality and a heavy on-the-ground presence of the EU, the latter including both a civilian and a military CFSP/CSDP mission. Finally, section eight will round up the working paper by providing several concluding remarks and presenting the implications of this paper for the project.

2. The RENFORCE/CLEER External Effects of EU Law project

The External Effects of EU Law project exists within the framework of the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE) and the Centre for the Law of European External Relations (CLEER). When the RENFORCE research group was set up in 2013, it based its main research questions on the broad character of regulation and enforcement in the EU. The research group is developing an interdisciplinary approach to the study of the optimal mix of policy instruments for EU regulation in light of the EU's core values and multi-level legal order. In the search for an understanding of the policy mix within several EU law focus areas, it became clear that projects assessing the internal dynamics of the EU did not yet provide a full picture of European regulation and enforcement. In a globalized and interdependent world, the EU is subject to external influences of other states, regions, companies, NGO's and IGO's, while it is conversely exerting its own influence over Europe's external dimension. Thus, the External Effects of EU Law project was set up to assess the ways in which the EU can influence its external dimension, determine the different policy areas which show external EU law effects and analyze which goals these processes potentially serve for the EU itself.

The primary core of the project constitutes legal researchers from several domains, such as private, international law, European law, environmental law, data protection law, criminal law and public law. Additionally, the RENFORCE research group contains expertise from the public administration and criminology disciplines. With the addition of CLEER as a collaborating partner the project also gained access to other legal disciplines. While this diverse array of expertise is beneficial to a comprehensive review of the external effects of EU law, it also posed a challenge to the coherence of the project. One of the primary methods intended to ensure coherence in the output of the project is the development of a conceptual framework, which will serve as a starting point for the articles and papers of this project. This shared framework will not only ensure that articles will be drafted coherently, it will also facilitate an overarching analysis in a separate report, in which the findings of the different articles will be compared. The literature overview of this working paper is meant to provide the basis for the development of the project's conceptual framework.

3. The identity of the European Union in the global arena

Several approaches exist to the study of the EU's role in its external sphere. One discussion, developed mainly in the international relations field, focuses on identity and power bases of the EU. Scholars utilizing this approach analyze the characteristics intrinsic to the EU and see these as an explanation for the way the EU approaches its external dimension. A relatively recent article by Ian Manners[13] seems in particular to have sparked a large amount of interest in the role of the EU's

[13] I. Manners, 2002

identity in explaining why Europe approaches its neighbors in a given way. His conceptualization of the EU as a normative power, which sets examples globally and socializes other states and actors to adopt similar norms, is therefore the focus of subsection 2.1. Another direction in this debate which has recently received a substantial amount of attention focuses on the civil and economic power of the EU. Proponents of the Market Power Europe conceptualization of the EU point to the Union's inception as an economic entity,[14] its influential role in shaping the internal market within its borders and to regulate trade externally[15] and the fact that the EU comprises the world's largest consumer market.[16] Their arguments will be discussed in subsection 2.2. Finally, the slowly developing security and military capabilities of the EU will be discussed in subsection 2.3, although the consensus among most scholars seems to be that the EU's military role will at best remain ancillary to its normative and market-oriented identities for the time being. It is worth mentioning that the various identities the EU has in its external relations must not be seen as mutually exclusive. Instead, the concepts complement one another in explaining the EU's heterogeneous and complex system of external action.

3.1 The EU as a Normative Power Europe

In his seminal contribution to the analysis of the identity and power of the EU in the global political arena, Manners added a new dimension to the already existing conceptualizations of Europe as a civilian power and Europe's military power (or lack thereof).[17] He argued that the European Union does not only posit itself as a market entity, but that it lends much of its identity from the shared values of the Member States. These values lie at the basis of the Treaties and thus inspire and guide the EU's role in the international scene. Manners' argument finds much support in the Lisbon Treaty, with article 2 TEU proclaiming the EU is founded on values such as human dignity, freedom and democracy and article 3(5) TEU tasking the EU to uphold and promote its founding values globally.[18] According to Manners, the idea of Normative Power Europe (or NPM, as later articles sometimes abbreviate it), is located in a discussion of Europe's power over opinion. This does not necessarily mean that the EU cannot be considered a civilian or military power, but rather adds a third concept to this set. According to Manners, the constitution of the EU is an elite-driven and treaty based process which has led to a new non-state legal order. This process means that constitutional norms are at the foundation of the European Union and that these norms also form part of the EU's external, international identity.

Manners distinguishes between several core and minor norms which together form the normative basis of the EU. According to Manners, the core values constituting the EU are peace, liberty, democracy, the rule of law and the respect for fundamental freedoms and human rights. Of the four minor norms the first is social solidarity, which Manners argues can be found throughout the *acquis*

[14] C. Damro, 2012

[15] It for instance enjoys exclusive competences to regulate competition, the customs union, monetary policy for Eurozone countries and under the common commercial policy. See article 3(1) TFEU.

[16] C. Damro, 2012

[17] I. Manners, 2002

[18] More specific support can be found in article 21 TEU. Section 1 of Article 21 states that The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.' Section 2 continues with a long list of values and goals for EU foreign policy to strive for, which reiterates the earlier quoted values but also adds other values such as the integration of all countries into the world economy, combating climate change and good global governance. See also S. Keukeleire, T. Delreux, *The foreign policy of the European Union,* Hampshire: Palgrave Macmillan, 2014, p.25-27

communautaire et politique and the preambles of treaties.[19] Secondly, anti-discrimination is distinguished as a minor norm. Sustainable development can be considered the third, while finally the Nice Treaty has incorporated good governance as the fourth minor norm.[20]

Manners then analyzes how this normative basis of the Union is diffused externally. Manners, similar to several other conceptualizations of policy diffusion,[21] distinguishes between several factors that are conducive to diffusion. Norms may proliferate through *contagion,* which Manners elaborates is the 'unintentional diffusion of ideas from the EU to other political actors'. Thus, when contagion occurs another actor follows the European example without there being any specific European pressure to do so. *Informational* diffusion results from strategic communications on part of the EU, such as Commission strategies or Council declarations. Thirdly, *procedural diffusion* occurs when an institutionalized link between the EU and a third party is set up, such as an agreement. Through *transference,* fourthly, the EU may diffuse its norms when it exchanges goods, aid, technical assistance or otherwise engages in trade. A good example is the carrot and stick approach the EU often takes with regard to financial assistance or economic sanctions or other forms of conditionality.[22] *Overt diffusion* occurs as a result of the EU being physically present in third states or international organizations, such as through delegations to other states, negotiation delegations or observer statuses. Finally, Manners adds a factor which is not so much a mechanism of diffusion as it is a filter that shapes the way in which norms are diffused. Manners' *cultural filter* entails that the impact of international norms and political learning in third states is shaped by the interplay of political and social identity and the construction of knowledge on part of these third parties.[23]

The strength of the Normative Power Europe perspective is that it allows for analyses of European external activities which do not seem to correspond to purely self-interested explanations. While it could be argued that EU promotion of human rights or the rule of law in its direct geo-political environment is done out of self-interest to safeguard interests such as the EU's security,[24] such arguments have less merit for EU activities towards regions where these interests are less well-established.[25] The Normative Power Europe thesis provides an alternative model, in which the EU both serves as an example of normative standards and actively tries to disseminate its standards as a model for third countries or international actors. The conceptualization of the EU as a normative entity is therefore an interesting addition to the international relations discourse on the global role of the EU.

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[19] Note that the article by Manners was written before the introduction of the Lisbon Treaty, which introduced the concept of the EU being a 'social market economy' in article 3(3) TEU. Although the interpretation of this article remains subject to discussion, it shows some similarity to Manners' norm of social solidarity.

[20] See again footnote 18 for the extent to which these norms are traceable to the text of the current Treaties, in particular Article 21 TEU

[21] See T.A. Börzel, T. Risse, 2009

[22] See also section 4.3

[23] I. Manners, 2002 subsequently uses the final part of his article to provide an example of norm diffusion by the EU. Manners argues that pre-accession negotiations with Cyprus and Poland in 1998 aided in the procedural diffusion of the abolition of the death penalty, with both countries ratifying protocol 6 of the ECHR in 2000. EU political pressure arguably also contributed to the diffusion of the norm in Albania and Ukraine. In Turkey the adoption of the Community acquis lead to the abolition of the death penalty for civil offences. Meanwhile, the EU continues to pressurize Russia's usage of the death penalty explicitly.

[24] The presence of self-interest could be argued, for instance, for the EU's support towards Kosovo, which includes the stabilization and association process and the most expansive EU civilian mission to date: EULEX Kosovo. While the preambles of the EULEX Kosovo Joint Action 2008/124/CFSP and Stability and Association Process documents utilize a rhetoric of support for the region, the continued stability of Kosovo, which lies near the eastern borders of the enlarged EU, is certainly an important aspect for EU security considerations. This has been argued, for instance, by A. Higashino, For the sake of 'peace and security'? The role of security in the European Union enlargement eastwards, *Cooperation and Conflict,* volume 39, issue 4 2004, pp.347-368

[25] For instance removing lower tariff preferences under the GATT enabling clause for Burmese violations of the rule of law. This will be discussed more in-depth in subsection 4.3

3.2 The EU as a Market Power Europe

While the Normative Power Europe concept offers an interesting framework capable of analyzing the motivations of the EU to exert normative power through its basis of constitutional norms, other scholars have responded with their own analytical frameworks to explain the identity and power basis of the EU. One of the most notable responses to Normative Power Europe was the 2012 article by Damro, suggesting that the EU is fundamentally a single market entity and is thus best understood as a Market Power Europe.[26] According to Damro, the EU primarily views itself as a large, regulated single market. The EU has realized that it is a capable international market actor and, through its market, an important shaper of globalization. Damro identifies three mutually reinforcing characteristics that shape Market Power Europe.[27] The first is the material existence of the single market, which forms the basis of Europe's presence in the international system. As the largest advanced industrialized market in the world it enjoys significant economic power. This economic power can be utilized to force external companies to adopt European standards, thus generating external effects of internal policies. Damro nuances this argument, however, by acknowledging that other large market powers, for instance the United States or China, may be less affected by European pressure. Their own substantial consumer markets can compensate for the loss of access the EU market should the European regulator adopt a new, conflicting measure. It is furthermore worth noting that Damro acknowledges that external effects through the European market can occur both intentionally and unintentionally.[28]

The second characteristic of Market Power Europe is the conceptualization of the EU as a regulatory institution. Damro argues that high levels of regulatory expertise, coherence and sanctioning authority are beneficial to the export of standards. Therefore, the EU as an externalizing actor will need professional personnel, appropriate budgetary resources and long-term experience, factors the EU in some cases does possess. However, on some policy areas the EU's regulatory powers are somewhat diffuse, leading the EU to experience difficulties in mobilizing its regulatory power.[29] Thus, internal dynamics may either positively or negatively affect the EU's ability to intentionally externalize a given rule or policy. The third characteristic is the conceptualization of the EU as an interest contestation arena. Interest groups have differing desires with regard to the type of regulation the EU adopts and may also attempt to influence the externalization of their interests. When these interest groups are foreign (for instance large non-European companies lobbying for a given policy result) this adds further complication to the prediction of future external effects.[30]

The discussion of the EU as a Market Power Europe ties in well with other perspectives from other branches in the EU external effects literature, as will be seen in for instance the subparagraph on the Brussels effect in section four. This latter concept, while focusing less on the identity of the EU and more on the mechanism by which EU law can be transferred through market processes, also incorporates criteria on regulatory propensity, market size, importance of the EU consumer market for foreign traders and producers, etc. The conceptualization of the EU as a Market Power Europe may also help in determining why EU conditionality can, in some cases, be a powerful motivator for foreign actors to abide with their commitments towards the EU, or how effective internal European norms that are directly aimed at regulating the conduct of external market parties are. Conditionality and extraterritorial or territorially extended norms will respectively be discussed in subsections 4.2 and 4.3. How the EU's role as a market power may come in to play in real life will be illustrated in some of the examples of section 6. First, the discussion will turn to a slowly developing

[26] C. Damro, 2012
[27] C. Damro, 2012, at p.686-689
[28] C. Damro, 2012, at p.686-687
[29] C. Damro, 2012, at p.687-688
[30] C. Damro, 2012, at p.688-689

and immature, but often overlooked power base of the EU: its security and military capabilities. Finally, it is worth mentioning that the goals of Market Power Europe may extend beyond purely economic gains. The EU may also utilize its market power in an attempt to leverage other entities to abide by more normative standards that the EU seeks to impose. In such cases the roles Normative Power Europe and Market Power Europe may overlap significantly, especially if the EU simultaneously utilizes normative diffusion methods alongside externalization means based on the EU's market power.

