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# DISCOURSE ANALYSIS OF EMISSIONS TRADING SCHOLARSHIP: A CASE STUDY OF THE EU EMISSIONS TRADING SCHEME

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# ABSTRACT

Over the last four decades emissions trading has enjoyed a high profile in environmental law scholarship and in environmental law and policy. Much of this regulatory discussion is promotional, preferring emissions trading above other regulatory strategies without, however, engaging with legal complexities embedded in conceptualising, scrutinising and managing emissions trading schemes. The combined effect of these debates is to create a perception that emissions trading is a straightforward regulatory strategy, imposable across various jurisdictions and environmental settings. This thesis shows that this view of emissions trading is problematic for at least two reasons. First, emissions trading responds to distinct environmental and non-environmental goals, including creating profit-centres, establishing a governance regime aimed at substituting state control of common resources, and ensuring regulatory compliance. This is important, as the particular purpose entrusted to a given emissions trading regime has, as its corollary, a particular governance structure, according to which the regime may be constructed and managed. Second, the governance structures of emissions trading regimes are culture-specific, which is a significant reminder of the importance of law in understanding not only how emissions trading schemes function but also what meaning is given to them as regulatory strategies. This is shown by deconstructing emissions trading discourses: that is, by inquiring into the assumptions about emissions trading that feature in the literature and in debates involving law- and policymakers and the judiciary at the EU level. Ultimately, this thesis makes a strong argument for reconfiguring the common understanding of emissions trading schemes as regulatory strategies, and sets out a framework for analysis to sustain that reconfiguration.

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# TABLE OF ABBREVIATIONS

| | |
|---|---|
| AG | Advocate General |
| CFI | Court of First Instance |
| Directive | Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61 |
| EC | European Community Treaty in the version in force until 30 November 2009 |
| ECJ | European Court of Justice |
| EU | European Union |
| EDF | Environmental Defence Fund (U.S.) |
| EU Courts | Court of Justice, General Court and specialised courts |
| EU ETS | European Union Emissions Trading Scheme |
| ETS | Emissions Trading Scheme |
| CDM | Clean Development Mechanism |
| Commission | European Commission |
| Council | Council of Ministers |
| CJEU | Court of Justice of the European Union |
| DG | Directorate General |
| IPPC | Integrated Pollution Prevention Control |
| JI | Joint Implementation |
| NAP | National Allocation Plan |
| NGOs | Non-governmental Organisations |
| Parliament | European Parliament |

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|---|---|
| Protocol | Kyoto Protocol to the United Nations Framework Convention on Climate Change |
| revised Directive | Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community |
| TEU | Treaty on European Union in the version in force after 1 December 2009 |
| TFEU | Treaty on the Functioning of the European Union in the version in force after 1 December 2009 |
| UNFCCC | UN Framework Convention on Climate Change |
| U.S. | United States of America |
| WTO | World Trade Organisation |

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# CHAPTER ONE

# FROM UNIFORMITY TO LEGAL PARTICULARITIES OF GOVERNANCE REGIMES: REVISING THE FRAMEWORK OF ANALYSIS FOR EMISSIONS TRADING SCHEMES IN LAW

## I. INTRODUCTION

This is a study of environmental law scholarship and the way in which scholars[1] understand emissions trading as a regulatory concept. The aim that underpins this thesis is undeniably bold – I seek to challenge a certain vision and methodology applied in analysing emissions trading schemes that I take to be prevalent in environmental law scholarship. I intend to discard the generically uniform prism through which emissions trading tends to be projected and subsequently understood as a simple instrument that is based on common design features and thus imposable in public law from jurisdiction to jurisdiction to the same effect. In its place, I will set out a more pluralistic view of emissions trading, responding to diverse environmental and non-environmental problems – including creating profit-centres, establishing a governance regime aimed at substituting state control of common resources, and ensuring regulatory compliance – and as such, capable of establishing distinct

[1] As well as law- and policymakers and the judiciary, see Chapters Four and Five respectively.

governance regimes, each regime embedded in its own legal cultural and historical contingencies.

Analysing emissions trading schemes in their respective legal setting poses a methodological challenge that is central to this thesis. The challenge lies in accommodating emissions trading discourses that are intrinsically cross-jurisdictional, vastly interdisciplinary (albeit with overarching influences from economics), and continuously evolving in accordance with, or in differentiation to, the political climate, within a legal framework that rejects generalisations and mere technical portrayals of emissions trading schemes. The way in which this thesis responds to this challenge is by developing a methodology that 'zooms out' of emissions trading debates, and with an overview of these discourses, explores the type of environmental governance regimes that are furthered when emissions trading schemes are promoted. The current investigation shows that the understanding of emissions trading is mediated by three distinct and competing visions of how these trading schemes function or ought to function. As part of the analysis, I develop three models – the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models – in which these portrayals are distinctly projected. According to the *Economic Efficiency Model,* emissions trading schemes function as a means of securing economic benefits, the *Private Property Rights Model* promotes emissions trading schemes as an embrace of liberalism, and the *Command-and-Control Model* views emissions trading schemes as a neo-regulatory mechanism. These three visions, in turn, have as corollaries three different governance structures according to which a trading scheme may be constructed and managed, each structure conferring a different legal status upon the rights created in emissions allowances, whilst subscribing to

competing visions of what role the state plays, or ought to play, in the construction and management of the emissions market.

The significance of this methodology and the models is to establish a new framework for analyses of emissions trading schemes in law that enhances the idea of emissions trading as distinct governance regimes, thereby rejecting any generalisations that suggest that emissions trading schemes are simple regulatory tools that may be used across jurisdictional borders with equal simplicity and to the same effect. The models show that each governance regime created by emissions trading schemes is deeply grounded in the roles that are ascribed to the state and the market in environmental regulation. Although the emissions trading discourse tends to be dichotomous in this regard, the models highlight that the view of the state and the market exist in a symbiosis and that the idea regarding the function of the one, directly affects the idea regarding the function of the other. At the heart of emissions trading debates, therefore, stands the legal dilemma of how and to whom to allocate regulatory power.[2]

The models, however, form a *theoretical* framework of analysis that, as such, is incapable of determining what legal structures a particular emissions trading regime ought to take. With the intention of exploring the applicability of the models in law and to show that the governance regimes underpinning emissions trading schemes can only be understood in the context of legal specificities, I examine the EU Emissions

[2] Much regulatory theory deals with the meaning of regulatory power, covering questions, such as, who can exercise regulatory power, from whom is it transferred and on what grounds, and who can challenge it, see B Morgan and K Yeung, *An Introduction to Law and Regulation: Texts and Materials* (Cambridge University Press, Cambridge 2007) Chapters One, Three, Five and Six. Here, and throughout the thesis, I refer to 'regulatory power' simply as a understanding of how emissions trading schemes are understood to be organised and where the power to manage, as well as construct, these trading regimes lies.

Trading Scheme (EU ETS) against the backdrop of the legal order of the European Union (EU). More specifically, this exploration surveys the EU ETS by focusing first on how law - and policymakers[3] at the EU level, and second the Court of Justice of the European Union (CJEU, or EU Courts)[4] reason and give meaning to emissions trading. This close analysis of policy-based and judicial discourses surrounding the EU ETS reveals a strong mismatch in the understanding of the rationale and functionality of the EU ETS as envisioned by the European Commission (Commission), the EU Courts and the applicants. Mapping the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models onto the EU ETS judicial discourse helps to categorise and flesh out these discrepancies and show that competing visions of the construction, role and impact of the EU ETS exist and give rise to an ever-increasing number of case law. In effect, pointing to the multiple visions that exist in a single jurisdiction regarding an emissions trading scheme challenges the scholarly assumption that furthers emissions trading as a straightforward tool that can be applied across different legal settings with generic simplicity and uniform outcome. In its place, the case analysis unveils complex multi-level governance structures created by the emissions trading scheme in the EU jurisdiction.

The aim of this thesis is to undertake a positive analysis of environmental law scholarship and to explore the EU ETS with the intention of showing that emissions trading as a regulatory concept reflects different governance structures, which are

[3] Here referring to the European Commission.

[4] Formerly the European Court of Justice (ECJ) and the Court of First Instance (CFI). Since the Lisbon Treaty, the CJFU compromises the Court of Justice, the General Court and specialised courts, as listed in Article 19 TEU. 'TEU' refers to Consolidated Versions of the Treaty on European Union (TEU), [2008] OJ C115/13.

dependent on their specific cultural context for meaning and implication. From the viewpoint of other established areas of law, this exercise may not seem novel; ultimately any control system is certain to create a particular governance structure that relies on its legal specification for content and impact. In environmental law, nonetheless, and especially with regard to emissions trading schemes, this approach is significant because environmental law scholarship has yet to develop a methodology that accommodates thorough legal analysis of emissions markets. The current nature and framing of environmental law scholarship instead induce discussions that overlook the impact of legal culture and encourage simplistic and generic portrayals of this particular regulatory mechanism. Understanding *why* environmental law scholarship is shaped in this manner involves unpacking methodological challenges in environmental law, and revising the current framework of analysis of emissions trading schemes in law.

This Chapter provides a two-step introduction to this thesis.[5] First, it explains the framework within which emissions trading schemes tend to be debated in environmental law scholarship, and points to the consequences that this has for the way in which emissions trading as a regulatory option is portrayed. In effect, it paints the general picture of the problem that this thesis addresses. Second, it outlines the methodology applied in this thesis: a positive analysis of environmental law scholarship and an examination of the EU ETS as a case study. It explicates why such a methodology is useful and how its application paves the way for a robust and mature framework of analysis for emissions trading schemes in law.

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[5] Scotford's thesis was a source of inspiration is setting out this structure. E Scotford, *The Role of Environmental Principles in the Decisions of the European Union Courts and New South Wales Land and Environment Court* (DPhil Thesis, University of Oxford 2010).

This methodology is applied in the subsequent chapters. Chapter Two explores emissions trading discourses and inquires into the assumptions set out in these scholarly debates about the nature and role of emissions trading. These are categorised in the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models, each model establishing a different framework through which emissions trading regimes are understood and may be constructed. Chapter Three builds the broader argument for the importance of examining these models against the backdrop of a particular legal culture, and in the case of this thesis with regard to the EU legal order. In this way Chapter Three acts as an introduction to Chapters Four and Five where the EU ETS case study is set out, and more precisely, in which the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models are respectively applied to the Commission's and the EU Courts' emissions trading-related discourses. The hope with this case study is to explore the applicability of the models in law and scrutinise the various governance regimes that emissions trading is understood to create in an EU legal context. Chapter Six returns to an analysis of environmental law scholarship and examines the methodology currently applied to emissions trading schemes in law so as to explain *why* it has led to depictions of emissions trading as generically simple tools that are compliant to most problems and in most jurisdictions. I identify tendencies to dichotomise emissions trading discussions according to 'market versus state' distinctions, the focus on global features in defining emissions trading schemes, and the particular interdisciplinary, the promotional and the pragmatic character of emissions trading debates as reasons why legal specificities of emissions trading are marginalised and this regulatory strategy thought of as simple. In the final part of this thesis, Chapter Seven, the revised framework of analysis proposed in this thesis is evaluated against

the current methodology in environmental law scholarship and against the challenges that face environmental law scholarship more broadly.

The following Section introduces emissions trading with which this thesis is concerned. Describing emissions trading in general terms is conceptually difficult, as each description adheres to one particular governance structure that I intend to explore in Chapter Two. Thus merely as a brief introduction, one way of describing emissions trading is to state that it is a scheme under which the government imposes a limit on the total quantity of emissions, issues allowances adding up to that total, and then allows emitters to buy and sell allowances among each other, and imposing penalties on any polluter who emits without an allowance.[6] This formulation however is open-textured and as such different from, for instance, a rights-based view of emissions markets, which sees the creation of tradeable property right in emissions allowance as pivotal in the establishment of an emissions market. Dales explains this particular analysis:[7]

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[6] As described in R Stewart, 'Models for Environmental Regulation: Central Planning Versus Market-Based Approaches' (1992) 19 Boston College Environmental Affairs Law Review 547, 553.

[7] J Dales, *Pollution, Property and Prices: An Essay in Policy-Making and Economics* (University of Toronto Press, Toronto 1970) 107. Emphasis added.

> Because *transferable (or full) property rights* always command an explicit price, the establishment of such Rights *makes it easy to establish a market* in them. In turn, the buying and selling of the Rights in an open market and the consequent establishment of an explicit price for the right to discharge a ton of waste into water (or air) system results in a theoretically *efficient allocation* of 'anti-pollution effort' as between different dischargers. In other words, the *market automatically* ensures that the required reduction in waste discharged with be achieved *at the smallest possible total cost* to society.

In the words of Dales, transferable property rights in emissions (and water) rights mechanically create a market that is assigned the allocation of regulatory responsibilities of managing and reducing pollution. This view is again different from, for instance, a state-based description of emissions trading where these trading schemes are defined as:[8]

> …a 'command and control *plus*' instrument, with often even stronger [than traditional direct regulation] government intervention and control, in particular in relation to monitoring of emissions, and high non-compliance sanctions.

The obvious distinction between this explanation compared with the previous two is the focus on the state rather than on market forces in managing the emissions trading scheme, which suggests that the key structure and functionality of emissions trading following the above-listed emissions trading descriptions will differ. Listing these descriptions is not to suggest that these views are preferred or in any way representative of particular formal explanations of emissions trading. Indeed these illustrations are set out in different jurisdictions, periods and contexts and as such unsurprisingly diverse[9] but the fact that they frame the conceptualisation of emissions

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[8] J Lefevere, 'Greenhouse Gas Emission Allowance Trading in the EU: A Background' (2003) Yearbook of European Environmental Law 149, 154.

[9] Implications of cross-jurisdictional features of emissions trading scholarship are discussed in Chapter Six.

trading differently, shows, as Chapter Two discusses, that in debating emissions trading, different governance regimes for pollution control are ascribed to.

In the following Section further explanations of emissions trading as a regulatory concept are deliberately left to be explored in Chapter Two. This Section instead aims to orient the discussion on emissions trading by briefly illustrating the history of the use of these trading schemes and their high profile in environmental law and policy, and environmental law scholarship; point to the existing assumptions regarding this regulatory mechanism; and highlight the pressing need to revise the existing analytical framework through which these emissions trading schemes are viewed.

## II. EMISSIONS TRADING SCHEMES AND THEIR HIGH PROFILE IN ENVIRONMENTAL LAW

Emission trading is not a novel regulatory strategy. The general principles underlying emissions trading are based on scholarly proposals put forward in the late 1960s as part of theories concerning the optimal solution to the allocation of resources to various commons.[10] Coase, belonging to this category of scholars, and known as the 'grandfather of pollution trading',[11] revolutionised the way in which pollution control is viewed by arguing that pollution is simply a factor of production, and that by

[10] G Brown, 'Renewable Natural Resource Management and Use Without Markets' (2000) 38 Journal of Economic Literature 875. The notion of 'commons' and how emissions trading is understood to regulate it is discussed in Chapter Two.

[11] L Lohmann, 'Carbon Trading: A Critical Conversation on Climate Change, Privatisation and Power' (2006) 48 Development Dialogue 4, 55.

turning it into well-defined, transferable legal rights, the market, as opposed to the government, can play a crucial role in the way in which pollution is regulated.[12] This scholarly contribution, coupled with several other by now classic articles,[13] comprise the foundation for theorising about market-based mechanisms, including emissions trading schemes in environmental law, and have subsequently helped inspire legislative action.[14]

In the five decades that followed the publication of Coase's paper, the high profile of emissions trading schemes in environmental law and policy, as well as in environmental law scholarship, has thrived to the extent that it is impossible to debate regulatory choice for air pollution control without considering emissions trading schemes.[15] Although a strong sentiment exists in environmental law for the need to

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[12] R Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1. Coase's theory regarding the allocation of social costs of externalities, or pollution is discussed further in Chapter Two.

[13] Hardin investigates the problem of the allocation of rights to land: G Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243, Dales applies a similar theory to water pollution: J Dales, 'Land, Water, and Ownership' (1968) 1 The Canadian Journal of Economics 791, and to pollution problems; Dales *Pollution, Property and Prices* (n 7), Demsetz examines the elements of the theory of property rights from an economist's point of view that ties in with discussions on externalities: H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economic Review 347, Crocker studies air pollution in this regard, describing the air 'as an economic resource': T Crocker, 'The Structuring of Atmospheric Pollution Control System' in H Wolozin (ed) *The Economics of Air Pollution* (WW Norton & Co., New York City 1966) 61, 63, Montgomery investigates a 'pollution license' and an 'emission license' and their applicability in a similar regulatory context: W Montgomery, 'Markets in Licenses and Efficient Pollution Control Programs' (1972) 5 Journal of Economic Theory 395.

[14] In 1970s – almost two decades after Coase first published his article, the so-called 'off-set policy', an early form of emissions trading, was introduced in the U.S. Under these schemes, polluters were encouraged to voluntarily reduce their emissions levels below their legal requirements and the Environmental Protection Agency could thereafter verify these excess reductions as emissions reduction credits, see T Tietenberg, *Emissions Trading: Principles and Practice* (2nd edn Resources for the Future, Washington, DC 2006) 6-7.

[15] Academic journals, sections in environmental law textbooks, environmental law books, as well as debates on regulation more generally, debate and include references to emissions trading schemes, see for instance R Baldwin and M Cave, Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, Oxford 1999) 224, N Gunningham, P

apply a mix of regulatory mechanisms to environmental problems,[16] emissions trading schemes, falling within the broader scope of market-based mechanisms,[17] are widely considered *superior* to other direct regulatory options,[18] and their application is furthered as an obvious choice '*unless* one can show they are somehow deficient'.[19] From this angle, emissions trading is seen as 'the holy grail of environmental

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Grabosky and D Sinclair, Smart Regulation: Designing Environmental Policy (Clarendon Press, Oxford 1998) 424, R Macrory, Regulation, Enforcement and Governance in Environmental Law (Hart Publishing, Oxford 2010) 11, J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambridge 2007) 428, Morgan and Yeung *An Introduction to Law and regulation* (n 2) 85, A Ogus, Regulation: Legal Form and Economic Theory (Clarendon Press, Oxford 1994) 249, J Wiener, 'Global Environmental Regulation: Instrument Choice in the Legal Context' (1999) 108 Yale Law Journal 677, 709, S Bell and D McGillivray, *Environmental Law* (7th edn Oxford University Press, Oxford 2008) 509, C Olsen Lundh, 'Koldioxidhandeln Inom EU ETS - Stärkt och Expanderad?' (2008) 2 Europarättslig Tidskrift 350.

[16] See for instance B Rittberger and J Richardson, 'Old Wine in New Bottles? The Commission and the Use of Environmental Policy Instruments' (2003) 81 Public Administration 575, M Lee, EU Environmental Law: Challenges, Change and Decision-Making (Hart Publishing, Oxford 2005), E Donald, 'Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law' (2001) 29 Capital University Law 245, 246, L Krämer, 'Some Reflections on the EU Mix of Instruments on Climate Change' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 279. The idea of using a mix of regulatory instruments is also supported by the IPPC Directive, Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control [2003] OJ L 24/8 and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005) ('Kyoto Protocol').

[17] Market-based mechanisms are defined to fall into two general categories: regimes founded on effluent taxes and tradable pollution permit regimes, see J Nash, 'Too Much Market? Conflict between Tradable Pollution Allowances and the "Polluter Pays" Principle' (2000) 24 Harvard Environmental Law Review 465, 482.

[18] L Heinzerling, 'Selling Pollution, Forcing Democracy' (1995) 14 Stanford Environmental Law Journal 300, 302. This argument is particularly furthered by economists by comparing market-based mechanisms, such as emissions trading, to conduct rules that specify behaviour or technology, see J Wiener and B Richman, 'Mechanism Choice' in D Farber and A O'Connell (eds), Research Handbook on Public Choice and Public Law (Edward Elgar, Cheltenham 2010) 363, 370, J Freeman and C Kolstad, 'Prescriptive Environmental Regulations versus Market-Based Incentives' in J Freeman and C Kolstad (eds), *Moving to Markets in Environmental Regulation: Lessons After Twenty Years of Experience* (Oxford University Press, Oxford 2006) 3, 4.

[19] Freeman and Kolstad, 'Prescriptive Environmental Regulations versus Market-Based Incentives' , ibid 5. Emphasis added.

policymaking',[20] and its use in environmental law and policy 'close to politically correct'[21] – a point that is illustrated throughout this thesis.

The profile of emissions trading schemes in environmental law has particularly flourished in recent decades due to the inclusion of emissions trading in international environmental law and as part of the Kyoto Protocol (Protocol), in which emissions trading scheme is suggested as a strategy that may be applied to meet quantified emission limitations and thereby comply with international emissions targets.[22] The earlier success of the so-called 'acid rain program' in the U.S.,[23] which used emissions trading schemes to reduce sulphur dioxide, played a crucial role in the decision to place emissions trading at the centre of the international attempt to fight climate change[24] and in making this regulatory option 'fashionable'[25] in

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[20] L Raymond, 'The Emerging Revolution in Emissions Trading Policy' in B Rabe (ed) *Greenhouse Governance: Addressing Climate Change in America* (The Brookings Institute, Washington D.C. 2010) 101, 105.

[21] R Stavins, 'Market-Based Environmental Policies: What Can We Learn from U.S. Experience (and Related Research)?' in J Freeman and C Kolstad (eds), Moving to Markets in Environmental Regulation: Lessons from Twenty Years of Experience (Oxford University Press, Oxford 2007) 19, 19. Note that here emissions trading is part of a broader debate on market-based environmental policies.

[22] Kyoto Protocol, article 17.

[23] The 1990 Acid Rain Legislation is Title IV of the Clean Air Act, 42 U.S.C. §§ 7651 – 7651. For an overview see H Waxman, 'An Overview of the Clean Air Act Amendments of 1990' (1991) 21 Environmental Law 1721, R Martella, 'Market-based Regulation under the Clean Air Act' (2010) 4 Carbon and Climate Law Review 139. For an overview by EPA employers directly involved with the acid rain program, see S Napolitano and others, 'The U.S. Acid Rain Program: Key Insights from the Design, Operation, and Assessment of a Cap-and-Trade Program' (2007) 20 The Electricity Journal 47.

[24] D Driesen, 'Economic Instruments for Sustainable Development' in B Richardson and S Wood (eds), Environmental Law for Sustainability (Hart, Oxford 2006) 277, 298.

[25] D Helm and D Pearce, 'Economic Policy Towards the Environment: An Overview' in D Helm (ed) *Economic Policy Toward the Environment* (Blackwell Publishers, Oxford 1991) 1, 15.

environmental law and policy across various jurisdictions.[26] In EU environmental law, emissions trading is a 'key trend',[27] and the EU ETS,[28] which will be scrutinised against the backdrop of its case law, is described as one of the 'cornerstones'[29] of environmental protection policy of the Union. Environmental lawyers and policy-makers alike promote this particular regulatory option as one of the leading regulatory strategies for addressing the proliferation of threats imposed by greenhouse gases and climate change,[30] or even 'for nearly every pollution problem'.[31]

The application of trading schemes to air pollution has received most of the media and scholarly attention; trading schemes, however, are applied, or urged to be

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[26] For an overview of trading policies applied across the various states in the U.S., see C Cinnamon, 'Climate Change Policies an Ocean Apart: United States and European Union Climate Change Policies Compared' (2006) 14 Penn State Environmental Law Review 435, for an overview of developments of trading schemes in Norway, Switzerland, Japan, Australia and specifically New South Wales, Canada, Russia and the potential linking with the EU ETS see N Anger, 'Emissions Trading Beyond Europe: Linking Schemes in a Post-Kyoto World' (2008) 30 Energy Economics 2028.

[27] Emissions trading, together with 'out-sourcing' of responsibility, is the key trend in EU environmental law employed to achieve emissions reductions on the behalf of the Union, J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 805, 806.

[28] Based on Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, OJ 2003 L 275/32 (Directive), which is revised and set out in Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/63 (Revised Directive).

[29] Case C-127/07 *Arcelor Atlantique and Lorraine and Others v Commission* [2008] OJ C 44/8, Opinion of AG Maduro para. 2.

[30] C Carlarne, Climate Change Law and Policy: EU and US Approaches (Oxford University Press, Oxford 2010) 177. Carlarne offers an overview of climate change policies in the US and EU in this regard.

[31] Raymond argues that emissions trading is popular with policy-makers to the extent that it is applied also to inappropriate problems, such as mercury, which has the effect of concentrating the pollutant in one place at one time see Raymond 'The Emerging Revolution in Emissions Trading Policy' (n 20) at 107. Dales similarly claims that environmental markets '*can* be used to implement any anti-pollution policy that you or I can dream up.' Dales *Pollution, Property and Prices* (n 7) 100.

applied to a wide spectrum of environmental problems beyond air pollution, or 'whenever they can reliably achieve environmental objectives'.[32] For instance, these are employed to help curb overfishing,[33] mitigate wetlands, manage municipal waste,[34] resolve land use problems,[35] and manage water allocation.[36] Market-based mechanisms of this kind are understood to be 'the hottest growth industry in environmental law',[37] whose application in law has developed into a 'virtual orthodoxy'.[38] In short, and as predicted by Dales, the use of markets in environmental law has become the strategy 'no policy-maker can afford to do without'.[39]

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[32] D Schoenbrod, R Stewart and K Wyman, *Breaking the Logjam: Environmental Protection that Will Work* (Yale University Press, New Haven 2010) 36.

[33] See for instance K Wyman, 'Why Regulators Turn to Tradeable Permits: A Canadian Case Study' (2002) 52 University of Toronto Law Journal 419, K Wyman, 'The Property Rights Challenge in Marine Fisheries' (2008) 50 Arizona Law Review 511, A Rieser, 'Prescription for the Commons: Environmental Scholarship and the Fishing Quotas Debate' (1999) 23 Harvard Environmental Law Review 395.

[34] For an overview of trading schemes applied to waste management, such as Landfill Allowance Trading Scheme, see DEFRA, 'Waste Strategy for England 2007' (Presented to Parliament by the Secretary for Environment, Food and Rural Affairs by Command of Her Majesty May 2007) <http://www.defra.gov.uk/environment/waste/strategy/strategy07/documents/waste07-strategy.pdf>> accessed 8 March 2011.

[35] For instance, New York City employed a trading scheme approach to the preservation of landmark buildings, see Driesen 'Economic Instruments for Sustainable Development' (n 24) 288 and for further reading J Costonis, 'The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks' (1972) 85 Harvard Law Review 574, 576.

[36] M Bond and D Farrier, 'Transferable Water Allocations-Property Rights or Shimmering Mirage' (1996) 13 Environmental and Planning Law Journal 213, and for a broader and historical analysis of water rights see J Getzler, *A History of Water Rights at Common Law* (Oxford University Press, Oxford 2006).

[37] In particular when compared to traditional direct regulation, see E Orts, 'Reflexive Environmental Law' (1995) 89 Northwestern University Law Review 1227, 1241.

[38] Freeman and Kolstad ' Prescriptive Environmental Regulations' (n 18) 4.

[39] Dales *Pollution, Property and Prices* (n 7) 100.

The enthusiasm towards the use of emissions trading schemes as a regulatory strategy has, however, to some extent dampened in the aftermath of the financial crises.[40] The application of markets generally face a new level of scepticism,[41] and in the EU, the interest in emissions trading has been adversely affected[42] by incidents concerning cyber attacks on emission permits registers,[43] VAT fraud,[44] and the crash in carbon prices following over-allocation of emissions permits.[45] Despite these drawbacks, scholars have generally remained loyal to supporting the application of markets in environmental law, arguing, for instance, that emissions trading 'works far better'[46] than any other regulatory alternative. Equally policy- and lawmakers in the

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[40] For an overview of possible parallels between the financial crisis and carbon markets see M Chan, 'Lessons Learned from the Financial Crisis: Designing Carbon Markets for Environmental Effectiveness and Financial Stability' (2009) 2 Climate and Carbon Law Review 152, and measures that policy-makers ought to consider in the wake regulating markets after the financial crisis, L Lohmann, 'Regulatory Challenges for Financial and Carbon Markets' (2009) 2 Climate and Carbon Law Review 161.

[41] For the change of perceptions of markets more generally following the financial crises see J Stiglitz, *Freefall: Free Markets and the Sinking of the Global Economy* (Allen Lane London 2010).

[42] Following the recent closure of the EU ETS due to cyber attacks on the registry system, traders have labelled this particular emissions scheme a 'Mickey Mouse carbon market'. As cited in T Macalister, 'Traders Condemn EU's 'Mickey Mouse' Carbon Market After Botched Trading Statement' *The Guardian* (London 21 January 2011).

[43] EUROPA, 'Announcement of Transitional Measure: EU ETS Registry System' (19 January 2011) <http://ec.europa.eu/clima/news/docs/transitional_measure_ets.pdf> accessed 11 June 2011, T Macalister, 'European Carbon Market Reopens but Traders Stay Away' *The Guardian* (London 4 February 2011), T Macallister, 'European Union Faces Legal Action Over Fraudulent Carbon Emissions Trading' *The Guardian* (London 20 February 2011).

[44] EUROPOL, 'Further Investigations into VAT Fraud Linked to the Carbon Emissions Trading Scheme' (28 December 2010) <http://www.europol.europa.eu/index.asp?page=news&news=pr101228.htm> accessed 11 January 2011, A Seager, 'European Taxpayers Lose €5bn in Carbon Trading Fraud' *The Guardian* (London 14 December 2009).

[45] For an overview see D Ellerman and P Joskow, *The European Union's Emissions Trading System in Perspective* (Pew Center on Global Climate Change, Washington 2008).

[46] R Epstein, 'Carbon Dioxide: Our Newest Pollutant' (2010) 43 Suffolk University Law Review 797, 825. For similar support for the use of environmental markets see D

EU have extending the time frame in which emissions trading can be used,[47] indicating that notwithstanding the experienced problems with emissions trading, this regulatory option is allowed to retain a strong position in EU environmental law.[48] This steadfast support for emissions trading shows that emissions trading is a significant regulatory option, which further confirms that it certainly is worthy of a thorough legal examination.

The high profile of emissions trading schemes in environmental law and policy at international, regional and national level invites wide-ranging academic scrutiny of these regulatory measures in different contexts. The Kyoto Protocol, which establishes the legal skeleton for international emissions trading, does not prescribe any global emissions trading model on which trading schemes worldwide are to be based;[49] rather, Parties to the Protocol are encouraged to create their own

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Schoenbrod, R Stewart and K Wyman *Breaking the Logjam'* (n 32), R Lazarus, *The Making of Environmental Law* (Chicago University Press, Chicago 2004) 232-3, R Repetto, *America's Climate Problem: The Way Forward* (Earthscan, London 2011). Note that emissions trading schemes tend to be supported in this regard within a broader framework of market-based instruments.

[47] The revised Directive (n 28) shows the Union's ambition to continue to use emissions trading also after the Kyoto Protocol's commitment period, that is post 2012, has passed. For further voice support of emissions trading see Commission of the European Communities, Communication Toward an Enhanced Market Oversight Framework for the EU Emissions Trading Scheme, COM (2010) yyyfinal., European Environmental Bureau, *Future of EU Environmental Policy: Toward the 7th Environmental Action Programme* (European Environmental Bureau, Brussels November 2010).

[48] For instance, the Commission recently proposed that the common fisheries policy ought to be reformed by introducing markets to this area of environmental law, or in other words, to create a market in fisheries quotas. Commission of the European Communities, Green Paper on Reform of the Common Fisheries Policy, COM(2009) 163 final, Commission of the European Communities, Proposal for a Regulation on the Common Fisheries Policy, COM(2011) 425final.

[49] United Nations Framework Convention on Climate Change (UNFCCC) Decision of 30 November 2005 on Modalities, Rules and Guidelines for Emissions Trading under Article 17 of the Kyoto Protocol, 11/CMP.1 sets out general and non-legal guidelines suggesting to Parties to the Protocol how to fulfil article 17 of the Kyoto Protocol and thereby determine the

respective trading schemes.[50] Yet debates on this topic assume that the understanding of emissions trading as a regulatory concept is uniformly understood and that emissions trading schemes are devised according to a generic technique, or, are based on common so-called 'design features'.[51] As such, emissions trading is reduced to a mere tool that may be used across different jurisdictions, or to regional and national levels.[52] Indeed, emissions trading is often defined as being part of a 'regulator's toolbox',[53] implying that as long as this regulatory mechanism is *picked* before other available regulatory 'tools', it is able to fix the designated problem independently of the legal contexts to which it is applied.[54] Following this view, emissions trading schemes may be defined as legal constructions that are 'propagated in identical sterile

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modalities, rules and guidelines on emissions trading. See Bodansky on the extent to which the Protocol is a top-down regime, D Bodansky, 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773865> accessed 11 June 2011.

[50] 'The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading.' Kyoto Protocol, article 17. Distinctions between emissions trading as set out in international environmental law and the EU ETS are explained in more detail in Chapter Three.

[51] See for instance Tietenberg *Emissions Trading* (n 14) 17, D Mavrakis and P Konidari, 'Classification of Emissions Trading Scheme Design Characteristics' (2003) 13 European Environment 48, 52. Rose, for instance, assume that trading schemes are property regimes, see C Rose, 'Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances' in E Ostrom and e al (eds), *The Drama of the Commons* (National Resource Council, Washington DC 2003) 233, 235-237.

[52] The type of scholarship and framing that creates this effect are discussed further in Chapter Six.

[53] Phrase used by Wiener and Richman 'Mechanism Choice' (n 18) 363, 365, or, 'toolkit' as named by Schroeder, see C Schroeder, 'Public Choice and Environmental Policy' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 450, 474.

[54] Discourse about the 'regulatory toolbox' has the ability to undermine the complexity of law, see E Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law' in M Freedland and J-B Auby (eds), *The Public Law/Private Law Divide: Une Entente Assez Cordiale? la Distinction du Droit Public et du Droit Privé: Regards Français et Britanniques* (Hart Publishing Oxford 2006) 215.

laboratories'[55] to which legal particularities are irrelevant.[56] The problem with this particular approach toward emissions trading schemes is the assumption that a successful emissions trading story, for instance the U.S. acid rain program, may be replicated with equal success across jurisdictions.[57] As a consequence, legal complexities particular to a certain trading scheme are overlooked and law is mistakenly framed as uniform strategy applicable at all times and in all public law settings.[58]

The implication of assuming that trading schemes are uniform legal constructions applicable with equal effect across jurisdictional borders, is to presuppose that these are *straightforward* regulatory measures. In one of the landmark pieces on emissions trading, Ackerman and Stewart indentify four administrative tasks in setting up an emissions trading, ranking cap-setting on the top of the list

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[55] Description borrowed from L Zedner, 'Comparative Research in Criminal Justice' in L Noaks, M Maguire and M Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff 1995) 8, 14.

[56] This point is unpacked in Chapter Six. For an analysis of the ways in which international law frameworks, and in particular the Kyoto Protocol, overlook 'locality' see C Fogel, 'The Local, the Global, and the Kyoto Protocol' in S Jasanoff and ML Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, Cambridge, Mass. 2004) 103.

[57] S Sorrell and J Skea, 'Introduction' in S Sorrell and J Skea (eds), *Pollution For Sale: Emissions Trading and Joint Implementation* (Edward Elgar Publishing, Cheltenham 1999) 1, 23, M Hanemann, 'Cap-and-Trade: A Sufficient or Necessary Condition for Emission Reduction?' (2010) 26 Oxford Review of Economic Policy 225, 227, J Johnston, 'Problems of Equity and Efficiency in the Design of International Greenhouse Gas Cap-and-Trade Schemes' (2009) 33 Harvard Environmental Law Review 405, 429-430, L Heinzerling, 'The Environment' in M Tushnet and P Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford 2003) 701, 712-713. Note that Heinzerling's argument in this regard is directed at how environmental law scholars further this regulatory strategy across environmental settings, as opposed to jurisdictions.

[58] Similar argument set out in S Bogojević, 'Global Gazing: Viewing Markets Through the Lens of Emissions Trading Discourses' in K Rubenstein and B Jessup (eds), *Using Environmental Discourses to Traverse Public and International Environmental Laws* (Cambridge University Press, Cambridge 2011, in press).

followed by establishing an auction system for emissions allowances, a title registry, and a penalty system before concluding 'that's that'.[59] This description is part of a broader argument that suggests that emissions trading is *easier* to establish than traditional direct regulation[60] and that a generic step-by-step design model exists for creating emissions trading schemes.[61] As a consequence, emissions markets tend to be perceived as 'intuitively simple'[62] processes, and, as described by Stewart in a more recent publication, chiefly because the state is seen to play a 'simplified role'[63] in the creation and management of this regulatory strategy, allowing instead the market to deliver the assigned regulatory objectives once the emissions market has been introduced. This alleged division between the market and the state is analysed in detail in Chapter Six; here the point that I wish to make is that the assumed simple

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[59] B Ackerman and R Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333, 1347. More recent scholarly contributions apply an equally systematic and straightforward description of the way in which emissions trading schemes are constructed. Nash and Revesz, for instance, categorises the construction into three steps: 1) setting the acceptable level of pollution 2) allocate the allowances 3) allow trading, J Nash and R Revesz, 'Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants' (2001) 28 Ecological Law Quarterly 569, 575-6. Bell and McGillivray also categorise the regulatory process in six stages including establishing general policies on the environment, setting standards, applying these, enforcing permissions, providing information and monitoring the regulatory system, see S Bell and D McGillivray (n 15) 224. Similarly Dudek and Palmisano describe cap-setting as the key administrative task and from which emissions trading thereafter follows, see D Dudek and J Palmisano, 'Emissions Trading: Why is this Thoroughbred Hobbled?' (1988) 13 Colombia Journal of Environmental Law 217, 219.

[60] D Driesen, 'Capping Carbon' (2010) 1 Environmental Law 1, 11.

[61] Driesen, ibid, explains how the notion of 'cap-and-trade' in particular suggests simplicity in creating and managing an emissions market.

[62] J Skjærseth and J Wettestad, *EU Emissions Trading: Initiation, Decision-Making and Implementation* (Ashgate Publishing, Burlington 2008) 154.

[63] R Stewart, 'Instrument Choice' in D Bodansky, J Brunnée and E Hey (eds), *The Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 145, 156.

and generic legal architecture of emissions trading is used to further emissions trading as an easy regulatory tool.

To summarise the discussion above and recap on the objectives of this thesis, it is useful to compare the role assigned to emissions trading in environmental law and policy and environmental law scholarship to that of the 'new kid in town'. According to the song, the status of the 'new kid' entails:[64]

> Great expectations/Everybody's watching you/People you meet, they all seem to know you/Even your old friends treat you like you're something new

Emissions trading is similar to this 'new kid' in three ways. First, both have great expectations imposed on them. In the case of emissions trading, this regulatory option enjoys a high profile in environmental law and policy, and environmental law scholarship, which clearly inflicts high hopes on the abilities of emissions trading, for instance and as explained, to provide a solution to 'nearly every pollution problem'.[65] The new kid and emissions trading are also similar in the way that 'everybody is watching' them. With regard to the EU ETS, for example, Dimas, the former EU Environment Commissioner, announced that 'Europe's approach [to emissions trading] is very much one of leading by example, to encourage others to act'.[66] This infers that the success of emissions trading in the EU is able to affect regulatory

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[64] Eagles *The New Kid in Town* (Album 'Hotel California', 1976).

[65] See n 31. Note that emissions trading debates refer also to non-environmental objectives in examining the use of emissions trading schemes. These are discussed in Chapter Two.

[66] Stavros Dimas, EU Environment Commissioner, 'The EU Approach and International Perspectives on Climate Change' (Speech at the World Environment Center Event, National Press Club, Washington 6 March 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/134> accessed 11 June 2011. The pressure to make the EU ETS a success is further discussed in Chapter Five.

agendas beyond its jurisdiction and thus is observed by other law-and policymakers around the world.[67] Third, and most importantly, the new kid and emissions trading have in common the fact that they tend to be seen as different to the rest, or 'new'. The sulphur dioxide trading scheme in the U.S, for instance, was coined 'the Grand Policy *Experiment*',[68] suggesting not only a novelty but also a try-out in regulating pollution control via emissions trading. Similarly, the EU ETS is described as 'fundamentally different'[69] to how environmental laws are traditionally set out in the EU, and generally, and as Chapter Two explains, a tendency exists in environmental law scholarship to distinguish emissions trading from other traditional regulatory options and on this basis argue for their preference.[70] As furthered by Stewart above, one key difference that is stressed between emissions trading and other regulations is the fact that primer is straightforward and based on a generic and simple legal framework. In this way, the song by the Eagles helps to bring to light the common view and approach to emissions trading in environmental law and policy, and environmental law scholarship, which this thesis intends to unpack as described next.

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[67] Similarly, the linking between the EU ETS and carbon trading in California is suggested by Connie Hedegaard, EU's Climate Commissioner, to be able to 'break the ice' for other states in the U.S. to join international emissions trading. F Carus, 'EU Plans to Link Emissions Trading Scheme with California: Connie Hedegaard in Discussions on how to join the World's Largest and Second Largest Carbon Markets' *The Guardian* (London 7 April 2011).

[68] R Stavins, 'What Have We Learned From the Grand Policy Experiment? Lessons from SO2 Allowance Trading' (1998) 12 Journal of Economic Perspectives 69. Emphasis added. Similarly, the EU ETS is named the '*New* Grand Policy Experiment', J Kruger and W Pizer, *The EU Emissions Trading Directive: Opportunities and Potential Pitfalls* (Resources for the Future, Washington D.C. 2004) 1.

[69] Commission of the European Communities, Communication from the Commission on Preparing for Implementation of the Kyoto Protocol, COM (1999) 230, 14.

[70] Chapter Two.

# III. METHODOLOGY AND OUTLINE OF THESIS

The methodology of this thesis is based in part on a positive analysis of environmental law scholarship and in part on an exploration of the EU ETS and the way in which the Commission and the EU Courts understand and give reason to this regulatory strategy in an EU context. This Section explains the exact scope of these analyses and reasons for following this particular analytical framework to the study of emissions trading schemes in law.

## A. Positive Analysis of Environmental Law Scholarship

The positivist analysis of environmental law scholarship is set out in this thesis in two stages. First, in Chapter Two, environmental law scholarship is examined by focusing on emissions trading discourses. With the aim of unpacking the multifaceted governance structures that emissions trading schemes may take, an inquiry is made into assumptions about emissions trading schemes. These findings are categorised in three models – the *Economic Efficiency,* the *Private Property Rights* and *Command-and-Control* models – that help project the wide range of hopes and objectives that scholars assign to emissions trading as a regulatory mechanism and governance regime. In the second stage of the positive analysis of environmental law scholarship, Chapter Six examines the scholarly motivation for, and methodological limitations involved in, analysing emissions trading schemes in environmental law scholarship to date. The aim is to unwrap the reasons why environmental law scholars have failed to develop a more robust methodology to the study of emissions markets and in this manner explain how the revised framework of analysis for emissions trading schemes applied in this thesis responds to these challenges.

This positive analysis of emissions trading debates, both past and present, and environmental law more broadly is adopted for two reasons. First, an in-depth analysis of various scholarly conceptualisations of emissions trading helps to flesh out discrepancies regarding the role, construction and management of trading schemes that may be noticed in practice.[71] Taking a step back and examining the relevant emissions trading *discourse,* rather than particular trading schemes, provides the opportunity to examine emissions trading schemes as a regulatory idea. Although scholarly contributions since the 1960s have influenced the way in which emissions trading is understood in environmental law,[72] no study to date has examined the precise picture of emissions trading that these further, nor contrasted it with other existing understandings of the role of emissions trading. Instead, it is assumed that the way in which Coase, for instance, illustrates a regulatory system in which rights to pollution are traded, is effectively one picture of a trading scheme, applicable to different contexts, disciplines and time.[73] The positive analysis of emissions trading schemes in this thesis aims to challenge this assumption and set out models that highlight the various governance structures that emissions trading create.

Second, a positive analysis of environmental law scholarship invites consideration of the development of environmental law methodologies, which to date

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[71] The operation of these discrepancies in practice is examined in Chapters Four and Five.

[72] The emissions trading scholarship is examined in Chapter Six.

[73] Heinzerling, for instance, observes that lawyers accept claims at face value set out in disciplines other than their own rather than challenging these and the example Heinzerling uses is debates on market-based environmental laws, see Heinzerling 'The Environment' (n 57) 723.

are still in their infancy.[74] In order to create a coherent and rigid framework for environmental law scholarship it is crucial to bring to light the type of challenges that environmental law scholars face in applying law to a particular area of research. By better appreciating these obstacles, scholars can be better equipped, from a methodological viewpoint, to overcome them, which indeed is both the aim of this thesis and the specific topic of Chapter Six.

## B. Analysis of the EU ETS: the Commission's and the Courts' EU ETS-related Discourse

In the second stage of this thesis, the EU ETS is examined by analysing the Commission's and the EU Courts' narrative relating to this regulatory strategy with the aim of highlighting the way in which policy- and lawmakers, as well as judges give meaning to emissions trading in the context of the EU legal order. In terms of how this case study is carried out, it is concerned with mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models set out in Chapter Two when applicable to EU ETS portrayals issued by the Commission and the EU Courts. The reason for this exercise, as explained in Chapters Four and Five, is to show the applicability of the models in law, and more importantly, to demonstrate that any meaningful examination of emissions trading schemes must be tied to the legal culture in which the trading scheme operates.

The EU ETS is picked to be the heart of this case study for two reasons. First, it is the largest multi-country and multi-sector greenhouse gas emission trading

[74] See E Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213.

scheme anywhere in the world[75] and on this basis alone deserves attention from environmental legal scholars. Second, and most importantly, the EU ETS tends to be projected as a scheme that can be applied elsewhere. More precisely, it is based on a regulatory idea that has travelled from the U.S. to the Kyoto Protocol and following this path introduced top-down to the EU legal order, where, as a key EU climate change law, EU policy and lawmakers tend to project EU ETS as applicable worldwide.[76] As such, the EU ETS constitutes an ideal case study in which to show the uniqueness of each trading scheme and refute any suggestions of its direct transferability.

The reason why, in Chapter Four, I examine the discourse of the Commission as opposed to any other institution or actor is because beyond the Commission's usual obligation of initiating policy in the EU,[77] the Commission played an 'extraordinarily strong role'[78] in the process of creating emissions trading in Europe, as well as in establishing EU's position in climate change negotiations at Kyoto where the idea of implementing emissions trading in the EU legal context first emerged.[79] The EU ETS

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[75] See European Communities, *EU Emissions Trading: An Open Scheme Promoting Global Innovation to Combat Climate Change* (European Commission, Brussels 2005).

[76] Chapters Three and Six.

[77] According to Art 17(1) TEU 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.' Literature on the Commission's policy-initiating powers is vast, see for example S Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education, Harlow 2002) 54, D Chalmers and others, *European Union Law: Text and Materials* (Cambridge University Press, Cambridge 2006) 93, P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th edn Oxford University Press, Oxford 2008) 43 and chapter 4.

[78] J Wettestad, 'The Making of the 2003 EU Emissions Trading Directive: An Ultra-Quick Process due to Entrepreneurial Proficiency?' (2005) 5 Global Environmental Politics 1, 2.

[79] The Commission is reported to have acted as a sixteenth Member State in this regard. Y Slingenberg, 'The International Climate Policy developments of the 1990's: The UNFCCC, the Kytoto Protocol, the Marrakech Accords and the EU Ratification Decision' in J Delbeke

is ultimately the 'Commission's baby',[80] and as such, the Commission is positioned as an obvious part in the EU ETS case study.

The second part of the EU ETS case study is focused on the EU Courts' understanding of emissions trading as regulatory concept. The relevance of the courtroom to this thesis is two-fold. First, the EU ETS has been fiercely litigated[81] and as such studying this case law is an obvious part of any legal examination of this regulatory strategy. Importantly, emissions trading discourse tends to predict that the use of emissions trading schemes will significantly reduce litigation,[82] which is an assumption that fits the concept of emissions trading schemes as straightforward regulatory tools. The case study employed in this thesis challenges that assumption.

Second, only a study of case law before the EU Courts allows for a close enough legal examination of emissions trading schemes to reveal their legal rationale and construction as understood in that legal context.[83] The EU Courts have an important 'gate-keeping function'[84] in this regard in deciding to review national regulations and the criteria according to which to review these. This has the effect of shaping governance of the emissions trading scheme at hand because the EU Courts decide on the division of competencies between the Member States and the Union, as

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(ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 15, 23.

[80] J Wettestad, 'European Climate Policy: Toward Centralized Governance?' (2009) 26 Review of Policy Research 311, 313.

[81] Chapter Five.

[82] Ibid.

[83] Literature on legal culture is listed and examined in Chapter Three.

[84] J Scott and S Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006) 13 Colombia Journal of European Law 565, 565-6.

well as construct the relationship between states and markets, in particular because the EU Courts' judgements determine not only the constitutional limits to state intervention in the market but also the level of government at which regulation is legitimate.[85] As so-called 'interpretative communities'[86] the EU Courts outline the laws within the particular legal culture that is analysed, and as such, case law analysis is an ideal part of a study of the interpretation of a particular regulatory mechanism in a particular legal setting.

## C. Scope of Methodology Applied

The scope of the methodology in this thesis is limited in the following ways. First, it is a positive rather than a normative analytical study of emissions trading schemes in environmental law and policy and environmental law scholarship. As such, this thesis refrains form engaging in prescriptive accounts of the role, design, or impact that emissions trading schemes have or ought to have in environmental law or in the EU legal order. The reason for this narrower methodology relates back to the aim of this thesis: my intention is *not* to provide definite answers as to whether regulation via emissions trading schemes ought to be applauded; rather, the intention is to establish a framework which may be used to critically assess emissions markets as part of

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[85] M Egan, *Constructing a European Market* (Oxford University Press, Oxford 2001) 107. Maduro sets out a similar claim regarding the Courts role in interpreting the free movement provisions, M Maduro, *We the Court: The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 2002).

[86] R Cotterrell, 'Is There a Logic of Legal Transplants?' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford 2001) 71, 79, P Legrand, 'What 'Legal Transplants'? ' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford 2001) 55, 57-59, Scotford *The Role of Environmental Principles* (n 5) 25.

environmental law, and in that way contribute to a richer understanding of regulatory responses to the initiative to employ emissions trading schemes.

This also means that I do not reject the use of emissions trading schemes in law, nor do I discard scholarly contributions that favour the application of emissions trading schemes. As explained by Heinzerling, enthusiasm for the use of market-based mechanisms more broadly has 'spiralled into irrational exuberance',[87] but rather than rejecting scholarship that manifests this enthusiasm, my aim is to examine *why* emissions trading schemes are regarded with such zest and *how* this reflects on methodologies used to portray this particular regulatory measure in law. In this regard, I critique the current environmental law scholarship on the basis of its oversimplified portrayal of emissions trading from the perspective of the legal discipline. I recognise that there are scholars who take a more sophisticated view of emissions trading and who do not merely consider that emissions trading is a tool, imposable everywhere. This thesis helps to explain why this group is the minority rather than the norm in environmental law, and by revising the framework of analysis for emissions trading schemes in law, it suggests ways in which this trend may be reversed.

Although the EU ETS forms the basis of the case study in this thesis, it should not be understood as a prototype of the legal construction and rationale of emissions trading schemes in law, or markets more generally. In brief, environmental markets are different from other 'general' markets for the simple reason that environmental

[87] Heinzerling ' The Environment' (n 57) 713.

markets trade public goods that are privately produced.[88] Moreover, the EU ETS is different from other environmental markets on the basis of its specific scale and goal,[89] and because it was implemented in the EU legal order top-down following political deliberation and specific international obligations under the Kyoto Protocol.[90] The EU ETS, therefore, stands in sharp contrast to, for instance, voluntary markets, such as the Chicago carbon market, which are created without direct interference by the state.[91] Although different emissions markets exist, these must be understood in their legal context, and due to historical, cultural, and even circumstantial factors, relationships between markets and states is deemed to be different under each emissions trading regime. In this thesis the focus is on the EU ETS in the form of a case study. The account of the EU ETS is, however, far from complete; the EU ETS is portrayed only through the interpretations of the Commission and the courtroom and as such it provides only a snapshot of the competing and, at times, contradictory understandings of an emissions trading scheme in the particular jurisdiction of the EU.

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[88] G Chichilnisky and G Heal, 'Introduction ' in G Chichilnisky and G Heal (eds), *Environmental Markets: Equity and Efficiency* (Colombia University Press, New York City 2000) 1, 3.

[89] J Delbeke, 'Putting the Emerging Global Carbon Market on Solid Footing' (Speech For the Opening of ICAP Global Cabron Market Forum, 19-20 May 2008) <http://www.icapcarbonaction.com/index.php?option=com_content&view=article&id=18&Itemid=17&lang=ja> accessed 11 June 2011.

[90] As explained in Skjaerseth and Wettestad *EU Emissions Trading* (n 62).

[91] Although Vis argues that lessons that may be learned from voluntary and mandatory schemes are reinforcing and consistent. P Vis, 'Basic Design Options for Emissions Trading' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 39, 54. For an overview of voluntary markets see R Sandor, 'Creating New Markets: The Chicago Climate Exchange' in I Kaul and P Conceicao (eds), *The New Public Finance: Responding to Global Challenges* (Oxford University Press, Oxford 2006).

Studying the EU Courts' interpretation of the EU ETS is nonetheless a crucial step toward unpacking the governance structures that underpin an emissions trading scheme. To speak of 'governance' in this context may be ambiguous, especially since the concept has been defined a 'catch-all'[92] that may comprise any strategy or tactic for controlling or exercising authority over in a specific space, also including the shift away from the monopoly of traditional political-legal institutions, and the traditional framework of government.[93] In this thesis, governance is limited to the relationship between the emissions market and the state – both at the EU and the Member State level – as well the legal status of rights in emissions allowances, and how the Commission and the EU Courts see the relationship between these three to play out in an EU context.

Although the case analysis in this thesis is concerned with the regulatory framework of the EU ETS, the thesis, particularly Chapters Two and Six, relies heavily on U.S.-based literature concerning emissions trading. The reason is the extensive expertise that U.S.-based academics hold in this subject; positive and normative research concerning environmental regulation instruments is far advanced in the U.S. whilst in the EU it is only slowly emerging.[94] Considering that all theory-based discussions regarding emissions trading schemes stem from the U.S., it is impossible to write a positive thesis on this topic without looking to the U.S.-based scholarship. Also, in the process of constructing and implementing the EU ETS, EU

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[92] N Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press, Cambridge 1999) 15 as cited in E Fisher and others (n 74) 235.

[93] Ibid, G de Burca and J Scott, 'Introduction' in G de Burca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, Oxford 2006) 1, 2.

[94] Stewart 'Instrument Choice' (n 63) 148.

officials directly relied on expertise from U.S. academics and policy-makers,[95] and as such, the EU ETS cannot be studied from a positivist framework without examining U.S.-based debates in this regard. Obviously this poses certain challenges since the EU ETS is unavoidably tested against certain portrayals of emissions trading schemes that are written in a U.S. context. This, in fact, is one of the methodological problems that face environmental lawyers researching this topic and which this thesis seeks to address.

## D. Why is Conceptualisation of Emissions Trading Schemes a Useful Exercise?

Emissions trading literature[96] is extensively descriptive and explores questions of how to design emissions trading schemes,[97] and helps to guide practitioners and policy-makers through the complex international, regional and national trading regimes.[98] It is also promotional and urges policy-makers and environmental scholars to adopt emissions trading schemes.[99] A smaller body of literature analyses and compares

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[95] Chapter Four.

[96] Emissions trading literature is examined in Chapter Six.

[97] See for instance Tietenberg *Emissions Trading* (n 14). This group compromises debates assessing the effectiveness of trading scheme designs, see J Skjærseth and J Wettestad, 'Implementing the EU Emissions Trading: Success or Failure? ' (2008) International Environmental Agreements: Politics, Law and Economics 275, M Faure and M Peeters (eds), *Climate Change and European Emissions Trading: Lessons for Theory and Practice* (Edward Elgar, Cheltenham 2008).

[98] See for instance A Brohé, N Eyre and N Howarth, *Carbon Markets: An International Business Guide* (Earthscan, London 2009), S Deatherage, *Carbon Trading Law and Practice* (Oxford University Press, Oxford 2011), R Antes, B Hansjürgen and P Letmathe, *Emissions Trading and Business* (Physica-Verlag HD, Heidelberg 2010).

[99] Schoenbrod, Stewart, Wyman *Breaking the Logjam* (n 32), Ackerman and Stewart *Reforming Environmental Law* (n 59).

emissions trading schemes in particular legal settings,[100] and examines these in an international law context.[101] An even smaller group of debates explore emissions trading schemes as part of a broader complex governance regime,[102] or against specific legal questions.[103] The question of *how* emissions trading, as regulatory concepts, are understood remains an untouched scholarly territory – despite the fact that emissions trading schemes have a high profile in environmental law and policy, and in environmental law scholarship. This thesis aims to fill this gap by presenting a more nuanced picture of emissions trading as a regulatory strategy, and as such, to create a robust methodology to apply to the study of emissions trading schemes in law.

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[100] B Hansjürgen (ed), *Emissions Trading for Climate Policy: US and European Perspectives* (Cambridge University Press, Cambridge 2005), Carlarne *Climate Change Law and Policy* (n 30) 3-4, M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006).

[101] D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, Oxford 2009). Further literature listed in Chapter Three (II).

[102] Scott 'Multi-level governance of Climate Change' (n 27).

[103] Larragán examines the EU ETS against the backdrop of legal principle in the EU legal order J de Cendra de Larragán, *Distributional Choices in EU Climate Change Law and Policy: Towards a Principled Approach?* (Kluwer Law International, Alphen aan den Rijn 2011), Weishaar investigates various allocation rules in the EU ETS against EU competition laws. S Weishaar, *Towards Auctioning: The Transformation of the European Greenhouse Gas Emissions Trading System: Present and Future Challenges to Competition Law* (Kluwer Law International, Alphen aan den Rijn 2009).

