2012

The Brussels Effect

Anu Bradford
Columbia Law School, abradf@law.columbia.edu

 Printed in U.S.A.
Northwestern University Law Review Vol. 107, No. 1

Articles

THE BRUSSELS EFFECT

Anu Bradford

ABSTRACT—This Article examines the unprecedented and deeply underestimated global power that the EU is exercising through its legal institutions and standards, and how it successfully exports that influence to the rest of the world. Without the need to use international institutions or seek other nations' cooperation, the EU has a strong and growing ability to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to a notable "Europeanization" of many important aspects of global commerce. The Article identifies the precise conditions for and the specific mechanism through which this externalization of EU's standards unfolds. Enhanced understanding of these conditions and this mechanism helps explain why the EU is currently the only jurisdiction that can wield unilateral influence across a number of areas of law—ranging from antitrust and privacy to health and environmental regulation—and why the markets, other states, and international institutions can do little to constrain Europe's global regulatory power.

AUTHOR—Professor of Law, Columbia Law School. Helpful comments were provided by Lucas Bergkamp, George Bermann, Travis Bradford, Rachel Brewster, Tim Buthe, Grainne DeBurca, Lee Fennell, Jacob Gersen, Tom Ginsburg, Victor Goldberg, Michael Graetz, Todd Hendserson, Aziz Huq, Suzanne Kingston, Katerina Linos, Richard McAdams, Jay Modrall, Henry Monaghan, Jide Nzelibe, Nathaniel Persily, Katharina Pistor, Eric Posner, Tonya Putnam, Charles Sabel, Joanne Scott, Anne-Marie Slaughter, and David Vogel, as well as the participants of the workshops held at Columbia Law School, Duke Law School, University of Chicago Law School, and the University of Florence. I am grateful to Taimoor Aziz, Elliott DeRemer, Peter Dietrich, Christodoulus Kaoutzanis, Pauline Phoa, and Mark Sater for excellent research assistance.

INTRODUCTION

It is common to hear Europe described today as the power of the past. Europe is perceived to be weak militarily.[1] Its relative economic power is declining as Asia's is rising. Its common currency may be on the verge of disintegrating. On the world stage, the European Union is thought to be waning into irrelevance due to its inability to speak with one voice.[2] Given its seemingly declining power status and inability to get its way alone, the

[1] *See* Charles Grant, *How to Make Europe's Military Work*, FT.COM (Aug. 16, 2009, 6:53 PM), http://www.ft.com/intl/cms/s/0/f32e0e98-8a8b-11de-ad08-00144feabdc0.html#axzz2Bwh5garO.

[2] *See* Philip Stephens, *Europe's Leaders Recoil from Unity*, FT.COM (Dec. 2, 2010, 10:44 PM), http://www.ft.com/intl/cms/s/0/1301e064-fe53-11df-abac-00144feab49a.html#axzz29D0EJCei; *see also* Charles Grant, *The Unraveling of the EU*, PROSPECT, July 2009, at 48, 48 ("Russian, Chinese[, and] Indian policy-makers . . . view it as a trade bloc that had pretensions to power but has failed to realise them because it is divided and badly organised.").

EU is perceived as needing to retreat to weak multilateralism and international institutions.

Contrary to this prevalent perception, this Article highlights a deeply underestimated aspect of European power that the discussion on globalization and power politics overlooks: Europe's unilateral power to regulate global markets. The European Union sets the global rules across a range of areas, such as food, chemicals, competition, and the protection of privacy. EU regulations have a tangible impact on the everyday lives of citizens around the world.[3] Few Americans are aware that EU regulations determine the makeup they apply in the morning,[4] the cereal they eat for breakfast,[5] the software they use on their computer,[6] and the privacy settings they adjust on their Facebook page.[7] And that's just before 8:30 AM. The EU also sets the rules governing the interoffice phone directory they use to call a coworker.[8] EU regulations dictate what kind of air conditioners Americans use to cool their homes[9] and why their children no longer find soft plastic toys in their McDonald's Happy Meals.[10] This phenomenon—the "Brussels Effect"—is the focus of this Article.

This Article explains how and why the rules and regulations originating from Brussels have penetrated many aspects of economic life within and outside of Europe through the process of "unilateral regulatory globalization." Unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards.

---

3 *See, e.g.*, David Scheer, *For Your Eyes Only—Europe's New High-Tech Role: Playing Privacy Cop to the World*, WALL ST. J., Oct. 10, 2003, at A1; Brandon Mitchener, *Standard Bearers: Increasingly, Rules of Global Economy Are Set in Brussels*, WALL ST. J., Apr. 23, 2002, at A1; Editorial, *Regulatory Imperialism*, WALL ST. J. (Oct. 26, 2007), http://online.wsj.com/article/SB119334720539572002.html; *see* Case COMP/M.5984, Intel/McAfee, EUR-Lex 32011M5984 (Jan. 26, 2011).

4 *See* Council Directive 76/768/EEC, of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products, 1976 O.J. (L 262) 169.

5 *See* Regulation (EC) 1829/2003, of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268) 1.

6 *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 101 & 102, Mar. 30, 2010, 2010 O.J. (C 83) 47, 88–89 [hereinafter TFEU].

7 *See* Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Data Protection Directive].

8 *See id.*

9 *See* Directive 2002/95/EC, of the European Parliament and of the Council of 27 January 2003 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2003 O.J. (L 37) 19 [hereinafter Directive 2002/95/EC].

10 *See* Regulation (EC) 1907/2006, of the European Parliament and of the Council of 18 December 2006 Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Establishing a European Chemicals Agency, 2007 O.J. (L 136) 3 [hereinafter REACH]; Directive 2005/84/EC, of the European Parliament and of the Council of 14 December 2005 Relating to Restrictions on the Marketing and Use of Certain Dangerous Substances and Preparations (Phthalates in Toys and Childcare Articles), 2005 O.J. (L 344) 40.

This process can be distinguished from political globalization of regulatory standards where regulatory convergence results from negotiated standards, including international treaties or agreements among states or regulatory authorities.[11] It is also different from unilateral coercion, where one jurisdiction imposes its rules on others through threats or sanctions.[12] Unilateral regulatory globalization is a development where a law of one jurisdiction migrates into another in the absence of the former actively imposing it or the latter willingly adopting it.

Critics of globalization have claimed that trade liberalization undermines domestic regulation.[13] Extensive literature has emerged regarding the "race to the bottom" phenomenon—the idea that countries lower their regulatory standards in order to improve their relative competitive position in the global economy.[14] Recently, many of the assumptions driving this influential literature have been discredited.[15] For example, fears of businesses relocating to pollution havens or capital flights following higher levels of corporate taxation have not materialized in large numbers. Indeed, scholars have shown that international trade has frequently triggered a "race to the top," whereby domestic regulations have become more stringent as the global economy has become more integrated.[16] Still, the race to the bottom paradigm remains influential, shaping the debates among scholars and policy makers alike.

---

[11] *See, e.g.*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

[12] The United States, for example, has imposed sanctions to compel other countries to adopt stricter rules in areas such as antiterrorism and drug enforcement. *See* GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 11 (3d ed. 2009) (discussing foreign-policy use of economic sanctions generally).

[13] *See, e.g.*, Ralph Nader, *Preface* to LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION?: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY, at ix, xi (1999).

[14] *Id.*; *see also* ALAN TONELSON, THE RACE TO THE BOTTOM: WHY A WORLDWIDE WORKER SURPLUS AND UNCONTROLLED FREE TRADE ARE SINKING AMERICAN LIVING STANDARDS 14–15 (2002) ("[G]overnments and workers all over the world have been forced into a competition for productive investment that is most often won by scrapping or forswearing most of the laws and regulations that complicate business operations and lower short-term profits, but that also ensure that living wages are paid, that workplaces are safe, and that pollution is controlled."). For a general discussion of this dynamic, see DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY (2004), in particular Parts I, II, and V.

[15] *See* David Vogel & Robert A. Kagan, *Introduction* to DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 4–5 (David Vogel & Robert A. Kagan eds., 2004) [hereinafter DYNAMICS OF REGULATORY CHANGE].

[16] *See* Debora L. Spar & David B. Yoffie, *A Race to the Bottom or Governance from the Top?*, *in* COPING WITH GLOBALIZATION 31, 31–51 (Aseem Prakash & Jeffrey A. Hart eds., 2000); David Vogel, *Trading Up and Governing Across: Transnational Governance and Environmental Protection*, 4 J. EUR. PUB. POL'Y 556, 563 (1997); Vogel & Kagan, *supra* note 15, at 2–8; *see also* ELIZABETH R. DESOMBRE, FLAGGING STANDARDS: GLOBALIZATION AND ENVIRONMENTAL, SAFETY, AND LABOR REGULATIONS AT SEA (2006) (seeking to identify conditions under which a race to the top, race to the bottom, and a race to the middle take place).

The discussion on global regulatory races mirrors the debates on regulatory outcomes in federal systems. The "Delaware Effect" has been used to explain devolution in standards within the United States: since corporations can be incorporated in any state irrespective of where they do business, all states have an incentive to relax their chartering requirements in order to attract tax revenues that corporations bring to the state. Delaware has been the winner of this race by virtue of being the most attractive place to incorporate, either from the perspective of management, shareholders, or both.[17] The "California Effect" captures an opposite phenomenon: due to its large market and preference for strict consumer and environmental regulations, California is, at times, effectively able to set the regulatory standards for all the other states.[18] Businesses willing to export to California must meet its standards, and the prospect of scale economies from uniform production standards gives these firms an incentive to apply this same (strict) standard to their entire production.[19]

This Article explores the dynamics of the California Effect in a global context.[20] It focuses on the conditions under which a single country can externalize its regulations on other countries. It argues that the following conditions are necessary for a jurisdiction to dictate rules for global commerce: the jurisdiction must have a large domestic market, significant regulatory capacity, and the propensity to enforce strict rules over inelastic targets (e.g., consumer markets) as opposed to elastic targets (e.g., capital). In addition, unilateral regulatory globalization presumes that the benefits of adopting a uniform global standard exceed the benefits of adhering to multiple, including laxer, regulatory standards. This is the case in particular when the firms' conduct or production is nondivisible, meaning that it is not legally or technically feasible, or economically viable, for the firm to maintain different standards in different markets.

Unpacking the determinants of unilateral regulatory globalization explains why the EU has become the predominant regulator of global commerce, and why the EU can successfully export certain norms and not others. The EU has the world's largest internal market, supported by strong regulatory institutions. Trading with the EU requires foreign companies to adjust their conduct or production to EU standards—which often represent the most stringent standards—or else forgo the EU market entirely. Rarely

[17] *See* John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV 759, 761–63 (1987).

[18] *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995).

[19] *See* Vogel & Kagan, *supra* note 15, at 9. For an example of a California regulation that prompted firms to adopt the California standard and alter their production nationwide, see Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5–.13 (West 2006) (on labeling requirements in the presence of carcinogenic or reproductive toxins in consumer products or food).

[20] *See* Vogel, *supra* note 16, at 562.

is the latter an option. In addition, companies cannot undermine EU rules by moving regulatory targets to another jurisdiction because the EU primarily regulates inelastic consumer markets as opposed to more elastic capital markets. While the EU regulates only its internal market, multinational corporations often have an incentive to standardize their production globally and adhere to a single rule. This converts the EU rule into a global rule—the "de facto Brussels Effect." Finally, after these export-oriented firms have adjusted their business practices to meet the EU's strict standards, they often have the incentive to lobby their domestic governments to adopt these same standards in an effort to level the playing field against their domestic, non-export-oriented competitors—the "de jure Brussels Effect."[21]

This Article also seeks to explain what prompts the EU to exercise this authority and what implications this regulatory leverage has on other countries, including the United States. It concludes that the EU's external regulatory agenda is primarily, even if not exclusively, driven by a set of entrenched domestic policy preferences and the EU's efforts to create an internal market that reflects those preferences. The EU's external regulatory agenda has thus emerged largely as an inadvertent by-product of that internal goal rather than as a result of some conscious effort to engage in "regulatory imperialism."

After acknowledging the many manifestations and benefits of the EU's global regulatory authority, this Article moves on to discuss the limits of the Brussels Effect and the extent to which other countries or international institutions are able to counterbalance the EU's regulatory hegemony. Markets have a limited ability to act as a constraint on the "Europeanization" of global economic activity given that the EU primarily regulates policy areas of low elasticity, including consumer markets. Other states are also often powerless. Countries whose regulatory preferences are overridden by the EU's standards gain nothing by entering into a regulatory race with the EU—outpacing the EU will only leave them with even higher, and hence less desirable, regulatory standards. Further, international institutions have only an imperfect ability to dampen the EU's regulatory ambitions since issues such as privacy and antitrust do not fall within the purview of the WTO or other international institutions.[22] This Article therefore argues that the greatest check on the EU's regulatory powers comes from within the EU itself. As the EU's powers grow, internal divisions within the EU will increase. Thus, in the end, the boundaries of

[21] *See generally* VOGEL, *supra* note 18 (discussing a similar phenomenon in federal systems).

[22] *See, e.g.*, *Interaction Between Trade and Competition Policy*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Nov. 5, 2012); *see also* Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1 (2010) (discussing the WTO's failure to facilitate global cooperation on antitrust issues).

the EU's regulatory reach will be defined by the EU's own evolving conception of the limits of its regulatory authority.

This Article contributes to the scholarship on international regulatory convergence.[23] It also engages directly with the literature on the direction of possible regulatory races, such as whether the Delaware Effect or the California Effect is more pervasive in explaining regulatory outcomes globally.[24] While the Article builds on the existing theory of the California Effect, it goes beyond it in two critical ways. First, it seeks to outline the precise conditions that allow an upward regulatory convergence to take place. While the California Effect is recognized as a phenomenon,[25] existing scholarship has not explained its actual scope beyond anecdotes and individual examples. Second, it uncovers and explains a perhaps most significant example of the California Effect—its global occurrence—that has been undertheorized and underestimated as an empirical phenomenon.

The existing scholarship on the California Effect has recognized the importance of market size and scale economies as a source of jurisdiction's external regulatory clout. At the same time, it has failed to acknowledge factors such as regulatory capacity and inelasticity as key components of the theory, and it has overlooked criteria other than scale economies as factors that can prevent a company from producing different varieties for different markets. Thus, the discussion of the Brussels Effect provides a more nuanced theory of the conditions under which a single jurisdiction can exert regulatory influence outside its borders. Second, the global regulatory clout that the EU exercises via the Brussels Effect has been vastly underappreciated. Scholarship on international regulatory convergence has focused on a country's market size as the best proxy for its external regulatory influence. This Article, however, shows that market power alone does not explain international regulatory outcomes. A more accurate and complete understanding of the conditions underlying the Brussels Effect explains why the EU, as opposed to any other large economy, can unilaterally supply global standards.

In addition, this Article makes the following contributions. First, it shows that the Brussels Effect is more pervasive and widespread than thus far recognized. The current literature on upward regulatory races focuses almost exclusively on environmental regulation.[26] Even there, scholars

---

[23] *E.g.*, Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841, 841–59 (2005); Beth Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, *in* DYNAMICS OF REGULATORY CHANGE, *supra* note 15, at 42, 50–52.

[24] *See, e.g.*, Vogel & Kagan, *supra* note 15, at 6, 9.

[25] *See* VOGEL, *supra* note 18.

[26] *See, e.g.*, Katharina Holzinger & Thomas Sommerer, *'Race to the Bottom' or 'Race to Brussels'?: Environmental Competition in Europe*, 49 J. COMMON MARKET STUD. 315, 329 (2011) (concluding that empirical evidence demonstrates a "far-reaching upward trend in environmental regulation from the 1970s until today").

claim that regulatory globalization through the California Effect is constrained to "only a highly limited subset of environmental laws"[27] and largely excluded in the case of production (as opposed to product) standards[28] or consumer protection.[29] This view fails to capture the full impact of the phenomenon.

Second, the existing literature focuses on the race to the top that takes place when a lax foreign regulator formally adopts the strict rule of the lead regulator.[30] This attention to "de jure regulatory convergence" fails to account for an important phenomenon that takes place in the absence of formal changes to legal rules. In reality, this type of formal "trading up" often fails to occur. Instead, we typically see only a "de facto regulatory convergence" whereby much of global business is conducted under unilateral EU rules even when other states continue to maintain their own rules. This is true, for instance, with respect to U.S. antitrust laws, privacy laws, and rules on food safety. Unilateral regulatory globalization does not need to elicit a formal regulatory response from another nation—often there is no race to the top or de jure Brussels Effect. The EU law governs whether other countries follow suit or not. Seen in this light, the Brussels Effect is more about one jurisdiction's ability to override others than it is about triggering an upward race.

It is true that at times this de facto Brussels Effect is reinforced with a de jure Brussels Effect. This is the case when other countries' legislators affirmatively adopt the EU's strict standards. But even here, the path to regulatory convergence follows a sequence different from what we have become accustomed to in other contexts. Corporations' de facto adjustment to the EU rules paves the way for legislators' de jure implementation of these rules rather than the other way around. Thus, the implementation problem of the de jure Brussels Effect is solved from the outset.

Third, the theory of unilateral regulatory globalization departs from existing scholarship on the relationship between regulatory convergence

---

[27] Vogel & Kagan, *supra* note 15, at 10.

[28] *See* Fritz W. Scharpf, *Negative and Positive Integration in the Political Economy of European Welfare States*, *in* GOVERNANCE IN THE EUROPEAN UNION 15, 28–29 (Gary Marks et al. eds., 1996); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 67–110 (1996) (discussing regulatory-regime exportation in the context of environmental protection).

[29] *See, e.g.*, Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1359, 1361 (2003) (arguing that regulatory globalization does not take place in the area of consumer protection, where regulators are assumed to have complete autonomy to regulate their domestic markets).