3.3 Evolving towards a Military Power Europe?

Potentially the most controversial description of the EU's identity is focused on the military dimension of the EU's foreign policy. The discussion of whether the EU is a military power in its own right originates from earlier accounts on the ways in which a sovereign nation-state is capable of affecting its external dimension. Especially in the early years of European integration there have been scholars who argue that the EU will never be able to match the international weight of superpowers such as the US, due to a lack of a credible, unified army. In addition, scholars have pointed out that it is not the EU, but NATO who provides the primary platform for military coordination for Western European and Southern European nations. Without a credible military force to coerce third countries, the EU would not be able to become a true global player. According to other scholars this lack of military power would invariably lead the EU to have only a negligible role in international affairs, especially in a Cold War climate where the balance of powers in large part relied on the balance of military capabilities between East and West.[31]

This discussion has sparked the earlier discussed Normative Power Europe and Market Power Europe responses, which both focus on the *sui generis* nature of the EU as something different than a nation state. As noted, Europe can draw from its substantial internal market, its substantial amount of inhabitants and its normative framework in order to influence actors beyond its borders. In more recent times, however, developments in the EU may necessitate a rethinking of the *a priori* dismissal of Military Power Europe as a paradigm for the study of European power. While the early beginnings of security policy cooperation in Europe were humble,[32] the Treaty of Maastricht and subsequent Treaty amendments gradually expanded upon Europe's competences in the area of classic, security oriented foreign policy and military coordination. Since the early 1990's, the EU has attempted, with varying success, to play a more active role in international crisis management. Its earliest high-profile initiative was during the Yugoslavian crisis, which was often perceived as uncoordinated,[33] coming too late and ineffective.[34] In the Bosnian crisis that emerged from the earlier Yugoslavian separation the EU's insufficient responses shifted the center stage to a UN-NATO response on the initiative of the United States.[35] The perceived failure of European coordination in the Balkans lead to a strengthening of CFSP competences in the 1995 Amsterdam Treaty. The High Representative post was created, as well as the competence to send special representatives and an early warning mechanism for threats to European stability.[36] Following the Kosovo intervention, the EU's security competences shifted towards military response capabilities with the establishment of the European Security and Defence Policy (ESDP), which would later be renamed the Common Security and

[31] H. Bull, Civilian Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*, volume 21, issue 2 1982, pp. 149-170

[32] Such as limited informal cooperation under the CFSP's predecessor, the European Political Cooperation. See Bull, 1982

[33] U. Diedrics, M. Jopp, 2005

[34] U. Diedrics, M. Jopp, 2005, p.99

[35] U. Diedrics, M. Jopp, 2005, p.99

[36] Known as the PPEWU unit. It is notable that German support for the introduction of more Qualified Majority Voting was not followed by other states in the negotiations leading up to the Amsterdam Treaty. U. Diedrics, M. Jopp, 2005, p. 101

Defence Policy (CSDP) under the Lisbon Treaty. The EU leaders decided during the 1999 Helsinki Summit that the EU countries would have a 60.000 strong crisis intervention force ready to deploy in a six month timeframe, which was included in the Second Pillar during the Nice negotiations.[37] With the Lisbon Treaty came a new innovation through the EU battlegroups. These groups are a rapid response force, currently composed of two battalion-sized forces and rotating contributions from Member State militaries. In addition to these two military elements, the EU is also capable of spearheading missions on the basis of a Council Decision under article 34 TEU.

The current deployment of EU forces under the EU flag, while not incredibly high profile, is also not to be underestimated. With five ongoing military missions and even more civilian security-related missions, the EU's CFSP/CSDP competences have proven to be more than mere political rhetoric. While so far rapid response deployments have remained beyond the support of the Member States and EU forces have mostly been deployed in comparatively safe situations,[38] the EU's involvement in peace-keeping operations is undeniable. The Balkans Operation Althea, for instance, saw the deployment of 7000 military personnel at its high point, supported by Police training initiatives such as EULEX Kosovo and financial support instruments. With newfound competences to deploy armed forces come potential external effects of EU law. The sources of these potential effects range from the active support of European normative values such as human rights, the rule of law and democracy through military intervention and their supporting civilian operations, to the further integration of non-EU states with the armed forces standards of the EU through bilateral agreements. As the EU is under an obligation to strive for a consistent and coherent foreign policy under Article 21 TEU, it is in fact quite common to see CFSP operations being augmented through development aid, technical assistance or economic measures, with at least the civilian measures often containing goals to diffuse European values.[39] This can be seen for instance in the Artemis operation in the Democratic Republic of Congo (DRC), where civilian initiatives followed EU-lead military intervention in the form of substantial aid schemes, police training support and support for the reform of the security sector. Another example is the EUSEC mission in the DRC, which is charged with the support of security sector reform and is explicitly tasked to provide its advice in such a way as to promote policy compatible with human rights and international humanitarian law, democratic standards and the principles of good governance, transparency and respect for the rule of law.[40] EUPOL RD Congo, similarly, is tasked with supporting the criminal justice apparatus in Congo through *inter alia* legal advice at the strategic level and should promote the same normative principles EUSEC does.[41] Thus, the EU's military power can serve as a catalyst for Europe's normative power, stimulating local authorities to enter into a deeper relationship and dialogue with EU representatives. The combination of the EU's peacekeeping role and long-term nation-building initiatives based on European norms can be seen as an expression of the requirements imposed on the EU pursuant to Article 21 TEU, which provides *inter alia* that the EU's action on the international scene should be guided by the principles which have inspired its own creation – including, for instance, democracy, the rule of law and human rights[42] – and that its different foreign policy instruments should be

[37] G. Müller-Brandeck-Bocquet, The New CFSP and ESDP Decision-Making System of the European Union, *European Foreign Affairs Review,* issue 7 2002, pp. 257-282

[38] A. Menon, Empowering Paradise? The ESDP at ten, *International Affairs,* volume 85, issue 2 2009, pp.227-246

[39] This has been dubbed structural foreign policy by Keukeleire and Delreux. See: S. Keukeleire, T. Delreux, 2014, p.28-29

[40] Joint Action 2005/355/CFSP of 2 May 2005 on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC), Article 1(1)

[41] Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo), Articles 1(1), 3(1), 3(2)(c).

[42] Article 21(1) TEU

utilized in a consistent and coherent manner.[43] However, even though initiatives such as police missions attempt to stimulate the process of transitional justice and the build-up of new legal orders built on the rule of law and democratic standards, their efficacy is often difficult to definitively establish.[44] While the conceptualization of Europe as a military power is in an embryonic stage, it thus seems an under-appreciation to discount Europe's potential in shaping other legal orders as limited to the civilian and normative spheres. Moreover, the different European identities should not be seen in isolation from each other, as the different processes by which power can be exerted by the Union can be used in conjunction. It is to these processes that the next section of the discussion will turn.

4. The processes which bring about external effects of EU law and policy

While the international relations scholars focusing on normative power, market power and military power opt to study the identity and power bases of the EU, other scholars utilize a more instrumental toolkit and examine the processes by which the EU's rules can have an external effect. Moreover, the processes by which European law, policy, values and other norms are exported are no study subjects exclusively reserved to one discipline. Various fields, such as legal research, political economy, the political sciences and international relations have all contributed in one way or another to the understanding of the EU's place in the world. Nevertheless, there seems to be no comprehensive, interdisciplinary account of the different processes that have been observed by scholars from the various relevant fields, nor is there any account of how the various concepts relate to one another. In this section of the working paper, several of the more prevalent concepts will be elaborated upon and linked to one another. Two broad categories of mechanisms and processes may be distinguished in this literature. The first concerns internal European laws and policies that gain an external effect. This includes market processes that force foreign market operators to comply with European legislation, as well as internal norms that have been designed to also affect foreign parties through their external applicability. Subparagraph 4.1 will deal with these market processes as captured by the so-called Brussels Effect concept, while subparagraph 4.2 will consider extraterritorial and territorially extended jurisdiction. Secondly, the EU may use its external policies to give an external effect to internal legislation. It may actively promote the copying of its legislation through diplomatic tactics or development assistance, but it may also attempt to coerce third states to copy European laws, values or policies by making a set of incentives dependent on their adoption through what is known as conditionality. The EU's usage of conditionality strategies will be the subject of subparagraph 4.3, while 4.4 will discuss diplomatic strategies and supportive action. Subsequently, some attention will be devoted to the compound effects of several of these processes when they are applied together. The final paragraph of this section will provide an overview of a receiving actor's perspective, provided by the comparative legal discipline in the form of the legal transplant literature.

4.1 The Brussels Effect

In her seminal study of the power of Europe on the global market, Bradford provides a fascinating take on the processes by which EU standards can be exported. The Brussels effect focuses on how the EU has power to unilaterally regulate global markets. It is based on a set of earlier concepts developed in American literature known as the Delaware and the California effects.[45] The Delaware Effect is used in American literature to describe a regulatory race to the bottom when one state lowers its standards. Conversely, the California effect – on which Bradford bases her Brussels effect – denotes how a powerful state with strict levels of regulation can increase the standards of other

[43] Article 21(3) TEU

[44] A. Menon, 2009 notes that in general, the effects of EU missions on unstable territories seems to have been positive for local citizens perceptions of safety

[45] A. Bradford, 2012

states.[46] While Bradford is not the first to apply a variant of these effects to the unilateral influence of EU regulation,[47] she has included a number of variations in her conceptualization of how a Brussels effect is achieved. While the California effect includes market size and domestic producer as necessary criteria for it to occur, the Brussels effect is based on criteria that partially differ and partially overlap with the California effect. The Brussels effect retains the market power requirement, but provides added predictive power with the addition of several other requirements. While an elaborate discussion and evaluation of these requirements is beyond the scope of this contribution, it is necessary to shortly mention which requirements Bradford has described.

1. *Market Power.* The market power requirement expresses that large markets are more likely to incur pressure upon producers that export to that market. The European internal market can be seen by many standards as the largest consumer market on the planet. Not only does it have a consumer market of roughly 500 million consumers with a GDP of 16 billion, it also is the worlds' second-largest importer of goods and services, just below the United States.[48]

2. *Regulatory Capacity.* For the EU to be an effective unilateral regulator, it needs to be able to deploy its regulatory resources internally. The regulator needs to have the necessary expertise and be capable of sanctioning non-compliance.[49]

3. *Preference for strict rules.* This requirement expresses that regulatory capacity needs to be activated by the policy preferences of political leaders. The EU is known for its reliance on the precautionary principle, which implies that regulation in order to prevent risks which have not yet been extensively researched and documented may be appropriate to safeguard consumers and operators. It is often argued that the EU's relatively high aversion to risk generates a policy preference for strict regulation in many market sectors.[50] This is often opposed to the US, which utilizes a more cost-benefit based prevention principle under which a government requires substantial evidence of adverse effects before implementing stricter standards.

4. *Predisposition to regulate inelastic targets.* If a market is elastic in nature, third country governments and market parties will be under less pressure to conform to European regulation. However, if an inelastic EU consumer market is targeted by regulation, the lack of alternatives for companies to distribute their products means that they will be forced to adopt the European standard or face exclusion from an essential market.[51]

5. *Non-divisibility of standards.* Finally, producers must adopt the EU norms across their entire production line of a good. If a norm is divisible per market, a company will adjust its EU production to the new regulatory standard but will not do so for other markets, denying an external effect to European legislation. Standards can be non-divisible if it is technically impossible to adhere to different norms (for instance a service provided globally over the internet), if large-scale

[46] A. Bradford, 2012
[47] See for instance S. Princen's application of the California effect to the EU's Leghold Trap Regulation and fur trade with the US and Canada and to the 1995 Data Protection Directive in S. Princen, 2003, pp.142-157
[48] A. Bradford, 2012, p.11-12. See with regard to general information on the EU's position in trade European Commission, EU position in trade, 2014, retrieved on April 20, 2015, from: http://ec.europa.eu/trade/policy/eu-position-in-world-trade/
[49] A. Bradford, 2012, p.12-14; This requirement also mirrors the arguments made by C. Damro, 2012 in the context of his Market Power Europe discussions.
[50] A. Bradford, 2012, p.14-16, 26, 32; see also for a critical appraisal and the controversial nature of the principle under WTO law: G. Majone, What Price Safety? The Precautionary Principle and its Policy Implications, *Journal of Common Market Studies*, volume 40, issue 1 2002, pp.89-109, in particular p.94-98
[51] A. Bradford, 2012, p.16-17

production of a good brings cost benefits, or when it is legally impossible to divide a product or conduct.[52]

When EU regulation is adopted that fulfills these criteria, foreign producers exporting to the European consumer market will be faced with the choice of abandoning an important destination market or adhering to the EU standard. Should European standards go beyond what is required by other jurisdictions, this can have the effect of increasing the level of regulation worldwide, as the lower norms required by other jurisdictions are no longer the relevant standard to follow for producers. What is more, when the EU norm conflicts with the norms of other jurisdictions, the authorities of these states receive an incentive to alter their own legislation in order to allow European market access for their domestic producers. Similarly, an existing European method of legislation may provide guidance for other legal orders interested in adopting new legislation on the policy field. They will be faced with adopting legislation that does not go beyond EU law, in which case the level of standard will remain at the European level due to the existence of an indivisible product market, choose to conform to the European level, go beyond the European level, or adopt conflicting standards. Only if the jurisdiction has similar market power to the EU will these standards be able to compete or supersede the European norm.

Nevertheless, several important limitations exist to the process by which a Brussels effect is achieved. First of all, some elastic elements are present in most markets where the US and China are also large consumer destinations. Moreover, many norms are to some extent divisible for market operators, allowing them to change their standards for the European market while retaining lower standards for other markets. If this is easily possible for them to achieve the effect of EU regulation may remain limited to the European market. Furthermore, the WTO imposes limitations to the criteria the EU can legitimately adopt. In the leghold trap example analyzed by S. Princen, for instance, the threat of a future WTO case was enough for the EU to engage in bi-lateral compromises with the US and Canada, the latter two being major exporters of furs to the European consumer market.[53] Another limitation that exists in particular with regard to developing countries is the issue of whether compliance is feasible for the targeted producers. This is in large part due to it being unfeasible for producers and public institutions in developing countries to implement the techniques necessary pursuant to the European standard. Instead of exporting the higher standard, the EU regulation could then result in a drop in exports to the European market.[54] To partially counter several of these problems, in particular those related to the evasion of European market standards, the EU may attempt to include territorially extended or extraterritorial norms in its legislation. Such norms will be the topic of the next paragraph.