# CHAPTER TWO

# DECONSTRUCTING EMISSIONS TRADING DISCOURSES

## I. INTRODUCTION

As noted in the previous Chapter, emissions trading is commonly understood to be a regulatory system that, at its core, controls pollution, or broadly speaking, the exploitation of commons[1] in air.[2] Unpacking emissions trading discourses and going beyond this initial characterisation shows that a complex picture of emissions trading exists and in debating emissions trading, emissions trading scholars present different views as to what the underlying principle of emissions trading is or ought to be. More

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[1] The notion of a 'commons' is contentious, for instance, Nonini defines these as a 'global idea' of an ensemble of resources, D Nonini, 'The Global Idea of 'the Commons'' in D Nonini (ed) *The Global Idea of 'the Commons'* (Berghahn Books, New York 2007) 1 at 1-3, and Ostrom, famously, refers to these as 'common pool resources', E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge 1990). Commons have also been defined as 'open access' systems. K Anttonen, M Mehling and K Upston-Hooper, 'Breathing Life Into the Carbon Market Legal Frameworks of Emissions Trading in Europe' (2007) 16 European Environmental Law Review 96, 97. Note that 'open access' systems and 'commons' are arguably distinguishable on the basis that the former notion defines a system open to *all* with no entry or exit restrictions, while the latter refers to a group *within* a certain system – for example a farm family – to which no exclusionary rights within that set group are applied. H Dagan and M Heller, 'The Liberal Commons' (2001) 110 Yale Law Journal 549, 552.

[2] See T Tientenberg, 'The Tradable Permits Approach to Protecting the Commons: What Have We Learned ? ' in E Ostrom and others (eds), *The Drama of the Commons* (National Resource Council, Washington DC 2003) 197, L Raymond, 'The Emerging Revolution in Emissions Trading Policy' in B Rabe (ed) *Greenhouse Governance: Addressing Climate Change in America* (The Brookings Institute, Washington D.C. 2010) 101, 102, R Hahn and G Hester, 'Marketable Permits: Lessons for Theory and Practice' (1989) 16 Ecological Law Quarterly 361, 361, R Stewart and J Wiener, 'The Comprehensive Approach to Global Climate Policy: Issues of Design and Practicality' (1992) 9 Arizona Journal of International and Comparative Law 83, 83.

precisely, an inquiry into the assumptions in the emissions trading literature about the specific nature of the problem of exploitation and how emissions trading is supposed to solve it – a 'deconstruction' of emissions trading discourses – demonstrates that competing visions of emissions trading exist, each depending on a different 'interpretative map'.[3] In this Chapter, these different perceptions of emissions trading are set out in three models: the *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models. In the *Economic Efficiency Model,* exploitation of the commons is understood as an externality. The role of emissions trading is to help internalise these by putting a price tag on emissions and making emission reductions a lucrative business. Thus conceived, the role of emissions trading is that of a 'profit center.'[4] In the *Private Property Rights Model* emissions trading forms part of a certain world-view in which government control of the commons has given rise to ever-deteriorating environmental quality and emissions trading is projected as a system in which citizens, via private property rights, are able to defend and manage commons independently of governmental programs. Finally, according to the *Command-and-Control Model,* the overexploitation of clean air occurs due to ineffective direct pollution control regulations. Emissions trading is envisioned as an innovative regulatory strategy that 're-regulates'[5] environmental law by making it

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[3] A term used by Freeden to describe that the way in which we understand things will depend on merits, which correspond to our values and beliefs, which we impose on the case. See M Freeden, *Ideology: A Very Short Introduction* (Oxford University Press, New York 2003) 8.

[4] Description borrowed from R Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacles' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 171, 186.

[5] Term borrowed from G Majone, 'Introduction' in G Majone (ed) *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States* (Pinter Publishers, London 1990) 1. In this Chapter 're-regulation' is understood to allow for administrative flexibility as explained in Section III (C).

administratively flexible though without dislodging the state and its regulatory control[6] of the commons.

Besides offering an overview of the nature and content of key debates in emissions trading literature – literature that is fundamentally complex due to its cross-jurisdictional, interdisciplinary, and dynamic character[7] – there are three other key reasons why these models are significant. The first is that the models demonstrate that emissions trading can be viewed through diverse lenses, each lens setting out a different framework through which to construct and understand the functionality and objective of emissions trading schemes. The fact that various conceptualisations of emissions trading in emissions trading discourses exist is significant because these determine the expectations that are imposed on emissions trading as a regulatory idea, which, in turn has an impact on the way in the legislation upon which emissions trading schemes are based is constructed and interpreted. The models thus show that emissions trading discourses imagine *distinct* regulatory regimes in discussing emissions trading, and as this Chapter highlights, each regime is mediated by different visions of how the market, the state, and the legal status of emissions allowances ought to or do in fact operate.

The second reason why the models are important is that they discard the oversimplified view of emissions trading schemes as a straightforward and uniform

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[6] In the context of this Chapter regulation is understood to encompass a broad form of social control, whether imposed by the state or other social institutions, generating questions about the relationship between the state and the market. A similar definition is set out in B Morgan and K Yeung, *An Introduction to Law and Regulation: Texts and Materials* (Cambridge University Press, Cambridge 2007) 4.

[7] Emissions trading literature, which forms the basis of this study, is examined in detail in Chapter Six in light of environmental law scholarship more broadly.

regulatory strategy, as highlighted in Chapter One, by pointing to three distinct images of emissions trading. These are projected by the emissions trading literature, and show that emissions trading responds to different environmental and non-environmental problems, each image setting out a distinct regulatory regime that underpins emissions trading schemes. In other words, or more bluntly, the models demonstrate that emissions trading is a far more nuanced and sophisticated regulatory concept than what is to date assumed in environmental law and policy, and in environmental law scholarship.

Third, the models shed light on core legal dilemmas in promoting emissions trading schemes, which are concerned with questions of 'how' and 'to whom' to allocate regulatory power under such schemes. There is no consensus between the models in answering these questions; according to the *Economic Efficiency Model* emissions trading is understood to function according to free market mechanisms; in the *Private Property Rights Model* regulatory power is entrusted to the citizens, or private property holders, who decide on their own terms the control systems of common resources; and in the *Command-and-Control Model* regulatory power is vested in the central government. The models, however, do not provide any answers as to how regulatory power in emissions trading is in practice allocated as this would require attending rather to legal culture and examining an emissions trading scheme in legal isolation. Such research is carried out in the next three Chapters, using the EU ETS as a case study and examining this particular trading scheme in the context of the EU legal order.

This Chapter is structured as follows. In Section II, I define the role and significance of the *Economic Efficiency*, *Private Property Rights*, and *Command-and-Control* models, as well as the meaning of 'discourses' and the act of 'deconstructing'

emissions trading literature in light of the aims of this Chapter. It is crucial to understand these definition accurately and in the context of this thesis, simply because the validity of the methodology applied in this Chapter depends on it. In Section III, I deconstruct emissions trading discourses by setting out the three above-mentioned models, each model categorising a particular way in which emissions trading is understood as a regulatory concept in the emissions trading literature. Subsequently, these models are examined separately. In Section IV the models are compared and evaluated, and in the following part, Section V, their application to practice is considered. In this context emissions trading as a regulatory concept is compared to a parallel example of regulating a commons: parking on public roads. The aim of this comparison is to highlight that emissions trading - just like another example of commons regulation – is capable of creating multiple regulatory regimes depending on the underlying world-view. In the last part of this Chapter, Section VI, the findings of the Chapter are recapitulated.

Three points should be made before starting. First, this Chapter does not present a normative analysis – it does not prescribe ways in which emissions trading ought to be viewed or constructed. Instead it demonstrates, using the models, that competing visions exist in the emissions trading literature of how emissions trading systems function or ought to function – without deciding which of the models, if any, ought to be preferred. Second, the models employed in this Chapter project *theoretical* understandings – as opposed to descriptions of a particular regulatory reality – of the way in which emissions trading discourses view emissions trading schemes as a regulatory concept. In order to investigate the applicability of the models in practice, these have to be read in the legal context of a particular trading scheme and jurisdiction, which is the task set out in the next Chapter. Third, the list of

emissions trading literature, explored in this Chapter, and upon which the models are based, is not exhaustive. What is referred to as 'emissions trading literature' is in fact a fifty-year long scholarly debate on the regulation of common resources, which is analysed in Chapter Six.[8] Obviously it would be impossible, within the limited scope of this thesis, to dig into all pockets of this rich and extensive discourse and so what is offered is only a glimpse thereof. This brief glance, nonetheless suffices to highlight the divergent portrayals of emissions trading schemes that exist in emissions trading debates, each portrayal corresponding to a distinct emissions trading governance regime.

## II. DEFINING BASIC CONCEPTS

This Chapter deconstructs emissions trading discourses and appreciating its significance requires understanding the purpose of employing models as a methodological tool. Considering that the terms 'model', 'deconstruction' and 'discourses' admit of different interpretations in different contexts, it is particularly important to specify how these notions are understood in this thesis.

### A. Deconstructing *Discourses*

The *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models, which are based on emissions trading discourses, constitute the core of the

[8] Not only have emissions trading debates developed over a long period of time, they are also intrinsically interdisciplinary. On this point see L Heinzerling, 'The Environment' in M Tushnet and P Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford 2003) 701, 702.

analysis in this Chapter. Defining the notion of a 'discourse' first, it is worth noting that this concept has different meanings in different scholarly areas[9] and the bourgeoning literature on discourse theory and discourse analysis shows that there are also many distinct methods of studying it.[10] According to Dryzek, a discourse is by definition a collection of[11]

> shared concepts, categories, and ideas that enable actors to understand situations. Thus, any particular discourse will entail and include judgments, assumptions, capabilities, dispositions, and intentions, establishing the foundations for analysis, debates, agreements, and disagreements. Those who subscribe to a discourse will then be able to put together pieces of information into coherent accounts organized around storylines that can be shared in ways that are meaningful to fellow subscribers.

This definition brings to light two important ideas regarding discourses; first, they are projections of a particular worldview, and second, each discourse creates an analytical

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[9] The notion of 'discourse' tends to be associated with works by Foucault, who studied in particular social discourses, M Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books, Harmondsworth 1991), M Foucault, *The History of Sexuality* (Penguin Books, Harmondsworth 1981), and the relationship between power and discourse see M Foucault, *The Order of Things: An Archeology of the Human Science* (Routledge, London 2002). For an overview see S Hall, 'Foucault: Power, Knowledge and Discourse' in M Wetherell, S Taylor and S Yates (eds), *Discourse Theory and Practice: A Reader* (Sage, London 2001) 72. This Chapter does not apply Foucault's theories to the study of emissions trading schemes, for an example of the use of Foucault's work to environmental matters see É Darier (ed), *Discourses of the Environment* (Blackwell Publishers, Oxford 1999). For an overview of the many different ways in which discourse, and in particular discourse analysis is applied, M Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Clarendon Press, Oxford 1995) 43.

[10] Note that none of these will be studied in any detail in this thesis but for an overview see J Torfing, 'Discourse Theory: Achievements, Arguments, and Challenges' in D Howarth and J Torfing (eds), *Discourse Theory in European Politics: Identity, Policy and Governance* (Palgrave MacMillian, Hampshire 2005) 1, 5. For a collection on the application of discourse theory in a EU context see D Howarth and J Torfing (eds), *Discourse Theory in European Politics: Identity, Policy and Governance* (Palgrave MacMillan, Hampshire 2005). A Bryman, *Social Research Methods* (3rd edn Oxford University Press, Oxford 2008) 501.This literature shows that discourse analysis is a study itself.

[11] J Dryzek, 'Paradigms and Discourses' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 44, 46.

platform for a set of beliefs. Congruent to this explanation, a discourse may be viewed as a shared way of apprehending the exterior,[12] and an ensemble of ideas, concepts, and categories to which disparate views, values, and interests may be attached,[13] and which become the medium through which actors try to impose their view of reality on others.[14] Importantly, a discourse is able to project 'one version of the world in the face of competing versions',[15] and as such, it is based on a particular narrative, which suggests unity and a common thought within a particular group or debate that is part of a broader and often more complex discussion.[16] In the context of legal scholarship, a discourse may be understood as a particular framework through which the legal environment and the regulatory mechanisms applied thereto are interpreted.[17] Together these accounts suggest that each discourse paints a picture and encompasses a particular attitude or position against which experiences and facts may be tested or analysed.

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[12] J Dryzek, *The Politics of the Earth: Environmental Discourses* (2nd edn Oxford University Press, Oxford 2005) 9.

[13] M Hajer, 'Coalitions, Practices, and Meaning in Environmental Politics: From Acid Rain to BSE' in D Howarth and J Torfing (eds), *Discourse Theory in European Politics: Identity, Policy and Governance* (Palgrave Macmillan, Hampshire 2005) 297, 300.

[14] M Hajer, 'Discourse Coalition and the Institutionalisation of Practice: The Case of Acid Rain in Britain' in F Fischer and J Forester (eds), *The Argumentative Turn in Policy and Planning* (UCL Press, London 1993) 43, 47.

[15] R Gill, 'Discourse Analysis' in M Bauer and G Gaskell (eds), *Qualititative Research with Text, Image and Sound: A Practical Handbook* (Sage, London 2000) 172, 176.

[16] Hajer 'Discourse Coalition' (n 14) 46.

[17] For a collection of essays that portrays different kinds of environmental discourses and their implications on international and public law, as well as environmental law more generally, see B Jessup and K Rubenstein (eds), *Using Environmental Discourses to Traverse Public and International Environmental Laws* (Cambridge University Press, Cambridge 2011, in press), and with regard to emissions trading discourses S Bogojevic, 'Global Gazing: Viewing Markets Through the Lens of Emissions Trading Discourses' in K Rubenstein and B Jessup (eds), *Using Environmental Discourses to Traverse Public and International Environmental Laws* (Cambridge University Press, Cambridge 2011, in press).

Using Dryzek's term of 'storylines' to describe discourses may appear abstract, especially since this analogy falls short of explaining the impact that discourses may have on the particular topics they orbit. In this regard, it is crucial to flag the importance of language.[18] Obviously discourses depend on the existence and use of language for a story to be told but a discursive 'storyline' is not a mere anecdote or just a matter of words; rather it is part of a reality.[19] This argument rests on the idea that language is constructive and that the way in which environmental problems are interpreted, explained, discussed and analysed has consequences.[20] A particular use of language constructs a particular view of social reality,[21] and even if we do not subscribe to the view in question, we cannot avoid being influenced by it. Hajer offers a similar argument by showing how that the collective understanding of

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[18] For an introductory discussion abut the impact of language see M Wetherell, 'Themes in Discourse Research: The Case of Diana' in M Wetherell, S Taylor and S Yates (eds), *Discourse Theory and Practice: A Reader* (Sage, London 2001) 14, 16. The importance of language in discourse analysis lies at the heart of debates in contemporary social science and epistemology and 20th century philosophy. In this regard see for instance L Wittgenstein, *Philosophical Investigations* (4th edn Wiley-Blackwell, West-Sussex 2009), J Austin, 'A Plea For Excuses' (1956) 57 Aristotelian Society 57, and for a general overview F Fischer and J Forester, 'Introduction' in F Fischer and J Forester (eds), *The Argumentative Turn in Policy Analysis and Planning* (UCL Press, London 1993) 1, 1, 15, J McGowan, *Postmodernism and Its Critics* (Cornell University Press, Ithaca 1990), and J Potter, 'Wittgenstein and Austin' in M Wetherell, S Taylor and S Yates (eds), *Discourse Theory and Practice: A Reader* (Sage, London 2001) 39.

[19] Hajer 'Discourse Coalition' (n 14) 44. Dryzek explains that language and power – as examined by Foucault (n 9) – is central in analysing discourses and that social actions are always associated with language that establish their meaning, see Dryzek, *Paradigms and Discourses* (n 11). See also S Jasanoff, 'The Idiom of Co-Production' in S Jasanoff (ed) *States of Knowledge: the Co-Production of Science and Social Order* (Routledge, London 2004) 1, in which the idea of co-production between state-making and knowledge-making (interrelationships between society and technology) is discussed in a similar fashion as language and reality in the examples provided above.

[20] Dryzek *Politics of the Earth* (n 12) 10.

[21] Bryman *Social Research Methods* (n 10) 501.

language has moved away from seeing it as a mere description, or *means* to appreciating it as a *medium*:[22]

> ...a system of signification through which actors not simply describe but *create* the world

This definition of a discourse means, in the context of this Chapter, that the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models are based on particular narratives concerning the role of emissions trading schemes as regulatory concept, which, albeit mere positive descriptions, have real implications for how emissions trading is understood to function; in other words, they construct regulatory realities. The role of discourses in this Chapter is further explained by defining 'deconstruction' and 'model' in the same context.

## B. *Deconstructing* Discourses

The notion of 'deconstruction' also allows for different interpretations in different contexts, although it tends to be associated with the act of analysing philosophical and literary works with the aim of examining assumptions implicit in different forms of expression.[23] Deconstruction, following this description, is similarly carried out in this Chapter only that philosophical and literary texts are exchanged with emissions trading discourses, and deconstruction passed by inquiring into the assumptions set out in emissions trading debates about the objectives of emissions trading schemes.

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[22] Hajer, *Discourse Coalition* (n 14) 44. Gill 'Discourse Analysis' (n 15) 172 expresses a similar argument.

[23] As pioneered by the French philosopher Derrida, see J Derrida, *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (Northwestern University Press, Chicago 1973) 107, J Derrida, *Writing and Differences* (Chicago University Press, Chicago 1978), J Derrida, *Of Grammatology* (Johns Hopkins University Press, Baltimore 1974).

Upon this scrutiny, patterns surface that reflect different ways in which the rationale of emissions trading are understood in the scholarly debate. These patterns show that the portrayal of the problems that emissions trading schemes are supposed to remedy is inescapably linked to the way in which emissions trading, as a regulatory strategy is conceived.[24] In other words, the view of the problem is symptomatic of the suggestions as to how to ameliorate or solve it.[25] With the aim of highlighting these links, the three models – the *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models – are set out, each model illustrating a different understanding of why the overexploitation of the commons has occurred ('portraying the problem'),[26] and how emissions trading does or ought to remedy it ('understanding the solution').

The aim of this exercise is to flesh out differences, as well as to acknowledge overlaps, in the way emissions trading schemes are understood in the literature. Deconstruction therefore means exploring emissions trading discourses, and the way in which emissions trading schemes, as regulatory concepts, are narrated but without rejecting or criticising these descriptions. Ultimately, the intention is to shed light on

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[24] Similarly Jasanoff argues that the ways in which we understand the world is inseparably linked to the ways in which we seek to organise and control it, see (n 19).

[25] Bodansky argues that the in which problems are defined, is linked to our values see D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, Cambridge, Massachusetts 2010) 55, 59. Framing is particularly important in this context, for its impacts see S Jasanoff, 'Heaven and Earth' in S Jasanoff and M Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, Cambridge, Mass. 2004) 31, 49.

[26] As explained in Section I of this Chapter, the literature seems to agree upon that the overexploitation of commons is the problem, which emissions trading schemes should remedy; however, scholars take different views as to why the overexploitation has occurred in the first place.

these diverse conceptualisations of emissions trading and show how these set out distinct governance regimes for emissions trading schemes.

It is important to understand *how* different discourses have been distinguished and mapped out in the models, even before I set out and use the models in this Chapter. Differences in understanding emissions trading as a regulatory concept in the emissions trading literature are manifested rhetorically, through various catch phrases, and vocabularies of motive, as well as metaphors and analogies employed in discussing this pollution control system.[27] To a certain extent the models overlap, but their distinction is clear in the language used in defining and explaining emissions trading schemes. In the *Economic Efficiency Model* the focus is on the cost-effectiveness of the emissions market. Advocates of this model come mainly from Economics, and the debates therefore revolve around ideas of 'internalising externalities', creating 'incentives', 'bargaining systems' and 'profit-centres' that produce 'cost-efficient' results in managing the commons in air. This model reflects views that underpin international climate negotiations, and global trade agreements.[28]

In the *Private Property Rights Model*, on the other hand, the focal point is the market as a 'free' forum in which citizens of a community, rather than the state, are able to decide over and control common resources. Key phrases embedded in these discourses include 'liberty', 'bureaucratic coercion', 'privatisation', and 'private property rights'. In distinction from the other two models, visions of central

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[27] Method as applied in R Kemp, 'Why Not In My Backyard? A Radical Interpretation of Public Opposition to the Deep Disposal of Radioactive Waste in the United Kingdom' (1990) 22 Environment and Planning 1239. B Jessup and K Rubenstein (n 17).

[28] Chapter Four explains which goals and aims are imposed on the EU ETS by law- and policymakers at the EU level.

government in the *Private Property Rights Model* are shared with certain classic public choice theorists – in particular the view that the sole aim of government officials is to be re-elected to office, even if that comes at the cost of protecting a common good, such as clean air.[29] This places the *Private Property Rights Model* in opposition to any common or top-down approaches to public and international law.

In the *Command-and-Control Model*, the discussion shifts to regulatory reform and the manner in which emissions trading schemes can help to comply with regulatory obligations. Key words in this model are 're-regulation', 'regulatory and administrative flexibility', 'permits' and 'authorisation'. The *Command-and-Control Model,* in contrast to the two previous models, has a strong public law tradition, in which implementing administratively flexible regulation is the focal point of discussion.

It may appear to the reader that deconstructing emissions trading discourses by focusing on vocabulary employed in these debates is a rather frivolous affair, or at least an activity without any serious implications. Ultimately, stating legal solutions and problems in, for instance, economic language as illustrated in the *Economic Efficiency Model,* is not equivalent to applying Economics. Bork, for instance, highlights this point in evaluating courts' application of economic reasoning,

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[29] Public choice literature is vast. For classic public choice examples see A Downs, *An Economic Theory of Democracy* (Harper, New York 1957), J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor 1965), K Arrow, *Social Choice and Individual Values* (Yale University Press, New Haven 1963). For a recent overview see J Mashaw, 'Public Law and Public Choice: Critique and Rapprochment' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 19, D Farber and A O'Connell, 'A Brief Trajectory of Public Choice and Public Law' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 1.

explaining that 'economics is not a set of words; it is a method of reasoning'.[30] The focus on the narrative and linguistic differences in emissions trading debates in setting out the *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models does not contradict Bork's argument; on the contrary, this thesis aims to show that despite dominant, non-legal vocabulary often associated with emissions trading schemes, emissions trading is a legal vehicle, based on a particular legal text that must be understood in its legal context.

## C. Significance of the Models

The *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models that this Chapter is based upon, show that the understanding of emissions trading in emissions trading discourses is mediated by three distinct and competing visions of how these trading schemes function or ought to function. The models thus highlight three distinct governance regimes upon which emissions trading schemes may be based, each suggesting a different role for the market, the state, and rights in emissions allowances in such a scheme.

The models are significant for three reasons. First, they show that emissions trading schemes can be part of different paradigms, each setting out a different mould according to which these trading schemes may be constructed. Determining the nature of a particular trading scheme may only be done in legal isolation of such a scheme, and the models demonstrate that the role of the market, the state, and the legal rights envisioned for emissions allowances are crucial indicators of the type of regulatory

[30] R Bork, 'The Role of the Courts in Applying Economics' (1985) 54 Antitrust Law Journal 21, 22.

structure that a particular emissions trading scheme may seek to establish. In fact, deciding where to allocate regulatory power under an emissions trading scheme – the market, the rights holders, or the central government – is the key consideration in creating such a governance structure. Second, therefore, the models highlight that the allocation of regulatory power is the core of emissions trading debates. Third, the models make obvious that emissions trading cannot be generalised or described as a straightforward regulatory strategy; rather these trading schemes must to be viewed through a kaleidoscope of hopes and objectives that, in effect, construct the way emissions trading schemes are created and interpreted. In this context, my aim is not to describe *why* these different perceptions have arisen, but rather to show that these exist and point to their implications.

There exist important limitations to the role of models as described. To start with, the models contain elements both of what the emissions trading discourses argue in relation to emissions trading, and of that which I understand these discourses to state regarding emissions trading. As these models are my own, they can impossibly overcome the oversimplification of this kind of categorisation.[31] In this regard, it is crucial to note the scope and use of models in this Chapter. First, the models are neither prescriptive nor normative and therefore *do not* create a strict pattern of how emissions trading must be understood. The models are instead created so as to establish a forum for reflection and debate in environmental law scholarship about the way in which scholars understand and portray emissions trading as a regulatory strategy and then examine the implications thereof in law.

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[31] Frug makes a similar claim in G Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard Law Review 1276, 1282.

Second, the models are limited in scope; they are based on my own selection of emissions trading literature and further narrowed by focusing on discourses that promote emissions trading as a regulatory strategy.[32] The reasons for these limitations are twofold: first, it is practically impossible to include *all* emissions trading literature in a thesis limited in scope. The second reason relates back to Chapter One, in which I highlighted how emissions trading schemes have thrived in environmental law and policy, and in environmental law scholarship, one key regulatory appeal in this regard being their presumed straightforwardness.[33] Unpacking these debates and analysing reasons why emissions trading is furthered shows that there are competing images and establishes thereby that these are neither uniform nor straightforward.

Third, the models do not to reflect *a* particular regulatory reality, and as such, they do not project the functionality or construction of a specific emissions trading in practice. There are two reasons why this is the case. First, many influential scholarly contributions that constitute cornerstones of the emissions trading literature do not analyse emissions trading schemes *per se*. For instance, Coase,[34] who, as explained in

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[32] Environmental ethics literature, for instance, is omitted from the analysis in this Chapter. For a brief overview of the critique of emissions trading based on ethics see M Sagoff, 'Controlling Global Climate: The Debate over Pollution Trading' in V Gehring and W Galston (eds), *Philosophical Dimensions of Public Policy* (Transaction Publishers, New Brunswick 2002) 311, R Goodin, 'Selling Environmental Indulgences' (1994) 47 Kyklos 573. Also much writing on climate change and emissions trading is based on ethical concerns looking at distributive justice in particular. See H Sue, 'Climate' in D Jamieson (ed) *A Companion to Environmental Philosophy* (Blackwell Publishing, Oxford 2001) 449, M Paterson, 'International Justice and Global Warming' in B Holden (ed) *The Ethical Dimensions of Global Change* (Macmillan, London 1996) 181, G Michael, 'Seeking Fair Weather: Ethics and the International Debate on Climate Change' (1995) 71 International Affairs 463.

[33] How this straightforwardness is portrayed and why it is assumed is further explored in Chapter Six.

[34] R Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.

the previous Chapter, is considered to be the 'grandfather of pollution trading',[35] discusses optimal solutions to the allocation of resources in various commons[36] without, however, exploring or creating a specific regulatory agenda for emissions trading schemes. Yet his work forms an intrinsic part of emissions trading discourses. Similarly, Hardin,[37] whose scholarship is at the heart of any regulatory debate concerning control of the commons, envisions a number of different regulatory solutions, including privatisation, subsidies, taxes, and direct regulation, which may be applied to common resources.[38] As such, neither Coase nor Hardin – two central figures in theory-based emissions trading scholarship, in fact analyse emissions trading schemes. On this basis the models are mere *theoretical* frameworks. Second, any examination of the functionality or construction of emissions trading in practice must be carried out against the backdrop of the legal culture in which the emissions trading scheme in question operates. That is why in Chapters Four and Five, the applicability of the *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models to narratives relating the EU ETS will be examined in the context of the legal milieu of this set trading scheme.

Fourth, my intention is not to try to convince the reader that the categorisation of the emissions trading literature presented in this Chapter is the only possible or

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[35] L Lohmann, 'Carbon Trading: A Critical Conversation on Climate Change, Privatisation and Power' (2006) 48 Development Dialogue 4, 55.

[36] G Brown, 'Renewable Natural Resource Management and Use Without Markets' (2000) 38 Journal of Economic Literature 875.

[37] G Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

[38] With regard to pollution, Hardin suggests that coercive laws or taxing ought to be applied that 'make it cheaper for the polluter to treat his pollutants than to discharge them untreated', ibid 1254.

correct type of modelling.[39] Rather, my argument is that although we may disagree about the exact distinctions as to how emissions trading schemes are understood in emissions trading literature and set out in the models, it is nonetheless obvious that different conceptualisations about these trading schemes exist. The importance of understanding these conceptual differences relates back to earlier discussions in this Chapter about the significance of language and may be further explained by allusion to Mashaw's comment on Picasso's portrait of Gertrude Stein.[40]

> Commenting on his portrait of Gertrude Stein, Pablo Picasso is reported to have said:
>
> 'Everybody thinks she is not at all like her picture, but never mind, in the end she will manage to look just like it.'
>
> Picasso's statement may have been a product of his famous ego, but it contains an important insight. We are often the captives of our pictures of the world, and in the end, if the world does not look just like them, their influence on our perceptions is nevertheless profound.

Mashaw explains that although many would disagree with the way in which Picasso painted Stein, his portrait still *influences* our perceptions. He summerises; 'Our vision of what *is* guides our approach to what *ought* to be.'[41] This point is crucial, as it explicates the weight and vigour of pictures – both painted and written. Similarly, the models may be seen as distinct canvasses, each exhibiting a different view of emissions trading as a regulatory strategy. Although these pictures may not reflect

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[39] In this Chapter I focus on setting out models that deconstruct *emissions* trading discourses. Whether these models are applicable to other environmental policy debates is a question that falls outside the scope and aim of this Chapter.

[40] J Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, New Haven 1997) 1.

[41] Ibid. These notes draw inspiration from a similar analysis undertaken in E Fisher, B Lange and E Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, Oxford Forthcoming) Chapter One.

existing trading schemes or the way in which, if given the choice, we personally might depict them, the fact remains that the way in which they are portrayed in the models frames certain perceptions of emissions trading. The legal implications are manifested in the prescription of distinct roles to that of the market and the state, as well as the legal status of emissions allowances in emissions trading. As such, the models highlight various governance regimes according to which emissions trading schemes are based.

In sum, the models in this Chapter encompass different understandings as to why the exploitation of commons has occurred and how emissions trading remedies or ought to remedy it. Although these models are simple archetypes based on emissions trading literature, they frame the way in which the role of the market, the state, and the legal status of emissions allowances are understood with regard to emissions trading schemes. In this sense, the models highlight important themes concerning regulatory strategies applied to commons in air. The hope is by better understanding emissions trading models, there is better hope of creating systems mindful of regulatory disparity, local culture and understanding of different public law traditions.

## III. THE THREE MODELS

Below the *Economic Efficiency, Private Property,* and *Command-and-Control* models are set out and examined separately. This analysis is carried out by first listing the problem that emissions trading is understood to remedy ('portraying the problem') and thereafter the role that is envisioned for emissions trading schemes in remedying these ('understanding the solution'). The following sub-sections contain the bare

analysis of the emissions trading discourse in this regard, leaving the exercise of evaluating the models to Section IV.

### A. Economic Efficiency Model[42]

In the *Economic Efficiency Model*, emissions trading is understood to solve the problem of externalities. The belief is that externalities (such as air pollution) are created due to a lack of incentives to protect the commons. Emissions trading is identified as being able to circumvent this exploitation by turning externalities into transferable rights that are cost-efficiently allocated, via the market, to their highest bidder (thus internalising them). This idea is inspired by Coase's theory about removing externalities by creating a bargaining system, in which externalities are turned into property rights and thereafter traded.[43] In order to incentivise this kind of internalisation, the core consideration in constructing emissions trading is ensuring

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[42] Literature that falls under this model forms part of theory-based scholarly discussions concerning emissions trading and stems mainly from Economics. Examples thereof include Coase 'Problem of Social Cost' (n 34), H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economic Review 347, W Montgomery, 'Markets in Licenses and Efficient Pollution Control Programs' (1972) 5 Journal of Economic Theory 395, J Dales, *Pollution, Property and Prices: An Essay in Policy-Making and Economics* (University of Toronto Press, Toronto 1970). From a legal perspective see B Ackerman and R Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333. For an overview of theory-based debates on emissions trading see W Baumol and W Oates, *The Theory of Environmental Policy* (2nd edn Cambridge University Press, Camridge 1988) 177 and A Myrick Freeman III, 'Economics' in D Jamieson (ed) *A Companion to Environmental Philosophy* (Blackwell Publishing, Oxford 2001) 277, 287.

[43] Coase, ibid. It is crucial to note that although this model is inspired by certain theories advocated by Coase, it is not a truly Coaseian model. As explained in Section II (C) above, theory-based literature, including studies by scholars such as Coase, form part of emissions trading discourses although it does not discuss emissions trading *per se*. Thus, even if this model is heavily influenced by Coase, it is a mere application and not a mirror image of Coase's theories.

that the trading scheme functions cost-efficiently.[44] From this perspective, emissions trading is defined as a profit-centre,[45] which does not reduce emissions in itself but which makes it profitable to do so.

### *1. Portraying the Problem*

In the *Economic Efficiency Model*, externalities are flagged as the problem that emissions trading has as its regulatory rationale to remedy. In short, externalities are costs that are not reflected in free market prices.[46] A firm that discharges its waste into a river rather than purifying it is a typical example of an externality. By treating the river as a free resource, or a commons, the cost of polluting the river is imposed neither on the consumer who purchases the firm's product, nor on the polluter, but on society as a whole.[47] Costs of pollution, however, are not only externalised by private entities and in isolated markets but also by jurisdictions and sovereign.[48] Bodansky explains:[49]

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[44] Note that efficiency may be defined in various ways; a measure may be deemed inefficient if it costs more than the benefit it reaps, or if it is more costly than alternative ways of reaching the same objective. J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambridge 2007) 421. In this Chapter the latter definition applies.

[45] Stewart 'Economic Incentives for Environmental Protection' (n 4) or, as explained by Raymond 'Emerging Revolution in Emissions Trading Policy' (n 2) 102, emissions trading offers 'bang for the buck'.

[46] B Harrison, C Smith and B Davies, *Introductory Economics* (Macmillian Press, London 1992) 40.

[47] Ibid.

[48] Fisher, Lange and Scotford *Environmental Law* (n 41) Chapter Five.

[49] D Bodansky, J Brunnée and E Hey, 'International Environmental Law: Mapping the Field' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 1, 9.

> For example, one country emits sulphur dioxide that causes acid rain to fall on its neighbour downwind or it discharges pollution into a river, causing damage to lower riparians. To the extent that a country is able to 'externalize' the costs of polluting, it has no economic incentive to stop.

Following from this description, externalities arise because there is a lack of incentive to internalise them. This theory is further elucidates by allusion to Hardin's description of the 'Tragedy of the Commons'.

Hardin describes the idea behind the 'Tragedy of the Commons' by analogy to the management of agricultural land or more specifically to herdsmen with access to a 'pasture open to all'.[50] Without imposing any entrance or exit restrictions on the use of the pasture, every rational herdsman will seek to add additional grazing animals to the pasture with the aim of capitalising on the benefit he gains by having his cattle grazing for free. This might not in itself lead to utility problems. However, since all rational herdsmen will follow this path of reasoning and each add an extra animal to the common pasture, overgrazing will quickly become a problem. 'Therein is the tragedy'.[51] The underlying problem that Hardin describes is that there is no system in the commons that incentivise the herdsmen to internalise the costs imposed on the remaining herdsmen when extra animals on the pasture are added. 'In a 'reversed'[52] way, the tragedy of the commons appears also in the problem of pollution; rather than extracting from natural resources, air pollution puts something into a system and in

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[50] Hardin 'Tragedy of the Commons' (n 37) 1244. Note that Hardin re-frames his argument in later studies in which he claims that rather than regulating the commons via for instance privatisation, human behaviour directly ought to be controlled. G Hardin, 'The Tragedy of the Unmanaged Commons: Population and the Disguise of Providence' in R Andelson (ed) *Commons Without Tragedy* (Shepheard-Walwyn Publishers, London 1991) 162.

[51] Hardin 'Tragedy of the Commons' (n 37) 1244.

[52] Ibid 1245.

that sense it creates externalities in the form of purification costs or opportunities lost to subsequent or concurrent users.[53] The calculation of utility remain the same; the rational man finds that his share of the cost of the waste he discharges into the commons less than the cost of purifying the waste before releasing it.[54] The problem of externalities are understood to be particularly problematic and acute as human population increases and economic activities advance and become more complex.[55] As a result, certain externalities, such as greenhouse gases, are allowed to increase to levels that cause climate change, which is a threat in particular to vulnerable communities.[56] Subsequently, the effects of externalities become extensive, making the need for the application of a regulatory strategy for the commons pressing.

What the discussion above shows is that in the *Economic Efficiency Model* emissions trading is understood to be a regulatory strategy that seeks to solve the problem of externalities in the commons. Externalities are said to arise due to lack of incentives to internalise them.

### *2. Understanding the Solution*

The legal solution proposed by the *Economic Efficiency Model* to the above problem is heavily influenced by academics such as Coase who argue that externalities can be

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[53] Harrison, Smith and Davies *introductory Economics* (n 46).

[54] Hardin 'Tragedy of the Commons' (n 37) 1245.

[55] Hardin defines the problem of pollution to be a consequence of population. Ibid 1245.

[56] For an overview of the climate change debate see J Shaw and R Stroup, 'Global Warming and Ozone Depletion' in W Block (ed) *Economics and the Environment: A Reconciliation* (The Frasier Institute, Vancouver 1990) 159.

resolved by creating a bargaining system in which these are traded.[57] In this regard, externalities are seen as being left to the market to deal with on its own.[58] Central to this model is the belief that the problem with externalities is of a 'reciprocal nature'.[59] This means that by prohibiting activities which give rise to externalities (for example, forbidding the herdsmen in Hardin's example from accessing the grazing area), all herdsmen in that specific commons – and not only the herdsmen whose activities give rise to externalities – will be negatively affected.[60] Instead of banning externalities outright (for example via regulation), rights – either to cause harm or to be free from harm – are assigned to one party. In this way, the possibility of bargaining for the entitlement is created. The theory is that, subject to transaction costs, the party who values (in economic terms) the entitlement the most will obtain it.[61] In the context of air pollution, the cost of an entitlement to emit gases is the cost of opportunity lost to breathe unpolluted air, and only if the entitlement is valued more than clean air will air pollution occur.[62] This means that the allocation of rights to unpolluted air or rights to emit pollution is not based on environmental considerations but is, rather, substituted by economic calculations. As a result, the acceptable limit of air pollution is, according to this model, defined not by the regulator but by the market. This relationship between the market and the state in emissions trading schemes is explained further below.

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[57] Coase 'Problem of Social Cost' (n 34).

[58] Bodansky *International Environmental Law* (n 25) 49.

[59] Coase 'Problem of Social Cost' (n 34) 2.

[60] Ibid 2-3, 27.

[61] J Wiener, 'Global Environmental Regulation: Instrument Choice in the Legal Context' (1999) 108 Yale Law Journal 677, 709.

[62] Coase 'Problem of Social Cost' (n 34) 44.

In the *Economic Efficiency Model*, the market plays a central role in emissions trading because it is understood to provide the most cost-effective allocation of externalities. Its cost-effectiveness lies in the low cost of private transactions, which is contrasted with the traditionally high costs of administrative regulation.[63] As a consequence, questions such as what interest should prevail or what payment is paid for the right to externalities should not be defined by the regulator but are decided instead by market mechanisms.[64] In effect, price and allocation of externalities in this model are seen to depend on the shrewdness of the various bargainers in emissions markets.[65] This theory is, however, based on the premise that there are no transaction costs.[66] In real life, transaction costs exist, and when these are high, the *Economic Efficiency Model* explains that government intervention in the emissions market may be required.[67] To be more specific, if the government provides solutions for internalising externalities at a lower cost than can the market, the role of the

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[63] The cost-effectiveness of emissions trading, compared to direct regulation, is widely discussed in emissions trading literature, see for instance Ackerman and Stewart (n 42) 1362, T Tietenberg, *Emissions Trading, An Exercise in Reforming Pollution Policy* (Resources for the Future, Johns Hopkins University Press, Washington, D.C. 1985) 16, J Nash, 'Too Much Market? Conflict between Tradable Pollution Allowances and the "Polluter Pays" Principle' (2000) 24 Harvard Environmental Law Review 465, 481, R Stavins, 'Policy Instruments for Climate Change: How Can National Governments Address a Global Problem?' (1997) University of Chicago Legal Forum 293, 297-298, J Wiener, 'Global Environmental Regulation: Instrument Choice in the Legal Context' (1999) 108 Yale Law Journal 677, 682, 766-67.

[64] Note that Pigou, as a contrast, argues that the government ought to internalise externalities, and according to Pigou, via taxation. A Pigou, *Wealth and Welfare* (Macmilian, London 1912). Coase's study differs from Pigou's theory in the sense that Coase sees the market – due to its allocative efficiency – as opposed to the state, to internalises externalities.

[65] Coase 'Problem of Social Cost' (n 34) 5.

[66] Ibid 17.

[67] In analysing Coase, Bodansky explain that the greater the number of parties involved, the higher the bargaining costs and the greater the potential for strategic behaviour and free-riding. This is why externalities, such as pollution, are difficult to manage and may require state intervention. See Bodansky *International Environmental Law* (n 25) 49-50.

government should be to limit the costs of trading by regulatory intervention.[68] Therefore, when a regulatory strategy is applied to the commons, it should be constructed so as to provide the most cost-effective solutions instead of assuming that either the government or the market work 'costlessly'.[69] From this viewpoint, emissions trading is seen as a pragmatic economic process of allocation of externalities rather than as a doctrinal laissez-faire theory.[70]

According to the *Economic Efficiency Model* it is imperative to ensure that the object of trade, in this context emissions allowances, is well-defined as legal rights. Here it is suggested that in theory the exact legal status of these rights is immaterial as long as the rights are clear and thus do not create an obstacle to trade. The belief is that, subject to transaction costs, these will always be allocated to their highest bidder.[71] However, because transaction costs exist, the legal definition of emission allowances has a direct impact on the economic activity in the market, as it may affect investment.[72] With the single aim of providing security for investment in emissions trading schemes, emissions allowances in the *Economic Efficiency Model* are often defined in property rights terms.[73] This shows that the key consideration in

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[68] H Demsetz, 'The Cost of Transacting' (1968) 82 The Quarterly Journal of Economics 33, 34, Coase 'Problem of Social Cost' (n 34) 18.

[69] R Posner, 'Nobel Laureate: Ronald Coase and Methodology' (1993) 7 Journal of Economic Perspectives 195, 202.

[70] Ibid.

[71] Coase 'Problem of Social Cost' (n 34) 19.

[72] Ibid.

[73] See G Chichilnisky and G Heal, 'Markets for Tradable Carbon Dioxide Emission Quotas: Principles and Practice' in G Chichilnisky and G Heal (eds), *Environmental Markets: Equity and Efficiency* (Colombia University Press, New York 2001) 13, 17 and R Hahn and G Hester, 'Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program'

constructing emission trading schemes according to this model is to ensure that investments in the market are secured and the cost-effectiveness of the market safeguarded.

In sum, according to the *Economic Efficiency Model* emissions trading follows the rationale of a profit-centre that ensures allocative efficiency of externalities, and in this context, air pollutants. The market plays a crucial role in this regard as it is seen as internalising costs of pollution at the optimal price level, whilst the state intervenes in this market only when it is cost-beneficial to do so.

### B. Private Property Rights Model[74]

In the *Private Property Rights Model* the problem which emissions trading should solve is government control of the commons. State officials are understood to over-

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(1989) 6 Yale Journal on Regulation 109, 140, D Cole, 'Clearing the Air: Four Propositions About Property Rights and Environmental Protection' (1999) 10 Duke Environmental Law and Policy Forum 103, 109. Note that Cole argues that all environmental laws are property-based, including emissions trading schemes, but that these establish different types of properties.

[74] Literature that falls under this model includes scholarly contributions by free market environmentalists such as Anderson and Leal, as well as public choice inspired literature that identifies the government as the core of environmental protection problems. T Anderson and D Leal, *Free Market Environmentalism* (Westview Press, Oxford 1993) and E Brubaker, *Property Rights in the Defence of Nature* (Earthscan, London 1958). See also Heal who presents private property rights in public goods natural resources as a way of protecting these as opposed to leaving them to central government which is understood to be short-sighted and focused on quick, economic return. G Heal, 'Markets and Sustainability' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 410. Note that advocates of property rights in natural resources held on the behalf of citizens or future generations are distinct from this model. For an example of such scholarship see P Kohler, 'Common Property and Private Trusts' in J Holder and D McGillivray (eds), *Locality and Identity: Environmental Issues in Law and Society* (Ashgate, Dartmouth 1999) 223.

exploit the commons for their own benefit. By pleasing the industry and creating jobs, they secure their own re-election.[75] The formulation of the problem, which emissions trading in this model is seen to remedy, reflects a certain outlook on government control. Creating private property rights that are tradable in an emissions market is understood as a substitute for government control of common resources altogether. Here, privatisation of the commons is the epiphany of liberty. By transferring these private property rights to citizens, government control is diminished, and property owners are left to manage the commons on their own terms via the 'free' market (or in other words 'free' from regulatory intervention).[76]

### *1. Portraying the Problem*

According to the *Private Property Rights Model* government control of common resources is the key problem to the exploitation of the commons. State officials are described as squandering property rights in the commons for their personal benefit.[77] The reason is that a strong economy and a high level of employment guarantee popularity in elections, and so, the government has a selfish interest in pleasing industries that can secure national prosperity, rather than reducing air pollution.[78] It is described that in case after case, 'government regulation have made it easier – and

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[75] See R Stroup and S Goodman, 'Property Rights, Environmental Resources, and the Future' (1992) 15 Harvard Journal of Law and Public 427, 430.

[76] This signifies a regulatory shift from the government to the individual. See Brubaker (n 74) 174.

[77] Ibid 160-162, T Anderson and D Leal, 'Free Market Versus Political Environmentalism' (1992) 15 Harvard Journal of Law and Public Policy 297, 301. This idea is similar to those in the public choice scholarly contributions listed in n 29.

[78] Brubaker *Property Rights in the Defence of Nature* (n 74) 105.

cheaper – for industries to pollute.'[79] In effect, both the *Economic Efficiency Model* and the *Private Property Rights Model* are based on the belief that incentives matter. The distinction lies in the fact that the *Economic Efficiency Model* identifies the *lack* of incentives, as opposed to acting according to the *wrong* incentives, as envisioned in the *Private Property Rights Model,* as the key problem that emissions trading addresses.

Examples used to illustrate in what manner governments place jobs and revenue from industries before nature preservation are predominantly conservation cases in North America.[80] For instance, governments are described as having licensed and bankrolled polluters, who have 'turned forests into wastelands, emptied oceans of fish, and dammed rivers that were once magnificent.'[81] For the personal benefit of state officials, governments allegedly pressured property owners via for example taxation, subsidies or expropriation to allow industries to be set up ahead of securing pollution control or nature preservation.[82] Also, costly court proceedings, difficulties of court challenges, and complex causal chain justifications between pollution and harm are identified as administrative burdens leaving people powerless to protest against activities that cause, for example, high levels of air pollution.[83]

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[79] Ibid.

[80] One argument is that previous cases of environmental destruction bring to light what may happen to the remaining environment if government's are allowed to continue to control it, Heal 'Markets and Sustainability' (n 74) 411.

[81] Brubaker *Property Rights in the Defence of Nature* (n 74) 19-20.

[82] Ibid 161.

[83] Block argues that instead of encouraging respect of property rights, governments all too often override them and that 'this lies at the bottom of many of our pollution-related problems. W Block, 'Environmental Problems, Private Property Rights Solutions' in W Block

Because politicians and bureaucrats are seen as being rewarded for responding to political pressure groups, this model projects a strong disbelief in the ability and will of the political system to ever guarantee the environment's protection. Environmental legislations, therefore, are understood as manifestations of favours to special interest groups even if these are destined to prevent pollution and more generally to safeguard the environment.[84] As such, the *Private Property Rights Model* sees the central government as an example of institutional failure, both with regard to its interventions (by the introduction of certain laws) and omissions (by non-interference in favour of industries) in managing common resources.[85] The emphasis in this model is subsequently on governmental manipulation of the commons, which is understood to have created victims of pollution for the personal benefit of bureaucrats.

What the above discussion shows is that the *Private Property Model* portrays government control as the main reason for the exploitation of the commons. Government ownership and control of natural resources are considered to undermine sound management of natural resources and since no private property rights exist in commons resources, state control over such resources is retained and the commons are accordingly continuously abused.

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(ed) *Economics and the Environment: A Reconciliation* (The Frasier Institute, Vancouver 1990) 281, 282, ibid 113, 130.

[84] T Anderson and D Leal, 'Rethinking the Way We Think' in J Dryzek and D Schlosberg (eds), *Debating the Earth: The Environmental Politics Reader* (Oxford University Press, Oxford 2005) 211, 117, Anderson and Leal *Free Market Environmentalism* (n 74) Chapter Six.

[85] Ibid.

### *2. Understanding the Solution*

According to the *Private Property Rights Model*, the role of emissions trading is to replace government control of the commons by establishing tradable private property rights in common resources. The market, the state, and emissions allowances in these emissions trading schemes are not defined as mere components of a cost-effective allocation process – as in the *Economic Efficiency Model* – but as the cornerstone of a free society.

Creating tradable private property rights in the commons is considered essential in the *Private Property Rights Model.* Here, privatisation of common resources is thought to equal liberty: via private property rights, property holders are empowered to use and manage the commons on their *own* terms.[86] This means that the regulatory power which bureaucracies are thought to have misused in managing the commons is shifted to individuals and communities.[87] Individual preference is central, then; it is believed that through the aggregated expression of individual values in the market, resource shortage is avoided and environmental protection achieved.[88] Property holders are believed to avoid bad management decisions simply because their wealth in the property will depend on it.[89] Also, the idea that ownership secures material independence, which in turn facilitates political and even moral

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[86] Brubaker *Property Rights in the Defence of Nature* (n 74) 161-162. Note that creating private property rights to the atmosphere, although encouraged, is recognised as being more technologically challenging than creating property rights to land. Anderson and Leal 'Free Market Versus Political Environmentalism' (n 77) 309-310.

[87] Brubaker *Property Rights in the Defence of Nature* (n 74) 174.

[88] W Sunderlin, *Ideology, Social Theory, and the Environment* (Rowman and Littlefield Publishers, Lanham 2003) 88.

[89] Anderson and Leal 'Rethinking the Way We Think' (n 84) 208.

independence, saturates this model.[90] In effect, the underlying argument is that 'the further a decision maker is removed from this discipline – as he is when there is political control – the less likely it is that good resource stewardship will result.'[91] This approach does not seek to guarantee an overarching environmental standard or goal in a community, rather it advocates for these standards to be set by the will of the individuals or, more narrowly, private property holders.

Although the *Private Property Rights Model* and the *Economic Efficiency Model* are similar in the sense that both advocate for the creation of property rights in emissions allowances, the meaning of property rights here is very different from the understanding of property rights in the previous model. In the *Private Property Rights Model*, privatisation is thought to bestow upon property holders an 'unmatched power'[92] to protect the commons and to use property as a weapon to 'their own defence.'[93] Private property rights empower citizens both to manage and protect the commons from any further overexploitation independently of governmental programmes. This stands as a contrast to the *Economic Efficiency Model*, which

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[90] This idea date back to works such as J Mill, *On Liberty; and Other Essays* (Oxford University Press, Oxford 1991) and J-J Rousseau, *The Social Contract and Discourses* (Dent, London 1913). For an overview of the scholarly interpretations and view of the interrelationship between property rights and liberty see R Barnes, *Property Rights and Natural Resources* (Hart Publishing, Oxford 2009) 37. Barnes focuses on explaining the failings with the general approach to property in this regard by using Nozick's libertarian position as a reference point, R Nozick, *Anarchy, State, and Utopia* (Blackwell Publishing, Oxford 1974).

[91] Anderson and Leal *Free Market Environmentalism* (n 74) 3.

[92] A Scott, 'Foreword' in E Brubaker (ed) *Property Rights in the Defence of Nature* (Earthscan, London 1995) 16.

[93] Ibid 8.

defines emission allowances in property right terms merely as a way of offering security for investments.[94]

It is important to examine the way in which the relationship between the market and the state in emissions trading is understood by this model. The role of the market is vital as it is thought to ensure liberty for the individual. Only the free market, it is argued, can provide individual liberty, 'and without that human freedom, environmental quality will be of little consequence'.[95] According to this view, allowing citizens to trade in emissions allowances leads to a rise in environmental quality while expanding individual liberty.[96] Freedom in this context consists of the breadth of possibilities that the market offers every citizen for finding exchanges of private property rights on the best terms possible for that particular person.[97]

The element of freedom that is understood to exist in markets is contrasted with coercive bureaucratic pollution control. For instance, regulators are described as having failed the citizens and squandered common resources,[98] and since the aim of emissions trading is to hinder the overexploitation caused by this bureaucratic mismanagement, any direct government control of the commons under the emissions

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[94] See n 73.

[95] Anderson and Leal 'Free Market Versus Political Environmentalism' (n 77) 310.

[96] According to free market environmentalism proponents, including Anderson and Leal, private property rights and a free market from regulatory interventions are two essential components for wise custodianship of the environment, see Sunderlin *Ideology, Social Theory, and the Environment* (n 88) 88.

[97] A Alchian, *Pricing Society* (The Institute of Economic Affairs, Leicester 1967) 8.

[98] Brubaker *Property Rights in the Defence of Nature* (n 74) 162.

trading regime is rejected.[99] As such, this model overlaps with certain politics of Reagan – or today's Tea Party[100] – who identified the government not as the solution, but as the problem.[101] The market, on the other hand, is portrayed as 'the only non-arbitrary solution',[102] and a substitute for non-functioning government control of the commons. Emissions trading schemes are seen as being able to manage the commons independently of governmental programmes.[103] Still, this model recognises the need for policy-makers to establish the basic parameters of a market,[104] which in the context of emissions trading includes the legislator defining private property rights and the judiciary enforcing these.[105]

Clearly there are overlaps between this and the previous model; the way in which governmental overexploitation is discussed in this model shows strong resemblance to Hardin's example of herdsmen who overexploit the commons for their personal use. Also, Coase's theory about creating a market in which rights to a

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[99] In other words, the belief is that due to excessive government control and interference in the management of commons, environmental problems arise, see Sunderlin *Ideology, Social Theory, and the Environment* (n 88) 87.

[100] In this context I understand the Tea Party to be based on a sceptical attitude toward 'the expansion of government rolling forth from Washington, D.C.' as described in J O'Hara, *A New American Tea Party: The Counterrevolution Against Bailouts, Handouts, Reckless Spending and More Taxes* (John Wiley & Sons., Hoboken, New Jersey 2010) 4. I am thankful to Liz Fisher for the Tea Party reference.

[101] In his first inaugural address, Reagan stated that 'government is not the solution to our problems, government is the problem', as citied in C Schroeder, 'Public Choice and Environmental Policy' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 450, 452.

[102] Block 'Environmental Problems, Private Property Rights Solutions' (n 83) 302.

[103] Brubaker *Property Rights in the Defence of Nature* (n 74) 161-2.

[104] Dryzek explains that the majority of the scholarship that argues that the role of the government is to simply leave the market be, still recognise the role of the policy-makers in first creating the market. Dryzek *Politics of the Earth* (n 12) 121.

[105] Anderson and Leal *Free Market Environmentalism* (n 74) 3.

commons, such as air, are traded is another idea that the two models share. It is therefore worth recapping the differences. In the *Economic Efficiency Model* the focus is directed at the creation of a cost-effective trading scheme that helps to incentivise internalisation of pollution costs. Questions about whether the market is 'free' or heavily regulated, or whether the role of the state in emissions trading is laissez-faire or profoundly interventionist, are irrelevant as long as the emissions trading scheme constructed produces cost-effective results.[106] The *Private Property Rights Model,* on the other hand, is not equally flexible in this regard. Here, the debates revolve around the problems of bureaucratic mismanagement. Emissions trading is understood as an empowering mechanism by which citizens, via the creation of private property rights in common resources, are able to prevent state officials from continuing to overexploit the commons for their own profit. Private property rights in commons resources are therefore not mere components of a cost-effective market transaction – as in the *Economic-Efficiency Model* – but a symbol of a free and just society.[107] Additionally, the role of the state in emissions trading cannot be compromised but is limited to the legislator defining rights in these trading systems and the judiciary enforcing them. The role of the market, therefore, is to ensure liberty, not only as underpinning a cost-effective and autonomous market – as in the *Economic Efficiency Model* – but more as a way of assisting citizens in establishing a system in which they

[106] Although there is a presumption in the *Economic Efficiency Model* that the emissions market is most cost-effective when government interventions are strictly limited, see (n 67).

[107] In this context 'free society' means that citizens are free to access common resources, own and control these on their own terms and independently from coercive state interference and state pollution programs. Brubaker *Property Rights in the Defence of Nature* (n 74) 161-2.

can manage the commons on their own terms and conditions, according to their own values and independently of state control and bureaucratic meddling.[108]

In sum, in the *Private Property Rights Model* emissions trading is envisioned as turning common resources into tradable private property rights, thereby replacing state control of the commons and allowing property holders to manage and protect common resources on their own terms.

### C. Command-and-Control Model[109]

According to the *Command-and-Control Model* the reason why the exploitation of the atmosphere occurs is traced to direct regulation, or commonly named command-and-control. The role of emissions trading is portrayed as that of re-regulating classic command-and-control by turning outdated legislation into flexible and administratively effective regulation that caps and reduces diffuse pollutants. Re-regulating in this regard does not mean stripping the regulator of regulatory powers to manage the emissions market, or necessarily creating a profit-centre, as suggested in the previous models. Rather, it refers to the idea of creating a more suitable version of

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[108] Similarly, Ackerman and Stewart argue that emissions trading schemes may reinforce democracy by fostering and allowing for democratic debates about environmental values. B Ackerman and R Stewart, 'Reforming Environmental Law: The Democratic Case for Market Incentives ' (1988) 13 Colombia Journal of Environmental Law 171. Sunstein makes an analogous claim. C Sunstein, 'Panel II: Public Versus Private Environment Regulation ' (1994) 21 Ecological Law Quarterly 455, 459.

[109] Literature that falls under this model is mainly contemporary, EU-specific and projects emissions trading as an administrative tool. See for instance Morgan and Yeung *Law and Regulation* (n 6) Chapter Six, J Lefevere, 'Greenhouse Gas Emission Allowance Trading in the EU: A Background' (2003) Yearbook of European Environmental Law 149, A Sinden, 'The Tragedy of the Commons and the Myth of a Private Property Solution' (2007) 78 University of Colorado Law Review 533, D Driesen, 'Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy' (1998) 55 Washington and Lee Law Review 289.

direct regulation, a so-called ‘’command and control *plus*’ instrument’[110] that builds flexibility, so as to reduce the levels of certain air pollutants, into existing command-and-control regulatory regimes.