[30] *See* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 518–19 (2000) (discussing both race to the bottom (RTB) and race to the top (RTT), and arguing that RTT is a result of countries adopting as "best practices" those that they consider to be in their interest); Simmons, *supra* note 23 (canvassing research focusing on conditions under which other regulators have the incentive to adjust); Vogel & Kagan, *supra* note 15, at 14 (focusing on de jure trading up as the foreign country switches its standards as a result of RTT).

and regulatory power. Daniel Drezner has argued that great-power consensus leads to regulatory convergence whereas great-power disagreement leads to regulatory divergence and the emergence of rival standards.[31] Which rival standard trumps the other depends on the regulatory powers' relative ability to seek allies supporting their respective regulatory preferences and reach a tipping point after which the rival states need to switch standards.[32] In contrast to Drezner, this Article shows that de facto convergence can take place in the midst of a great-power disagreement. When the conditions for the Brussels Effect exist, rival standards between two equal powers fail to materialize. Instead, the outcome of the regulatory race is predetermined: the more stringent regulator prevails.

Finally, prevailing theories on regulatory globalization explain the emergence of regulatory convergence as a result of cooperation or coercion. The Brussels Effect differs because it falls between the two. Beth Simmons, for instance, shows how in the case of capital adequacy requirements and accounting standards for public offerings, countries with lenient regulatory standards have an incentive to adopt other countries' stricter standards in order to attract foreign capital.[33] This amounts to a market-driven race to the top that is normatively desirable—the followers have a clear economic incentive to adopt the desirable rules that leave everyone better off. In contrast, unilateral regulatory globalization is rarely a process of voluntary harmonization: foreign corporations would often prefer another rule but find it rational to adjust nonetheless given the opportunity costs of not doing so. Yet the EU is not coercing others to adopt its rules either. Market forces are sufficient to create "involuntary incentives" to adjust to the rules of the strict regulator. In other words, unilateral regulatory globalization entails the dominant jurisdiction imposing an incentive to adjust, followed by reluctant emulation by market participants. Seen this way, unilateral regulatory globalization is produced through "go-it-alone power" by a dominant regulator.[34]

In addition to advancing the literature on regulatory globalization, this Article makes a contribution to the literature on state power in international relations. While traditional tools of power have waned in importance—it is

---

31 *See* Drezner, *supra* note 23, at 841.

32 *Id.* at 850.

33 *See* Simmons, *supra* note 23, at 49.

34 *See* LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS (2000). Gruber contests the positive-sum models of international cooperation and explains why states join institutions that are not Pareto-improving for them. When states that win from some cooperative arrangement are in a position to proceed even without the support of the losing states, losing states' interest calculation changes and they join the new institution even though they would have preferred that such an institution was never set up in the first place. A movement or change that is Pareto-improving is one that makes at least one participant better off without making any participant worse off.

increasingly difficult to exert influence through raw military power or rely on economic sanctions or conditional incentives[35]—regulatory power that the EU possesses is more durable, more deployable, and less easily undermined by others.

This Article proceeds as follows. Part I outlines the conditions under which the Brussels Effect takes place. Part II illustrates the Brussels Effect through examples. Part III discusses the reasons that cause the EU to externalize its regulations. Part IV explains when and why the EU pursues political (cooperative) regulatory globalization instead of market-driven (unilateral) regulatory globalization. Part V discusses the limits of the Brussels Effect. The Conclusion focuses on the implications of the EU's global regulatory role within and beyond the EU. The purpose of this discussion is descriptive. This Article does not discuss whether strict regulatory standards are efficient or desirable. Instead, it provides an account for why and how trade liberalization can lead to stringent standards, why this follows a process of unilateral regulatory globalization, and why today these global standards are set predominantly by the EU.

I. CONDITIONS FOR UNILATERAL REGULATORY GLOBALIZATION

This Part lays the theoretical foundation for the Brussels Effect. It identifies the conditions for and the mechanism through which the externalization of one state's standards unfolds. It also explains why the EU is currently the predominant regulatory regime that can wield unilateral influence across a number of areas of law.

Existing literature on regulatory globalization focuses on the country's market size as a proxy for its ability to exercise regulatory authority over foreign entities.[36] Yet a more careful examination of unilateral regulatory authority suggests that market power alone does not determine whether any given country's standards can be globalized. The state must also have the regulatory capacity and the regulatory propensity to exercise global regulatory authority. By "regulatory capacity," I refer to institutional structures that are capable of producing and enforcing regulations effectively. By "regulatory propensity," I refer to prevailing domestic preferences for strict regulatory standards and the predisposition to regulate inelastic targets. Only strict standards regulating targets that cannot move ensure that a country's regulations will override alternative regulatory

---

35 *See* Leslie H. Gelb, *GDP Now Matters More than Force: A U.S. Foreign Policy for the Age of Economic Power*, FOREIGN AFF., Nov./Dec. 2010, at 35.

36 *See, e.g.*, Drezner, *supra* note 23, at 847 ("[A] . . . reasonable conjecture would be to say that the public good benefits from regulatory coordination depend upon the size of the newly opened market."); *see also, e.g.*, David A. Wirth, *The EU's New Impact on U.S. Environmental Regulation*, 31 FLETCHER F. WORLD AFF. 91, 96 (2007) ("If [a] jurisdiction's market share is sufficiently large, [its] regulatory requirements can affect an even larger area, including those under the control of other sovereign authorities.").

standards and make other jurisdictions' regulatory authority obsolete without being punished by markets or constrained by other jurisdictions' regulatory responses. Finally, EU standards become global standards only when the benefits of adhering to a single global standard are greater than the benefits of taking advantage of laxer standards in lenient jurisdictions—in other words, when targets' conduct or production is nondivisible.

A. Market Power

In the global economy, power is correlated with the relative size of any given country's internal market.[37] To secure access to important markets, producers gravitate toward adopting the standards prevailing in those markets.[38] The larger the market of the (strict) importing country relative to the (lenient) market of the exporter country, the more likely the Brussels Effect will occur.[39] More accurately, the greater the ratio of exports to the (strict) jurisdiction relative to sales in the (lenient) home or third-country markets, the more likely the Brussels Effect will occur. The better the exporter's ability to divert trade to third markets or increase demand on its home market, the less dependent it is on access to the market of the strict jurisdiction.

Focusing on large domestic markets alone, several states could qualify as potential global standard-setters. The EU is the largest economy in the world with a Gross Domestic Product (GDP) of nearly $16 trillion.[40] It consists of a single market with 500 million consumers.[41] The EU has a quarter of the countries' combined Gross National Product (GNP) worldwide and is the largest importer of goods and services.[42] The EU's internal market is also constantly growing as new countries are joining the EU. Of course, the United States, China, and Japan also possess domestic markets large enough to use access to their markets as leverage. The United States has an economy of over $15 trillion, almost the same size as the EU, while China has an economy of $11 trillion and Japan has one of $4 trillion.[43]

---

37 *See* Drezner, *supra* note 23, at 843.

38 *See id.*

39 *See* Vogel & Kagan, *supra* note 15, at 13 (citing Sebastiaan Princen, The California Effect in the EC's External Relations: A Comparison of the Leghold Trap and the Beef-Hormone Issues Between the EC and the US & Canada (June 2–5, 1999) (unpublished manuscript), *available at* http://aei.pitt.edu/2367/).

40 *European Union*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html (last visited Nov. 5, 2012). The GDP figure is based on purchasing power parity (PPP).

41 *See id.*

42 *See* WORLD TRADE ORG., WORLD TRADE REPORT 25 (2011), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

43 *United States*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Nov. 5, 2012); *China*, CIA WORLD FACTBOOK, https://www.cia.gov/

When assessing the value of market access, foreign corporations also consider the adjustment costs that are necessary to enter the market. A foreign producer will have an incentive to comply with the importing jurisdiction's strict standard when the benefits of market access outweigh the adjustment costs. The larger the strict importing market and the lower the adjustment costs relative to the benefits of market access, the more likely that adjustment will take place.[44] In the case of consumer goods, the benefits of market access are determined by the number and affluence of potential consumers of that product as well as by the opportunity costs of forgoing those consumers. These opportunity costs are particularly high when demand in the corporation's home market or in alternative third markets is limited. The adjustment costs can consist of initial setup costs and recurring compliance costs. They vary with the significance of cross-border differentials that determine the degree of adjustment and various other compliance costs associated with market access, including licenses or approval processes.

With the world's largest consumer market consisting of a high proportion of affluent consumers, a significant number of producers are dependent on their ability to supply the EU market.[45] They may be able to divert part of their exports elsewhere, but few are in a position to abandon the EU market altogether and recoup the forgone revenue in other markets. The distinctly high value of market access to the EU explains why many producers are prepared to incur even significant adjustment costs to retain their ability to trade with the EU.

B. Regulatory Capacity

Large market size alone does not explain a state's ability to project its regulatory preferences on others. Being a regulatory power is a conscious choice pursued by a state rather than something that is inherent in its market size. Not all states with large markets become sources of global standards. The state must also have the regulatory capacity to translate its market power into tangible regulatory influence.[46] Without regulatory expertise and resources to enforce its rules, a country cannot effectively exert authority

library/publications/the-world-factbook/geos/ch.html (last visited Nov. 5, 2012); *Japan*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html (last visited Nov. 5, 2012). The GDP figures are PPP-based.

[44] *See* Alasdair R. Young, *Political Transfer and "Trading Up"? Transatlantic Trade in Genetically Modified Food and U.S. Politics*, 55 WORLD POL. 457, 459 (2003).

[45] The EU's population exceeds 500 million, and its GDP per capita is approximately $34,000. *European Union*, *supra* note 40. The United States is relatively more affluent (GDP per capita of $48,100), but its consumer market is smaller (population of 313 million). *United States*, *supra* note 43. China, on the other hand, has a larger consumer market (population of 1.3 billion), but is relatively less affluent (GDP per capita of $8,400). *China*, *supra* note 43.

[46] *See* David Bach & Abraham L. Newman, *The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-Influence*, 14 J. EUR. PUB. POL'Y 827, 831 (2007).

over market participants—within or outside of its jurisdiction. An important element of regulatory capacity is the authority to impose sanctions in case of noncompliance. Only jurisdictions with the capacity to impose significant costs on others by excluding noncomplying firms from their markets can force regulatory adjustment.[47]

The degree to which a country has regulatory capacity sets important limits on a country's ability to exert global regulatory authority. For instance, many Asian economies are growing at a staggering rate, but it will take time before their GDP growth translates into regulatory experience and institutional capacity to enforce their norms.[48] Thus, acknowledging that sophisticated regulatory institutions are required to activate the power of sizable domestic markets, few jurisdictions outside the United States or the EU have the capacity to be regulators with global reach.[49]

The U.S. administrative agencies' capacity to promulgate and enforce rules in the United States is well understood. The rise of the regulatory state in the EU is more recent, yet the institutional developments that accompanied the creation of the single market have bestowed the EU with substantial regulatory capacity.[50] The Council of the European Union (representing the executive branches of the member states), together with the European Parliament (representing the EU citizens), exercises legislative authority in the EU. The Council makes decisions by a simple or qualified majority vote or, depending on the subject matter, unanimously. The European Commission (representing the common EU interest) is the EU's executive arm. The Commission enjoys substantial independent decisionmaking authority. It proposes legislation and ensures that the regulations and directives adopted by the Council and the Parliament are implemented in the member states. If an individual member state fails to

---

47 *See id.* at 832.

48 *See* Colin Kirkpatrick & David Parker, *Infrastructure Regulation: Models for Developing Asia* 40–41 (Asian Dev. Bank Inst. Discussion Paper No. 6, 2004), *available at* http://www.adbi.org/files/2004.05.06.dp006.infrastructure.asia.pdf (describing the difficulties developing countries face in implementing an effective regulatory regime, including an economy's "institutional endowment"). For instance, China adopted a domestic antitrust law in 2008, vesting the authority to enforce the law among three different agencies. *See* Xiaoye Wang, *Highlights of China's New Anti-Monopoly Law*, 75 ANTITRUST L.J. 133, 145 (2008). Prior to 2008, China had no capacity to exercise regulatory power in antitrust matters. Still, even after enacting the law and creating an institutional structure to enforce the law, it will be a while before the regulatory clout of the new agencies will match that of the United States (which has been enforcing antitrust laws since 1890) and the EU (which has been enforcing antitrust laws since 1957). Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)); Treaty Establishing the European Economic Community (Treaty of Rome) arts. 85, 86, Mar. 25, 1957, 298 U.N.T.S. 11.

49 *See* Sophie Meunier & Kalypso Nicolaïdis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUB. POL'Y 906, 907–08 (2006).

50 *See* Giandomenico Majone, *The Rise of the Regulatory State in Europe*, W. EUR. POL., July 1994, at 77, 83–101.

implement certain regulations, the Commission has the authority to challenge the noncomplying member state before the European courts.[51]

Vesting the EU institutions with the expertise, powers, and resources to guard the common market and to guarantee the rights and responsibilities embedded in European treaties has been integral to the entire European project. The EU's regulatory capacity has also gradually expanded over the years as a larger set of regulations have become subject to qualified majority voting as opposed to unanimity and as the European Parliament—known for its pro-regulation stance—has gained influence in the EU's legislative process.[52] The EU institutions have acquired these increased powers as a result of the need to further integrate the common market and pursue joint gains from deeper integration.

The EU's regulatory capacity varies across different policy areas. It is most extensive in areas like trade and competition policy, which are central to establishing and strengthening the single market. It is most limited in sensitive areas such as common foreign and security policy, where the individual member states have retained substantial authority. Naturally, the EU's global regulatory power is limited to policy areas in which the member states have ceded either exclusive or shared regulatory competence to the EU.[53]

C. *Preference for Strict Rules*

Regulatory capacity must further be supplemented with the political will to deploy it. Thus, the jurisdiction must also have the propensity to promulgate strict regulatory standards. The domestic preference for strict regulation is more likely to be found in countries with high levels of income.[54] Wealthier countries can better afford pursuing consumer protection at the expense of the profitability of their firms. This, together with the lack of regulatory capacity, explains why emerging markets are

---

[51] *See* MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 39–70 (6th ed. 2010) (providing an overview of the various institutions of the European Union); *see also* COUNCIL EUR. UNION, http://www.consilium.europa.eu/homepage.aspx?lang=en (last visited Nov. 5, 2012); EUR. COMMISSION, http://ec.europa.eu/index_en.htm (last visited Nov. 5, 2012); EUR. PARLIAMENT, http://www.europarl.europa.eu/portal/en (last visited Nov. 5, 2012).

[52] *See, e.g.*, Single European Act art. 6, Feb. 17, 1986, 1987 O.J. (L 169) 1 (granting the European Parliament a cooperative role in regulating Europe's economy and implementing qualified majority voting); Treaty on European Union art. G, Feb. 7, 1992, 1992 O.J. (C 191) 1, 5–44 (same); Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon] (same).

[53] *Compare* TFEU arts. 3–4 (listing the exclusive and shared competences of the EU, respectively), *with id.* art. 6 (describing competences that are reserved to the member states and where the EU's role is merely supportive).

[54] J. Luis Guasch & Robert W. Hahn, *The Costs and Benefits of Regulation: Implications for Developing Countries*, 14 WORLD BANK RES. OBSERVER 137, 138 (1999).

unlikely to exercise rulemaking power that would match their growing market size.

But even wealthy countries differ in their predisposition to regulatory intervention. To be a global regulator requires that the state subscribe to strict domestic standards that prevail over more lenient standards by the simple virtue of being the most stringent. Until the 1980s, the United States set the global norms in consumer and environmental regulation, leading European firms to adjust to higher standards originating from the United States.[55] Since then, the roles have been reversed as the EU has increasingly adopted tighter standards of consumer and environmental protection while the United States has failed to follow the EU's lead.[56] The only way for the United States to supersede the European standards today would be to adopt even higher standards itself—something that it does not consider to be welfare enhancing and thus in its interest.

EU policymakers' preference for stringent regulation reflects their aversion to risk and commitment to a social market economy.[57] European consumers rank environment and food safety higher than crime and terrorism when asked to evaluate various risks, leading to distinctly high levels of consumer and environmental protection.[58] European political elites have also been ideologically less divided than their U.S. counterparts, and consequently are more responsive to the demands of the general public for new and more stringent regulations.[59] Further, the EU follows the precautionary principle, which dictates that precautionary regulatory action is proper even in the absence of an absolute, quantifiable certainty of the risk, as long as there are reasonable grounds for concern that the potentially

---

55 *See, e.g.*, Ragnar E. Löfstedt & David Vogel, *The Changing Character of Regulation: A Comparison of Europe and the United States*, 21 RISK ANALYSIS 399, 400–01 (2001).

56 *See* Zaki Laïdi, *The Unintended Consequences of European Power* 8 (Les Cahiers Européens de Sciences Po. No. 5, 2007), *available at* http://www.cee.sciences-po.fr/erpa/docs/wp_2007_5.pdf ("Up to [the late 1980s], it was the United States that set the norms since theirs were the strictest. Since then the roles have been reversed."); R. Daniel Keleman & David Vogel, Trading Places: The US and the EU in International Environmental Politics 1–2 & tbl.1 (Sept. 2007) (unpublished manuscript), *available at* http://www.princeton.edu/~smeunier/kelemen%20vogel%20trading%20places%20sept%2007.pdf (describing how the EU's and United States' respective regulatory preferences have switched over time).

57 The EU's commitment to the social market economy is explicitly mentioned as a common objective for Europe, added by Article 1 of the new Lisbon Treaty. Treaty of Lisbon art. 1(4) ("[The Union] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, . . . and a high level of protection and improvement of the quality of the environment.").