4.2 Extraterritorial Jurisdiction and Territorial Extension

In a set of articles Joanne Scott has described two mechanisms available to the EU to influence its outside world with internal regulation: extraterritoriality and territorial extension.[55] While the first of these concepts deals with extraterritorial jurisdiction and enforcement, the second encompasses

[52] A. Bradford, 2012, p.17-19

[53] S. Princen, 2003, pp.142-157

[54] In an economic analysis of the EU's intensified aflatoxin standards (aflatoxins are a group of related toxic compounds which raise the chance of liver cancer) in food products, Otsuki, Wilson and Sewadeh for instance predicted that the African export revenue of cereals, dried fruits and nuts to Europe would experience a decrease of around 50%. This prediction was in part based on the difficulties the local institutions would face in effectively implementing the new European standards. See T. Otsuki, M. Sewadeh, J.S. Wilson, Saving two in a billion: quantifying the trade effect of European food safety standards on African exports, *Food Policy,* volume 26, issue 1 2001, pp.495-514, in particular p.498, 504-505, 511-512

[55] J. Scott, Extraterritoriality and Territorial Extension in EU Law, American Journal of Comparative Law, volume 62, issue 1 2013, pp.87-126; J. Scott, The New EU 'Extraterritoriality', Common Market Law Review, volume 51, issue 5 2014, pp.1343-1390

forms of jurisdiction which resemble extraterritorial jurisdiction, but which, upon closer inspection, do have a relationship with EU territory, however tenuous that relationship may be. Problematic in this regard is that definitions of what is extraterritorial jurisdiction vary between different authors. As this working paper is predominantly based on the work of Scott, her definitions will be followed. According to Scott, it is essential with regard to true extraterritoriality that the measure involved does not have any territorial connection to the EU.[56] Therefore, it must not be traceable in any way to the presence or conduct of a person on European territory.[57] Scott has argued that true extraterritorial jurisdiction is exceedingly rare in EU law.[58] Even in cases where no territorial connection is apparent in one trigger for a norm, a second, supplementary trigger usually does require some form of conduct within the EU. A good example are the EU Merger Regulation's norms, which apply regardless of the jurisdiction they take place in, but do require EU market turnover thresholds to be passed before being applicable. Thus, while the location of the businesses is irrelevant, at least a significant portion of their conduct must occur within the European legal order.[59] There is one major exception to the rule of territoriality, however. Holding the nationality of one of the EU Member States is the sole form of jurisdiction in EU law which requires no additional territorial link.[60] This type of jurisdiction is for instance included in many EU criminal law norms. Directives such as those on human trafficking,[61] cybercrime[62] and the proposed Directive on combating fraud affecting the Union's interest[63] all include jurisdiction over nationals of EU states. While for fraud penalties a second territorial trigger exists (the EU must be affected), recent EU cybercrime and human trafficking norms do not require any link to EU territory or an entity on EU territory. For instance, Article 17 of Directive 2011/92/EU on sexual abuse of children and child pornography requires Member States to adopt legislation that includes jurisdiction where the offence is committed in whole or in part on the territory of the Member State concerned, or if the offender is one of its nationals.

A method similar to extraterritorial jurisdiction to generate external effects of European law utilizes a legislative technique which has been dubbed territorial extension by Scott.[64] She considers a measure territorially extended when a connection to the territory of a state, however tenuous that connection may be, is necessary for its application.[65] The basis for this technique is the idea that a sovereign can exercise jurisdiction either over conduct which occurs at least partially within its territory or the (potentially external) conduct of persons who are present within the territory of the sovereign.[66] As noted the EU's recourse to true extraterritorial measures, barring cases where nationals of EU states are addressed, is exceedingly rare. Instead, Scott has argued that the EU has adopted several new jurisdiction triggers beyond the classic jurisdiction sources nationality,

[56] J. Scott, 2013, at p.90
[57] J. Scott, 2013, at p.89-90
[58] J. Scott, 2013, at p.94
[59] J. Scott, 2013, at p.95-96
[60] J. Scott, 2013, at p.90; J. Scott, 2014, The New EU 'Extraterritoriality', Common Market Law Review, volume 51, issue 5 2014, pp.1343-1390, at p.1351-1352
[61] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1
[62] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1; Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218/8
[63] European Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM/2012/0363 final
[64] J. Scott, 2013, at p.89-94
[65] J. Scott, 2013, at p.90
[66] J. Scott, 2013, at p.89-92

territoriality of the individual or territoriality of the conduct.[67] This mirrors processes unfolding in other jurisdictions, where in the face of international or global problems the application of domestic laws to individuals and conduct beyond the states' borders has also grown.[68] Thus, while the new triggers for EU jurisdiction should be classified as territorial extension, they are noteworthy in that they come very close to extraterritoriality. The three new triggers identified by Scott are effects-based jurisdiction, anti-evasion jurisdiction and jurisdiction based on a transaction with an EU person or property located in the EU.[69]

Competition law is the classic example for an effects-based jurisdiction. Agreements, concerted practices and abuses of dominant market positions all infringe articles 101 or 102 TFEU regardless of where the conduct took place, with the condition that there must be sizeable effects on the European market. Interestingly, the fact that competition law traditionally makes use of effects-based jurisdictions can be seen as a reason that the EU had a stake in actively stimulating China to adopt similar norms and avoid as much as possible conflicting requirements for undertakings.[70] Scott notes that effects based jurisdiction has moved beyond competition law in recent years, with for instance the EMIR derivatives Regulation imposing clearing obligations on all contracts with a direct, substantial and foreseeable effect in the EU legal order.[71] Beyond markets regulation effects-based jurisdiction is visible in EU law as well. In the area of cybercrime, for instance, Directive 2013/40/EU on attacks against information systems requires Member States to adopt laws that offer jurisdiction over attacks committed against information systems present in the territory of that Member State.

The second of the novel triggers is anti-evasion jurisdiction, which is designed to capture artificial conduct aimed specifically at avoiding the obligations parties would otherwise have under EU law. Scott notes that derivative contracts between two parties located in third countries, for instance, need to be cleared, with Article 4(1)(v) of Regulation 648/2012 establishing: '*provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation'.*[72]

Thirdly, Scott observes that the presence of transactions with an EU person or with property in the EU has been used as a source of jurisdiction. Once more the EU's cybercrime legislation can be used as an example. Directive 2011/92/EU on combating sexual abuse and sexual exploitation of children and child pornography explicitly requires that jurisdiction should be extended to offences committed outside the territory of the EU, but with access information and communication technology located within the territory of an EU Member State. This is a very broad provision, which may not only capture situations in which a user directly accesses an interface in the EU, but also situations in which servers and IT services located in the EU are accessed through the internet, with both the person and the conduct being located beyond EU borders. The proposed Regulation on data protection would follow a similarly broad jurisdiction basis, with the proposed scope of the

[67] J. Scott, 2014

[68] See for the US situation for instance, A.L. Parris, Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canada-U.S. Transboundary Water Pollution Disputes, *Boston University Law Review,* volume 85, issue 2 2005, pp.364-428

[69] J. Scott, 2014, p.1347,

[70] Q. Wu, EU-China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law? European Law Journal, volume 13, issue 3 2012, pp.461-477

[71] J. Scott, 2014, p.1356-1359

[72] J. Scott, 2014, p.1359-1360; Regulation 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, Article 4(1)(v), preamble 23

Regulation extending to controllers or processors located in the Union, even if the person whose data is involved is located beyond the EU.[73]

Another notable facet about territorial extension schemes is that they include the possibility for the EU to declare third states' domestic legal system as offering equivalent protection. If such equivalence is found for a Member State, their companies may be guaranteed market access or can fall under regime that employs less intensive scrutiny. Thus, territorial extension schemes can have a dual focus, consisting of both market pressure on producers which in turn incentivizes governments to apply for equivalence and upgrade their domestic standards.[74] One example is the EU-US safe harbor agreement, providing that US companies participating in the Safe Harbour Privacy Principles and Frequently Asked Questions issued by the US Department of Commerce provide equivalent data processing and privacy standards. This allows for the transfer of personal data to complying US companies, which would otherwise not be possible under Article 25(1) of Directive 95/46/EC.[75] Furthermore, the EU's aviation Emission Trading Scheme (ETS) allows for the Commission to unilaterally declare another countries climate change reduction measures as equivalent to the EU's efforts, exempting air carriers from that state from the ETS obligations under Directive 2008/101/EC.[76] Thus, the EU possesses a substantial toolkit to provide external effects to its internal legislation, both through applying norms to external conduct and through targeting EU conduct of external parties. It enjoys these options in large part due to its large and powerful domestic market, which ensures that many external producers and third countries must consider European legislation for their export policies. Nevertheless, targeting conduct through legislation is not the only option for the EU to provide an external effect to its regulation. It can also utilize more direct diplomatic methods to influence third country governments. Instead of influence on the conduct and market access of private parties, these processes directly target the regulation of third countries, which in turn influences the conduct of producers. The options available to the EU through this route will be the subject of the next paragraph.

4.3 Conditionality strategies

The usage of conditionality by the EU to leverage third states to adopt legislation or perform certain actions has been widely documented and is subject to study from perspectives ranging from the political sciences to public administration and the legal disciplines. Whereas the previously mentioned processes and techniques focused on the external aspects of internal EU legislation, the EU may also influence its external environment more directly. By including conditionality in its bilateral and multilateral agreements the EU is capable of exerting soft power on its partners. Specifically, the EU seeks to achieve compliance on part of third state governments by granting or withholding incentives on the basis of a set of conditions.[77]

The rewards in question may differ substantially from country to country. For example, countries under the Enlargement Policy of the EU can be offered *inter alia* accession to the EU, trade privileges in the years before the actual accession, financial support, technical support, increased political cooperation with Union actors, migration and home affairs privileges and military cooperation and coordination. Often, several of these incentives are offered in a package deal through an association agreement under Article 217 TFEU. The European Commission assesses the speed of and extent to

[73] http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf
[74] J. Scott, 2013, p.108-110
[75] See for an insightful overview of the working of the Safe Harbour also Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, COM/2013/0847 final
[76] See in particular article 25a(1) of Directive 2008/101/EC
[77] F. Schimmelfennig, U. Sedelmeier, Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe, *Journal of European Public Policy,* volume 11, issue 4 2004, pp.661-679

which reforms take place in the country involved. In this assessment, several criteria pertaining *inter alia* to the adoption of EU market legislation, democratization, human rights, the rule of law and other facets deemed important by the Commission are set as criteria, determining whether the country is ready to start negotiating the terms of a next agreement or actual accession. A slightly watered down version of the methods employed in the context of enlargement can be found in the European Neighbourhood Policy (ENP). Countries under the ENP are also offered a set of rewards and annually determined criteria. Indeed, the ENP has been argued to be a near direct transplant of enlargement policy to a new context.[78] However, the distinctive characteristic of the ENP is that the accession incentive is not granted to partner countries. This means that conditionality is applied without the potentially largest reward the EU has to offer. As such, the effectiveness of conditionality-based strategies within the context of the ENP has been met with mixed evaluations from academia. Although some are carefully optimistic about the EU's ability to offer other relevant benefits and to at least partially influence the local policy cycle,[79] others perceive the lack of accession as a core challenge for the ENP.[80]

While Enlargement Policy and the ENP comprise the two most salient examples of the application of conditionality by the EU, the technique has also been adopted in other areas. Perhaps the foremost example of conditionality outside ENP and accession is the Generalised Scheme of Preferences (GSP) of the EU. GSP schemes are aimed at providing tariff reductions for developing countries and are allowed under the GATT enabling clause. This forms an exception to the Most Favored Nation Principle of Article 1 GATT, which provides in paragraph 1 that all benefits accorded to one contracting party must immediately and unconditionally be accorded to products from all other contracting parties.[81] The 1995 revision of the GSP system introduced a conditionality-based approach to third countries. In return for adhering to labor standards on issues such as child-labor and the freedom of association, the EU could extend a tariff reduction to beneficiaries.[82] Conversely, beneficiaries under the GSP programme could be excluded if major breaches of labor rights were found. As with the ENP and Enlargement policy, this scheme provides the EU with a – albeit somewhat limited – carrot and stick tool to incentivize social reforms in prospective GSP beneficiaries and to enforce standards in current beneficiary states. Thus, countries such as Myanmar have been excluded from benefits due to poor labor standards, while other countries such as Moldova and Sri Lanka have managed to convince the EU to extend preferences after the implementation of improved standards. The 1995 scheme also included a specific section on drug policy, rewarding states with trade benefits in return for an active anti-drug-trafficking policy. Countries that are beneficiaries under the drug-section of GSP included Pakistan and the Andean Community, both major sources of drugs for the European market.[83] Both GSP policies are a clear indication of the EU using issue linkage in combination with a conditionality mechanism in order to induce desired reforms in third states it would otherwise have difficulty in achieving. In 2005 the

[78] See for instance: D. Kochenov, The ENP Conditionality: Pre-accession Mistakes Repeated, in E. Tulmets, L. Delcour (eds.), Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood, Baden Baden: Nomos, pp.105-120

[79] J. Langbein and K. Wolczuk for instance note that while the EU has had some influence on Ukrainian policy, this was patchy in nature, with Ukranian officials being selective in their adoption of reforms. See: J. Langbein, K. Wolczuk, Convergence without membership? The Impact of the European Union in the neighbourhood, *Journal of European Public Policy*, volume 19, issue 6 2011, pp.863-881

[80] See for instance the arguments by J. Kelley, 2006, at p.36-39, p.48-52 and K.E. Smith, The outsiders: the European Neighbourhood Policy, International Affairs, volume 81, issue 5 2005, pp.757-773, at p.767-773. Both argue that the absence of enlargement offers will pose a challenge for the ENP, as the incentives for ENP countries are less enticing than those countries that were included in enlargement programmes.