### *1. Portraying the Problem*

In the *Command-and-Control Model* exploitation of the atmosphere is explained to occur due to the failings of direct regulation to respond to and control mobile and diffuse pollutants. The traditional licensing and command-and-control mechanisms that usually are applied to pollution control are thought to place too impossible administrative demands on central government to gather information, set standards, monitor and then enforce these in cases of highly complex and novel environmental problems, such as climate change.[111] The concern is that fixed environmental standards or licenses are quickly outpaced and outdated both by more effective technology and increasingly complex environmental problems.[112] Moreover, direct regulation is understood to offer no incentive to implement new technology or go

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[110] Description borrowed from Lefevere ibid 154.

[111] Extensive literature exists on this point, and starting in the 1980s, an entire wave of scholarship focused on pointing at the failings of direct regulation to deal with new environmental law problems and presenting emissions trading as able to correct the ‘defects’ of command-and-control. Ackerman and Stewart ‘Reforming Environmental Law’ (n 42) produced the landmark piece on this topic, and for a more recent EU-based overview see C Knill and A Lenschow, 'Do New Brooms Really Sweep Cleaner? Implementation of New Instruments in EU Environmental Policy' in C Knill and A Lenschow (eds), *Alternative Approaches to Implementing Environmental Law* (Manchester University Press, Manchester 2000) 251.

[112] JB Ruhl, 'Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law ' (1997) 34 Houston Law Review 933, 984, Ackerman and Stewart ‘Reforming Environmental Law’ (n 42).

beyond the set pollution standards,[113] and so, the *Command-and-Control Model* identifies a regulatory stalemate in applying command-and-control to certain new pollutants. The problem that emissions trading is seen to address is to regulate these high-risk, invisible and multiple pollution-sources that direct regulation is viewed inapt to successfully manage.[114]

It is important to note that this model considers command-and-control techniques effective when applied to stationary and point sources of pollution, and in contrast to the *Private Property Right Model* that uses examples of conservation cases in North America to show the failings of government control of commons, the *Command-and-Control Model* refers to examples of environmental protection to show that the application of bureaucratic management over the past few decades has helped decrease visible pollution.[115] This means that the *Command-and-Control Model* calls for re-regulation of command-and-control to specific types of pollution that are problematic rather than seeking to overhaul the entire governance regime of regulating the environment.

Ultimately all emissions trading discourses promote a particular version of emissions trading against the backdrop of the failings of direct regulation, and so it is inevitable that criticism of traditional environmental regulation appears in all three models. In the *Economic Efficiency Model* the criticism focuses on the fact that

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[113] R Stewart, 'Regulation, Innovation, and Administrative Law: A Conceptual Framework' (1981) 69 California Law Review 1256.

[114] M Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, Oxford 2005) 187.

[115] C Hilson, *Regulating Pollution. A UK and EC Perspective* (Hart Publishing, Oxford 2000) 127.

externalities persist whilst in the *Private Property Rights Model* the extensive government control is the main objection to direct regulation. It is in these academic debates that the term 'command-and-control' has emerged as a way of describing governmental control as a form of 'draconian bureaucracy',[116] coercing firms and consumers into something that is ineffective and which is described to bring to mind 'Soviet style interference in private life'[117] that allegedly are 'at odds with the worldwide recognition of the failures of state socialism.'[118] What the two models thus do is to label any type of government interference 'command-and-control', even when, as explained in the *Economic Efficiency Model,* such interference is cost-effective.

In the *Command-and-Control Model*, on the other hand, the problem that emissions trading addresses is framed neither as an externality issue nor as a rejection of government control of commons; rather, the only disputed 'commanded and controlled' parts of state interference concern regulatory mechanisms that determine pollution standards, reduction targets and product standards and that demand detailed data collection and fix implementation exercises.[119] This means that the *Command-and-Control Model* is not based on a particular objectionable view of central government, as is the *Private Property Rights Model.* As such, central government

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[116] M Jacobs, *The Green Economy: Environment, Sustainable Development, and the Politics of the Future* (Pluto Press, London 1991) 151.

[117] See Lee *EU Environmental Law* (n 114) 183, Dryzek *Politics of the Earth* (n 12) 135.

[118] R Stewart, 'Introduction' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 1, 19.

[119] These requirements range from the setting of maximum level of pollution release (for instance target standards) to specifying methods of how to achieve this (for instance specific standards). Lee *EU Environmental Law* (n 114) 183.

control of common resources is not discarded nor is emissions trading understood to work in lieu of, or as opposed to, central management of the commons.[120] The *Command-and-Control Model* is nonetheless similar to the *Economic Efficiency Model* in that it too portrays certain direct regulations as cost-ineffective.[121] The difference between the two is nonetheless that at the heart of the *Command-and-Control Model* lies the aim to establish a regulatory strategy that successfully complies with regulatory obligations and reduces pollution levels rather than creating a profit-centre *per se*.

What the discussion above shows is that in the *Command-and-Control Model*, traditional regulation is portrayed as ineffective in dealing with air pollution control. The motivation behind emissions trading is to establish a revised regulatory framework, which deals with specific types of air pollutants in a flexible and administratively effective manner.

### *2. Understanding the Solution*

As explained, in the *Command-and-Control Model* emissions trading is presented as re-regulation of classic command-and-control applied to certain air pollutants. The notion of 're-regulation' elucidates that such a trading scheme is not a matter of

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[120] See Driesen 'Replacing Command and Control / Economic Incentive Dichotomy' (n 109) 310, Lefevere (n 109) 152, L Krämer, 'Some Reflections on the EU Mix of Instruments on Climate Change' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 279. Sinden 'Tragedy of the Commons' (n 109) 538 states that the fact that property rights in common resources and markets are generated as an alternative to government regulation of environmental problems – and as encompassed here in the *Private Property Rights Model* – 'is in fact nothing more than a mirage.'

[121] See n 63.

challenging regulatory powers of central government but rather reforming the existing legal framework to address new regulatory challenges.[122] The key regulatory adaption that emissions trading is thought to achieve is the creation of a less 'imposing'[123] regulatory tool where polluters are allowed considerable flexibility in complying with pollution targets. Rather than imposing definitions as to 'how', 'where', and 'when' compliance must be achieved – which direct regulation is understood to do – and in that sense command a particular behaviour or technology that industries must follow and apply, emissions trading is seen to delegate the question of which route to take to compliance.[124] More precisely, allowing polluters to trade rights in emissions allowances and so decide on their own whether to reduce emissions and sell their surplus, stay within the regulatory equilibrium or increase emissions and buy additional emissions rights, flexibility that emissions trading schemes are hailed for, is achieved.[125] This administrative flexibility is thought not only to unburden the central government from micro-level management of a myriad of pollutants, their sources

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[122] In more general literature on regulation, reregulation has been defined as 'fine tuning' of markets without 'going back' to direct regulation, see M Ghertman, 'The Puzzle of Regulation, Deregulation and Reregulation' in C Ménard and M Ghertman (eds), *Regulation, Deregulation, Reregulation: Institutional Perspectives* (Edward Elgar, Cheltenham 2009) 351, 367. According to Majone 'Introduction' (n 5) 3, reregulation is a form of regulatory reform which fits the description of re-regulation as encompassed in the *Command-and-Control Model.* Reregulation in this context thus does not signify the abolishment of regulation but rather achieving regulatory objectives by less administrative burdensome rules.

[123] B Rittberger and J Richardson, 'Old Wine in New Bottles? The Commission and the Use of Environmental Policy Instruments' (2003) 81 Public Administration 575, 575.

[124] Literature that advocates for emissions trading schemes due to their flexibility is vast and the following are mere examples, see J Wiener and B Richman, 'Mechanism Choice' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 363, 370, R Stewart, 'Reconstitutive Law' (1989) 46 Maryland Law Review 86, D Dudek, R Stewart and J Wiener, 'Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches' (1992) 17 Colombia Journal of Environmental Law 1, 3, R Stewart, 'A New Generation of Environmental Regulation?' (2001) 29 Capital University Law Review 21.

[125] See n 113.

and technologies to apply to reduce these but also lead to innovation and in particular incentivise firms to invest in clean technologies so as to be able to sell any potential surplus in emissions allowances.[126] As such, from this viewpoint of the *Command-and-Control Model,* emissions trading is able to cure the failings of classic command-and-control by decentralising compliance methods from the central government and offering innovation incentives to industries by creating tradable rights in emissions allowances.

The *Command-and-Control Model* is similar to the *Economic Efficiency Model* in that both stress the importance of flexibility and effectiveness in managing commons in air. Moreover, both rely on incentives that markets offer to change the behaviour of the regulated. There is nonetheless an important difference in the role of the state envisioned by these two models and the *Private Property Rights Model* in this regard. In the *Economic Efficiency Model* the role of the central government is determined according to its *impact* on the functioning of the market and the cost-effectiveness of market transactions, while in the *Private Property Rights Model,* the role of the state is limited to the legislator defining private property rights and the legislator enforcing these. In the *Command-and-Control Model*, however, the regulator's role is not compromised. The regulatory is vested with the discretion to determine, for instance, the quantity of emissions, the form of allocation, the recognition of entitlements and the enforcement of sanctions.[127] These are important regulatory powers, even with the regulated have the right to decide where and how to

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[126] Ibid.

[127] M Peeters, 'Enforcement of the EU Greenhouse Gas Emissions Trading Scheme' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 169.

emit and whether to reduce, buy or sell emission allowances.[128] Subsequently, in the *Command-and-Control Model* emissions trading is seen to function around obligations that the government creates, just like any other command-and-control type of regulation,[129] and on this basis it is explained that emissions trading 'cannot be equated with 'market forces''.[130] As such, emissions trading is presented as regulation albeit of 'a different *form* from command-and-control.'[131] Moreover, this model recognises emissions trading schemes also as part of a global emissions trading scheme, in which nation states – rather than private property holders – are the primary actors both for agreeing to such trading schemes and implementing them in their legal orders.[132] The image and role prescribed to the central government in emissions trading is, in fact, what distinguishes the *Command-and-Control Model* from the *Economic Efficiency* and the *Private Property Rights* models.

Moreover, in comparison to the *Economic Efficiency* and *Private Property Rights* models, the *Command-and-Control Model* is far more critical of the role of the

[128] Driesen elucidates this point with reference to property rights and how the thought of 'ownership' with regard to emissions allowances is a misguided description, D Driesen, 'What's Property Got To Do With It?: A Review Essay of 'Pollution and Property: Comparing Ownership Institutions for Environmental Protection' by Daniel Cole' (2003) 30 Ecology Law Quarterly 1003, 1012-1015.

[129] Morgan and Yeung *Law and Regulation* (n 6) 315, Sinden 'Tragedy of the Commons' (n 109) 538, Driesen 'Replacing Command and Control / Economic Incentive Dichotomy' (n 109) 338.

[130] Hilson *Regulating Pollution* (n 114) 103. Jacobs distinguishes between markets and market forces, stating that the latter is a macroeconomic phenomenon, operating at the economy as a whole whilst markets microeconomic and are regulated by government interventions. Jacobs *Green Economy* (n 116) 24.

[131] Hilson *Regulating Pollution* (n 114) 103. See also Jacobs *Green Economy* (n 116) 151.

[132] Morgan and Yeung *Law and Regulation* (n 6) 316, M Peeters, 'Towards a European System of Tradable Pollution Permits?' (1993) 2 Tilburg Foreign Law Review 117, G Pring, 'A Decade of Emissions Trading in the USA: Experience and Observations for the EU' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 188.

market in emissions trading. In the two previous models, the market is depicted as 'free', meaning that no room is envisaged for governmental intervention in relation to emissions trading – unless it is cost-effective, as explained in the *Economic Efficiency Model*. In the *Command-and-Control Model*, markets are not understood to exist in this kind of legal vacuum, but in the constant presence of the regulator.[133] There is no so-called invisible hand of the market but rather the state is there to regulate it. The task of the regulator is defined as ensuring fair competition via government intervention in the emissions market – a view contrary to the *Private Property Rights Model*. Unregulated markets are described as giving rise to dominant market players, who have the possibility of raising costs for rivals or blocking the entry of new competitors by means of predation, pre-emption, exclusion, and collusion, unless the regulator intervenes.[134] Emissions trading is viewed as a regulation strategy in which the government artificially shapes competition so as to prevent this.[135] Moreover, the regulator – not the market – is envisioned to limit and target the quantity of emission allowances so as to create scarcity and ensure that the market functions.[136] Therefore, the market is not understood as 'free' in the *Command-and-Control Model* but at best as 'partial or incomplete'; as a mere device through which regulatory obligations can be carried out.[137]

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[133] Driesen 'Replacing Command and Control / Economic Incentive Dichotomy' (n 109) 338.

[134] Ibid.

[135] E Rehbinder, 'Market-Based Incentives for Environmental Protection' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and the Sustainable Development* (Cambridge University Press, Cambridge 2000) 245, 249.

[136] Lefevere 'Greenhouse Gas Emissions Allowance Trading' (n 109) 151.

[137] Morgan and Yeung *Law and Regulation* (n 6) 316.

With regard to the legal status of emissions allowances, these are inconsistently defined in the *Command-and-Control Model* including, for instance, 'environmental obligations', 'licences', 'pollution rights' or 'permits'.[138] As such, it is not always clear as to what is traded,[139] suggesting that here emissions allowances are seen as 'hybrid rights'.[140] Although these definitions arguably fall under a broad legal spectrum, privatisation of emission allowances is not envisaged in this model – a direct contrast to the *Private Property Rights Model*. One of the key reasons as to why emissions allowances do not fall within the spectrum of private property right is that would eliminate regulatory flexibility and the government's control over the commons,[141] which is an idea that forms the basis for this model. In other words, emission allowances are legally defined so as to facilitate emissions trading without removing the regulator's control over it.

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[138] Lefevere 'Greenhouse Gas Emissions Allowance Trading' (n 109) 151, for instance, sees emissions allowances as a 'right to emit a particular quantity of [in this context] greenhouse gases'. Driesen 'What's Property Got To Do With It?' (n 128) 1013, similarly, names these 'environmental obligations'. For a list of the variety of rights that emissions rights may take see G Libecap, 'Property Rights Allocation of Common Pool Rescources' in C Ménard and M Ghertman (eds), *Regulation, Deregulation, Reregulation: Institutional Perspectives* (Edward Elgar, Cheltenham 2009) 27, 40.

[139] J Button, 'Carbon: Commodity or Currency? The Case for an International Carbon Market Based on the Currency Model' (2008) 32 Harvard Environmental Law Review 571, L Rajamani, 'Rights-Based Perspective on Climate Change Negotiations' (2010) 22 Journal of Environmental Law 391.

[140] Note that 'hybrid' in this context describes a range of non-property based emission allowances and is therefore not employed in the same way in C Rose, 'Expanding the Choice for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes' ' (1999) 10 Duke Environmental Law and Policy Forum 45. See also Libecap 'Property Rights Allocation of Common Pool Rescources' (n 138).

[141] This is considered the case in particular so as not to be liable to pay compensation, see D Kelly, 'Tradable Environmental Allowances: Property, Non-Property, or Quasi-Property? ' (Princeton University, Woodrow Wilson School of Public and International Affairs 2010) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=323> accessed 11 June 2011.

In sum, the *Command-and-Control Model* presents emissions trading as a regulatory response to the failings of classic command-and-control pollution control systems. The re-regulation is manifested in the creation of emissions trading schemes and tradable hybrid rights in emissions allowances that allow surplus in emission allowances to be traded and emissions reductions to be achieved according to operators' own accord. This regulatory framework is, nonetheless, understood to operate against the backdrop of government control, and at the direction of the regulator. As such, the *Command-and-Control Model* furthers emissions trading schemes due to their regulatory flexibility but this does not mean that it compromises the role of the central government in constructing and managing this regulatory strategy.

## IV. EVALUATING AND COMPARING THE MODELS

The analysis of the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models above highlights emissions trading as a shared paradigm, meaning that the scholarship on emissions trading is informed by a wide variety of intellectual disciplines and thoughts.[142] Accordingly competing visions regarding the role that these trading schemes play or ought to play in managing the commons in air, as understood by the academic community, exist. The models demonstrate that underpinning the overarching theme of managing the exploitation of

[142] Similar conclusion, albeit using a different methodology is reached in D MacKenzie, F Muniesa and L Siu, 'Introduction' in D MacKenzie, F Muniesa and L Siu (eds), *Do Economists Make Markets? On the Performativity of Economics* (Princeton University Press, Princeton 2007) 1, 15-16. The implications of the interdisciplinary nature of environmental law scholarship more broadly is addressed in Chapter Six.

the commons, lie nuanced discussions in emissions trading discourses regarding distinct environmental and non-environmental problems to which emissions trading is thought to respond to. These relate to establishing a profit-centre (the *Economic Efficiency Model*), a governance system that replaces government control of common resources (the *Private Property Rights Model*), and a regulatory system that complies with regulatory goals effectively (the *Command-and-Control Model*). Each narrative in the three models envisions the governance regime of emissions trading differently, as manifested in the dissimilar roles that the market, the state, and emissions allowances are understood to play in these trading schemes. Table 1 below illustrates these findings as encompassed by the models.

**Table 1: The models compared**

| | **Economic Efficiency Model** | **Private Property Rights Model** | **Command-and-Control Model** |
|---|---|---|---|
| **PORTRAYING THE PROBLEM** | | | |
| *Problem* | Externalities | Government control of the commons | Ineffective cross-boundary pollution regulation |
| *Reason for the Problem* | Lack of incentive to internalise externalities | No private property rights in the commons | Lack of administratively effective regulatory strategies |
| **UNDERSTANDING THE SOLUTION** | | | |
| *Role of the Market* | Enable the creation of 'profit- centres' | Safeguard personal liberty (that is, ensuring transfer of private property rights on the terms of property holders) | Regulatory device |
| *Role of the State* | Regulatory intervention if cost-effective | Limited to the legislator defining private property rights and the judiciary enforcing these | Create and manage the emissions trading scheme |
| *Legal Nature of Emissions Allowance* | Secured financial right | Private property right | Hybrid right |

This table highlights very different forms of emissions trading schemes and it is useful to summarise these findings before evaluation. In the *Economic Efficiency Model*, emissions trading is understood as trying to solve the problem of externalities. In this model, the key aim is to create a cost-effective emissions trading scheme that induces internalisation of externalities. The role of the market and the state depend therefore on whether it is cost-effective to have a heavily regulated or a 'free' market. Equally, emissions allowances are defined in property rights terms with the aim of providing financial security for investors. Thus the role of emissions trading is to act as a profit-centre, so as to secure participation in the emissions market, and in this sense, induce the internalisation of externalities.

In the *Private Property Rights Model*, emissions trading is understood to remedy poor government control of the commons. State officials are described as having squandered these for their personal benefit, and, are thus found unsuitable for controlling common resources. By privatising the commons, emissions trading is seen as empowering citizens to manage common resources on their own terms, and more importantly, independently of governmental programmes. Hence the role of the state in emissions trading is limited to the legislator defining private tradable property rights and to the judiciary enforcing these. The market thus plays a crucial role in ensuring liberty by assisting citizens in establishing a system in which they can trade rights to common resource and in this way manage these on their own conditions. Overall, emissions trading is thought of as a substitute for government control of the commons.

In the *Command-and-Control Model*, emissions trading addresses the problem of ineffective direct pollution regulation. In contrast to the two previous models, the *Command-and-Control Model* portrays the emissions market as a device, rather than

the central component of emissions trading, through which regulatory obligation is created. The market is therefore not 'free' but heavily regulated. Since emissions trading is not understood as stripping the regulator of its control of the commons – as envisaged in the *Private Property Rights Model* – emission allowances are not defined in property rights terms but are understood as licences and permits; in other words as hybrid rights. From this perspective, the role of emissions trading is to re-regulate and establish a flexible and administratively effective air pollution strategy.

Having bared the emissions trading discourses in the described manner, none of the models may seem particularly appealing. The *Private Property Rights* sits uncomfortably with any current international agreement that uses emissions trading schemes as a top-down means to combat, for instance, a common problems such as climate change,[143] and although the *Economic Efficiency Model* and the *Command-and-Control Model* seem less politically radical in comparison (depending on one's own political views), they are dogged in specific agendas such as the creation of economic opportunities and re-regulation respectively. It may be argued that the models are not appealing because they constitute three extremes of the emissions trading literature. In light of this argument, the following points need to be raised.

It is not demanded from the reader to show alliance to any model as listed in this Chapter. Ultimately these models are limited in scope as they are based on only a small part of the extensive scholarly landscape that is the emissions trading

[143] A prime example of an international treaty on climate change is Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005).

literature.[144] Moreover, there is the constant risk of bias in the selection and categorisation of literature. To start with, environmental problems are 'interconnected and multidimensional; they are, in a word, complex'.[145] This gives rise to equally complex debates that are extremely hard to conceptualise and categorise in distinct models. Because cataloguing broad-ranging discourses on a topic such as emissions trading is extremely hard, the risk of oversimplification is high – especially in this Chapter as these models are based on no previous system of modelling with regard to emissions trading. A way of avoiding this would have been to resort to existing theoretical categories on regulation instead of defining models according to my own analysis of the set literature. For example, the *Private Property Rights Model* reflects ideas shared with public choice theorists.[146] In broad terms, public choice theorists

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[144] Here, discourses that reject the idea of applying emissions markets to environmental problems have to a large extent been excluded from this analysis; on this point see J Mintz, 'Economic Reform of Environmental Protection: A Brief Commentary on a Recent Debate' (1991) 15 Harvard Environmental Law Review 149. Also, scholarly contributions that offer other regulatory solutions to emissions markets to help limit and halt the exploitation of the commons are also excluded. This debate is disputed and unsettled, see B Yandle and A Morriss, 'The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons' (2001) 28 Ecology Law Quarterly 123, 168. Hardin suggests that preventing the overuse of the commons may be accomplished by privatisation, subsidies or taxes without making clear his preferences. Hardin 'Tragedy of the Commons' (n 37) 1245. For a critique of the over-reliance on privatisation so as to overcome the problem of overexploitation of the commons see M Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* (Basic Books, New York City 2008). In studying the so-called 'common pool resources', Nobel laureate Ostrom identifies various local resource management structures see E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge 1990).

[145] Dryzek explains that 'environmental issues do not present themselves in well-defined boxes, instead they are interconnected in all kinds of ways. Dryzek *Politics of the Earth* (n 12) 8.

[146] A Drew, 'Two Directives, Two Politics - Prospects for the EU ETS' (Law Society Economy Working Papers 11/2010, LSE Law 2010) <http://www.lse.ac.uk/collections/law/wps/WPS2010-11_Drew.pdf> accessed 11 June 2011. Drew argues that most emissions trading literature applies public choice theory to emissions trading in order to highlight the risks of regulatory failure.

critically analyse the way in which governments make decisions,[147] arguing that politicians set out policies with the single aim of being re-elected.[148] In the *Private Property Rights Model* governments are similarly portrayed as squandering the commons for the benefit of industries, which guarantee jobs and therefore also votes. Indeed, environmental discourses and public choice arguably 'grew up together'[149] and so strong similarities between the two are bound to exist. As another alternative, emissions trading debates could have been mapped onto environmental discourses as defined by Dryzek. In particular 'economic rationalism', which is defined to rely on the 'free market' and the idea of private property holders being able to trade in natural resource rights, overlaps greatly with the *Private Property Rights Model.*[150] The reason why the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models have not been mapped on already existing scholarly patterns is because emissions trading literature demands separate attention.[151] Although similarities between the *Private Property Rights Model* and public choice and economic rationalism in environmental discourses are apparent, these particular theories of regulation are only two amongst various influences on emissions trading discourses.[152] Stating that these are mere mirror images of different regulatory

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[147] P Samuelson and W Nordhaus, *Economics* (McGraw-Hills Book Company, London 2005) 745.

[148] See n 29.

[149] See Schroeder (n 101) 451.

[150] These are administrative rationalism, democratic pragmatism and economic rationalism. Dryzek *Politics of the Earth* (n 12) 121-128.

[151] The emissions trading scholarship is further analysed in Chapter Six.

[152] Ibid.

theories would not only undervalue the specific nature and complexity of emissions trading literature but also the significance of the models.

Moreover, although the models should not be read as *the* categorisation of emissions trading literature, they offer *a* type of categorisation of the emissions trading discourse. This categorisation is useful in highlighting a chronological development of emissions trading debates, which may serve as a valuable outline of emissions trading discourses more generally.[153] For instance, the *Economic Efficiency Model* projects theory-based emissions trading debates that stem from economics and that gained support in legal academia in the 1980's.[154] The view of emissions trading here is that it creates an economic opportunity and allows the emissions market to regulate pollution with limited input from the state. Following the most recent financial crises and wave of scepticism toward unregulated markets, enthusiasm for this model may be seen to have faltered.[155] Instead, the *Command-and-Control Model*, which places regulation – albeit of a different form to direct regulation – at the forefront in creating and managing emissions market, may now gain more wide-spread support. Ideas and visions of emissions trading as portrayed in the *Private Property Rights Model,* on the other hand, were prominent in the U.S. in the 1970s and again in the 1990s but have been less forceful in the EU and the multilateral

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[153] I am thankful to Richard Stewart for this comment.

[154] The scholarly piece by Ackerman and Stewart 'Reforming Environmental Law' (n 42) first introduced emissions trading schemes to environmental law.

[155] Even Alan Greenspan – 'the highest priest of laissez faire economics' – has admitted that he may have gone too far in believing that markets could be self-regulating, as cited by Stiglitz. J Stiglitz, 'Government Failure vs. Market Failure: Principles of Regulation' in E Balleisen and D Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, Cambridge 2010) 1.

contexts.[156] Viewing the models as chronological indicators and showing that certain views encompassed in a particular model are more favourable at different times and in different legal contexts, as well as responding to various political climates, reinforces the idea that emissions trading schemes are not static regulatory strategies but complex regulatory strategies that feed off current affairs and respond to particular regulatory agendas. Although the models fail to answer *why* certain depictions of emissions trading schemes are more appealing than others, they help to show that these fluctuations exist.

The significance of setting out models based on emissions trading literature is also to illustrate that emissions trading schemes are nuanced and complex regulatory concepts that do not allow for generalisation. Indeed, and as explained in Chapter One, emissions trading tends to be linked[157] with the ascendancy of market-oriented thinking,[158] and thereby regarded as an embrace of capitalism[159] and a natural process of privatisation more generally.[160] These ideas are rooted in the *Private Property*

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[156] J Dunoff, 'Levels of Environmental Governance' in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 85, 98. Note that in this regard, reference is made to public choice discourse. Indeed ideas concerning the use of the 'free' market and managing commons on the basis of private property rights or not as popular as for instance administrative or rationalism. Dryzek, *Politics of the Earth* (n 12) 121-128. In this context, note that 'the salience of public choice arguments seems to ebb and flow over time.'

[157] This understanding exists both in literature that seeks to criticise as well as promote emissions trading schemes as regulatory strategies.

[158] Lee *EU Environmental Law* (n 119) 186.

[159] D Satz, *Why Some Things Should Not Be For Sale* (Oxford University Press, Oxford 2010) 3.

[160] For instance, the use of markets in fisheries took off in New Zeeland at the same time as privatisation, see K Wyman, 'Why Regulators Turn to Tradeable Permits: A Canadian Case Study' (2002) 52 University of Toronto Law Journal 419, although Wyman defies this argument stating that not ideology or legal culture but the cost-effectiveness of the regulatory mechanisms determines whether the mechanisms is employed.

*Rights Model,* and in part, also in the *Economic Efficiency Model.* However, re-regulatory focus in the *Command-and-Control Model* shows that ensuring cost-effectiveness and responding to market-failures[161] is not the sole reason for regulating the commons. These regulatory rationales subsequently result in emissions trading schemes taking different legal forms, which means that the picture of the emissions trading scheme as a regulatory concept is fragmented and complex. The models are in other words significant because they help to dement the assumption that emissions trading schemes are straightforward regulations that may be applied with the same effect across different jurisdictions.

## V. APPLICABILITY OF THE MODELS

The reader should now be familiar with the argument that emissions allowance discourses refer to different roles and objectives for emissions trading schemes in promoting this regulatory strategy to control commons in air. The implications of this finding has as yet not been crystallised and it is to these that I now turn.[162]

Emissions trading schemes are broadly understood as dealing with the management of the commons. One idea that is shared in these debates, and which the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models highlight, is that confronting resource users with the need to obtain or

[161] For an overview of regulatory aims see G Majone, 'Theories of Regulation' in G Majone (ed) *Regulating Europe* (Routledge, Abingdon 1996) 28.

[162] Indeed, Kennedy argues that each successful legal distinction – here, encompassed by the *Economic Efficiency*, the *Private Property Rights* and the *Command-and-Control* models – must be able to point to the difference and implication that the distinction makes. D Kennedy, 'The Stages of the Decline of the Public/Private Distinction ' (1982) 130 University of Pennsylvania 1349.

purchase rights to utilise the commons – in the context of this Chapter, emitting emissions into the atmosphere – leads to the husbandry of resources for the purpose of securing economic opportunities (the *Economic Efficiency Model*), liberty (the *Private Property Rights Model*), or regulatory compliance (the *Command-and-Control Model*).[163] Although these objectives are divergent and no consensus exists as to *how* to achieve them, all three models imagine some form of governance authority that imposes restraints on the use of the commons recourses. According to the *Economic Efficiency Model* the regulatory authority lies within the market, as it is according to market forces that property rights in emissions allowances are allocated; in the *Private Property Rights Model* private property holders are vested with regulatory authority in deciding, on their own terms, whether to sell, keep, squander or safeguard their property; and in the *Command-and-Control Model* the regulatory power is entrusted to the central government. An implication of the models is the emphasis that emissions trading discourses orbit the legal dilemma of 'how' and 'to whom' to allocate regulatory power. Considering that each model imagines a different regulatory authority to govern emissions trading, it follows that each model refers to a distinct governance structure for these trading schemes.

An implication of this kind may not seem novel or valuable enough considering the intricate task of categorising emissions trading discourses into models that this exercise has entailed. Indeed, new sources of regulatory power are obviously created when rules, such as emissions trading, are applied to a resource that used to

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[163] As predicted by C Rose, 'Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances' in E Ostrom and e al (eds), *The Drama of the Commons* (National Resource Council, Washington DC 2003) 233, 235.

belong to all,[164] and the question of to whom to allocate power is a dilemma widely debated amongst environmental law scholars.[165] Yet the models highlight a different and important point that breaks away from the existing methodology in emissions trading discourse and environmental law scholarship in two specific ways.

First, the models show that the roles that scholars ascribe to the market, the state and emission allowances under emissions trading exist in a symbiosis; they are co-produced.[166] This means that a particular picture for instance of the state – irrespective of its negative or positive understanding of the state's capabilities when entrusted with regulatory powers – directly affects the roles suggested for the market and emissions allowances under emissions trading schemes. For environmental lawyers working in this area, this means examining these three entities as part of a broader mosaic that constitutes emissions trading, rather than inquiring into, for instance, the legal status of emissions allowances in isolation.[167] By assuming that the

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[164] N Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press, Princeton 2001) 4, Revesz also argues that any rules applied to the commons is concerned with how to allocate regulatory power in such a system. R Revesz, *NYU Casebook: Environmental Law and Policy* (Foundation Press, New York City 2008) 1-20.

[165] Dunoff 'Levels of Environmental Governance' (n 156) 86, argues that the question about how environmental decisions are made and who makes them – that is, questions of environmental governance – lie 'at the heart of environmental law and policy. Similarly it is described that the toughest political problem is to decide how to 'divide the pie' in creating environmental regulation. D Schoenbrod, R Stewart and K Wyman, *Breaking the Logjam: Environmental Protection that Will Work* (Yale University Press, New Haven 2010) 28.

[166] Terminology borrowed from Jasanoff 'Idiom of Co-Production' (n 19).

[167] One legal aspect of emissions trading that has received a lot of scholarly limelight is the legal status of rights in emissions allowances. Literature on this topic is vast, one of the key reasons being that emissions trading, as a regulatory idea, emerged in economic literature in which the creation of property rights in emissions allowances is thought a prerequisite for an emissions market, Demsetz 'Toward a Theory of Property Rights' (n 42). The wider literature on the economic inefficiency of open-access regimes assume that the introduction of private property allows for these inefficiencies to be remedied, see Barnes *Property Rights and Natural Resources* (n 90) 2-3, 41. Also, economists tend to see assignment of property rights

state does not 'retreat' from emissions trading but that its entrusted role defines the trading scheme, this three-legged approach to studying emissions trading schemes breaks away from and rejects any alleged public / private divide emissions trading discourses, which are discussed further in Chapter Six.

The models also show that determining the allocation of regulatory power within an emissions trading scheme is central to understanding how the governance structure underpinning such a scheme is imagined. Governance-related discussions in environmental law scholarship are expansive, in particular considering the multi-level governance structures of numerous environmental laws.[168] As such, questions concerning the allocation of regulatory power within a wider global environment governance system[169] and the fit of emissions trading within this multi-level

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as an alternative to command-and-control, Libecap 'Property Rights Allocation' (n 138) 27. As the models show, there is no consensus as to how to define emissions allowances in legal terms, for an overview of these debates see R Stavins, 'Transaction Costs and Tradeable Permits' (1995) 29 Journal of Environmental Economics and Management 133, R Sandor, 'Creating New Markets: The Chicago Climate Exchange' in I Kaul and P Conceicao (eds), *The New Public Finance: Responding to Global Challenges* (Oxford University Press, Oxford 2006) 390, D Cole, 'Clearing the Air: Four Propositions About Property Rights and Environmental Protection' (1999) 10 Duke Environmental Law and Policy Forum 103, J Stavang, 'Property in Emissions? Analysis of the Norwegian GHG ETS with References also to the UK and the EU' 17 Environmental Law and Management 209, A Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford 1994) 249-50. Note that Cole argues that all are in fact property rights, although different type of property rights, D Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (Cambridge University Press, Cambridge 2002). An unresolved issue in the property rights literature is whether the assignment of rights triggers re-allocation of resources, C Holderness, 'The Assignment of Rights, Entry Effects, and the Allocation of Resources' in R Epstein (ed) *Economics of Property Law* (Edward Elgar, Cheltenham 2007) 119.

[168] For an overview see P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn Oxford University Press, Oxford 2009), Fisher (n 41) Chapter Five.

[169] See Dunoff 'Levels of Environmental Governance' (n 156), R Revesz, 'Federalism and Environmental Regulation: An Overview' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 37, M Betsill, 'Global Climate Change Policy: Making Progress or Spinning the

governance frame,[170] are important and unresolved issues. The models, however, stress a different point. They show that emissions trading as a single regulatory *concept* envisions and allows different governance regimes to be established. Ultimately, the models show that emissions trading is not a straightforward regulatory strategy with uniformly defined objectives and aims. Rather it is a nuanced and complex regulatory strategy.

Here it is useful to set this discussion about emissions trading in a broader regulatory debate. In doing so, I will briefly outline and draw comparisons between emissions trading and an altogether different regulatory scenario; Epstein's study of the allocation of parking rights on public roads in Chicago.[171] These have in common their general objective: managing the commons. More importantly, however, Epstein points to the same conclusions as I have in this Chapter with the help of the models, namely that regulating the commons allows for different governance regimes to be established, each depending on a particular world-view. Epstein's analysis of parking on public roads is a study that[172]

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Wheels?' in R Axelrod, D Downie and N Vig (eds), *The Global Environment: Institutions, law, and Policy* (CQ Press, Washington D.C. 2005) 103.

[170] See J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 804.

[171] R Epstein, 'The Allocation of the Commons: Parking on Public Roads' (2002) 31 The Journal of Legal Studies 515.

[172] Ibid.

> looks at bottom-up regimes for parking which are based on possession of particular spaces for limited periods of time, and top-down systems of allocation, such as metered parking and parking permits, which are based on such factors as place of residence or disability.

In this study, Epstein is particularly concerned with the allocative effectiveness of the different regimes available to control public road parking, establishing that bottom-up systems do better in this regard. The argument is that bottom-up systems tend to reduce the dead time associated with parking spaces and maximise the use of parking spots by providing access to these only for the specific time needed.[173] The reason why maximising the use of common land is thought advantageous depends on a specific economic rationale; guaranteeing a high flux of cars being able to park, Epstein suggests, would enable any commercial stores nearby public roads to profit from the high number of potential customers that can subsequently access the stores:[174]

> There is a powerful correlation between the amount of business traffic and the turnover rate of parking. Merchants will sell a lot more merchandise if 1,000 cars park on their street for 2 hours each than if 250 cars park there for the full business day.

This shows that the lens that Epstein applied in furthering a particular governance regime for parking on public roads is based on a particular economic rationale. He explains that business owners could ratio these spaces on their own and thereby help increase the volume of business through price charges, one such example being auctioning rights to parking spaces, which would also bring revenue.[175]

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[173] Ibid.

[174] Ibid 534.

[175] Ibid.

Epstein, however, concludes that this type of auctioning seldom realises, and the reasons he offers set out a second lens through which parking on public roads may be viewed. More precisely, he argues that the political process do not allow auction in this context on the basis that it would create an exclusionary market in which citizens, who cannot afford higher prices, would be excluded from accessing to park public roads. It is this view, Epstein clarifies, which is the reason why parking spaces that would cost eight to ten U.S. dollars per hour on the 'free' market, are capped to cost well below the market price to one U.S. dollar.[176] This type of market intervention may seem objectionable on the grounds of cost-effectiveness,[177] but the point is that governance regimes applied to commons do not always have as their prime aim to stimulate and steer the economy to profit but can also target guaranteeing access as a general right.

Epstein's study may seem an altogether different regulatory scenario from emissions trading but it overlaps with the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models. For instance, regulating parking on public roads via a system of metered parking to which parking rights are auctioned resembles the *Economic Efficiency Model:* both regulatory regimes focus on allocative efficiency that yields most economic opportunities, including the profit centre that revenue from auctioning would harvest and the optimal number of customers being able to access the relevant merchants. Alternatively, by assigning a stronger role to the state in this regulatory system and instead of auctioning, capping

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[176] Ibid.

[177] For an overview of what 'free' parking costs the society at large see T Cowen, 'Free Parking Comes at a Price' *New York Times* (New York 14 August 2010).

metered parking prices below market prices so as to guarantee a wider overall access to common land, it seems clear that what Epstein discusses is a *Command-and-Control Mode*-type of approach to regulating commons. Here, the key consideration is no longer merely to create economic opportunities but to establish a regulatory regime within the public sphere that is flexible enough to allow high numbered utility of the roads. This system is therefore not left to the 'free market' to allocate rights to common resource but rather the state regulates market preferences to the use of parking spaces. Although not mentioned in the latter example from Epstein's study, the *Private Property Rights Model* would, in terms of regulating public roads, correspond to a case of substituting the metered parking for parking allocation via occupation or place of residence, which Epstein defines as a top-down approach.[178] This means that the property rights holder, based on his property right, is entitled to parking at all times – independently of the cost-effectiveness or fairness of such a regulation.

Beyond mapping the models onto Epstein's study and shedding light at certain parallels between the two, this exercise shows that it is possible to envision multiple regimes for the use of common space. Epstein concludes that bottom-up systems 'do better in an economics sense'[179] but economic sensibility, as he shows, is not always the rationale of a particular regulatory system. Second, and more importantly, the fact that multiple ways exist to regulate common resources is true not only because different regulatory *methods* are available but also because each regulatory mechanism is applied according to a particular worldview and regulatory agenda. In

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[178] Epstein 'Parking on Public Roads' (n 171).

[179] Ibid 515.

Epstein's examples, parking on public roads could be regulated to stimulate business or ensure fair and equal access to common land, as well as to potentially protecting property holders by offering rights based on residence. Ultimately, the way in which the regulatory regime applied to these commons is structured will depend on the role that is given to the market, the state, and rights in land, which are similar to the central points found emissions trading literature, clearly indicating that regulating the commons is never a straightforward affair.

In sum, what the discussion above demonstrates is that in debating emissions trading, diverse regulatory strategies are referred to, in which the roles of the market, the state, and the legal status of emissions allowances are understood differently. Upon closer scrutiny of the models, it appears that the way in which emissions trading is conceptualised has direct implications for the way in which allocation of regulatory power under such a scheme is constructed, each creating a different regulatory model – both in the case of regulating commons in air and parking rights on public roads.

## VI. CONCLUSION

At the outset of my thesis I explained that it follows a bold aim that is to re-configure the way in which scholars discuss and portray emissions trading schemes as a regulatory strategy. In this Chapter I have provided three distinct lenses through which to view emissions trading schemes. From the perspective of the *Economic Efficiency Model* emissions trading is a profit centre in which the market is envisioned as free, and the role of the state limited. In the *Private Property Rights Model* private property rights holders stand at centre stage of emissions trading with vested regulatory powers to manage common resources on their own terms. In the

*Command-and-Control Model* emissions trading is understood as an administratively flexible regulatory mechanism, in which, nonetheless, the state is entrusted with all regulatory powers. The implication of this finding is that emissions trading, as a regulatory concept, encompass distinct regulatory structures, each regulatory regime suggesting a different role for the state, the market and the legal nature of emissions allowances. The models thus show that although emissions trading is broadly understood to respond to the exploitation of the commons, it is a regulatory concept that allows for distinct regulatory regimes to be established, each addressing different environmental and non-environmental problems.

The models are nonetheless *theoretical* frameworks meaning that they do not map how emissions trading schemes in practice function or ought to function. In order to understand how the role of the market, the state, and the legal status of emissions allowances are defined in a particular emissions trading scheme, the legal context in which the set trading scheme operates must be taken into consideration. The next chapter explains the importance of legal culture in more detail, before, in Chapter Four and Five, I investigate the applicability of the *Economic Efficiency*, the *Private Property Rights* and the *Command-and-Control* models in law.

# CHAPTER THREE

# THE EU EMISSIONS TRADING SCHEME AND THE IMPORTANCE OF LEGAL CULTURE

## I. INTRODUCTION

In the previous Chapter my focus was on how scholars understand emissions trading as a regulatory concept and illustrating these diverging conceptions by establishing the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models. In Chapters Four and Five respectively, these models are mapped onto EU ETS-related discourses as voiced by the Commission and in EU ETS case law before the CJEU[1] with the aim to test the models' utility and relevance in law, as well as to provide a close examination of the EU ETS. As a preliminary to such an analysis, this Chapter emphasises a different, albeit highly correlated point, which is that any discussion about the EU ETS and legal roles entrusted to the market and the state, as well as rights created in the EU ETS are fundamentally an expression and part of EU legal culture.

To show the importance of legal culture, this Chapter examines the unique legal environment of the EU in which the EU ETS operates. In particular, I

[1] Formerly the European Court of Justice (ECJ) and Court of First Instance (CFI). Since the Lisbon Treaty, the CJFU compromises the Court of Justice, General Court and specialised courts, as listed in Article 19 TEU. 'TEU' refers to Consolidated Versions of the Treaty on European Union (TEU), [2008] OJ C115/13.

demonstrate how environmental protection and environmental law and policy in the EU are historically tied to a particular idea of market creation as integration, and how the distinctive role of the CJEU, as well as the governing approach in the EU to use regulation to create a single competitive market further this particular market objective. On the basis of this close nexus between markets, courts and law in the EU, I argue that it is impossible to discuss the EU ETS – irrespective of whether this particular market is thought of as 'free', the epiphany of liberty, or a regulatory device – without paying attention to legal culture in which this trading scheme operates and the specific market discourse pertinent to European integration. The purpose of this study is twofold.

First, showing that laws are embedded in and filtered by a particular legal and institutional setting, which in the context of this Chapter is the EU legal order, I aim to discard any suggestions that emissions trading is a basic design structure equally imposable in different jurisdictions. This point is particularly important to make in the context of emissions trading and the EU ETS mainly because the Directive,[2] upon which the EU ETS is based, appears simple and is believed to be able to 'travel'[3] to establish the core of emissions trading beyond the EU jurisdiction. This is indeed a common assumption regarding successful trading schemes, and as explained in Chapter One, the sulphur dioxide emissions trading scheme in the U.S. is similarly presumed to be able to be replicated across borders with equal success. What this Chapter does by emphasising the significance of legal culture is to discard such assumptions.

[2] Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, OJ 2003 L 275/32 (Directive).

[3] The meaning of laws that are assumed to 'travel' is set out in Section II.

Second, highlighting the importance of legal culture has a methodological significance in this Chapter. More precisely, engaging in a debate on legal culture aims to demonstrate that the common legal questions that emissions trading discourses orbit and that the previous Chapter sets out – that is, the roles entrusted to the market, the state, and emissions allowances in emissions trading – are in fact only theoretical and can only be answered against the background of legal specificities. As such, this Chapter is used as a justification for analysing the legal status of the market, the state, and emission rights by their interpretation through policy-and lawmakers, as well as by the courts in Chapters Four and Five respectively rather than simply examining their legal status as listed in the relevant plain text of the Directive.

Ultimately, my concern in this Chapter is to establish the validity of legal culture as a lens through which to view and understand the governance structure of emissions trading schemes. I do so by first introducing the reader, in Section II, to the EU ETS, which is the emissions trading scheme that I use as a case study in this thesis. In particular, I highlight the basic structure of the Directive and show how the simple form of this legal text sits comfortably with the idea that the EU ETS is transferable across jurisdictions. Moreover, and equally to explain the idea of transferability of emissions trading schemes, I describe how the emissions trading, as a regulatory strategy applied to air pollution, first entered the EU legal order from international environmental law and under the influence of the highly successful U.S. sulphur dioxide trading scheme. In the same Section I elucidate the use of 'legal culture' in this thesis and highlight its significance in understanding the pitfalls of assuming emissions trading to be a generic regulatory strategy. In Section III I sketch a key feature of the EU legal culture, and highlight how market creation and market maintenance, the extensive interpretative role of the EU Courts and environmental

law overlap and co-exist in the EU legal order. The aim therewith is to illustrate – albeit roughly – the complex legal landscape in which the EU ETS exists, and more importantly to demonstrate that markets in the EU legal order are not generic design structures, as is often believed in emissions trading discourses,[4] but rather constructed by the court and part of a particular rationale of market integration. Finally, in Section IV these findings are evaluated and in Section V the conclusion of this Chapter is set out.

Before starting I need to enter a couple of caveats. First, this Chapter is not intended to provide a full exposé of the meaning of EU legal culture; nor is the aim to explain the complete process of constructing an European market through judicial progressiveness and market-rulemaking. My aim is rather to simply highlight a few examples of how markets, the EU courts and environmental law and policy overlap and therewith sketch the complex market-discourse in the EU legal order that the EU ETS is inevitably part of. Second and subsequently, any questions that address whether EU legal culture is 'converging' or 'diverging'[5], or examining EU legal culture bottom-up with focus on various legal cultures of the Member States[6] fall

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[4] This point is discussed further in Chapter Six.

[5] Defining legal culture in the EU tends to be layered with political difficulties concerning the determination of the real borders of Europe and whether political, historical and religious ties constitute essential ingredients for a common culture, for an exposé of this kind see F Wieacker, 'Foundations of European Legal Culture' (1990) 38 The American Journal of Comparative Law 1. In fact, debates on EU legal culture apt to focus on the legal culture of the Member States separately, or in blocks of, for instance, 'civil' and 'common' law traditions, using these analyses so as to establish whether legal cultures within the EU legal framework are converging or diverging, See for instance J Gibson and G Caldeira, 'The Legal Cultures of Europe' (1996) 30 Law and Society Review 55, P Legrand, 'Against a European Civil Code' (1997) 60 Modern Law Review 44.

[6] One way of understanding EU legal culture is by defining it as a bottom-up convergence of various European legal cultures, which together create a coherent and dynamic picture of the EU legal culture, or rather, it is this exercise that determines whether a common EU legal

outside the scope of this Chapter, as does any discussion of culture as understood in Title XIII TFEU.[7]

## II. EU EMISSIONS TRADING SCHEME

The EU emissions trading scheme constitutes an important environmental law in the EU legal context, and the fact that it is identified as the 'flagship measure',[8] the 'jewel in the crown'[9] and the 'parade horse'[10] of EU climate change policy, as well as one of the 'cornerstones of Community environmental protection policy'[11] clearly highlights its significance. The EU ETS was codified in the EU legal order on October 13th 2003

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culture exists or could exist, see C Lyons, 'Perspectives on Convergence Within European Integration' in P Beaumont, C Lyons and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart, Oxford 2001) 79, 96.

[7] Article 167 TFEU is the specific article on culture and includes, for instance, the need for the Union to 'take cultural aspects into account' when legislating under the Treaty. For an overview of the development of this provision see R Craufurd Smith, 'The Evolution of Cultural Policy in the European Union' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 2011) 869. 'TFEU' refers to the Consolidated Versions of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/49.

[8] Stavros Dimas, EU Environment Commissioner, 'Improving Environmental Quality through Carbon Trading' (Speech at the Carbon Expo Conference, Köln 2 May 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH07/265&format=HTML&aged=1&language=EN&guiLanguage=en>> accessed 29 May 2011.

[9] Stavros Dimas, EU Environment Commissioner, 'Climate Change - International and EU Action' (Speech at the Climate Change Conference, Prague 31 October 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/570&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 29 May 2011.

[10] K Deketelaere and M Peeters, 'Key Challenges of EU Climate Change Policy: Competence, Measures and Compliance' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 3, 8.

[11] Case T-263/07 *Republic of Estonia v Commission* [2009] ECR II-03395 , para 57, Stavros Dimas, EU Environment Commissioner, 'Opening Speech' (8th Session of Working Group 2 of the IPCC, Brussels 2 April 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/216&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 29 May 2011.

as the Parliament and the Council adopted Directive 2003/87 establishing a scheme for greenhouse gas emission allowances trading within the Union to start operating on the first day of 2005.[12] In the words of the Directive, its aim is to contribute to fulfilling the commitments of the Union and its Member States under the Kyoto Protocol 'more effectively, through an efficient European market in greenhouse gas emission allowances, with the least possible diminution of economic development and employment'[13] and to promote reductions of greenhouse gas emissions 'in a cost-effective and economically efficient manner.'[14] The way in which the Directive organises this trading and how law- and policymakers, as well as the CJEU, interpret these measures is discussed in detail in the next two Chapters. Here, and as an introduction to the EU ETS, two correlated points regarding the Directive are specifically highlighted: its basic structure and origin. It is against these two points that the relevance of legal culture to this study will be raised.

## A. EU Emissions Trading Scheme: A Basic Structure

In general terms, the Directive prescribes the system of emissions trading to function by demanding each of the relevant installations to obtain a permit in order to emit pre-determined levels of pollution, which, if there is a surplus, is tradable.[15] The idea is that if an installation does better than its target, it can sell its surplus allowances, and

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[12] This Directive is adopted according to Article 192(1) TFEU and the ordinary legislative procedure set out in Article 294 TFEU.

[13] Preamble 5.

[14] Article 1.

[15] Article 5. Note that it is the allowance limit specified in the permit rather than the permit itself that is tradable.

if it does worse, it has to buy additional allowances on the emissions market.[16] The various ways in which the Commission understands emissions trading to function are analysed in detail in the next Chapter, here it can be stated by way of introduction to this trading scheme that the thought is to allow sources with high costs to invest in reductions in sources with lower costs by buying allowances freed up by these sources, and thereby reduce costs of compliance to the most optimal level.[17] This market, it is important to note, covers only certain private sectors, including the power and the heavy industry sector across the Union,[18] and certain emissions thereof,[19] meaning that it is limited in scope.[20] To date, nonetheless, it is the largest carbon market in the world, worth a total value of 62 billion in 2008 and enjoying an impressive growth since.[21]

One of the key features of the EU ETS legal architecture is its decentralised trading regime: the private sector is entrusted with monitoring and reporting emissions,[22] and the Member States are vested with the regulatory discretion of deciding on the total national level of greenhouse gases that may be emitted,[23]

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[16] J Lefevere, 'Greenhouse Gas Emission Allowance Trading in the EU: A Background' (2003) Yearbook of European Environmental Law 149, 151.

[17] Ibid.

[18] Annex I lists categories of activities that installations, if emitting, are covered by the Directive.

[19] The Directive covers the following six greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride, Annex II.

[20] Article 30, however, allows the Directive to expand in scope to include also other sectors and gases.

[21] J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 805, 808.

[22] Article 6.

[23] Article 9.

granting emissions permits,[24] determining the allocation mechanism of emission permits to the industry,[25] verifying emissions levels,[26] and imposing penalties for non-compliance.[27] Considering that the EU ETS is based on a directive, this legal feature is not surprising. According to the Treaty, such a legal measure should only establish a regulatory framework, leaving the method and content of implementation to the Member States.[28] Equally, Prechal explains that directives are often used in creating or facilitating the functioning of markets on the basis that any market measures inevitably cut into the administration and economic structures of the Member States, and rather than seeking to harmonise national practices in this regard, directives regulate but without affecting any national decision-making processes.[29] What is remarkable with the legal construction of this Directive, however, is that beyond its decentralised quality, it is in part 'void'[30] in its stipulations, meaning that it omits to set out important legal definitions, including the legal status of emissions allowances. The reason for this is that the Directive is set out to establish a simple governance

[24] Article 6.

[25] Article 10. Note that 95% of the allowances are allocated free of charge, and from 2008 90%.

[26] Article 15.

[27] Article 16.

[28] According to Article 288 TFEU 'A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

[29] S Prechal, *Directives in EC Law* (Oxford University Press, Oxford 2005) 4-5. In comparison to US environmental law, Carlarne states that EU rules tend to be less detailed, focusing on establishing overarching goals, and depending on the Member States for implementation. On this basis she argues that decentralisation of this kind is an inherent feature of EU environmental law. C Carlarne, *Climate Change Law and Policy: EU and US Approaches* (Oxford University Press, Oxford 2010) 250-251.

[30] Description borrowed from C Bourbon-Seclet, 'Legal Aspects of Climate Change in Europe: Is the European Emission Trading Scheme Greater than the Sum of the Parts? Part 1' (2008) 23 Journal of International Banking Law and Regulation 252, 261.

system. Indeed, throughout the legislative process that led to the implementation of the Directive, the Commission endeavoured the Directive to 'remain as simple as it can be'[31] as a way of rallying support for this particular regulatory strategy,[32] which has resulted in a Directive that *claims* simplicity by leaving out complex rules on trading and *appears* simple, because it is, as a consequence of the previous, a very short legal document.[33] The effect of this 'lite' regulation[34] is that the EU ETS seems a straightforward pollution control system that involves no loser, and most importantly, that can act as a legal model for emissions trading across jurisdictions.

Indeed emissions trading is commonly understood to be a legal instrument that allows cross-fertilisation, and often the EU ETS is used as an example thereof.[35] Prior to the implementation of the Directive, emissions trading was foreign to EU environmental law and seen as 'an alien'[36] regulatory mechanism. With the exception

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[31] Commission of the European Communities, Proposal for a Directive of the European and of the Council establishing a scheme for greenouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM (2001) 581 final, 5 and Commission of the European Communities, Green Paper on Greenhouse Gas Emissions Trading Within the European Union, COM(2000) 87 final, 12.

[32] The Commission pushed for the Directive to remain simple also on a request from the industry, ibid. Note that the EU ETS emerged on the law-and policymaking table following the 'ill-fated' attempt to introduce carbon tax, see Commission of the European Communities, Commission Proposal for a Council Directive Introducting a Tax on Carbon Dioxide Emissions and Energy, COM(92) 226 final, Scott 'The Multi-Level Governance of Climate Change' (n 21) 808.

[33] It consists of thirty-three articles and five annexes.

[34] Term borrowed from Baldwin, who described such measures to deliberately leaving out complexity and detail so as to favour the dominant powers regulated. Note that Baldwin refers to emissions trading in an UK context. R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) 2 Regulation and Governance 193.

[35] See for instance J Wiener, 'Better Regulation in Europe' (2006) 59 Current Legal Problems 447.

[36] H van Asselt, 'Emissions Trading: The Enthustiatic Adoption of an 'Alien' Instrument? ' in A Jordan and others (eds), *Climate Change Policy in the European Union* (Cambridge University Press, Cambridge 2010) 125.

of domestic trading schemes in certain Member States – including Denmark, the Netherlands, and the United Kingdom[37] – and isolated scholarly debates on the topic,[38] the Union lacked knowledge and experience of emissions trading schemes and their function.[39] As such, adopting the Directive was thought to add a 'new dimension' to EU environmental law,[40] which was added top-down, or through international environmental law as part of a collective effort to deal with threats of climate change.

The problem of climate change was first addressed at the UN Framework Convention on Climate Change (UNFCCC),[41] which was followed by the Kyoto Protocol[42] that is designed, *inter alia*, to utilise a series of so-called 'flexible mechanism'[43] to help limit and reduce the level of a set of greenhouse gas

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[37] M Rodi, 'Legal Aspects of the European Emissions Trading Scheme' in B Hansjürgen (ed) *Emissions Trading for Climate Policy: US and European Perspectives* (Cambridge University Press, Cambridge 2005) 177, 177.

[38] M Peeters, 'Towards a European System of Tradable Pollution Permits?' (1993) 2 Tilburg Foreign Law Review 117.

[39] Commission of the European Communities, Communication from the Commission on Preparing for Implementation of the Kyoto Protocol, COM (1999) 230, 14-15.

[40] M Peeters, 'Emissions Trading as a New Dimension to European Environmental Law: The Political Agreement of the European Council on Greenhouse Gas Allowance Trading' (2003) 12 European Environmental Law Review 82.

[41] United Nations Framework Convention on Climate Change (UNFCCC) opened for signature 9 May 1992, 31 ILM 849 (entered into force 21 March 1994).

[42] Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005).

[43] Flexible mechanisms encompass international emission trading (IET) and project-based mechanisms that allow for emissions reductions for projects in developing countries through Joint Implementation (JI) and Clean Development Mechanism (CDM). For an overview of the two latter mechanisms see respectively C Streck, 'Joint Implementation: History, Requirements, and Challenges' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, Oxford 2005) 107, and E Meijer and J Werksman, 'Keeping it Clean - Safeguarding the Environmental Integrity of the Clean Development Mechanism' in D Freestone and C Streck (eds), *Legal Aspects of*

emissions.[44] Signatories to the Protocol pledged to reduce set greenhouse gases by a certain percentage during the first commitment period from 2008 to 2012,[45] and whilst each party to the Protocol is responsible for drawing up its own policies to meet these targets, the Protocol flags emissions trading as one of the flexible mechanisms able to help achieve the reduction obligations. The importance of the Protocol is the introduction of emissions trading to international environmental law[46] and to the EU, which, as a signatory of the Protocol, initiated a discussion regarding

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*Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, Oxford 2005) 191.