58 *See* Laïdi, *supra* note 56, at 8; *see also* EUROPEAN COMM'N, SPECIAL EUROBAROMETER 217: THE ATTITUDES OF EUROPEAN CITIZENS TOWARDS ENVIRONMENT 31–32 (2005), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_217_en.pdf (noting that close to 90% of Europeans believe environmental policies are just as important as social or economic ones).

59 DAVID VOGEL, THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES 31–32 (2012).

dangerous effects may be inconsistent with the chosen level of protection.[60] In contrast, the risk must first be quantified and found to be unreasonable before regulatory intervention can be justified in the United States.[61] The U.S. regulatory agencies are also guided by cost–benefit analysis, which forces them to substantiate that the benefits of intervention outweigh its costs.[62] To generalize, the United States is therefore more sensitive to the costs of regulatory action and "false positive" regulations, whereas the EU emphasizes the costs of inaction and the risks of "false negatives." These differences often lead to more extensive regulation originating from the EU.[63]

The extent of regulation at the EU level also reflects the efforts by export-oriented EU firms to seek consistent and predictable regulatory frameworks. Uniform regulations have abolished obstacles for doing business within the common market—it is more complicated and costly to comply with multiple, sometimes conflicting regulations than with a harmonized regulatory scheme. And once all European firms have incurred the adjustment costs of conforming to common European standards, they have preferred that those standards are institutionalized globally. Hence, to level the playing field and ensure the competitiveness of European firms, EU corporations have sought to export these standards to third countries.

D. Predisposition to Regulate Inelastic Targets

Strict domestic regulations can operate as global standards only if such strict regulations cannot be circumvented by moving the regulatory targets to another jurisdiction. In other words, a state's ability to override another state's preference for lenient standards is compromised if the target can escape the strict regulation by simply relocating. This is the dynamic that triggers races to the bottom as producers seek less constraining regulatory environments. The EU avoids this circumvention of its standards by

---

[60] *See, e.g.*, *Communication from the Commission on the Precautionary Principle*, COM (2000) 1 final (Feb. 2, 2000); *see also* Sarah Harrell, *Beyond "REACH"?: An Analysis of the European Union's Chemical Regulation Program Under World Trade Organization Agreements*, 24 WIS. INT'L L.J. 471, 481–89 (2007) (contrasting the United States' "strict risk-assessment approach" with Europe's "precautionary principle"). However, purely hypothetical risk is not sufficient grounds for regulatory intervention. *See* Case T-13/99, Pfizer Animal Health SA v. Council, 2002 E.C.R. II-3318, para. 142.

[61] *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 642–46 (1980); *see also* Exec. Order No. 13,563, 3 C.F.R. 215, 215 (2011) (laying out general principles for regulation in the United States, including reliance on the "least burdensome tools for achieving regulatory ends").

[62] *See* 3 C.F.R. 215.

[63] However, there are examples of regulatory areas where the United States prefers a stricter rule. For instance, the United States is more concerned than the EU is about the adverse effects of smoking. *See, e.g.*, Paulette Kurzer, European Citizens Against Globalization: Public Health and Risk Perceptions 5–12 (April 2004) (unpublished manuscript), *available at* http://www.lehigh.edu/~incntr/publications/documents/kurzer.pdf; *see also infra* text accompanying notes 292–94 (discussing U.S. financial regulation).

primarily regulating consumer markets, such as product or food safety. Unlike a regulatory target such as capital, which is more mobile, consumers rarely move to another jurisdiction in response to strict regulatory standards. Thus, as long as a firm willing to trade within the EU wants access to its 500 million consumers, it needs to comply with the EU's consumer protection regulations. These consumers cannot be moved to a jurisdiction where lesser protections govern what products can be sold to them.

The inelasticity of consumer markets can be contrasted with a global corporation's strategic decision on where to incorporate or enlist, or to a shipping company's decision regarding the flag under which its ship sails. While not perfectly elastic, capital is significantly more mobile than consumer markets.[64] If the EU, for instance, tried to harmonize corporate tax levels at excessively high levels, a number of corporations could flee its jurisdiction and incorporate elsewhere. Similarly, if the EU were to impose a tax on financial transactions, trading activity could be diverted to financial centers outside the EU.[65] Thus, the EU's choice of focusing on consumer markets in its regulatory endeavors thus far has further reinforced its role as a global standard-setter whose regulations cannot be undermined by market forces and the elasticity of its targets.

E. *Nondivisibility of Standards*

The above conditions only ensure that the strict jurisdiction is able to regulate extraterritorially. Meeting these conditions does not, by itself, mean that the strict standard will actually be globalized. The Brussels Effect is only triggered when the exporter, after having converted its products or business practices to comply with the strict standards, decides to apply this new standard to its products or conduct worldwide. In other words, global standards emerge only when corporations voluntarily opt to comply with a single standard determined by the most stringent regulator, making other regulators obsolete in the process.

The exporter has an incentive to adopt a global standard whenever its production or conduct is nondivisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets. Complying with

64 International capital mobility is contingent on numerous factors and assumes limited exchange controls and the ability of foreign corporations and individuals to engage in foreign direct investment (FDI) and invest in foreign stock markets. *See also infra* note 294 (discussing whether stock exchange listings are indeed elastic).

65 In the wake of the financial crises in the Eurozone, the Commission has proposed to impose a financial transaction tax. However, the U.K., among others, is vehemently opposed. *See* Joshua Chaffin, *Business Attacks Transaction Tax Plan*, FT.COM (Sept. 28, 2011, 6:36 PM), http://www.ft.com/intl/cms/s/0/f9d2188a-e9ec-11e0-a149-00144feab49a.html#axzz1rOJUmpsd; *see also infra* notes 295–96 (discussing the limits of the Brussels Effect in case of elastic targets including financial transactions).

just one regulatory standard allows a corporation to maintain a single production process, which is less costly than tailoring its production to meet divergent regulatory standards.[66] A single standard also facilitates the preservation of a uniform global brand.[67] Thus, unilateral regulatory globalization follows from the nondivisibility of a corporation's production or conduct.

Nondivisibility of a corporation's production or conduct occurs in three primary types: legal nondivisibility, technical nondivisibility, and economic nondivisibility. "Legal nondivisibility" can be seen in global mergers, which cannot be consummated on a jurisdiction-by-jurisdiction basis—the most stringent antitrust jurisdiction gets to determine the fate of the transaction worldwide.[68] The principle of "technical nondivisibility" often applies for the regulation of privacy. For example, the EU forces companies like Google to amend their data storage and other business practices to conform to European privacy standards. Unable to isolate its data collection for the EU for technical reasons, Google is forced to adjust its global operations to the most demanding EU standard.[69] "Economic nondivisibility" is exemplified in market participants' responses to the EU's health, environmental, and other product standards. An illustrative example is European chemical regulation, which applies to all companies seeking to enter the EU market.[70] Numerous U.S. manufacturers, who would find it too costly to develop different products for different consumer markets, choose to conform their entire global chemical production to the EU standard.[71] The scale economies associated with a single global production process therefore often allow the EU to effectively dictate the global product standards.[72]

These examples can be contrasted with attempts to regulate, for example, many labor standards. Labor markets are divisible as long as scale economies do not require the producer to concentrate production into a

---

[66] *See* Drezner, *supra* note 23, at 844–45; David Lazer, *Regulatory Interdependence and International Governance*, 8 J. EUR. PUB. POL'Y 474, 476–78 (2001).

[67] VOGEL, *supra* note 59, at 16.

[68] *See* Anu Bradford, *Antitrust Law in Global Markets*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 283, 308–11 (Einer Elhauge ed., 2012).

[69] *See* Ryan Singel, *EU Tells Search Engines to Stop Creating Tracking Databases*, WIRED (Apr. 8, 2008, 9:25 AM), http://www.wired.com/threatlevel/2008/04/eu-tells-search/ (discussing how EU privacy rules on search engines' data retention practices extend to the United States "due to technical difficulty of determining whether a particular user is or isn't a citizen of an EU country").

[70] *See* REACH, *supra* note 10, arts. 5–7.

[71] *See infra* notes 134–38.

[72] *See also* JOEL WALDFOGEL, THE TYRANNY OF THE MARKET: WHY YOU CAN'T ALWAYS GET WHAT YOU WANT (2007) (discussing the distinct advantage of being a standard setter with respect to products where the markets can only bear one standard). In such a case, a consumer with a minority taste will receive no product. The ability to tip the market in your favor is therefore the only way to ensure that products that you value are being produced.

single production location. Adhering to one global minimum wage across jurisdictions, for instance, entails few scale economies. A corporation can maintain different standards in different jurisdictions without difficulty—ranging from working hours and vacation policies to retirement plans and collective labor strategies. When employing labor in Europe, foreign firms have to follow the EU's labor rules, which does not preclude them from being able to take advantage of divergent (and presumably lower) standards in their home markets.[73]

* * *

Thus, a single jurisdiction is able to supply global standards whenever that jurisdiction has a large domestic market, sufficient regulatory infrastructure, and a preference for regulating inelastic targets with strict and nondivisible standards. Otherwise, its regulatory authority can become irrelevant since other jurisdictions may supersede its standards or its chosen regulatory targets may move to less burdensome jurisdictions or segregate their standards across different markets.

II. EXAMPLES OF UNILATERAL REGULATORY GLOBALIZATION

The above discussion has focused on the conditions under which a state can harness the power of markets to unilaterally globalize its standards. The cumulative force of the conditions underlying the Brussels Effect suggests that the EU is the predominant entity that can exercise global regulatory authority across a wide range of regulatory areas. These same conditions also delineate the kind of standards that the EU can effectively externalize. This Part illustrates a few representative areas of regulatory policy that demonstrate the EU's ability to unilaterally set global rules, focusing on antitrust, privacy, human health, and the environment. It also discusses food safety as an example of an area where the EU's attempt to regulate global production has been partially successful.

A. Antitrust Laws

The strictest antitrust laws prevail in situations where conflict exists among different regulators. If lenient antitrust jurisdiction *A* and stringent antitrust jurisdiction *B* investigate the same transaction, *B*'s standard will prevail. A company seeking to merge that would be rejected by State *B* has two options: abandon the merger or abandon State *B*. If State *B*'s market is relatively insignificant, the company might choose the latter. However, if

[73] Note that this Article does not argue that labor standards cannot be exported to other jurisdictions through other means. The argument is only that to the extent they are divisible, labor standards are not amenable to the Brussels Effect. *See, e.g.*, Brian Greenhill et al., *Trade-Based Diffusion of Labor Rights: A Panel Study, 1986–2002*, 103 AM. POL. SCI. REV. 669, 678–80 (2009).

State *B*'s market is large, abandoning it is not often a realistic option.[74] At the international level, the EU antitrust laws are, indeed, often the most stringent.[75] The EU also consists of a consumer market that is too large and important to abandon. For this reason, the EU antitrust laws have often become the de facto global antitrust standards, to which the more permissive U.S. antitrust laws must yield.[76]

The reasons for the U.S.–EU difference in antitrust enforcement are manifold. At the most basic level, the EU antitrust authorities remain suspicious of the market's ability to deliver efficient outcomes and are therefore more inclined to intervene through a regulatory process.[77] While the EU is more fearful of the harmful effects of nonintervention (so called "false negatives," anti-competitive practices that the EU fails to regulate), the U.S. authorities are often more mindful of the detrimental effects of inefficient intervention (so called "false positives," pro-competitive practices that the United States erroneously restricts).[78] Yet given the logic of unilateral regulatory globalization, it is the EU approach that determines the outcome.

One of the most famous examples of the EU's global regulatory clout was its decision to prohibit the $42 billion proposed acquisition of Honeywell International by General Electric.[79] When the EU blocked this transaction involving two U.S. companies, it was irrelevant that the U.S. antitrust authorities had previously cleared the transaction: the acquisition was banned worldwide because it was legally impossible to let the merger proceed in one market and prohibit it in another. In this sense, merger decisions are legally nondivisible.[80] The GE/Honeywell case is emblematic

---

[74] *See* Bradford, *supra* note 68, at 310.

[75] *Id.*

[76] *Id.* at 309.

[77] *See* Gunnar Niels & Adriaan ten Kate, *Introduction: Antitrust in the U.S. and the EU—Converging or Diverging Paths?*, 49 ANTITRUST BULL. 1, 11–15 (2004).

[78] *See, e.g.*, Deborah Platt Majoras, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on GE–Honeywell: The U.S. Decision, Before the Antitrust Law Section, State Bar of Georgia 16 (Nov. 29, 2001), *available at* http://www.justice.gov/atr/public/speeches/9893.pdf ("In the United States, we have much greater faith in markets than we do in regulators. . . . [T]he European Union comes from a more statist tradition that places greater confidence in the utility of governmental intervention in markets.").

[79] *See* Commission Decision of 3 July 2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement, Case COMP/M.2220—General Electric/Honeywell, 2004 O.J. (L 48) 1. In contrast, for the position of U.S. regulatory authorities, see Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/8140.pdf.

[80] Note that not all antitrust decisions are characterized by nondivisibility. For instance, a company may be able to retain different distribution systems in different markets. Thus, if the EU bans certain vertical agreements between a manufacturer and its dealer, the manufacturer can often hold onto a similar arrangement in another jurisdiction. *See also infra* note 300 (noting Microsoft's decision to offer an unbundled product only in the EU as an example of divisibility).

of a difference in the antitrust regulatory approaches of the EU and the United States. The U.S. authorities considered the merger to be efficient and hence welfare enhancing. In contrast, the EU was concerned that any efficiencies that resulted from the transaction, including a short-term decrease in price, would later drive out competitors and result in a long-term increase in price.[81]

While GE/Honeywell is the most famous international antitrust enforcement conflict, it does not stand alone.[82] The EU similarly threatened to block a merger between two U.S. companies, Boeing and McDonnell Douglas, even though the deal was already cleared by the U.S. authorities without conditions.[83] In the end, the EU let the merger proceed subject to extensive commitments.[84] These included abandoning Boeing's exclusive dealing contracts with various U.S. carriers.[85] Similarly, the EU often gets to dictate the code of conduct for dominant companies worldwide. For example, the EU has imposed record-high fines and behavioral remedies against dominant U.S. companies, including Microsoft and Intel.[86]

The global nature of antitrust remedies is not unusual. The EU has frequently extracted commitments that require parties to modify their behavior globally or restructure assets in foreign countries.[87] However, the United States has similarly restructured deals where parties' productive assets are located offshore. Both the U.S. and EU agencies are vested with

---

81 *See* Bradford, *supra* note 68, at 299; *see also* Eleanor M. Fox, GE/Honeywell*: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331, 339–40 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (describing the concerns motivating EU antitrust regulators in the case).

82 For instance, see the EU's decision to block the acquisition of De Havilland by the Avions de Transport Régional, which had been approved by the Canadian authorities. Commission Decision of 2 October 1991 Declaring the Incompatibility with the Common Market of a Concentration, Case IV/M.053—Aerospatiale-Alenia/de Havilland, 1991 O.J. (L 334) 42.

83 Boeing Co. et al., Joint Statement Closing Investigation of the Proposed Merger, 5 Trade Reg. Rep. (CCH) ¶ 24,295 (July 1, 1997).

84 Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, Case No. IV/M.877—Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, 36–38.

85 *See* William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 838–39 (2001) (discussing commitments).

86 *E.g.*, Summary of Commission Decision of 13 May 2009, Case COMP/C-3/37.990—Intel, 2009 O.J. (C 227) 13, 17; Commission Decision of 24 May 2004, Case COMP/C-3/37.792—Microsoft, 2007 O.J. (L 32) 23, 27–28; *see* Stephen Castle, *Microsoft Gets Record Fine and a Rebuke from Europe*, N.Y. TIMES, Feb. 28, 2008, at C3; Editorial, *Europe v. U.S. Business*, WALL ST. J., Jan. 17, 2008, at A16.

87 *See, e.g.*, Commission Decision of 22 Feb. 2006, Case COMP/B-2/38.381—De Beers, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38381/38381_1065_1.pdf (requiring De Beers to stop buying rough diamonds from a Russian company Alrosa as a commitment in an Article 102 dominance case); Case COMP/M.5984, Intel/McAfee, EUR-Lex 32011M5984 (Jan. 26, 2011) (requiring Intel to unbundle software and security solutions worldwide as a condition for a merger); Case COMP/M.5421, Panasonic/Sanyo, EUR-Lex 32009M5421 (Sept. 29, 2009) (imposing an obligation to divest one of the parties' factories in Japan as a condition for a merger).

extraterritorial regulatory capacity.[88] Both recognize their authority to apply laws to foreign companies as long as anticompetitive "effects" are felt on their markets. It is thus not the regulatory capacity as such but the EU's sustained preference to impose more frequent and more invasive remedies that has made it the world's de facto antitrust enforcer. In some respect, however, the EU Commission has an even greater regulatory capacity than its U.S. counterparts: the Commission is empowered to prohibit mergers and impose behavioral and structural remedies without first obtaining a court judgment.[89] Administrative delegation does not reach this far in the United States, where the agencies need federal court endorsement to enjoin a merger.[90]

Critics of the EU's antitrust activism express concern over "antitrust multiple jeopardy" and condemn the EU's alleged overreach. Some go as far as to suggest that the EU's reluctance to give deference to U.S. antitrust agencies' decisions in the spirit of comity should give way to mutual recognition of antitrust decisions.[91] This is very unlikely to occur. The EU is expected to defend its right to regulate its own market whenever competition in that market is affected. The U.S. antitrust authorities know this, conceding "We recognize that the EU is entitled to make and interpret its own laws."[92]

B. Privacy Regulation

As with antitrust regulation, the EU often sets the tone globally in the regulation of privacy. The EU has adopted stricter privacy regulations than the United States.[93] In the EU, privacy is widely regarded as a fundamental right that cannot, therefore, be contracted away.[94] The EU favors

---

[88] *See, e.g.*, Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a (2006); United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945); Case T-102/96, Gencor Ltd v. Comm'n, 1999 E.C.R. II-759, paras. 73, 92, 96; *see also* Eleanor M. Fox, *National Law, Global Markets, and* Hartford*: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 79–86 (2000) (describing cases of extraterritorial assertions of antitrust jurisdiction of both the EU and the United States); Damien Geradin et al., *Extraterritoriality, Comity, and Cooperation in EU Competition Law*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 21, 24–29 (Andrew T. Guzman ed., 2011) (describing bases of extraterritorial prescriptive and enforcement jurisdiction under EU antitrust law).