[81] J. Orbie, L. Tortell, The new GSP:Beneficiaries: Ticking the box or truly consistent with ILO findings? European Foreign Affairs Review, volume 14, issue 5 2009, pp.663-681

[82] J. Orbie, L. Tortell, 2009

[83] G. Faber, J. Orbie, The new trade and development agenda of the European Union, *Perspectives on European Politics and Society,* Volume 9, issue 2 2008, pp.192-207

system was revised considerably. The new system, dubbed GSP Plus, aims at a more comprehensive set of requirements for countries that wish to receive preferential tariff treatments. It requires the implementation and ratification of a set of 8 international labor conventions, and also includes the criterion whether these rights are effectively guaranteed. Faber and Orbie, however, have noted that EU monitoring of the effective implementation of international human rights law leaves much to be desired, with countries such as Columbia receiving trade preferences under GSP Plus even though their human rights track record is questionable.[84] Moreover, Orbie and Tortell have noted that ratification is a crude indicator of effective implementation, and that substantial unclarity exists over Commission's approach to analyzing International Labor Organization reports and labor circumstances in (prospective) GSP Plus states.[85]

Thus, in general the conditionality mechanism seems to suffer from principal-agent relationship problems. Where the interests of beneficiaries are not always perfectly aligned with the goals set out by the EU, such is sometimes the case under ENP of GSP-like policies, financial, technical and market-access benefits may not be enough to generate a perfect level of compliance. The problem is subsequently further exacerbated by the Commission's limited ability to monitor the internal situation. Under the ENP the Commission is often accused of box-ticking and an uncritical stance, while under the GSP mechanism it has been criticized for merely duplicating ILO reports. The better performance of Enlargement Policy conditionality noted by the literature can be explained by the larger stakes for both parties – both the EU and prospective Member States stand to gain and lose much from their continuing approximation. The incentives are higher for prospective states, and the investment greater for the Union, providing a greater reflex for compliance as well as a greater impetus for monitoring.

4.4 Diffusion with EU involvement: socialization, persuasion and spurred emulation

A final, but no less important process of EU law external effects occurs not through the legal, but through the socio-political sphere. For some countries or in some policy areas the EU may not have substantial coercive or semi-coercive tools at its disposal to provide an external effect to its internal standards. For instance, countries that have limited trade flows with the EU and that are geographically distant, the EU will be able to rely on the external effects of internal legislation or conditionality to a far lesser extent. Similarly, if the third country in question is an economic powerhouse in itself, and has ulterior export markets, the influence of EU legislation on domestic producers will be less pervasive and conditionality is difficult for the EU to impose. However, this does not mean that the EU is no longer interested in generating compliance to or approximation towards its standards. Moreover, the EU can and does attempt to provide an external effect to its own model of legislation in such situations, even though its toolbox is more limited, it has no enforcement options and effects are not always guaranteed. The mechanisms still open to the EU are primarily social and supportive. Moreover, the social dimension of influence may also be used as an additional instrument, reinforcing other mechanism employed by the EU. It has for instance been argued for the normative dimension of the EU's external affairs that adding persuasion techniques and conferral of shame or prestige techniques will work better than a recourse to solely coercive or material motivations.[86]

There are three social mechanisms that have not been covered by the concepts previously described in this paper. Firstly, the EU can rely on normative socialization. When the EU relies on normative socialization to export a norm this is a manifestation of the earlier discussed Normative Power

[84] G. Faber, J. Orbie, 2008
[85] J. Orbie, L. Tortell, 2009
[86] I. Manners, The Social Dimension of EU Trade Policies: Reflections from a normative power perspective, European Foreign Affairs Review, volume 14, issue 5 2009, pp.785-803

Europe. Through the usage of political rhetoric in unilateral resolutions, multilateral fora and bilateral relationships the EU is sometimes capable of steering other countries towards its standards. Secondly, through persuasion EU officials may attempt to alter the perception of their counterparts in such a way that the latter see the European solution as desirable. In these two instances, the export of a standard occurs on the EU's initiative. Thirdly, third countries often emulate the EU's regulatory solutions and transplant them into their own settings.

The voluntary emulation process is specifically interesting for the EU. When a third country is looking at other regulatory models for best practices, this provides an opportunity for the EU to engage in dialogue and to provide support for the country involved. Lenz has argued that these opportunities are especially prevalent when states or regional organizations are faced with an internal policy failure or are otherwise convinced of the need for new policy in a specific area. This leads to a demand for a new set of rules, which may be found in EU legislation if domestic actors support the adoption of European-type legislation. Thus, the emulation process is far less hierarchical in nature than all the other processes described until this point, although it does not mean that the EU is a passive bystander. Often, the EU will deliver substantial amounts of financial support and technical assistance for the diffusion of the policy involved. Lenz has coined emulation that occurs with the support of the EU 'spurred emulation'.[87]

Such support not only serves the purpose of increasing the chance that the European model will be used as a base for third country legislation, it also serves to reduce the chance that competing models from, for instance, the US will be adopted. What the interest for the EU is to support the initiatives of other countries to emulate European law may vary. With regard to the influential EU-China dialogue on the new Chinese Anti-Monopoly Law, for instance, economic and enforcement interests seem to prevail.[88] The EU seemingly hopes that exporting competition law, as an integral part of a larger liberal market approach, will improve the Chinese market, foster bi-lateral trade flows and prevent conflicts between European and Chinese competition authorities on enforcement issues.[89] To that end EU experts have provided technical expertise and practical knowhow on its own competition law system to Chinese officials, who have indicated that this dialogue has directly influenced the current Chinese system.[90] Conversely, EU support for the reform of regional organizations such as Mercosur and SADC, while similarly achieved by structural dialogue, substantial financial assistance[91] and technical support, seems to be based on the more normative assumption that regional integration along the lines of the EU model is desirable. EU officials have noted for instance that furthering and supporting the regional integration of the SADC would ensure an environment of peace and create conditions for prosperity for all, indicating that the process was seen as normatively just.[92] Similarly, the EU-Mercosur Interregional Framework Cooperation Agreement preambles note the desire to strengthen the tenets of international free trade, the importance of open regionalism, the perception that regionalism would foster economic and social development and integration into the world economy and that further integration in Mercosur

[87] T. Lenz, Spurred Emulation: The EU and Regional Integration in Mercosur and SADC, West European Politics, volume 35, issue 1 2011, pp.155-173
[88] Q. Wu, EU-China Competition Dialogue: A New Step in the Internationalisation of EU Competition Law? European Law Journal, volume 13, issue 3 2012, pp.461-477
[89] Speech Commissioner Kroes at the University of International Business and Economics, Beijing, http://ec.europa.eu/competition/speeches/text/sp2007_10_en.pdf
[90] Q. Wu, 2012, at p.467
[91] SADC for instance is in large part financed by the external partners and receives substantial support from the EU, see T. Lenz, 2011, at p.158, 163-164. See also the Joint Press Release EU Delegation to Botswana and SADC, SADC Secretariat, 'The European Union and SADC sign multimillion Euros agreements in support of regional integration in Southern Africa', 2012, retrieved on 19-3-2015 from: http://www.sadc.int/files/9213/5419/6696/EU-SADC_Sign_10th_EDF_Agreements_on_November_07_2012_English.pdf
[92] EU Delegation to Botswana and SADC, SADC Secretariat, 2012

would promote closer relations between peoples and international stability.[93] Thus, while indirectly economic interests do seem present, the main tenet of the preambles seems that regionalism is inherently and normatively justified and should be supported.

4.5 Compound effects of processes and techniques

As acknowledged explicitly by most of the authors studying the processes mentioned in the previous paragraphs, the external effects of EU law are often the result of several processes. For example, the Brussels effect of the EU's substantial internal market may be complemented by bilateral agreements that include conditionality as both provide an incentive for a third country to reform its laws according to the European standard. Combined, two or more processes may become more than the sum of their parts and provide sufficient incentives for a foreign actor to adhere to the desired European norm. For instance, while territorially extended norms increase European jurisdiction to conduct and entities beyond EU borders, the success of their underlying strategies can be heavily dependent on the importance of the European market. For countries which do not export large amounts of timber to the EU will not be heavily affected by the EU Timber Regulation's territorially extended due diligence norms. Conversely, countries which are heavily dependent on the European export market may find their producers faced both with EU product requirements and the territorially extended norms of the Timber Regulation, providing a double incentive for domestic traders to adapt their norms. This combined effect of the Timber Regulation and the importance of the EU as a destination market will be explored in section 5. Similarly, spurred emulation strategies in which the EU provides financial and technical support are often combined with conditionality policies. Thus, on the one hand, the EU requires reforms in exchange for rewards such as further integration, while on the other it simultaneously provides support for these reforms. The earlier discussed ENP is heavily infused with such a two-pronged approach, with the European Neighbourhood and Partnership Instrument (ENPI) providing the main mode of European support for involved third states.

The aforementioned examples pertain to the compound effect of multiple externalization processes being applied on one (subgroup of) foreign actors. However, the EU may also utilize a strategy in which different actors are approached with different techniques. For instance, those countries in a close geographical 'ring' around the EU can more easily be offered conditionality incentives such as market integration and accession to stimulate the adoption of EU norms. Countries not in the immediate geo-political sphere of influence of the EU will likely be less easy to influence with similar strategies, leading the EU to use a different set of techniques. For these countries the EU could employ socialization and persuasion techniques or spurred emulation. By differentiating between the techniques that would offer the best likelihood of success per third state, the EU can develop a net of measures designed to as effectively as possible target a broad set of foreign actors. In doing so, the EU can also take into account which set of actors in a country or region it can best target to achieve an external effect of EU law. If it has great market leverage over a third countries' private actors, for instance, it could regulate their market access to influence the domestic policy cycle. As the domestic actor provides interest group pressure to the third countries' legislator, the EU may foster this through persuasion or spurred emulation techniques. In figure 4.1 a simplified model of the described techniques, the actors they target and the processes that occur in the third state is presented.

[93] Interregional Framework Cooperation Agreement between the the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part, OJ L 69/4

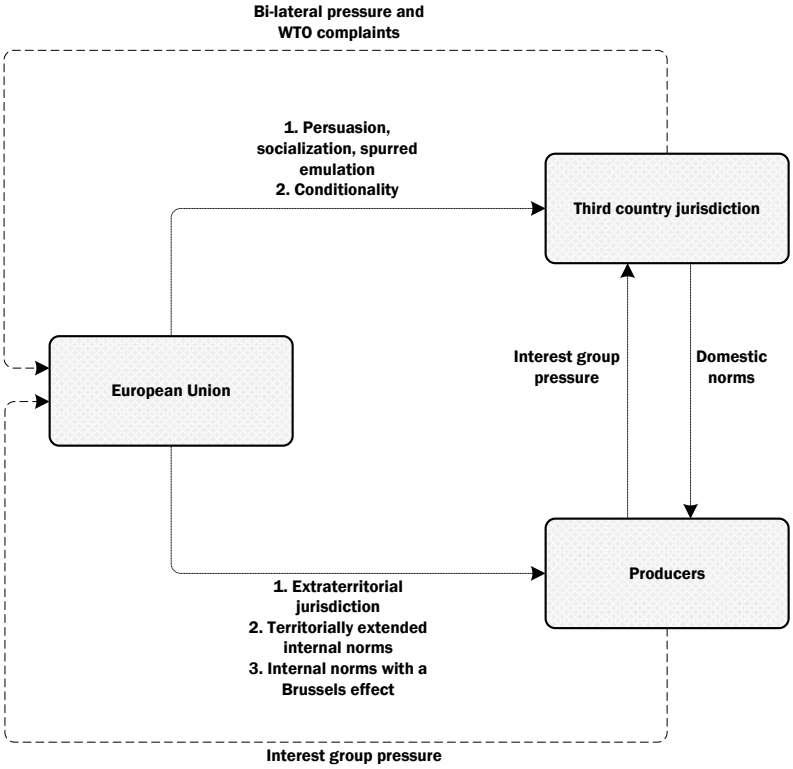

Figure 4.1: An EU-centered model of rule-export mechanisms

5. Interlude: the receiving side's perspective and the legal transplant concept

Comparative law scholars have similarly attempted to explain the diffusion of legal rules, and have put forward the concept of the legal transplant. While legal transplants will most likely not be the dominant perspective for the execution of this project (for reasons set out at the bottom of this paragraph), an interlude sketching a few elements of the perspective is nonetheless informative. The legal transplant concept has become a prevalent term in comparative legal scholarship to describe the copying of a rule from another legal order into the domestic setting. While interpretations of the legal transplant process differ from author to author, one main branch of the literature supports the conceptualization of law as an autonomous entity, with several core rules remaining consistent across the evolution of legal orders.[94] Another important body emphasizes the role of the adopting country's policy cycle as an important or essential element for a legal transplant to occur.[95] While the historical perspective offered by the conceptualization of law as a (semi)autonomous entity is certainly interesting, it is less informative for the study of current diffusion processes occurring between the EU and other legal orders. This paragraph will therefore focus on the second body of legal transplant literature. As this body itself is also extremely diverse and significantly expansive,