[44] D Freestone, 'The UN Framework Convention of Climate Change, the Kyoto Protocol, and the Kyoto Mechanisms' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms* (Oxford University Press, Oxford 2005) 3, 3. Gases that fall under the scope of the Protocol are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. Literature concerning more broadly the significance and implications following lengthy international negotiations before and after the Protocol is vast. For an overview see D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, Oxford 2009) and M Grubb, C Vrolijk and D Brack, *The Kyoto Protocol: A Guide and Assessment* (The Royal Institute of International Affairs, London 1999).

[45] The Union and its Member States committed themselves to reduce their emissions of these gases by 8% during the period 2008 to 2012 in comparison with their levels in 1990, see Decision 1600/2002/EC of 10 September 2002 laying down the Sixth Community Environment Action Programme [2002] OJ L 242/6, article 5.

[46] A Runge Metzger, 'The Potential Role of the EU ETS for the Development of Long-Term International Climate Policies' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 253, 254. Another major significance of the Protocol is obviously the fact that the Parties to the Protocol committed to reducing their emissions of greenhouse gases. On this point see R de Witt Wijnen, 'Emissions Trading under Article 17 of the Kyoto Protocol' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford University Press, Oxford 2005) 403, 407.

the use of emissions trading in Europe as a response to the Protocol.[47] Quickly thereafter, the Directive was adopted.[48]

Although the EU bound itself at Kyoto to tackling climate change problems as addressed at the international level, it did *not have to* implement an emissions trading scheme to respect its regulatory commitments.[49] In this regard, the success of the U.S. acid rain emissions trading programme played a crucial role in making this regulatory strategy popular[50] – both at international level and including it as a compliance method in the Protocol,[51] and in influencing the EU in deciding to adopt it as a key climate change law.[52] What is often understood to derive from U.S. trading experience in sulphur dioxide is that emissions trading is a regulatory strategy that can be equally successfully applied elsewhere[53] – that it indeed can travel both vertically

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[47] See Commission of the European Communities, Communication from the Commission on Climate Change - Towards an EU Post-Kyoto Strategy, COM (1998) 353.

[48] The Directive was adopted within three years of its official initiation, see J Wettestad, 'The Making of the 2003 EU Emissions Trading Directive: An Ultra-Quick Process due to Entrepreneurial Proficiency?' (2005) 5 Global Environmental Politics 1.

[49] Article 17 of the Kyoto Protocol (n 42) states that emissions trading is only a regulatory option for compliance. This points is discussed also in J Skjærseth and J Wettestad, *EU Emissions Trading: Initiation, Decision-Making and Implementation* (Ashgate Publishing, Burlington 2008) 35.

[50] There has been much debate from political scientists as to why the Directive was finally adopted, which fall outside the scope of this Chapter. For such an overview, see ibid.

[51] J Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecological Law Quarterly 1295, 1312.

[52] J Delbeke, 'The Emissions Trading Scheme (ETS): The Cornerstone of the EU's Implementation of the Kyoto Protocol' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 1, 7-8.

[53] J Johnston, 'Problems of Equity and Efficiency in the Design of International Greenhouse Gas Cap-and-Trade Schemes' (2009) 33 Harvard Environmental Law Review 405, 429-30, Chapter One Section II.

and horizontally to international and national legal regimes respectively.[54] Similarly, the EU ETS – now the biggest and first supranational trading scheme[55] – is predicted to become the 'centrepiece',[56] 'cornerstone',[57] 'role model',[58] and 'blueprint'[59] for other schemes and an emerging global emissions trading regime.

What the above shows is that the EU ETS is clearly 'on the move':[60] it entered the EU legal order – to which it is not native[61] – following the encouraged promulgation of emissions trading regimes by the Protocol and the U.S. emissions trading experience. These type of travels, or 'legal transfers'[62] are not uncommon:[63]

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[54] Wiener 'Something Borrowed for Something Blue' (n 51).

[55] van Asselt 'Enthusiastic Adoption of an 'Alien' Instrument?' (n 36).

[56] G Michael, 'Preface' in G Michael, R Betz and K Neuhoff (eds), *National Allocation Plans in the EU Emissions Trading Scheme: Lessons and Implications for Phase II* (Earthscan, London 2007) 349, 349.

[57] D Ellerman, F Convery and C de Perthuis, *Pricing Carbon: the European Union Emissions Trading Scheme* (Cambridge University Press, Cambridge 2010) 1 citing C Egenhofer and others, *The EU Emissions Trading Scheme: Taking Stock and Looking Forward* (Mistra, Brussels 2006).

[58] Runge Metzger 'The Potential Role of the EU ETS' (n 46) 273.

[59] Delbeke 'The Cornerstone of the EU's Implementation' (n 52) 13.

[60] 'On the move' as defined by Nelken who describes the travels of regulatory ideas as legal transfers from one legal entity to another. D Nelken, 'Comparatists and Transferability' in D Nelken (ed) *Beyond Law in Context: Developing a Sociological Understanding of Law* (Ashgate, Surrey 2009) 255, 255.

[61] Harro 'Enthusiastic Adoption of an 'Alien' Instrument?' (n 36) 125. The Commission has also remarked on the fact this regulatory strategy is new to the EU legal order, Commission of the European Communities, Communication from the Commission on Preparing for Implementation of the Kyoto Protocol, COM (1999) 230, 14.

[62] Nelken 'Comparatists and Transferability' (n 60).

[63] EU regulation on chemicals is an example of laws 'migrating' from the EU to the U.S. legal order. J Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 American Journal of Comparative Law 897. The 'better regulation' agenda in the EU, Wiener 'Better Regulation in Europe' (n 35) describes to be 'borrowed' from the U.S.

following the growth of markets, the proliferation of means of communication, and the stronger role of mass media – each of which encourages and facilitates jurisdictions to come together – the migration of regulatory ideas are becoming increasingly frequent.[64] The danger, however, with assuming that particular legal mechanisms can travel across borders is to underestimate the impact of legal culture, in which the set law operates. In the case of the EU ETS, two types of caution must be raised against the assumption that it is an emerging global or transferable legal emissions trading regime: one relates to concrete procedural differences between the EU ETS and the international emissions trading scheme as set out under the Protocol, and the second to legal culture as defined below.

### *1. Kyoto Protocol and the EU Emissions Trading Scheme*

As explained, emissions trading was introduced in the EU legal order through international environmental law and from this viewpoint it tends to be argued that emissions trading in the EU would not exist 'were it not for the Protocol.'[65] The crucial point to make here is that despite this strong relationship between the EU ETS and international environmental law, and more precisely the Protocol, the EU ETS

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[64] Nelken 'Comparatists and Transferability' (n 60). Laws are understood to travel from dominant countries in particular sectors to the rest of the world, see D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism ' (2005) 598 The ANNALS of the American Academy of Political and Social Science 12, 24-25. In this regard, Friedman describes how Japan and Turkey 'swallowed whole codes of law from Europe' L Friedman, 'Some Comments on Cotterrell and Legal Transplants' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford 2001) 93, 93. Van Hoecke and Warrington systemise the study of legal cultures by dividing these into different legal families, M van Hoecke and M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quarterly 495, 498.

[65] D Ellerman and P Joskow, *The European Union's Emissions Trading System in Perspective* (Pew Center on Global Climate Change, Arlington, VA 2008) 1.

stands as an independent climate change regime that is embedded in legal culture and a constituent of a rich legal system that is the EU jurisdiction. Over and above legal culture, four procedural differences between the emissions trading in the EU and the international climate change regime highlight the *sui generis* of the EU ETS in this regard.

First, the Protocol regulates trading only between its signatories at state level and not at the level of installations, as is the case under the EU ETS.[66] This means that the Protocol is negotiated between governments imposing reduction targets on a country's total emissions, whereas the EU ETS is a scheme at industry level, regulating emissions of particular installations only.[67] Second, the commitments to reduce emissions by the EU are shared amongst its Member States according to the so-called Burden Sharing Agreement, which means that the EU ETS is based on emissions limits that are specific to the EU legal order – despite its origins in the Protocol and the overall emissions limits that the Protocol imposes.[68] Third, the two

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[66] As explained above by Y Slingenberg, 'The International Climate Policy developments of the 1990's: The UNFCCC, the Kytoto Protocol, the Marrakech Accords and the EU Ratification Decision' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 15, 19.

[67] Dornau R Dornau, 'The Emissions Trading Scheme of the European Union' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford University Press, Oxford 2005) 417, 421.

[68] This means that any changes to the burden sharing agreement would not have any effect on international law, see Y Slingenberg, 'Community Action in the Fight Against Climate Change' in M Onida (ed) *Europe and the Environment: Legal Essays in Honour of Ludwig Krämer* (Europa Law Publishing, Groningen 2004) 211, 218. The distribution of the internal emissions reduction commitments are set with regard to national conditions, including current greenhouse gas emissions, opportunity to reduce them, and the level of economic development, see Council Decision 2002/358 of 25 April 2002 concerning the approval, on the behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder [2002] OJ L130. Based on these considerations, different Member States may emit to different extents – for quantification of the respective emission levels of the Member States see Commission Decision of 14 December 2006 determining the respective emissions levels

trading systems follow different timelines: the EU ETS was enacted before the Protocol became legally binding in international and EU law, and it was clear that the EU ETS would be put in operation even if the Protocol had not taken effect.[69] The first period of trading under the EU ETS therefore fell entirely outside of the scope of the Protocol. Fourth, the EU ETS is based on a legal framework that continues also after 2012, that is, beyond the timeframe of the Protocol,[70] and independent of any successor agreement to the Protocol being agreed upon.[71]

Moreover, the fact that the EU emissions market is established as a legal response to international environmental law has no bearing on the construction and management of the EU ETS. This is not only because of the impact and importance of legal culture discussed in the following sub-section, but also due to the Protocol

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allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC [2006] OJ L358/87.

[69] Ellerman and Joskow *The European Union's Emissions Trading System in Perspective* (n 65).

[70] The revised EU ETS Directive applies from 2013 onwards, see Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/63. J Delbeke, 'The Emissions Trading Scheme (ETS): The Cornerstone of the EU's Implementation of the Kyoto Protocol' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 1, 13.

[71] At the time of writing, the afterlife of the Protocol is one of the major concerns in international environmental law. Cole, for instance, argues that the focus should be on developing a better negotiating strategy for climate change policies that is able to better aligning interests of the various Parties to the Protocol than what has currently been possible. D Cole, 'Climate Change and Collective Action' (2008) 61 Current Legal Problems 229, 264. Bodansky argues that bottom-up, as opposed to present top-down solutions to future international architecture ought to be explored, D Bodansky, 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773865> accessed 11 June 2011. A recent survey looks at 40 different proposals as to how to reform or shape future climate change negotiations, see D Bodansky, S Chou and C Jorge-Tresolini, *International Climate: Efforts Beyond 2012 - A Survey of Approaches* (Pew Center on Global Climate Change, Arlington, VA 2004).

establishing simply 'the barest skeleton of a market'.[72] In other words, the Protocol contains few details of the trading scheme, or rather, the bare minimum,[73] leaving the 'relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability'[74] to be determined at subsequent Conferences of the Parties.[75] As a consequence, different trading schemes may arise following the Protocol,[76] in particular because – and as the models show more generally in the previous Chapter – Parties involved in the Protocol may have different concepts of emissions trading.[77]

What these four procedural differences show is that although international environmental law has been essential to the introduction and later implementation of emissions trading to the EU regulatory scene, the EU ETS stands as an EU-specific legal construction independent of the global climate change law framework. The impact and importance of legal culture in this regard are considered next.

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[72] D MacKenzie, *Material Markets: How Economic Agents are Constructed* (Oxford University Press, Oxford 2009) 153.

[73] Grubb, Vrolijk and Brack *The Kyoto Protocol* (n 44) 129.

[74] Kyoto Protocol, article 17.

[75] Following the Protocol, five conferences finally lead to a political agreement in Bonn that were translated into legal documents at Marrakech. United Nations Framework Convention on Climate Change Report of the Conference of the Parties on its Seventh Session, FCCC/CP/2001/13/Add.1, 21 January 2002. For an overview of these conferences see Slingenberg 'Climate Change Developments' (n 66) 214-215.

[76] Grubb, Vrolijk and Brack *The Kyoto Protocol* (n 44) 207-208, identifies three possible trading schemes under this global regime: at one extreme, governments might simply transfer title deeds for part of their assigned amount to corporations and authorise these to corporations to trade internationally. Another option is for the government to define emission permits and to allow corporations to obtain these against assigned amounts specifically designated for international exchanges. A third option is to allow national companies to trade amongst themselves in a legal framework created by the central government, the latter also assuming responsibility for the trade under the Protocol.

[77] de Witt Wijnen 'Emissions Trading under Article 17' (n 46) 415.

### *2. What's Legal Culture Got to Do with it?*

Over and above the procedural difference between emissions trading at international and at EU level, emissions trading regimes depend on their specific legal culture for meaning. This is because each rule or legal framework has a particular meaning tied to a particular place and time,[78] and each legal concept and line of legal argument operate in pre-determined traditional contexts that spring from different cultural traditions[79] – or according to a so-called *mentalité*.[80] As such, a rule or regime cannot be examined only as a black-letter text, rather it must be scrutinised through a culture-specific lens, taking into consideration its legal culture.[81]

'Legal culture', however, is a ubiquitous concept.[82] It reflects a fusion of social, political, and economic forces that impact a law's development, significance and process of implementation, as well as expressing the institutional and historical traditions and forces in a particular jurisdiction and in its legal language.[83] An

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[78] Here Legrand in particular refers to the importance of interpretation and not only the text of the law itself. P Legrand, 'What 'Legal Transplants'? ' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford 2001) 55, 57-8.

[79] C Joerges, 'The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts' (1995) 3 European Environmental Law Review 175, 183. Questiaux applies a similar argument in her examination of the impact of legal culture on implementation. N Questiaux, 'Implementing EC Law in France: The Role of the French Conseil d'Etat' in P Craig and C Harlow (eds), *Lawmaking in the European Union* (Kluwer International London 1998) 479.

[80] Legrand 'What 'Legal Transplants' (n 78) 65.

[81] Ibid.

[82] Gibson and Caldeira 'Legal Cultures of Europe' (n 5). Moreover, Cotterrell views legal culture 'too unclear to ever be fruitfully applied'. R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed) *Comparing Legal Cultures* (Darthmouth Publishing, Aldershot 1997) 13, 14.

[83] E Scotford, *The Role of Environmental Principles in the Decisions of the European Union Courts and New South Wales Land and Environment Court* (DPhil Thesis, University of Oxford 2010) Chapter One.

appreciation of legal culture therefore agrees that the study of a legal concept and the examination of a law that is thought to have 'travelled' – as is the case in this Chapter – will mirror these influences. Although there is a rich literature on this topic that suggests various methods and framework of how to study laws in comparison or laws that appear to be 'on the move', there is no overriding, uniform or straightforward guidance as to how to examine a law's particularities.[84] One analytical framework[85] proposes that legal culture is the study of finding the 'right fit'[86] between a law that is travelling and the hosting legal body to which it travels. From this viewpoint, legal transfers are seen as 'legal transplants'[87] that must be 'domesticated' to fit into their new context,[88] or the transfer would run the risk of being 'rejected'[89] and the

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[84] For instance, legal culture may be treated as an aggregating concept that captures everything that is part of law in a particular field, or it may be viewed as an explanatory tool that helps to explain particular attitudes to laws that are culture-specific, see J Webber, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken' (2004) 29 Australian Journal of Legal Philosophy 27, 27-28.

[85] A related, albeit different, use of legal culture is to demonstrate that legal transplants are in fact never possible, or, that law can never successfully be borrowed or transferred between legal systems. The argument here is that that when a law is translated from one legal system to another, instead of experiencing integration or rejection as described above, the imported law instead triggers a set of new and unexpected events and thereby creates a new law with a new meaning. These so-called 'legal irritants' are understood to be resistant to domestication, and thus unable to transform 'from something alien into something familiar'. These are instead understood to unleash 'an evolutionary dynamic' that results in a significant change both to the meaning of the rule and the context to which it is applied.[85] This approach employs legal culture to show that legal culture is an undeniable and non-transferable part of a law's life and to highlight each law's uniqueness. G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 Modern Law Review 11, 12.

[86] Nelken 'Comparatists and Transferability' (n 60).

[87] It is argued that this medical reference does not work fully. For example, if the body rejects the transplant, sometimes medics need to force the body to accept it. That would mean that laws are imposed rather than influencing each other when laws are said to 'travel'. Nelken flags the importance of the use of metaphors, such as transplantations, in literature on legal culture mobilise and favour different ideas of how law fits society, see ibid 281.

[88] D Nelken, 'Towards a Sociology of Legal Adaption' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Publishing, Oxford 2001) 7, 13. Here, knowledge is required

transplant proven a failure.[90] This illustration aims to show that no transplant, not even a legal one, is simple and that in order to have a chance at succeeding in applying foreign legal elements to a domestic legal system, such as emissions trading to the EU, knowledge of both the implementing law and the hosting legal system is required. Such a study may be carried out by focusing on legal culture as a series of 'internal' factors – including judicial decisions, written law, scholarly comments, architecture of legal institutions – and/or 'external' elements – comprising social behaviour, attitudes to judicial decisions and informal organisation of behaviour within a community.[91]

The reference to legal culture in this Chapter is not intended to turn into a socio-legal study – external elements relating to the EU ETS will not be examined. The point with legal culture here is rather to show that the legal features of the EU ETS are highly contingent on the legal system in which it operates, and its legal architecture, albeit appearing to be simple, is tied to complex questions concerning power-allocation between the Commission and the Member States that are specific to the EU. This is in fact why the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models are mapped onto EU ETS discourses, and the roles of the emissions market, the state, and the legal status of emissions allowances as envisioned by law- and policymakers, as well as the EU Courts are scrutinised in a close contextual legal

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about the law and its 'web of meaning'. D Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1, 10.

[89] Nelken 'Sociology of Legal Adaption', ibid.

[90] L Zedner, 'Comparative Research in Criminal Justice' in L Noaks, M Maguire and M Levi (eds), *Contemporary Issues in Criminology* (University of Wales Press, Cardiff 1995) 11-12.

[91] Scotford *Environmental Principles* (n 83).

analysis in Chapters Four and Five. This means that legal culture within the framework of this thesis adopts an 'internal' meaning and engages in an analysis of emissions trading beyond the crude legal text of the Directive to focus on a study of the EU ETS within a particular legal setting and interpretative community in that jurisdiction.

Thus 'legal culture' is here an expression for the institutional and jurisdictional forces that shape the roles of emissions trading regimes and, more specifically, the emissions market, the state and emissions allowances within law- and policymaking and judicial discourse and reasoning. However, rather than start directly with a scrutiny of how the Commission and the EU Courts understand the EU ETS, it is useful to first sketch the general market discourse in the EU and show that in these debates the work of the judiciary is strongly tied to market construction, environmental protection and regulation. This rough outline aims to show that markets in the EU legal context are constructed according to a particular legal order, which it is difficult, if at all possible, to duplicate elsewhere, and which thus justifies a close examination of EU ETS, such as undertaken in the next two Chapters, looking to the interpretation of the EU ETS as delivered by the law and policy-maker and the judiciary.

## III. EU LEGAL CULTURE: LEGAL INTERSECTIONS BETWEEN THE INTERNAL MARKET, EU COURTS AND REGULATION

EU legal culture is part of a vibrant evolution: the Union was created as a *sui generis* polity in 1958 and has since passed different legal processes of Treaty amendments

and revisions, dramatic programmes of deregulation and re-regulation,[92] aimed at creating a particular economic and political 'ever closer union.'[93] These developments have occurred in different phases[94] and the Treaty articles, secondary Union legislation, the EU courts, and the institutions have all been important in realising this progress of creating an integrated Europe.[95] Such integration has evolved around markets and market-creation[96] mainly because market liberation is seen as the main promoter of consolidating 'co-operation and integration that would make pan-European armed conflict inconceivable'[97] – a goal that is traditionally at the heart of the EU.[98] Indeed, a market shared by Member States in which free movement of goods and factors of production are safeguarded, was identified by the founders of the

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[92] E Fisher, *Risk, Regulation and Administrative Constitutionalism* (Hart Publishing Oxford 2007) 168.

[93] Article 1 TEU states that the Lisbon Treaty 'marks a new stage in the process of creating an ever closer union among the peoples of Europe'. See also D Dinan, *Ever Closer Union: An Introduction to European Integration* (3rd edn Palgrave Macmillan, Hampshire 2005).

[94] For an overview of the development of European integration and EU competences see P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th edn Oxford University Press, Oxford 2008) chapter 1, C Harlow, 'Three Phases in the Evolution of EU Administrative Law' in P Craig and Gd Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 439. Warleigh defines these developments to have occurred 'gradually and elliptically' see A Warleigh, 'Purposeful Opportunists? EU Institutions and the Struggle over European Citizenship' in R Bellamy and A Warleigh (eds) Citizenship and Governance in the EU (London Continuum 2001) 19, 34.

[95] P Craig, 'The Evolution of the Single Market: Unpacking the Premises' in C Barnard and J Scott (eds), *The Law of the Single European Market* (Hart Publishing Oxford 2002) 1, 40.

[96] Illustrating the essence of the single European market to EU's governance and vice versa, Joerges explains the argument of EU functioning as a 'market without a State' as much as it could be 'States without market'. C Joerges, 'What is Left of the European Economic Constitution? A Melancholic Euology' (2005) 30 European Law Review 461, 475.

[97] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edn Oxford University Press, Oxford 2007) 23.

[98] Ibid.

Treaty as key to generating economic growth, wealth,[99] and ultimately securing political unity across Europe.[100] As such, the use of markets in this context has a double-edged quality: it husbands economic activities and furthers European integration that is the centrepiece of EU legal culture.

To talk about markets in general terms is problematic,[101] however, particularly so in the context of EU legal culture where markets hold different meanings depending on the type of law employed and the law's purpose. For instance, within the scope of competition law, a particular market and market definitions are carried out so as to assess whether a firm or firms possess market power and whether to apply competition law.[102] Competition law merits,[103] however, are different to how a market is defined in applying, for example, the integration principle in the EU legal

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[99] T Burns, 'Better Lawmaking? An Evaluation of Lawmaking in the European Community' in P Craig and C Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International, London 1998) 435, 440.

[100] As epitomised by the former President of the European Commission, Jacques Delors, who is understood to have exclaimed: 'We're not here just to make a single market – that doesn't interest me – but to make a political union.' As cited in G Rachman, 'Greece Threatens More than the Euro ' *Financial Times* (London February 23 2010) 15.

[101] Callon, for instance illustrates, albeit in a broader and from an economic perspective, that it is impossible to talk about *a* market; rather there are different kind*s* of markets. M Callon, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology' in M Callon (ed) *The Laws of the Markets* (Blackwell Publishers, Oxford 1998) 244. On a similar point see also D MacKenzie, *Material Markets: How Economic Agents are Constructed* (Oxford University Press, Oxford 2009) 182.

[102] By pinning down the product and geographical area of a certain market, it is thereafter possible to determine the competitive constraints upon undertakings in that particular market and apply competition policies thereto. At EU level see Commission of the European Communities, Notice from the Commission on the Definition of the Relevant Market for the Purposes of Community Competition Law OJ [1997] C 372/5, and at UK level, see Office of Fair Trade, Competition Act 1998 Market Definition, March 1999, OFT 403. See R Whish, *Competition Law* (6th edn Lexis Nexis Butterworths, London 2009) 25.

[103] Note that markets also within competition law may be differently defined depending on the competition problem at hand see ibid.

environment.[104] Discussions about the scope of the single European market further complicate matters. As illustrated by Armstrong, the single European market can be seen 'to have the qualities of Russian dolls'[105] in the sense that increasingly narrow or, increasingly broad definitions can be applied to define it. He explains that in the strictest sense, this market refers to the Treaty definition of establishing an internal market,[106] which connects to the Commission's *White Paper on Completing the Internal Market* and the objectives stipulated therein, such as abolishing barriers to trade, harmonising and approximating legislation with the aim of facilitating firms work across borders.[107] Yet, even in adopting this allegedly narrow definition, the internal market cannot be precisely defined simply because the Commission's targeted goals in finalising the internal market are ongoing rather than 'historical artefact.'[108]

Clearly, market discourses in the EU legal order are dynamic and complex but the idea behind this Chapter is *not* to capture the entire essence of these discourses nor

[104] Certain integration principles under TFEU, such as the environmental integration principle in Art 11 TFEU have general application and as such must be integrated into the definition and integration of Union's policies and activities, stretching beyond market definitions relevant to competition provisions. For an overview of various integration principles under the Lisbon Treaty see H Vedder, 'Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental Law 285, 289.

[105] K Armstrong, 'Governance and the Single Market' in P Craig and G de Burca (eds), *The Evolution of EU law* (Oxford University Press, Oxford 1999) 745, 747.

[106] Art 26(2) TFEU states that the 'internal market shall compromise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

[107] Commission of the European Communities, White Paper on Completing the Internal Market COM(85) 310 final.

[108] C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edn Oxford University Press, Oxford 2007) 13. Over the years and following the White Paper, ibid, the Commission has set out various ambitious goals to finalise the internal market project, for an overview see S Weatherill, *Cases and Materials on EU Law* (8th edn Oxford University Press, Oxford 2007) 304-314.

to depict the complete picture of the part that markets play in establishing an EU legal culture. The objective here is far narrower and seeks to highlight – in the form of mere snapshots – that the emission markets in the EU operate in a broader market-based legal framework in which the courts play a progressive role in constructing a high level of environmental protection and integration and market discourses stand shoulder to shoulder with particular regulatory agendas aimed at creating competitive and integrated markets. Although mere snapshots, it is in the light of these the legal role of the emissions market in the EU can be made sense of and the relevance of a close examination of this market system appreciated.

## A. *Markets*, Courts and Environmental Law

The Union enjoys extensive market-making powers that tend to be exercised directly or indirectly to state measures:[109] provisions on the control of fiscal barriers[110] and the free movement provisions[111] are clear examples of Treaty provisions that may be applied to ensure market harmonisation by limiting domestic regulatory measures.[112] The process of creating the single European market thus realises economic freedoms

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[109] S Weatherill and P Beaumont, *EU Law* (3rd edn Penguin Publishing, London 1999) 1000.

[110] See Articles 30 and 110 TFEU.

[111] Articles 34 and 35 TFEU controls quantitative physical and technical barriers and articles 45, 49, and 56 TFEU control obstacles to the free movement of persons and services.

[112] Weatherill and Beaumont *EU Law* (n 109) and Weatherill *Cases and Materials on EU Law* (n 108) 387-390. The so-called Sunday trading cases, for instance, show that the CJEU interprets Union law so as to exercise control also over local regulatory choices that in fact do not harm the realisation of economics of scale or the enhancement of consumer choice. In this context, regulatory interventions, based on Articles 114 and 352 TFEU that seek to overcome any market fragmentation caused by diverse arrays of national standards and regulation have been allowed. For post-Keck situations, C-142/05 *Mickelsson and Roos* is another example of restrictions on use that is in the view of the courts compatible with EU law.

but established is not *just* a market. Rather, what is described by Weiler as 'a highly politicized choice of ethos, ideology and political culture'[113] is crafted that also follows an economic rationale[114] that seeks to protect high social and environmental standards. This can be seen in Article 3(3) TEU, which provides that the Union shall establish an internal market that is 'a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.' Moreover, Article 114(3) TFEU, which vests regulatory power with the Union to approximate laws on the grounds of the functioning of the internal market, obliges the Commission to consider a high level of environmental and consumer protection in its legislative proposals. What this shows is that the internal market follows deep social structures that stretch far beyond laissez-faire policies of a market.

This idea of establishing a market with a particular regulatory goal, including that of environmental protection, dates back to the First Environmental Action Programme, which stated that the establishment of a common market cannot be realised without an effective campaign against pollution and nuisance and an improvement in the quality of life and protection of the environment.[115] At the time when the First Environmental Action Programme was issued, and prior to the Single

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[113] J Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2477.

[114] Craig and de Burca *EU Law* (n 94) 630, argue that one of the key reasons why the French referendum on the Constitutional Treaty had a negative outcome is because the EU was dominated too much by market considerations.

[115] J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambridge 2007) 143.

European Act,[116] however, the Union lacked the competence to legislate on environmental matters. Indeed the general rule underpinning EU law and according to settled case law, the Union must act within its powers, and any measure that it stipulates must have a legal basis within the Treaty.[117] In practice, what the Union did was to exercise its discretion for market-creation, relying on two articles in particular – current Articles 114 TFEU and 352 TFEU, which allow harmonisation of national laws on the basis of furthering the establishment of the internal market and create residual general powers for the Union to safeguard the functioning of the internal market respectively – to develop environment protection and thereby legitimise legislation in this area.[118] A series of directives that sought to protect the environment were adopted on this basis – the Drinking Water Directive[119] being but one example. This legal measure is supposed to regulate disparity in national provisions on the quality of water that may create differences in conditions of competition, and thereby 'affect the operation of the common market'.[120] Although different environmental

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[116] The Single European Act [1987] OJ L169/1 (SEA), the Union lacked competence to regulate on environmental matters. SEA introduced Articles 130r-t that provides the first explicit codified legal base for environmental measures.

[117] Article 5(2) TEU states that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competence not conferred upon the Union in the Treaties remain with the Member States.' Plentiful of cases exist on this topic, see for instance Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107 .

[118] Most environmental law books writing on the development of EU environmental law will discuss this point, see for example S Bell and D McGillivray, *Environmental Law* (7th edn Oxford University Press, Oxford 2008) 185. Note that the current version of Article 352 TFEU is not tied to the internal market.

[119] Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption as amended by Directive 81/858/EEC and 91/692/EEC (1980) OJ L229 .

[120] This example is used as citied in Holder and Lee *Environmental Protection* (n 115) 159.

standards are known to be able to create trade barriers[121] and legislation that stems from this phase is rooted in a concern for the attainment of a common market, environmental considerations 'undoubtedly played a part'[122] in establishing these laws.

In setting out the snapshots above, two points should be stressed. First, market discourses in the EU are clearly embedded in a kaleidoscope of aims, including the creation of prosperity, social security and environmental protection. This shows that the market mentality at an EU level is not purely profit-oriented or neutral. Second, the Union has used the market and the process of market creation for 'economic spillover', or more exactly, to expand its competence to regulate environmental matters. 'EU environmental competence', as explained in more detail next, is the core notion of EU environmental law, which not only highlights the close tie between the internal market and environmental protection in the EU but also that this overlap is particular to EU legal culture.

### B. Markets, *Courts* and Environmental Regulation

The progressiveness of environmental protection via market rules explained above has been and is possible due to the interpretative freedom given to the EU courts to shape and construct EU law by the founding Treaties. More precisely, Article 19 TEU states that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed,' which in practice means that the CJEU possesses the

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[121] J Scott, *Environmental Law* (Longman, London 1998) 12-15.

[122] J Jans and H Vedder, *European Environmental Law* (3rd edn Europa Law Publishing, Groningen 2008) 3.

capacity to alter the constitutional 'rules of the game' under which all other organs of governance, including the Member States, the EU's legislative institutions and the courts interact.[123] Relying on this Treaty provision, the CJEU has repeatedly supported the creation of a market geared toward the integration of Europe,[124] and that creates environmental policy, as exemplified in the *ADBHU* case.[125] Here, the CJEU was asked whether the requirement to apply for a permit to dispose of oil within a particular zone according to a Directive on the disposal of oil spills was incompatible with the free movement of goods provision, thereby raising a trade question that concerns also environmental protection. The CJEU found that environmental protection is one of 'the Community's essential objectives', which, as such, justifies certain limitations to the activities in the common market.[126] This is the first time environmental safeguarding is recognised with such rigour, and even more remarkable is the timing – this judgement was delivered before the Union had codified environmental competences.[127] What this shows is the sharp intersection between the use of a particular market framework to safeguard the environment and thus not only seeking trade-liberation and relying on the specific role of the EU courts to justify such action.

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[123] As described in A Stone Sweet, 'The European Court of Justice' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford 2011) 121, 131.

[124] See for instance M Maduro, *We the Court: The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 2002).

[125] Case C-240/83 *Procureur de la République v Association de Défense Des Brûleurs D'huiles Usagées (ADBHU)* [1985] ECR 531 .

[126] Ibid para. 13.

[127] Jans and Vedder *European Environmental Law* (n 122) 6.

Over the course of various Treaty amendments, the Union has developed competences to legislate on environmental matters[128] and as such does not need to rely on market rules in order to protect the environment nor on the CJEU to support economic spillovers into environmental matters. At present, title XX of the Lisbon Treaty provides the legal basis for EU-wide actions relating to the environment. Yet overlaps between market creation and environment policy-and lawmaking have not subsided.[129] The reason is that a measure may have an impact on the internal market whilst targeting an environment-oriented aim, which can lead to the dilemma of choosing the right legal base for legislation.[130] Considering that the Union may only act upon its conferred powers, this is a significant choice to make, which if wrong, leads to the invalidation of the measure.[131] This is a seemingly straightforward rule, but the Treaty, and the extent to which it allows the Member States vis-à-vis the Union to enjoy regulative discretion, can be difficult to define,[132] in particular considering the open-texture of a legal basis, such as Article 308 pre-Lisbon that provided an implied power to the Union to regulate, should the Union prove it

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[128] Currently these are encompassed in articles 114(3) and 191-193 TFEU.

[129] Indeed, in the run-up to the Commission's proposal for the EU emissions trading scheme it was considered whether instead of the environmental legal basis Article 191(1) TFEU the EU ETS ought to be based on the former Article 95 EU that has as its goal to establish the EU's internal market. The fact that it could not be shown that emissions trading schemes were causing distortion to the internal market made this legal basis inapplicable. See D Meadows, 'The Emissions Allowance Trading Directive 2003/87/EC Explained ' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 63, 64.

[130] J Jans, 'Environmental Spill-overs Into General Community Law' (2008) 31 Fordham International Law Journal 1360, 1362.

[131] This is codified in Article 5(1) TEU which states that the 'limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.'

[132] For an overview of the different categories of competences see Craig and de Burca *EU Law* (n 94) chapter 3.

'necessary to attain' a particular objective for the functioning of the common market. This unclear cut between competences in regulating the internal market and trade on the one hand, and safeguarding the environment on the other, is clearly manifested in the CJEU's Opinion on the conclusion of the Cartagena Protocol.[133] Here the Court examined whether conclusion of an international agreement, which aimed to control the transboundary movement and management of living modified organisms, should be based on Article 207 TFEU,[134] and thereby be classified a trade measure, or under the environmental legal basis, Article 192 TFEU[135] In this context, the Court weighed the environmental objectives against the international trade feature in deciding the primary objective of the Protocol, and thus its appropriate legal base.[136] The Court concluded that the Protocol is clearly concerned with the environment both in light of its context, aim and content, and thus should be based on Article 192 TFEU.

Similarly, the EU courts frequently engage in balancing between environmental law and policy and economic objectives in the application of free movement provisions. Cases such as *Bluhme*[137] and *Preussen Elektra*[138] are instances

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[133] Opinion 2/00 of the Court of 6 December 2001 concerning the Cartagena Protocol ECR I-09713.

[134] The Commission argues that the conclusion of the Protocol falls within commercial activities and ought thus be based on former Articles 133 EC and 300 EC, which would give it exclusive competence to implement the agreement. 'EC' refers to legislation adopted under the EC Treaty and prior to the current Lisbon Treaty.

[135] Former, and in this case, Article 175 EC.

[136] Many commentaries exist on this Opinion, see for instance P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, Oxford 2004) 43.

[137] Case C-67/97 *Bluhme* [1998] ECR I-8033 . Case dealing with a legislation prohibiting the keeping of certain kind of bees on the Danish island of Laesö.

where the Court found measures with environmental objectives to fall within the scope of Article 34 TFEU but justified on the grounds of protecting and preserving the bee population, and promoting renewable energy respectively. Also, restrictions to trade – both distinctly[139] and indistinctly applicable measures[140] – have been justified, one of the arguments being that the 'protection of the environment is one of the Community's essential objectives.'[141] These are mere examples of the vast case law on environmental and trade related disputes[142] but they help to show that the EU courts play a vital role in supporting a particular market mentality and considering broader social and environmental matters in deciding the legitimacy of market rules.

What the discussion above shows is that the CJEU plays a crucial role in the development of the internal market: the EU courts have helped legitimise the extension of legislative activity in areas for which the EU lacked strict competence and it has itself pushed for environmental protection in reviewing and interpreting acts of market and environment competence, as well as in balancing the objectives of trade with environmental protection. Ultimately, an understanding of the function and construction of market discourses at EU level is incomplete without attention paid to the progressive role of the EU Courts.

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[138]Case C-379/98 *Preussen Elektra* [2001] ECR I-2099 . Case concerning German legislation that obliged suppliers of electricity to purchase electricity from renewable energy sources at minimum price.

[139] Case C-302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607 . Case concerning a Danish system that requires manufactures and importers to market beer and soft drinks only in re-usable containers that have to be approved by the National Agency for the Protection of the Environment.

[140] Case C-2/90 *Commission v Belgium* [1992] ECR I-14431 .

[141] *Danish Bottles* (n 139).

[142] For an overview see for instance L Krämer, *Casebook on EU Environmental Law* (Hart, Oxford 2002) 33.

### C. Markets, Courts and *Environmental Regulation*

What can be seen from the above two sub-sections is that the Union is 'regulatory in nature'[143] and that it constructs the internal market through regulation and regulatory interpretation. This particular tier of governance can be described to follow a catchy motto of 'freer markets, more rules'.[144] The *type* of rules used in this regard matters also in adopting environmental laws. Environmental legislation has typically been 'command-and-control' – that is, direct regulation that determines the technique and methodology required for compliance[145] – that is accredited to accommodate market transactions by imposing stable and clear obligations.[146] As such, the argument is that environmental regulation should not only enhance environmental protection but also safeguard and further the functionality of the internal market. Similarly, European environmental law has traditionally addressed only the most direct forms of market failures, such as pollution from one Member State to another, or environmental

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[143] Description as used in S Weatherill, 'The Challenge of Better Regulation ' in S Weatherill (ed) *Better Regulation* (Hart, Oxford 2007) 1, 3. A similar description exists in G Majone, 'The Rise of Statutory Regulation in Europe' in G Majone (ed) *Regulating Europe* (Routledge, Abingdon 1996) 47, 55.

[144] S Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press, Ithaca 1996). Vogel explains that the reason why rules are necessary is because governments cannot simply allow competition; they have to *create* it. S Vogel, 'Why Freer Markets Need More Rules' in M Landy, M Levin and M Shapiro (eds), *Creating Competitive Markets: The Politics of Regulatory Reform* (Brookings Institution Press, Washington D.C. 2007) 25, 34.

[145] As defined in M Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, Oxford 2005) 183.

[146] D Chalmers, 'Inhabitants in the Field of EC Environmental Law' in P Craig and G de Burca (eds), *The Evolution of EU Law* (1st edn, Oxford University Press, Oxford 1999) 653, 659.

protection primarily because of the likely distorting effects of national environmental laws on the European market.[147]

Equally, when by the end of the 1980's the use of command-and-control type of regulation was criticised, considerations regarding the inability of this regulatory method to address complex and varied environmental problems were raised[148] and its effects on the internal market questioned. Command-and-control was described as 'obscure, complex and inaccessible',[149] and as such, harming 'the competitiveness of European business, damaging the employment prospects of European citizens and inhibiting economic growth.'[150] The two key regulatory agendas that were applied to address this regulatory inertia – the Better Regulation,[151] which is succeeded by the Smart Regulation[152] agenda, and the regulatory movement towards ecological modernisation – each seek to establish a strong interrelationship between competitive markets and environmental protection, thus highlighting the close nexus between markets and environmental law in the EU legal order.

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[147] Ibid 660, Holder and Lee *Environmental Protection* (n 115) 162.

[148] Holder and Lee *Environmental Protection* (n 115) 164.

[149] Burns 'Better Lawmaking' (n 99) 435.

[150] Citing the Molitor Group as stated in ibid.

[151] Commission of the European Communities, Communication from the Commission on Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final.

[152] Commission of the European Communities, Communication from the Commission on Smart Regulation in the European Union, COM(2010) 543 final. In regulatory scholarship 'smart regulation' is furthered as a regulatory design in which a mix of institutions and regulations work together for a common regulatory goal, see N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, Oxford 1998). Note that the better regulation agenda does not always lead to smart regulation as understood by Gunningham, Grabosky and Sinclair, although there is consistency between the two, see R Baldwin, 'Is Better regulation Smarter Regulation?' (2005) Autumn Public Law 485, 502.

More precisely, creating *better* regulation became a clear priority following the Lisbon Agenda in which regulation was identified as pivotal in making the EU 'the most competitive and dynamic knowledge-based economy in the world.'[153] The Better Regulation agenda subsequently set out to simplify legislation, reduce administrative burdens, and thereby increase economic competitiveness,[154] which is why it is aligned with the growth and job priorities of the Lisbon Agenda.[155] Regulatory objectives forming part of the Better Regulation agenda cover a wide range of initiatives,[156] including securing high levels of both social and environmental protection, effective implementation of laws, and easy access to regulation,[157] which is further linked to good governance.[158] Indeed, Better Regulation narratives are fluid and dynamic,[159] and suggest both strict regulatory standards, as well as deregulation to achieve the prescribed goals.[160] Relevant to the discussion about environmental laws is the focus of both the Better and Smart Regulation agendas on the idea that

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[153] Presidency Conclusions (EU) Lisbon European Council 23 and 24 March 2000 <http://www.europarl.europa.eu/summits/lis1_en.htm> accessed 13 May 2011.

[154] Communication 'Better Regulation' (n 151).

[155] C Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14 Journal of European Public Policy 190, 204.

[156] Baldwin argues that the better regulation agenda is not so much a single idea as a collection of ideas that have been together to form an initiative. R Baldwin, 'Better Regulation: The Search and the Struggle' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford 2010) 258, 275.

[157] These were set out in the Manderlkern Report set out as the basis for better regulation in the EU. Manderlkern Group on Better Regulation (2001) <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf> accessed 13 May 2011.

[158] Commission of the European Communities, Commission White Paper on European Governance, COM(2001) 428at 5.

[159] Radaelli 'Better Regulation' (n 155) 200.

[160] Ibid 197.

better and smarter regulation can enhance competition.[161] The idea is to create 'win-win' situations that will allow companies to 'behave responsibly' and maximise profits at the same time.[162] The focus on creating 'win-win' solutions shows that ecological modernisation concepts have managed to 'put an imprint' on the Union's portrayal of regulatory reform.[163] The idea that more efficiency – at the level of regulation and innovation – is able to secure competitiveness and employment, as well as evade any environmental crises.[164] This movement aims to unite the forces that drive technical change and economic development to improve the quality of the environment.[165] Dimas summerises this goal by stating that Europe 'needs to invest more in innovative ways to protect the environment while boosting the EU's competitiveness.'[166] This idea, clearly influenced by the thought of ecological modernisation, has been steered toward the use of more flexible environmental regulation, and in the EU context the use of a mix of regulations and deregulation.[167] What it signifies is the overlap between market progressiveness and environmental

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[161] Communication 'Smart Regulation' (n 152) 12, Communication 'Better Regulation' (n 151).

[162] R Haythornthwaite, 'Better Regulation in Europe' in S Weatherill (ed) *Better Regulation* (Hart, Oxford 2007) 19, Baldwin (n 152) 507.

[163] MS Andersen and I Massa, 'Ecological Modernization: Origin, Dilemmas and Future Directions' (2000) 2 Environmental and Planning Law Journal 337, 339.

[164] I Massa and MS Andersen, 'Special Issue Introduction: Ecological Modernization' (2000) 2 Journal of Environmental Policy and Planning 265, 265.

[165] Holder and Lee *Environmental Protection* (n 115) 164.

[166] As cited in European Commission, 'Member States need to Embrace Reform More Decisively to Create More Growth and Jobs' (Brussels 27 January 2005) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/100&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

[167] Holder and Lee *Environmental Protection* (n 115) 165.

protection and that the two are interwoven in debates on regulation and regulatory reform in the EU.

These regulatory discussions, however, are part of an agenda that is not unique to the EU,[168] as indeed most governments are faced with demands for regulatory improvement.[169] As such, most public and private actors across Europe are devout 'in the pilgrimage toward the holy shrine of 'Better Regulation"'.[170] There are nonetheless two key reasons, as identified by Weatherill,[171] why these regulatory reform programmes in the EU are different from anywhere else and ultimately, why any EU-rule is inevitably intertwined in the EU legal culture. The first reason is that any assessment and reform of EU legislation is directly linked to EU's institutional framework.[172] This includes taking into consideration the Commission's 'policy entrepreneurship',[173] or, right of policy initiation, as well as the position of the Council and the Parliament to co-decide most matters that fall under the scope of the Treaty according to the ordinary legislative procedure.[174] The question of how the EU regulates *better* is inevitably linked to this particular process of policy-deliberation.

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[168] Wiener 'Better Regulation' (n 35) argues that the better regulation agenda in the US has been borrowed from the U.S. legal debate.

[169] It is an agenda furthered also by international bodies, including the Organisation for Economic and Co-operation development (OECD), see R Baldwin, M Cave and M Lodge, 'Regulation - The Field and the Developing Agenda' in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford 2010) 3, 8.

[170] S Weatherill, 'The Challenge of Better Regulation ' in S Weatherill (ed) *Better Regulation* (Hart, Oxford 2007) 1, 4.

[171] Ibid.

[172] Ibid 2.

[173] G Majone, 'The European Commission as Regulator' in G Majone (ed) *Regulating Europe* (Routledge, Abingdon 1996) 61.

[174] Weatherill 'Challenge of Better Regulation' (n 170) 2. Article 294 TFEU sets out the ordinary legislative procedure.

Examining the various methods of legislative processes thus helps to explain why an environmental measure, such as an EU-wide carbon energy tax[175] that requires unanimity in the decision-making process, [176] is less likely to be implemented and considered better regulation compared to, for instance, an emission trading regime that is based on the ordinary legislative procedure. Moreover, subsidiarity forms an intrinsic part of this examination. This principle encapsulates a core constitutional rule that says that policy areas that do not fall within its exclusive competence, the Union shall legislate only when there is a real need and where it is clear that the objective cannot be reached effectively by national measures.[177] In the context of environmental law, this is particularly pertinent considering that the Union shares competence with the Member States to legislate on environmental matters.[178] This means that environmental measures under Articles 191-193 TFEU must be adopted according to subsidiarity and Article 5(3) TEU.[179] Due to the political profile of the subsidiarity principle, each environmental law measure that is tested for improvement, faces an assessment on whether the Union *can* but also whether it *should* legislate.[180]

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[175] Commission of the European Communities, Commission Proposal for a Council Directive Introducting a Tax on Carbon Dioxide Emissions and Energy, COM(92) 226 final.

[176] Article 192(2)(a) TFEU.

[177] See Article 5(2) TEU, ibid and E Olivi, 'The EU Better Regulation Agenda' in S Weatherill (ed) *Better Regulation* (Hart, Oxford 2007) 191, 191.

[178] Article 4(e) TFEU.

[179] Article 5(3) TEU says that under 'the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member State, either at central level or at regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level.

[180] Holder and Lee *Environmental Protection* (n 115) 152.

Second, creating *better* regulation is inherently value-based and as such tied to its legal context for proper assessment.[181] For instance, smart regulation, which builds on the foundation of better regulation, identifies regulation as playing a key role in curing market failure:[182]

> They [markets] exist to serve a purpose which is to deliver sustainable prosperity for all, and they will not always do this on their own. Regulation has a positive and necessary role to play.

Here the Commission raises the importance of regulation in ensuring a well-functioning market but this goal leaves the question how to balance protection from market failures on the one hand, and commercial freedom on the other unanswered.[183] Indeed this is the dilemma of better regulation: under its umbrella stand a wide range of goals including endeavoring to facilitate growth and job creation and regulation that will be 'of benefit to all economic actors in the least burdensome and most cost-effective way possible'[184], as well as 'high levels of both social and environment protection'.[185] Understanding how these interests can be combined is an assignment, as this sub-section has attempted to show, which is EU-specific.

What the above illustrate is that debates on regulation are central to the Union: it constructs the internal market via regulation and it is through the use and interpretation of these regulations and the relevant competences that the internal

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[181] Weatherill 'Challenge of Better Regulation' (n 170) 4.

[182] Commission of the European Communities, Communication from the Commission on Smart Regulation in the European Union, COM(2010) 543 final 2.

[183] Weatherill 'Challenge of Better Regulation' (n 170) 4.

[184] Commission to the European Communities, Commission Working Paper on Better Regulation and the Thematic Strategies for the Environment, COM(2005) 446 final, at 2.

[185] Communication 'Better Regulation' (n 151).

market has progressed to secure high standards of environment protection in the EU. At the same time, environmental law tends to be constructed and reformed so as to help enhance this market and its competitiveness, indicating a clear symbiosis between the two. The significance of this is that environmental law discourses in the EU are inherently tied to the internal market, and more precisely the EU legal order.

## IV. ALL TOGETHER NOW: THE KYOTO PROTOCOL, THE INTERNAL MARKET, EU COURTS, ENVIRONMENTAL LAW AND THE EU ETS

The focus in this Chapter has been on legal culture and establishing why the role of an EU environmental regime, such as the EU ETS, can only be determined by a close contextual analysis of the terms of a particular legal culture, as will be done in the next two Chapters with respect to the Commission and the EU Courts and the meaning these give to the EU ETS. As such, this Chapter justifies the specific analysis of the EU ETS in the subsequent two Chapters while setting out two key points.

First, the discussions above point to two key reasons why legal culture matters in examining emissions trading scheme. One refers to legal culture scholarship more broadly and the idea therein that each law is inherently tied for understanding to its specific legal environment. The second reason relates to the idea of emissions trading schemes more specifically and the tendency to regard these as imposable emission trading regimes across public law regimes. This is clearly seen in the context of the EU ETS: is based on a regulatory idea that reached the legislative table in Brussels top-down following the EU's commitment as set out in the Protocol, it is influenced

by the U.S. trading experience, and is believed to set out a straightforward model for emission trading, predicted to build on and create a global emissions trading scheme. The argument here is that these 'travels' must be set in their legal context and any assumed direct borrowing of legal regimes rejected – both on the ground of procedural differences, as was found between the EU ETS and the international emissions trading system, and on the ground of legal culture.

Second, this Chapter does not actually engage in an analysis of the EU ETS but it explains why it is impossible to consider any environmental law or market operating in the EU legal context neutral or imposable in a different, non-EU legal context. Setting out snapshots of the 'multi-layered'[186] and complex legal culture in which the EU ETS is implemented and focusing on the legal interactions between the internal market, the EU Courts and environmental law this point is illustrated. Albeit mere sketches, these snapshots highlight that market-discourses in the EU are caught in a spider web of considerations of creating prosperity and competitiveness but also securing integration and environmental protection within the framework of the Treaty competences. This means that market regulation, which tends to be tied to state-measures, is not only concerned with pushing 'back the frontiers of the state'[187] but also with establishing a 'social market economy' in which social and environmental

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[186] This description is employed to explain the nature of Dutch legal culture in E Blankenburg and F Bruinsma, *Dutch Legal Culture* (2nd edn Kluwer, Deventer 1994) as cited in D Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 Social and Legal Studies 435, 438. Nelken explains that legal culture is multilayered in the sense that it includes legal norms, legal institutions and their infrastructure, as well as social behaviour and the 'legal consciousness' in creating and applying laws. Similarly Harlow suggests that law and culture can be presented as 'an onion, whose skins can be stripped away to reveal deeper layers.' C Harlow, 'Voices of Difference in a Plural Community' (2002) 50 The American Journal of Comparative Law 339, 349.

[187] M Egan, *Constructing a European Market* (Oxford University Press, Oxford 2001) 2.

protection is safeguarded. The relevance of this point to a study of the EU ETS is to show that when EU-wide markets are thus discussed, they exist in a broader legal framework in which a multitude of rationales are followed that are not strictly economic. Similarly the snapshots show that debates on environmental law are tightly tied to the internal market: regulation is implemented that can stimulate this market and that moreover is in legal conformity to it. Any legal reforms, as shown, are equally fixed to the legal structure of the EU and bound to principles of subsidiarity and various decision-making processes. In the midst of market and environmental law intersections stand the EU Courts. It has the crucial role of interpreting laws and in so doing constructs markets and structures, as well as legitimises governance regimes imposed in the EU legal order and progressively applies laws so as to secure social and environmental protection in the EU.

What this shows is not merely that the internal market, judicial interpretations and environmental regulation exist in a close nexus in the EU context but that it is in fact impossible to talk about any EU market regime that is imposed as a response to an environmental treaty in a neutral fashion, in which, for instance the EU courts and the mechanisms of EU law are ignored.

## V. CONCLUSION

My snapshots of EU legal culture in this Chapter are not meant to establish a complete picture of the EU legal order nor of the interaction between market creation, the progressive role of the EU courts and environmental law therein. What these snapshots do make clear, however, is that an environmental regime, such as the EU ETS, is inherently different from any other emissions trading scheme in a different

jurisdiction – whether at international or national level – not only in its specific purpose but also in the role and the structure of governance as understood in this legal context. What I will show in the next two Chapters, nonetheless, is that despite the specificity of this legal culture, the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models operate both in the policy- and lawmaker's discourse and in judiciary EU ETS-related discourse.

# CHAPTER FOUR

# UNPACKING EU EMISSIONS TRADING DISCOURSES (I): THE COMMISSION

## I. INTRODUCTION

In the previous Chapter I argued that the EU emissions trading scheme is inevitably an expression of EU legal culture and, as such, demands to be studied in its EU law context. What I now wish to do is to show how this regulatory concept is understood in the EU legal order. The bulk of this examination will be carried out in the two following Chapters; here the focus is on demonstrating how emissions trading is identified at the EU level policy- and lawmakers (in this Chapter),[1] and by the judiciary (in the next Chapter). My analysis in this Chapter based on a series of documents – Communications, a Green Paper, legislation proposals, directives, as well as press-releases, memos and speeches issued mainly by the Commission on the topic of the EU ETS[2] – onto which I map the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models when applicable. I make two key points in this Chapter in the light of this exercise.

First, I demonstrate that the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models operate in these discourses, albeit to different

[1] Here the Commission.

[2] These are fully referenced in Section II (B).

degrees and in different periods.[3] The fact that the models are traceable in the Commission's EU ETS-related narrative, however, proves their applicability in law, and demonstrates that EU emissions trading discourses revolve around a set of questions similar to the general emissions trading debates examined in Chapter Two—namely, how to allocate regulatory power between markets and states and how to define tradable rights in emissions allowances in legal terms. This stands as evidence that the common query in emissions trading discussions in theory, as well as in practice, is a trichotomy of legal questions relating to the role of the state, the market and the legal status of tradable emissions rights.

Second, I demonstrate that over the course of emissions trading debates in the EU, the understanding of emissions trading is far from straightforward. This regulatory strategy plays various roles and is employed for a bouquet of different reasons: from that of ensuring cost-effective implementation of international law, to creating significant economic opportunities for the Union and its Member States by following a particular regulatory agenda of creating Better Regulation,[4] to centralising regulatory powers and adopting a stronger regulatory framework with the aim of creating 'freer markets' through more rules.[5] In highlighting these regulatory themes

[3] The *Economic Efficiency Model* appears most often in these discourses, while the *Command-and-Control Model* emerges primarily in the preliminary discussions on emissions trading. The *Private Property Rights Model*, on the other hand, is relevant chiefly as a consideration voiced by the industry.

[4] The definition of the Better Regulation agendas, as explained in the previous Chapter, is difficult to pin down but it tends to include deregulation, simplifying legislation, and reducing administrative burdens so as to facilitate economic growth and create jobs, as one of its key aims. Commission of the European Communities, Communication from the Commission on Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final.

[5] The 'freer market, more rules' concept is the underpinning idea of market-creation and regulation in the EU. S Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press, Ithaca 1996). This idea is further developed in Section III (C)(2).

– some of them discussed already in the previous Chapter – the emphasis is not on the reasons *why* emissions trading in the EU materialised. Studies of the so-called 'pregnancy period'[6] that eventually resulted in the 'birth' of the EU ETS exist elsewhere.[7] Instead I intend to highlight a different, albeit related, point which is that the various rationales that underpin the EU emissions trading regime are culture-specific, and similarly to the previous Chapter, show that as such, this trading regime and any evaluation thereof, is inevitably a reflection of EU legal culture.

In order to map the *Economic Efficiency,* the *Private Property Rights* and the *Command-and-Control* models onto the Commission's EU ETS-related discourses, Section II first examines the institutional identity of the Commission and the role it plays in the EU legal order as the legislative initiator. This legal background complements the discussion of legal culture outlined in the previous Chapter and aims to explain how the EU constitutional law framework allows the Commission to play a vital role in the introduction and shaping of emissions trading, and in light of this, explain why it is important to study the Commission's understanding of the EU ETS. In the same Section, the legislative history of the EU ETS is briefly summarised with the objective of highlighting the Commission's role therein, as well as orienting the discussion on the key documents that are examined in this Chapter and onto which I map the three models. Next, in Section III, I explore EU emissions trading discourses,

[6] J Wettestad, 'The Making of the 2003 EU Emissions Trading Directive: An Ultra-Quick Process due to Entrepreneurial Proficiency?' (2005) 5 Global Environmental Politics 1, 10.