[89] *See* Council Regulation (EC) 139/2004, On the Control of Concentrations Between Undertakings (the EC Merger Regulation), art. 8, 2004 O.J. (L 24) 1.

[90] *See* Kovacic, *supra* note 85, at 851.

[91] Editorial, *supra* note 86.

[92] Majoras, *supra* note 78, at 14.

[93] *See* Mark F. Kightlinger, *Twilight of the Idols? EU Internet Privacy and the Post Enlightenment Paradigm*, 14 COLUM. J. EUR. L. 1, 2–3 (2007).

[94] *See id.* at 21, 34. "[T]he right to privacy . . . is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of [European] Community Law." *Id.* at 34 (second alteration in original) (quoting Council Directive 95/46, On the Protection of Individuals with Regard to the Processing of Personal Data, 1995 O.J. (L 281) 31, para. 10 [hereinafter EU Data Protection Directive]).

comprehensive legislation that establishes privacy principles for both the public and private sectors, enforced by independent regulatory agencies.[95] In contrast, the U.S. data privacy laws are restricted to the public sector and some sensitive sectors, including health care and banking.[96] The data privacy issues of the private sector are largely relegated to self-enforcement by the industry.[97] Individual companies are allowed to create their own privacy policies, and consumers are expected to contract with those companies for the level of privacy they want.[98]

The EU approach to the protection of privacy rights is spreading outside its boundaries. Since the EU's Data Protection Directive was passed, over thirty countries have adopted EU-type privacy laws, including most countries participating in the Organization for Economic Cooperation and Development (OECD).[99] The United States has been an exception, resisting the EU's lead in privacy protection—at least until very recently. In February 2012, the White House published a report, *Consumer Data Privacy in a Networked World*, which urges Congress to adopt a consumer privacy "bill of rights."[100] This suggests that the United States may eventually come to embrace the EU's privacy rules. Still, irrespective of whether this will happen, the EU privacy standards already affect the business practices of many U.S. companies. For instance, Yahoo! was prosecuted before French courts for the material that it made available on its U.S. website because that material was accessible to French citizens.[101] And this is just one example of the many lawsuits against U.S. companies in European courts.[102]

---

95 *See* EU Data Protection Directive, *supra* note 94, arts. 3, 28.

96 *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a(4) (2006) (defining "records" protected by the Act as limited to certain categories, and limiting the application of the Act to government agencies); *see also* Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 23–28 (2000) (describing privacy protection in the United States, including state privacy acts). The protection of individual privacy was further weakened in the United States in the wake of September 11 when privacy interests gave way to concerns of public safety. *See* Kelly Fiveash, *Euro Commissioner Tells Facebook It Has Nowhere to Hide*, REGISTER (June 21, 2011, 13:03 GMT), http://www.theregister.co.uk/2011/06/21/viviane_reding_interview/ (interviewing Viviane Reding, EU Commissioner for Justice, Fundamental Rights and Citizenship, on the EU–U.S. difference in approach to privacy protection).

97 *See* Bach & Newman, *supra* note 46, at 833. However, recent developments suggest that the U.S. government is moving towards a more aggressive stand in its enforcement of privacy rights. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Gives Final Approval to Settlement with Google over Buzz Rollout (Oct. 24, 2011), *available at* http://www.ftc.gov/opa/2011/10/buzz.shtm.

98 *See* Bach & Newman, *supra* note 46, at 833.

99 *See id.* at 833–34.

100 *See* WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY 1–26 (2012), *available at* http://www.whitehouse.gov/sites/default/files/privacy-final.pdf.

101 *The Internet: Vive La Liberté!*, ECONOMIST, Nov. 25, 2000, at 75.

102 *See, e.g.*, Shaffer, *supra* note 96, at 43 (discussing the aftermath of American Airlines being sued in Sweden after transferring data from Sweden to a U.S. electronic reservation system without prior

The EU believes that its high privacy standards are compromised if the protected data is made available in other jurisdictions. For this reason, the EU bans the transfer of data from the EU to third countries that fail to ensure "an adequate level of protection" of data privacy rights.[103] What constitutes "adequate" is defined case by case by the EU. U.S. companies have strongly criticized the EU's regulatory efforts, referring to "unreasonable restraints" on their business practices and the high costs of compliance.[104] Their disapproval is only likely to grow as the EU proceeds to enact a new, even more stringent privacy law with an extraterritorial reach.[105] The proposed new data protection regulation, expected to take effect in 2014, further expands Internet users' rights against service providers.[106] Particularly far-reaching is the new law's proposed "right to be forgotten"—the Internet user's right to demand all data on him or her to be permanently deleted upon request.[107] The new law also envisions bolstering the EU's enforcement efforts with tougher penalties, including fines up to 2% of the company's annual global revenue.[108] This planned expansion of privacy rights is expected to severely curtail the business practices of foreign corporations and, according to its vehement critics in the United States, "represents the biggest threat to free speech on the Internet in the coming decade."[109]

Yet many U.S. corporations have already adopted, however reluctantly, privacy policies that satisfy the EU requirements. Numerous U.S. corporations have also voluntarily signed onto the EU□U.S. negotiated "Safe Harbor Principles," issued by the Department of Commerce after the EU Directive entered into force.[110] The Safe Harbor

customer consent); *see also* Cecilia Kang, *Promise by Google Ends FTC's Privacy-Breach Probe*, WASH. POST, Oct. 28, 2010, at A15 (discussing the FTC's decision to close its investigation against Google's Street View service, in sharp contrast to European regulators).

[103] *See* EU Data Protection Directive, *supra* note 94, arts. 25; *see also* Shaffer, *supra* note 96, at 21–23 (discussing in more detail these same Directive provisions, and analyzing whether the United States, as a third-party country, would assure an adequate level of protection).

[104] *See* Shaffer, *supra* note 96, at 75; *cf. id.* at 17–20.

[105] Kevin J. O'Brien, *Europe Plans to Tighten Web Privacy and Apply It to U.S. Companies*, N.Y. TIMES, Nov. 10, 2011, at B4.

[106] *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *General Data Protection Regulation*].

[107] *Id.* art. 17.

[108] *See* Press Release, European Comm'n, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of Their Data and to Cut Costs for Businesses (Jan. 25, 2012), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/46.

[109] Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012).

[110] *See* Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000). While signing on to the Safe Harbor Principles is voluntary, the signatories are bound by them. Failure to adhere to their commitments subjects the signatories to FTC enforcement

Agreement stipulates that U.S. firms active in the EU market comply with EU privacy rules even when their data are processed in the United States.[111] Despite being otherwise "strong-armed" into the Agreement,[112] the United States managed to negotiate one important exception: the EU conceded to allow airlines to transfer passenger records to the U.S. Department of Homeland Security in the interest of U.S. national security.[113]

The nondivisibility of data has further facilitated the globalization of the EU's privacy policy. While national regulations may differ from country to country, "data flows lightly and instantly across borders."[114] Multinational corporations have adjusted their global data management systems to reduce their compliance costs with multiple regulatory regimes.[115] Internet companies find it difficult to create different programs for different markets and therefore tend to apply the strictest international standards across the board. At times, it is technologically difficult or impossible to separate data involving European and non-European citizens.[116] Other times it may be feasible but too costly to create special websites or data-processing practices just for the EU.[117] As a result, the technical or the economic nondivisibility of the EU rules has prompted several U.S. companies ranging from Google to General Motors to amend their global privacy practices.[118] Indeed, today many multinational

---

actions under § 5 of the Federal Trade Commission Act against unfair or deceptive acts or practices. *See* U.S. TRADE REPRESENTATIVE, 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: EUROPEAN UNION 143, 166 (2010).

111 *See* Bach & Newman, *supra* note 46, at 833–34.

112 David Bach & Abraham L. Newman, *Local Power, Global Reach: The Domestic Institutional Roots of Internet Governance*, ST. ANTONY'S INT'L REV., May 2007, at 23, 29.

113 *See* Bach & Newman, *supra* note 46, at 834; Council Decision 2007/551/CFSP/JHA of 23 July 2007, on the Signing of an Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security (DHS), 2007 O.J. (L 204) 16.

114 *Legal Confusion on Internet Privacy: The Clash of Data Civilizations*, ECONOMIST, June 19, 2010, at 63.

115 *See* Bach & Newman, *supra* note 112, at 29; *see also* DOROTHEE HEISENBERG, NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION 119 (2005) ("Indeed, there is a hint that it has already become cheaper for US multinational companies to treat all data (including US data) with the same strict privacy standard as the data of the Europeans.").

116 *See* Singel, *supra* note 69.

117 *See* Mitchener, *supra* note 3.

118 *See, e.g.*, *Legal Confusion on Internet Privacy*, *supra* note 114 (discussing changes the EU demanded in Google Buzz, the firm's social network service); Kevin J. O'Brien, *Anger in Europe over Google and Privacy*, N.Y. TIMES, May 17, 2010, at B5 (discussing personal information Google collected through Street View, and Google's response); Scheer, *supra* note 3 (discussing GM, DuPont, and Procter & Gamble's practice of applying EU-like standards to its employee data worldwide); *see also* Mark Berniker, *EU: Microsoft Agrees to .NET Passport Changes*, DATAMATION (Jan. 30, 2003), http://www.datamation.com/entdev/article.php/1576901/EU-Microsoft-Agrees-to-NET-Passport-Changes.htm (discussing Microsoft's agreement with EU authorities to implement a data protection plan regarding one of its products).

companies have only one company-wide privacy protection policy—and it is Europe's.[119]

C. Health Protection: Regulation of Chemicals

The EU has also become the preeminent global regulator of the chemicals industry. This reflects Europeans' elevated concern for the adverse effects that unsafe chemicals have on humans and on the environment. The Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) is an EU chemicals regulation that has had a substantial impact on a global scale.[120] The chemicals industry is multinational, and the EU is an important destination market for a vast number of chemicals as well as goods and preparations containing chemicals.[121]

REACH, which was enacted in 2007, builds on an idea of industry responsibility. Embracing the idea of "no data, no market," REACH places the burden of proof on manufacturers and importers as opposed to regulators.[122] Manufacturers and importers are required to gather information on the effects that their substances have on human health and the environment, and to provide this information to EU authorities.[123] Another important feature of REACH is that it was enacted to regulate not only new chemicals that enter the stream of commerce but also tens of thousands of "existing substances" that had been placed on the EU market before they were regulated.[124] According to the Commission, these chemicals represent 99% of the total substances on the market.[125] The implementation of REACH is also guided by the "precautionary principle," which lowers the threshold for regulatory intervention.[126]

---

[119] *See* Mitchener, *supra* note 3 (citing Microsoft's Director of Corporate Privacy, who confirmed that Microsoft applies one company-wide privacy standard, and that is the EU standard).

[120] REACH, *supra* note 10.

[121] *See* Melody M. Bomgardner, *Facts & Figures of the Chemical Industry*, CHEMICAL & ENGINEERING NEWS, July 4, 2011, at 33–67 (describing European chemical shipments of $428.5 billion and European chemical imports worth $98.6 billion for 2010).

[122] *See* REACH, *supra* note 10, art. 5; Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897, 898–99 (2009) (explaining the individual responsibility required for the industry actors to provide data in order to participate in the market).

[123] *See* Doaa Abdel Motaal, *Reaching REACH: The Challenge for Chemicals Entering International Trade*, 12 J. INT'L ECON. L. 643, 645 (2009); Scott, *supra* note 122.

[124] *See Commission White Paper: Strategy for a Future Chemicals Policy*, at 7–8, 28, COM (2001) 88 final (Feb. 27, 2001) (referring to the "burden of the past"—i.e., the past effects of the 30,000 chemicals already on the market in the EU—as a motivation for regulating existing chemicals).

[125] *Id.* at 6.

[126] *See* TFEU art. 191(2); *cf.* Case C-180/96, United Kingdom v. Comm'n, 1998 E.C.R. I-2269, para. 99 ("Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.").

REACH represents a stark difference from its U.S. counterpart, the Toxic Substance Control Act (TSCA), which continues to place the burden of proof on regulators.[127] While REACH requires companies to develop information on the safety of their chemicals, the TSCA requires companies to develop this information only if directed to do so by the Environmental Protection Agency (EPA).[128] The EPA also has a high evidentiary burden when requesting safety data, leading it to restrict or ban very few chemicals.[129] The TSCA is further weakened by its provision grandfathering 95% of existing chemicals and thus forgoing any testing with respect to the vast majority of the chemicals on the market.[130]

The global spread of REACH has met with resistance at the international level. As the regulation applies to approximately 30,000 chemicals, its impact on the $600 billion U.S. chemical industry is profound.[131] Critics claim that REACH imposes significant costs and challenges on manufacturers and importers, particularly related to the supply chain, sales, and procurement.[132] At worst, the regulation is said to impede innovation and the development of new substances due to fears that they would not meet the more stringent European requirements.[133]

Despite this resistance, the de facto Brussels Effect has ensured that REACH is effecting change at a global level.[134] Multinational firms including Ikea, Lego, and Mattel have declared their global production to be PVC free.[135] Dow Chemical announced all of its production to be REACH-consistent, whether they are sold in the EU or elsewhere.[136] Large cosmetics producers such as Revlon, Unilever, and L'Oreal have similarly reformulated all their products to be REACH-compatible, while Estee

---

127 15 U.S.C. §§ 2601–2692 (2006).

128 *See* Motaal, *supra* note 123, at 647.

129 The EPA needs to provide "substantial evidence" that the chemical presents "unreasonable risk" to health or the environment, in addition to justifying the regulatory intervention under a cost–benefit analysis. This high standard of proof has led, for instance, to the EPA's failure to regulate asbestos. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1207 (5th Cir. 1991); *see also* Scott, *supra* note 122, at 903–04 (describing the burden of persuasion the EPA must meet regarding health and safety before it can regulate or restrict chemicals).

130 *See* Wirth, *supra* note 36, at 102.

131 *See* Mark Schapiro, *New Power for 'Old Europe,'* NATION, Dec. 27, 2004, at 11, 12; Scott, *supra* note 122, at 902 (noting the size of the U.S. chemicals industry).

132 *See* LAWRENCE A. KOGAN, EXPORTING PRECAUTION: HOW EUROPE'S RISK-FREE REGULATORY AGENDA THREATENS AMERICAN FREE ENTERPRISE 40–43 (2005), *available at* http://www.wlf.org/upload/110405MONOKogan.pdf.

133 *See, e.g.*, Anne Pouillot et al., *REACH: Impact on the US Cosmetics Industry?*, 8 J. COSMETIC DERMATOLOGY 3, 5–6 (2009).

134 *See* Wirth, *supra* note 36, at 102–03; *see also* Scott, *supra* note 122, at 908–20 (describing how REACH's effect on U.S. businesses has prompted state-level harmonization attempts).

135 VOGEL, *supra* note 59, at 204.

136 *Id.* at 169.

Lauder uses a single safety standard for 95% of its production.[137] Many foreign chemical manufacturers that export a significant amount of chemicals to the EU are switching to REACH standards to avoid being excluded from the large and lucrative EU market. Since they often find it cheaper to create a single product for all markets, they have an incentive to produce their products in accordance with the strictest global standards, which happens to be the EU's REACH standard.[138] Here nondivisibility is driven by scale economies in production rather than a legal or technical inability to produce different products or pursue different conduct in different markets. Another reason for conforming to REACH is that many downstream users of chemicals refuse to include substances in their products if the EU has identified any such substance as a "substance of very high concern."[139]

In addition to this kind of de facto Brussels Effect, REACH has triggered a more limited de jure Brussels Effect, prompting international adoption of REACH-style laws.[140] Producers outside the EU who adopt stricter and more expensive REACH standards in order to export to the EU have an incentive to pressure their home governments to increase their domestic regulations to the level of REACH. Since their exports already meet REACH standards, they could then produce similar products for both markets at a lower cost than could domestic competitors who do not export to the EU and, therefore, have not yet developed EU-compliant production processes.[141] Similarly, a de jure Brussels Effect would level the playing field in the domestic market against foreign producers that are not active in the EU market and that similarly do not, therefore, conform to the EU rules. This type of lobbying has been reinforced by consumer health and environmental activists who have embraced the EU regulation and used it as a benchmark in their efforts to influence domestic debates on the issue.[142]

In the United States, REACH has prompted state-level regulatory reforms and the introduction of congressional bills seeking to amend the

---

[137] *Id.* at 217.

[138] *See* Scott, *supra* note 122, at 939–40; Henrik Selin & Stacy D. VanDeveer, *Raising Global Standards: Hazardous Substances and E-Waste Management in the European Union*, ENVIRONMENT, Dec. 2006, at 7, 14. This is consistent with VOGEL, *supra* note 18, at 5–8.

[139] *See* KERSTIN HEITMANN & ANTONIA REIHLEN, TECHNO-ECONOMIC SUPPORT ON REACH: CASE STUDY ON "ANNOUNCEMENT EFFECT" IN THE MARKET RELATED TO THE CANDIDATE LIST OF SUBSTANCES SUBJECT TO AUTHORISATION 5, 9 (2007), *available at* http://ec.europa.eu/environment/chemicals/reach/background/docs/report_announcement_effect.pdf; *see also* Michael Kirschner, *Why Electronics Companies Need to Worry About REACH*, EE TIMES (Sept. 18, 2007, 2:40 PM), http://www.eetimes.com/electronics-news/4181306/Why-electronics-companies-need-to-worry-about-REACH (discussing the implications of REACH in the entire supply network).