[94] One of the important authors in this field is Alan Watson, who offers a historical perspective into the continued prevalence of Roman private law rules in many of today's Western European states through the existence of a group of legal elites. According to Watson this may persist even if rules are for instance dysfunctional to the society they regulate. See for a succinct overview W. Ewald, Comparative jurisprudence (II): the logic of legal transplants, *The American Journal of Comparative Law,* volume 43, issue 4 1995, pp.489-510. See also for instance, A. Watson, Legal change: sources of law and legal culture, *University of Pennsylvania Law Review,* volume 131, issue 5 1983, pp.1121-1157; A. Watson, From legal transplants to legal formants, *The American Journal of Comparative Law,* volume 43, issue 3 1995, pp.469-476

[95] J.M. Miller, A typology of legal transplants: using sociology, legal history and Argentine examples to explain the transplant process, *The American Journal of Comparative Law,* volume 51, issue 4 2003, pp.839-885

the working paper will make grateful use of a typology and overview provided by Miller, which itself seeks to summarize the literature in several categories.[96]

Miller's typology distinguishes between four broad types of legal transplants, which reflect the different motivations a receiving legal order can have to borrow a model. He argues that all transplants described in the literature can be categorized under the labels of the cost-saving transplant, the externally dictated transplant, the entrepreneurial transplant and the legitimacy-generating transplant. The cost-saving form of legal transplants is relatively straight-forward: a jurisdiction perceives that it can save drafting costs by adopting (parts) of a model already established by another legal order. Miller argues that this can be very attractive for states which do not have a large amount of resources themselves.[97] They may look to the US or the EU for their models, as these two large regulatory powers have the capacity to fully evaluate how legislation should be drafted and what effects these rules will have. Even states which have substantial resources themselves may opt to copy foreign models, however. These have been tested and best-practices with regard to the implementation of that legislation are already available, making them very attractive for states which seek to regulate similar issues. The earlier mentioned voluntary copy of portions of the EU's competition rules by China are an example of this. China stood to benefit from Europe's considerable experience in the formulation and implementation of competition law, including the practical problems the EU had faced in its own experiences with the legislation. China was therefore very open to input from EU officials in the design of the Chinese Anti-Monopoly law.[98] Another example may implicitly be found in Reimann's discussion of the spread of the European product liability model. One of Reimann's arguments explaining why the European model has spread instead of the original US version – on which the EU's Product Liability Directive itself is based – is based on the fact that the EU's model was laid down in a statutory document, while the US model was implemented through a jurisprudence system. According to Reimann, this meant that the EU model was more easily accessible and more succinctly documented than its US counterpart. Therefore, it was easier and more efficient for third countries to base their rules on the EU's Directive than to delve into the details of the US system.[99]

The second category of transplants, which Miller coins the externally dictated transplant, refers to instances in which the receiver was forced, legally or otherwise, to adopt a given set of legislation. This type of transplant could be seen as the receiver's perspective of processes mentioned earlier in section 4, such as conditionality and territorial extension. Miller notes, for instance, that countries have been forced to adopt human rights standards in order for them to receive trade benefits, or to improve their aviation safety legislation to US levels in order to retain market access.[100] Most of Europe's accession policy would for instance also fit in this category of transplants, as the EU dictates the adoption of the EU acquis for the acceding state. Third is the entrepreneurial transplant, which focuses on the role of specific actors promoting the emulation of a foreign set of rules domestically. This may happen for instance when policymakers have worked or studied in another legal order, thereby internalizing a certain way of regulating an issue. Upon returning to their own country they can then become advocates of the adoption of a similar set of rules internally.[101] Finally, the role of the foreign models' prestige is captured by the legitimacy-generating transplant concept. The legitimacy-generating transplant is utilized when the adopting country attempts to legitimize its

[96] J.M. Miller, 2003
[97] J.M. Miller, 2003, at p.845-846
[98] Q. Wu, 2012
[99] M. Reimann, Product Liability in a Global Context: the Hollow Victory of the European Model, *European Review of Private Law*, volume 11, issue 2 2003, pp.128-154, at p.142-145
[100] J.M. Miller, 2003, at p.847-848
[101] J.M. Miller, 2003, at p. 849-854

internal measures by borrowing a well-known and positively received model.[102] A good example where Europe functioned as a source of inspiration is the adoption of EU structures by other regional organizations. ASEAN countries, for instance, faced several economic and political crises in the mid 2000's, with ASEAN not being capable of addressing these sufficiently. To regain credibility as a regional actor and policy actor, it has been argued that ASEAN adopted several hallmark institutions of the EU system, the most prominent of these being a COREPER-like system of permanent national representatives.[103]

Scholars in the legal transplant literature often argue that, as much or perhaps even more than the source of the borrowed model, it is the domestic process in the adopting jurisdictions which determines whether a model will be copied.[104] This is *inter alia* illustrated by Miller's categorization of legal transplants, in which only one category emphasizes external pressure. The literature therefore provides useful insights into the role the receiving legal order has in adopting foreign standards. Especially when the EU is not capable of applying substantial and credible coercive power does the internal policy cycle become the dominant feature of a transfer process. Moreover, combinations of external benefits and internal factors such as the presence of a norm entrepreneur and a cost-saving perspective may be present in specific cases. This should inform scholars on the topic of rule transfer that other considerations than solely European pressure may have been a factor for the adoption of an EU rule. However, the focus this body of literature has on the receiving legal order makes the legal transplant concept less adequate for a coherent conceptual framework for a project on how the EU exports its own norms. Nevertheless, the insights of the legal transplant literature should be kept in mind to fully appreciate a third country's role in the copying process as often being an active and powerful one, instead of falling into the trap of per definition perceiving a third legal order as a mere passive subject of the EU's will. While legal transplants were thus an interesting body of literature to mention here in an intermission, the following section will leave the legal transplant concept beyond consideration and focus instead on the EU's role conceptualization and the mechanisms of rule transfer,

6. Case study 1 – the EU's global combat against illegal logging

In this section the first case study on the EU's action in the area of the combat against illegal logging will be presented. Based primarily on the FLEGT Action Plan of 2003[105] and its subsequent complement in the Timber Regulation,[106] the EU has undertaken a broad range of initiatives to fight illegal logging globally and to further the norm of good forest management in third countries. The diverse array of mechanisms employed by the EU in the effort against illegal logging includes territorial extension of due diligence norms, persuasion tactics in so-called Voluntary Partnership Agreements (VPA's) and other trade agreements and the usage of its internal market in a process very much like the Brussels Effect. These mechanisms make the illegal logging policy area an interesting topic for the study of the external effects of EU law and will be the focus of paragraphs 6.1-6.4. Finally, paragraph 6.5 will utilize the analyses of the different modes of externalization utilized by the EU to infer that it very much behaves as a hybrid Normative and Market Power Europe.

[102] J.M. Miller, 2003, at p.854-867
[103] A. Jetschke, P. Murray, Diffusing Regional Integration: The EU and Southeast Asia, *West European Politics*, volume 35, issue 1 2012, pp. 174-191, at p.181-186
[104] J.M. Miller, 2003
[105] European Commission, Communication from the Commission to the Council and the European Parliament: Forest Law Enforcement, Governance and trade (FLEGT): Proposal for an EU Action Plan, COM(2003)251 final, 2003
[106] Regulation 995/201 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, L 295/23 (hereinafter 'the Timber Regulation')

6.1 Wood products and sustainability: combating illegal trade through the Brussels effect, territorial extension, negotiation strategies, socialization strategies and conditionality

One environmental policy which has drawn substantial unilateral and multilateral activities from the EU is the countering of illegal logging worldwide. Illegal logging in non-EU countries, in particular developing countries, has generated substantial concerns with regard to not only environmental and sustainability effects, but also the effects of these activities on local tax revenue, corruption and the rule of law.[107] As both a primary destination market for timber and wood products[108] as well as a regional organization with high ambitions in the field of sustainability, the EU has opted to utilize its economic and political leverage to further its goals in countering illegal timber harvesting. For the purposes of this paper, the EU's external action in the area of timber harvesting is interesting due to the simultaneous employment of a number of mechanisms to generate external effects of European legislation, policy and values. At the core of the system lie the Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements (VPA) and the EU Timber Regulation (EUTR), which together form a prime example of Scott's earlier discussed territorial extension concept. Moreover, the EU's sizable destination market for wood products and its local wood processing industry make it an important player for exporting countries, enabling it to exert a Brussels effect on some third country producers and governments. The EU's activities do not remain limited to its FLEGT initiatives and internal regulation, however. It supports these core activities through bilateral dialogues, supplementary obligations in free trade agreements and socialization initiatives, showcasing the EU's usage of persuasion and socialization tools. Thus, nearly the entirety of the EU's external effects toolbox is visible in the timber governance field.

6.2 Persuasion through the FLEGT Voluntary Partnership Agreements

The FLEGT Action Plan is currently one of the most important guiding documents for the EU's global timber management policies and goals. Adopted in 2003, the Action Plan is a notably ambitious Commission Communication detailing the need and solution to global illegal logging problems.[109] The Action Plan builds on several earlier regional processes in Africa and Asia that were mainly concerned with the legality of harvested timber and local law enforcement initiatives. The Action Plan adopts the same approach and assumes that an improvement of local law enforcement and the gradual abolition of illegally logged timber products will also aid in the objective of sustainable global forest management.[110] This is attributed to the Commission's perception that the domestic forest management and logging regulations of states is often based on the principle of sustainability.[111] The main mechanism proposed by the Commission in the Action Plan is to negotiate VPA's with major exporters of wood products. This mechanism was later codified through Regulation 2173/2005, which establishes a licensing scheme for wood products for all countries which conclude a VPA with the EU. Once a FLEGT license has been given to a product it may enter the European market. Conversely, products originating from a state which has adopted a VPA with the EU and which have not received a license are barred from entering the EU market. The VPA's themselves are a bi-lateral form of cooperation which – at least in rhetoric - emphasize cooperation instead of a hierarchical relationship between the Union and the third state involved. As such, all agreements are negotiated separately for states that wish to be part of the scheme and all

[107] D. Brack, Excluding illegal timber and improving forest governance: The European Union's forest law enforcement, governance and trade initiative, in: P. Lijala, S.A. Rustad, *High-Value Natural Resources and Peacebuilding,* London 2012: Earthscan, pp.211-220; European Commission, COM(2003)251 final, 2003

[108] See for instance EU-Canada SIA Final Report Team, EU-Canada SIA Final Report, 2011, retrieved on 22-4-2015 from: http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf

[109] D. Brack, 2012, p.211,212

[110] European Commission, COM(2003)251 final, at p.4-5

[111] European Commission, Proposal for a Regulation of the European Parliament and the Council laying down the obligations of operators who place timber and timber products on the market, COM(2008) 644/3, at p.5

agreements show some differences.[112] Nevertheless, while the texts do differ slightly from VPA to VPA, the core mechanism remains identical and the VPA's seem to be substantially similar in layout and obligations imposed on the participating third state. The agreements' obligations are clearly skewed towards commitments from third states, placing elaborate requirements on the third state to implement the FLEGT licensing scheme included in Regulation 2173/2005. These requirements mainly entail that the EU's counterparties are to designate a licensing authority that issues FLEGT licenses and that they must establish a system through which authorities can ascertain that timber has been legally harvested - including compliance checks to avoid the undue FLEGT certification of products. The substantive rules for what constitutes legally harvested timber may differ per partner state, however, and these local legality requirements are included in the annexes of each VPA. What is interesting is that all the currently concluded VPA's include either an obligation for the partner country to apply the same legality checks to wood products not destined for the European market,[113] or a commitment to endeavor for such an application of internal legality checks.[114] Thus, while leaving substantive provisions on legality to the third state, the FLEGT VPA's and Regulation 2173/2005 clearly seek to impose the EU's preferred intensity of legality and compliance checks in producing countries.

The EU's strategy in the 2003 action plan can at first glance be considered one of value and policy diffusion through persuasion strategies. The VPA's adoption relies in large part on several rounds of negotiations between the EU and the third state as well as the willingness of third states to join into the scheme. However, as mentioned earlier, the agreements very much show a skewed nature, with the EU mainly imposing obligations on the third state. While some supportive measures and a commitment from the EU to promote the perception of FLEGT timber products on the EU markets can be found, the main tenet running through the VPA's is that of third countries ensuring the EU that they will be capable of tracing and certifying timber product shipments as legally harvested. The willingness of third states to enter into these agreements, despite their non-reciprocal nature indicates that other processes than purely diffusion by persuasion are also at work – processes that generate additional circumstances through which states are motivated to join the negotiating table with the EU. The next subsection will therefore consider to what extent a Brussels Effect aids the EU's efforts in establishing FLEGT VPA's with timber-producing states.

6.3 A Brussels effect on Asia and Central Africa recognizable in the FLEGT VPA's?

While a direct, mechanistic transfer of rules through the Brussels effect has not been observed, it is interesting to note that the EU's efforts through the VPA's is heavily based on its sizeable role as a destination market for timber. The importance of the EU's market leverage in diffusing its sustainable timber harvesting value worldwide can be illustrated by shortly analyzing the diffusion process of the FLEGT VPA's. A Brussels effect perspective would expect the VPA's to be especially

[112] Some differences can for instance be found in the way the review of the agreement is included in the agreements. The EU-Congo VPA includes an obligation for both parties to consult an independent auditor, while the EU-Liberia, EU-CAR, EU-Cameroon and EU-Ghana agreements only include the obligation for the partnership country, not for the EU. Furthermore, the EU-Indonesia agreement lacks an independent auditor obligation completely.