[7] See ibid, J Lefevere, 'A Climate of Change: An Analysis of Progress in EU and International Climate Change Policy' in J Scott (ed) *Environmental Protection: European Law and Governance* (Oxford University Press, New York 2009) 171, 183-187, C Damro and PL Méndez, 'Emissions Trading at Kyoto: From EU Resistance to Union Innovation' (2003) 12 Environmental Politics 71, M Braun, 'The Evolution of Emissions Trading in the European Union - the Role of Policy Networks, Knowledge and Policy Entrepreneurs' (2009) 34 Accounting, Organizations and Society 469, D Ellerman, F Convery and C de Perthuis, *Pricing Carbon: the European Union Emissions Trading Scheme* (Cambridge University Press, Cambridge 2010).

as voiced by the Commission through various press releases, memos, and speeches, as well as in its Communications and a Green Paper concerning emissions trading, and proposals for directives on emissions trading. By mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto these documents, I show that variations exist in the Commission's understanding of the purpose and construction of an emissions trading scheme in the EU, and point to how in practice the models' applicability depends on legal culture and various EU-specific regulatory agendas. Subsequently, in Section IV, I evaluate these findings, and in the final part, Section V, set out the conclusion.

## II. THE INSTITUTIONAL IDENTITY OF THE COMMISSION AND ITS TREATMENT OF EMISSIONS TRADING AS A REGULATORY CONCEPT

The role and the legal construction of the EU emissions trading regime is shaped by EU legal culture, particularly by the institutional identity of the Commission in initiating law and its ability to influence the form and content of laws in the EU jurisdiction. This Section aims to further illustrate this argument by explaining the constitutional law relationship between the Commission and the enactment of the EU ETS, and in the light of these considerations, account for the reasons why I examine and apply the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models to the Commission's EU ETS- related discourse.

At the outset of this Section it is important to stress that the mapping exercise carried out in this Chapter is deliberately limited in scope and does not examine any ETS-related narrative of the Council, the Parliament, the Member States, the industry,

or the non-governmental organisations (NGOs) – indeed, actors that played a crucial part in the process of adopting emissions trading as part of the EU's *acquis communutaire*.[8] This is because the intention with the mapping-exercise is not to examine the EU ETS *per se* or to provide a full illustration of how and why this regulatory regime was established in the EU legal context but to show that emissions trading is a complex regulatory concept that can be understood and applied in various ways – even within a single jurisdiction and by a particular institution. Targeting this particular objective means that it is sufficient to examine only a selection of EU ETS narratives, which in the case of this Chapter is the ETS-related narrative of the Commission.

## A. The Constitutional Role of the Commission

The Commission plays a major role in the EU legal order and is described to operate 'at the very heart of the European Union'.[9] Article 17 TEU provides a list of various legislative, executive and judicial functions that are entrusted to the Commission, specifying that the Commission 'shall promote the general interest of the Union and take appropriate initiatives to that end.'[10] The Commission's legislative role is to initiate Union legislative acts, which according Article 17(2) TEU, is a power that the

[8] The impact of the various actors are particularly clear in the decision-making process, see J Skjærseth and J Wettestad, *EU Emissions Trading: Initiation, Decision-Making and Implementation* (Ashgate Publishing, Burlington 2008) Chapter 5.

[9] S Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education, Harlow 2002) 53.

[10] Weiler explains that the key aim of the Commission is, and has been since the Treaty of Rome, to safeguard and further integration in Europe. J Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge 1999) 64.

Commission monopolises.[11] These proposals may take a variety of forms but effectively, the Commission can decide therein whether the Union ought to legislate and, if so, in what legal form and what content and implementing procedures the proposal should embody.[12] Thus to examine the Commission's proposal on emissions trading, as is done in this Chapter, is to study the key preliminary visions of the EU emissions trading regime and how it is thought to fit the EU legal order.

This policy-initiating feature of the Commission is coupled with judicial powers that enable the Commission to supervise legislation to ensure its proper implementation across the Union and to bring actions against Member States that fail to comply with EU law.[13] Applying Article 17(1) TEU in this regard has meant that the Commission is the seen as the 'guardian of the Treaties'[14] that helps ensure the effectiveness of EU laws. In the next Chapter, EU ETS cases that are brought before the CJEU by the Commission are scrutinised. Here it is useful to note that the judicial powers of the Commission indicate that it is relevant to understand the meaning that the Commission gives the emissions trading regime not only in its legislative proposals but also more generally, as it is the Commission that overlooks whether emissions trading occurs in accordance with EU law.

[11] Article 17(2) states that 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.'

[12] G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, Oxford 2009) 78.

[13] Article 17(1) TEU states that the Commission 'shall oversee the application of Union law under the control of the Court of Justice of the European Union'. This procedure is set out in Article 258 TFEU.

[14] As such, the Commission tends to be seen as the 'motor' of integration. P Craig and G de Burca, *EU Law: Text, Cases and Material* (4th edn Oxford University Press, Oxford 2008) 43.

The Commission also has certain executive powers, including the task of negotiating on behalf of the EU in international agreements and cooperation with third countries.[15] In developing and agreeing on the Kyoto Protocol – that led to the idea of emissions trading being implemented in the EU – the Commission is said to have played an extraordinarily strong role therein,[16] although it did not formally represent the Union.[17] What this highlights is the Commission's engagement, from the very start, to debates concerned with emissions trading, and it maintained a strong, advocatory role in the enactment and implementation of this trading scheme in the EU – a role that has earned the Commission the title of 'a particularly resourceful "midwife"'[18] that helped deliver the EU ETS. Although this analogy indicates that the Commission did not 'conceive' the EU ETS – as indeed the Directive on emissions trading was adopted by the Council and the Parliament, as explained below – its role in introducing emissions trading to the EU is still significant.

The discussion above highlights two important points. First, it illustrates the Commission's strong commitment to the EU ETS – both as a result of its constitutional identity and due to a broader interest in the EU ETS as a regulatory

[15] The Commission's executive powers include also power of implementation, as well as managing the budget, Article 17 TFEU. N Nugent, *The Government and Politics of the European Union* (Oxford University Press, Oxford 2006) 186-7. Note that the term 'executive' power may be misleading, as the Commission's function in this regard is not entirely state-like but limited to the scope of the Treaty. A Dashwood and D Wyatt, *European Union Law* (5th edn Sweet & Maxwell, London 2006) 41.

[16] The Commission is reported to have acted as a sixteenth Member State in this regard. Y Slingenberg, 'The International Climate Policy developments of the 1990's: The UNFCCC, the Kytoto Protocol, the Marrakech Accords and the EU Ratification Decision' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 15, 23

[17] Indeed at such international negotiations, the Union tends to be represented by the President of the Council but which may 'associate' the Commission to the negotiations. K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (2nd edn Sweet and Maxwell, London 2005) 431.

[18] Wettestad 'The Making of the 2003 EU Emissions Trading' (n 6) 2.

strategy. Second, it shows the Commission as a 'filter' through which all EU legislative acts must pass, and which, as such, is an important 'internal' component of the EU legal culture. As the Commission thus clearly stands at the centre of affairs with regard to the EU ETS, its narrative on this topic is obviously a useful case study.

To talk about the Commission as a 'single-minded institution'[19] in this sense is, nonetheless, misleading, as this is a fragmented, diverse and pluralistic institution similar to that of the EU as a whole.[20] In fact, preparing the proposal for the EU ETS involved numerous consultation sessions with a range of officials from different Directorate Generals (DG) in the Commission, including that of the Environment, Trade, Internal Market, Enterprise, Transport and Energy, and Economic and Financial Affairs,[21] which highlights the complexity both of the EU constitutional regime and emissions trading as a regulatory concept. Yet throughout these deliberations within the Commission, the EU ETS has become, as mentioned in Chapter One, the 'Commission's baby',[22] for the support of which the Commission has rallied forcefully. What this Chapter aims to do is to examine these visions of the EU ETS that the Commission has promoted, and depict the different ways in which the Commission understands emissions trading as a regulatory concept.

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[19] J Peterson and E Bomberg, *Decision-Making in the European Union* (Macmillan, London 1999) 39.

[20] Douglas-Scott (n 9) 63.

[21] Ellerman, Convery and Perthuis (n 7) 26-27. In particular nine officials are listed as having been particularly useful in advocating for and helping during the adoption and implementation process of the EU ETS, J Delbeke (ed), *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) viii.

[22] J Wettestad, 'European Climate Policy: Toward Centralized Governance?' (2009) 26 Review of Policy Research 311, 313.

## B. An Overview of the Legislative Journey of the EU ETS

The legislative history of the EU ETS is short but dynamic. A debate on implementing emissions trading in the EU legal order first took form following the Kyoto Protocol and as the Commission issued two consecutive Communications on this topic.[23] This regulatory idea was significantly developed in the Green Paper on emissions trading that the Commission published in 2000,[24] and further built on in Commission's Proposal for an emissions trading Directive set out in 2001.[25] This proposal provides that it is based on Article 192 TFEU, meaning that the Council and the Parliament must act in accordance with the ordinary legislative procedure for it to be adopted. This environmental competence has been amended by the Lisbon Treaty[26] but at the time when the EU ETS was deliberated, Article 192 TFEU provided the Parliament with two readings of the proposal: the first in which the Parliament gives its opinion to the Council and the second if the Council fails to agree on all points that the Parliament proposes as part of the first-reading amendments.[27] The Parliament's first reading of the EU ETS proposal started in spring 2002, in which the Parliament

[23] Commission of the European Communities, Communication from the Commission on Climate Change - Towards an EU Post-Kyoto Strategy, COM (1998) 353 and Commission of the European Communities, Communication from the Commission on Preparing for Implementation of the Kyoto Protocol, COM (1999) 230.

[24] Commission of the European Communities, Green Paper on Greenhouse Gas Emissions Trading Within the European Union, COM(2000) 87 final.

[25] Commission of the European Communities, Proposal for a Directive of the European and of the Council establishing a scheme for greenouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM (2001) 581 final.

[26] Article 294 TFEU sets out the post-Lisbon rules on the ordinary legislative procedure, allowing the Parliament three readings.

[27] In case the Council fails to agree to these first-reading amendments, the Parliament has the legislative power to veto the Council's response to its first-reading amendments, approve or amend these. This is provided in Article 251 EC. 'EC' refers to legislation adopted under the EC Treaty and prior to the current Lisbon Treaty.

set forward over 80 suggested amendments.[28] Together with the Council, nonetheless, a quick compromise was found and in June 2003, following a second reading, and an 'ultra-quick process' of legislating,[29] a common position was established and the Directive adopted.

However, by 2008 and only three years after the start of emissions trading in the EU, the Commission set forward a proposal for revision of the Directive[30] as part of a broader climate and energy package.[31] Again, legislative action occurred quickly and the revised Directive was adopted only six months later during the first Parliamentary reading.[32] These amendments change the legal structures of the EU emissions trading regime considerably and mainly by extensively centralising regulatory power with the Commission. The revised Directive will be effective from 2013 onwards.[33]

This brief overview is significant for two reasons. First, it roughly lists the chronological legal developments of the EU ETS and second, it puts into context the key documents that are examined in this Chapter, which include, more precisely, the

[28] Skjaerseth and Wettestad *EU Emissions Trading* (n 8) 43 and Chapter Five. In short, the Parliament wanted to further widen the coverage of the proposed Directive and to change the allocation methods. The Council, however, pushed for the original version of the proposal to be adopted. Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, OJ 2003 L 275/32.

[29] Wettestad 'The Making of the 2003 EU Emissions Trading' (n 6).

[30] Commission of the European Communities, Proposal for a Directive amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, COM(2008) 16final .

[31] Commission of the European Communities, '20 20 by 2020 - Europe's Climate Change Opportunity, COM(2008) 30 final.

[32] S Bogojevic, 'The EU ETS Directive Revised: Yet Another Stepping Stone' (2009) 11 Environmental Law Review 279.

[33] Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/63.

two Communications, the Green Paper on emissions trading, the proposal for a Directive on emissions trading as well as the proposal for a revised Directive on emissions trading, and the two directives on emissions trading. The way these are examined in this Chapter is explained next.

## III. MAPPING MODELS ONTO THE COMMISSION'S EU ETS-RELATED DISCOURSE

In this Section my concern is to study emissions trading as understood by the Commission. This analysis is carried out by analysing the texts listed above, as well as press-releases, memos and speeches issued by the Commission concerning these documents and their meaning, and applying the *Economic Efficiency*, the *Private Property Rights* and *Command-and-Control* models thereto when applicable. The purpose of this exercise is to test the applicability of the models in law, and thereby examine the different ways that the power allocation between the state and the market is understood, as well as the legal status of rights in emissions allowances. What the findings in this Chapter show is that over the course of history of the Commission's emissions trading discourse, emissions trading as a regulatory concept is framed differently and applied for a variety of regulatory purposes, including to ensure compliance of international law, create better regulation and create 'more rules' so as to establish a 'freer market'. To each regulatory purpose, different models are seen to emerge and to different extents, which ultimately proves that whether a particular model applies in law is determined by legal culture.

Before I start, it is useful to briefly recap the images of emissions trading projected by the *Economic Efficiency,* the *Private Property Rights* and the *Command-*

*and-Control* models. The *Economic Efficiency Model* sees emissions trading as an economic opportunity and profit centre. In this context, the role of the state is to set out the necessary legal framework to enable these opportunities to arise, including the creation of property rights in emissions allowances, as this is thought to safeguard investments and allow the market to make the most cost-effective decisions concerning the allocation of regulatory responsibility. As the following study shows, this model frequently operates in the Commission's discussions of the EU ETS.

The *Private Property Rights Model* views emissions trading as a pollution control system that allows private property holders to replace governments' control over common resources. Here, the role of the state is restricted to structuring the market by creating tradable private property rights in emission allowances, which the property rights holders are able to allocate on their own terms according to free market forces. Because the Commission sees emissions trading as a legal regime imposed top-down, the *Private Property Rights Model* rarely emerges in the Commission's narrative but it is relevant to certain stakeholders' view of how emissions trading in the EU ought to be constructed and that the Commission considers.

In the *Command-and-Control Model,* emissions trading is presented as an administrative regime where regulatory powers are centralised and the market used as a device to ensure cost-effective compliance and implementation of regulatory obligations. This model is present chiefly in the Commission's first official descriptions of emissions trading in the EU, while there are hints of its re-emergence in current debates on this topic, and as explained below, particularly following the carbon crash in 2006 that contributed to a general push toward stronger regulatory oversight of markets.

Another point that is important to highlight before starting is that this investigation is not meant to be an exhaustive account of the above-mentioned documents; rather I focus on highlighting areas in which the models operate, thus emphasising descriptions of the regulatory power divisions between the market and the states and the legal status of rights in emissions allowances. To a large extent, this is a fairly technical and repetitive exercise but the repetition is a necessary part of being able to highlight the fact that the models exist in the above-mentioned discourses, and as such, in law.

## A. Emissions Trading as an Implementation Mechanism

Emissions trading first emerged in the EU as part of a regulatory narrative concerning the development of regulatory strategies to help the Union and its Member States comply with their commitments under the Kyoto Protocol. In two Communications – *Climate Change – Towards an EU-Post Kyoto Strategy*[34] and *Preparing for Implementation of the Kyoto Protocol*[35] – the Commission focused on a practical dimension of the implementation of the Protocol and in this context included emissions trading as compliance mechanism that is able to secure regulatory goals.

These Communications are rarely, if ever, discussed in much detail, or beyond being referred to as the official documents in which the Commission 'first broached the idea of a European trading regime.'[36] Examining the context in which emissions

[34] Communication 'Towards an EU Post-Kyoto Strategy' (n 23) 17.

[35] Communication 'Preparing for the Implementation of the Protocol' (n 23) 1.

[36] F Convery and L Redmond, 'Market and Price Developments in the European Union Emissions Trading Scheme' (2007) 1 Review of Environmental Economics and Policy 88, 89. The Communications are similarly described in C Carlarne, *Climate Change Law and Policy: EU and US Approaches* (Oxford University Press, Oxford 2010) 171.

trading entered regulatory discourses in the EU is nonetheless significant: it shows that emissions trading was primarily narrated in strict compliance terms and seen as a regulatory strategy which the Member States could implement, through public law, to conform to an international law obligation. The emphasis on the national governments and the Commission to ensure that emissions trading is implemented highlights that the equally state-centred *Command-and-Control Model* operates in these discourses. This point is illustrated by next analysing the two Communications in turn.

### *1. Communication: Climate Change – Towards an EU-Post Kyoto Strategy*

The primary concern of this Communication is the proceedings of a strategy to implement the Protocol, and as such it is hailed as an 'important and necessary step towards fulfilling the reduction commitments undertaken by the European Union in Kyoto.'[37] It is in the light of international environmental law that emissions trading was first introduced to the EU legal order as a regulatory mechanism and was thought to grant compliance with international legal commitments. Here emissions trading is examined in a broader framework of flexible mechanisms and explained to function by each party being assigned emissions amounts that they are able to sell, or alternatively, buy extra from other parties, depending on whether they have spare capacity and are willing to sell, or need an additional emissions allowance.[38] This is a straightforward view of how emissions trading works but the Communication flags

[37] EUROPA, 'Climate Change - The Commission Presents the First Steps in the Post-Kyoto Strategy to Meet the Commitments of the European Union' (Brussels 3 June 1998) < http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/498&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

[38] Communication 'Towards an EU Post-Kyoto Strategy' (n 23) 17.

that any steps to implement international law, and create domestic emissions trading schemes will depend on public law measures.

This public law aspect, and thus also the *Command-and-Control Model,* appear in this Communication by its listing of significant implementation and management roles for the Member States and the Commission in realising an EU emissions trading scheme. For instance, Member States are understood to 'have a major role' in ensuring compliance with the Protocol and implementing emissions trading as a domestic measure.[39] Moreover, the Commission is said to be required to co-ordinate, in accordance with the principle of subsidiarity, the actions of the Member States, and harmonise the trading schemes to the extent necessary to ensure proper functioning of the internal market.[40] In this regard, the Commission is assigned the task of creating a common framework in which key principles and minimum rules are set out so as to avoid distortion of competition and discrimination.[41] This sets the idea of emissions trading in a broad public law framework, in which emissions trading, similarly to the *Command-and-Control Model,* depend on the multi-level governance of the Union for its existence and function. This is a picture that is state-oriented and clearly distinct from, for instance, the *Private Property Rights Model* that imagines emissions trading as enabling private property holders to manage common resources in lieu of public law systems.

The *Command-and-Control Model* emerges also in the Communication's main criterion of cost-effectiveness, which is listed for the development of a post-

[39] In particular because the Member States are individually responsible for their targets under the Burden Sharing Agreement. Ibid 7, 17-18.

[40] Ibid 18.

[41] Ibid 18-19.

Kyoto implementation strategy. Notably, this criterion is not defined in strict economic terms, as found in the *Economic Efficiency Model* but instead refers to the benefit of reducing pollution, as well as reducing costs of meeting regulatory targets, which in total are deemed 'important for economic and political acceptability of a strategy.'[42] The Commission concludes that only a comprehensive, as opposed to multiple domestic, trading system can grant such cost-effectiveness.[43] The important point to make here is that the understanding of cost-effectiveness of emissions trading strongly resembles that found in the *Command-and-Control Model,* where it similarly infers reduced administrative costs in relation to reducing pollution, and not profit *per se*, as suggested by the *Economic Efficiency Model.*

What this Communication shows is a *Command-and-Control Model*-related understanding of emissions trading. Here, emissions trading is projected as a regulatory mechanism that promises cost-effective compliance with international law and that is heavily reliant on the Member States for implementation and the Commission in ensuring that it accords with the EU legal order. Thus, similarly to the *Command-and-Control Model,* emissions trading is projected as a cost-effective administrative regime.

### *2. Communication: Preparing for Implementation of the Kyoto Protocol*

The second Communication leading up to the implementation of emissions trading in the EU served as an agenda at the 1999 European Council Summit in Cologne, which dealt with regulatory solutions to environmental challenges, including climate

[42] Ibid 6.

[43] Ibid 6, 18.

change.[44] This document aimed to press Member States to 'go beyond moral commitments'[45] and 'show leadership'[46] by implementing the Protocol. As such, the narrative is predominantly promotional and focuses on the practical dimensions of this implementation. Although emissions trading is not discussed in any depth here, it is part of the debate concerning the implementation procedure of the Protocol,[47] and similarly to the previous Communications, it is understood as a regulatory device that can help achieve the specific regulatory goals cost-effectively.

The *Command-and-Control Model* appears in this Communication in its suggestion that emissions trading in the EU context is a mere regulatory exercise, or 'the best preparation for the Community and its Member States'[48] ahead of the launch of an international emissions trading scheme, which was set to start in 2008. The Commission clarifies that flexible mechanisms, including emissions trading, are 'fundamentally different'[49] from the way the Union and its Member States have organised their environmental policy over the last decades, and as such experience in this regard is seen as necessary. This new regulatory regime, however, is not envisioned as a substitute for government control, as the *Private Property Rights Model* would have it; rather the Commission is understood to play a vital role in ensuring that any trading schemes comply with the internal market, and in particular with state aid and competition rules, as well as existing EU environmental law

[44] Ibid.

[45] EUROPA, 'Preparing for Implementation of the Kyoto Protocol' (Brussels 19 May 1999) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/99/333&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 28 May 2011.

[46] Communication 'Preparing for the Implementation of the Protocol' (n 23) 1.

[47] Ibid 15.

[48] Ibid 15.

[49] Ibid 14.

policies and other regulatory regimes such as the WTO.[50] This shows that emissions trading is seen to rely on existing public law structures of the EU for its implementation and function in much similarity to the *Command-and-Control Model.*

Overall the focus of this Communication is on securing the implementation of the Protocol, and in this context, emissions trading plays the secondary role of helping the Union and its Member Sates with such compliance. Here emissions trading is neither an economic entity, as envisioned in the *Economic Efficiency Model* nor a substitute for regulatory control as suggested by the *Private Property Rights Model.* Instead it is portrayed as a compliance mechanism that is tied to a regulatory goal and legal framework, similarly to emissions trading narratives traced in the *Command-and-Control Model.*

### *3. Theme: Implementation*

The above-mentioned Communications clearly orbit a broader theme of implementing the Protocol. This is not surprising considering the Commission's broader regulatory objectives at the time. In particular, following the Commission's official 1996-implementation strategy,[51] implementation was of major concern in European environmental law. The Commission argued that achieving goals of high level of environmental protection 'is only possible if our legal framework is being properly implemented'[52] and stressed that regulatory attention must focus on the application and enforcement procedures, as opposed to creating legal frameworks as an end in

[50] Ibid 14, 18.

[51] Commission of the European Communities, Communication on Implementing Community Environmental Law, COM (96) 500 final.

[52] Ibid 1.

itself.[53] In fact, ahead of the international environmental law negotiations at the Rio 'Earth Summit', which later led to the Kyoto Protocol, the Commission highlighted implementation of environmental law and policy as 'an important area for discussion',[54] and pressed to have its own implementation policy 'firmly in place by that time.'[55] Connecting this implementation strategy to the narrative in the above-mentioned Communications helps to explain why emissions trading was framed in a particular way during in this period, but it also shows that emissions trading was employed as part of a broader EU-specific regulatory agenda.

Another important point to pick up here is that the two Communications offer no other role to emissions trading outside of the implementation framework; it is neither a 'profit-centre', as described in the *Economic Efficiency Model*, nor a replacement for bureaucratic control over rights to use common resources, as explained in the *Private Property Rights Model.* Emissions trading is instead placed in a public law framework in which the Member States and the Commission play vital roles in securing implementation and conformity of emissions trading to existing regulatory regimes – a vision symmetric to the *Command-and-Control Model*.

### B. Emissions Trading as an Economic Opportunity: Decentralised Approach

Next the Commission issued a Green Paper and a proposal for an emissions trading Directive that also led to the adoption of the Directive on emissions trading –

[53] E Hattan, 'The Implementation of EU Environmental Law' (2003) 15 Journal of Environmental Law 273, 286, L Krämer, *EC Environmental Law* (4th edn Sweet & Maxwell, London 2000) 281.

[54] Commission 'Implementing Community Environmental Law' (n 51) 6.

[55] Ibid.

documents that I now analyse. Over the course of these speedy legislative proceedings, the Commission's discourse on emissions trading changed significantly: having previously adhered to the *Command-and-Control Model*-type of considerations and debating emissions trading in strict compliance terms with regard to international law, it shifted to the *Economic Efficiency Model*-style of deliberation, emphasising economic opportunities that emissions trading is thought to realise. Emissions trading is here understood as putting 'a price tag on the environment to make it interesting for companies to reduce pollution',[56] and in this way correct 'mis-pricing by making the value of clean air apparent.'[57] This narrative loudly echoes the *Economic Efficiency Model,* in which emissions trading is similarly described in economic terms as a mechanism that internalises externalities, or in other words, the costs of pollution.

According to the *Economic Efficiency Model*, the role that the state plays in emissions trading regimes is establishing the required legal framework, leaving it to the market to allocate regulatory responsibility the way it sees fit, or according to market forces. Similarly, the Commission portrays emissions trading as part of a broader stream of liberalisation of markets in the EU,[58] where the regulators play a

[56] Margot Wallström, EU Environment Commissioner, 'From Lisbon to Gothenburg: The Business Agenda for Sustainable Development' (Seminar on The European Policy Agenda during the Swedish Presidency, London 15 March 2001) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/126&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

[57] This description is by Vis, who was one of the main authors of the Green Paper. P Vis, 'Basic Design Options for Emissions Trading' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 39, 46-7. Lefevere, who was part of the team that drafted the proposal for the Directive, describes the EU ETS emissions trading scheme to be concerned with 'getting the prices right'. J Lefevere, 'Greenhouse Gas Emission Allowance Trading in the EU: A Background' (2003) Yearbook of European Environmental Law 149, 173.

[58] Margot Wallström, EU Environment Commissioner, 'Sustainable Energy' (Energieforum, Berlin 1 February 2001)

central part in establishing 'necessary structures'[59] for trade but ultimately allowing the market to find the best solution and place for emission reductions.[60] It is visions of this heavily decentralised and 'results-oriented'[61] – as opposed to rule-based – emissions regime that are next explored against the backdrop of the three documents mentioned.

### *1. Green Paper on Emissions Trading*

The Green Paper launched an EU-wide consultation process concerning the scope, function and structure of emissions trading and gave 'flesh and blood'[62] to the idea of how such a trading scheme ought to work in an EU legal context. In this document the Commission moves away from a *Command-and-Control Model*-type of deliberation, as seen above in the two Communications, and instead the *Economic Efficiency Model* emerges in two particular respects: in the Commission's reliance on the private

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<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/45&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

[59] EUROPA, 'Commission Proposes Ratification of Kyoto Protocol and Emissions Trading System' (Brussels 23 October 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1465&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

[60] Stavros Dimas, EU Environment Commissioner, 'Winning the Fight Against Climate Change: An EU Perspective' (Speech at the University of Cambridge 13 June 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/333&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011, Delbeke argues that introducing the flexible policy instruments in the Protocol that call market forces to reduce greenhouse gas emissions is one of its strongest elements. J Delbeke, 'The Emissions Trading Scheme (ETS): The Cornerstone of the EU's Implementation of the Kyoto Protocol' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 1, 1.

[61] Delbeke, ibid 7.

[62] Skjaerseth and Wettestad *EU Emissions Trading* (n 28) 39.

sector to organise the actual emissions trading, and the portrayal of emissions trading as an economic opportunity.

The Commission's focus on the private sector is evident in its discussions about the coverage of emissions trading. In the above-mentioned Communications, emissions trading is debated in the context of international law, and as such, is state-focused but here, and with regard to trading in the EU, the Commission's rhetoric changes tune and looks to the private sector. Vis – one of the main authors of the Green Paper[63] – explains that operating emissions trading at the level of individual companies is 'unquestionably the correct level to maximise the economic advantage of emissions trading, as companies know their own costs much better than government officials know the costs for a country as a whole.'[64] The fact that economic factors are emphasised in the discussion of the applicability of emissions trading suggests that the *Economic Efficiency Model* operates here.

The private sector is also thought vital to the process of allocating allowances. The Green Paper devotes considerable time to this issue and considers various possibilities for the allocation of permits once the cap has been set, in particular comparing free allocation and auctioning. Without favouring one method above the other, and in the end leaving it to the Member States to the issue, it concludes that 'how the permits are allocated does not affect the environmental outcome.'[65] The reason is, the Commission explains, that emissions trading does not reduce emissions, it 'simply provides incentives to find the lowest cost of achieving a given amount of

[63] J Delbeke (ed), *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) xiii.

[64] Vis 'Basic Design Options for Emissions Trading' (n 57) 40-1.

[65] Ellerman, Convery and Perthuis (n 7) 23.

emissions reductions.'[66] It is in fact this mechanism – allowing the market rather than the government to determine the allocation of regulatory obligations via price signalling – that is identified as the strength of emissions trading. The view here is that companies can 'better judge the business opportunities of trading, and their potential benefit in engaging in this market.'[67] This description echoes the *Economic Efficiency Model* in two specific ways. First, it praises price as the standard according to which business opportunities, as well as the allocation of regulatory obligations, ought to be measured, and second, it takes emissions trading to adhere to a particular market-mentality in which regulatory power is entrusted to the private sector, not in order to cut emissions but to make a profit. This particular framing of emissions trading as a business opportunity distinguished this type of discourse from the *Command-and-Control Model,* which furthers emissions trading not for the sake of profit but so as to ensure administrative effectiveness and thus compliance.

The fact that the Commission clearly relies on the market to organise the emissions trading regime, however, does not mean, and nor does the *Economic Efficiency Model* suggest, that there is no role envisioned for the state to play therein. Wallström, the former EU Commissioner for Environment, explains that emissions trading is not 'just about leaving things to market forces, but creating the necessary structures in which cost-effective incentives can exist.'[68] These 'structures' include, for instance, implementation, determining the cap for the total level of emissions that

[66] Green Paper (n 24) 10.

[67] Ibid 8.

[68] Margot Wallström, former EU Environment Commissioner, as quoted in EUROPA, 'Climate Change: Commission Launches European Climate Change Programme and Advocates Twin-Track Appraoch for Reducing Emissions' (Brussels 8 March 2000) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/232&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

are tradable during a particular period,[69] deciding on rules for emissions allocations, and enforcing penalties – tasks that according to the Green Paper fall within the scope of Member State regulatory discretion.[70] This description of the role of the Member States is obviously different from the *Private Property Rights Model* that imagines deregulation as an act of substituting government control, and the *Command-and-Control Model* that promotes regulatory power to be centralised, as opposed to merely creating 'structures' for trading.

While the Member States are prescribed to set out the relevant 'structures' of emissions trading, the Green Paper is unclear as to what role the Commission ought to play in the emissions trading regime. It lists varying degrees of possible interventions in the emissions market, ranging from mere oversight so as to ensure conformity between existing EU laws and emissions trading practices, to full harmonisation.[71] The Green Paper explains that the level of intervention ultimately depends on the extent to which common rules are required to safeguard the internal market[72] but that in any case, the Commission is entrusted with its traditional role under the Treaty of being able to bring Member States before the Court in case of non-compliance.[73] What is relevant to note is that the Green Paper refers to different model-types in proposing various roles for the Commission: it pictures the *Command-and-Control Model* in case of full harmonisation and the *Economic Efficiency Model* when it identifies the Commission's intervention limited to mere oversight of conformity

[69] Caps are thus understood to be set according to the 'overall environmental ambitions' of the Member States. Green Paper (n 24) 7-8.

[70] Green Paper (n 24) 24-25. Vis 'Basic Design Options for Emissions Trading' (n 57) 47.

[71] Green Paper (n 24) 12.

[72] Ibid.

[73] Ibid 26.

between EU and national ETS-related laws. The implication of this is that it in actual fact proposes two different emissions trading regimes for the EU legal context.

The *Economic Efficiency Model* appears in the Green Paper also in the way that the Commission promotes emissions trading as an economic opportunity for the private sector. In particular, it predicts all companies involved in emissions trading to incur lower compliance costs, as market-actors will be able to decide whether to increase production and buy additional emissions allowances, or reduce production and sell surplus allowances.[74] On this basis, the Commission sees this trading system as 'an immediate monetary incentive'[75] for the private sector to reduce their emissions, sell surpluses and invest in newer and more energy-efficient installations. This innovation-enhancing picture of emissions trading is significant, in particular because shortly before the EU ETS started operating, it was brought to the Commission's attention that it would cost circa €600 billion to refurbish and replace old power stations across Europe.[76] Its assertion that emissions trading is 'an opportunity for new technology and for modernising our [Union's] economies',[77] indicates that the Commission sees emissions trading as a not only cheap but also profit-generating solution to an expensive problem. The focus on the economic

[74] Ibid 11. The Paper emphasises that costs could be reduced to energy producers and energy intensive industry of meeting Kyoto obligations through an emissions trading scheme with nearly one-fifth than allowing separate national schemes to be created.

[75] A Runge-Metzger, 'The Potential Role of the EU ETS for the Development of Long-Term International Climate Policies' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 253, 271.

[76] Ibid 260.

[77] Margot Wallström, former EU Environment Commissioner, as quoted in EUROPA, 'EU Will Fight to Save Kyoto Agreement' (Brussels 4 April 2001) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/01/121&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

benefits of emissions trading confirms the existence of the *Economic Efficiency Model* in the Commission's narrative.

Similarly to the above-mentioned Communications, the Green Paper pushes for a quick start of emissions trading and 'before the international emissions trading scheme is launched'.[78] In the Communications, however, the reason for this head start was phrased as 'preparation'[79] for international trading while here the focus is on the economic opportunities that such head start grants. More specifically, gaining 'a leading edge'[80] in using the regulatory mechanism compared to other Parties to the Protocol is deemed crucial not due to any green politics[81] but because, and as Kelemen explains, it grants competitive advantages, including being able to influence and set up rules for an international emissions trading scheme by which competitors must abide.[82] Later, and following the U.S refusal to ratify the Protocol by mid-2001, becoming a 'forerunner'[83] and taking advantage of this 'window of opportunity'[84] to exert global climate policy leadership became increasingly important in the Commission's rhetoric.[85] What this shows is that emissions trading is presented as an

[78] Green Paper (n 24) 10.

[79] n 48.

[80] Green Paper (n 24) 10.

[81] Kelemen notes that starting in the 1990s as the awareness of the threat of climate change mounted, domestic political pressure for action to curb green house gases increased in the EU. He argues that the calculus for European policy-makers was clear: given that voters would in any case demand domestic action on climate change, it was clearly preferable to promote action at an international level that would force the EU's competitors to undertake costly measures as well. D Kelemen, 'Globalizing EU Environmental Regulation' (2007) 17 Journal of European Public Policy 335, 339.

[82] Ibid.

[83] Vis 'Basic Design Options for Emissions Trading' (n 57) 40.

[84] Skjaerseth and Wettestad *EU Emissions Trading* (n 28) 7.

[85] For instance, Dimas exclaimed that emissions trading promises the EU to become 'a strong global player'. Stavros Dimas, EU Environment Commissioner, 'Climate Change -

economic opportunity – not only to the private sector but also to the Member States, which overlaps with a similar economic focus found in the *Economic Efficiency Model.*

This thinking in the Commission about emissions trading shows that this regulatory strategy is positioned in a broader economic rationale, analogous to the *Economic Efficiency Model.*[86] Here the Commission projects emissions trading as an economic opportunity that works against the backdrop of a decentralised legal framework, which, in accord with the *Economic Efficiency Model,* is understood to create economic opportunities by allowing the market to find solutions to regulatory dilemmas, including to whom to allocate regulatory responsibility.

### *2. Proposal for Directive on Emissions Trading*

The Green Paper was widely well received amongst stakeholders[87] and quickly thereafter the Commission put forward its proposal for a Directive on emissions trading. This document raises numerous issues related to emissions trading, including the environmental value of such a regulatory strategy.[88] Here, however, I focus on the Commission's description of what role the private sector, the Member States and the

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International and EU Action' (Speech at the Climate Change Conference, Prague 31 October 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/570&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 29 May 2011.

[86] This does not mean that the Protocol is no longer relevant to these debates, and the Commission identifies emissions trading as an integral and major part of the Union's implementation strategy. Green Paper (n 24) 4.

[87] M Mehling, 'Emissions Trading and National Allocation in the Member States - An Achilles' Heel of European Climate Policy?' (2005) 5 The Yearbook of European Environmental Law 113, 124.

[88] Proposal for a Directive on emissions trading (n 25) 4.

Commission are seen to play in the emissions trading regime, and the way in which this understanding overlaps with the *Economic Efficiency Model*.

First to note is that this proposal does not stipulate how a market in emissions allowances ought to be organised but instead promotes a deregulatory approach where market forces, as opposed to the state, decide on market practices. The Commission explains that[89]

> it [the Commission] is convinced that market structures will arise once the obligations are clear, and the allowances for fulfilling the obligations are established. The Commission wishes the organisation of the market in allowances to be left open to solutions driven by the private sector.

Two points are important to highlight here. First, the fact that it is the private sector, rather than the Member States or the Commission that is supposed to determine market practice shows that regulatory trust requires market forces to work freely[90] and on these terms deliver optimal regulatory solutions. This view is distinct from the *Command-and-Control Model* that is critical toward any suggestion of the ability of markets to work on their own but symmetric to the *Economic Efficiency Model* that equally understands emissions markets to be able to provide solutions to regulatory dilemmas. Second, the Commission clarifies that it sees emissions allowances as 'obligations' rather than, for instance, private property rights. On this basis, the Commission's vision of emissions trading is also distinct from the *Private Property*

[89] Ibid 16.

[90] Meadows explains that the reliance on the private sector in this regard is thought to facilitate price discovery, generate greater liquidity, and flexibility. See D Meadows, 'The Emissions Allowance Trading Directive 2003/87/EC Explained ' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 63, 86.

*Rights Model* that understands the creation of private property rights in emissions allowances as the core of a trading scheme.

Similarly to the Green Paper, this proposal prescribes a decentralised emissions trading regime in which the Commission plays its traditional role of guarding the Treaty and ensuring that national ETS-measures are in conformity with EU law,[91] while the Member States are entrusted the task of determining the structure of the trading scheme and decide on issues such as the allocation of allowances, the level of cap and the enforcement of penalties.[92] In the view of Runge-Metzger, who was in the Commission's 'boiler room'[93] where the proposal for this Directive was drafted, this particular regulatory structure of the EU ETS is 'pragmatic and practical'[94] since in 'liberal market economies it is logical to hand the responsibility down from Governments to private sector players',[95] and in this sense, provide the state only with powers required to establish such a market. What this shows is that key Commission officials envision the emissions market to function along the lines of a 'free', or liberal market, which indicates that the *Economic Efficiency Model* operates in these discourses.

The discussion above shows that the Commission proposes an emissions trading regime that is decentralised: the Member States are vested with significant

[91] Proposal for a Directive on emissions trading (n 25) 5-6, 11. This means that the Commission needs to ensure that any measure falls in conformity with state aid laws, competition laws, as well as existing environmental laws in the EU jurisdiction.

[92] Ibid.

[93] This description is borrowed from F Convery, 'Reflections - The Emerging Literature on Emissions Trading in Europe' (2009) 2 Review of Environmental Economics and Policy 121, 123. Convery also counts Jos Delbeke, Mattio Vainio and Peter Zapel as key plays in proposing and later implementing the EU ETS.

[94] Runge-Metzger (n 75) 271.

[95] Ibid.

decision-making powers to construct the emissions market while the Commission is thought to play an important supervisory role of ensuring that this construction process adheres to general EU law. It is nonetheless the private sector that is recruited to help drive the trading scheme and according to which market practices are thought to be established – in short, a picture of emissions trading that is representative of the *Economic Efficiency Model.*

### *3. Directive on Emissions Trading*

The Directive on emissions trading was adopted in 2003, which, as explained in the previous Chapter, is a short legal text that establishes a 'basic architecture'[96] for emissions trading in an EU context. Mapping the models onto this legal document shows that the *Economic Efficiency Model* emerges in the way that regulatory power between the Member States and the Commission is allocated. While the Directive leaves the definition of the legal status of emission allowances open-ended, the Commission seems to understand this right both according to the *Command-and-Control Model* as a particular regulatory authorisation, and the *Economic Efficiency Model* as part of a cost-efficiency-centred regime. The operation of these two models in the Directive and the Commission's related narrative appears as next described.

What is clear from the Directive is that the emissions trading scheme functions on the pre-condition that all installations covered by the Directive must hold a permit

[96] J de Cendra de Larragán, 'Too much harmonization? An analysis of the Commission's Proposal to amend the EU ETS from the Perspective of Legal Principles ' in M Faure and M Peeters (eds), *Climate Change and European Emissions Trading: Lessons for Theory and Practice* (Edward Elgar, Cheltenham 2008) 53, 57.

in order to be able to engage in industrial activities listed in Annex I.[97] Permit-holders are authorised to emit greenhouse gases from their installations[98] but they must also bear certain obligations, such as monitoring and reporting emissions, as well as surrendering allowances equal to the total emissions of the installation in each calendar year.[99] What is not equally clear from the Directive is the specific legal status of emissions permits, as these are nowhere explicitly defined. As such, the Directive leaves the door to speculations wide open and some scholars and the industry have suggested that these ought to be considered as property rights.[100] Vis, however, sees emissions permits as mere obligations:[101]

> It is the idea that emissions trading represents an appropriation of 'property rights' or entitlements that appears to some people as contrary to natural justice. However, such a sentiment makes a number of assumptions that may be wrong. Emissions trading is just a mechanism that allows for greater economic efficiency.

The fact that Vis draws links between emissions permits and economic efficiency suggests that these rights are viewed in accordance with the *Economic Efficiency Model* where the key role of emissions allowances is to secure market-transactions and allow the emissions market to allocate regulatory obligations in the most cost-effective way. Meadows, however, argues that the precise legal nature of this permit

[97] These include, for instance, the production and processing of ferrous metals. Directive (n 28) Article 4 and Annex I.

[98] Article 6(1).

[99] Article 6 (1)-(2).

[100] MJ Mace, 'The Legal Nature of Emission Reductions and EU Allowances: Issues Addressed in an International Workshop' (2005) 2 Journal of Energy and Environmental Law 123, 124-126, C Bourbon-Seclet, 'A Tentative Agenda to Improve the 'Gold Standard' and Bring Some Contractual Certainty into the System: Part 2' (2008) 23 Journal of International Banking Law and Regulation 302, 306.

[101] Vis 'Basic Design Options for Emissions Trading' (n 57) 41.

is 'a type of tradable administrative authorisation',[102] which highlights an element of the *Command-and-Control Model* in how Commission officials think about this issue. On this basis, it may not be altogether clear what type of rights the Directive creates but what seems obvious from both Vis' and Meadows' description is that these are not defined in accordance with the *Private Property Model* where the right to common resources is strictly defined in private property right terms and as a symbol for liberty.

The key provision that determines the power allocation between the Member States and the Commission with regard to constructing the emissions market is codified in Article 9, which is one of the most litigated sections of the Directive and discussed in detail in the next Chapter. Article 9 provides that:

> For each period…each Member State shall develop a national plan [NAP] stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them.

This stipulation builds on similar formulations in the Green Paper and the proposal on emissions trading concerning the cap-setting procedure,[103] which plainly entrusts the Member States to determine the total national cap and decide on the initial emissions allowances allocation. According to Vis, the advantage with this system of predetermining national caps and the initial allocations of emissions allowances is that the emissions trading scheme thereafter is 'simpler to administer'[104] and 'the market can develop with greater certainty'.[105] What Vis suggests is that the rationale behind

[102] Meadows (n 90) 83.

[103] Green Paper (n 24) 7-8, Proposal for a Directive on emissions trading (n 25) 5-6.

[104] Vis 'Basic Design Options for Emissions Trading' (n 57) 41.

[105] Vis explains that ultimately this leads also to greater certainty in the environmental outcome, ibid. Scholars, however, have questioned the extent to which this type of market construction and division of regulatory discretion in fact contributes to market certainty, J de

the process of constructing the emissions market is similar to the *Economic Efficiency Model* where market certainty also stands as the centrepiece of emissions trading deliberation.

This construction process of the emissions market has a public law dimension. More precisely, the Directive obliges the Member States to follow objective and transparent criteria, listed in Annex III of the Directive, in determining their caps, as well as taking into account the Common Burden Sharing Agreement and public opinions, which, together must be notified to and approved by the Commission.[106] Article 9(3) stipulates the implications of these requirements:

> Within three months of notification of national allocation plans…the Commission may reject that plan, or any aspect thereof, on the basis that it is incompatible with the criteria listed in Annex III or with Article 10.

This rule suggests that the Commission holds a strong supervisory role in the process of emissions market creation, with potential veto-rights to national caps. Vis, however, explains that the relationship between the Commission and the Member States in this regard is one of cooperation, and that the Commission's part is in fact 'overseeing the Directive'[107] rather than opposing the discretion of the Member States. This type of explanation suggests that the *Economic Efficiency Model* operates in the Commission's understanding of the power division, as it promotes a limited

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Cendra de Larragán, *Distributional Choices in EU Climate Change Law and Policy: Towards a Principled Approach?* (Kluwer Law International, Alphen aan den Rijn 2011) 6, C Kemfert and a others, 'The Environmental and Economic Effects of European Emissions Trading' in G Michael, R Betz and K Neuhoff (eds), *National Allocation Plans in the EU Emissions Trading Scheme: Lessons and Implications for Phase II* (Earthscan, London 2007) 441, 443.

[106] Article 9 (1).

[107] P Vis, 'The First Allocation Round: A Brief History' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 187, 202.

role for central management of the emissions trading regime. This would also suggest that the Commission's view in this regard is distinct both from the *Command-and-Control Model* in which the central government is viewed to play a central role in the construction of markets, and the *Private Property Rights Model* that, on the other hand, aims to substitute government control.

What the short descriptions above highlight is the Commission's understanding of the Directive on two particular issues: the legal status of emissions permits and the power allocation between the Commission and the Member States. In these discourses visions of the *Command-and-Control Model,* as well as the *Economic Efficiency Model* appear in explanations of the legal definition of rights as encompassed in emission permits, while with regard to the issue of power-allocation, the Commission aligns with the *Economic Efficiency Model* in promoting limited central control of the emissions market. The fact that two models are applicable in this context seems to follow as a result of the open-texture of the Directive.

### *4. Theme: Better Regulation*

During the period in which the Green Paper, the proposal for emissions trading and the Directive were deliberated, the Commission shifted from a compliance-based narrative, found in the two previously mentioned Communications, to economically oriented debates. In particular, the regulatory focus swung from state-focused debates on the implementation of environmental laws, to creating environmental law regimes reliant on the private sector, capable of yielding economic opportunities and helping further the competitiveness of European economies. Emissions trading in this context is presented as a suitable regulatory option, as the Commission indeed understands

this trading scheme to create a rich 'carbon economy',[108] and establish new layers of financial activities, such as carbon management.[109] This type of regulatory consideration echoes the *Economic Efficiency Model,* which similarly emphasises profits that emissions trading is thought to promise.

The documents and the discourse highlighted above also demonstrate that the Commission promotes a heavily decentralised legal structure for the emissions trading regime in which the Member States are trusted to set out the necessary framework for emissions trading and the market to establish the relevant trading practices. This view is captured by Dimas, the former Commissioner for Environment, who in reflecting over the Directive concludes that[110]

> In many instances where the legal framework [the Directive] leaves Member States a choice to either let market forces work or bring in an administrative rule, we have seen administrative rules being chosen. I fear our regulatory minds have re-entered via the back-door in the implementation process of what is a market-based instrument. I do believe we should put more trust in a well-designed market instrument and in more instances give the market the benefit of the doubt.

Dimas' obvious frustration over the implementation of the Directive illustrates two important and correlated points. First, it shows that the hope behind this type of decentralisation is that it will enable markets to operate freely and without administrative regulatory burdens. Second, it demonstrates that market-based

[108] Slingenberg defines a carbon-economy a place where scarcity leads to a 'new society conscious of its contribution to climate change'. Y Slingenberg, 'Community Action in the Fight Against Climate Change' in M Onida (ed) *Europe and the Environment: Legal Essays in Honour of Ludwig Krämer* (Europa Law Publishing, Groningen 2004) 211, 222.

[109] This includes services such as accounting, reporting and setting up brokering houses, as well as carbon trade analysts. Runge-Metzger (n 75) 271-2.

[110] Stavros Dimas, EU Environment Commissioner, 'The EU Emissions Trading Scheme - Looking Back and Forward' (Speech at the Green Week Debate on Emissions Trading Scheme, Brussels 2 June 2005 ) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/317&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

instruments, such as the emissions trading scheme, are believed to be able to operate without the interference of Member States, or the Commission. The picture of emissions trading that Dimas thus depicts is one that clearly corresponds to the *Economic Efficiency Model.*

Ultimately, the fact that the Commission sees emissions trading as an opportunity for the EU to improve its competitiveness and stimulate its economy, and the trading regime as a decentralised regulatory system able to operate according to market forces and without detailed administrative rules, shows that the Commission frames emissions trading according to the Better Regulation agenda. In the previous Chapter, I highlighted some of the key leitmotifs underpinning this regulatory agenda, including the fact that it aims to adopt simple regulation and to regulate via decentralised mechanisms and thereby help the industry grow and advance.[111] Indeed, Wiener explicitly refers to the EU ETS as an example of Better Regulation in the EU.[112] The significance of this is two-fold. First, it helps to explain why the shift in the Commission narrative changed to focus on economic considerations. Second, and more importantly, it shows that although the *Economic Efficiency Model* and to an extent also the *Command-and-Control Model* appear in the examined documents, their presence can only be understood and explained with reference to the relevant regulatory aims that form part of EU legal culture.

[111] See J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambridge 2007) 165 and Chapter Three Section III (C).

[112] J Wiener, 'Better Regulation in Europe' (2006) 59 Current Legal Problems 447.

### C. Emissions Trading as an Economic Opportunity: Centralised Approach

Only three years after the start of emissions trading in the EU, the Commission proposed to revise the EU ETS regime, leading to a 'major overhaul'[113] of the Directive. Although the Commission judged the first period of emissions trading to have been 'generally positive',[114] in 2006 and following the first publication of verified emissions data from 2005, it surfaced that a surplus of about 44 million emission allowances for 2005 had been issued by national authorities and allowed on the emissions market, causing prices for emissions allowances to plummet.[115] By 2009 the Directive had also been the subject of over 40 proceedings before the EU Courts,[116] which also had 'a bearish impact'[117] on the emissions market. Moreover, with the global financial crisis casting a shadow over the use of markets, including carbon markets,[118] the Commission set forward a proposal for the revision of the emissions trading regime in June 2008 with the aim to refine and improve the EU

[113] Connier Hedegaard, EU Commissioner for Climate Action, 'Europe's View on Intrenational Climate Policy' (Speech at Harvard Kennedy School, Cambridge 20 September 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/468> accessed 29 May 2011.

[114] Delbeke (n 60) 10. Similarly, Vis 'Basic Design Options for Emissions Trading' (n 57) 212 describes the first allocation period of emissions allowances to have passed 'remarkably well.'

[115] See R Betz, K Rogge and J Schleich, 'EU Emissions Trading: An Early Analysis of National Allocation Plans for 2008-2012' in G Michael, R Betz and K Neuhoff (eds), *National Allocation Plans in the EU Emissions Trading Scheme: Lessons and Implications for Phase II* (Earthscan, London 2007) 361, 366.

[116] Carlarne (n 36) 175. The EU ETS case law will be analysed in more detail in the next Chapter, here it is important to note that the numerous pending litigation was 'nowhere mentioned' in the Commission's working group on the review of the EU ETS. J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 805, 813. However, as the next Chapter explains, with the revisions of the EU ETS adopted, the Commission expressed hope that this would decrease the number of cases before the EU Courts.

[117] J Maurici, 'Litigation and the EU Emissions Trading Scheme' (2009) 50 Environmental Law 7, 24.

[118] L Lohmann, 'Regulatory Challenges for Financial and Carbon Markets' (2009) 2 Climate and Carbon Law Review 161.

ETS 'in the light of experience gathered.'[119] Having been adopted only six month later, the revised Directive is set to take full effect in 2013.

During the course of the revision proceedings, the Commission retained its focus seen in the previous period of ETS-discourse on economic benefits that the EU ETS is thought to be able to help the EU harvest. For instance, the EU ETS is described to be able to secure leadership for the EU in becoming a green economy, boosting 'energy efficiency and security'[120] for the EU. Also, according to Hedegaard, the EU Commissioner for Climate Action, the EU ETS is a key strategy for the EU in 'a global race for green growth and jobs'.[121] Moreover, the fact that one of the key changes in the revised emissions trading regime is a shift from the standard method of allocating allowances free of charge to auctioning, has also meant that the Commission sees this regulatory regime as a new source of government revenue able to help control government deficit.[122] These visions are an expression for the *Economic Efficiency Model* in the sense that they emphasise the economic opportunities in emissions trading, or creating a so-called 'win-win'[123] regulatory

[119] Proposal for a revised Directive on emissions trading (n 30) 2.

[120] Commission (EC) Communication on International Climate Policy Post Copenhagen COM(2010) 86 final at 4.

[121] Hedegaard (n 113).

[122] Stavros describes emissions trading as a new source for revenue, suggesting that it can be useful particular in financing climate change projects. Stavros Dimas, EU Environment Commissioner, 'Climate change: Commission sets out global finance blueprint for ambitious action by developing nations' (Speech to Press Points Brussels 10 September 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/380&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011. Similar analysis expressed in J Werksman and C Voigt, 'Editorial' (2009) 2 Carbon and Climate Law Review 133, 133.

[123] Stavros Dimas, EU Environment Commissioner, 'Climate Change in times of Economic Crises - the Path to a Successful Climate Conference in Copenhagen' (Speech at the Humbold University, Berlin 6 July 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/332&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 29 May 2011.

scenario where environmental law helps to stimulate the economy at times of economic crises.

The key difference between the Commission's narrative in the documents previously examined and those presently under consideration lies in the understanding of the extent to which the state ought to intervene in emissions market operations. In discussing the framework of the emissions market, the Commission concludes that:[124]

> the market needs to have an appropriate market oversight framework. Such a framework needs to secure fair and efficient trading conditions for all market participants through transparency requirements as well as by preventing and sanctioning market misconduct, in particular insider dealing and market manipulation. Such a framework should also provide safeguards to minimise the risk that the carbon market is used as a vehicle for other illegal activities, such as money laundering or VAT fraud.

This statement highlights two important points. First, it shows the Commission pushing for market control and regulated market practices, which indicates that the Commission has moved away from the view that markets ought to be given 'the benefit of the doubt',[125] as Dimas urged. Yet it also demonstrates that the Commission is only aiming at re-adjusting the *framework* of emissions market regulation rather than seeking to entirely harmonise or standardise these market practises, as would have been suggested had the *Command-and-Control Model* been applicable here. Indeed, the Commission explains that the proposal to revise the Directive 'balances the needs for economic efficiency and fairness between sectors and Member States, and will provide more predictability for industry'.[126] The Commission thus expressed

[124] Commission of the European Communities, Communication Toward an Enhanced Market Oversight Framework for the EU Emissions Trading Scheme, COM (2010) yyyfinal. 2.

[125] Dimas 'The EU Emissions Trading Scheme - Looking Back and Forward (n 110).

[126] EUROPA, 'Questions and Answers on the Commission's Proposal to Revise the EU Emissions Trading Scheme' (23 January 2008)

the need to strengthen the emissions market through increased regulatory oversight but in a balanced way and so as to safeguard competition and enhance investments.[127] This view overlaps with the *Economic Efficiency Model,* which similarly prescribes heavier state intervention in emissions markets when transaction costs are high and the market fails to deliver the most cost-effective results.

During the review process, the Commission identified four main points in the current Directive on emissions trading to discuss and potentially revise: the scope of the Directive, the level of harmonisation, compliance and enforcement mechanisms, and links to third countries.[128] Here I examine only the revised rules relating to the cap-setting procedures, auctioning, and the harmonisation of monitoring and verification rules, as these are thought to alter the balance of power allocation under the current Directive.

### *1. Directive on Emissions Trading Revised*

One of the key changes under the revised Directive is the centralisation of the cap-setting procedure. The revised Directive amends Article 9 in this regard and stipulates that from 2013 onwards a Community-wide quantity of allowances will be issued

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/35> accessed 29 May 2011.

[127] Survey as conducted and presented in M Åhman and K Holmgren, 'New Entrant Allocation in the Nordic Energy Sectors: Incentives and Options in the EU ETS' in G Michael, R Betz and K Neuhoff (eds), *National Allocation Plans in the EU Emissions Trading Scheme: Lessons and Implications for Phase II* (Earthscan, London 2007) 423, 435-436.

[128] Commission of the European Communities, Communication on Building a Global Market - Report Pursuant to Article 30 of Directive 2003/87/EC, COM(2006) 676 final 7.

each year, decreasing by a linear factor of 1,74%.[129] Such a decrease is understood to lead to an overall reduction of emissions at least 20% below 1990 levels by 2020, which is a goal that the Commission targets in its climate change package '20 20 by 2020'.[130] As a consequence of this revision, cap-setting powers will be vested with the Commission, which has been called a 'Commission coup'[131] to monopolise regulatory powers under the EU emissions trading scheme. This would indeed imply that the *Command-and-Control Model* drives the legal developments with regard to emissions trading. The Commission, however, explains that the reason why these amendments were proposed is the dire impact that the national allocation plans had on the emissions market, proving ineffective both in reaching emissions reduction targets and minimising overall costs of reduction.[132] A central cap, the Commission suggests, provides 'long-term perspective and increased predictability',[133] that is deemed a necessity for long-term investments in efficient abatement'.[134] The Commission's attention to the economic impact on the emissions market highlights that it proposes regulatory revision following the rationale of the *Economic Efficiency Model.*

Another far-reaching amendment to the Directive is the change from the current system of so-called 'grandfathering' or, allocating emissions allowances free

[129] The level of emissions will compare to the average annual total quantity issued by Member States in their NAPs for the period 2008 to 2012, see revised Directive (n 33) Article 9.

[130] Commission, '20 20 by 2020' (n 31).

[131] J Wettestad, 'Revising EU Emissions Trading: A 'Requested Revolution'?' (The European Union and the Fight Against Global Climate Change Lecture Series 2008) <http://www.fni.no/doc&pdf/jw-081029-ies.pdf> accessed 25 June 2009.

[132] Proposal for a revised Directive (n 30) 2.

[133] Ibid 7.

[134] Ibid.

of charge, to auctioning.[135] The Commission proposes auctioning as the basic principle for allocation based on the reason that this is[136]

> the simplest and generally considered to be the most economically efficient system. This [auctioning] should also eliminate windfall profits and put new entrants and higher than average growing economies on the same competitive footing as existing installations.