[140] REACH-type regulations have been adopted in countries such as Canada, Australia, China, South Korea, Japan, and Russia. *See* VOGEL, *supra* note 59, at 170.

[141] *See* Yoshiko Naiki, *Assessing Policy Reach: Japan's Chemical Policy Reform in Response to the EU's REACH Regulation*, 22 J. ENVTL. L. 171, 178 (2010).

[142] Scott, *supra* note 122, at 920–28.

TSCA.[143] These legislative efforts acknowledge the global nature of the chemical industry and the existing need for U.S. companies to comply with REACH, including collecting the safety information relevant for their production.[144] In California, for instance, the existing informational burden imposed by REACH was seen as a compelling reason to utilize the same data in California as well. As a result, the California Department of Toxic Substances Control is now required to use "to the maximum extent feasible" the safety information generated in other nations in its regulation of chemical products, including, most importantly, the EU.[145]

D. Environmental Protection

While REACH is often considered a health measure, its provisions are also directly geared at protecting the environment. Yet REACH does not stand alone among the environmental measures spread through the Brussels Effect. Before REACH was adopted, the EU already regulated the management of hazardous substances and electronic waste.[146] The 2003 Restriction of Hazardous Substances Directive (RoHS Directive) bans the release of hazardous substances into the environment when many common products such as household appliances and computers reach the end of their useful life.[147] The Commission has recently extended the Directive to cover all electrical and electronic products.[148]

The RoHS Directive has been exported to other jurisdictions through both a de facto and de jure Brussels Effect. Foreign manufacturers exporting products into the EU prefer to comply with one set of standards and thus make their entire production RoHS-compliant.[149] This has led to a global change in the design of electronic products.[150] In addition, several

[143] *Id.* at 914–20 (discussing regulatory reforms in Maine and Massachusetts and in Congress).

[144] *Id.*

[145] *Id.* at 910–14 (quoting CAL. HEALTH & SAFETY CODE § 25252(b)(2) (West Supp. 2012)).

[146] *See* Directive 2002/95/EC, *supra* note 9, art. 1 (laying out the EU policy on the restriction of the use of certain hazardous substances in electrical and electronic equipment); *see also* Directive 2002/96/EC, of the European Parliament and of the Council of 27 January 2003 on Waste Electric and Electronic Equipment (WEEE), 2003 O.J. (L 37) 24.

[147] *See* Directive 2002/95/EC, *supra* note 9.

[148] *See* Press Release, European Comm'n, Environment: Fewer Risks from Hazardous Substances in Electrical and Electronic Equipment (July 20, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/912&format=HTML&aged=0&language=EN&guiLanguage=en.

[149] *See Legislation on Electrical and Electronic Equipment Enters New Phase*, ENV'T FOR EUROPEANS, Mar. 2011, at 10, *available at* http://ec.europa.eu/environment/news/efe/pdf/efe42/EN-EFE42-110328.pdf; *see also* Selin & VanDeveer, *supra* note 138, at 14 (reaching the same conclusion).

[150] *See* Press Release, *supra* note 148 (referring to the RoHS Directive having led to "important changes in product design in the European Union and worldwide"); *see also* Otto Pohl, *European Environmental Rules Propel Change in U.S.*, N.Y. TIMES, July 6, 2004, at F4 (discussing the global nature of the electronics business and noting that "a multinational that redesigns its product to eliminate a substance banned in the E.U. often finds it cheaper to sell that product worldwide"); *About the RoHS Directive*, FUJITSU, http://www.fujitsu.com/emea/services/components/thermal-printers/rohs.html (last

jurisdictions outside the EU have adopted RoHS-type laws, including China, Japan, and South Korea.[151] California also responded to the EU's strict electronic waste regulation by explicitly incorporating EU standards into its Electronic Waste Recycling Act of 2003.[152] This Act, referred to as the "Cal RoHS," bans the sale of electronic devices in California when those devices are banned in the EU and, rather strikingly, also states that amendments to the EU directive will be incorporated into California law.[153]

The most recent example of EU environmental unilateralism relates to its emissions trading scheme (ETS). The ETS forms a cornerstone of the EU's climate change policy. As of January 1, 2012, the EU folded aviation into this scheme.[154] All airlines, including foreign ones, have to buy emission permits for all their flights that depart from or land at European airports. This way, airlines cannot limit their compliance to the part of the journey that takes place in the European airspace, making the scheme nondivisible. For instance, on a flight from San Francisco to London, only 9% of the emissions are calculated to occur in the EU airspace (29%, 37%, and 25% of the emissions occurring over the United States, Canada, and the high seas, respectively).[155] Yet the airline must acquire emission permits for each ton of emissions emitted across the entire flight since the point of landing is the EU.[156] A foreign airline refusing to comply is subject to a fine[157] or, even more severely, could be banned from European airports.[158]

United, Continental, and American Airlines, supported by the U.S. Air Transport Association, challenged their inclusion in the scheme before U.K. courts, alleging that the U.K.'s decision to implement the EU Directive

visited Nov. 6, 2012) (stating Fujitsu's compliance with RoHS); *Oracle Global Position on Restriction of Hazardous Substances (RoHS)*, ORACLE (Oct. 2012), http://www.oracle.com/us/products/applications/green/rohs-position-185078.pdf (stating Oracle's global compliance with RoHS).

[151] *See* Selin & VanDeveer, *supra* note 138, at 14–15.

[152] *See* CAL. PUB. RES. CODE §§ 42460–42486 (West 2007 & Supp. 2012). The EU's RoHS Directive is referenced in § 42465.2(b).

[153] *See id.* §§ 42463, 42465.2(b); CAL. HEALTH & SAFETY CODE § 25214.10(b) (West 2006); Scott, *supra* note 122, at 942.

[154] *See* Directive 2008/101/EC, of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC So as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3 [hereinafter Directive 2008/101/EC].

[155] Nancy N. Young, Vice President of Envtl. Affairs, Air Transp. Ass'n of Am., Inc., Statement Before the Subcommittee on Aviation of the House Transportation and Infrastructure Committee: The European Union's Emissions Trading Scheme: A Violation of International Law 4 (July 27, 2011), *available at* http://republicans.transportation.house.gov/Media/file/TestimonyAviation/2011-07-27-Young.pdf.

[156] *Id.* at 4–5.

[157] *Id.*

[158] *See* Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change, EUR-Lex 62010CJ0366 (Dec. 21, 2011).

violates international law.[159] The U.K. Court referred the question to the European Court of Justice. The European Court confirmed the validity of the ETS Directive with various international agreements and customary international law, concluding that the "application of the emissions trading scheme to aircraft operators infringes neither the principle of territoriality nor the sovereignty of third States."[160] The Court emphasized that an aircraft flying over the high seas is not subject to the ETS. Only when the aircraft is physically in the member state of the EU—i.e., lands in or departs from an airport situated in the EU—does the EU attach jurisdiction on the operator of that aircraft.[161]

Airlines are exempted from the ETS with respect to their flights landing in the EU, but not with respect to their flights taking off from the EU, if they are subject to "equivalent measures" in their home jurisdiction.[162] Whether domestic climate regulation in the United States or China, for instance, would qualify as an equivalent provision is subject to the EU's unilateral decision.[163] China, for instance, has already proposed domestic emissions-cutting measures and asked the EU to consider those as "equivalent" to what the EU requires.[164] It is plausible that the EU's unilateralism will prompt countries to either adopt tougher domestic climate change regulations or consider adopting international measures. And even if no such de jure Brussels Effect takes place, compliance costs with EU rules will likely lead to increasing demands to design planes with fuel efficiency improvements. It is also doubtful that the airlines would limit these improvements to planes that fly to Europe but would more likely order entire fleets of planes that allow them to meet the stricter EU standards more cost-effectively, confirming the de facto Brussels Effect.

---

159 *See ATA Challenges Application of the EU ETS to U.S. Airlines*, AIRLINES FOR AM., http://www.airlines.org/Pages/ATA-challenges-the-application-of-the-EU-ETS-to-U.S.-Airlines.aspx (last visited Nov. 6, 2012). According to the plaintiffs, the ETS Directive violates a number of international agreements, including the Convention on International Civil Aviation (Chicago Convention), the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and the Air Transport Agreement between the United States and the EU and its member states (Open Skies Agreement).

160 Press Release No. 139/11, Court of Justice of the European Union, The Directive Including Aviation Activities in the EU's Emissions Trading Scheme is Valid 2 (Dec. 21, 2011), *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-12/cp110139en.pdf (discussing Case C-366/10, *Air Transp. Ass'n of Am.*).

161 *See* Case C-366/10, *Air Transp. Ass'n of Am.*, paras. 122–127.

162 *See* Directive 2008/101/EC, *supra* note 154, para. 17; *see also* Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EUR. J. INT'L L. 469, 482–83 (2012) (discussing the equivalency concept in more detail).

163 *See* Scott & Rajamani, *supra* note 162, at 475.

164 *See* Saqib Rahim, *U.S.-E.U. Showdown over Airline Emissions Begins Today*, N.Y. TIMES (July 5, 2011), http://www.nytimes.com/cwire/2011/07/05/05climatewire-us-eu-showdown-over-airline-emissions-begins-88684.html.

E. Food Safety

The EU's attempt to regulate Genetically Modified Organisms (GMOs) is an example where the EU has been partially successful in externalizing its food safety regulations but where the Brussels Effect has been incomplete. It therefore offers a particularly interesting case to examine the relative importance of the various conditions that underlie the Brussels Effect.

The EU and the United States take starkly opposing views on the regulation of biotechnology. The United States regards GMO products as substantially similar to products made using traditional production methods. GMO products can therefore be cultivated and marketed in the United States without extensive premarket safety studies or the need to specifically label them.[165] In contrast, the EU subjects GMOs to extensive regulation based on their potential adverse health effects. The GMOs have to go through a lengthy approval process, which entails an evaluation of the risk the GMOs pose to human health and the environment.[166] The evaluation is also guided by the precautionary principle, which justifies regulatory intervention in the presence of scientific uncertainty.[167] The EU further requires that most authorized foods, ingredients, and animal feeds containing over 0.9% GMOs be labeled.[168]

Several reasons explain the U.S.–EU regulatory divergence.[169] The United States is the world's leading GMO producer whereas GMOs are hardly cultivated in the EU.[170] Biotechnology is seen as a key for retaining the U.S. competitiveness in export markets, while the EU places cultural importance on small-scale farming and remains skeptical of mass production technologies.[171] Consequently, U.S. farmers and the entire biotechnology industry are influential players in the U.S. political process, whereas farmers producing non-GMO crops wield influence in the EU. At its root, however, the divergence mirrors very different consumer preferences with respect to food safety across the Atlantic. Survey data

---

[165] *See* Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 22,988, 22,991 (May 29, 1992).

[166] Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268) 1, 2.

[167] *See* Joanne Scott, *European Regulation of GMOs and the WTO*, 9 COLUM. J. EUR. L. 213, 219–24 (2003).

[168] Regulation (EC) No. 1830/2003 of the European Parliament and of the Council of 22 September 2003 Concerning the Traceability and Labelling of Genetically Modified Organisms, 2003 O.J. (L 268) 24, 26–27.

[169] *But see* Aseem Prakash & Kelly L. Kollman, *Biopolitics in the EU and the U.S.: A Race to the Bottom or Convergence to the Top?*, 47 INT'L STUD. Q. 617, 629–34 (2003) (discussing how U.S. and EU regulatory approaches may be converging as state-level legislative activity and court challenges against GMOs grow).

[170] *Id.* at 627.

[171] *Id.*

show that 62% of Europeans are worried about the food safety risks posed by GMOs and 71% of Europeans do not want GMOs in their food,[172] whereas U.S. consumers have shown little interest or concern for the issue.[173]

The above discussion suggests that the EU certainly has the requisite *propensity* to regulate GMOs with the strictest standards. Arguably, over time, the EU has also built the kind of institutional *capacity* that would allow it to exercise this regulatory authority.[174] GMOs are also characterized as falling under *inelastic* consumer protection regulation, which ensures that the EU's regulatory clout cannot be circumvented by moving the regulatory targets to another jurisdiction. But it is less clear that the other conditions for the Brussels Effect are present. For U.S. farmers, the EU is only the fifth largest export market and accounts for just 8% of U.S. agricultural exports.[175] Many producers should thus afford to forgo the EU market and divert their trade elsewhere.[176] At the same time, an increasing number of other countries, including Australia, Brazil, China, and Japan, are following the EU's lead and adopting mandatory labeling schemes for GMO products.[177] This narrows the U.S. farmers' scope for trade diversion.

At first glance, it appears that GMOs should also be divisible and thus not amenable to the Brussels Effect. In principle, U.S. farmers could separate their production and cultivate both GMO and non-GMO varieties destined for domestic and export markets, respectively. Yet such division can be difficult in practice. The GMO crops must be segregated from the time they are planted throughout the processing and marketing chain. This entails separating growing areas and preventing pollen drift from GMO

[172] *See* EUROPEAN COMM'N, EUROBAROMETER 55.2: EUROPEANS, SCIENCE, AND TECHNOLOGY 40 (2001), *available at* http://ec.europa.eu/research/press/2001/pr0612en-report.pdf (presenting data on Europeans' perceptions of GMOs specifically, with 71% of respondents agreeing with the statement, "I do not want this type of food"); EUROPEAN COMM'N, SPECIAL EUROBAROMETER 238: RISK ISSUES 53 (2006), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_238_en.pdf (presenting data on Europeans' perception of various food-related risks, with 62% concerned about GMOs).

[173] *See* Prakash & Kollman, *supra* note 169, at 627 (citing an Environics poll, which reported that while 78% of Americans support agriculture biotechnology, the comparable figure in Germany was 54%, 52% in France, 36% in Britain, and 29% in Spain).

[174] See ABRAHAM L. NEWMAN, PROTECTORS OF PRIVACY: REGULATING PERSONAL DATA IN THE GLOBAL ECONOMY 147 (2008), in which Newman argues that regulatory capacity is the key variable explaining global regulatory outcomes. He argues that the EU initially had fragmented institutional capacity with respect to food safety, explaining its limited ability to export its preferences globally. However, he reasons that the establishment of the European Food Safety Agency "could substantially strengthen the European position." *Id.*

[175] U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 2010, at XV-3 tbl.15-3 (2010).

[176] However, trade diversion may entail the producers being able to sell their crop at a lower price in alternative export markets.

[177] *See* Prakash & Kollman, *supra* note 169, at 632; *see also* VOGEL, *supra* note 59, at 89 (noting that "[a]s of 2002, seventeen countries had adopted mandatory GM food labeling requirements").

fields to non-GMO fields.[178] Producers and distributors must also use separate equipment, storage areas, and shipping containers, and establish trait identification systems that allow for the tracking of produce from the farm to the consumer.[179] The specific processes by which U.S. farmers gather and transport their crops for distribution often make their harvests inseparable in practice.[180] At a minimum, separation of production is costly. This technical and economic nondivisibility of GMO production has led some farmers to choose to forgo the risks and costs of separation, and converge to the strictest standard by only cultivating EU-approved GMO crops—irrespective of where these crops are sold.[181]

The practical nondivisibility of production is enhanced by the influence and business practices of multinational food processors.[182] They are reluctant to make separate batches for the EU and United States and frequently refuse to buy corn that could potentially cause them marketing problems in the EU.[183] Even if they secured an authorization for their products, the labeling requirement makes products containing GMOs unmarketable in practice. Thus, the possibility that a non-EU-approved variety can be found within the bulk means that the entire crop is unfit for sale to multinational food processors that export to the EU. By refusing to purchase even conventional grain from farmers who also plant GMO varieties, these food processors have steered some U.S. farmers away from GMO products altogether.[184]

Finally, unlike the other fields of regulation discussed above, GMOs are an interesting test case for the Brussels Effect because it is an area where the United States challenged the EU's regulatory stance before the

---

[178] *See* CHARLES E. HANRAHAN, CONG. RESEARCH SERV., RS21556, AGRICULTURAL BIOTECHNOLOGY: THE U.S.-EU DISPUTE 5 (2010); *see also* Case C-442/09, Bablok v. Freistaat Bayern, EUR-Lex 62009CJ0442, at 8 (Sept. 6, 2011) (confirming that honey containing traces of GMOs due to accidental contamination from GMO test fields that were 500 meters away nonetheless is considered food produced from a GMO under European food law).

[179] HANRAHAN, *supra* note 178.

[180] *See* Young, *supra* note 44, at 467–68.

[181] *Id.* at 469; *see also* VOGEL, *supra* note 59, at 86 (noting that over 95% of the GMO corn production in the United States today concentrates on the varieties approved in the EU, notwithstanding a greater number of GMO varieties approved in the United States, and similarly, that almost all GMO soybean production in the United States employs the single variety approved by the EU).

[182] For instance, firms like Unilever and Nestle have pledged not to use GMOs in any of their products, irrespective of the end market. Gerber and Heinz similarly exclude GMOs from all of their baby food, including baby food sold on the U.S. market. *See* VOGEL, *supra* note 59, at 86.

[183] Mitchener, *supra* note 3.

[184] *See id.*; *see also* Wirth, *supra* note 36, at 104 (referring to the "virtual collapse of the market for U.S. exports of corn" following the EU's labeling requirements, and noting that U.S. rice and wheat farmers have steered away from GMO varieties for the same reason). Similarly, multinational restaurant retailers operating in the EU, including McDonalds, have requested their contract farmers to produce only non-GMO crops to mitigate consumer backlash in the EU. *See* Prakash & Kollman, *supra* note 169, at 632.