[113] Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on forest law enforcement, governance and trade in timber products into the European Union, OJ L 265; Voluntary Partnership Agreement between the European Union and the Central African Republic on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), OJ L 191; Voluntary Partnership Agreement between the European Union and the Republic of Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), OJ L 92/4; Voluntary Partnership Agreement between the European Union and the Republic of the Congo on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT), OJ L 92

[114] Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union, OJ L 191; Voluntary Partnership Agreement between the European Community and the Republic of Ghana on forest law enforcement, governance and trade in timber products into the Community, OJ L 70

interesting for countries for which the export values of timber products towards the EU constitutes a sizeable part of their trade. While a rigorous empirical review of the negotiation process of VPA's linkage to trade flows is beyond the scope of this contribution, some supporting evidence can be presented for this assumption. Out of the five largest tropical zone exporters of wood products to the EU in 1999, four have either adopted a VPA or are in the process of negotiating a VPA with the EU.[115] Indonesia and Cameroon have already concluded agreements and are in the implementation phase, while Gabon and Malaysia are currently in the negotiating phase.[116] Moreover, for several Central African countries EU-destined timber constitute a substantially important part of their exports. The original FLEGT action plan notes, for instance, that for certain countries in Central Africa EU wood exports constitutes 20% of their total trade.[117] Another illustration is that Cameroon, by 2009, was dependent on the European markets for 74% of its export in timber products.[118] The FLEGT Action Plan furthermore provides a helpful overview of important export markets per production region for several product categories. The EU again dominates as the main export market for African states in 1999 in all three categories, although China is also a notable player with regard to roundwood exports from African states.[119] It is therefore notable that countries in this region are also prevalent in the VPA scheme. As mentioned earlier, Cameroon is implementing a VPA while Gabon is negotiating an agreement. Other implementing countries in the region at the time of writing of this paper are the Central African Republic, Ghana, Liberia, the Republic of Congo, while Côte d'Ivoire is in the negotiation process. Thus, easier market access for local producers seems to have been an incentive for third countries to engage in negotiations with the EU and conform to the FLEGT scheme. In addition, there is some evidence that corporations have voluntarily adopted EU norms in their own policies to ensure continued access to the EU market. What is unclear at this point, however, is to what extent the standards are indivisible for local producers. If they can easily produce certified wood for the European market while retaining illegal production for the domestic market, the effect of the European norms will remain limited to consumption on the EU territory, unless the legislator in question is also bound by a VPA, by another agreement with the EU or emulates European norms on its own initiative. Nevertheless, the aforementioned observations seem to suggest that the Brussels effect is, to some extent, present for some of the larger timber producing countries and for countries that are particularly dependent on the European timber market. This helps explain why in particular African countries have concluded that negotiating a VPA with the EU was in their interests, even though they will be the party that is mainly faced with obligations.

6.4 Due diligence requirements and the exemption of FLEGT-certified timber products through the Timber Regulation – reinforcing the FLEGT initiative through territorial extension

The EU's famed Timber Regulation, alongside the earlier discussed FLEGT Partnerships, constitutes the second major part of the European effort to combat the illegal trade in timber. The Timber Regulation should primarily be seen as a complement and reinforcement to the earlier adopted FLEGT initiative. The 2008 Commission proposal for the Timber Regulation acknowledged that sole recourse to the FLEGT Partnerships could result in an incomplete coverage of important timber-producing countries and expressed the desire to move beyond the slowly progressing multi-lateral

[115] D. Brack, 2005, Controlling illegal logging and the trade in illegally harvested timber: the EU's Forest Law Enforcement, Governance and Trade initiative, Review of Community & International Environmental Law, volume 14, issue 1 2005, pp.28-38

[116] European Commission, COM(2003)251 final

[117] European Commission, COM(2003)251 final, at p.10

[118] R. Eba'a Atyi, S. Assembe-Mvondo, G. Lescuyer, P. Cerutti, Impacts of international timber procurement policies on Central Africa's forestry sector: the case of Cameroon, *Forest Policy and Economics,* volume 32 2013, pp.40-48

[119] The other categories are Sawnwood and Plywood. European Commission, COM(2003)251 final, at p.28-30

initiatives.[120] Thus, the Commission argued that, while ideally the governance emphasis of FLEGT Partnership Agreements would in the future take the lead, additional measures imposing requirements on market operators were necessary.[121] Fearing that a strict entry ban for illegally logged timber and an accompanying obligation for traders to prove the legality of the products would run into difficulties under WTO law – specifically due to the fact that the EU would assume that illegal logging occurs outside the EU as it does not impose the same obligations on its own Member States – a due diligence strategy was proposed by the Commission instead. Market operators would be required to trace the origins of their products with due diligence and have in place systems that provide a high degree of certainty that the timber was logged in line with domestic provisions. Already the proposal acknowledges that this would benefit FLEGT Partner countries in particular, as products with the FLEGT license could relatively easily be considered in compliance with the proposed rules.[122] These considerations are reflected well by the final Regulation, which again emphasizes the synergies of the measures with the FLEGT initiative.[123]

The core of the Regulation is provided by Articles 4 to 6. Article 4(1) prohibits the placing of illegally logged timber on the EU market, while Article 4(2) establishes that operators should exercise due diligence to trade only in legally harvested timber. To that end operators should *inter alia* establish a 'due diligence system' of procedures and measures, a concept on which Article 6 elaborates.[124] Article 4 thus territorially extends the EU's jurisdiction to all operators wishing to import timber products to the EU markets. It utilizes an adapted form of the effects doctrine by assuming that since the products will be traded in the EU, the effects of the trade also occur within the EU, meaning there is some form of territorial link allowing for the EU to exercise jurisdiction.[125] Article 5 subsequently provides the first substantiation of the due diligence requirement established by Article 4 and obliges operators to be able to identify traders in the supply chain. Subsequently, Article 6 details how a due diligence system should be designed. Among the elements of the due diligence system included in Article 6 is the requirement for operators to able to describe description of product,[126] the country (and sometimes region) of harvest, the quantity of the product, the name and address of different organizations in the supply chain and, perhaps most importantly, information indicating compliance of the products with the relevant domestic legislation. Another element is that operators should have risk assessment and risk mitigation procedures in place, allowing the operator to both evaluate the risk of timber being logged illegally and, where the risk assessed is not negligible, minimize the risk of such illegal logging.

The Timber Regulation serves as a safety net, ensuring that even if third countries do not wish to adhere to the FLEGT scheme, their timber sectors are still subject to European import norms through the territorial extension of due diligence requirements. While the FLEGT scheme targets the legislators of third states and is dependent on their willingness to cooperate, the Timber Regulation bypasses third state governments by directing its norms at market operators. Nevertheless, part of the intent of the territorially extended Timber Regulation scheme, as was already argued in

[120] European Commission, COM(2008) 644/3, at p.3-6
[121] European Commission, Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council determining the obligations of operators who make timber and timber products available on the Market, 2008, at p.16
[122] European Commission, COM(2008) 644/3, at p.6-7
[123] Regulation 995/201 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, L 295/23 (hereinafter 'the Timber Regulation'), preambles 7-9.
[124] The Timber Regulation itself provides an example of risk mitigation measure in which an operator requires additional documents from timber product producers to prove the legality of the shipment. See Article 4 of the Timber Regulation
[125] This reasoning is somewhat questionable, however, as the environmental effects of a specific timber product transaction arguably occur mainly in the country of origin.
[126] Including the type of product and the name of the tree species

paragraph 4.5 is also to engage interest group pressure in the third country itself. The requirements imposed on market operators are intended not only to improve the legality of timber imports, but also to motivate wood-producing countries to start negotiations on the conclusion of a VPA with the EU, in order to relieve the burdens imposed by the European legislator on their local wood industry. Preamble 9 of the Timber Regulation acknowledges this observation by stating that the efforts of FLEGT VPA countries should be recognized and that encouragement for other countries to adopt VPA's should be provided by the Regulation. Article 3 of the same Regulation therefore provides that timber products covered by the FLEGT licensing scheme should be considered in compliance with the obligations of the Timber Regulation. This substantially eases the burden of proof on for third country market operators by exempting them from due diligence requirements for FLEGT licensed products. It only requires those companies to adhere to the local norms for legally logged timber in the FLEGT scheme, meaning the operators are faced with one set of rules, which will probably be easier to understand and implement for them. This could be argued to constitute an implicit form of the equivalence finding strategy that, as Scott has argued, often accompany territorially extended measures. The combined effect of the Timber Regulation and the FLEGT Partnerships is that either third country authorities or third country timber traders are obliged to implement a version of the EU's legality checks when wishing to export wood products to the European internal market.

6.5 The EU's role and power basis in combating illegal timber trade: Normative Power and Market Power Europe

The EU's activities in countering illegal logging has a clear normative undertone. The policy area reflects the EU's Treaty-based commitment to promoting sustainable development externally, as laid down in particular in Articles 2(5) TEU, 21(2)(d) TEU and 21(2)(f) TEU. The preambles of the Timber Regulation form the secondary law expression of these Treaty objectives and are in particular infused with the values of sustainability, the preservation of eco-diversity and the prevention of climate change.[127] Moreover, the Timber Regulation itself is based on article 192(2) TFEU, which, by reference to article 191 TFEU, is built on the value of protecting and preserving the environment on a worldwide level. Rhetoric similar to the preambles of the Timber Regulation and the various sustainability and environment provisions in the Treaties can be found in the policy documents published by the European Commission. Both the FLEGT Action Plan and the Commission proposal for a Timber Regulation begin by connecting illegal logging to a variety of development and sustainability issues. In both cases the Commission argued that illegal logging is associated with corruption and organized crime, is detrimental to the rule of law, democratic principles and human rights, and causes significant environmental damage and loss of biodiversity.[128] Therefore, according to the Commission, logging undermines Europe's development objectives, which are said to include the eradication of poverty and the promotion of peace, security, good governance, the fight against corruption and a sustainable environment.[129]

Thus, the FLEGT Partnerships and the Timber Regulation are both expressions of the EU's goal to promote several of its core values. It will be recalled from section 2 that Manners distinguished between several values that lie at the heart of the EU, and as such are instrumental to the EU's external normative stance. The core values Manners distinguishes are peace, liberty, democracy, the rule of law and respect for fundamental freedoms and fundamental rights. All of these are reflected to some extent in the argumentations underlying the FLEGT initiative and the Timber Regulation. Furthermore, Manners distinguished between four minor norms. Sustainability in particular is the minor norm that lies at the heart of the EU's combat against illegal logging, but good governance is

[127] Regulation 995/2010, preambles 1, 3,
[128] European Commission, COM(2003)251 final, at p.4, European Commission, COM(2008) 644/3, at p.2-3
[129] European Commission, COM(2003)251 final, at p.4

also mentioned by the Commission as an intermediate goal for the management of natural resources.[130]

While the normative dimension of the EU's goals in combating illegal timber trade is dominant, the EU's role as a market power performs a role as well, in particular in the area of the instruments and mechanisms utilized to attain normative goals. As was discussed earlier, In particular, the two stage process mentioned by Damro is present in the case. Damro argues that the EU as a Market Power Europe first targets private actors and forces them to adhere to its norms. This, in turn, generates the conditions necessary for the second stage, in which public actors are also persuaded to conform to Europe's desired standards.[131] In this case, the EU noted that its voluntary bi-lateral FLEGT agreements were insufficient, and subsequently moved to utilize the process described by Damro. The addition of the territorially extended norms of the Timber Regulation, coupled with the present Brussels Effect for many timber-producing states that are dependent on the EU export market, should provide a stimulus for the further dissemination of the FLEGT Partnerships. Thus, while the EU seeks to attain normative goals, its mechanisms since the addition of the Timber Regulation of 2008 are very much in line with those predicted by the Market Power Europe line. This illustrates how both conceptualizations of Europe as a foreign policy actor may reinforce one another. The EU's combat against illegal timber also illustrates that the EU is willing to utilize its market size and externally applicable regulation as coercive instruments, should its more cooperative bi-lateral and/or multi-lateral initiatives alone fail to be sufficient to achieve the values enshrined in the EU Treaties.

7. Case study 2 – Bosnia and Herzegovina: geopolitical interests and the EU's comprehensive approach

Perhaps one of the most interesting cases to discuss from a geopolitical viewpoint is the EU's involvement in the CEEC countries. The revision of the CFSP after the EU's lagging action in the Yugoslavia Crisis is a much discussed topic in EU foreign affairs studies. This crisis exposed the EU's cumbersome nature in the area of military crisis management and spurred the debate on if and how Europe could become a viable military intervention actor. More recently, however, the CEEC's have become of primary importance to EU foreign policy due to their proximity to the enlarged EU. European involvement in the area is manifold, spanning nearly the entire spectrum of EU foreign policy competences. First of all, several civilian and military CFSP/CSDP missions are either ongoing or have been concluded in the area. Moreover, many of the CEEC's are part of the EU's stabilization and association process in the region, which includes the gradual integration of CEEC's with the European market through association agreements and the perspective of accession, as well as efforts to improve the adherence of the CEEC's to European values such as democracy, the rule of law and human rights. The utilization of such a broad toolkit is not an accident. It is rooted in the EU's perception that a comprehensive approach that utilizes both the EU's soft power instruments as well as its peacekeeping capacity would provide the most effective results for countries in the region.[132] Bosnia and Herzegovina currently stands out from an external effects of EU law perspective due to its significant on-the-ground EU presence. Bosnia and Herzegovina for instance hosts an ongoing military mission and has hosted a civilian police mission. In addition to this operational presence, the EU and Bosnia and Herzegovina have already adopted an Interim Free Trade Agreement with and Bosnia and Herzegovina has signed – but not ratified – a stabilization and association agreement with the EU. This contribution will focus on the conditionality policies adopted by the EU towards Bosnia and Herzegovina in the context of the stabilization and association process, the spurred

[130] European Commission, COM(2003)251 final, at p.8
[131] C. Damro, 2012, p.690-691
[132] Address by the Deputy Secretary General for the External Action Service H.E. Maciej Popowski, retrieved on May 10 2015 from: http://www.iss.europa.eu/uploads/media/EUPM_Mr_Maciel_Popowski_address_on_8_June.pdf.

emulation of European rules after the inception of the Bosnia and Herzegovinian state and the combination of the EU's presence as a normative, market-oriented and military power in the region. Paragraphs 7.1 and 7.2 will deal with the EU's conditionality policies towards Bosnia and the role of the CFSP/CSDP missions in fostering stability and spurred emulation. Finally, paragraph 7.3 will discuss the interesting combination of roles the EU takes on with regard to Bosnia, which mainly blends elements from Normative Power Europe and Market Power Europe, but also includes some support from the EU's military dimension.