This view echoes the *Economic Efficiency Model* in two ways. First, it determines the function of emissions trading based on economic consideration and second, because auctioning is the preferred method of allocation of most economists writing on this topic.[137] Yet auctioning, as stipulated in the revised Directive, does not allow distribution of permits to be entirely determined by bidding. The Commission is entrusted with the regulation of the timing and administration of the auctioning process[138] with the aim of ensuring that it is predictable and 'undeniably safe for investments',[139] and each year the Commission must submit a report to the Parliament and the Council on the functioning of the European carbon market, including the process of auctioning.[140] Moreover, the Directive also restricts the Member States from using auctioning revenues entirely according to their will; instead, the Directive

[135] Revised Directive (n 33) Article 10 provides that from '2013 onwards, Member States shall auction all allowances which are not allocated free of charge.'

[136] Proposal for a revised Directive (n 30) 14.

[137] Literature on this topic is abundant, and in particular with regard to U.S.-based scholarship. For a recent, EU-based analysis see S Weishaar, *Towards Auctioning: The Transformation of the European Greenhouse Gas Emissions Trading System: Present and Future Challenges to Competition Law* (Kluwer Law International, Alphen aan den Rijn 2009).

[138] Revised Directive (n 33) Article 10(4). Commission Regulation No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community [2010] OJ L 302/1.

[139] Ibid.

[140] Ibid Article 10(5).

proposes 50% of the revenue to be invested in nine different climate-related projects[141] and requires 10% of the total quantity of allowances that are auctioned in the EU as a whole to be distributed amongst certain Member States for the 'purpose of solidarity.'[142] The actual legal implications of these stipulations and the extent to which the Commission may in fact interfere with auctioning at Member State level are still uncertain but at the very least what the above shows is that the revised Directive sets out a market-based allocation system with a firm regulatory oversight. This could suggest that the *Command-and-Control Model*-type of considerations operate here but as these provisions were proposed by the Commission so as to stimulate growth, it appears it is the *Economic Efficiency Model* that dominates these deliberations.

It is important to note, however, that the application of auctioning under the Directive is restricted in scope. More precisely, auctioning emission allowances applies only to the power sector while sectors considered carbon sensitive, such as the heating industry, will receive free permits until 2027 according to harmonised EU-wide rules.[143] The Commission sees this restriction as necessary on the basis that it protects certain energy-intensive actors in the EU that are subject to international competition, and that would be put at an 'economic disadvantage' in relation to industries that are not subject to comparable regulation.[144] With the aim of avoiding the over-allocation of free permits to these sectors the Commission is nonetheless

[141] Note that the extent of this requirement is uncertain, as Member States are encouraged rather than obliged to invest in these projects, which include instance financing the development of renewable energies and research and development of energy efficiency, see ibid Article 10 (3)(a)-(i).

[142] Ibid Article 10(2)(a).

[143] Ibid Article 10(a).

[144] Proposal for a revised Directive (n 30) 16.

vested with the regulatory discretion to set benchmarks for free emissions permits.[145] What this shows is that similarly to the *Command-and-Control Model,* the Commission considers it a necessity to artificially construct competition on the emissions market so as to safeguard the EU industries against its competitors.

Under the revised Directive, the Commission will further harmonise the EU emissions trading regime by codifying monitoring and reporting rules, as well as the verification rules through regulations.[146] The purpose of this regulatory centralisation, the Commission explains, is to help create an even playing field between market actors across the emissions market, which is thought to further contribute to predicable market practices that can 'directly affect investment decisions.'[147] The Commission acknowledges that regulations and detailed rules in this regard may lead to higher administrative costs, but concludes that this outcome is 'justified, as administrative costs in the longer term would be much lower.'[148] This projects the *Economic Efficiency Model*-type of rationale where temporary high costs validate long-term economic solutions.

The discussion above offers a brief overview of the Commission's narrative concerning the revised Directive and its official explanation to some of the key changes stipulated therein. The key implication of the revised emissions trading

[145] Commission Decision of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council [2011] L130/1.

[146] Revised Directive (n 33) Article 14 and 15. These will be adopted by 31 December 2011.

[147] Council, of the European Communities, 'Review of the European Union Emissions Trading Scheme' (Council Conclusions, Brussels 4 July 2007) <http://register.consilium.europa.eu/pdf/en/07/st11/st11429.en07.pdf> accessed 29 May 2011.

[148] Proposal for a revised Directive (n 30) 6.

regime is the centralisation of regulatory powers, which give the Commission a stronger role in managing and overlooking the function of the emissions market. The way in which the Commission interprets this change is similar to the *Economic Efficiency Model* that equally allows for a stronger state role in cases where this helps improve market security and activity.

### *2. Theme: Freer Markets, More Rules*

The revised Directive has significantly changed the emissions trading regime: the cap is centralised, monitoring and verification methods are standardised and emissions allowances are, as a general rule, distributed through auctioning at Member State level. Considering that these activities are carried out either by the Commission or under its supervision, the revised emissions trading regime clearly centralises regulatory powers in the Commission's favour. What the discussion above shows is that the Commission sees these legislative changes as necessary to safeguard the emissions market and induce confidence in emissions trading – especially following the initial crash in carbon prices due to over-allocation. This understanding of heavier regulation for the sake of stronger markets suggests that the *Economic Efficiency Model*, which equally appreciates state intervention when the market demands it, operates here.

Thus the key difference between the Commission's narratives here and during the previous period of ETS-debates is the intent to safeguard economic benefits, which the emissions market is thought to hold, through a strong regulatory framework where both the construction and the operation of the emissions market is centrally regulated. This idea of creating more rules so as to further market activity and

integration is a regulatory theme and objective that is deeply embedded in the EU legal culture. As explained in the previous Chapter, Vogel uses the phrase, 'freer markets, more rules', to explain how in the EU legal order, competition is enhanced and created via rules and centralised governance.[149] This shows that the way in which the Commission understands the legal developments of emissions trading in the EU is a reflection not only of the *Economic Efficiency Model* but also of EU legal culture.

## IV. REFLECTIONS

The analysis above only provides a glimpse of how the Commission's understanding of the EU emissions trading scheme and the legal features of this regime have developed over the course of the ten-year period that the above study covers. What this glimpse nonetheless shows are different turns that the Commission's ETS-related discourse has taken. In the initial debates on emissions trading, the Commission promotes this regulatory strategy as a promising implementation strategy that can guarantee compliance with international environmental law. At this point, implementation was, as highlighted, one of the Commission's core regulatory concerns. In the two periods of emissions trading deliberation that followed – the first concerning the current Directive, and the second the revised Directive – the Commission's emphasis shifts from implementation to economic opportunities that emissions trading is thought to realise. Although the focus is on economic considerations in both, in each period the Commission presents a different picture of how the emissions trading scheme ought to be constructed and managed. In particular, the extent to which the private sector is entrusted with the establishment and

[149] Vogel (n 5).

management of the actual trading practices differs. In relation to the current Directive, the Commission shows a deep confidence in the private sector in this regard, which indicates that the Commission in fact sees the EU ETS as a regime where the market works in this sense freely, and allocates regulatory responsibility according to its own established practices. This vision relates to certain aspects of the Better Regulation agenda, in particular the way in which it depicts the reduction of administrative regulation and deregulation more generally as a way of helping create economic opportunities for EU economies. Discussions of the revised Directive, however, show that the Commission's perception of the extent to which the private sector can work freely in the emissions trading regime has changed and the Commission presses for a stronger market oversight through centralisation of regulatory power and an increased number of ETS-related regulations. This approach of establishing more rules in order to stabilise the emissions market and create stability for the relevant market-actors may be seen as forming part of a more general regulatory trend following the most recent financial turbulence.[150] Even so, it is symptomatic also of a deeper regulatory philosophy of market-creation and regulation in the EU, which is to enhance market activity through wide-reaching regulation. These 'turns', so to speak, in the Commission's ETS-related narrative may not appear particularly dramatic but they highlight two important points.

First, they demonstrate that the Commission's understanding of emissions trading as a regulatory concept is in flux. This finding may not appear surprising considering that the EU ETS is generally seen to be *in vivo* an 'experiment[151] that is

[150] See J Stiglitz, *Freefall: Free Markets and the Sinking of the Global Economy* (Allen Lane London 2010).

[151] D MacKenzie, *Material Markets: How Economic Agents are Constructed* (Oxford University Press, Oxford 2009) 166.

stipulated to change[152] and that is described also by the Commission as a 'learning-by-doing' experience.[153] What the analysis above indicates, however, is a slightly different point, which is that the Commission's understanding of the EU ETS is undeniably linked to different regulatory agendas relevant to EU legal culture, and as these change, so does the use and focus of the EU emissions trading regime. Effectively, this shows that emissions trading as a regulatory concept derives its meaning from the particular regulatory lens through which the law-and policymaker observes it and, as such, the legal culture in which it operates.

Second, the various narratives on this topic establish that different models from Chapter Two operate here at different times. Notably the *Economic Efficiency Model* surfaces most often over the course of these debates, which may be explained by the fact that the team that drafted the Green Paper and the remaining official document relevant for the creation of the EU ETS are mainly economists.[154] The *Command-and-Control Model* appears as well but chiefly in state-based discussions, as exemplified by the Communications where the focus is on the implementation and compliance with international environmental law. The *Private Property Rights Model*, on the other hand, seems to be absent from the Commission's ETS-based rhetoric. The obvious reason for this is that the Commission is itself a bureaucratic component and part of a multi-governance regulatory structure that the *Private Property Rights*

[152] Article 30 of the Directive stipulates that the scope of the emissions trading regime can be broadened to include additional sectors, and as of 2008, Member States can individually include other greenhouse gases above carbon dioxide in the scheme. See Slingenberg 'Action in the Fight Against Climate Change' (n 108) 221.

[153] Green Paper (n 24) 10.

[154] Jos Delbeke, head of unit, and Arthur Runge-Metzger, Mattio Vainio,Peter Zapfel and Peter Vis were central to the implementation of the EU ETS and are all economists. Olivia Hartridge is political scientist, Damien Medows, Yvon Slingberg and Jürgen Lefevere are lawyers. As listed in Ellerman, Convery and de Perthuis (n 7) 26.

*Model* would seek to abolish. This is not to say, however, that *Private Property Rights Model*-type of considerations are generally nonexistent in the EU ETS-context and not considered by the Commission. For instance, during a stakeholder meeting with the industry and NGOs, the Commission suggested that public authorities ought to be able to intervene in the emissions market so as to 'smooth the peaks and troughs of price fluctuations'.[155] The stakeholders, however, responded by expressing 'mistrust…towards the intervention of public authorities in private markets',[156] and in the final proposal for a Directive on emissions, this suggestion is no longer included. These hints of the *Private Property Rights Model* in the stakeholder's view of emissions trading serves to show that although the Commission does not voice this particular model in its own rhetoric, the *Private Property Rights Model* is, nonetheless, part of its deliberation.

There are, however, a number of important limitations to the way in which the models are applied in the analysis above. To start with, and as explained in Chapter Two, these models are imperfect: they are my own and they reflect the way in which I see emissions trading schemes to be perceived in selected emissions trading scholarship. Mapping these fixed models onto dynamic discourses, such as the Commission's ETS-related debates, is challenging - particularly attempting to consistently square a decade long debate into a particular model for a particular period. Clearly the models at times overlap and I am aware of the fact that the reader may see the models as operating differently in the above-listed discourse. The point

[155] Commission of the European Communities, 'Chairmain's Summery Record of Stakeholer Consultation Meeting with Industry and Environmental NGOs' (Brussels, 17 September 2001) <http://ec.europa.eu/clima/documentation/ets/docs/record_of_stakeholder_consultation_meeting_en.pdf> accessed 31 July 2011.

[156] Ibid.

with this exercise, however, is different from arguing that a particular model represents *the* way in which the Commission understands emissions trading. My aim is rather to show that different models – albeit to different degrees and at times only as mere hints – operate here, which stands as evidence for two points.

First, it demonstrates that emissions trading discourse in the EU is complex and that even in the narrative of one particular institution, traces of different visions of how emissions trading regimes ought to be constructed and applied, exist. Second, it highlights that the common query in emissions trading scholarship, and more precisely the trichotomy of legal questions relating to the role of the state, the market and the legal status of tradable emissions rights identified in Chapter Two, is relevant also in practice. However, the fact that the *Private Property Rights Model* was found to be applicable to the Commission's ETS-related narrative to a lesser extent than the other two models helps to show that the question of rights *per se* is not as important in this context as the question of the allocation of regulatory power between public authorities – both at EU and national level – and the private sector. In this way, the models also help highlight the difference in emphasis concerning these core questions as seen by the Commission and the emissions trading scholarship more generally.

## V. CONCLUSION

As explained at the outset of this Chapter, my aim in mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto the Commission's ETS-related discourse has not been to provide an exhaustive account of the EU ETS or to explain the full legal developments of this trading scheme. Rather my objective is to show evidence of the applicability of the models in

law, not for the sake of evidence as such but for what this applicability signifies. It shows that emissions trading discourses in the EU are complex and dynamic and deal with a similar set of questions as emissions trading scholars do – although to a lesser extent questions of rights. However, the fact that rights, in the Commission's view, are not as central to the debate on emissions trading as is the allocation of regulatory power proves a second crucial point, which is that the applicability of the models is intrinsically tied to legal culture. This also helps to reinforce the key argument in the pervious Chapter; namely, the EU emissions trading regime cannot be severed from the EU legal culture.

# CHAPTER FIVE

# UNPACKING EU EMISSIONS TRADING DISCOURSES (II):

# EU COURTS

## I. INTRODUCTION

This Chapter constitutes the second part of my case study of how emissions trading as a regulatory concept is conceived in the EU legal context. Here I build on the analysis developed in the previous Chapter and move from the study of policy- and lawmakers' ETS-related discourse to examining EU ETS case law, focusing on how judges reason and give meaning to emissions trading, as well as how the CJEU responds to the idea of an EU market in emissions allowances as projected by the Commission and the applicants. I map the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto these ETS-related judicial discourses when applicable, and as in the previous Chapter, my aim therewith is to provide an example of how emissions trading, even in a single jurisdiction, admits of different understandings. In this way, I intend to make visible some of the legal complexities involved in conceptualising emissions trading, and in particular, I wish to make two points in this Chapter.

First, I show that the main legal problem that the EU Courts address in EU ETS case law is rooted in the question of to whom the regulatory power required to construct the EU emissions trading regime is to be allocated. Mapping the *Economic*

*Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto these judicial discourses and demonstrating that these – albeit to different degrees[1] – are applicable, helps illustrate that distinct understandings of emissions trading as a regulatory concept exist in the courtroom, each furthering a particular view of to whom regulatory power[2] under the Directive[3] ought to be allocated. This study thus shows the usefulness of the models in fleshing out the discrepancies and giving an insight into EU ETS case law, as well as contributing with an explanation as to why the EU ETS regime has been, and continues to be, fiercely litigated.

Second, I demonstrate that the CJEU, when delivering its ETS-related judgements, plays a pivotal role in constructing the EU emissions market. In particular, determining the extent of regulatory discretion – at the national and the EU level – to determine emissions allowance caps, and deciding at what level of governance legislation is legitimate, the EU Courts effectively construct the emissions market. This type of judgement, and the legal (un)certainty that it is assumed to bring, is significant also because it has proven to have a direct impact on market prices for emissions allowances.[4] Thus what this illustrates is that the emissions market and the EU Court's interpretations thereof demand to be analysed within the same analytical framework, which further validates the argument set out in Chapter Three; namely,

[1] Similarly to the previous Chapter, the *Private Property Rights Model* does not operate to the same extent, as do the other two models in the EU ETS-related judicial discourses. Reasons why this is the case are discussed in Section IV.

[2] As explained in Chapter One, I refer to 'regulatory power' simply as a understanding of how emissions trading schemes are understood to be organised and where the power to manage, as well as construct, these trading regimes lies.

[3] Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, OJ 2003 L 275/32.

[4] This is further discussed at Section III(A)(1) but in short, judgments where the EU Courts have upheld a deregulatory power allocation in constructing NAPs has in this context contributed to prices for emissions allowance to plunge.

that in the EU legal context and at the EU level, markets, EU Courts, and regulation exist in a close symbiosis and, as such, must be analysed as parts of a broader jigsaw rather than as discrete entities.

The structure of this Chapter is as follows. In Section II, I introduce the reader to EU ETS jurisprudence first against a general backdrop of climate change litigation and thereafter by explaining how this set case law is inherently EU-specific. I make this latter point by matching the type of actions that compromise EU ETS case law with CJEU's particular areas of its jurisdiction and specific constitutional role in interpreting, applying and articulating EU law. This exercise serves to highlight the importance of legal culture, as well as explain why it is important to study CJEU's understanding of emissions trading as a regulatory concept. Next, in Section III, I analyse a selection of EU ETS cases by mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto the judicial proceedings where applicable. The aim with this methodology is the same as in the previous Chapter; to demonstrate that the models operate in law, which is further used to highlight that various conceptualisations of emissions trading as a regulatory concept operate in the EU legal order. Subsequently, I evaluate my findings in Section IV, and in Section V, I discuss the possible implications that the revised Directive on emissions trading[5] may have on the type of actions brought before the EU Courts in the future. Lastly, in Section VI, the findings in this Chapter are summarised.

Before starting I need to set out a number of caveats. First, this Chapter is not intended as a normative study in which a particular argument or view analysed as part

[5] Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/63 (revised Directive).

of the EU ETS legal proceedings is preferred, nor do I suggest how diverging judicial discourses relating to the EU ETS can or ought to be reconciled. The purpose here is merely to show that different understandings of emissions trading exist and highlight these through the application of the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models to the relevant cases. It is with the applicability of the models that I seek to attest the core of my thesis, which is to unpack legal complexities embedded in emissions trading as a regulatory concept, and more precisely, to show that this regulatory regime is complex and can be envisioned and applied to function in multiple ways and for different regulatory reasons.

Second, the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models are applied in this study so as to help better understand reality. That is not to say, however, that these models are, or can be, perfectly mapped onto the EU ETS judicial proceedings and the arguments of the involved parties. Obviously, the reality is far too complex to be captured in a model – or even in three – but what the models are able to show is that different understandings of emissions trading operate in the EU ETS–related judicial discourses, and thereby demonstrate that emissions trading cannot be conceptualised in uniform or straightforward terms.

Third, this Chapter is an examination of how the EU Courts understand and interpret the EU emissions trading regime but it is neither a general nor a comprehensive study of how the EU Courts work or interpret cases in a more general EU context. The fact that this Chapter relies on EU constitutional law to explain why a certain kind of legal questions occur in EU ETS judicial proceedings serves, nonetheless, to show that this emissions trading scheme can only be properly understood in the legal environment in which it operates.

## II. EU ETS JURISPRUDENCE AND THE EU COURTS

The number of EU ETS cases has swiftly mushroomed since the EU emissions trading scheme started operating in 2005 and only in the first four years following its enactment, the Directive was challenged in more than 40 cases.[6] The EU ETS jurisprudence can be classified as part of a broader group of climate change litigation,[7] which is a legal genre that in recent years has more experienced an increasing upward trend in legal proceedings more generally.[8] Much climate change litigation in other jurisdictions focuses on using existing legal venues through, for instance, torts, judicial review, and human rights to be able to establish a new claim centred around the impact of climate change[9] and thereby to try to mitigate, prevent or

[6] As Singh Ghaleigh explains, these 40 EU ETS cases dwarf 25 and 17 respective legal actions brought under Council Regulation No 2037/2000 of 16 September 2009 on Substances that Deplete the Ozone Layer [2009] OJ L 286/1, and Council Directive 96/62 of 27 September 1996 on ambient air quality assessment and management [1996] OJ L 296 – two other key EU regulations on pollution control. N Singh Ghaleigh, 'Emissions Trading Before the European Court of Justice: Market Making in Luxembourg' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (Oxford University Press, Oxford 2009) 367, 374.

[7] Hilson discusses the ambiguity of labelling cases 'climate change case law' but argues that if these are framed as such then that suffices as qualification, and indeed he classifies EU ETS as climate change litigation. C Hilson, 'Climate Change Litigation: A Social Movement Perspective' (Legal and Criminological Consequences of Climate Change 2010) <http://www.reading.ac.uk/web/FILES/law/Climate_Change_Litigation_13_July_SSRN_2010.pdf> accessed 6 June 2011. Markell and Ruhl use a narrower approach stating that climate change litigation refers to cases in which the party or tribunal decisions 'directly or expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.' D Markell and JB Ruhl, 'An Empirical Survey of Climate Change Litigation in the United States' (2010) 40 Environmental Law Reporter 10644, 10647. EU ETS case law, nonetheless, would qualify, as climate change litigation, also according to this latter definition as indeed the Directive is the key regulation at EU level to deal with challenges of climate change.

[8] Osofsky describes this trend as an 'explosion of climate change litigation' see H Osofsky, 'Climate Change Litigation as Pluralist Legal Dialogue' (2007) 26 Stanford Environmental Law Journal 181, 184.

[9] By using existing legal venues, these traditional legal routes are hoped to be able to help develop new claims, such as 'carbon torts'. Markell and Ruhl 'Litigation in the United States' (n 7) 10646.

adapt to climate change.[10] As such, scholarship in this area tends to cast the spotlight on questions such as to what extent civil liability and courts can be used to take measures to reduce the effects of climate change,[11] and investigate to what degree the courts are or, can be employed as a venue for political resistance – particularly when the legislator proves inapt for legal action.[12] In this context, the courts are said to have become a 'critical forum in which the future of GHG-emission [greenhouse gas] regulation and responsibility are debated',[13] which raises important questions regarding the role that courts play or ought to play in public governance.[14] To date, climate change litigation has received considerable legal attention in the U.S.,[15] where

[10] Singh Ghaleigh 'Emissions Trading before the European Court of Justice' (n 6) 385-6. Wyman, for instance, discusses the challenges that climate change-induced sea level rise may give to, and more precisely the possible legal right of citizens from 'sinking states' to resettle elsewhere. K Wyman, 'Sinking States' in D Cole and E Ostrom (eds), *Evolution of Property Rights Related to Land and Natural Resources* (Lincoln Institute of Land Policy, Cambridge, MA Forthcoming).

[11] There is vast literature on this topic, for a recent EU perspective see Faure's and Peeters' edited collection of essays M Faure and M Peeters (eds), *Climate Change Liability* (Edward Elgar, Cheltenham 2011), and for an U.S.-based view of both the possibilities and challenges that courtrooms face with regard to climate change litigation see R Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Future to Liberate the Future' (2009) 94 Cornell Law Review 1153.

[12] Hilson 'Climate Change Litigation' (n 7). Literature on this topic is rapidly developing, for an introduction and overview see W Burns and H Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, Cambridge 2009), J Peel, 'Issues in Climate Change Litigation' (2011) 1 Climate and Carbon Law Review 15, B Preston, 'Climate Change Litigation (Part 1)' (2011) 1 Climate and Carbon Law Review 3 and for a brief overview of how climate deliberation more generally is understood to lead to social movement see J Pettit, 'Climate Justice: A New Social Movement for Atmospheric Rights' (2009) 35 IDS Bulletin 102.

[13] H Osofsky, 'The Continuing Importance of Climate Change Litigation' (2010) 1 Climate Law 3, 4.

[14] D Markell and JB Ruhl, 'An Empirical Assesment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' *Public Law Research Paper No. 483* (FSU College of Law, 9 June 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762886> accessed 23 June 2011.

[15] For an overview of the relevant literature see Hilson 'Climate Change Litigation' (n 7).

the typical example of such legal action is driven by NGOs who act as plaintiffs and most commonly before the federal and state courts.[16]

Following this description, however, EU ETS jurisprudence stands in contrast to typical climate change litigation. Rather than pressing for new climate-change related claims through established legal venues or using the courtroom with a broader political motive, EU ETS litigation predominately deliberates and raises questions that stand at the heart of the EU legal order; and more precisely, it demands that the regulatory competences between the Commission and the Member States are drawn.[17] It is thus in light of the constitutional structure of the EU and the role that the EU Courts play in addressing this type of legal concerns that the essence of EU ETS case laws can be made sense of. This Section considers the specific constitutional role and jurisdictional scope of the EU Courts and against this background explains how the body of EU ETS case law falls into and ultimately is characteristic of this particular legal framework. These considerations, it is important to highlight, are not aimed at providing an exhaustive account of the constitutional features and functions of the EU Courts, nor adding to the rich debate on EU constitutional law, but rather to show that EU ETS-related climate change litigation inherently involves questions of EU law, which are further shaped by the extent to which applicants are allowed to challenge these laws before the EU Courts. Similarly thus to the two previous Chapters, this Section emphasises the importance of legal culture in unpacking complexities of emissions trading regimes.

[16] Markell and Ruhl 'Litigation in the United States' (n 7) 10649.

[17] This is not to say that the EU judicial branch never can be mobilised to secure rights for particular social groups, see H Schepel and E Blankenburg, 'Mobilizing the European Court of Justice' in G de Burca and J Weiler (eds), *The European Court of justice* (Oxford University Press, New York 2001) 9-42.

## A. The Constitutional Role of the EU Courts

The CJEU, and its predecessor the European Court of Justice (ECJ) and the Court of First Instance (CFI), which together constitute the judicial component of the EU, play a seminal constitutional part in the EU legal order. Article 19 TEU,[18] which sets out the basic rules governing the EU Courts, stipulates that the CJEU 'shall ensure that in the interpretation and application of the Treaties law is observed.' Since regulatory competences are attributed to the Union as listed in the Treaty,[19] this interpretative role is essential in observing and effectively deciding who – between the Union and its Member States – gets to do what in the EU legal order. As such, the CJEU is undoubtedly the key institution in the EU's constitutional architecture.[20]

Relying on Article 19 TEU, the CJEU has over the years progressively developed a wide constitutional base both for its own rulings and for EU law. For instance, the EU Courts have given effect to measures that were not directly mentioned as an EU competence in the Treaty – environmental protection, as described in Chapter Three[21] is an example thereof – as well as asserted supremacy and direct effect of EU law over national jurisdictions,[22] and developed a normative framework that governs the relationship between the institutions and the Member

[18] Consolidated Versions of the Treaty on European Union (TEU), [2008] OJ C115/13.

[19] Article 5 (1) TEU.

[20] T Tridimas, *The General Principles of EU Law* (2nd edn Oxford University Press, Oxford 2006) 18, as cited in E Scotford, *The Role of Environmental Principles in the Decisions of the European Union Courts and New South Wales Land and Environment Court* (DPhil Thesis, University of Oxford 2010) Chapter Four.

[21] Chapter Three, Section III (B) describes how the EU Courts has interpreted market-related provisions to further environmental protection, at the time when environment was as yet not included in the Treaty as a competence.

[22] A wide range of literature exists on this point, for an overview of the key case law on this topic see S Weatherill, *Cases and Materials on EU Law* (9th edn Oxford University Press, Oxford 2010) Chapter Three.

States.[23] The manner in which the EU Courts have been able to progress in this way has a great deal to do with the ambiguity of the Treaty provisions. As described by Lord Denning, the Treaty 'lacks precision [and] uses words and phrases without defining what they mean',[24] which has meant that in utilising Article 19 TEU, the CJEU has, by 'observing' EU laws, *de facto* articulated their purpose and meaning. As a result of this type of 'gap-filling' role,[25] the CJEU has engaged with 'constitution-making' in the EU, and in the process, cemented its own role as the Union institution with the ultimate authority to make these types of structure decisions.[26]

There observations are well known in the academic community, but what is of relevance to note in this Chapter is how the CJEU is able to use its wide interpretative powers in its jurisdictions. Because it is within these specific legal frameworks that EU ETS cases appear and are given their legal meaning. Three jurisdictions in particular – as stipulated in Articles 263, 276 and 258 TFEU – are important to highlight in this regard.[27]

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[23] J Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge 1999) 189.

[24] *Bulmer v Bollinger* [1974] 2 WLR 202 , as cited in S Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education, Harlow 2002) 208.

[25] Description borrowed from P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th edn Oxford University Press, Oxford 2008) 97.

[26] Weiler (n 23).

[27] CJEU's other jurisdictions are discussed in P Craig, *EU Administrative Law* (Oxford University Press, Oxford 2006) Chapter 9.

## B. CJEU's Jurisdictions and EU ETS Case Law

The CJEU enjoys a wide array of jurisdictions, including the power to order EU acts to be annulled. This provision is set out in Article 263 TFEU, which, more precisely, allows the CJEU to decide actions brought directly before the EU Courts against any of the institutions, challenging the legality of legislative Union acts.[28] Article 263(2) TFEU lists various grounds for review, including lack of competence, essential procedural infringement, misuse of powers or infringement of any rule of law relating to the particular application. To date, the most common EU ETS actions have appeared within the scope of Article 263 TFEU, the most frequent cause for such a challenge being the use of Commission's regulatory powers under the Directive to review national allocation plans for emissions allowances.[29] Two distinct groups have challenged the EU emissions trading regime in this way: Member States and private operators covered by the Directive. Since Article 263(2) TFEU provides Member States with the status of 'privileged applicants' – meaning that they do not have to show any special interest in the case to gain standing – all EU ETS actions brought by Member States have gained access to the EU courts. The reality is different for private operators, who as 'non-privileged' applicants must comply with conditions under Article 263(4) TFEU, which are notoriously restrictively interpreted,[30] to challenge the Commission's exercise of discretion under the Directive. As a result, all Article 263(4) TFEU actions in this context have to date been found inadmissible.[31] This point is crucial to highlight as it distinguishes EU's ETS-based climate change litigation from the more general prototype of climate change litigation that, as

[28] As codified in Article 263 TFEU.

[29] Section III (A).

[30] This is discussed in Section III (A) (2), see n 103.

[31] See n 99.

described earlier, is driven by NGO's. Moreover, the fact that EU Courts are limited in hearing cases from private operators, places the emphasis in EU ETS litigation on Member States and the Commission, this being one of the key feature of this specific series of ETS-based climate change jurisprudence.

The second crucial CJEU jurisdiction is codified in Article 267 TFEU and allows the CJEU to interpret the Treaties and EU law, as well as the validity of acts of institutions upon a national court or tribunal making a preliminary reference. This process of interpretation is recognised as the 'jewel in the Crown'[32] of EU constitutional law as it is through these processes that the EU Courts have progressed to secure authoritative interpretations of EU law, establishing, for instance, direct effect of EU law.[33] Moreover, this type of interpretation is crucial to the EU legal order as it helps secure uniformity in applying EU law throughout twenty-seven different national jurisdictions, without the CJEU ruling on all cases itself.[34] With regard to EU ETS cases, two preliminary references have to date been issued: from the French administrative court concerning the question whether the Directive is compatible with the principle of equal treatment,[35] and the United Kingdom regarding the extent to which the Directive is valid against a series of international law provisions, in particular international customary law.[36] The important feature of

[32] Craig *EU Administrative Law* (n 27) 285.

[33] Ibid 285-286.

[34] Case C-166/73 *Rheinmühlen-Düsseldorf v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1974] ECR 33 , and for an overview of case law on this topic see Weatherill (n 22) Chapter 7.

[35] Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008] ECR I-09895 .

Article 267 TFEU-type of cases is that the EU Court does not rule on the validity of the conflicting views before the court[37] but it nonetheless offers an authoritative view of what it believes EU law to mean.

The CJEU enjoys a third jurisdiction over enforcement cases between the Commission and the Member States as stipulated in Article 258 TFEU. Typically these cases are brought by the Commission against Member States for failure to fulfil Treaty obligations. With regard to the EU ETS, the Commission has brought two such cases: against Italy[38] and Finland[39] for their failure to implement the Directive according to the set time limit. In both instances the EU Courts made the relevant declarations owing to the incomplete transposition of the Directive.

The above descriptions are significant for two reasons. First, they categorise EU ETS cases to date and show that these are moulded according to particular judicial frameworks specific to the EU, and more precisely CJEU's jurisdictions. The fact that the most common EU ETS cases are actions challenging Commission's powers under the Directive similarly highlights that the issue of competence is crucial to the EU emissions trading regime in practice, which reinstates the argument that ETS-climate change litigation in the EU is a reflection of competence-based EU legal culture.

Second, they show that the EU Courts have a wide platform in interpreting EU ETS through which they establish the framework of EU governance and determine

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[36] Case C-366/10 *The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change* (Reference for a preliminary ruling made on 22 July 2010) .

[37] Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 .

[38] Case C-122/05 *Commission v Italy* [2006] ECR I-65 .

[39] Case C-107/05 *Commission v Finland* [2006] ECR I-10 .

the legitimate level and allocation of regulatory powers – a question that the models in Chapter Two show is central to emissions trading discourses. Considering that the CJEU has by tradition 'added flesh to the barish bones of the treaty'[40] and in this way delivered the final interpretation of what the purpose and aim of EU law is, it is clear that the EU Court's understanding of the Directive is crucial – not only because the court's conceptualisation is effective in law but also because the text of the Directive, as described in Chapter Three, is 'lite' and open-textured.[41] Applying the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models to these judicial discourses, next, shows that this textual openness allows for various interpretations of the meaning and significance of the EU emissions trading regime.

## III. MAPPING MODELS ONTO ETS-RELATED JUDICIAL DISCOURSE

In this Section my concern is to study EU ETS case law, and in particular the way in which the EU Courts, the Commission and applicants conceptualise emissions trading as a regulatory concept therein. This analysis is carried out by studying the first two groups of EU ETS case law listed above: Article 263 TFEU and Article 267 TFEU – based actions. I analyse this selection of jurisprudence by mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto the relevant judicial proceedings when applicable, which is the methodology employed in this thesis to unpack legal complexities embedded in emissions trading

[40] Douglas-Scott *Constitutional Law of the EU* (n 24) 213.

[41] The question as to what extent the EU Courts ought to be considered the 'oracle' in this regard – a question more generally posed by Scott and Sturm – falls nonetheless outside the scope of this Chapter. J Scott and S Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006) 13 Colombia Journal of European Law 565.

discourses, and to highlight, in the context of this Chapter, the discrepancies in the EU Court's and the applicant's view of how the Directive ought to be applied.

The various meanings, distinctions and overlaps relating to the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models are discussed both in Chapters Two and Four; still it is useful to briefly recap here the type of emissions trading regime that each model envisions in furthering this regulatory strategy and the extent to which the models emerge in the case law examined below.

According to the *Economic Efficiency Model,* the purpose of emissions trading is to create a profit-centre in selling and buying emissions allowances. The narrative of this model is market-centred and projects a deep belief in the ability of the market to allocate regulatory responsibilities at optimal economic levels. As the market is left to work 'on its own', the role of the state is envisioned to be minimal; that is, unless regulatory intervention becomes necessary to stabilise the market. In the EU ETS case law, the Commission, similarly as illustrated in the previous Chapter,[42] tends to further *Economic Efficiency Model*-type of considerations, as does the Court of Justice.

The *Private Property Rights Model* sees emissions trading as a regime that is able to replace state control over common resources, including air. This trading system is envisioned to function by the regulatory establishing private property rights in emissions allowances but thereafter allowing private property holders to manage the access to the commons on their own terms. Such a system is thought possible by

[42] In particular during the third period: 'freer markets, more rules'. Chapter Four, Section III(C).

the trade of these private property rights on the 'free' market, and as opposed to under a state-controlled scheme. As in the previous Chapter, the *Private Property Rights Model* does not appear in ETS-related judiciary discourses to the same degree as the other two models but there are light hints of its existence, most vividly in early EU ETS case law where the General Court can be seen to express *Private Property Rights Model*-inspired views.

The *Command-and-Control Model* views emissions trading as an administrative law regime that uses the market as a mere device to comply with a certain regulatory goal. Here, the role of the state in emissions trading is understood to be somewhat decentralised, yet this model sees emissions trading as a state-based regime in which the role of the state is unchallenged. This conceptualisation appears most often in the judgments of the General Court, as well as in certain judicial proceedings brought by installation operators under the Directive.

Before I start, a couple of important limitations to the following case study need to be set out. First, this Chapter does not provide an exhaustive account of EU ETS case law but rather focuses on two types of EU ETS-related actions: Articles 263 and 267 TFEU. In analysing these cases, I also do not offer a full review of the judicial deliberation therein but focus on points raised where any of the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models appears. As such, and similarly to the mapping exercise carried out in the previous Chapter, I provide quick snapshots of the actual texts analysed, which, moreover, are to a large extent technical and repetitive. The reason for the snapshots is that the purpose of this case study is not to analyse EU ETS jurisprudence *per se* but rather to trace the applicability of the models in law and thereby be able to demonstrate that the EU Courts, the Commission and the applicants perceive emissions trading as a

regulatory concept in distinct ways. The technicality and the repetition is part of this exercise.

A practical note before I start; most judgements examined in the following were decided prior to the Lisbon Treaty. For this reason, in analysing the cases below, references will primarily be to the EU Courts by their prior name.

## A. EU ETS Case Law (I): Article 263 TFEU

The bulk of EU ETS jurisprudence relies on Article 263 TFEU, contesting the allocation of regulatory powers under the Directive between, on the one hand, the Commission in reviewing national allocation plans establishing the total levels of emissions and, on the other hand, the Member States in implementing the Directive. The process of establishing NAP was briefly described in Chapter Three and in more detail in Chapter Four. Here, it is useful to highlight the main rules – encapsulated in Articles 9, 10 and 11 of the Directive – for determining NAP, as these are the areas of dispute between parties in the relevant case law. Article 9 stipulated that Member States:

> shall develop a national plan [NAP] stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them.

This sets out the general obligation on the part of the national authorities in creating the EU trading regime,[43] to which the Directive sets out three further qualifications.[44]

[43] Other tasks include verifying emissions levels, imposing penalties, establishing registries, as set out in Articles 15, 16 and 19.

[44] Scott and Trubek explain that offering Member States a broad policy discretion to enjoy in the implementation of directives but binding these to a procedural protocol through constraints such as consultation requirements, reporting obligations, is in fact a typical version of new approaches to governance within the basic legislative processes. See J Scott

First, Member States must notify their NAP to the Commission and the other Member States under a specific time schedule.[45] Second, once the NAP has been approved, emissions allowances, at least 95% for the first period of trading, and 90% for the periods thereafter,[46] should be allocated free of charge by the respective national authorities.[47] Third, the Member States must follow 'objective and transparent criteria' in determining its NAP, and take into account criteria listed in Annex III[48] and comments from the public.[49] It is on these criteria that the Commission may 'reject that plan, or any aspect thereof',[50] which is a key regulatory discretion entrusted to the Commission under the Directive and which also is limited by two conditions. First, the Commission may reject NAP only within three months of its notification, and second, it must give reasons for such a decision.[51] Ultimately, it is Member States that make the final decision on NAP but in doing so they still need to fulfil certain conditions, such as providing information regarding the final quantity of

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and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union ' (2002) 8 European Law Journal 1, 2.

[45] Article 9(1). For the first period the NAP had to be notified by 31 March 2004, and for subsequent trading period at least 18 months before the beginning of the trading period.

[46] The first trading period started in 2005 and lasted for three years, and as of 1 January 2008 each trading period lasts for five years, Article 11(2).

[47] Article 10.

[48] These include taking into account targets committed to under the Kyoto Protocol, consistency with other environmental laws, non-discrimination and state aid provisions, as well as various stipulations on providing information and allowing access to information. For an overview of these see M Mehling, 'Emissions Trading and National Allocation in the Member States - An Achilles' Heel of European Climate Policy?' (2005) 5 The Yearbook of European Environmental Law 113, 144-151.

[49] Article 9(3).

[50] Ibid.

[51] Ibid.

emissions allowances it intends to allocate and the method it aims to use to allocate these.[52]

These provisions are seemingly very technical but in application, and as the EU ETS case law shows, they give rise to important competence questions. In particular, the uncertainties regarding the extent to which the Commission can rely on Article 9(3) of the Directive to review NAPs. Mapping the *Economic Efficiency, Private Property Rights* and the *Command-and-Control* models onto these judicial proceedings shows that the CFI and the Commission have distinct views on this subject. As a rule, the Commission relies on the *Economic Efficiency Model*-type of arguments in pleading for a strong regulatory overview of establishing NAPs. The Commission's view is that its role under the Directive is to provide the necessary regulatory structures that will ensure stability in the emissions market. The Commission therefore looks at the *impact* that a particular NAP would have on the emissions market in deciding to what extent its regulatory intervention in reviewing the NAP stretches. This position is similar to the *Economic Efficiency Model* in the way that the Commission measures the extent of its regulatory powers against how well the market is able to function without such regulatory intervention.

The CFI, on the other hand, tends to take a *Command-and-Control Model*-inspired approach in delivering its EU ETS judgements. More specifically, the CFI frames emissions trading as an administrative tool and articulates a clear rejection of examining the *effects* on the emissions market in weighing Commission's competences. The court's focus is instead on creating a trading system that ensures legal certainty for Member States, and this focus on the state as opposed to the market

[52] In this regard, Member States must conclude their final NAP in accordance with Article 11(1).

reinforces the argument that the CFI aligns with the *Command-and-Control Model* in depicting emissions trading. However, in the early EU ETS cases in this context, the *Private Property Rights Model* emerges vaguely in CFI's considerations, and in particular in its focus on individual stakeholders, and their ability to limit regulatory discretion in determining NAP.

These judicial narratives are analysed next by first examining actions brought first by Member States and subsequently by single operators covered by the Directive.

### *1. Member States v Commission*

In this Section I focus on five cases in examining EU ETS actions brought by Member States challenging the Commission's regulatory powers under the Directive.[53] This selection of case law relates to two distinct trading phases, according to which the cases are studied: Phase I (2005-2007) signifies the first implementation period of the EU ETS, whereas Phase II (2008-2012) coordinates the EU emissions trading regime and NAP determined therein with the Kyoto Protocol commitments and compliance period. In practice, what this means is that each trading period is based on a separate NAP that the applicants seek to challenge.

During both trading periods the CFI projects emissions trading according to the *Command-and-Control Model* and in certain regards hints at the *Private Property Rights Model* whereas the Commission presents the same regulatory concept along the lines of the *Economic Efficiency Model*. What this case analysis nonetheless

[53] These compromise: Case T-178/05 *United Kingdom v Commission* [2005] ECR II-4807 , Case T-374/04 *Germany v Commission* [2007] ECR II-4431 , Case T-183/07 *Republic of Poland v Commission* [2009] ECR II-03395 (Poland v Commission), Case T-263/07 *Republic of Estonia v Commission* [2009] ECR II-03395 (Estonia v Commission), Case T-369/07 *Republic of Latvia v Commission* [2011] OJ C139/29 (Latvia v Commission).

shows is that during Phase II, the Commission relies on *Economic Efficiency Model*-type of considerations more sturdily than in Phase I, and similarly to what the discourse analysis shows in Chapter Four, the Commission uses the carbon crash in 2006 as an example of the need to centralise regulatory powers when the market demands it – a view of regulatory power re-allocation typical of the *Economic Efficiency Model.*

### *a. Phase I: United Kingdom v Commission* and *Germany v Commission*

The United Kingdom brought the first EU ETS-related action, which was lodged only five months following the start of EU emissions trading. The facts of this case concern the inclusion of 'provisional' data in the United Kingdom's NAP. More precisely, upon submission, the United Kingdom had notified the Commission that the total level of its NAP was based on 'provisional' data, which it on a later date asked to amend to add allowances. The Commission, however, issued a decision refusing to accept the United Kingdom's amendments, stating that the first set of 'provisional' data was, in fact, final.[54] The legal dilemma that roots this case is whether the Commission is entitled to regulatory powers under the Directive to conclude that the total quantity of allowances are fixed at the provisional level and thereby be able to treat any amendments as inadmissible. Ultimately, this case tests the limits to the Commission's discretion to review NAP.

Commission's main argument in this case as to why its regulatory powers under the Directive indeed include refusing amendments that increase the level of allowances, is centred on the *Economic Efficiency Model*-type of considerations. In

[54] *United Kingdom v Commission* (n 53) para 6-18.

particular, the Commission emphasises *impacts* on the emissions market as a key measurement for determining its regulatory discretion. In this regard, the Commission explains that its decisions on NAP:[55]

> must provide certainty, both for the coherence of the emissions trading system overall and in order for the allowance market to function properly, as market price building depends strongly on the utmost stability of the total quantity of allowances

This statement highlights two important points. First, it illustrates the type of rhetoric that the Commission utilises in debating regulatory power; references to 'market stability' and 'price building' mirror terminology typical of the *Economic Efficiency Model,* which is distinct from the *Command-and-Control Model* that frames emissions trading as a 'regulatory device' or the *Private Property Rights Model* that focuses on the private property rights and the liberties that emissions trading is thought to grant. Second, it shows that the Commission focuses on *market* certainty and the possible adverse effects that additional allowances might have on the operation of the emissions market in defining its regulatory role – a regulatory approach to emissions trading similar to the *Economic Efficiency Model.* Indeed, it is on the basis of market stability that the Commission pleads that its review powers of NAP include the ability to reject amendments that would increase emissions allowance quantities and thereby harm the operation of the emissions market.[56]

The CFI, however, rejects this plea and thus also the *Economic Efficiency Model*-based view of power allocation in emissions trading. It does so by concluding that the Commission is empowered, pursuant to Article 9(3) of the Directive, to reject an NAP based on the NAP's incompatibility with the criteria of Annex III to or with

[55] Ibid para. 38.

[56] Ibid para 39.

Article 10 of the Directive, and most importantly notes that 'no other ground for rejection of a NAP is provided for in the Directive.'[57] As such, CFI explicitly disregards the Commission's idea that regulatory power related to reviewing NAP ought to be measured against the impact that the NAP would have on the emissions market, and, moreover, interprets Commission's focus on 'the stability of the market' in this regard as 'exaggerated'.[58]

The CFI instead determines this case by hinting to *Private Property Rights Model*-kind of considerations. More precisely, the CFI emphasises the importance of public consultation in determining NAPs, which Article 9(1) of the Directive indeed stipulates that Member States must consider. The concern in this case, however, is to what extent a second round of public consultation has to be granted, as in the view of the Commission, 'provisional' data is final and thus a second round of public consultation unattainable. CFI concludes that such an approach renders public consultation 'purely academic'[59] and adds that 'there is nothing either in the wording of the Directive, nor in the general structure and objectives'[60] that demands such exclusion. On this basis, the CFI concludes that the Commission erred in law in rejecting a second round of amendments proposed by the United Kingdom.[61] The fact that the public's right to be heard is emphasised suggests that the *Private Property Rights Model* operates in CFI's deliberation. Obviously, the right to public consultation is not the same as private property rights, which are in focus in the

[57] Ibid para. 54.

[58] Ibid para. 69.

[59] Ibid para. 57.

[60] Ibid para 58.

[61] Ibid para. 56.

*Private Property Rights Model.* Yet the CFI interprets public consultation to have effects similar to the ones private property rights are thought to have in the *Private Property Rights Model,* namely a limitation of regulatory discretion in constructing and managing regimes applied to common resources.

In the next case before the CFI, *Germany v Commission,* the CFI, however, relied on *Command-and-Control Model*-inspired arguments in delivering its judgment. This case concerns ex-post adjustment mechanisms that Germany had stipulated in its NAP with the aim of being able to alter emissions allowances levels in case of 'erroneous forecasts'.[62] The Commission rejected the German NAP on the basis that such adjustment provisions 'create uncertainty, indeed deter operators from investing, with the consequence that improvement in production technologies and reductions in production are less substantial than they would be in the absence of adjustments.'[63] The important point to highlight here is that the Commission looks to the emissions market in deciding whether particular provisions ought to be allowed to be incorporated in an NAP, and, similarly to the *Economic Efficiency Model*, the Commission includes such choices in its regulatory powers because it understands that market stability demands it.[64] Moreover, the Commission encourages a teleological interpretation of its reviewing powers, stating that the criteria set out in Annex III ought to be read in light of the general context of the Directive, which the Commission describes as offering 'operators, on the basis of clear and fixed

[62] *Germany v Commission* (n 53) para. 62.

[63] Ibid para. 127.

[64] In particular, the Commission looks to the effects that the NAP in question would have in incentivising installation operators to want to reduce emissions with the aim of selling these on the emissions market, ibid para. 68-71.

allowances, an economic incentive to reduce their emissions.'[65] The Commission, analogously to the *Economic Efficiency Model,* thus locates the focal point of emissions trading in the system's ability to create economic incentives, and sees its regulatory role to be to ensure that these incentives materialise.

The view that CFI takes in this case is that ex post adjustments are not stipulated in the Directive and as such fall within the discretion of the Member States in implementing the Directive.[66] Rather than focusing on the impacts on the market, according to the *Economic Efficiency Model*, the CFI examines competences and more precisely, the subsidiarity principle enshrined in Article 5(3) TEU in determining to whom to allocate regulatory power with regard to deciding on the validity of ex-post adjustments.[67] This particular constitutional law framing of the EU emissions trading regime suggests that CFI's view of ETS overlaps with the *Command-and-Control Model,* which similarly identifies emissions trading as an administrative device that is fitted around state-governance.

Moreover, the *Command-and-Control Model* emerges in the CFI's description of the purpose of the Directive. CFI explains that the Directive has one principal objective and different sub-objectives: the principal objective is 'to reduce greenhouse gas emissions substantially in order to be able to fulfil the commitments of the Community and its Member States under the Kyoto Protocol', whilst sub-objectives include maintaining 'cost-effective and economically efficient conditions' and 'the safeguarding of economic development and employment'.[68] The fact that the

[65] Ibid para. 67.

[66] Ibid para. 77-79.

[67] Ibid para. 79.

[68] Ibid para. 124-125.

emissions trading is thought of as chiefly a means to comply with regulatory obligations highlights that the *Command-and-Control Model* operates in these judicial discourses, rather than the *Economic Efficiency* or, the *Private Property Rights* models, which identify the creation of economic opportunities and private property rights in common resources respectively, as the key objectives of emissions trading. In this regard, the CFI concludes that[69]

> the mere fact that the practice of ex-post adjustments are liable to deter operators from reducing their production volume and therefore, their emission rates, is not sufficient to call into question the adjustments' legality in light of the directive's objectives as a whole.

What the CFI thus suggests is that even in case of negative economic effects on the emissions market, ex-post adjustment stipulations *per se* do not contradict the aim of the Directive, which it identifies to be compliance with international environmental law. Its emphasis on compliance in this regard again highlights the presence of the *Command-and-Control Model* in CFI's deliberation.

Phase I-related judgments have been described as signifying a restrictive judiciary approach in interpreting Commission's regulatory powers under the Directive; more precisely, the CFI is understood to 'clip the wings'[70] of Commission's plea for broad regulatory discretion. Mapping the models onto Phase I cases, as exemplified by the two cases above, offers an explanation as to why the Commission pushes for a strong reviewing role under the Directive. From the exercise above, it is clear that the Commission sees emissions trading as working according to the *Economic Efficiency Model,* which, if the stability of the emissions market

[69] Ibid para. 148.

[70] Singh Ghaleigh 'Emissions Trading Before the European Court of Justice' (n 6) 378. Note that reference here is made to *United Kingdom v Commission* (n 53).

demands it, allows wide regulatory interventions. The CFI, on the other hand, pictures emissions trading as a compliance system, governed by the general rules on the division of competences and public consultation provisions, which corresponds to the *Command-and-Control* models and hints at the *Private Property Rights*. Ultimately, this demonstrates that the Commission and the CFI imagine emissions trading as distinctive regulatory concepts.

### b. *Phase II: Poland v Commission, Estonia v Commission* and *Latvia v Commission*

Cases concerning Phase II of emissions trading derive mainly from new Member States that joined the EU following enlargement and similarly to Phase I, these challenge the scope of Commission's regulatory power to review NAP as listed in Article 9(3) of the Directive. Mapping the models onto judicial proceedings from this trading period shows that the Commission consistently applies the *Economic Efficiency Model* in its reasoning, and following the carbon crash in 2006,[71] it explicitly refers to the collapse of carbon prices as a confirmation of the need to look to market impacts in allocating regulatory power. However, the CFI is equally affirmative in its use of *Command-and-Control Model*-type of considerations, depicting emissions trading as a mere administrative tool that is fitted around competences set out for the Member States and the EU institutions to regulate in this regard. Thus similarly to cases in Phase I, two distinct visions of emissions trading as regulatory concepts exist in the courtroom also in Phase II cases.

[71] Similar note taken in R Betz, K Rogge and J Schleich, 'EU Emissions Trading: An Early Analysis of National Allocation Plans for 2008-2012' in G Michael, R Betz and K Neuhoff (eds), *National Allocation Plans in the EU Emissions Trading Scheme: Lessons and Implications for Phase II* (Earthscan, London 2007) 361, 366.

CFI heard the two actions from Poland[72] and Estonia[73] on two consecutive days and factually, these cases are identical. The Commission had rejected NAPs from both Member States on the basis that their assessment data of emission quantities, on which emissions allowances were determined, did not match the Commission's own set of data. Poland's and Estonia's claim is that the Commission oversteps its regulatory powers in this regard; rather than reviewing NAPs, the Commission replaces these with its own set of data and thereby *de facto* determines emissions ceilings for Member States.[74]

In the Polish case, Commission's key argument is an expression of the *Economic Efficiency Model.* It argues that a correct assessment of a NAP:[75]

> must enable a situation to be avoided in which surpluses of allowances build up, thereby risking a 'collapse in the market' as happened during the trading period from 2005 to 2007.

This shows, similarly to cases in Phase I, that the Commission focuses on the *impacts* of NAP on the emissions market in determining its regulatory competence to review emissions quantitative data. In fact, the Commission clearly articulates this, claiming that its reviewing powers are not limited to assessing the quality of data but taking into account 'the reaction which the market is likely to have in relation to the quality of those data.'[76] On this basis, the Commission explains that it had to reject the NAP in question as it would have added an immediate surplus of allocations to the

[72] *Poland v Commission* (n 53).

[73] *Estonia v Commission* (n 53).

[74] Ibid para. 36-40, *Poland v Commission* (n 53) para. 48-59.

[75] *Poland v Commission* (n 53) para. 64.

[76] Ibid para. 67.

emissions market, which would have 'an effect on the price of those allowances'.[77] What this shows is that the Commission understands its regulatory powers to extend once market stability requires it, for instance, in cases where market crash looms. This tight correlation between regulatory powers and market impacts shows that the Commission furthers a vision of emissions trading related to the *Economic Efficiency Model.*

In response to Commission's plea and in delivering its judgment, the CFI concludes that Commission's powers to review NAP are severely limited and do not include taking into account the effects of NAP on the emissions market. More precisely, it explains that even if a NAP would add an excess of emissions allowances and thereby contribute to a possible collapse of the emissions market, such a possibility[78]

> cannot justify maintaining the contested decision in force in a community governed by the rule of law such as the Community, since that act was adopted in breach of the distribution of powers between the Member States and the Commission, as defined in the Directive.

The reference to the rule of law here is significant because it highlights the importance of legal culture in appreciating how regulatory power is allocated in a particular emissions trading scheme. To elucidate this point, it is useful to briefly contrast two possible visions – although others exist – of the meaning of the rule of law and to show how this applies to the EU legal order.

[77] Ibid.

[78] Ibid para 129.

For instance, according to Hayek, the principle of the rule of law is crucial to restrict arbitrary government actions and safeguard individual freedom.[79] To Hayek, this law is not about legality, as indeed he states '[t]his rule has little to do with the question of whether all actions of government are legal in the juridical sense'[80] but rather he uses it to imply limits to the scope of legislation and coercive powers of the state to interfere with the individual by allowing the state to act only in cases defined in advanced by the law, and in such a way that it can be foreseen how state powers will be used.[81] Hayek's version of the rule of law is thus an idea that resembles beliefs held by the *Private Property Rights Model* regarding the ability of law to safeguard the individual against state coercion. In the context of the EU legal order, however, the rule of law has a different focus – one that parallels the *Command-and-Control Model.* This principle is codified in Article 2 TEU[82], which is applied to secure violations of the law being brought to court, legal decisions being respected and in this way, create 'autonomous influence of law and legal rulings extend[ing] to the political process itself.'[83] Ultimately, the rule of law at EU level allows the EU to effectively influence state behaviour, compel Member State compliance via available court venues[84] while basing this particular co-existence of national legal orders and

[79] Hayek draws the distinction between a permanent framework in which all actions are known beforehand and within which the 'productive activity is guided by individual decisions', on the one hand, and the direction of economic activity by a central authority', on the other hand, which, Hayek explains, is the general distinction between the rule of law and arbitrary government. FA Hayek, *The Road to Serfdom* (Routledge and Kegan Paul, London and Henley 1976) 54-44.

[80] Ibid 61.

[81] Ibid 62.

[82] Article 2 TEU states that thus Union is 'this founded on[..] the rule of law'.

[83] K Alter, *Establishing the Supremacy of European Law: Making of an International Rule of Law in Europe* (Oxford University Press, Oxford 2001) 3.

[84] Ibid.

the EU jurisdiction on constitutional law.[85] Indeed, in the statement above, the CFI points to the division of power between Member States and the Commission in stressing the importance of the rule of law. What this discussion aims to show – without engaging with the meaning of the principle of the rule of law *per se* – is that there are multiple ways, each inherently culture-specific, to understand how power structures in an emissions trading scheme are determined at the mention of the rule of law. Here, CFI's reference to this rule in the context of competences signals that its focus in analysing emissions trading is on ensuring that the power balance between the Member States and the institutions is secured and that regulatory compliance on state level is achieved. Thus the focus on the state, as opposed to the individual or the market, suggests that the *Command-and-Control Model,* rather than the *Private Property Rights,* or the *Economic Efficiency* models, operates in CFI's deliberation in this case.

Similarly to the Polish case, in *Estonia v Commission* the Commission pleads for a teleological interpretation of the Directive, and argues that its reviewing powers encompass the discretion to reject NAP on the basis that Member States have fixed emissions allowance ceilings that are unable to entail an increase in the price of carbon.[86] In particular, the Commission emphasises the importance of effective price signalling in emissions trading and concludes that if its powers to review NAP are limited to only assessing the quality of the data therein, as opposed to evaluating the impact of NAP on the market, oversupply of allowances will follow, which the Commission takes to 'completely undermin[e] the effects of the Directive as a tool to

[85] J Shaw, *Law of the European Union* (3rd edn Palgrave, London 2000) 191.