WTO and won a trade dispute in 2006.[185] Yet, for the reasons discussed below in Part V, the negative ruling by the WTO has done little to compromise the EU's regulation of GMOs. The EU has failed to comply with the ruling, and transatlantic trade involving GMOs remains restricted.[186] As a result, U.S. producers of GMO varieties continue to feel the (limited) Brussels Effect due to their inability to altogether ignore the EU market and their dependence on multinational companies who prefer to cater to a single global standard and remain sensitive to potential risks and liabilities they may face in the EU.

III. THE EU'S MOTIVATIONS

The EU's exercise of global regulatory clout can spring from various motivations—both external and internal. Some commentators argue that the EU's external policies reflect "imperialistic" objectives whereas others emphasize the EU's role as a benevolent hegemon.[187] The charges of regulatory imperialism appear misguided. A more compelling account suggests that the EU is guided primarily by internal motivations stemming from its need to preserve the single market without undermining the competitiveness of European companies. Externalization of the single market also serves the bureaucratic interests of the European Commission and allows for the maximization of interest group support embracing corporations and consumer advocates alike.

A. External Motivations

In contrast to the United States' unilateralism in international affairs, the EU is often portrayed as a champion of multilateral cooperation and universal norms.[188] However, the EU's commitment to multilateralism and universalism must be qualified. The EU is an influential global player with the ability and the willingness to shape the international order to its liking. It seeks to vigorously promote its interests on the global stage, both

---

[185] Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, paras. 8.1–.33, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006).

[186] *See* HANRAHAN, *supra* note 178, at 6; *see also* Minutes of Meeting, WT/DSB/M/311, at 6–7 (Mar. 15, 2012) (discussing the continuing concerns of the United States regarding the EU's backlog of approvals of biotech product applications); *European Communities—Measures Affecting the Approval and Marketing of Biotech Products: Current Status*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last updated Feb. 24, 2010) (discussing the United States' request to "retaliate" against the EU for failing to comply with the judgment).

[187] *See generally* Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MARKET STUD. 235, 235 (2002) (arguing that the EU is a "normative power" in world politics). These concepts are further elaborated below. *See also infra* notes 188, 190–93, 196–200 and accompanying text.

[188] *See, e.g.*, Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1975–76, 2005–06 (2004).

unilaterally and multilaterally. In doing so, the EU acts like any great power with the desire to ensure that international norms reflect its preferences.[189]

Some scholars suggest that the EU's motivations are imperialistic—that the EU is, in fact, seeking to exert political and economic domination over other countries.[190] The EU does have significant leverage over countries that seek closer cooperation with, or eventually membership in, the EU.[191] But even outside of its immediate sphere of influence, critics maintain that the EU is engaged in a novel form of imperialism. Instead of pursuing its goals through military and political instruments, the EU has been accused of relying on economic and bureaucratic tools of dominion over countries that are dependent on access to its vast domestic market.[192] Lawrence A. Kogan, criticizing the EU's extensive regulatory reach in environmental and food safety matters, put it bluntly:

> [T]he EU has embarked upon an adventure in environmental cultural imperialism. This is a global practice reminiscent of an earlier European colonial era. And the fact that Europe is using "soft power" to enforce it will hardly make it more palatable to people who will be unable to feed themselves as a result.[193]

While critics claim that the EU is exporting its standards without the consent of other states, the EU counters that it is not engaged in coercion—it is simply enforcing the norms of the single market equally on domestic and foreign players and merely asking others to play by its rules when operating in its home market. Still, the EU's regulatory stance is not inconsistent with a desire to shape the global regulatory environment and

---

[189] *See* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 53 (2011) (arguing that most major international powers are exceptionalist in that they "seek to embody their values and interests in international law").

[190] *See, e.g.*, JAN ZIELONKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EUROPEAN UNION 9–22 (2006); Jan Zielonka, *Europe as a Global Actor: Empire by Example?*, 84 INT'L AFF. 471, 471, 475 n.17 (2008) [hereinafter Zielonka, *Empire by Example*]; *see also* KOGAN, *supra* note 132, at 98 (arguing that Europe's goal is to establish the precautionary principle not only as a regional standard but also "as an absolute global legal standard").

[191] *See* Laïdi, *supra* note 56, at 9–10; *see also* Zielonka, *Empire by Example*, *supra* note 190, at 476 (discussing how negotiations with candidate countries are highly asymmetrical and the countries are presented with two options: adopting the entire body of EU laws and regulations as a condition for membership, or not joining the club).

[192] *See, e.g.*, Editorial, *supra* note 3 (referring to the EU as "try[ing] to force the rest of the world . . . to play by its cumbersome rules" as well as "impos[ing] its regulatory vision on other jurisdictions by setting the toughest standards"); *see also* Editorial, *supra* note 86 (discussing EU antitrust enforcement and calling for "Washington to wake up to Europe's regulatory imperialism").

[193] Lawrence A. Kogan, *Exporting Europe's Protectionism*, NAT'L INT., Fall 2004, at 91, 99. The quoted passage relates to Kogan's discussion of the EU's GMO ban and the impact of that ban on developing countries in particular. *See also* Peter F. Drucker, *Trading Places*, NAT'L INT., Spring 2005, at 101 (arguing that one of the purposes of economic blocs—like the EU—is to export their regulations for protectionist purposes).

pursue global influence.[194] In its 2007 policy paper, *A Single Market for Citizens*, the European Commission envisioned the EU and its internal market to be standard-setters at the international level:

> [The EU] has spurred the development of rules and standards in areas such as product safety, the environment, securities and corporate governance which inspire global standard setting. It gives the EU the potential to shape global norms and to ensure that fair rules are applied to worldwide trade and investment. The single market of the future should be the launch pad of an ambitious global agenda.[195]

In describing its global role, the EU legitimizes its strategies by claiming that its values and policies are normatively desirable and universally applicable.[196] Seen in this light, the EU's externalization of its regulatory preferences reflects altruistic purposes of a benign hegemon. As a champion of norms that serve global welfare, the EU wants to create a

---

194 According to polls, 70% of Europeans want Europe to assume this role. *See* Benita Ferrero-Waldner, European Comm'r for External Relations & European Neighbourhood Pol'y, Speech at George Bush Presidential Library Foundation and Texas A&M University EU Center of Excellence: The European Union: A Global Power? (Sept. 25, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/530&format=PDF&aged=1&language=EN&guiLanguage=en; *see also* EUROPEAN COMM'N, TAKING EUROPE TO THE WORLD 59 (2004) (emphasizing as a significant achievement Europe's new and growing world influence); Alasdair R. Young & John Peterson, *The EU and the New Trade Politics*, *in* THE EUROPEAN UNION AND THE NEW TRADE POLITICS 1, 2 (John Peterson & Alasdair R. Young eds., 2007) ("[B]ecause its economy is important to other actors, the EU seeks to wield influence by making access to its large and valuable market conditional on domestic policy changes elsewhere . . . .").

195 *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Citizens*, at 7, COM (2007) 60 final (Feb. 21, 2007); *see also Reducing Emissions from the Aviation Sector*, EUR. COMM'N, http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (last updated Nov. 13, 2012) (noting that the EU Emissions Trading System is "a step towards global action to mitigate the climate impacts of aviation").

196 *See* TFEU art. 3(5) ("In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."); *see also* Ian Manners, *The Normative Ethics of the European Union*, 84 INT'L AFF. 45, 46 (2008) (arguing that the EU is indeed a normative power because it "promotes a series of normative principles that are generally acknowledged . . . to be universally applicable"); Jose Manuel Barroso, *Europe's Rising Global Role*, PROJECT SYNDICATE (Dec. 18, 2009), http://www.project-syndicate.org/commentary/europe-s-rising-global-role ("[I]t is often said that the EU's comparative advantage lies in its normative power or the power of its values. I think this is right. In the post-crisis world, when people are looking for new ways to ensure their well-being, peace, prosperity, the European experience has a great deal to offer the world."); Joseph Stiglitz, *The EU's Global Role*, GUARDIAN (Mar. 29, 2007, 11:00 AM), http://www.guardian.co.uk/commentisfree/2007/mar/29/theeusglobalmission ("Europe . . . must become one of the central pillars of [the] world by projecting what has come to be called 'soft power'—the power and influence of ideas and example. Indeed, Europe's success is due in part to its promotion of a set of values that, while quintessentially European, are at the same time global.").

rule-based world and offer an alternative to the more controversial and self-serving worldview advanced by the United States. A commitment to a social welfare state and a cautious attitude towards risk guides the EU's global agenda and steers it towards extensive regulation of the global economy—the protection of the environment, health care, precaution in the field of biotechnology, and various welfare rights. By emphasizing the universal benefits of its global regulatory agenda, the EU often succeeds in obscuring the de facto unilateralism that drives its implementation.

The EU's active role in the fight against climate change presents one example of regulation that is presumably driven by largely benevolent motives. Climate change is a global problem that requires a global response. The EU has a limited capacity to mitigate climate change alone if other states continue to emit greenhouse gases into the atmosphere. The EU has led efforts to conclude a new and more potent global climate change treaty.[197] Yet the difficulties associated with international treaty negotiations have given the EU the imperative to act unilaterally.[198] The EU's defense of its unilateral regulation is that it is acting in the collective interest to provide a global public good: mitigation of climate change.[199]

The EU also emphasizes the strong democratic backing for its regulatory stance. The European Commission has described the EU's commitment to further its social agenda as part of its trade policy as "forging collective preferences"—cultivating the idea that the EU is indeed concerned about the social effects of economic integration and justifying its measures against foreign entrants as legitimate policies reflecting social choices made collectively by Europeans.[200]

The EU's own experience in creating a common market reinforces the EU's pursuit of a global order based on predictable rules. In forming the EU, the member states retained their sovereignty. The only way to bind them to the common European enterprise was to have them adhere to common rules designed to create an internal market.[201] More regulation

---

[197] *See, e.g.*, Press Release, European Comm'n, The Copenhagen Climate Change Negotiations: EU Position and State of Play 1 (Nov. 9, 2009), *available at* http://europa.eu/rapid/press-release_MEMO-09-493_en.htm?locale=en.

[198] *See id.*

[199] *See Clean-Air Turbulence*, ECONOMIST, July 9–15, 2011, at 16; Editorial, *supra* note 3.

[200] Meunier & Nicolaïdis, *supra* note 49, at 921–22 (quoting Pascal Lemy, EU Trade Comm'r, Speech Before the Conference on "Collective Preferences and Global Governance: What Future for the Multilateral Trading System": The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation (Sept. 15, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/400&format=HTML&aged=0&language=EN&guiLanguage=en); *see also* Jürgen Habermas, *Why Europe Needs a Constitution*, *in* THE SHAPE OF THE NEW EUROPE 25 (Ralf Rogowski & Charles Turner eds., 2006) (arguing that social regulation is part of the European tradition). This is often referred to as an "embedded liberalism" compromise. *See* John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 392–99 (1982).

[201] *See* Laïdi, *supra* note 56, at 4.

meant more predictability and stability. This has fostered a belief that an extensive regulatory system is needed to preserve global public goods. The EU takes the view that trade liberalization without simultaneous harmonization of policies fails. This, for the EU, offers the most efficient and universally valid model of economic and political integration.[202]

Yet even if the EU were able to portray itself as a benevolent, normative power that is advancing universal norms,[203] skeptics point out that the notion of a normative power has neo-colonial undertones as the EU is exporting its "standards of civilization."[204] In the end, any entity that is willing to shape the international order—whether for self-serving or more altruistic motives—must do so with the means available to it. In the case of the EU, regulatory power is all it has. Lacking traditional means of power, the EU's greatest global influence is accomplished through the norms that it has the competence to promulgate. In the absence of military power or unconstrained economic power, the EU can exercise genuine unilateral power only by fixing the standards of behavior for the rest of the world.[205]

B. *Internal Motivations*

For those skeptical of the EU's benevolent motives, the EU is simply seeking to level the playing field by exporting its costly regulations abroad under the guise of concern for consumer and environmental health and safety.[206] According to the Czech president Vàclav Klaus, "[t]he claims for quasi-universal social rights are disguised attempts to protect high-cost producers in highly regulated countries, with unsustainable welfare standards, against cheaper labor in less productive countries."[207]

A concern for EU corporations' competitiveness offers a compelling explanation for the EU's global regulatory agenda.[208] Europe is committed

---

[202] *See* Zielonka, *Empire by Example*, *supra* note 190, at 475.

[203] *See, e.g.*, MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY (2005); Manners, *supra* note 187, at 235–58; Karen E. Smith, *Still 'Civilian Power EU?'* 13–14 (European Foreign Policy Unit, Working Paper No. 2005/1, 2005) (discussing whether EU projections of soft power constitute global "good international citizenship").

[204] *E.g.*, Kalypso Nicolaïdis & Robert Howse, *'This is my EUtopia . . .': Narrative as Power*, 40 J. COMMON MARKET STUD. 767, 789 (2002); *see also* Thomas Diez, *Europe's Others and the Return of Geopolitics*, 17 CAMBRIDGE REV. INT'L AFF. 319, 325, 330–35 (2004) (arguing that European integration—and norm exportation—is an essential part of the process of constructing a new European identity in opposition both to foreign nations like the United States and its own past).

[205] *See* Laïdi *supra* note 56, at 5 ("For Europe knows that it is only by norms and not by force that it can make its voice heard.").

[206] *See* KOGAN, *supra* note 132, at 3–4, 101–02.

[207] VÁCLAV KLAUS, RENAISSANCE: THE REBIRTH OF LIBERTY IN THE HEART OF EUROPE 16 (1997).

[208] *See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A Strategic Vision for European Standards: Moving Forward to Enhance and Accelerate the Sustainable Growth of the European Economy by 2020*, at 2–3, COM (2011) 311 final (June 1, 2011) ("It is especially vital that in areas where Europe is the driving innovation force in developing new types of tradable goods, services and technologies . . . that the

to the welfare state and the sustainability of its economic policies. Yet the failure to export its standards to others would put European firms at a competitive disadvantage.[209] By acting as a global regulator, the EU can defend its social preferences without compromising the competitiveness of its industries. The worry about EU airlines' competitiveness was explicitly included as a rationale to include foreign airlines into the EU's emissions trading scheme.[210] If foreign companies adhere to EU norms on the European market, the import-competing industries are assured a level playing field. If the EU's norms further spread to third countries, the EU can ensure that its export-oriented firms are not disadvantaged in those markets. This account of the EU's motivations is particularly persuasive when one focuses on the private interests as drivers of the EU's regulatory policies and assumes that regulators are responsive to these interests.

In fact, the Brussels Effect can be seen as a way to level the playing field at two levels. First, a group of individual EU member states advocates EU-level legislation to ensure that their higher domestic standard does not prevent them from competing with corporations subject to lower standards in other EU member states. For instance, Germany, the Netherlands, and the Nordic countries were the pioneers of the EU's environmental regulation.[211] Similarly, regulators in France and Germany were some of the key member states who exported their privacy regulation upward within the EU.[212] These countries leveraged their regulations at the EU level by calling for harmonized, community-wide standards. Thus, the regulatory preferences of a small number of EU member states first become entrenched in EU legislation, after which the Brussels Effect can transmit them to third countries.

The push for externalization of EU standards is also reinforced by a peculiar constellation of domestic politics, whereby environmentalists or consumer advocates and corporations join forces in lobbying for the globalization of EU standards. While often in disagreement, both environmentalists and corporate interests benefit from the EU imposing its standards on foreign firms. Environmentalists gain broader adherence to norms that they support—many of which have an inherently global

creation of the European standard be carried out rapidly with the aim of asserting it as an international standard. This would maximise first mover advantage and increase the competitiveness of European industry.").

[209] *See, e.g.*, Emma Tucker, *Plastic Toy Quandary that EU Cannot Duck*, FIN. TIMES, Dec. 9, 1998, at 3 (discussing the Commission's attempt to reconcile its two central functions—demands for consumer protection and competitiveness of European industry).

[210] *See, e.g.*, Rahim, *supra* note 164 (quoting the Commission's spokesman, Isaac Valero-Ladron, defending the EU's inclusion of foreign airlines in the EU's ETS scheme: "We can't impose a burden only to European airlines and not include others . . . . It would be distortion of competition.").

[211] *See* Selin & VanDeever, *supra* note 138, at 10–11 (discussing this phenomenon inside the EU in connection with environmental regulation).

[212] NEWMAN, *supra* note 174, at 11.

character. At the same time, EU corporations gain a level playing field whereby foreign firms do not gain a competitive advantage at their expense.[213] One example of such an alliance was a coalition between EU corporations and environmental groups regarding the EU's Eco-Management and Auditing Scheme (EMAS), which regulates public disclosure of corporations' environmental improvement record.[214] Already subject to the disclosure obligations, the EU corporations teamed up with environmental NGOs to lobby for the adoption of the same standards by U.S. and Asian corporations. In the end, the campaign was successful and the European standards were converted into global standards by the International Organization for Standardization (ISO).[215] Thus, the EU has a particularly powerful incentive to act externally when the moral and economic imperatives of the community coincide—when it enjoys political rents from EU industry and the consumer and environmental advocates at the same time.[216]

It seems evident that the EU is concerned about its corporations' competitiveness and eager to respond to strong domestic pressures calling for the globalization of its standards. Yet the EU's external influence can also be viewed as an accidental byproduct of its internal motivations. The supranational regulatory apparatus was created to establish and oversee an integrated, liberalized, and competitive market in Europe. This institutional capacity was a response to internal challenges driven by a political agenda that was inward-looking.[217] Inconsistent domestic regulations were seen to threaten the single market, prompting the need for harmonization. The importance of preserving the single market has also driven various regulations that do not directly serve the goals of economic integration. For instance, the EU's expanded regulatory authority in consumer and environmental matters was created to reassure the European public that economic integration would not be pursued at the expense of consumer and environmental protection. Rather than aiming to provide global environmental standards, the EU was thus concerned with the legitimacy of

---

213 *Cf.* ELIZABETH R. DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY 39–47 (2000) (discussing how in the context of environmental regulation in the United States, aligned interests of industry and environmental interest groups were responsible for internationalization of various regulations).