7.1 The Stabilization and Association Process: EU Conditionality in the wake of the Balkan Crises

The Stabilization and Association Process (SAP) forms the primary basis for the integration of Western Balkan countries with the EU.[133] Developed as the main part of a Regional Strategy in 1999 the SAP includes several methods of cooperation with the countries involved. Perhaps the most powerful of these methods is the offer under conditionality requirements of two successive levels of integration with the EU. First, all SAP countries were offered a Stabilization and Association Agreement (SAA) as a mid-term perspective for complying with European conditionality requirements. Secondly, after the 2003 Thessaloniki Summit the EU importantly added a long-term prospect of EU accession commonly referred to as the countries' 'European perspective'.[134] The additional reward of accession meant that, in addition to the conditionality programs already relevant for the conclusion of SAA's with the region, compliance with the Copenhagen accession criteria now also became a relevant part of the SAP.[135]

In its Feasibility Study of 2002 the European Commission first proposed a set of 18 criteria to which Bosnia and Herzegovina should comply before SAA negotiations could be started.[136] Criteria range from legal reforms in the area of the rule of law, the judiciary and law enforcement, human rights, civil and social rights to good governance principles for the countries' public administration and economic criteria such as the implementation of free movement. The criteria go beyond mere output goals that indicate a desired level of legislation. Many of the economic criteria also specify that the Bosnian Herzegovinian reforms should bring their legislation in line with that of the EU. In the context of energy, for instance, the Commission expects reforms based on a market economy model and developed with a view to gradual integration with EU policies and networks.[137] Similarly, transport legislation should be in line with that of the EU and gradually improve for mutual access for European and Bosnia and Herzegovinian operators. As the future SAA would in large part entail free trade elements, these economic conditions are not extremely surprising. Perhaps more surprising is that the EU similarly addresses some normative issues by making comparisons with EU standards and principles, even if the Commission goes somewhat less far in detailing the shape and scope of Bosnian-Herzegovinian reforms in such areas. With regard to the perceived lack of quality of the Bosnian-Herzegovinian judiciary the Commission for instance notes: *'Since the EU is a community governed by rule of law, it is essential that in the context of a SAA BiH be able to guarantee the operation and effectiveness of an impartial judicial system'*.[138] Another area that was evidently of great interest to the EU is the Bosnian-Herzegovinian asylum policy, as the EU required the country

[133] Specifically addressed in addition to Bosnia and Herzegovina were Albania, Croatia, Macedonia, Serbia Montenegro and Kosovo

[134] Declaration of the EU-Western Balkans Summit Thessaloniki, 2003, retrieved on May 13 2015 from: http://europa.eu/rapid/press-release_PRES-03-163_en.htm

[135] Declaration of the EU-Western Balkans Summit Thessaloniki, 2003, retrieved on May 13 2015 from: http://europa.eu/rapid/press-release_PRES-03-163_en.htm

[136] European Commission, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, COM(2003) 692 final, p.5

[137] European Commission, COM(2003) 692 final, p.37

[138] European Commission, COM(2003) 692 final, p.26-27

to readmit nationals illegally present on EU territory for the adoption of an SAA.[139] However, it must also be noted that on other normative issues such as human rights the Commission's approach was more to emphasize current local issues and encouraging higher standards than to specifically mention European standards as a requirement.[140] In sum it seems that the document already uses accession-style language and criteria, while it mainly pertains to a mid-term SAA objective.

These criteria were subsequently specified further through the European Partnership with Bosnia and Herzegovina,[141] which consisted of a series of consecutive Council Decisions that were meant to both identify priority areas for reform and to provide a more specific 'checklist' against which to measure integration progress.[142] The first of these Decisions is already substantially more intrusive than the earlier 2002 feasibility study. Working on roughly the same criteria, it goes beyond the earlier document by very specifically outlining what legislative and policy action the Bosnian-Herzegovinian government should take. The document contains separate short-term and medium-term sections on the European standards that need to be implemented before an SAA can be adopted. These sections include the creation of new institutions such as a Directorate for European Integration and the further implementation of internal market and justice and home affairs policies. Also notable is that the requirements imposed on issues such as human rights, democracy and the rule of law are far more specific than in the 2002 Commission analysis. They address issues such as consolidating an independent Ombudsman, improving the standards of the judiciaries and prosecutors' training, improving the police system, etc.[143] The 2006 replacement Decision goes even further by stating that Bosnian-Herzegovinian human rights should be fully compatible with ECHR standards – which also form the minimum standard for EU human rights protection pursuant to the Charter on Fundamental Rights of the EU[144] – and minority protection should be in line with EU laws.[145]

In 2005, however, the Commission already ascertained that by and large Bosnia and Herzegovina had managed to book considerable progress on 16 of the 18 criteria set out in the early 2000's. It praised the strengthened public administration of the country and the establishment of the Directorate for European Integration, the strengthened national police structure and capabilities (see also subparagraph 7.2 for a deeper analysis of this topic), noted that the public broadcasting legislation was in line with European standards, has adopted structures for the return of illegal migrants to the EU, made progress towards a VAT tax, and more.[146] This illustrates the significant effects that EU conditionality has played on the country in the early years of the SAP structure. The Commission concluded that while further progress on the 18 indicators was desirable, Bosnia and

[139] European Commission, COM(2003) 692 final, p.28
[140] European Commission, COM(2003) 692 final, p.6, 12-13
[141] The European Partnerships find their basis in Regulation 533/2004 on the establishment of European partnerships in the framework of the stabilisation and association process
[142] Regulation 533/2004, preamble 5
[143] Annex to Council Decision 2004/515/EC 14 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina, L 221/10, sections 3.1 and 3.2
[144] See Article 52(3) of the Charter on Fundamental Rights of the EU, stating that '*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.*' Even though the Charter was not yet binding before the adoption of the Treaty of Lisbon it already formed a guiding document for EU human rights standards. The EU's interest in extending the effective implementation of the ECHR to Bosnia and Herzegovina is therefore notable.
[145] Annex to Council Decision 2006/55/EC on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2004/515/EC, section 3.2
[146] European Commission, Communication from the Commission to the Council on the progress achieved by Bosnia and Herzegovina in implementing the priorities identified in the "Feasibility Study on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union (COM (2003) 692 final)", COM(2005) 529 final

Herzegovina was eligible to start negotiations on its SAA, with said agreement eventually being concluded in 2008. While the SAA has not completed its ratification process yet, an interim trade agreement between the EU and Bosnia and Herzegovina is currently in force until ratification of the SAA by both parties is completed. Notable in the Commissions' recommendation to start negotiations with Bosnia and Herzegovina was the statement that if at any time Bosnia and Herzegovina would be considered not to live up to further conditionality expectations, it propose to suspend negotiations.[147] This shows the willingness on part of the Commission to enforce adherence to its conditionality policies as much as possible. What is also interesting to note is that no true criteria exist for the Commission to propose such a suspension. Thus, so long as the EU is capable of making an attractive conditionality offer to a third state, it also gains an adaptable instrument to promote that third states' compliance with the EU's policy preferences.

7.2 The EU's CFSP/CSDP presence: ensuring stability exists for other European initiatives and attempts to spur change and emulation through expert law enforcement support

An analysis of the EU's presence in Bosnia and Herzegovina is hard to make without devoting attention to the security related aspects under the EU's CFSP and CSDP initiatives in the country. EUFOR Althea is the first of the EU's military missions and was adopted in 2004 and replaces the earlier NATO-led stabilization mission in the area. The operation should be seen as a part of a European attempt to create a comprehensive approach towards Bosnia and Herzegovina and as such is closely related to the stabilization and association process and the EUPM mission. From a perspective of externalizing European law and policy the role of EUFOR should mainly be seen as supportive. It can be argued that the continued stability of the Bosnia and Herzegovinian state was necessary for the EU's efforts to promote the European integration of Bosnia. The 2004 Council Joint Action authorizing the mission confirms that this was a major objective of the mission by stating that *'The operation should reinforce the EU's comprehensive approach towards BiH, and support BiH's progress towards EU integration by its own efforts, with the objective of the signing of a Stabilization and Association Agreement as a medium-term objective'*,[148] and that the mission should '*contribute to a safe and secure environment in BiH … required to achieve core tasks in the OHR's Mission Implementation Plan and the Stabilization and Association Process'* in Article 1.[149] Thus, from the outset the mission was geared explicitly to promoting European integration, including the transfer of European rules and values.

More directly involved in the promotion of European values and policies was EUFOR Althea's civilian counterpart, EUPM Bosnia and Herzegovina. This operation ran from 2002 to 2012 and was intended to support Bosnian-Herzegovinian law enforcement structures. The EUPM's mission statement in the Annex to its establishing Joint Action notes that it should establish sustainable policing arrangements which are in line with best European and international practices. On the operational level, the mission was intended to reform Bosnia and Herzegovinian police as to *inter alia* be free of political interference, contribute to the administration of justice, act in a professional, transparent, objective and accountable manner, investigate corruption cases regardless of political consequences and enter into cooperation with the police services of both other CEEC's and EU Member States. This illustrates the EU's approach to the Bosnia and Herzegovinian build-up of the rule of law, which is heavily based on the export of policies the EU considers a part of a well-functioning police structure and a state which adheres to the overarching rule of law value.[150]

[147] European Commission, COM(2005) 529 final, p.6
[148] Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, L 252/10, preamble 10
[149] Council Joint Action 2004/570/CFSP, Article 1(1)
[150] Annex to Council Joint Action 2002/2010/CFSP of 11 March 2002 on the European Union Police Mission, L 70/1, sections I(1) and II(4)

Indeed, Head of EUPM Feller has used the words '*Europeanization of the law enforcement sector*' to describe the aims of EUPM. This was in the context of a speech, however, that also admitted that such Europeanization is difficult to accomplish in the context of the complicated political environment in Bosnia and Herzegovina.[151] Evaluations of the EUPM's activities thus show a mixed picture of both successes and failures. According to one evaluator, EUPM has significantly managed to support the harmonization of the splintered and decentralized regulation of the Bosnian-Herzegovinian police cantons on topics such as the promotion of officers on the basis of merit and the spread of best practices throughout the cantons.[152] This was important as top-down integration of the police cantons, as was desired by many EU actors, proved impossible due to the system imposed by the Bosnian-Herzegovinian constitutional structure. Harmonization stimulated by the EUPM thus provided a second-best option.[153] A second evaluation has added that EUPM has stimulated enhanced capacity and cooperation between police agencies,[154] successes which are also claimed by the EEAS itself.[155] Another claimed success is the EUPM's support to local authorities in fulfilling the visa-liberalization and stabilization and association roadmap, which allowed for the abolishment of visa requirements for Bosnia and Herzegovinian citizens and aided in Bosnia and Herzegovina's integration with the EU.[156] This claim is particularly interesting from an external effects of EU law standpoint as it indicates that through a form of spurred emulation, local institutional support can aid in the effectiveness of conditionality policies to externalize EU standards. However, the EUPM had less success in for instance abolishing the ethno-centric power-sharing structures in the police sector, nor did it significantly manage to reduce political influence on the police system. With regard to the latter, Fréjabue has noted that while declarations on the operational independence of the police system were made, in practice there was no functional delineation between the Ministry and the police. Similarly, political independence still varied greatly per canton. The willingness of the Bosnia and Herzegovinian politicians as a necessary factor for EUPM to induce change was also observed, which provided important limitations to the EUPM's ability to achieve results.[157]

7.3 The EU's comprehensive approach to Bosnia and Herzegovina: Normative Power Europe, Market Power Europe and a supportive role for Military Power Europe

One interesting facet about the EU's comprehensive approach to the Balkan's, especially recent conflict areas such as Kosovo and Bosnia and Herzegovina, is its usage of various identities and various power bases. While failing in the early 1990's to play a proactive role in crisis-management, a role which was therefore adopted by the more matured NATO crisis-intervention structures, the earlier discussion of the EU's EUFOR Althea peacekeeping mission shows that the EU has become prepared to take recourse to military options to steer the stability of its geo-political neighborhood. Although after the transfer of peacekeeping tasks from NATO to EUFOR Althea in 2004 the Bosnia and Herzegovinian situation was in large part stabilized, the multi-ethnic tensions and slowly