[86] *Estonia v Commission* (n 53) 42.

reduce emissions.'[87] What this line of argument highlights, as argued previously, is that the Commission relies on *Economic Efficiency Model*-type of considerations in describing its regulatory role as correlating and being determinative of the needs of the market.

In this judgment, the CFI states that the Directive is of primary importance in EU's fight against global warming, which, the CFI defines as being 'one of the greatest social, economic and environmental threats which the worlds currently faces'.[88] However, with regard to whether Commission's reviewing powers extend to assess impacts on the emissions market, the CFI concludes that[89]

> in a community governed by the rule of law, administrative measures must be adopted in compliance with the competences attributed to various administrative bodies.

This statement reflects the *Command-and-Control Model* in two specific ways. First, it shows that CFI identifies emissions trading as a mere 'administrative measure', which is analogous to the *Command-and-Control Model* – and not as a profit-centre, or a substitute for a state-controlled governance regime, which are the views of emissions trading in the *Economic Efficiency* and the *Private Property Rights* models respectively. Second, it demonstrates that CFI emphasises the rule of law in interpreting regulatory power under the Directive, whichin the EU context, as explained above, is a *Command-and-Control Model*-inspired view on how to construct an emissions trading regime. Again, this is different from the *Economic Efficiency* and the *Private Property Rights* models where regulatory power is either

[87] Ibid.

[88] Ibid para 49.

[89] Ibid para 50.

allocated to central government so that the necessary structures for a stable and profitable market can be established or, alternatively, to property holders with the aim of empowering these, through private property rights, to overturn bureaucratic control of common resources.

In both above-mentioned cases, the CFI annulled the contested decisions, leading market prices for emissions allowances to fall by 2,3%[90] and Dimas, the former EU Environment Commissioner, urging Member States to act swiftly and prepare new NAPs so as to 'minimise the regulatory uncertainty created by the court ruling'.[91] The fact that the judgments have a real impact on the operation of the emissions market[92] shows the significance of analysing markets and the court within the same framework, and examining how the judiciary understands emissions trading. In fact, the Commission has appealed against both judgments on the basis that the CFI erred in law in its interpretation of the scope and objective of Article 9(3) of Directive,[93] which highlights, as does the application of the models to these judiciary proceedings, that the way the Commission views the allocation of regulatory power in emissions trading, and ultimately emissions trading as a regulatory concept, is distinct from the vision that the CFI holds of the same regulatory strategy.

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[90] As quoted in J van Zeben, 'Case Note: Respective Powers of the European Member State and Commission Regarding Emissions Trading and Allowance Allocation' (2010) 12 Environmental Law Review 216, 223.

[91] As cited in EUROPA, 'Emissions Trading: Commission Takes New Decisions on Estonia and Polish National Allocation Plans for 2008-2012' (Brussels 11 December 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1907&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 9 June 2011.

[92] G Dari-Mattiacci and J van Zeben, 'Legal and Market Uncertainty in Market-Based Instruments: The Case of the EU ETS' (2011) No. 2010-02 Working Paper, University of Amsterdam Center for Law & Economics .

[93] Case C-504/09 *Case C-504/09 Commission v Poland* [2009] (Appeal brought on 4 December 2009, pending) , Case C-505/09 *Commission v Estonia* [2009] (Appeal brought on 4 December 2009, pending) .

While the two appeals are still pending, the most recent EU ETS judgment, *Latvia v Commission,* further elucidates the court's[94] view on the meaning of Article 9(3) of the Directive. This case concerns the validity of Commission's decision to reject the Latvian NAP on the basis that Latvia had failed to submit requested amendments within a three-month period, which Latvia argues only applies to the initial notification of NAP and not to later amendments.[95] Again, this is seemingly a highly technical case but the judgment projects an important picture of how the court understands the governance structures of the EU emissions trading regime. More precisely, the General Court states that the review power under Article 9(3) of the Directive aims to[96]

> provide legal certainty for the Member States and, in particular to permit them to be sure, within a short time, how they may allocate emission allowances and manage the allowance trading scheme on the basis of their NAP during the allocation period in question.

The significance of this statement is that it shows that the court emphasises legal certainty for *Member States,* as opposed to *market* stability which is the focus of Commission's judicial narrative,[97] in interpreting governance structures in the EU emissions trading regime. This state-focus demonstrates that the *Command-and-Control Model* is applicable to the court's deliberation, which, considering that the Commission furthers *Economic Efficiency Model*-based arguments, shows that significantly different understandings of what constitutes the core of the emissions trading scheme exist in the courtroom.

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[94] This case is post-Lisbon, which means that the General Court delivered this judgment.

[95] *Latvia v Commission* (n 53) para. 38-44.

[96] Ibid para. 54.

[97] For instance, *Poland v Commission* (n 53) para. 47, *Estonia v Commission* (n 53) para. 42.

In addition to the cases above, a series of actions challenging Commission's use of Article 9(3) of the Directive are still pending.[98] What the above snapshots of cases to date from the two first trading periods show is that distinct narratives exist in the courtroom, each portraying emissions trading as a regulatory concept differently. The Commission aligns with the *Economic Efficiency Model,* focusing on the function of the market and based on this outlook, argues that power allocation must be assigned according to the needs to stabilise the market. The EU courts, however, centre their judicial deliberation on competences and the need to provide legal certainty for Member States to comply with the assigned rules under the Directive – an idea of emissions trading similar to the *Command-and-Control Model*. As such, the EU Courts define emissions trading to be a mere administrative system that is cut to fit power divisions between the Member States and the institutions – irrespective of possible adverse emissions market impacts.

### *2. Installation Operators v Commission*

Individual operators, covered by the Directive, and challenging the Commission's decisions under Article 9(3) of the Directive, have brought a second long series of actions for annulment. However, due to the restrictive criteria for standing for non-privileged applicants under Article 263(4) TFEU, each action in this context has been found inadmissible.[99] The relevant point for this Chapter and the centrality of these

[98] Case T-221/07 *Hungary v Commission* [2007] OJ C199/41 , Case T-194/07 *Czech Republic v Commission* [2007] OJ C199/38 , Case T-368/07 *Lithuania v Commission* [2007] OJ C283/35 , Case T-484/07 *Romania v Commission* [2008] OJ C51/57 , Case T-500/07 *Bulgaria v Commission* [2008] OJ C 64/51 .

[99] Including for instance *Drax Power and Others v Commission* [2007] ECR II-67 the applicant appealed against the Commission's decision that the UK proposed amendments to its Phase I NAP were inadmissible, Case T-489/04 *US Steel Kosice v Commission* [2007] ECR II-127 , Case T-13/07 *Cemex UK Cement v Commission* [2007] ECR II-98 , Case C-

cases is how the CFI – in concurrence with the Commission – rules private operators out, and how the reasons given correspond to the *Command-and-Control Model.* This mapping exercise is carried out by examining one of the first 263(4) TFEU-based cases on this topic; *EnBW Energie Baden Württemberg v Commission*.[100]

### *a. EnBW Energie Baden Württemberg v Commission*

In this case, EnBW brought an action challenging Commission decision approving a German NAP that contained so-called 'transfer rules'.[101] These rules allow operators, who have decommissioned old plans with new installations, to enjoy the same number of emissions allowances that they would have been granted had they continued to operate their old plant. The purpose of this provision, Germany explains, is to reward investments in clean energy. The applicant, however, argues that this constitutes state aid, as it allows its key competitor to benefit from an excess of emission allowances and thus gives them a competitive advantage.[102]

This judgment is centred on the question whether EnBW is allowed standing to challenge the contested decision. According to settled-case law, non-privileged

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503/07 *Saint-Gobain Glass Deustchland v Commission* [2008] ECR I-2217 , Case T-193/07 *Gorazdze Cement v Commission* [2008] OJ C301/36 , Case T-195/07 *Lafarge Cement v Commission* [2008] OJ C 301/36 , Case T-197/07 *Grupa Ozarow v Commission* [2008] OJ C 301/37 , Case T-198/07 *Cementownia 'Warta' v Commission* [2008] OJ C301/38 , Case T-199/07 *Cementownia 'Odra' v Commission* [2008] OJ C 301/ 38 , Case T-241/07 *Buzzi Unicem v Commission* [2009] OJ C6/30 , T-28/07 *Fels-Werke and Others v Commission* [2007] ECR II-98 .

[100] Case T-387/04 *EnBW Energie Baden-Württemberg AG v Commission* [2007] ECR II-1195 (EnBW),

[101] More precisely, the Commission had issued a decision rejecting the German NAP but only to the extent that it provided for ex-post adjustments to the allocation of emission allowances, and so, the transfer rules were approved. Ibid para. 40-47.

[102] Ibid para. 31-36.

applicants must show 'direct and individual' concern in order to gain access to the EU Courts,[103] which the Commission claims that EnBW lacks.[104] The way in which the CFI answers this question is by investigating whether annulment of the contested decision is 'capable of having legal consequences' that could procure an advantage on EnBW.[105] In deciding on this particular point, the CFI ultimately defines the nature of Commission's regulatory power under the Directive, and answers whether individual operators incur any rights from Commission's decision on NAP – in both instances the CFI adheres to a *Command-and-Control*-inspired view of power allocation in emissions trading.

The CFI explains that the Commission has no 'general power of authorisation'[106] under the Directive and that its power to review NAP is severely limited. More precisely, the Commission is listed to only be able to consider a NAP against criteria laid down in Annex III and Article 10 of the Directive, and provide this assessment within a 3-month time frame; or, Member States may implement their NAP without Commission's approval. This echoes previous case law examined above[107] and its significance lies in elucidating that there is a presumption of legality

[103] The preconditions are to show 'direct and individual concern' to which the 'Plaumann test' is in particular relevant. It sets out that persons, other than those to whom a decision is addressed, could only claim to be individually concerned if the decision affected them by reason of certain attributes peculiar to them, or by reason of circumstances in which they were differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. Case C-25/62 *Plaumann & Co. v Commission* [1963] ECR 95 . There is vast literature on this topic, for an overview, see Craig (n 32) 331-344, Craig and de Burca *EU Law* (n 25) chapter 14. For an description from an environmental law point of view see J Jans and H Vedder, *European Environmental Law* (3rd edn Europa Law Publishing, Groningen 2008) 209-214.

[104] EnBW (n 100) para. 57-58.

[105] Ibid para. 96. CFI cites Case C-50/00 *Union de Pequenos Agricultores v Council* [2002] ECR I-6677 , Case T-310/00 *MCI v Commission* [2004] ECR II-3253 in this regard.

[106] EnBW (n 100) para. 105-107.

[107] *United Kingdom v Commission* (n 53) 54.

as to the NAP.[108] The CFI delivers the punch line in this context by explaining that the Commission's role to review NAP is not concerned with the creation of rights but to provide 'legal certainty for the Member States'[109] so that Member States know how they can allocate their emissions allowances.[110] On this basis, the CFI concludes that the contested decision is unable to procure an advantage on EnWB and subsequently dismisses this case on lack of standing.[111]

This judgment highlights two important points. To start with, the fact that the CFI emphasises legal certainty for Member States and sees Commission's importance under Article 9(3) as that of helping Member States comply with the Directive, demonstrates that the court furthers a state-based vision of emissions trading similar to the *Command-and-Control Model*. This is clear also from the court's lack of engagement with the question concerning emissions trading *rights* that could arise from NAPs. For instance, in the *Private Property Rights*- and the *Economic Efficiency* models, the issue of creating rights in emissions allowances stands at the centre of emissions trading discourse; either so as to empower private property holders through private property rights to substitute state-control of common resources, or to induce investments and thus confidence in the emissions market via property rights. However, the fact that CFI finds that the Commission's approval of NAP fails to create rights for *EnBW* – an argument that the CFI uses to explain the inadmissibility of this case – is crucial and proves that the *Command-and-Control Model* operates in

[108] EnBW (n 100) para.115.

[109] Ibid para. 117.

[110] Ibid.

[111] Ibid para. 123.

its deliberation.[112] If attention is devoted to rules on standing more generally, it is clear that their purpose is to regulate level at which intervention in the regulatory processes is allowed.[113] Examining standing in the EU context, and according to an early study by Stein and Vining, it appears that the EU Courts' focus and construction of 'direct concern' ultimately manifests a deeper interest in maintaining the delicate balance between Member State and Commission regulatory powers at EU level, leaving individuals to be protected via national jurisdictional venues rather than allowing them to challenge political proceedings at international level.[114] This analysis sits uncomfortably with the idea of 'an ever closer Union' but it fits well with the *Command-and-Control Model* and indeed CFI's reasoning in this case. As shown above, CFI's narrative is state-focused and by interpreting private actions as inadmissible, it is clear that the CFI's emphasis is on the state rather than on the individual or market actors more specifically to engage with and challenge the regulatory processes of an emissions trading regime. What this also shows is that legal culture is crucial in understanding ETS-climate change litigation in the EU, and the court's approach to actions from installations operators under the Directive.

This assessment of standing for private operators challenging Commission's use of Article 9(3) of the Directive has consistently been applied in subsequent

[112] A methodological point raised by Hajer is that in analysing court discourses, it is crucial to investigate in what instances certain discourses are rules out. M Hajer, 'Coalitions, Practices, and Meaning in Environmental Politics: From Acid Rain to BSE' in D Howarth and J Torfing (eds), *Discourse Theory in European Politics: Identity, Policy and Governance* (Palgrave Macmillan, Hampshire 2005) 297, 301.

[113] Sunstein explains the development of laws on standing in the U.S., their different impacts at different periods and engages in a more general debate on standing as a regulatory concept, see C Sunstein, 'Standing and the Privatization of Public Law' (1988) 88 Colombia Law Review 1432, 1461.

[114] E Stein and J Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context' (1976) 70 American Journal of International Law 219, 233.

cases.[115] Following the Treaty of Lisbon, the provisions on standing were amended so that 'individual concern' does not have to be proven for regulatory acts that are of 'direct concern' to the applicant and that do not entail implementing measures.[116] This revised provision was tested in *Arcelor v Parliament and Council,*[117] where the court found that the Directive cannot 'in any event, be regarded as being a regulatory act which does not entail implementing measures within the terms of the fourth paragraph of Article 263 TFEU'.[118] Thus individual operators can ultimately never challenge the Directive, or the Commission's powers therein,[119] which reinforces the analysis above and the argument that the *Command-and-Control Model* operates in the court's interpretation of Article 236(4) TFEU cases on emissions trading.

## B. EU ETS Case Law (II): Article 267 TFEU

There have been few EU ETS cases in the Article 267 TFEU category, and only one that to date has been decided by the EU Courts.[120] Mapping the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models onto judicial proceedings in *Société Arcelor Atlantique* provides a different pattern of the models'

[115] See case law (n 99) generally and as exemplified in *US Steel Kosice v Commission* para. 46-49.

[116] Article 263(4) TFEU, see also P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, Oxford 2010) 129-133, H Vedder, 'Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental Law 285, 297.

[117] Case T-16/04 *Arcelor v Parliament and Council* [2010] OJ C 100/52 .

[118] *Ibid* para. 123.

[119] Similarly in *Latvia v Commission* (n 53) para. 33, the General Court states that the right to bring action for annulment the Treaty draws 'a clear distinction' between the right of Union institutions and Member States, on the one hand, and legal persons and individuals, on the other hand.

[120] *Société Arcelor Atlantique* (n 35).

applicability in the EU ETS case law. Here, the court's narrative is in line with arguments and rhetoric common to the *Economic Efficiency Model* – as opposed to the *Command-and-Control Model* as previously shown – while the applicant from the national court – a steel manufacturer covered by the Directive – depicts the EU emissions trading regime in accordance with the *Command-and-Control Model.* The importance of this finding is that it shows that variations exist in how different EU courts conceptualise the EU emissions trading regime, which adds to the complexity of emissions trading debates, as well as highlights their cultural specificity.

The French *Conseil d'État* used the preliminary reference procedure with regard to the EU ETS to ask the ECJ to interpret whether the Directive is valid in light of the principle of equal treatment, in so far as it applicable to installations in the steel sector, without including other sector, such as the aluminium and the plastic industries.[121] The applicant in the main proceedings is the world's largest volume producer of steel, a so-called 'carbon fat cat'[122] that profited hugely from the sale of excess allowances in 2006.[123] The applicant, nonetheless, challenges the validity of the Directive, claiming that it breaches several constitutional principles, including the right to property, the freedom of establishment and the principle of equal treatment, as it does not cover its main competitors from the chemical and plastic sectors.[124] What is remarkable about this plea is that despite the economic benefits that the applicant enjoyed from the Directive, its view of emissions trading does not relate to the

[121] Ibid para. 22.

[122] R Elsworth and others, *Carbon Fat Cats 2011: The Companies Profiting from the EU Emissions Trading Scheme* (Sandbag, London 2011) 1.

[123] As noted in Case C-127/07 *Arcelor Atlantique and Lorraine and Others v Commission* [2008] OJ C 44/8, Opinion of AG Maduro para. 57.

[124] *Société Arcelor Atlantique* (n 35) para. 20.

*Economic Efficiency Model* where emissions trading schemes are thought of as a profit-centre; but rather the applicant focuses on the administrative obligations imposed by the Directive – such as applying for emissions allowance permits and having to surrender these – and from this viewpoint see the emissions regime as a set of regulatory burdens restricting and discriminating against its economic activities.[125] Although the applicant's argument is that these regulatory impositions are illegal, the fact that emissions trading as a regulatory concept is framed as an administrative state-controlled regime shows that hints of *Command-and-Control Model*-based descriptions operate in the applicant's emissions trading discourse.

Considering whether the Directive breaches the principle of equal treatment, the ECJ, however, imagines emissions trading similarly to the *Economic Efficiency Model.* To start with, its narrative reflects economic considerations: it deliberates on the 'supply and demand for allowances'[126] and takes into consideration the costs of compliance 'of individual undertakings'.[127] The latter point stands in sharp contrast to the previous case law where the CFI looks only at the compliance of Member States, which signals that the ECJ and the CFI view emissions trading as a regulatory strategy differently. Moreover, in considering whether the Directive is compatible with the principle of equal treatment, the ECJ, similarly to the *Economic Efficiency Model* and the Commission in the previously analysed cases, focuses on the *impact* that a wider scope of sectors covered by the Directive would have on emissions trading. It concludes that a broader coverage[128]

[125] Ibid.

[126] Ibid para. 33.

[127] Ibid.

[128] Ibid para. 65.

> would have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded.

This emphasis on the *function* of the emissions market is analogous to the *Economic Efficiency Model* and again different from CFI's commitment to *Command-and-Control Model*-type of considerations in focusing exclusively on competences between Member States and the institutions in deciding the governance structures of the EU emissions trading regime. Additionally, the ECJ stresses that the emissions trading scheme is 'novel and complex'[129] and on the basis of its function being burdened by too many participants, it finds that the EU legislator's 'step-by-step' approach, pursuant to Article 30 of the Directive, is justified in establishing emissions trading where the chemical industry and the steel sector are treated differently.[130] This pragmatic and impact-focused approach to debating governing structures of the EU emissions trading scheme shows that the ECJ bases its deliberations on *Economic Efficiency Model*-type of visions of emissions trading as a regulatory concept.

In summing up, what is clear from the study of the EU ETS-related preliminary reference is that the ECJ shows signs of pragmatism in its judgments and looks to the impact and function of the emissions scheme in interpreting the legitimacy of the scope of the emissions market. As such, the ECJ turns out to correlate with the *Economic Efficiency Model* in its results-based understanding of emissions trading as a regulatory concept.

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[129] Ibid para. 61.

[130] AG Maduro describes the emissions trading scheme along the same lines to the ECJ and in delivering his Opinion, he the novelty and complex of this trading scheme and on this basis justifies, similarly to the ECJ, the Directive's dissimilar treatment of similar sectors. Opinion AG Maduro (n 123) para. 44.

# IV. REFLECTIONS

The analysis above provides snapshots of how meaning is given to emissions trading in the EU ETS jurisprudence. What these snapshots show is that distinct conceptualisations of emissions trading take form in the EU case law, ultimately contributing to a complex and conflicting emissions trading discourse. Mapping the models onto these debates helps to highlight discrepancies therein and illustrate distinct outlooks on emissions trading and the governance structure that this trading system is thought to create as understood by the EU Courts, the Commission and applicants in EU ETS case law.

In EU ETS case law the Commission centres its narrative on the market and looks to the need of ensuring market stability in deciding the extent of its regulatory powers under the Directive. This view correlates with the *Economic Efficiency Model* in the sense that it is impact-based and in this regard pragmatic as to what role the state ultimately plays in the market. Commission's portrayal of emissions trading in ETS-based judicial discourses fits well with its law- and policy-based narrative examined in the Previous Chapter. There, the Commission similarly applies the *Economic Efficiency Model* first to support a decentralised regulatory structure for emissions trading and then to advocate for a centralised regime[131] – in both instances looking at the needs of the market in deciding on the emissions trading governance structures. The ECJ is similarly pragmatic in interpreting the scope of the emissions market, in particular considering the effects that a broader coverage of industrial sectors would have on the workability of the emissions market. The fact that the *Economic Efficiency Model* thus operates in ECJ's deliberation is particularly

[131] During the 'Better Regulation Agenda' and 'Freer Markets, More Rules' periods as defined in Chapter Four.

interesting considering that the CFI adheres to the *Command-and-Control Model* and hints at the *Private Property Rights Model* but rarely embraces ideas typical of the *Economic Efficiency Model.* What this in simple terms shows is that the two EU Courts understand the significance of emissions trading differently. Indeed, the CFI concentrates almost exclusively on legal security for Member States, rejects Commission's market-focused line of reasoning, and provides a strict reading of competence divisions in interpreting the regulatory regime for emissions trading. The CFI clearly 'speaks the language of constitutional law'[132] and the significance of this language is that it is EU-specific and as such restrictive in application to private parties, and in this context, installation operators. Mapping the *Command-and-Control Model* onto Article 263(4) TFEU cases demonstrate that from the perspective of the CFI, emissions trading is a state-focused administrative regime, which as such is open only to Member States to challenge. Moreover, applicants share this view of emissions trading as a state-controlled regulatory regime, as exemplified in *Société Arcelor Atlantique.* Another layer of complexity, however, is added to these discourses by the CFI, which finds that the right to public consultation is able to limit centralised regulatory discretion, thereby embracing the *Private Property Rights Model* in interpreting emissions trading. What these mixes of narratives ultimately show is that different expressions and understandings for emissions trading as a regulatory concept exist in the courtroom. This is a crucial finding considering the CJEU's constitutional role in articulating the purpose of EU law.

What is clear from the EU ETS case law is that the main legal dilemma concerns the allocation of the regulatory power to construct the emissions trading

[132] J Scott, 'The Multi-Level Governance of Climate Change' in P Craig and G de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press, Oxford 2011) 805, 811.

regime. To date, EU ETS jurisprudence is predominately based on CFI judgments, which consistently interpret the Directive as establishing an extensively decentralised regulatory regime where Member States rather than the Commission enjoy central regulatory discretion in constructing the emissions market – irrespective of the impact this governance structure may have on the emissions market. As explained, CFI judgments are framed as competence questions, and decided accordingly which highlights two important points. First, it shows that EU ETS-based climate change litigation is culture specific and orbits questions of EU law. Second, it offers an explanation as to why the topic of the legal status and significance of *rights* in emissions allowances – which, as shown in Chapter Two, forms an important part of emissions trading scholarship – is not a central question before the EU judiciary. In *United Kingdom v Commission* the CFI briefly refers to the possibility that allowances are ''property' having commercial value'[133] and in *EnBW Energie Baden Württemberg v Commission* the Commission suggests that emissions allowances are equivalent to 'an intangible asset the value of which was determined by the market'.[134] Over and above these basic observations, the relevant judicial discourses add nothing further to this debate and moreover, the CFI finds that due to the *lack of rights* stemming from Commission's approval of NAP, private installation cannot enjoy standing. This point is further highlighted by the rare appearance of the *Private Property Rights Model* in the judicial discourses, which reinforces the argument that EU ETS litigation, as well as the applicability of the models thereto, is an expression of legal culture.

[133] *United Kingdom v Commission* (n 53) para. 161.

[134] *EnBW Energie Baden Württemberg v Commission (*n 100) para. 22.

Unpacking emissions trading discourses through the application of models is, as explained in the previous Chapter, limited is numerous ways. One of the key limitations is that the models are imperfect and reflect how I understand emissions trading debates as being part of a particular narrative. The fact that the case law examined in this Chapter provides only snapshots of key arguments that surfaced in the EU ETS cases is another limitation. Moreover, the finding that EU ETS cases examined by the CFI are interpreted through a competence-focused lens may seem an all too obvious conclusion, and thus limited in significance. Krämer explains that it is clear that EU Courts rule only on the laws that have been adopted through the legal process and so will not rule – even when this has detrimental effects on the market – on matters that it understands to fall outside its scope.[135] The emphasis of my argument, however, lies elsewhere. My claim in this Chapter is that emissions trading is a complex regulatory concept, which, as illustrated through an analysis of series of snapshots of judicial discourses, is given distinct meanings in the EU ETS-based judicial discourses.

## V. LOOKING AHEAD

The case law analysis above shows that the sheer number of EU ETS jurisprudence orbits the question of how to allocate regulatory power between the Commission and the Member States in determining NAP, which involves an interpretation of Article 9 of the Directive. Due to the fact that it is by far the most litigated stipulation of the Directive, Article 9 is commonly seen as the 'Achilles' heel' of EU climate policy.[136]

[135] L Krämer, 'Recent Case-Law of the European Court of Justice and the Court of First Instance' (2006) 2 Journal of European Environmental and Planning Law 153, 156.

[136] Mehling (n 48) 128.

In addition to the high number of court cases, the cap-setting procedure is generally thought of as the 'hornets' nest',[137] as it involves taking into consideration a series of recommendations and rules and stakeholders' viewpoints while respecting specific emissions targets. Also, its vulnerability to litigation, or the fact that Article 9 of the Directive has been heavily litigated, has proven to have a real impact on the emissions market, as manifested in the fall in prices for emissions allowances following judgments in *Poland v Commission* and *Estonia v Commission*.[138] NAP-related cases may, however, be judged to have a short impact considering that from 2013 onwards, under the revised Directive, caps will be centrally decided by the Commission.[139] On this note, and as a response to the judgment in *Poland v Commission* and *Estonia v Commission*, Dimas explained:[140]

> The Commission is fully committed to ensuring the integrity, predictability and stability of the system [the EU emissions trading scheme]. Fundamental changes were agreed last December to the cap-setting process from 2013, guaranteeing a healthy development of the European carbon market.

What Dimas seems to suggest is that a centrally set cap will be able to avoid market volatility, and ultimately litigation. This idea of avoiding court cases by centralising the process of determining the cap is widely shared among scholars and it is based on a deeper belief that the construction of emissions markets can be severed from the

[137] C Stone, *The Gnat is Older than Man - Environment and Human Agenda* (Princeton University Press, Princeton 1993) 1 as cited in ibid 113.

[138] See n 90.

[139] Revised Directive (n 5) Article 9 provides that 'The Community-wide quantity of allowances issued each year starting in 2013 shall decrease in a linear manner beginning from the mid-point of period 2008 to 2012.'

[140] EUROPA, 'Emission Trading System: Statement by Commissioner Stavros Dimas on the Court Rulings related to the Commission Decisions on the Estonian and Polish National Allocation Plans for 2008-2012' (Brussels 24 September 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1355&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 9 June 2011.

operation of markets. In Chapter One I highlighted the landmark piece on emissions trading by Ackerman and Stewart, in which they identify four administrative tasks in setting up an emissions trading scheme, ranking cap-setting on the top of the list, before concluding that 'that's that'.[141] This type of description is significant for a number of reasons. First, it portrays the construction of emissions trading, and cap-setting as a mere technicality before the actual trading starts, thus creating a clear divide between the operation and the function of emissions trading, which equally creates a state / market distinction. Moreover, it envisions a minimal role for the state, or, as described by Stewart in a more recent publication, the state is seen to play a 'simplified role',[142] which is further understood to be a key reason why emissions trading is often predicted to reduce litigation.[143] It should be noted that these predictions are made in a U.S.-based legal context[144] but as illustrated by Dimas' statement above, key EU officials seem to adopt them as well. These predictions, nonetheless, sit uncomfortably with the fact that the industry together with, and under the umbrella of, the European Confederation of Iron and Steel Industries (EUROFER)

[141] B Ackerman and R Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333, 1347.

[142] R Stewart, 'Instrument Choice' in D Bodansky, J Brunnée and E Hey (eds), *The Handbook of International Environmental Law* (Oxford University Press, Oxford 2007) 145, 156.

[143] Ackerman and Stewart ' Reforming Environmental Law' (n 141), R Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacles' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 171, 202, D Ellerman, 'Are Cap-and-Trade Programs More Environmentally Effective than Conventional Regulation?' in J Freeman and C Kolstad (eds), *Moving to Markets in Environmental Regulation: Lessons From Twenty Years of Experience* (Oxford University Press, Oxford 2007) 48-63. Driesen sets out related observations, D Driesen, 'Capping Carbon' (2010) 1 Environmental Law 1.

[144] G Pring, 'A Decade of Emissions Trading in the USA: Experience and Observations for the EU' in M Peeters and K Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, Cheltenham 2006) 188, 195.

have already earmarked Commission's decisions on benchmarking for litigation.[145] Benchmarking, as explained in the previous Chapter, forms part of the centralised cap-setting procedure and allows the Commission to determine the level at which certain carbon heavy industry will receive free emissions allowance permits.[146] The key reason behind this legal action is the belief that the Commission has overstepped its competences in deciding on benchmark levels.[147] With the case study in this Chapter in mind, and in particular the wide applicability of the *Command-and-Control Model* to certain applicants' and the CFI's judicial discourses, it seems clear that a centralised cap is an unlikely legal panacea, as indeed competence-testing is the core of EU ETS-climate change litigation. Rather what this pending case shows, is a pressing need for a wider appreciation of the complexity and nuances in EU ETS jurisprudence.

## VI. CONCLUSION

This analysis of judicial discourses and how emissions trading as a regulatory concept is understood by the EU Courts, the Commission and applicants in EU ETS case law is the second step in my method of unpacking emissions trading discourses using the EU ETS as a case study. As a preliminary step to this case study, I stressed the

[145] ENDS, 'EU Steel Industry to sue over ETS Benchmarks' (Brussels 4 April 2011) <http://www.endseurope.com/25989/eu-steel-industry-to-sue-over-ets-benchmarks> accessed 9 June 2011.

[146] Revised Directive (n 5) Article 10(a).

[147] SteelOrbis, 'EUROFER to Challenge EC Decision on Benchmarks for Steel' (4 April 2011) <http://www.steelorbis.com/steel-news/latest-news/eurofer-to-challenge-ec-decision-on-benchmarks-for-steel-591841.htm> accessed 10 June 2011. The contested Decision is Commission Decision of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council [2011] L130/1.

importance of legal culture in analysing the EU ETS in Chapter Three . Against this legal background, in Chapter Four I illustrated how the Commission's narrative on emissions trading has developed to respond to different regulatory purposes and how the regulatory focus, governance structure and thus the also the conceptualisation of the EU emissions trading regime has thereby changed over time. In this Chapter I have pointed to a variety of understandings of the EU emissions trading by examining ETS-related judicial discourses and focusing on the meaning given to this regulatory strategy by the EU Courts. These different nuances in conceptualising emissions trading as a regulatory concept – either within the EU legal context or elsewhere – are rarely identified in environmental law scholarship, and in the next Chapter I aim to examine why this is the case.

# CHAPTER SIX

# THE 'HONEYMOON' IN ENVIRONMENTAL LAW SCHOLARSHIP

## I. INTRODUCTION

To this point, my focus in this thesis has been upon how emissions trading is conceptualised by scholars, policymakers and lawmakers, as well as in the courtroom; and highlighting the importance of legal culture in understanding the various shapes that these conceptualisations take. What this study has shown, albeit principally through snapshots, is at least two things. First, it has illustrated the breadth of different environmental and non-environmental problems that emissions trading is thought to respond to, including creating competitive economies, embracing liberalism as a form of governance and complying with environmental international law.[1] Second, it has demonstrated that the key dilemma underpinning emissions trading discourse, and what in fact distinguishes the different visions of emissions trading apart, is the view of the role that the state, the market and rights in emissions allowances play or ought to play in emissions trading regimes. This kaleidoscopic picture of emissions trading stands in contrast to what I described in Chapter One to be a generically uniform prism through which environmental law scholarship tends to view and engage with this subject.[2] Having identified the problem with how

[1] Chapters Two and Four.

[2] Chapter One, Section II.

emissions trading schemes are perceived in law at the start of this thesis and thereafter, in Chapters Two to Five, provided case studies that have exposed the legal complexities involved in emissions trading, focusing on the EU ETS, I now intend to explore why environmental law scholarship has failed to explore, or at least recognise, such complexities. In particular, I wish to make two points in this Chapter.

First, the starting point for this Chapter is that emissions trading have enjoyed a long 'honeymoon'[3] in environmental law scholarship. The honeymoon consists of promoting and preferring emissions trading above other regulatory strategies without, however, engaging with legal complexities embedded in conceptualising, scrutinising, applying and/or managing emissions trading schemes. In examining this phenomenon, I try to identify ways in which environmental law scholarship manages to oversimplify emissions trading, treating it as a generic tool – which indeed is a manifestation of the honeymoon.

The second point, at the heart of this Chapter, is an explanation for why environmental law scholarship enjoys this honeymoon, which I relate to the framework and the nature of emissions trading debates in environmental law scholarship. Strong tendencies exist to dichotomise emissions trading discussions according to 'market versus state' distinctions, as well as to focus on global features in defining this regulatory option. These frameworks, coupled with the interdisciplinary, promotional and pragmatic character of emissions trading literature, contribute to the honeymoon by marginalising the relevance of law and the

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[3] Description borrowed from L Heinzerling, 'The Environment' in M Tushnet and P Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford 2003) 701, 712. The use of this term is explained in Section II.

importance of legal specificities to emissions trading, thereby creating a perception of emissions trading as a straightforward regulatory mechanism, imposable across environmental settings and public law contexts. An investigation into these frameworks and the nature of emissions trading discussions exposes what underpins this oversimplified picture of emissions trading in environmental law scholarship and thus explains why the honeymoon persists.

The significance of drawing a map of how emissions trading is approached in environmental law scholarship is twofold. First, it marks the start of a debate on how to create a coherent and rigid framework of analysis for emissions trading in law, which includes thinking critically of the way in which scholars debate and view emissions trading as an environmental law topic. The motive is to better appreciate current methodologies so as to be better equipped in fleshing out legal aspects of emissions trading schemes. This exercise is thus distinct both from critiquing the *use* of market mechanisms in environmental law and claiming that environmental law scholars ought to adopt my methodology employed in this thesis to their respective studies of emissions trading regimes.

Second, it forms part of a maturing process that environmental law scholarship as an intellectual enterprise is currently undergoing.[4] Understanding the type of challenges that environmental law scholars face in committing to a certain scholarly field and mapping environmental law methodologies are examples of important steps toward helping environmental scholarship mature and think more critically about

[4] E Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213.

itself as a subject.[5] By examining *how* environmental law scholarship projects emissions trading as a simple regulatory tool and *why* it commits to this view, this Chapter contributes to this maturing process. Considering that the honeymoon is attributed to a lack of scholarly reflection of complexities behind emissions trading, this exercise is particularly pressing.

This Chapter is structured as follows. First, in Section II, I briefly explain the notion of a 'honeymoon' in environmental law scholarship as defined by Heinzerling, who used this term to critique environmental law scholarship. Subsequently, I explain how I use the term in this Chapter. In Section III I identify and unpack five reasons, each connected to the state of environmental law scholarship, as to why the honeymoon exists. This list compromises the interdisciplinary, the pragmatic and the promotional nature of emissions trading debates in environmental law scholarship, environmental law scholarship's framing of emissions trading discussions according to market/state distinctions, and the global outlook through which environmental law scholarship defines emissions trading schemes. A common theme in these features is indeed an immaturity of methodologies, which is particularly obvious in the way that environmental law scholarship addresses the use of emissions markets in environmental law as straightforward, without establishing a robust scholarly process through which to critically assess legal aspects relating to such trading. In Section IV, I evaluate these findings and in reflecting on how environmental law scholarship can mature, I draw parallels between environmental law scholarship's approach to emissions trading and common public/private distinctions in legal scholarship. In particular, I show that the way in which environmental law scholarship perceives law

[5] Ibid 243-49.

and legal scholarship as marginal, or technical in analysing emissions markets, is similar to tendencies in legal scholarship to distinguish between the state and the market. This exercise is brief but it shows that in order to create a more robust and mature methodology of analysis for emissions trading in law, environmental law scholars need to think critically about how they engage with the application of markets in environmental law and understand relationships between markets and the state with regard to emissions trading. In Section V, I set out and summarise the conclusions of this Chapter.

Three points should be made clear before starting. First, my intention in this Chapter is not to point fingers at current environmental law scholarship from a methodological pedestal and argue that methodologies applied in this thesis are more 'mature' or 'better' than existing ones. On the contrary, the particular framing and the nature of emissions trading literature in environmental law scholarship that I identify as the source of the honeymoon are ultimately methodological challenges that I faced in conducting research for this thesis, overlapping with methodological challenges that environmental law scholars are confronted with in studying this topic. As such, this Chapter seeks to reflect on, rather than to prescribe environmental law methodologies. Second, this Chapter does not assess the extent to which the framework of analysis for emissions trading applied in the previous Chapters – that is, the use of the *Economic Efficiency,* the *Private Property Rights*, and the *Command-and-Control* models to demonstrate and flesh out legal complexities embedded in emissions trading discourses – manages to respond to the methodological challenges posed by the honeymoon. Rather it acts as a springboard to this discussion, which is set out in the next and final Chapter of this thesis. Third, the focus in this Chapter is on literature from earlier Chapters, predominately environmental law literature

concerning the EU ETS, stemming from academic communities in the UK/EU. However, I rely heavily on U.S. literature because much of emissions trading scholarship stems from the U.S., and indeed also the concept of the honeymoon.

## II. DEFINING THE 'HONEYMOON' IN ENVIRONMENTAL LAW SCHOLARSHIP

According to Heinzerling, all market-based mechanisms,[6] including pollution trading schemes, are enjoying a 'long honeymoon'[7] in legal scholarship. Written as part of a commentary on environmental law scholarship, Heinzerling uses the notion of a honeymoon to critique the manner in which legal scholars have engaged, or rather failed to engage 'carefully and critically',[8] in debates on market mechanisms. In this context, she makes two related points. First, she focuses her criticism on the way in which environmental law scholarship has spiralled into 'irrational exuberance'[9] to conclude that market mechanisms are not only the solution to *some* environmental problems but that they in fact are the *only* solution.[10] Second, she tracks this academic exuberance to the U.S the sulphur dioxide program and the Emergency Planning and Community Rights-to-Know-Act – two market mechanisms that are widely

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[6] Market mechanisms include effluent taxes, emissions trading schemes or, any environmental requirement that enlists the market in the service of environmental protection. J Nash, 'Too Much Market? Conflict between Tradable Pollution Allowances and the "Polluter Pays" Principle' (2000) 24 Harvard Environmental Law Review 465, 482.

[7] Heinzerling 'The Environment' (n 3) 712.

[8] Ibid 713.

[9] Ibid.

[10] Ibid.

considered successful due to their achievement in reducing chemical use and release at a far lower cost than traditional regulation.[11] Heinzerling explains that based on these two regulatory experiences, scholars encourage the application of market mechanisms to other environmental settings without, however, taking contextual differences into consideration.[12] The key argument that Heinzerling thus furthers in observing environmental law scholarship is not an outright rejection of the use of market mechanisms but rather a criticism and warning to environmental lawyers in promoting this particular regulatory strategy to be applied 'everywhere at once'.[13]

In this Chapter I align myself closely with Heinzerling's critique of environmental law scholarship. In fact, I position the 'honeymoon' analogy at the heart of the problem that this Chapter addresses but I also build on Heinzerling's above-listed arguments in three distinct ways. To start with, I focus my study of the honeymoon and the reasons why it persists with references to emissions trading schemes, and in particular the EU ETS, as opposed to market-based mechanisms more broadly. Second, the significance of the honeymoon period in the context of this Chapter is not only scholars' 'irrational exuberance' over the application of market-mechanisms in environmental law but also, and more importantly, a systematic approach in environmental law scholarship to overlook legal complexities and specificities embedded in conceptualising, establishing and operating this regulatory strategy. Third, I trace the source of the honeymoon not only to isolated cases of successful regulatory experiences with market mechanisms but more broadly to the

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[11] Ibid 712-713.

[12] Ibid 713.

[13] Ibid.

existing frameworks of analysis for emissions trading schemes in law.[14] In particular, I demonstrate that there is a tendency to compartmentalise emissions trading debates into 'market versus state' camps and, as such, to dichotomise without thoroughly recognising the overlaps and intersections between the two. This particular framework, as well as the focus on global characteristics and use of emissions trading, and the interdisciplinary, the pragmatic and the promotional nature of emissions trading debates in environmental law scholarship contribute to the honeymoon in two ways: they oversimplify and/or overlook legal questions and legal specificities of emissions trading, and subsequently also undermine the role that environmental law scholarship plays or ought to play in analysing this regulatory strategy.

In sum, 'honeymoon' in this Chapter refers to an oversimplification of emissions trading from a legal perspective. Next I show how the honeymoon manifests itself in analyses of emissions trading in environmental law scholarship and explore reasons why it persists.

## III. WHY THE HONEYMOON EXISTS IN ENVIRONMENTAL LAW SCHOLARSHIP

Exposing reasons why emissions trading schemes enjoy a honeymoon in environmental law scholarship, or in other words why these regulatory strategies are treated as simple regulatory tools, is a difficult and controversial task for at least three

[14] I used the honeymoon analogy in an earlier publication but referred to it in a narrower sense, and more precisely to infer oversimplification of legal aspects of emissions trading schemes in environmental law scholarship. S Bogojević, 'Ending the Honeymoon: Deconstructing Emissions Trading Discourses' (2009) 21 Journal of Environmental Law 443, 446.

reasons. First, it is difficult to engage in such a scrutiny without offending other scholars or appearing arrogant, or indeed both.[15] Second, this exercise requires analysing a very long and still ongoing debate. Discussions on emissions trading started with Coase's analysis of the social cost of externalities or, pollution[16] and have over the years expanded to regulatory debates in a range of different legal settings and academic communities. Obviously, and as stated at the outset of this Chapter, my intention is not to cover the full fifty years of this debate but that precisely raises the question regarding the validity of my assessment. Third, despite the seemingly long debate on this topic, emissions trading scholarship is in comparison to other more established legal areas still a very young subject, or indeed 'not yet mature'.[17] According to Bodansky, it is only with time and experience that a new legal field develops a robust scholarship that asks more challenging questions.[18] From this viewpoint, my explanations for the honeymoon may appear simply premature.

Against the backdrop of these points and before starting, it is important to clarify the purpose of understanding why the honeymoon exists. To start with, I do not argue that *all* legal scholarship on this topic assumes that trading schemes are simple and uniform from a legal perspective. In fact, in defining the honeymoon,

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[15] D Rhode, 'Legal Scholarship' (2002) 115 Harvard Law Review 1327, 1327.

[16] R Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1. The influence of this article on environmental law scholarship is further explained in Section III (A).

[17] F Convery, 'Reflections - The Emerging Literature on Emissions Trading in Europe' (2009) 2 Review of Environmental Economics and Policy 121, 123. This belief is engrained more generally in environmental law scholarship. Fisher and others 'Maturity and Methodology' (n 4) 218, explain how this environmental law scholarship is often thought of as the 'Peter Pan of legal scholarship – 'the discipline that never grew up''.

[18] D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, Cambridge, Massachusetts 2010) 35. Note that Bodansky refers to international environmental law.

Heinzerling recognises that there is 'a handful of scholars…who have taken the time to look carefully, and critically'[19] at legal complexities of emissions trading and thus have not committed their scholarship to the honeymoon period. Moreover, I acknowledge that my list of reasons as to why the honeymoon period exists is non-exhaustive, yet it contains a common theme of methodological challenges, relating to the nature and framing of emissions trading literature in environmental law scholarship, which face environmental law scholars working in this area. Understanding these challenges, and how they result in a failure to execute robust legal analysis of emissions trading in law, will better equip scholars from a methodological viewpoint to create revised frameworks of analysis and thereby pave for thorough legal scrutiny on this topic and an end to the honeymoon. To do so, is not a question of waiting for environmental law scholarship to mature, as such maturity can only be reached by dissecting methodologies and thinking critically about methods used to understand environmental laws.[20] In this regard, I identify five aspects of the current state of environmental law scholarship that has prolonged the honeymoon period: its interdisciplinary, pragmatic, and promotional nature; its insistence on the market/state dichotomy, and finally the tendency to analyse this regulatory strategy through a global outlook. It is to a discussion of these that I now turn.

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[19] Equally Heinzerling 'The Environment' (n 3) 713.

[20] Fisher and others 'Maturity and Methodology (n 4) 213.

## A. Interdisciplinarity of Environmental Law Scholarship

The first[21] reason why the honeymoon exists is related to the interdisciplinary nature of environmental law scholarship.[22] Its subject-matter is by itself interdisciplinary[23] and there is a 'methodological expectation'[24] that this scholarship be interdisciplinary. In the case of emissions trading debates, which are dominated by economists, such methodological expectations demand that environmental law scholarship challenge and engage with claims from non-legal disciplines. However, due to its failure to do so, environmental law scholarship has created an image of emissions trading where the relevance of legal scholarship and law, compared to economics, is marginal. Two interrelated explanations underlie this approach, each contributing to the honeymoon period.

The first reason why environmental law scholarship fails to engage with interdisciplinary debates on emissions trading is that there is no established methodology for such engagement. Emissions trading scholarship is hugely influenced by economics, not the least because emissions trading as a regulatory idea

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[21] This numerical ordering does not reflect the importance of the reasons listed.

[22] Heinzerling described environmental law as 'pervasively interdisciplinary.' Heinzerling 'The Environment' (n 3) 702.

[23] For instance, any legal regulation and legal activities that falls within the field of environmental law is supported and legitimised by, for example, the work of biologists, chemists, economists, engineers, geneticists and physicists, and, additionally, each is underpinned by cultural assumptions, and circumstantial factors. J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambridge 2007) xii. Emissions trading is a typical 'shared paradigm' where a variety of intellectual disciplines are involved in considering the shape that the emissions market ought to take, including considerations as wide apart as metrology, international and domestic politics, and industry lobbying. D MacKenzie, F Muniesa and L Siu, 'Introduction' in D MacKenzie, F Muniesa and L Siu (eds), *Do Economists Make Markets? On the Performativity of Economics* (Princeton University Press, Princeton 2007) 1, 15-16.

[24] Fisher and others 'Maturity and Methodology (n 4) 232.

derives from this discipline.[25] As explained in Chapters One and Two, emissions trading is based on a theory concerning the optimal solution to the allocation of social cost for pollution. Coase, an economist, articulated this theory by claiming that pollution is an externality for which a bargaining system ought to be created, allowing the right to pollute to be traded – in the form of property rights – to the highest bidder.[26] This idea was quickly developed by at least four other economists; Crocker,[27] Montgomery[28] Demsetz[29] and Dales,[30] who investigated a similar theory's applicability also to other commons, including water and land. Collectively, these studies are the 'academic and experimental platform'[31] that made emissions trading in practice possible. I explain this here is in order to highlight that if environmental law scholars want to 'carefully and critically' scrutinise emissions trading, they need to understand a wide array of topics that the theory covers, including Coase's theorem, economic ideas about creating a bargaining system and property rights, as well as regulatory theory and its application.[32] Such an exercise is clearly methodologically

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[25] Ibid 703.

[26] Coase 'The Problem of Social Cost' (n 16) 3.

[27] T Crocker, 'The Structuring of Atmospheric Pollution Control System' in H Wolozin (ed) *The Economics of Air Pollution* (WW Norton & Co., New York City 1966) 61.

[28] W Montgomery, 'Markets in Licenses and Efficient Pollution Control Programs' (1972) 5 Journal of Economic Theory 395.

[29] H Demsetz, 'The Cost of Transacting' (1968) 82 The Quarterly Journal of Economics 33, H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 American Economic Review 347.

[30] Dales analyses the importance of creating transferable property rights in commons. J Dales, 'Land, Water, and Ownership' (1968) 1 The Canadian Journal of Economics 791, J Dales, *Pollution, Property and Prices: An Essay in Policy-Making and Economics* (University of Toronto Press, Toronto 1970).

[31] D Ellerman, F Convery and C de Perthuis, *Pricing Carbon: the European Union Emissions Trading Scheme* (Cambridge University Press, Cambridge 2010) 9.

[32] Fisher and others 'Maturity and Methodology (n 4) 238. On a related note, Dales *Pollution, Property and Prices* (n 30), argues that literature on this topic is 'in a mess'.

challenging but in failing to engage with these interdisciplinary debates, or even acknowledge the difficulties therewith, theoretical claims regarding emissions trading remain untested from a legal perspective.[33] This is remarkable considering that theory-based emissions trading literature tends not to discuss emissions trading schemes *per se* but rather examines more generally various theories about the optimal solution to the allocation of resources in various commons.[34] This makes it easy to assume that differences between how theory and the law define emissions trading exist, yet as the environmental law scholarship fails to recognise even the possibility of such differences and challenge non-legal claims, the role of law in interdisciplinary debates is left to seem marginal, and thereby the honeymoon period prolonged.

The second reason why environmental law scholarship has failed to engage more critically with non-legal contributions on emissions trading is self-doubt, or the common belief, held by legal and non-legal scholars alike, that in order to engage with emissions trading, legal scholars need to be equipped with special skills, and most obviously understand economics.[35] Markets are generally understood to be the domain of economists,[36] and equally market mechanisms, including emissions trading, is strongly assumed to be based on economic calculations that are best

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[33] This argument is set out against environmental law scholarship more broadly; Fisher and others 'Maturity and Methodology (n 4) 238.

[34] G Brown, 'Renewable Natural Resource Management and Use Without Markets' (2000) 38 Journal of Economic Literature 875.

[35] Fisher and others 'Maturity and Methodology' (n 4) 226.

[36] N Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (Princeton University Press, Princeton 2001).

understood from an economic viewpoint.[37] This view is clearly reflected in the composition of law and policy-initiating sectors; for instance, the majority of officials drafting the EU ETS were economists,[38] and it is widely held that the extent to which emissions trading schemes are applied in various jurisdictions and environmental settings depends on whether economists are involved in the decision-making process. Stavins verbalises this correlation by stating that '[t]raditional regulatory programs require regulators with a technical or legal-based skill-set. Market-based instruments require an economics orientation.'[39] On a similar basis, it is explained that EU officials, who were in favour of emissions trading when emissions trading was initiated in the EU legal order, were 'disposed to market approaches'[40] and thus able to understand 'the importance of market signals as animators of environmentally responsible behaviour'.[41] Equally, in the U.S., the fact that the Environmental Defence Fund (EDF) is one of the great proponent of implementing emissions trading in the U.S. legal context, is explained with reference to its composition: 'EDF has

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[37] M Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, Oxford 2005) 185 argues that market mechanisms assume even more strongly than direct regulation that environmental harm is a result of market failures, to be based on economic calculations.

[38] With regard to the creation of the EU ETS, Jos Delbeke, head of unit, and Arthur Runge-Metzger, Mattio Vainio,Peter Zapfel and Peter Vis were central to the implementation of the EU ETS and are all economists. Olivia Hartride is political scientist, Damien Medows a lawyer and Yvon Slingberg, Jürgen Lefevere. Ellerman, Convery and Perthuis *Pricing Carbon* (n 31) 26.

[39] R Stavins and B Whitehead, 'Market-Based Environmental Politics' in J Dryzek and D Schlosberg (eds), *Debating the Earth: The Environmental Politics Reader* (Oxford University Press, Oxford 2005) 229, 232.

[40] Here reference is made to Catherine Day who served in the Cabinet of Peter Sutherland's Directorate General for Competition. Ellerman, Convery and Perthuis *Pricing Carbon* (n 31) 27.

[41] Here reference is made to Wallström, the former EU Commissioner for Environment, ibid.

always had a good number of economists on its staff.'[42] Such views, uncontested by environmental law scholars, allow the honeymoon period to persist as they depict the importance of law with regard to emissions trading as marginal compared to economics.

Following these methodological challenges, the way in which the honeymoon period manifests itself in environmental law scholarship concerns the *focus*, as opposed the quality, of emissions trading debates. More precisely, the fact that economics is dominant in these discussions and that its theories on emissions trading are largely unchallenged by legal scholars, determines the type of questions that are discussed and considered pressing. This further defines how emissions trading as a legal instrument is perceived. Freeman and Kolstad help to elucidate this point:[43]

> economists, for example, focus on the potential of regulation to generate cost savings, whereas legal scholars tend to focus more on procedural regularity and fairness in instrument design, as well as how tool selection might affect the balance of power among the different institutions of government, such as the courts and the executive branch. Economists worry about front-end design issues that affect efficiency, including the point of regulation, the system of allocating entitlements, and the cost of implementation. Lawyers translate these choices into statues and regulations but traditionally spend most of their energy on the back-end struggles over liability and compliance that frequently lead to legal challenges

The significance of this rather long outline of differences in approach between lawyers and economists in scrutinising regulation is concise: lawyers and economists

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[42] C Schroeder, 'Public Choice and Environmental Policy' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 450, 476.

[43] J Freeman and C Kolstad, 'Prescriptive Environmental Regulations versus Market-Based Incentives' in J Freeman and C Kolstad (eds), *Moving to Markets in Environmental Regulation: Lessons After Twenty Years of Experience* (Oxford University Press, Oxford 2006) 3, 6-7.

view regulation differently and thus emphasise different aspects of law as important. This may seem an obvious point to make but it is an important one to highlight in the context of interdisciplinary emissions trading debates where economics is the dominant scholarship, as it explains why economics-related features of emissions trading, dealing with design issues, or efficiency, will inevitably be in focus. Two brief examples show that this is indeed the case.

To start with, the previous Chapter demonstrated that one of the most pressing legal questions relating to emissions trading in practice – at least in the EU legal context – is the process of determining caps. But in emissions trading literature this has attracted only a modest scholarly debate because, as Driesen explains, economists focus on *trading*-specific questions and not on policy-matters, which cap-setting is understood to represent.[44] This distinction between trade and policy is a recurring theme in emissions trading debates, and is highlighted again in Section D in the discussion about market and state dichotomies in emissions trading scholarship. Here it is referred to as a symptom of the influence of economics on the type of questions that are thought of as topical in relation to emissions trading.

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[44] D Driesen, 'Capping Carbon' (2010) 1 Environmental Law 1, 9-10. Also L Heinzerling, 'Selling Pollution, Forcing Democracy' (1995) 14 Stanford Environmental Law Journal 300, 302-303. Note that both Driesen and Heinzerling refer to Dales *Pollution Property, and Price* (n 30) as an example of scholarship that has contributed to the creation of this particular cap-*and*-trade distinction. Note that similarly, the Commission with regard to the EU ETS, marks a difference between the procedure of determining the cap – which is a task entrusted to the Member States to set according to their 'overall environmental ambitions'. Commission of the European Communities, Green Paper on Greenhouse Gas Emissions Trading Within the European Union, COM(2000) 87 final 7-8.

Second, a major recent study of 'excellent' and 'most valuable literature' on emissions trading,[45] concludes that nine topics have been most significant in this regard – eight of which have economic focus, if Freeman's and Kolstad's distinction between focal points in economics and law is followed.[46] Interestingly, this survey establishes that 'the [emissions trading] literature is poor because there has been little understanding of how institutional rules have been the dominant force in shaping the outcome in the market.'[47] Ultimately, what this proves is that economics has had a real impact on the type of questions that are considered 'valuable' to investigate with regard to emissions trading, but also that there is a strong need for legal scholarship in this area, in particular in analysing the intersections between emissions market and policy and law, as opposed to setting these apart.

In sum, what the discussion above shows is that the interdisciplinary nature of emissions trading debates involve methodological challenges that make emissions trading a difficult subject for environmental law scholars to claim. Yet failing to engage in these interdisciplinary debates leaves the impression that law is irrelevant. It is in this prevailing, non-legal focus of emissions trading as a regulatory mechanism that the honeymoon manifests itself.

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[45] Convery 'Emerging Literature on Emissions Trading' (n 4) 122-123. This study included a survey of fifty-two research practitioners in the emissions trading field.

[46] These include: emissions reductions, allocation, competitiveness, distributional issues, new entrants, markets, finance, and trading. Ibid 123.

[47] Ibid 133.

### B. Pragmatic Approach in Environmental Law Scholarship

The second reason why the honeymoon exists in environmental law scholarship is that the bulk of environmental law scholarship adopts a pragmatic approach to analysing emissions trading. This kind of scholarship serves primarily to describe and prescribe legal developments in this area and so deals mainly with questions of how emissions trading schemes operate, or ought to be reformed.[48] Utility-based literature of this kind is valuable in its own right; however, by focusing on functional issues, environmental law scholarship presents itself, as well as the legal aspects of emissions trading, as merely instrumental. As a result, law is viewed as a simple 'toolbox' and emissions trading a mere tool[49] – therein the honeymoon. Indeed, law is often, and in particular among non-lawyers, thought to have chiefly an instrumental function, or a so-called 'technical-serviant role',[50] to translate policies into 'operational language'.[51]

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[48] In the context of the EU ETS much environmental law scholarship is concerned with reforms of this trading schemes, as mere examples of this literature see J van Zeben, '(De)Centralized Law-making in the Revised EU ETS' (2009) 3 Carbon and Climate Law Review 340, M Peeters and S Weishaar, 'Exploring Uncertainties in the EU ETS: 'Learning by Doing' Continues Beyond 2012' (2009) 1 Carbon and Climate Law Review 88, J Sim, 'EU ETS Allocation: Evaluation of Present System and Options Beyond 2012' (2006) 30 Zeitschrift für Energiewirtschaft 285, P Vis, 'Basic Design Options for Emissions Trading' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 39, S Bogojević, 'The EU ETS Directive Revised: Yet Another Stepping Stone' (2009) 11 Environmental Law Review 279.