214 *See* Regulation (EC) 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the Voluntary Participation by Organisations in a Community Eco-Management and Audit Scheme (EMAS), art. 1, 2009 O.J. (L 342) 1; Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, *in* THE POLITICS OF GLOBAL REGULATION 1, 35 (Walter Mattli & Ngaire Woods eds., 2009).

215 *See* Mattli & Woods, *supra* note 214.

216 *See* VOGEL, *supra* note 18, at 67.

217 *See, e.g.*, Shaffer, *supra* note 96, at 10–13 (discussing the link between the EU Data Protection Directive and EU trade liberalization).

the single market program.[218] Acknowledging the primacy of these internal motivations also suggests that the EU's external influence is not compromised during times when it is turned inwards—the external power flows directly from the EU's pursuit of its internal goals.

While the primary objective of European regulatory activity has been to create and guard the single market, this activity has had the ancillary effect of establishing the EU as a global regulatory hegemon. This external dimension of the single market was only fully realized when the EU's trading partners expressed concerns that the single market might impose costs on third countries.[219] Of course, the EU—in particular its institutions representing the Community interest on the world stage—benefits from such "incidental externalities" that follow from the EU's pursuit of the Community's internal regulatory agenda. These actors likely welcome the EU's newfound external regulatory power, however unintended its origin. It is also plausible that the EU's internal goals are gradually giving way to a more multifaceted set of goals—both internal and external—that the EU pursues in setting its regulatory policy today. Still, it is the internal goals relating to the need to harmonize regulations within the EU that provide the most powerful explanation for the origins of, and the motivations for, the Brussels Effect.

Finally, the EU's external regulatory power can be as much a reflection of the bureaucratic interests of the European Commission as it is the economic interests of Europe as a whole. The European Commission is the executive arm of the EU. Through extensive use of its regulatory powers, the Commission compensates for the lack of power it otherwise has in external affairs. The Commission's legal competence to act on its member states' behalf in foreign policy or security-related matters is limited and subject to unanimity among the member states.[220] On issues relating to the single market, the EU's legal authority is at its broadest. For instance, imposing economic sanctions requires a unanimous decision in the European Council, which subjects such a decision to a veto by any of the twenty-seven member states.[221] In contrast, the Commission has been delegated the power to take all measures necessary to create and maintain the single market.[222]

---

[218] *See* VOGEL, *supra* note 59, at 237.

[219] *See* Sieglinde Gstöhl, *Political Dimensions of an Externalization of the EU's Internal Market* 4–5 (Dep't of EU Int'l Relations & Diplomacy Studies, EU Diplomacy Papers No. 3/2007, 2007), *available at* http://aei.pitt.edu/9593/1/EDP_3-2007_Gst%C3%B6hl.pdf.

[220] TFEU arts. 23–25.

[221] *See id.*

[222] *See id.* art. 3(3) (discussing the objectives of the EU: "The Union shall establish an internal market."); *see also* Single European Act, *supra* note 52 (delegating substantial powers to the Commission to ensure its ability to complete the single market).

Expanding the Commission's regulatory authority also involves low costs. Regulations are not constrained by budgetary appropriations and are hence not dependent on the tax revenues available to the Community institutions. This is significant given that the EU's budget amounts to only around 1% of the GDP of the EU.[223] This gives the Commission limited options to pursue policies that involve direct budgetary expenditures. The EU does not have the funds to provide significant public goods or services or finance a large-scale industrial or innovation policy at the Community level. Thus, the only way for the Commission to exert influence without extensive financial resources is to engage in regulatory activity. The cost of complying with these regulations is primarily borne by firms and individuals as targets of the EU regulations. And the costs involved in implementing and enforcing regulations often fall on the governments of the individual member states. Historically, vesting the Commission with so much regulatory power might have been unintentional: the EU member states wanted to restrict the powers of the Commission through tight budgetary discipline. Yet in the absence of traditional powers of states to tax and spend (not to mention wage a war), the Commission has built an empire of laws and regulations.[224]

IV. MARKET-DRIVEN VERSUS POLITICAL HARMONIZATION

The above discussion has focused on the conditions under which the Brussels Effect generates global standards and the factors that cause the EU to externalize its regulations through this process. However, unilateralism is not the exclusive path for global standards. There are different paths to regulatory convergence, all of which operate in parallel. International institutions and standard-setting organizations as well as transgovernmental standard-setting bodies play a prominent role in promulgating global standards.[225] In addition, individual firms (or consortia of firms within an industry) may become sources of global standards.[226] Similarly, the Brussels

[223] *Budget: Investing in our Future*, EUR. COMM'N, http://europa.eu/pol/financ/index_en.htm (last updated May 16, 2012); *Myths and Facts: EU Budget Myths*, EUR. COMM'N, http://ec.europa.eu/budget/explained/myths/myths_en.cfm#1of15 (last updated Apr. 18, 2012). This can be contrasted to the U.S. federal government spending, which regularly exceeds 20% of the GDP. *See* OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2013 HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT 9 (2010).

[224] *See* Majone, *supra* note 50, at 85, 98.

[225] *See* Tim Büthe & Walter Mattli, *International Standards and Standard-Setting Bodies, in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 440, 448–63 (David Coen et al. eds., 2010). The EU has no direct role in, for instance, the International Organization for Standardization (ISO), but European firms have been more successful than U.S. firms in influencing ISO standards due to better institutional complementarities between standardization systems at the national level in the EU and at the international level. *See* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 162 (2011) [hereinafter BÜTHE & MATTLI, THE NEW GLOBAL RULERS].

[226] For example, Microsoft established the Windows operating system as a global de facto standard. Another example is the Blu-ray optical disc format developed by a consortia consisting of Sony, Philips,

Effect is not the sole manifestation of the EU's global regulatory influence. The EU also exports its standards through bilateral agreements—most glaringly, though accession agreements and partnership treaties.[227] At times, EU rules diffuse more informally and lead to legislative borrowing through various benchmarking mechanisms.[228]

This Part compares and contrasts two identifiable avenues for regulatory globalization: political harmonization and market-driven harmonization. Via political harmonization, the EU pursues regulatory convergence through treaties and institutions. Via market-driven harmonization, the EU relies on the unilateral Brussels Effect to spread its norms. This Part argues that unilateral, market-driven harmonization has distinct advantages over political harmonization for the EU. It then seeks to explain why, despite these unambiguous advantages, the EU continues to embrace multilateralism and pursue political harmonization in some instances.

A. The Relative Advantages of Unilateralism

Market-driven harmonization has a distinct advantage over political harmonization: it entails low contracting costs and limited enforcement costs. In relying on unilateral measures, the EU is not forced to seek the consent of other states. Unilateralism avoids the need to overcome collective action problems or the need to extend costly transfer payments or undertake costly coercive measures towards countries reluctant to join a treaty or an institution. The EU can also forgo the uncertainties associated with the ratification of treaties by foreign legislators. The EU's recent unsuccessful efforts to further the WTO's Doha Round negotiations and the UN-led process to negotiate a new global climate change treaty reveal the difficulties associated with multilateral cooperation.[229] These processes have

---

and Panasonic. The Blu-ray format overtook the HD-DVD format and became a global standard after a number of market participants—including computer manufacturers, retailers, and movie studios—switched to the Blu-ray standard. *See* BÜTHE & MATTLI, THE NEW GLOBAL RULERS, *supra* note 225, at 27–28.

[227] *See Communication from the Commission to the Council and the European Parliament: Wider Europe—Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours*, at 5, COM (2003) 104 final (Mar. 11, 2003) ("The incentive for reform created by the prospect of membership [is] strong—enlargement has unarguably been the Union's most successful foreign policy instrument.").

[228] On theories that highlight the central role of experimentalism, benchmarking, and legislative borrowing in shaping the global regulatory environment, see, for example, Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008). For an example of how adoption of a high regulation in the EU can help build political pressure for regulatory reform in the United States, see Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678, 685–86 (2011), discussing how a key argument for the passage of maternity leave in the United States was that Europe and Japan already offered this benefit.

[229] Literature and commentary on the failure of these negotiations are legion. *See, e.g.*, Damian Carrington et al., *Global Deal on Climate Change in 2010 'All But Impossible,'* GUARDIAN (Jan. 31,

required extensive political capital and diplomatic efforts and yielded few results. Instead of engaging in burdensome diplomacy to endorse its standards, market-driven harmonization allows the EU to outsource the lobbying to foreign firms who often become advocates for higher standards in their own home markets after having incurred compliance costs in the EU.

The EU's unilateral regulatory agenda is more easily implemented as it requires the cooperation of foreign corporations willing to trade in its market rather than cooperation by foreign sovereigns. A contrast can be drawn to the efforts of the SEC and the U.S. State Department to enforce U.S. rules on insider trading. These efforts were complicated by the reluctance of foreign countries, particularly Switzerland, to cooperate with the United States due to their domestic laws on bank secrecy. The United States has had to spend extensive political capital to persuade Swiss authorities to cooperate. This was considered worth the effort given that Swiss banks hold approximately half of the world's private assets.[230] The United States' ability to curtail domestic insider trading would have been compromised had it not secured a change in the domestic rules of a foreign country. Merely incentivizing foreign corporations operating in the United States to cooperate was not sufficient to meet this goal.

Political harmonization is particularly difficult if states do not agree on the benefits of global standards. But multilateral standard-setting is difficult even if most states agree on the desirability of uniform standards. States often have different views on the optimal standard to which they should converge. Different points of convergence entail different distributional consequences, making some states prefer one standard over another.[231] Unilateral regulatory globalization solves such coordination problems: the most stringent rule becomes the focal point of convergence. A mutual understanding that the EU can retain its standards at no cost provides a predictable and stable equilibrium.

Perhaps most importantly, market-driven harmonization provides the most efficient form of regulatory globalization because the EU can rely on its existing domestic institutions to enforce its regulations. Treaties are distinctly difficult and expensive to enforce. When a strict global standard is a product of an international treaty, there is no guarantee that the treaty will be implemented and enforced. The treaty on the world's marine fisheries is one of the many examples of negotiated global standards that

---

2012), http://www.guardian.co.uk/environment/2010/feb/01/climate-change-deal-impossible-2010; Megan Dee, *Tackling the EU's Emerging Irrelevance in the Doha Round*, IDEAS ON EUR. (Apr. 12, 2012), http://ecfr.ideasoneurope.eu/2012/04/12/tackling-the-eus-emerging-irrelevance-in-the-doha-round/.

[230] *See* Macey, *supra* note 29, at 1367–69.

[231] *See* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 413–22 (2007).

fail to accomplish their goals: the treaty has not been successful in addressing the problem of overfishing and propelling sustainable management of fishing stocks.[232] And this is not an anomaly in the world of global standards embedded in difficult-to-enforce treaties. Indeed, some commentators have noted that treaties producing "effectively enforced international standards are the exception rather than the rule."[233]

B. Reasons for Persisting Multilateralism

The EU has not abandoned multilateralism in favor of unilateralism in all instances. The EU's persisting, if selective, reliance on multilateral rules and institutions may be surprising given the many benefits embedded in unilateral globalization. Yet there are certain instances where market-driven harmonization is not enough, prompting the EU to seek affirmative adoption of regulation by foreign regulators. When above-discussed conditions for unilateral harmonization are not present, no Brussels Effect takes place—whether de jure or de facto. In these situations, multilateralism is often the only path to regulatory globalization.

The theory underlying the Brussels Effect offers further predictions on when the EU is likely to pursue political harmonization. The EU would be expected to seek political harmonization in situations where it cares about international standards and where the Brussels Effect fails to reach EU corporations' important export markets. In the absence of a level playing field, the EU's export-oriented firms may have difficulties penetrating these markets. Thus, when the EU is a net exporter as opposed to a net importer of a certain product, the EU is expected to care more about the standard of the export market than that of its home market. Further, it is precisely then that the Brussels Effect is least likely to automatically ratchet the standard up, since net importer countries have a smaller presence in the EU. The EU is therefore likely to expend diplomatic efforts to negotiate multilateral standards in areas where it is a net exporter and rely on markets in areas where it is a net importer.

The EU may also be motivated to encourage third countries to adopt certain standards if its internal regulatory objectives would be compromised by more lenient standards elsewhere. This is true when actions of other countries produce negative externalities that adversely impact Europe, such as when China's failure to limit its greenhouse gas (GHG) emissions directly compromises the EU's efforts to halt climate change.[234] Another example would be the EU's efforts to convince other countries to adopt

---

[232] *See* Christopher J. Carr & Harry N. Scheiber, *Dealing With a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 53, 62, 76–79 (2002).

[233] *See* Vogel & Kagan, *supra* note 15, at 23.

[234] *See, e.g.*, *A Large Black Cloud: Rapid Growth Is Exacting a Heavy Environmental Price*, ECONOMIST, Mar. 15, 2008, at 13, 17.

tough domestic antitrust laws.[235] The deterrent effect of the EU's antitrust laws can be compromised if members of a cartel are able to offset high EU fines by reaping supracompetitive profits in markets that fail to control their collusive practices.[236] Foreign standards may also reinforce the desired effect of EU standards. For example, when standards are characterized by network effects, the benefits relative to the costs of adopting a standard increase when several countries have the same standard.[237]

The EU may also seek to encourage third countries to adopt its standards in cases where it is acting out of a moral imperative. If the EU is motivated by a moral quest to change behavior globally—e.g., promote human rights—unilateral globalization is rarely sufficient. This is particularly likely when the issue is salient to influential domestic political groups that seek to export an ideology or moral convictions and when they care about establishing standards for universal conduct.[238]

Finally, at times the EU may pursue political harmonization even when market-driven harmonization is taking place. This may reflect willingness to "lock-in" certain EU standards by institutionalizing them.[239] This can be a shrewd way to preempt a future state of the world where market access will be a less effective tool for the EU to exert influence. The EU is also often successful in incorporating its standards into international organizations, making the benefits of unilateralism over multilateralism less stark. Being a construction of intergovernmental cooperation itself, the EU has extensive experience in promulgating rules that lend themselves to adoption by heterogeneous states. The EU is also skillful in using its institutional structure—being a hybrid between state and a federation—to its advantage. In international negotiations, it can leverage the negotiating power of twenty-seven countries while also using the same number strategically as a

---

[235] Bradford, *supra* note 231, at 408.

[236] The EU is not the lone aggressive regulator of cartels. The United States takes an equally tough stand vis-à-vis collusive practices of firms, more than the EU does. Indeed, the United States has more invasive investigatory tools and remedies at its disposal than the EU does, due to more extensive discovery rules in the United States and U.S. authorities' ability to pursue criminal penalties. Third countries' agencies can often free ride on U.S. and EU authorities' investigations. Yet both agencies can see their laws' deterrent effect diluted if cartels can freely operate in third markets. *See, e.g.*, F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 169 (2004).

[237] *See* Vogel & Kagan, *supra* note 15, at 13. However, these standards are not more likely to spread unless the main economic activity is taking place on export markets.

[238] *See* Macey, *supra* note 29, at 1369.

[239] The European Commission has stated that "[t]he EU aims at global standard setting by promoting the adoption overseas of standards and regulatory approaches based on, or compatible with, international and European practices." Gstöhl, *supra* note 219, at 19 (emphasis and internal quotation marks omitted) (quoting *Commission Staff Working Paper: Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: A Tool Box of Instruments*, at 8, SEC (2001) 1570 final (Sept. 28, 2001)); *see Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Citizens*, COM (2007) 60 final (Feb. 21, 2007).

constraint when portraying itself as an agent whose hands are tied and who can therefore only sign onto a set of policies that pass the various domestic veto points.[240]

Market-driven and political harmonization can also take place in sequence. The EU is better able to institutionalize its standard if a limited Brussels Effect has already taken place: a set of countries exporting into the EU already follow the EU standard, whether de jure or de facto. The EU may seek to reinforce this trend by requiring its standards to be adopted as a condition for closer economic and political relationships with the EU, increasing its sphere of influence within its neighborhood. These developments allow the EU to reach a critical mass that tips the balance in Europe's favor in any international efforts to reach an agreement on harmonization of certain regulations.[241]

V. LIMITS OF THE BRUSSELS EFFECT

The Brussels Effect is not unlimited. A number of external and internal constraints impose boundaries on the EU's ability to leverage its market size and foist its regulatory preferences on other states and market participants. This Part discusses the relative ability of markets, the EU's trading partners, and international institutions to constrain the "Europeanization" of global economic activity. It concludes that these forces and actors have a limited ability to temper the EU's regulatory agenda. Instead, the most powerful constraints come from within the EU itself.

A. External Constraints

1. Markets.—Conventionally, we think that markets are able to punish inefficiently stringent regulators. An economic theory of regulatory competition among jurisdictions would suggest that if the EU's regulatory standards are too high, it would lose business and foreign investment to jurisdictions with more attractive regulatory environments. But this assumption is based on the premise that the targets of the regulation are mobile. When a state regulates targets that are inelastic—as is the case in the EU's regulation of consumer markets—markets have a limited ability to punish for any regulatory excesses. Consumers are likely to stay in Europe and businesses have the choice of either providing them with goods

---

240 *See* Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L L. 1307, 1324–27 (2008).

241 In a similar vein, Wirth argues that de facto convergence of regulations and business practices increases the likelihood of regulatory consensus and thus paves the way for international harmonization. Wirth, *supra* note 36, at 106; *see also* Bradford, *supra* note 231, at 439 (arguing that increased convergence may pave the way for an international antitrust agreement, but also noting the declining net benefits of such an agreement after de facto harmonization has taken place).

conforming to EU standards or forgoing the entire market. They rarely opt for the latter.