[151] Address by the Head of European Union Police Mission in Bosnia and Herzegovina Commissioner Stefan Feller, retrieved on 11-05-2015 from: http://www.iss.europa.eu/uploads/media/EUPM_Mr_Stefan_Feller_address_on_7_June.pdf

[152] E. Fréjabue, IV. Lessons from EUPM: a legal approach, in: T. Flessenkemper, D. Helly, *Ten years after: lessons from the EUPM in Bosnia and Herzegovina 2002-2012,* Paris 2013: European Union Institute for Security Studies, pp.34-42

[153] D. Tolksdorf, II. Police reform and conditionality, in: T. Flessenkemper, D. Helly, *Ten years after: lessons from the EUPM in Bosnia and Herzegovina 2002-2012,* Paris 2013: European Union Institute for Security Studies, p.25

[154] S.E. Penksa, VIII. Measuring impact: specific achievements and outcomes, in: T. Flessenkemper, D. Helly, *Ten years after: lessons from the EUPM in Bosnia and Herzegovina 2002-2012,* Paris 2013: European Union Institute for Security Studies, p.69

[155] European External Action Service, European Union Police Mission in Bosnia and Herzegovina (EUPM), 2012, retrieved on 20-05-2015 from: http://www.eeas.europa.eu/csdp/missions-and-operations/eupm-bih/pdf/25062012_factsheet_eupm-bih_en.pdf

[156] S.E. Penksa, 2013, p.69

[157] E. Fréjabue, 2013, p.39-42

developing but still weak government institutions still necessitated a military presence in order to preserve the area's newfound stability.[158] Nevertheless, EUFOR Althea's role cannot purely be conceptualized as an exercise of hard military power, as its daily work would also consist of more civil oriented supportive tasks. The force was for instance also charged with contributing to the fight against organized crime and the reorganization of the local defense sector.[159] Thus, the EU's local role as a military power can still be identified as a supportive mechanism to ensure the EU's capability to achieve normative and market reforms. Nevertheless, it must also be recognized that the EU's goals in the area are very much security related. The enlarged EU now borders on the Balkans, meaning a deteriorating situation in Bosnia and Herzegovina could also affect eastern EU states in areas such as military security and cross-border migration and crime. Thus, while the military instruments the EU uses and the military power it can effectively deploy are both still severely limited foreign policy tools, the EU could still be seen as an actor actively involved in ensuring its own military and civil security, a goal which very much ties in with what could be conceptualized as a Military Power Europe. While further progress in this field in the future would probably remain limited due to an internal lack of political consensus, entirely discounting the EU's role and identity as a (military) security actor seems wrongful.

The EU's normative and economic involvement in the country is especially notable in the SAP process and the resulting 2008 SAA. The Commission's Feasibility Analysis of 2002 already hinted at a double role for the EU as both a normative and an economic power, as it included a broad package of economic goals for Bosnia and Herzegovina to attain as well as using the opportunity to attempt to induce normative changes based on several of the values Manners has considered the core of the EU's constitutional identity. The SAP conditionality process addressed the values democracy, the rule of law and human rights extensively. It moreover included various fundamental freedoms, such as civil and political rights as well as the EU's four economic freedoms of movement. Moreover, promoting the value of peace in the Balkans was used – at least in rhetoric – as the primary reason for the EU's military presence in the country. About equal weight is also given to the EU's identity and role as a market actor. This is visible in the power basis it uses for influence on the country, in the mechanisms it employs to approach the Bosnian-Herzegovinian government as well in the goals it has for cooperation with the country. The SAP processes' success relies in large part on the attractiveness of European market integration for Bosnia and Herzegovina, thus providing the primary power basis for the EU both in its exercise of normative reforms as well its imposition of market law standards. It uses its market power basis to effectively impose a far-reaching mechanism of conditionality. Furthermore, while some strategic goals such as stability and normative goals such as peace, the adherence to the rule of law and democracy are indeed visible in the EU's approach to the area, economic integration is certainly also to the benefit of the EU's own economic goals. Thus, in sum, it would seem that the EU's primary drivers for its approach to Bosnia and Herzegovina are its normative and market-based identities, although there is also great interest in the Bosnia and Herzegovinian security situation.

8. Conclusions and project recommendations

The working paper has shown the diverse nature of European foreign policy and the external effects of EU law, which may range from economically generated pressure on third states to conscious efforts on part of EU actors to influence the decision-making of foreign actors. Moreover, the working paper has identified several concepts from the substantial body literature which aid in the description of external effects and that are capable of predicting where these effects will occur.

[158] See also: J. Knauer, EUFOR Althea: Appraisal and future perspectives of the EU's former flagship operation in Bosnia and Herzegovina, College of Europe EU Diplomacy Papers, 2011, retrieved on 20 May 2015 from: https://www.coleurope.eu/system/files_force/research-paper/edp_7_2011_knauer.pdf?download=1

[159] J. Knauer, 2011, at p.9

Drawing on the debate in international relations studies, the working paper has described the EU as a normative power, a market power and as a fledgling military power. In particular the EU's normative and economic dimensions provide compelling explanations for EU external action, as was seen in the illegal logging and EU-Bosnia and Herzegovina relations cases. However, it was also argued that the EU's security and defense-oriented CFSP/CSDP arm should not be overlooked as an important dimension of EU foreign policy, which may provide support for the EU's normative and economic external action. In particular supportive missions under the CFSP/CSDP, such as the police mission EUPM in Bosnia and Herzegovina or the rule of law mission EULEX in Kosovo may contribute to the generation of external effects of EU law. Moreover, it was argued that an abundance of processes, working both through private parties and through governments, contribute to the generation of external effects of European law. These effects may generated purely through the presence of the EU as an important market actor and as a normative example for other organizations, or may result from active intervention by the EU. When the EU actively attempts to externalize its policies it may have recourse to internal legislative techniques and more direct diplomatic means. After the application of these concepts to the illegal logging and EU-Bosnia and Herzegovina relations cases several project recommendations can be made:

1. Adopt a conceptual framework based on the processes generating EU external effects. In section 3 the working paper at length described several concepts – namely the Brussels Effect, extraterritorial and territorially extended jurisdiction, conditionality strategies, negotiation and socialization strategies and spurred emulation strategies – developed to capture such processes. As these concepts seem highly adequate for legally oriented studies into the external effects of EU law, offer a degree of freedom for contributing authors and could form a coherent framework, the main recommendation of this working paper is to incorporate (several of) these processes into the final conceptual framework. The Normative Power Europe, Market Power Europe and Military Power Europe seems less adequate for the highly legal-technical expertise available in the projects' current group, as these contributors will likely focus on several very specific external effects areas instead of on the power sources and role of the EU on an aggregate scale. While these concepts thus seem less adequate for the final conceptual framework of a mainly legal project group, describing the normative, economic and security related elements of the EU's international presence could still be interesting for the contributions, as will be argued in particular in recommendations 3 and 4.

2. Include how several processes and legislative techniques may reinforce one another. Differing literature lines such as those on Brussels and California Effects, those on jurisdiction and those on conditionality have developed in a relatively confined setting, while together they may be capable of providing a fuller and richer explanation of EU law's external effects. The illegal timber logging case described in section 5 for instance showed that the EU consciously uses a combination of its internal market's Brussels effect, and stimulates externalization by adopting territorially extended norms and negotiating treaties. Its agreement negotiating strategies are furthermore explicitly supported by the EU's internal norms, which are geared at supporting the diffusion of the FLEGT Partnership Agreements.

3. Take into account normative elements in the EU's external action. Like laws and policies, the EU actively tries to externalize its internal values, as it has been tasked to do under articles 3(5) TEU and 21 TEU. Both cases analyzed in this working paper showed a strong connection to the conception of the EU as a Normative Power Europe. In the illegal timber logging example the EU's adherence to values such as sustainability, eco-diversity, the rule of law and the eradication of corruption and crime were of paramount importance. In the EU's relations with Bosnia and Herzegovina a large amount of the conditionality indicators were geared to the latter's adherence to norms such as democratic governance, human rights and the rule of law. While a test of the

effectiveness of these European efforts was beyond the scope of this working paper, a focus on such issues would be an interesting area of study for the future contributions to the External Effects of EU Law project.

4. Take into account the normative implications of the EU's actions for other legal orders and third-state or international actors. As noted under the previous recommendation, the EU may defend its initiatives in external policy areas such as illegal logging on the basis that values such as environmental protection, the rule of law, the fight against corruption, etc., normatively justify the stringent market access, certification and due diligence criteria it has developed.[160] However, it may also be argued that such ambitious initiatives – where effective in externalizing the EU's standard – can be considered detrimental to the sovereignty of the third state involved. By the same logic, a strong influence of the EU on a smaller democratic state can undermine the latter's democratic process, as norms may not always be chosen on the basis of the preferences of the domestic electorate. A European normative standard may furthermore lack legitimacy in other parts of the world, raising questions on whether the projected values are as universal as the EU sometimes seems to assume. Even if other states are committed to values such as the rule of law, the fight against corruption and the environment, their perceptions on how these values should be defined and pursued may differ substantially. The contributions to the project should therefore be aware of such issues and incorporate the normative consequences of European external action into their analysis.

5. Take into account the supporting role the EU's CFSP/CSDP may have in some specific cases. While the tendency of legal literature lines related to the external effects of EU law is to focus on civil and market-oriented cases, the EU also has a relatively active military and civilian mission arm. It was noted in section 5 that the civilian CFSP police mission EUPM can be attributed with at least some reforms of the Bosnia and Herzegovinian police and visa system. This helped the country to progress on the conditionality norms set by the EU, which in turn contributed to a further externalization of EU law through the in 2008 concluded SAA and the currently in force interim trade agreement. Furthermore, the countries' EUFOR Althea military mission was explicitly aimed at fostering conditions of stability conducive to the EU's reform agenda for Bosnia and Herzegovina. Thus, while much can be said about the effectiveness of both missions, it is clear they were designed to promote the further integration of the Bosnia and Herzegovinian state with the EU.

6. Take into account the differing nature of the EU's influence on international law compared to the EU's influence on private actors and third states. This working paper had as its main focus processes which influence the conduct of private actors and states and cause them to adhere or sometimes even implement European norms. However, in some cases these processes will be unsuited to explain the dynamics of developments in international law. While negotiation strategies and persuasion strategies may for instance remain a useful explanatory factor for international agreements, conditionality strategies seem less adequate for an analysis of policy and law on the international level. Furthermore, in some cases the market power of the EU may have an influence in the international scene's response to European law, but it will be difficult to reconcile this with specific Brussels Effect requirements such as the non-divisible product market. Such issues make the concept unsuited to the study of the effects of the EU on international law. Nevertheless, the inapplicability of one concept based on the analysis of EU market power does not mean the broader

[160] The EU may argue that these are, in fact, a set of global values. In this line of reasoning the EU pursues the common good for the world, justifying its external action. See for a consideration of whether global values may justify territorially extended measures for instance: G. de Baere, C. Ryngaert, The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy, *European Foreign Affairs Review*, volume 18, issue 3 2013, pp.389-409, at p.400-405

idea of market power is irrelevant. For instance, the UN's reforms towards a system in which listed persons have better opportunities to be involved in the process after the ECJ's annulment of an implementing sanctions Regulation could perhaps partially be explained by arguing that implementation of sanctions in the EU is necessary due to the latter's substantial market size. This could have pressurized the UN into reforms in a way that smaller market powers may not have accomplished. The consequence for the projects' conceptual framework is that care should be taken to develop a framework which is both suited for analyses on the state and private parties level as well as analyses on the international level. This may require two sets of concepts which are slightly different per level of analysis.

7. Incorporate in the analyses whether third states, foreign private parties or international actors can voluntarily adopt EU legislation or whether they are forced to adhere to a European norm in some way. Where the EU cannot apply coercive effect through for instance its market power it will be more difficult for the EU to mechanistically externalize EU law. In these cases the EU becomes more dependent upon the voluntary adoption of policy by other actors. While strategies such as spurred emulation or negotiation are still available, they will not be able to forcibly dictate the result of an internal policy cycle. In these cases, an analysis of the effectiveness of European initiatives should be carried out differently, taking into account the limited power resources available to the EU. For instance, steering competition policy in China through dialogue in a direction which is more or less comparable to the main tenets of European competition law is an impressive result, even if the Chinese version does include significant changes to the EU model. Comparing this case negatively to accession cases in which the EU was able to externalize competition policy more easily would fail to recognize the difference in power resources available to the EU in these two cases.

8. Incorporate, where appropriate, geo-political factors as a point of study for the project. This recommendation is related to the previous one in that it is based on the assumption that the EU can apply different amounts of pressure to different areas in the world. This working paper for instance found that the EU's FLEGT VPA's were in particular adopted by former African colonies that were dependent on the EU markets, and that the EU can apply significant pressure to a close and relatively dependent neighbor such as Bosnia and Herzegovina. In the latter case, the proximity and eastern European culture of the country meant that accession strategies were also available to the EU. Conversely, it may be more difficult for the EU to achieve external effects of EU law for larger powers such as the US or China, or for countries which are neither located in close proximity to EU nor have significant economic or historic ties to it.

9. Take into account the preferences and voluntary actions of third states and other foreign actors. Section five on legal transplants noted the importance of the policy processes in third states in determining whether rules, norms and laws would be adopted or not. In section seven the salience of this argument was illustrated by the difficulty EUPM faced at times in spurring reforms in Bosnia and Herzegovina. Even in the face of technical and financial support and a far-reaching set of conditionality norms through the SAP, the local political dimension was far from obsolete. Thus, even if the focus of the project is not on the adopting side of externalization processes, its importance must be kept in mind.

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