[49] Fisher notes that assuming that environmental law is simply about functional matters (i.e. law being a type of 'toolbox' and thus focusing on mere 'instrumentality' as the law) is a typical misconception present in legal scholarship. E Fisher, 'Unpacking the Toolbox: Or Why the Public/Private Divide Is Important in EC Environmental Law' in M Freedland and J-B Auby (eds), *The Public Law/Private Law Divide: Une Entente Assez Cordiale? la Distinction du Droit Public et du Droit Privé: Regards Français et Britanniques* (Hart Publishing Oxford 2006) 215, 217.

[50] J Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (2008) 21 Journal of Common Market Studies 39, 39. Weiler refers to Union law in this context. This point is also set out in M Maduro, *We the Court: The European Court of Justice and the European Economic Constitution - A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, Oxford 2002) 13-14.

[51] Weiler 'Community, Member States and European Integration' (n 50).

This view is especially strong in environmental law, which, according to Coyle and Morrow, is essentially thought of as a series of statutory limitations on the exercise of private entitlements to protect the environment, valuable only instrumentally, 'rather than as an end in itself'.[52] Two things account for this honeymoon, and more specifically the pragmatic approach to emissions trading in environmental law scholarship.

To start with, much environmental law scholarship is descriptive because it had to grow up with environmental law itself.[53] Heinzerling explains, from a U.S. perspective, how prior to the first environmental statutes, environmental law scholarship did not exist, which means that the key occupation of environmental law scholars has been to comment on issues of statutory content and design.[54] This has had two further implications, both contributing to the honeymoon period. First, it has meant that environmental law scholarship is intimately tied to the practice and operation of law.[55] More precisely, environmental law scholarship is commonly *expected* by legislators, as well as the industry to explain how a certain law works or ought to function, so as to be able to plan how to proceed with legal reforms and investments respectively.[56] In the case of emissions trading, the industry's interest in the future and operation of these trading regimes is clearly reflected in the type of

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[52] S Coyle and K Morrow, *Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, Oxford 2004) 2-3.

[53] Heinzerling 'the Environment' (n 3) 701. Similar discussion in E Fisher, B Lange and E Scotford, *Environmental Law: Text, Cases and Materials* (Oxford University Press, Oxford Forthcoming) Chapter One.

[54] Heinzerling 'the Environment' (n 3) 701.

[55] Fisher and others *Environmental Law* (n 53) Chapter One.

[56] Heinzerling 'the Environment' (n 3) 703.

emissions trading scholarship that is published on this topic.[57] Ultimately, what this means with regard to the honeymoon period is that it is perpetuated by the traditions of environmental law scholarship and expectations imposed on environmental law scholars to produce technical reports on law.

Second, and interrelated with the previous point, environmental law scholarship adopts a pragmatic approach to studying emissions trading as a response to the high speed and scope of legal developments.[58] Climate change law and policy, in particular, are one of the fastest, 'if not the fastest'[59] moving legal areas in the EU and at international level. The case of the EU ETS, as explained in Chapter Four,[60] is a prime example of such fast-progressing area of law: the EU ETS Directive[61] was implemented within only two years of its initiation and revised within six months of the proposal for revision.[62] The high pace and high number of laws, policy proposals,

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[57] For instance S Deatherage, *Carbon Trading Law and Practice* (Oxford University Press, Oxford 2011), A Brohé, N Eyre and N Howarth, *Carbon Markets: An International Business Guide* (Earthscan, London 2009), R Antes, B Hansjürgen and P Letmathe, *Emissions Trading and Business* (Physica-Verlag HD, Heidelberg 2010), R Bayon, A Hawn and K Hamilton, *Voluntary Carbon Markets An International Business Guide to What They Are and How They Work* (2nd edn Earthscan, London 2009), T Tietenberg, *Emissions Trading: Principles and Practice* (2nd edn Resources for the Future, Washington, DC 2006), R Antes, *Emissions Trading and Business* (1st edn Springer, New York 2006).

[58] Similar note set out in Fisher and others 'Maturity and Methodology' (n 4) 229, relating to environmental law scholarship more broadly.

[59] J Lefevere, 'A Climate of Change: An Analysis of Progress in EU and International Climate Change Policy' in J Scott (ed) *Environmental Protection: European Law and Governance* (Oxford University Press, New York 2009) 171, 171.

[60] Section II.

[61] Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Directive 96/61, OJ 2003 L 275/32

[62] Commission (EC) '20 20 by 2020 – Europe's Climate Change Opportunity' (Communication) COM(2008) 30 final, 23 January 2008, Directive 2009/29 of the European Parliament and of the European Council amending the Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ 2009 L140/63.

international negotiations and meetings about emissions trading add to the honeymoon period by creating a methodological challenge for environmental lawyers working in this field trying to get an overview of the relevant developments and laws, and manage, at the same time, to produce in-depth and thorough analyses that are not merely descriptive, or fragmented. This challenge is layered with an ever-increasing and high-pressured demand from within the scholarship itself to produce emissions trading-related analysis, as clearly reflected in the growing number of journals specialising in climate and carbon law.[63] This state of affairs has induced environmental law scholars to commit their scholarship to chiefly commenting on legal designs and options for emissions trading and thereby maintain the honeymoon period in environmental law scholarship.

Ultimately what the discussion above shows is that the honeymoon exists in environmental law scholarship in part due to the practice-oriented nature of environmental law scholarship and in part due to the high-paced nature of legal developments relating to emissions trading regimes. These reasons are clearly interlinked, and their effect on the legal scholarship on emissions trading has been to portray legal aspects relating to emissions trading as mere technicalities.

### C. Promotional Environmental Law Scholarship

A third reason for the honeymoon period in environmental law scholarship and the persistence of the image that emissions trading is straightforward relates to the promotional nature of emissions trading scholarship. This 'promotional' aspect is

[63] In the EU at least two such specialised journals have been set up only in the last three years: *Climate Law* in 2010 and *Carbon and Climate Law Review* in 2008.

expressed in the fact that much emissions trading debate in environmental law scholarship focuses on endorsing, rather than critically assessing, emissions trading regimes, and as such overlooks and/or oversimplifies the legal complexities involved. The basis for such scholarship is related to the previous point regarding the close nexus between environmental law scholarship and the practice and operation of law. Indeed most scholarship that is promotional in this context is aimed at policy- and lawmakers, as well as other relevant parties to trading, including the industry and indeed environmental law scholarship generally, rallying support for the use of this regulatory strategy in environmental law.[64] The honeymoon manifests itself in two ways in this regard.

First, promotional environmental law scholarship on emissions trading overlooks legal and contextual complexities involved with emissions trading, and calls for trading regimes to be applied to all environmental settings – without attending to legal specificities of such suggestions.[65] Chapter One provided a long list of examples of how emissions trading schemes and their use in environmental law is addressed with forceful zest.[66] This list includes portraying emissions trading as a system able to create 'win-win' solutions[67] that involves no losers, and which in times

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[64] See for instance D Schoenbrod, R Stewart and K Wyman, *Breaking the Logjam: Environmental Protection that Will Work* (Yale University Press, New Haven 2010), B Ackerman and R Stewart, 'Reforming Environmental Law' (1985) 37 Stanford Law Review 1333.

[65] Hezinerling 'the Environment' (n 3) 713. As previously explained, Heinzerling refers to market mechanisms more broadly.

[66] Section II.

[67] G Boyle, 'Greenhouse Gas Emissions Trading and Duties of the State: A Preliminary Review of Alberta's Specified Gas Emitters Regulation' (2008) 2 Climate and Carbon Law Review 160.

of climate change, we have 'no choice but to implement',[68] or even, which ought to be employed at *all* times, 'unless one can show they are somehow deficient.'[69] This kind of scholarship is useful in crystallising possible advantages with emissions trading but as Heinzerling explains, it prolongs the honeymoon period in the sense that it advances an image of emissions trading being applicable 'everywhere at once'[70] – without mentioning the legal probability or complexities of such a view.

Second, and following from the former point, emissions trading schemes tend to be furthered as *simple* regulatory strategies, which is also the reason why they are believed to be imposable in different regulatory contexts. This is apparent in two ways. First, and rather directly, emissions trading is referred to as a *per se* 'simple solution'[71] applicable to complex environmental problems, such as climate change. The key belief underpinning this view is that emissions trading schemes are understood to grant great flexibility, in particular being extendable to new sectors, market actors, and gases with allegedly greater ease than direct regulation.[72] Second, emissions trading is presented as straightforward both in its construction and operation. As explained in Chapter One, in a landmark piece on emissions trading, Ackerman and Stewart identify four bureaucratic tasks in the setting up and managing

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[68] R Baldwin, 'Regulation Lite: The Rise of Emissions Trading' (2008) 2 Regulation and Governance 193, 194.

[69] As explained in Freeman and Kolstad 'Prescriptive Environmental Regulation versus Market-based Incentives' (n 43) 5.

[70] Hezinerling 'the Environment' (n 3) 713. As previously explained, Heinzerling refers to market mechanisms more broadly.

[71] B Hansjürgen, 'Concluding Observations' in B Hansjürgen (ed) *Emissions Trading for Climate Policy: US and European Perspectives* (Cambridge University Press, Cambridge 2005) 222, 223. Hansjürgen refers to the EU ETS in this regard.

[72] Ibid.

of emissions trading schemes before concluding that 'that's that'.[73] This kind of oversimplification is not a rarity present only in this particular article, but is a general approach to describing the construction process of emissions trading.[74] Similarly, this description is part of a broader argument that suggests that emissions trading is easier to establish than direct regulation[75] and that a generic step-by-step design model exists for creating emissions trading schemes.[76] What these descriptions create is a sentiment that emissions trading is 'intuitively simple'[77], which thereafter is employed as an argument for the endorsement of this regulatory strategy. This shows that projecting emissions trading as a straightforward regulatory process is in fact the purpose of the promotion-focused environmental law scholarship. On this ground, the honeymoon persists.

As explained earlier, Heinzerling specifically criticised the extent to which environmental law scholarship has 'spiralled into irrational exuberance'[78] to further market-based mechanisms to all environmental law problems. The discussion above shows that in the context of emissions trading, such exuberance can be traced to the aim of seeking to mobilise support for the use of this regulatory strategy, which is

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[73] Ackerman and Stewart 'Reforming Environmental Law' (n 64) 1347. These include setting the cap, establishing an auction system for emissions allowances, a title registry, and a penalty system.

[74] Indeed the term 'cap-and-trade' serves to indicate that emissions trading schemes based on this system are easy to set up. Driesen 'Capping Carbon' (n 44).

[75] Ibid 11.

[76] Driesen, ibid, explains how the notion of 'cap-and-trade' in particular suggests simplicity in creating and managing an emissions market.

[77] J Skjærseth and J Wettestad, *EU Emissions Trading: Initiation, Decision-Making and Implementation* (Ashgate Publishing, Burlington 2008) 154.

[78] Hezinerling 'the Environment' (n 3) 713.

also why emissions trading is projected as easy and straightforward. Promotional environmental law scholarship thus perpetuates the honeymoon.

### D. Framing of Environmental Law Scholarship: Market versus State

The fourth reason why the honeymoon period exists in environmental law scholarship is the dichotomous framing[79] of emissions trading debates according to market/state distinctions. This dichotomy is expressed in the framing of market mechanisms, here as exemplified by emissions trading, as a regulatory strategy that is distinct from direct regulation on the basis that the latter is state-controlled while the former operates via market mechanisms. Two camps lead such debates:[80] one that emphasises various capabilities of markets[81] to manage pollution *better* than state-based regulation because it operates via market mechanisms, and another that focuses on market failures and inequalities produced by economies to argue for central management of pollution control systems. Both camps are underpinned by a particular vision and ideology concerning what the market and the state do, or ought to do. On the one side, the market is charged with theories regarding *government* failure, or so-

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[79] The significance of 'framing' is discussed in greater detail in Chapter, Two Section II. Here it simply refers to the categorisation of a particular topic, which ultimately affects the way in which we understand and study the subject in question. Following scholarship discuses this point further, S Jasanoff, 'Heaven and Earth' in S Jasanoff and M Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, Cambridge, Mass. 2004) 31, L Heinzerling, 'Climate Change in the Supreme Court' (2008) 38 Environmental Law 1, 7-8, J Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press, New Haven 1997) 1.

[80] J Holder and M Lee, *Environmental Protection, Law and Policy* (2nd edn Cambridge University Press, Cambrdige 2007) xii.

[81] Discussions on markets 'swim in a sea of discourse' but in this Chapter I focus on environmental markets, and more precisely emissions markets, in environmental law scholarship. As cited in H White, 'Modeling Discourse in and around Markets' (2000) 27 Poetics 117, 118.

called loss of faith in the state, which the market is understood to remedy by establishing a more effective and transparent management system. On the other side, the government is seen as a necessary actor to fix *market* failures.[82] Ultimately, each camp upholds ideal and oversimplified[83] versions of the 'state' or the 'market' to the effect that any discussion about emissions markets and market reforms fall either with the market at one end of the spectrum, or direct regulation, or the state, at the other – thereby creating state/market distinctions in environmental law scholarship.[84] In both instances, the opportunity to recognise the symbiotic and legally complex relationship between markets and the state is overlooked, and thus the honeymoon period in environmental law scholarship is prolonged. This dichotomy, and thus the honeymoon period, is visible in the following five examples of how emissions markets and the state are described in environmental law scholarship.

In the first camp, emissions markets are regarded as politically *neutral* regulatory systems.[85] The idea is that emissions markets are democratic institutions, which allow market actors to secure agreements on their own terms[86] and according to

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[82] Stern, for instance, argues that climate change is the biggest market failure to date, N Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge 2007) 1.

[83] According to Ackerman and Heinzerling, depictions of markets tend to be simple enough to 'fit on bumper stickers'. F Ackerman and L Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York Press, New York City 2004) 25.

[84] Aman makes this point in relation to market/state distinctions in administrative law A Aman Jr., 'Administrative Law for a New Century' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford 1997) 90, 110.

[85] On a related note Satz argues that environmental markets tend to be considered as being 'the same everywhere' and in that sense uniform. D Satz, *Why Some Things Should Not Be For Sale* (Oxford University Press, Oxford 2010) 92.

[86] B Ackerman and R Stewart, 'Reforming Environmental Law: The Democratic Case for Market Incentives ' (1988) 13 Colombia Journal of Environmental Law 171.

what the majority sees fit.[87] Similarly, Sunstein suggests that emissions markets are 'democracy reinforcing'[88] because they start with a discussion on pollution levels and by fixing the attention on the overall environmental quality – as opposed to specific technologies – they inspire the public's participation in deliberating environmental goals.[89] These descriptions are contrasted with state-controlled regulatory regimes where decisions regarding how, where and who should reduce emissions are fettered by political choice and vested interests.[90] In fact, the underlying argument is that the creation of emissions market will 'help to reclaim community control over decisions about our government from distant and bureaucratic and selfish factions.'[91] This is a clear example of state/market distinctions in environmental law scholarship where emissions markets are understood to deliver regulatory choices independent from the state.

Second, environmental markets are commonly portrayed as *superior*[92] to other regulatory options in implementing environmental policies. For example, markets are described as being in a 'much better position'[93] to decide where most pollution

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[87] D Pearce and E Barbier, *Blueprint for Sustainable Development* (Earthscan, London 2000) 2. Environmental markets discussed more broadly.

[88] C Sunstein, 'Panel II: Public Versus Private Environment Regulation ' (1994) 21 Ecological Law Quarterly 455, 459.

[89] This debate is set similarly analysed in Heinzerling 'Selling Pollution' (n 44) 302.

[90] In particular, emissions trading is understood to circumvent any 'coercive' central planning, J Wiener, 'Global Environmental Regulation: Instrument Choice in the Legal Context' (1999) 108 Yale Law Journal 677, 775.

[91] As cited ibid in Heinzerling 'Selling Pollution' (n 44) 302.

[92] Ibid. Emphasis added.

[93] R de Witt Wijnen, 'Emissions Trading under Article 17 of the Kyoto Protocol' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford University Press, Oxford 2005) 403, 403.

reduction is achieved with each investment under the presumption that 'the market always knows best'.[94] The singularity of the market in achieving regulatory goals cost-effectively is often contrasted with direct regulation, such as end-of-pipe pollution control methods, which are thought of as costly and burdensome due to their micro-management by central government.[95] In effect, this kind of description frames emissions markets as different from state-managed regulation on the basis of efficiency,[96] but in doing so it also suggests that markets operate independently of the state.

Third, the first camp depicts emissions market as *autonomous* entities, that is, distinct from the state, by using stigmatised rhetoric to describe regulation.[97] For example, emissions trading tends to be referred to as an *economic* instrument and

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[94] This general attitude is described in F Ackerman and L Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York Press, New York City 2004) 25. This view is similar to that expressed by the Commission as explained in Chapter Four regarding the benefits of employing emissions markets in the EU legal order. Commission of the European Communities, Green Paper on Greenhouse Gas Emissions Trading Within the European Union, COM(2000) 87 final.

[95] See for instance, R Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacles' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, Cambridge 2000) 171, 182, J Wiener and B Richman, 'Mechanism Choice' in D Farber and A O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar, Cheltenham 2010) 363, 370, Freeman and Kolstad 'Prescriptive Environmental Regulation versus Market-Based Incentives' (n 43) 4.

[96] Button describes that there is a strong tendency with the use of emissions trading schemes to 'leave it up to the market' to organise market practices. J Button, 'Carbon: Commodity or Currency? The Case for an International Carbon Market Based on the Currency Model' (2008) 32 Harvard Environmental Law Review 571, 582. Similarly, according to popular jargon, government are urged to leave the markets to 'do their work' P Krugman, 'The Green Economy' *New York Times* (New York 5 April 2010).

[97] Traditional and alternative regulation as defined in J Dryzek, *The Politics of the Earth: Environmental Discourses* (2nd edn Oxford University Press, Oxford 2005) 135.

markets prefixed as 'free', whilst direct regulation is labelled *command*-and-*control.*[98] These distinct categorisations not only portray traditional regulation in a derogatory fashion and suggest that public authority dictates environmental control,[99] but also suggest that emissions markets are *economic* regulatory options – working outside the control of the state.[100] Although environmental law scholars have acknowledged the apparent bias of these labels,[101] the fact is that such bias is symptomatic of a deeper mistrust in the state to manage the environment,[102] which underpins the state/market dichotomy in environmental law scholarship and adds to the honeymoon.

In the second camp, the scholarly focus shifts to market failures and the alleged inabilities of the market to further environmental protection. Here, environmental law scholarship seeks to challenge the 'naïve belief'[103] in the 'magic of markets'[104] and to emphasise 'the flaws of the markets'[105] that are thought to have been forgotten. One such flaw is described as the *inequitable* nature of emissions market. In this context, emissions trading regimes are defined as simple bargaining systems over pollution, in which the 'rich may get away with what the poor cannot

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[98] M Jacobs, *The Green Economy: Environment, Sustainable Development, and the Politics of the Future* (Pluto Press, London 1991) 151.

[99] M Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, Oxford 2005) 183.

[100] Jacobs *The Green Economy* (n 98).

[101] R Macrory, 'Regulating in a Risky Environment' (2001) 54 Current Legal Problems 619, Lee *EU Environmental Law* (n 99) 184.

[102] Lee *EU Environmental Law* (n 99) 184. As an example see Ackerman and Stewart 'Reforming Environmental Law' (n 64).

[103] Ackerman and Heinzerling *Priceless* (n 94) 24.

[104] N Deakin and K Walsh, 'The Enabling State: The Role of Markets and Contracts' (1996) 74 Public Administartion 33, 35.

[105] Ackerman and Heinzerling *Priceless* (n 94) 24.

afford to commit.'[106] Similarly, references to 'hot-spots' – that is, high local concentrations of pollution – are used to claim that the application of markets in environmental law ultimately leads to uneven levels of distribution of pollution affecting poor areas the most.[107] Along the same line, markets in environmental law are defined as *unethical*. The argument is that in order for markets to function, nature has to be price-tagged or, in other words, transferred into a 'commodity'.[108] However, since nature is seen as 'priceless',[109] markets are rejected as unsuitable for environmental protection purposes. This type of rhetoric describes environmental markets equally derogatory as the previous camp, referring to direct regulation as 'command-and-control'. In effect, each camp highlights its preference as to how

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[106] Ac cited in Emission, Trading Policy Statement, 'General Principles for the Creation, Banking and the Use of Emission Reduction Credits EPA' (51) 51 Federal Regulation 381. Goodin explains, from a discourse perspective, how polluting tends to be alluded to as 'sins' in these debates, R Goodin, 'Selling Environmental Indulgences' (1994) 47 Kyklos 573. Particularly in international environmental law, developed countries raise concerns regarding inequalities between developed and developing countries in negotiations on and solutions to climate change. For an overview, L Rajamani, 'The Increasing Current and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 Journal of Environmental Law 391, 395.

[107] E Rehbinder, 'Market-Based Incentives for Environmental Protection' in R Revesz, P Sands and R Stewart (eds), *Environmental Law, the Economy and the Sustainable Development* (Cambridge University Press, Cambridge 2000) 245, 245. One of the reasons why this is found to be the case relates to uneven market power, which is a key concern in international environmental law and the relationship between developed and developing. For this discussion – in the context of CDM see J Parikh and K Parikh, 'The Kyoto Protocol: An Indian Perspective' (2004) 5 International Review for Environmental Strategies 127, 139. H van Asselt and J Gupta, 'Stretching Too Far? Developing Countries and the Role of Flexible Mechanisms Beyond Kyoto' (2009) 28 Stanford Environmental Law Journal 311, 355.

[108] According to Nash, this description of emissions markets leading to 'commodification' of common resources is a common technique to tarnish the use of environmental markets in the public eye. J Nash, 'Framing Effect and Regulatory Choice' (2006) 82 Notre Dame Law Review 313, 315. Similarly, the Guardian notes that the narratives in debating emissions trading are clearly bias, for instance, stating that under emissions trading pollution can be 'redeemed' alludes to methods of the Catholic Church in the 16th century saving sinners from eternal damnation upon the exchange of money. S Manea, 'The Carbon Market - Gone in a Puff of Smoke?' *The Guardian* (London 24 January 2011). Also Stern makes a similar point *The Stern Review* (n 82) 193.

[109] Ackerman and Heinzerling *Priceless* (n 94).

society more broadly should be managed: via the market in the case of the former, and via public authorities, 'specially trained to secure environment protection',[110] in the case of the latter. The honeymoon persists in these debates not because each camp has a particular preference in regulatory mechanism but because both camps fail to recognise the interrelationship between markets and state in environmental law--for instance, the effect that rules on regulatory competences have on market operation.[111]

Ultimately, the above discussion is a very rough overview of the type of arguments that dichotomise emissions market debates in environmental law scholarship. As an important caveat, I do not argue that all environmental law scholarship is polarised in the manner described above,[112] nor do I claim that environmental law scholars are blind to the obvious role that the state plays in creating a legal framework for emissions markets.[113] Yet the idea of market and state as polar opposites is not only a 'constitutive feature of late modernity'[114] but also deeply engrained in environmental law methodologies. The effect of such a distinction is to construct an image of markets as distinct from the state, or even more dramatically, from law. What this means is that important overlaps between, for

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[110] Ibid.

[111] The case study of EU ETS litigation in Chapter Five showed, for instance that the courts interpretation of competence rules had an impact on market prices of carbon.

[112] Lazarus, for instance, argues that any reference to markets as opposed to the state are unhelpful for a fruitful environmental law debate. R Lazarus, 'Panel II: Public Versus Private Environment Regulation' (1994) 21 Ecological Law Quarterly 438.

[113] Stewart 'Economic Incentives' (n 95) 174, Wiener 'Global Environmental Regulation' (n 90) 783, Lee *EU Environmental Law* (n 100) 186.

[114] E Fisher, *Expertise and the WTO SPS Agreement* (ESIL-ASIL Research Forum, Helsinki, 2-3 October 2009).

instance, legal certainty and market stability are overlooked,[115] just as the complex and dynamic relationships between markets and state in emissions trading are oversimplified. On this basis, the honeymoon in environmental law scholarship is maintained.

## E. Global Approach to Emissions Trading in Environmental Law Scholarship[116]

The fifth reason why the honeymoon period exists in environmental law scholarship is the global outlook through which emissions trading tends to be discussed. The effect of such a global approach is the projection of emissions trading as a uniform regulatory instrument, imposable in public law from jurisdiction to jurisdiction without much consideration of cultural particularities. Emissions trading debates that commit to this type of framing date mainly after the Kyoto Protocol,[117] as this international treaty first set out the legal framework for a global emissions trading scheme. Although the Protocol does not demand uniformity in Parties' compliance, or in creating national emissions trading schemes,[118] Fogel argues that it nonetheless describes environmental problems and their solutions through a so-called 'global

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[115] See for instance G Dari-Mattiacci and J van Zeben, 'Legal and Market Uncertainty in Market-Based Instruments: The Case of the EU ETS' (2011) No. 2010-02 Working Paper, University of Amsterdam Center for Law & Economics .

[116] Similar argument employed in S Bogojević, 'Global Gazing: Viewing Markets Through the Lens of Emissions Trading Discourses' in K Rubenstein and B Jessup (eds), *Using Environmental Discourses to Traverse Public and International Environmental Laws* (Cambridge University Press, Cambridge 2011, in press).

[117] Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005).

[118] Chapter Three, Section II (A) (1) shows how this is the case with the Kyoto Protocol and the EU.

gaze'.[119] This means that the environment, as well as policy and law are simplified and generalised so as to enable international law to 'rule by afar.'[120] This inherent global approach of international treaties has in certain regards filtered through to how environmental law scholarship understands emissions trading schemes that respond to the Kyoto Protocol. In the case of the EU ETS – the trading scheme upon which I base my argument – this is manifested in the way that the EU ETS is reduced to a simple design structure that can be applied elsewhere. This view is indicated in the following three ways.

First, a common description of the EU ETS *emphasises* a global profile of this regulatory strategy because it is thought that the EU ETS will eventually become a global carbon market.[121] As highlighted in Chapters Three and Four,[122] the EU emissions trading regime is envisaged to become the 'world prototype'[123] and a 'blueprint'[124] for future international emissions trading, as well as the 'nucleus of a

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[119] C Fogel, 'The Local, the Global, and the Kyoto Protocol' in S Jasanoff and ML Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, Cambridge, Mass. 2004) 103, 121.

[120] Ibid.

[121] Citing Gordon Brown delivering a key note speech in 2007 on the UNFFFC, as quoted in S-J Clifton, *A Dangerous Obsession: The Evidence against Carbon Trading and for Real Solutions to Avoid a Climate Crunch* (Friends of the Earth, London 2009) 17.

[122] In Chapter Three I explained how this type of rhetoric contribute to the idea that emissions trading are 'on the move' and in Chapter Four I explained showed how the Commission emphasises the 'global' features of emissions trading as a way of projecting emissions trading as an economic opportunity.

[123] A Engels, 'Market Creation and Transnational Rule-Making: The case of CO2 Emissions Trading ' in M-L Djelic and K Sahlin-Andersson (eds), *Transnational Governance: Institutional Dynamics of Regulation* (Cambridge University Press, Cambridge 2006) 329, 343.

[124] Y Slingenberg, 'The International Climate Policy developments of the 1990's: The UNFCCC, the Kytoto Protocol, the Marrakech Accords and the EU Ratification Decision' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 15, 3**5**.

single global carbon market',[125] the 'golden'[126] and the 'global standard-setter'[127] with regard to carbon trading. One of the most dominant reasons for this global approach is the idea that the EU ETS is able to secure economic benefits for the EU by being a model for other carbon markets.[128] This is rhetoric typical of policy- and lawmakers at the EU level; however, it is mimicked by academics.[129] The effect of these narratives is to frame a particular perception of the EU ETS as a regulatory mould, which, depending on its success, can form emissions trading scheme globally, regardless of its specific legal structure.

Second, and related to the above, the possibility of 'linking' the EU ETS to other emissions trading schemes assigned to the Kyoto Protocol plays a crucial part in why the global features of this emissions trading regime are emphasised. In short, linking means that each emissions allowance under the EU ETS may be identified, or linked to an assigned amount under the Protocol, and as such allow cross-market trade

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[125] Stavros Dimas, EU Environment Commissioner, 'EU Climate Change' (Speech to the House of Commons, London 21 November 2005) <http://www.europa-eu-un.org/articles/en/article_5337_en.htm> accessed 1 July 2009.

[126] Stavros Dimas, EU Environment Commissioner, 'The EU and the Fight Against Climate Change' (Speech to the European Commission at the Finnish Institute for International Affairs, Helsinki 4 May 2006 <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/276&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 29 May 2011.

[127] Commission of the European Communities, Communication: A Single Market for 21st Century Europe, COM(2007) 724 final.

[128] Chapter Four, Section II (B)(1).

[129] See for instance J Wettestad, 'The Making of the 2003 EU Emissions Trading Directive: An Ultra-Quick Process due to Entrepreneurial Proficiency?' (2005) 5 Global Environmental Politics 1, 17, A Runge Metzger, 'The Potential Role of the EU ETS for the Development of Long-Term International Climate Policies' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 253.

to take place.[130] Since the idea is that the EU ETS 'should only be the beginning'[131] of an international emissions trading regime, linking provides the means to expand the trading system globally. What is important to highlight following these opportunities is that, as a result, the EU ETS is seen as 'an open architecture'[132] to which other trading schemes can easily connect. This has, however, meant that the actual legal particularities of the EU ETS regime are deemed irrelevant, as linking via contracts and agreements is possible.[133] Arguably, this type of linking is introduced so as to avoid having to agree on one international emissions trading model,[134] but what it does is imply that emissions trading schemes under the Kyoto Protocol can form a global emissions trading scheme – centred around the EU ETS – without much attention to legal culture. In this way, the honeymoon is maintained and prolonged.

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[130] M Mehling, 'Linking Emissions Trading Schemes' in D Freestone and C Streck (eds), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen, and Beyond* (Oxford University Press, Oxford 2009) 108, N Anger, 'Emissions Trading Beyond Europe: Linking Schemes in a Post-Kyoto World' (2008) 30 Energy Economics 2028.

[131] D Meadows, 'The Emissions Allowance Trading Directive 2003/87/EC Explained ' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 63, 100.

[132] R Dornau, 'The Emissions Trading Scheme of the European Union' in D Freestone and C Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (Oxford University Press, Oxford 2005) 417, 430. Similar description in Hansjürgen 'Concluding Observations' (n 71) 223.

[133] Nash makes this point in discussing linking in international law more generally stating that linking enables national emissions markets to take the form and shape that national government pleases. Nash 'Too much Market?' (n 6) 534. For a similar note, and as discussed in Nash, see J Wiener, 'Global Environmental Regulation: Instrument Choice in the Legal Context' (1999) 108 Yale Law Journal 677. Lefevere lists the type of technical questions that have been relevant to linking-related debates in the EU, J Lefevere, 'The EU ETS 'linking Directive' explained' in J Delbeke (ed) *EU Energy Law: The EU Greenhouse Gas Emissions Trading Scheme* (Claeys & Casteels, Leuven 2006) 117.

[134] Nash 'Too much Market?' (n 6) 534, Wiener ibid.

Third, the global approach to emissions trading is linked to a broader regulatory idea of the possibility to 'cross-hybridize'[135] this regulatory strategy. As explained by Heinzerling, the successful story of emissions trading with sulphur dioxide in the U.S. has inspired scholars to urge policy- and lawmakers to apply and replicate emissions trading schemes elsewhere with the assumption that they will work equally well.[136] Notably, Heinzerling only discusses the cross-application of emissions trading to different environmental settings; however, the U.S. regulatory example is often cited as 'an inspiration'[137] for the EU ETS legal construction. In fact, certain 'design' features of the U.S. trading scheme were replicated to the EU ETS[138] with the belief that their success in the U.S. would be equally applicable in the EU. Hansjürgen elucidates this by claiming that:[139]

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[135] Term borrowed from J Wiener, 'Convergence, Divergence, and Complexity in the US and European Risk Regulation' in N Vig and M Faure (eds), *Green Giants? Environmental Policies of the United States and the European Union* (MIT Press, Cambridge 2004) 73.

[136] M Hanemann, 'Cap-and-Trade: A Sufficient or Necessary Condition for Emission Reduction?' (2010) 26 Oxford Review of Economic Policy 225, 227. Heinzerling 'The Environment'(3) 713.

[137] J Delbeke, 'Putting the Emerging Global Carbon Market on Solid Footing' (Speech For the Opening of ICAP Global Cabron Market Forum, 19-20 May 2008) <http://www.icapcarbonaction.com/index.php?option=com_content&view=article&id=18&Itemid=17&lang=ja> accessed 11 June 2011.

[138] Ellerman, Convery, Perthuis *Pricing Carbon* (n 31) 3, J Skjærseth and J Wettestad, *EU Emissions Trading: Initiation, Decision-Making and Implementation* (Ashgate Publishing, Burlington 2008) 154, Convery 'Emerging Literature on Emissions Trading in Europe' (n 4) 127.

[139] Hansjürgen 'Concluding Observations' (n 71) 223.

> With regard to the chosen design options for the European emissions trading market, important lessons from the US experience have been adopted. There is little reason to think that these design options would not work with regard to the ETS.

This highlights the idea that emissions trading designs – irrespective of legal context – are transferable across public law settings. Equally, and as described above, the EU ETS is promoted as the future design structure upon which other emissions trading schemes will be based.[140] Lack of attention to legal specificities in furthering such regulatory goals and thus assuming that emissions trading schemes are generic regulatory mechanisms, however, help to further the honeymoon.

The crucial point to pick up here is not that the EU ETS – deriving from international law, inspired by the U.S. pollution control history and aiming to become the future centre for carbon markets – constitutes a problem *per se.* The difficulty, and the contribution to the honeymoon, lies in the fact that this global view on emissions trading is underpinned by the belief that emissions trading schemes can be replicated across jurisdictions generically. By emphasising the potentially global application without acknowledging the huge impact that legal culture has on emissions trading features, thus frames emissions trading an easily applicable tool that will seek to achieve the sought-for regulatory results at all times and in all public law settings. Hence, the honeymoon exists in environmental law scholarship.

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[140] See n 121 – n 129.

## IV. REFLECTIONS: LONG HONEYMOON, SWEET ENDING?

What we see from the exposé above are two things. First, it shows that emissions trading schemes are experiencing a long honeymoon in environmental law scholarship. This honeymoon expresses itself in various ways: the prevailing economics-centred literature, technical and descriptive reports of emissions trading laws and their developments, promotional depictions of emissions trading as straightforward regulatory strategies, dichotomous understandings of emissions markets and the state, and the global, as opposed to culture-specific, outlook on emissions trading regimes. What these manifestations have in common is that they oversimplify and/or overlook legal aspects of emissions trading and thereby also undermine the role of environmental law scholarship in providing legal analyses of emissions trading. This is a pretty dire picture of the state of environmental law scholarship but as I have stated throughout this Chapter, the purpose of this exercise has not been to blacklist environmental law scholarship that contributes to the honeymoon but rather to understand *why* environmental law scholars are induced to do so.

This takes me to the second point, which concerns the question how come the honeymoon exists. The exercise above points to five reasons: the specific nature of emissions trading debates – its interdisciplinary, pragmatic and promotional character – as well as the framing of emissions trading schemes according to market/state distinctions and a global outlook in environmental law scholarship. These reasons are interrelated in two ways. First, they are underpinned by various methodological challenges, including the challenge to engage in complex interdisciplinary debates, deal with high-paced legal developments and the pressures from the practice, industry, as well as the scholarship itself to respond quickly to legal changes relevant

to emissions trading. The key reason why these challenges are difficult to overcome is that this area of legal scholarship is still immature, meaning that robust methodologies through which to face these issues have yet to be established.[141] Second, they highlight a common theme of how environmental law scholarship approaches the use of markets in environmental law. The fact that emissions trading schemes concern the creation of an emissions *market* is what founds the market/state dichotomy, as well as the scholarship's lack of confidence to engage more forcefully in interdisciplinary debates. Also in the pragmatic and the promotional debates on emissions trading, the fact that emissions trading is a *market* is used to further it as simple, and in the case of the global framing of emissions trading, global. What this means, and what the mapping of methodologies applied to emissions trading schemes in environmental law scholarship shows, is that we need to think more critically about the way in which markets in environmental law are perceived and studied as a first step toward ending the honeymoon.

Approaching markets distinctly from regulation, or the state is a common trend in legal studies. Arguably the entire history of legal thought, since the turn of the century, is the history of the decline of a particular set of distinctions.[142] These distinctions, taken together, constitute a particular way in which scholars think about the social world, and it may be regarded as an ideological classification, and one that

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[141] Fisher and others 'Maturity and Methodology (n 4).

[142] Literature on this topic is vast and the following references are mere examples thereof. C Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 Federal Law Review 185, M Freedland and J-B Auby (eds), *The Public Law/Private Law Divide: Une Entente Assez Cordiale? la Distinction du Droit Public et du Droit Privé: Regards Français et Britanniques* (Hart Publishing, Oxford 2006) 1, J Freeman, 'Private Role in Public Governance ' (2000) 75 New York University Law Review 543, D Kennedy, 'The Stages of the Decline of the Public/Private Distinction ' (1982) 130 University of Pennsylvania 1349.

is commonly associated with liberal political theory.[143] Equally, environmental law rests upon such a distinction: that of the public and the private. More precisely, environmental law is seen as relying, on the one hand, on certain presuppositions about the relationship between the private realm of individual rights, and, on the other hand, on the public realm of collective interest and choice.[144] In effect, environmental law is often perceived as a series of attempts to resolve clashes between public and private interests as they arise.[145] Without going much deeper into public/private distinctions, it is useful to very briefly highlight what these are and how they affect how law is seen so as to illustrate the urgency of developing a more sophisticated understanding of markets in environmental law.

Although public/private distinctions are widely contested[146] they remain employed and connote familiar distinctions.[147] For instance, the 'public' sphere correlates with state power, and from which typically a so-called 'public-regarding' behaviour is expected. 'Private', consequently, refers to organisations that are associated with the pursuit of profit, such as firms, or even ideological goals, such as

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[143] These include state/society, public/private, individual/group, right/power, property/sovereignty, legislature/judiciary, objective/subjective, freedom/coercion, science/politics dichotomies. For the latter distinction see E Fisher, *Risk, Regulation and Administrative Constitutionalism* (Hart Publishing Oxford 2007). Distinctions otherwise as set out in P Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept' in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence* (Clarendon Press, Oxford 1987) 57.

[144] Coyle and Morrow *Philosophical Foundation of Environmental Law* (n 52) 160.

[145] Ibid 184.

[146] Aronson 'A Public Lawyer's Responses' (n 82) 52, C Harlow, "Public' and 'Private' Law: Definition without Distinction' (1980) 43 Market Law Review 241, F Olsen, 'The Family and the Market: Ideology and the Legal Reform ' (1983) 96 Harvard Law Review 1497.

[147] J Freeman, 'Private Role in Public Governance ' (2000) 75 New York University Law Review 543, 551.

environmental organisations.[148] The most common caricature of the public/private division is manifested in the private sphere being portrayed as a spontaneous order built on cooperation, consent and contract, compared with the coerced order of the public sphere, the state, created by legal regulation.[149] The idea of law, which runs from this distinction, suggests that within the private sphere, affairs between individuals are managed via one-to-one agreements, even in the absence of law, while, on the other hand, in the public law sphere, relationships between the state and individual citizens are uniformly managed by the state. The public/private distinction is subsequently relying on a different set of distinctions concerning the administration of the public and the private,[150] which affects not only the perception of the two spheres but also the kind of legal rules that are applied thereto. Following this distinction, the market is clearly part of the private ambit, mainly because market actions by market participants are understood as being 'irreducibly individualistic' or rather, a negation of 'collective action'.[151] The argument is that individual acts, albeit interconnected in the market, are not a matter of common decision-making, and therefore they are private.[152] The essence of the public/private distinction is, from this description, the conviction that it is possible to conceive of social and economic life

[148] Ibid.

[149] C Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 Federal Law Review 185, 187-8.

[150] J Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Law* (Clarendon Press, Oxford 1996).

[151] A Preda, *Framing Finance: The Boundaries of Markets and Modern Capitalism* (Chicago University Press, Chicago 2009) 7.

[152] Ibid 103-4.

apart from government and law. In fact, herein lies the power of the words 'public' and 'private'.[153]

What this short overview of public/private distinctions shows is that by adhering to similar divisions, whatever falls within the private sphere, such as the market, will be understood as not law at all and therefore irrelevant for lawyers to scrutinise. Arguably this would be the most extreme case of public/private, or state/market distinctions, yet unwrapping the five reasons underpinning the honeymoon period shows that there are hints of this type of assumption, in particular comparing the extent to which law, relative to economics, is perceived as significant in interdisciplinary debates on emissions trading. What this shows is that the need for environmental law scholarship to mature and to think critically about its approach toward the use of markets in environmental law is pressing.

## V. CONCLUSION

My aim in this Chapter was to map current methodologies of analysis for emissions trading schemes in law so as to expose what underpins the oversimplified views of emissions trading schemes in law. What this investigation has shown is that a common theme of immaturity of methodologies in environmental law scholarship, and in particular, a lack of 'critical and careful' method with which to study the application of markets in environmental law, has resulted in emissions trading schemes being perceived as straightforward tools. While identifying this state of affairs, I have not assessed whether the methodology developed in this thesis – that is,

[153] Sampford 'Law, Institutions' (n 149) 187-188.

the use of the *Economic Efficiency,* the *Private Property Rights,* and the *Command-and-Control* models to unpack emissions trading discourses and highlight legal dilemmas and discrepancies underpinning the understanding of emissions trading as a regulatory concept – manages to respond to the methodological challenges underlying the honeymoon period. It is to this consideration, and the general conclusions of this thesis, that I now turn.

# CHAPTER SEVEN

# CONCLUSIONS

## I. BEYOND UNIFORMITY OF EMISSIONS TRADING SCHEMES

This thesis set the ambitious goal of re-configuring the way in which scholars discuss and portray emissions trading schemes as a regulatory concept. Over the course of the previous six Chapters I have made three points in particular. First, emissions trading schemes are complex regulatory strategies that respond to a wide range of environmental and non-environmental goals, including creating profit-centres, establishing a governance regime aimed at substituting state control of common resources, and ensuring regulatory compliance. Second, the particular purpose entrusted to emissions trading has, as a corollary, a distinct governance structure according to which an emissions trading regime may be constructed and managed. These governance structures differ in the legal status upon which emissions rights are created and in the vision of the role that the state plays, or ought to play, in the construction and management of the emissions market. Third, these features of governance structures are culture-specific, which is a significant reminder of the importance of law in understanding not only how emissions trading schemes function but also what meaning is given to them as regulatory strategies.

Ultimately this thesis has provided a revised prism through which to view emissions trading as a regulatory strategy. Through snapshots of emissions trading

discourses as voiced by scholars, as well as law- and policy-makers and the judiciary in the EU legal context, I have painted a pluralistic view of emissions trading and brought to light legal complexities involved in conceptualising and applying emissions trading in law. The importance of this exercise has been to discard any suggestion that emissions trading is a simple and generic regulatory mechanism and to set out a framework for analysis, in which emissions trading schemes are critically assessed from a legal perspective.

Much of this thesis has been concerned with pointing to legal complexities relating to emissions trading, without providing any solutions to resolve these complexities. This is because the motive behind this project has been to reflect on the role and shape that emissions trading schemes are thought to take in environmental law scholarship and environmental law and policy, rather than to prescribe the shape they ought to take. In this final Chapter it is convenient to summarise my findings, which I will set out in a two-limbed conclusion. In the first limb, I focus on this thesis's reconfiguration of the common understanding of emissions trading schemes as a regulatory concept and, in the second limb, I highlight the methodological significance of this project, which I sum up and explain against the backdrop of the honeymoon in environmental law. It is to this exercise that I now turn.

## II. SUMMARY OF ANALYSIS

This thesis started with a broad and bold explanation of the need to revise the dominant prism through which emissions trading schemes, as a legal device, tend to be viewed and described. My description of this prism is that it sees emissions trading as a simple tool, imposable across jurisdictions, and, on this basis, I argued that its

revision was a necessity. Throughout this thesis I have returned to this point; highlighting areas of complexity in conceptualising, as well as applying, emissions trading schemes, I have underlined the demand for a robust legal approach to the study of this regulatory strategy, as well as showed that the strategy is neither straightforward nor uniform.

The starting point of my analysis was the deconstruction of emissions trading literature, resulting in the elaboration of the *Economic Efficiency*, the *Private Property Rights*, and the *Command-and-Control* models. Categorising emissions trading debates according to these models has been indispensable to this project, not least because the mere fact that different models exist – each model encapsulating distinct understandings of the purpose and function of emissions trading – demonstrates that emissions trading schemes are complex regulatory strategies. In particular, the models have highlighted three main features of emissions trading schemes and how they are considered as a regulatory concept in environmental law and environmental law scholarship.

First, the models show that emissions trading schemes respond to a variety of regulatory goals, including creating economic opportunities (the *Economic Efficiency Model*), establishing a property-based governance regime of common resources (the *Private Property Rights Model*), and ensuring regulatory compliance (the *Command-and-Control Model*). What this means is that emissions trading is a rich regulatory concept that is far more nuanced than the common presumption that emissions trading corrects a market failure,[1] or more generally, regulates a commons. This also proves

[1] Commission of the European Communities, Green Paper on Market-Based Instruments for Environment and Related Policy Purposes, COM(2007) 140 final 1. Note that the Commission here refers to market-based instruments more generally.

that any suggestion that emissions trading schemes are simple or generic regulatory strategies is misplaced.

Second, the models highlight that, underlying the distinct regulatory objectives imposed on emissions trading schemes, some form of governance authority that restrains the use of commons resources is imagined. According to the *Economic Efficiency Model* the regulatory authority lies within the market, as it is according to market forces that emissions allowances are allocated; in the *Private Property Rights Model* private property holders are invested with regulatory authority in deciding, on their own terms, whether to sell, keep, squander or safeguard their property rights in emissions allowances; and in the *Command-and-Control Model* the regulatory power is entrusted to the central government. What this shows is that emissions trading discourses address legal dilemmas of 'how' and 'to whom' to allocate regulatory power, that is, power to construct and organise emissions trading schemes. Considering that each model imagines a different regulatory authority governing emissions trading, it follows that each model refers to a distinct governance structure, differing as to the legal status of emissions allowances and the roles that the market and the state play or ought to play in emissions trading. The importance of this exercise is to show that emissions trading schemes are able to establish a range of different governance structures and, as such, to demonstrate that emissions trading regimes are neither uncomplicated nor uniform.

Third, through their applicability in law, the models help to flesh out discrepancies in the conceptualisation of emissions trading in a particular legal context and illustrate that the meaning given to emissions trading derives from legal culture. The EU ETS was taken as a case study. Applying the models to the ETS-related discourses of law- and policy-makers and the judiciary at the EU level reveals

distinct visions of the role emissions trading schemes ought to play in the EU legal setting. This is apparent in Chapter Four, which highlights the Commission's dynamic view of emissions trading, shifting from a *Command-and-Control Model*-inspired projection of regulation as a mere compliance system to the *Economic Efficiency Model*-based view of emissions trading as an economic opportunity. Similarly, Chapter Five shows that the CFI frames legal questions concerning the EU ETS as competence questions (a *Command-and-Control Model*-type of consideration), whilst the ECJ and the Commission, acting chiefly as the defendant, focus on economic impact in conceptualising and defining the structures of the emissions trading regime (an *Economic Efficiency Model*-based view). It is interesting, albeit not surprising, that the *Private Property Rights Model* is not applicable to EU ETS-related discourses to the same extent as the *Economic Efficiency* or the *Command-and-Control* models. Considering the findings of Chapter Three is useful in this regard, as Chapter Three explains how the EU jurisdiction builds on integration through a multi-level governance system, in which markets, judicial market-interpretation and market-construction, and law are intertwined – a regulatory reality distinct from the aims of the *Private Property Rights Model*, which seeks to substitute for central governance of common resources emissions markets and the creation of private property rights in emissions allowances. What this shows is that the applicability of the models in law is dependent on legal culture, which also demonstrates that conceptualisations and constructions of emissions trading schemes are culture-specific. This point is further clarified in Chapter Four, which illustrates a strong correlation between dominant regulatory agendas in the EU and the regulatory goals imposed on the EU ETS by law- and policymakers at the EU level. For instance, the Commission promoted emissions trading as a promising implementation strategy that could guarantee

compliance by the EU with international law at the time when implementation was its key regulatory agenda. Also, Chapter Five shows the significance of legal culture in relation to the type of legal questions that judges review as part of ETS litigation and in relation to how judges perceive the emissions trading regime from the outlook of EU constitutional law. This constitutional law focus explains why ETS-specific challenges from private parties are dismissed on the grounds of lack of standing and why the core legal questions deliberated in the courtroom concern the balance of competences between the Commission and the Member States. Ultimately, what this mapping exercise highlights is the utility of the models. In particular, it demonstrates the complexity involved in understanding emissions trading as a regulatory concept – even in a single jurisdiction – and shows that emissions trading schemes are not an instrumental set of rules or an empty design structure that is imposable across jurisdictions but, rather, a reflection of legal culture in itself.[2]

## III. THE END OF THE HONEYMOON?

What the above discussion has done is to recapitulate the core findings of this thesis relating to the *Economic Efficiency*, the *Private Property Rights* and the *Command-and-Control* models, and the way in which these models help to reveal the kaleidoscopic understandings of emissions trading that exist in environmental law scholarship and in the EU legal context. My analysis, however, has not been limited to explaining *how* emissions trading are conceptualised but explained, further, *why* emissions trading schemes are generally thought to be simple and uniform regulatory tools. This is the real issue in this thesis: the belief commonly held in emissions

[2] Similar finding albeit in a different environmental law context E Fisher, *Risk, Regulation and Administrative Constitutionalism* (Hart Publishing Oxford 2007) 249.

trading discourses that emissions trading schemes are straightforward and that these can be applied across jurisdictions and environmental settings with equal success. Chapter Six pointed to the immaturity of methodologies in environmental law scholarship as a key reason why such oversimplification of environmental law persists. Developing a robust methodology in this field is difficult: emissions trading debates are frequently economics-centred, technical, descriptive and promotional; they generally adopt a dichotomous framing of emissions markets in opposition to the state, and emphasise global, as opposed to culture-specific, aspects of emissions trading. The combined effect of this is to create a perception of emissions trading schemes as easy, economy-based tools to which law is only marginally relevant – a vision that persists because environmental law scholarship fails to challenge it. In Heinzerling's terms, this is the honeymoon that emissions trading currently enjoys in environmental law scholarship.[3] The significance of the models is that they challenge this honeymoon, and they do so in at least two ways.

First, the models show that the understandings of the role of markets, the state, and rights in common resources are co-produced. What this means is that the way in which the market is thought of, in an emissions trading context, links to ideas of the role of the state, as well as conceptions of rights in emissions allowances. The models illustrate that considerable variation is available in the types of relationship that the state, the market, and property holders in emissions allowances may enter: the *Economic Efficiency Model* sees the market operating 'freely' but relies on the possibility of the state intervening when market stability demands it; the *Private Property Rights Model* thinks of private property holders as the centrepiece of

[3] L Heinzerling, 'The Environment' in M Tushnet and P Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford 2003) 701, 712.

emissions trading and the market as a forum in which they can agree on their own terms to whom and how to allocate rights in emissions allowances – the state is only thought of as relevant in granting private property rights; and in the *Command-and-Control Model* the state is understood to play the central role in regulating pollution, using emissions markets as a device and creating licenses and permits in emissions allowances, rather than private property rights. Under each model, the roles of the state, the market and rights in emissions allowances are differently defined but the understanding of each is intrinsically linked to the understanding of the other two.

The importance of this finding is that it refutes the tendency, which Chapter Six explains exists in environmental law scholarship, to polarise discussions on emissions markets according to state / market distinctions. Such distinctions suggest that regulatory power rests either in the market or the state, that limiting the power of the market thus means extending the power of the state, or that a particular institutional problem is shifted or even solved by making a regulatory power transfer. What this kind of market / state distinction ultimately does is construct an image of emissions markets as distinct from the state, or even from the law and, from this perspective, it prolongs the honeymoon in environmental law scholarship. Chapter Six explained how this view of emissions trading is also the result of the dominance of economics in interdisciplinary emissions trading debates, which marginalise the significance of legal analysis of emissions markets. However, as this thesis shows, the application of emissions markets in environmental law does not correspond to the 'retreat' of the state, or to the marginal relevance of law to understanding emissions trading as a regulatory strategy but, rather, it encourages environmental law scholarship to examine further the overlaps between market, states, and rights and how these exist symbiotically in emissions trading regimes.

Second, the models show that underlying emissions trading discourses lies a story of governance.[4] As explained above, emissions trading debates revolve around the dilemma of how and to whom to allocate regulatory power,[5] which, in the case of the EU ETS, are questions concerning the allocation of regulatory power between the Commission and the Member States to manage and construct the trading regime. This regulatory power-sharing, as Chapter Five shows, has given rise to fierce litigation relating to the interpretations of competences in regulating the environment at the EU level. Governance, in this context, is thus not a mere organisation of regulatory powers, but an imperative reflection of legal culture and the rationale of a particular legal system. What this demonstrates is that emissions markets cannot exist in any pre-political state or legal vacuum, in a form readily imposable across jurisdictions, as suggested from the viewpoint of the honeymoon in environmental law scholarship. Rather, emissions markets are crucially part of, and reliant on, law. This point further highlights a key problem in considering emissions trading from a legal viewpoint: there is a need to show that the use of emissions trading has not meant that the 'province of law',[6] or more precisely, environmental law scholarship, has shrunk but, instead, that there is a real need for it to develop a clearer picture of the different types of governance structures that emissions trading regimes are able to create, and what their implications are, or could be.

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[4] Similar argument, albeit in a public law context in J Freeman, 'Private Role in Public Governance ' (2000) 75 New York University Law Review 543, 675.

[5] Exploring the affect on the balance of power among different institutions of government is arguably a typical pre-occupation of lawyers, see M Loughlin, *Public Law and Political Theory* (Clarendon Press, Oxford 1992), similar fining in J Freeman and C Kolstad, 'Prescriptive Environmental Regulations versus Market-Based Incentives' in J Freeman and C Kolstad (eds), *Moving to Markets in Environmental Regulation: Lessons After Twenty Years of Experience* (Oxford University Press, Oxford 2006) 3, 6.

[6] Phrase borrowed from M Taggart (ed), *The Province of Administrative Law* (Hart Publishing Oxford 1997).

Throughout this thesis I have repeatedly stated the limits of the use of the *Economic Efficiency*, the *Private Property Rights* and the *Command-and-Control* models, in particular because they reflect my idiosyncratic perception of how the relevant literature and debates describe emissions trading, and how they fit into discourses in law. Also, I have recognised that there is a great deal of literature that takes a more sophisticated view of emissions trading, that does not merely consider that emissions trading is a tool imposable everywhere, or that emissions markets exist outside of law. What I have shown here, however, is that the models can be used as a framework for analysis of emissions trading schemes in law. This methodological tool may not be flawless or suitable for all purposes but, importantly, it ends the honeymoon in environmental law scholarship by refuting any suggestion that emissions trading is a simple form of regulation, and by pointing to governance issues as a starting point for legal investigations on this topic.

## IV. CONCLUSION

The findings in this thesis are analogous to the story of the Wizard of Oz.[7] This may seem unlikely but the Wizard and emissions trading are comparable in the sense that each enjoys a special status in its respective domain: the Wizard is understood to possess the most forceful and potent magic in Oz, whilst emissions trading enjoys a high profile in environmental law: it is considered superior to other direct regulation

[7] Similar parallel set out in S Bogojević, 'Global Gazing: Viewing Markets Through the Lens of Emissions Trading Discourses' in K Rubenstein and B Jessup (eds), *Using Environmental Discourses to Traverse Public and International Environmental Laws* (Cambridge University Press, Cambridge 2011, in press).

options[8] and, in the EU legal context, is thought of as the 'flagship measure'[9], one of the 'cornerstones'[10], and the 'jewel in the crown'[11] of the EU's climate change policy. In other words, both the Wizard and emissions trading are regarded as pre-eminent and powerful amongst their peers. When confronted by Dorothy and her friends, the Wizard, however, confesses that he is not a great Wizard but instead 'just a common man'.[12] Over the course of the past six Chapters, I have similarly demonstrated that emissions trading is not the type of regulatory strategy it is often assumed to be – that is, simple and generic. Rather, emissions trading schemes are complex governance regimes, applied for a range of regulatory objectives, which mirror the legal cultures in which they operate – in this sense, they are 'just' very complicated environmental regulation.

The relevance of the analogy is that the Wizard is not what Dorothy and her friends expected him to be – the greatest Wizard of all, but that, nonetheless, the Wizard proves helpful in leading Dorothy and her company to what they initially demanded of him. Here, I have similarly emphasised that emissions trading schemes are unable to provide the level of simplicity and uniformity that is often demanded or expected of them as a regulatory strategy – but I have also argued that this does not

[8] L Heinzerling, 'Selling Pollution, Forcing Democracy' (1995) 14 Stanford Environmental Law Journal 300, 302.

[9] Stavros Dimas, EU Environment Commissioner, 'Improving Environmental Quality through Carbon Trading' (Speech at the Carbon Expo Conference, Köln 2 May 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH07/265&format=HTML&aged=1&language=EN&guiLanguage=en>> accessed 29 May 2011.

[10] Case C-127/07 *Arcelor Atlantique and Lorraine and Others v Commission* [2008] OJ C 44/8, Opinion of AG Maduro , para. 2.

[11] Stavros Dimas, EU Environment Commissioner, 'Climate Change - International and EU Action' (Speech at the Climate Change Conference, Prague 31 October 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/570&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 29 May 2011.

[12] L Baum, *The Wizard of Oz* (Templar Publishing, Surrey 2007) 104.

mean that emissions trading schemes ought to be disregarded. The value of this thesis, like the value of the story of the Wizard of Oz, is as an opportunity to understand why emissions trading schemes are perceived as straightforward regulatory strategies, and to establish a methodology through which such reasons may be challenged – just as Dorothy and her friends were challenged in the course of following the 'yellow brick road.' Ultimately, this thesis has shown that there is a need critically and carefully to assess emissions trading schemes in law, and has provided an analytical framework for doing so.

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