However, over time, the EU's regulatory clout may begin to erode as the emerging markets increase in the size and affluence of their consumer base. Today, corporations are rarely able to carve out the EU as a market for their products and services and divert trade elsewhere. But as demand in places like China grows, businesses' dependence on their access to the EU market is diminishing.[242] It is difficult to imagine a future state of the world where genuinely multinational companies like GE would choose to forgo trade in Europe and thus avoid clearing their transactions and conduct with the EU's antitrust authorities. But the opportunities for trading elsewhere will increase, reducing the opportunity costs of forgoing the European market, at least with respect to some products and activities. China will increasingly be in a position to offer an alternative destination for various goods if European standards make it too costly for businesses to trade there.

Still, the growing might of Chinese consumers is an imperfect threat, at best, to the near-term ability of the EU to continue on its chosen path. It will be a while before China could replace the EU as a source of de facto global standards. China's regulatory capacity and the willingness to elevate the protection of consumers and the environment over the pursuit of growth are not growing with the speed of its economy. While China has banned a few high-profile global mergers,[243] it has by no means overtaken the European Commission as the most ardent guardian of competitive markets. And while China may soon be the largest consumer market, GDP per capita is a better prediction of a country's regulatory propensity than is overall GDP.[244] Affluence and social regulation are often correlated, suggesting that domestic demand for high levels of regulation is likely to be weak for some time to come.[245] By the time China might be able to overtake the EU, the EU might already have entrenched its norms in other jurisdictions and institutions by changing the way business is conducted in a lasting way.

2. *Other States.*—Other states, including the United States, have an incentive to constrain the EU. EU policies impose adjustment costs on U.S. corporations.[246] U.S. consumers also end up paying more for goods when

---

[242] *See* Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050* (Goldman Sachs, Global Econ., Paper No. 99, 2003), *available at* http://www.goldmansachs.com/our-thinking/brics/brics-reports-pdfs/brics-dream.pdf (predicting rapid growth in emerging economies in the coming decades).

[243] For example, Chinese officials rejected Coca-Cola's attempted acquisition of Huiyuan Juice Group for $2.4 billion. *See* Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477, 480–81 (2009).

[244] *See* Vogel & Kagan, *supra* note 15, at 9.

[245] *Id.* at 6.

[246] Of course, it is plausible that some corporations benefit from their adherence to strict EU standards. Compliance with EU rules may be a way to signal high product quality or commitment to high standards of consumer protection.

producers are forced to accommodate concerns that U.S. consumers do not necessarily share. The United States frequently views the EU's regulatory policies as inefficient and detrimental to its welfare—in addition to being countermajoritarian and thus undemocratic. Prompted by the American chemicals industry, the U.S. government engaged in extensive efforts to block or substantially alter the REACH regulation.[247] U.S. reaction to the EU's interventionist antitrust laws has been equally hostile.[248] And the recent plan to subject foreign airlines to the EU's ETS system has been vehemently opposed by U.S. airlines and the U.S. government, as well as other foreign governments.[249]

But there is very little that the United States can do to stop the EU from regulating its domestic market. In this sense, the Brussels Effect differs starkly from the California Effect. California cannot promulgate regulations that are inconsistent with the federal laws in the United States absent an explicit waiver from the U.S. federal government. But there is nothing akin to a doctrine of preemption that constrains the EU's regulatory powers.[250] When U.S. producers are forced to either comply with higher standards or be shut out of the EU market, the United States has four ways to respond: (1) choose voluntarily to converge to the EU standard; (2) try to compel the EU to change its rules, such as by resorting to diplomacy, suing the EU in the WTO, or offering the EU some rewards or threatening the EU with sanctions; (3) seek a cooperative solution, such as by pursuing an international standard that reflects some combination of U.S. and EU preferences; or, finally, (4) choose to do nothing.[251]

The most controversial strategy for the United States or any other foreign government would be to threaten the EU with sanctions. The EU's decision to include foreign airlines into its ETS scheme, for example, has

---

[247] *See* H.R. COMM. ON GOVERNMENT REFORM, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., A SPECIAL INTEREST CASE STUDY: THE CHEMICAL INDUSTRY, THE BUSH ADMINISTRATION, AND EUROPEAN EFFORTS TO REGULATE CHEMICALS (2004), *available at* http://oversight-archive.waxman.house.gov/documents/20040817125807-75305.pdf.

[248] *See* Matt Murray et al., *Oceans Apart: As Honeywell Deal Goes Awry for GE, Fallout May Be Global*, WALL ST. J., June 15, 2001, at A1 (discussing how the result of the GE/Honeywell agreement might chill merger activity among other US multinationals interested in expanding globally).

[249] See the E.C.J. case discussed by Murray et al., *supra* note 248; see also Joshua Chaffin & Andrew Parker, *Blow to US Airlines in the Emissions Fight*, FT.COM (Oct. 6, 2011, 1:21 PM), http://www.ft.com/cms/s/0/36556726-f005-11e0-bc9d-00144feab49a.html#axzz2BZQvmThR. The article mentions that twenty-one countries have opposed the inclusion of non-EU airlines into the EU's ETS scheme, how there have been several threats of retaliation, and how China has threatened to cancel a contract for ten planes made by European manufacturer Airbus. India has similarly threatened with retaliation.

[250] For instance, the Bush Administration preempted California's regulations on GHG emissions. *See* 42 U.S.C. § 7543(a) (2006). The EPA also denied California's first application for a preemption waiver. *See* Letter from Stephen L. Johnson, Adm'r, EPA, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epa-letter.pdf.

[251] *See* Young, *supra* note 44, at 458–59.

provoked threats that foreign carriers may forgo European Airbus planes in favor of competing U.S.-based Boeing planes.[252] However, the prospect of a trade war is often too costly for the countries themselves to pursue as a strategy. In many instances, the proposed trade sanctions would also be inconsistent with the countries' obligations under the WTO. In past U.S.–EU antitrust enforcement conflicts, for instance, the United States threatened the EU with trade sanctions unless the EU backed down.[253] Yet notwithstanding the escalated rhetoric of retaliation, the antitrust controversies led the U.S. government to concede that "[w]e have no power to change EU law."[254]

A further challenge for the United States is that it often gains nothing by defending its standard even if that standard was more efficient. As a less stringent regulator, the United States simply becomes obsolete in the fields where the de facto Brussels Effect takes place.[255] But the United States is unlikely to adopt the EU standard as a regular course of action, either. If we assume that the existing domestic regulation in the United States is efficient in the sense that it maximizes national welfare and reflects domestic political equilibrium, any deviation from that standard entails costs. Firms need to reorganize their production processes or practices in order to comply with another standard.[256] Governments incur costs relating to legislating and retraining its regulators.[257] And most importantly, the United States must forgo the efficiencies that its preferred regulation would generate. When holding onto its own domestic standards, the United States can at least ensure that its standard governs the activity that is domestic in nature. And given how large the U.S. market is, this often provides an adequate incentive to stick to its preferred regulation domestically absent overwhelming lobbying by domestic export-oriented industries to the contrary.

The United States may also find that even in the absence of its ability to defend its corporations from the EU's standards, its vocal criticism of those standards leads the EU to critically evaluate and revise some of its

[252] Daniel Michaels, *Chinese Envoy Urges Airlines to Shun Buying Airbus Planes*, WALL ST. J. EUR., Mar. 12, 2012, at 21. However, the EU insists it will not back down. *See* Joshua Chaffin, *EU Defies Carbon Trade War Threats*, FT.COM (Mar. 20, 2012, 8:00 PM), http://www.ft.com/intl/cms/s/0/10aebc46-72b6-11e1-ae73-00144feab49a.html#axzz263rsQIP5.

[253] *See, e.g.*, Brian Coleman, *U.S. May Retaliate if EU Rejects Boeing Merger*, WALL ST. J., July 18, 1997, at A2 (reporting that President Clinton threatened the EU with unilateral trade sanctions or a WTO challenge if the EU were to block the deal).

[254] Majoras, *supra* note 78, at 14.

[255] At times, the United States may therefore concede and adopt the EU standard, in particular if it faces domestic demand to do so following any lobbying activity by its own export-oriented companies that are already subject to EU rules and that therefore seek to level the playing field domestically.

[256] *See* Drezner, *supra* note 23, at 845.

[257] *See id.*

regulations. The United States' persistent and strongly voiced criticism[258] of the banned GE/Honeywell transaction led the EU to pursue more sophisticated economic analyses in its future merger investigations. Few in the United States believe that the uncertain prospect of fostering changes through such "feedback effects" that may (or may not) influence some areas of the EU's policy constitutes a satisfactory response to the loss of the U.S.'s regulatory autonomy. Yet the alternative options are limited.

The somewhat surprising outcome is that the EU's increasing regulatory clout and its impact on U.S. businesses may lead the United States to support greater oversight by international institutions. Though often skeptical of international institutions' ability to regulate the markets, the United States may come to see international cooperation as an opportunity to play a shared, rather than obsolete, role in the regulation of global commerce. This might resemble the idea of "preemptive federalism," whereby the United States may seek international regulation as a means to prevent the Brussels Effect. Having some influence over regulatory standards is better than ceding influence to the EU altogether.[259] But this, of course, requires that the EU be prepared to forgo unilateralism for multilateralism, enhancing the EU's bargaining power in any such negotiations.

At the same time, foreign states' responses are complicated by the fact that some foreign stakeholders welcome the EU's extensive regulatory activity. For instance, the intensity of U.S. corporations' opposition to EU rules likely depends on whether they are large, export-oriented producers or small, non-export-oriented producers.[260] If an export-oriented U.S. firm is forced to adjust its global production to the (presumably more costly) EU standard, the non-export-oriented U.S. firm gains a competitive advantage in the firms' home market (the only market in which the non-exporting firm operates). The small non-exporting firm thus welcomes the de facto Brussels Effect. However, these firms' interests are reversed with respect to a possible de jure Brussels Effect. An export-oriented U.S. firm often has the incentive to advocate the EU standard in its home market after having already adjusted to the EU standard. It benefits from leveling the playing field in its home market at no additional cost to itself. In contrast, a non-export-oriented U.S. firm is likely to resist the de jure Brussels Effect as it

---

258 *See, e.g.*, Majoras, *supra* note 78.

259 *See* Macey, *supra* note 29, at 1359; Majoras, *supra* note 78, at 15 (after criticizing the GE/Honeywell decision, proposing to pursue greater international cooperation to avoid inconsistent decisions in the future); *see also* Rahim, *supra* note 164 (discussing how the Air Transport Association of America (ATA) is urging global climate action in the wake of the EU's decision to include foreign airlines into its ETS). The ATA endorses a nonbinding international emissions agreement within the UN's International Civil Aviation Organization.

260 *See, e.g.*, HELEN V. MILNER, RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE (1988) (discussing the divergent interests of exporting and non-exporting firms).

benefits from retaining its competitive advantage over the firm conforming to the EU standard. Thus, the relative influence of export-oriented and non-export-oriented firms will impact the United States' response to the Brussels Effect.

Some progressive states in the United States endorse the EU's leadership, voluntarily choosing to incorporate EU regulations into their own state laws.[261] Some developing country governments similarly welcome the Brussels Effect. The Brussels Effect presents developing countries with an opportunity to outsource their regulatory pursuits to a more resourceful agency. Developing country antitrust agencies often free ride on the EU's antitrust investigations, benefiting from the global effects of the EU's decision to ban anticompetitive mergers or force firms to amend their conduct and products globally. The countries with the desire, but limited resources, to provide safer products for their consumers benefit from the EU imposing strict standards that affect production patterns globally. U.S. consumers who prefer higher levels of consumer protection and a civil society that advocates environmental protection often seize on EU policies and use them in their attempts to forge change in the United States.[262] These groups welcome the EU's unilateralism, hailing the EU as the benevolent provider of global public goods in situations where their own countries or multilateral cooperation mechanisms fail to provide them.

Multinational U.S. corporations can also have a mixed reaction to EU regulation. When trading across the common market, they benefit from facing a single EU standard instead of twenty-seven different national standards, even if that standard is higher than the average standard before the upward harmonization took place in the EU. This way, EU regulations can be seen as coordination devices that reduce complexity and enhance predictability. U.S. corporations can also seize business opportunities in third markets in situations where the EU bans certain products or production methods domestically, but where there is still demand for those products in third markets. In these markets where the Brussels Effect has failed to take hold, U.S. producers are likely to face less competition from EU producers.

---

[261] For California, REACH can be described as having been "both a catalyst and a resource for regulatory reform." Scott, *supra* note 122, at 898; *see also* Pohl, *supra* note 150 (arriving at the same conclusion).

[262] *See* Young, *supra* note 44, at 474. For instance, while the EU rules on GMO-derived food have not led to a regulatory change in the United States, the dispute surrounding the issue has heightened domestic debates on potential downsides of biotechnology. Civic interest groups have seized on the issue and used it to promote regulatory change domestically. Similarly, some American consumers are content that web operators cannot place cookies—software files that track consumers' Internet searches to gather marketing information—on personal computers. *See* Pohl, *supra* note 150; Scott, *supra* note 122, at 920–28 (discussing how U.S.-based NGOs, including the Environmental Defense Fund, have used REACH to advocate for domestic reform); Editorial, *supra* note 3.

Finally, the EU provides a forum for U.S. producers to challenge their competitors' practices. REACH allows interested parties to submit proposals to restrict the use of certain chemicals. This allows any producer of chemicals, including a U.S. company, to seek denial of its competitors' (including domestic competitors) substances in the EU.[263] In the antitrust realm, U.S. corporations have found the EU a valuable legal battleground and frequently engage in forum shopping when they seek to halt practices of their (often domestic) competitors. U.S.-based United Technologies was the principal complainant in the GE/Honeywell merger investigation after having lost its acquisition bid to GE. It was also a U.S. company that brought charges against Microsoft in the EU,[264] knowing that it was more likely to obtain remedies in the EU, which harbors a broader notion of what constitutes anticompetitive conduct. As the tables turned, Microsoft lodged an antitrust complaint before the European Commission against Google.[265]

Whether these foreign stakeholders embrace or oppose the Brussels Effect, they have the incentive to invest considerable resources in trying to influence regulatory outcomes in the EU. Indeed, given the global reach of the EU's regulatory actions, lobbying activity is likely to be particularly salient in Brussels as the benefits available from the possible regulatory capture of the Commission or another EU institution is expected to exceed the benefits of successfully influencing any other regulatory agency with lesser global clout.

3. International Institutions.—At times, international institutions have provided the most effective venue to challenge the EU regulations. The WTO law prevents countries from restricting imports from countries with less stringent regulations unless the importing country can provide a scientific justification for the restriction or if the restriction is necessary to protect public health or related to conservation of the environment.[266] These exceptions are subject to specific conditions to ensure that countries do not use them as disguised forms of trade protectionism.[267] Much of WTO litigation therefore centers on the parties' disagreement as to whether

[263] This is particularly valuable if a chemical company can show that it produces a safer alternative compared to its competitor's "substance of very high concern," as this would lead to automatic denial of the competitor's substance. *See* Scott, *supra* note 122, at 930.

[264] *See* Commission Decision of 24 May 2004, Case COMP/C-3/37.792—Microsoft, 2007 O.J. (L 32) 23. The case was initiated by a U.S.-based corporation, Novell, and later joined by Sun Microsystems, another U.S.-based corporation. Commission Decision of 24 March 2004, Case COMP/C-3/37.792—Microsoft, paras. 3–4, C (2004) 900 final (Apr. 21, 2004).

[265] *See* Steve Lohr, *Antitrust Cry from Microsoft*, N.Y. TIMES, Mar. 31, 2011, at B1; Brad Smith, *Adding Our Voice to Concerns About Search in Europe*, MICROSOFT ON THE ISSUES (Mar. 30, 2011, 9:00 PM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/30/adding-our-voice-to-concerns-about-search-in-europe.aspx.

[266] General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[267] *Id.*

domestic regulations reflect a legitimate exercise of domestic regulatory authority or whether they serve protectionist goals and hence constitute impediments for international trade.

The United States did resort to the WTO in challenging the EU's prohibition on GMO food and hormone-treated beef, eventually winning its core claims in both trade disputes.[268] The United States claimed that the EU's alleged pursuit of food safety and concern for the health of its consumers in reality reflected its desire to protect its farmers from foreign competition.[269] The EU defended its measures on grounds of genuine consumer preferences, which in Europe reflect deep skepticism of GMOs and growth-promoting hormones,[270] and argued that scientific studies supported its health concerns.[271] The WTO ruled for the United States, urging the EU to lift its import ban of hormone-treated beef and similarly approve GMO products without "undue delay." Most recently, the United States has challenged the EU's import ban of U.S. poultry that is rinsed in chlorine—a process which, according to the United States, makes poultry safe for consumption.[272] These challenges suggest that the WTO should indeed impose some limits on the EU's regulatory pursuits.

Despite these victories, the WTO offers, at best, imperfect remedies. The WTO dispute settlement mechanism is characterized by weaknesses such as nonretroactive damages.[273] In addition, the WTO system cannot compel a member state to lift its restrictive measures. It can merely authorize sanctions against a noncompliant member state.[274] For instance, the EU has maintained its import ban on hormone-treated beef, preferring to endure U.S. retaliation.[275] The EU has also repeatedly allowed the deadline for implementing the GMO ruling to lapse, while the United States has

---

[268] *See* Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998) [hereinafter Appellate Body Report]; Panel Report, *supra* note 185, at 1070–72.

[269] Appellate Body Report, *supra* note 268, at 28.

[270] *See id.* at 20–23.

[271] *Id.* at 7.

[272] *See* Press Release, Office of the U.S. Trade Representative, U.S. Files WTO Case Challenging EU Restrictions on U.S. Poultry Exports (Jan. 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/january/us-files-wto-case-challenging-eu-restrictions-us-p.

[273] JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 367 (5th ed. 2008).

[274] *Id.*

[275] *See* RENÉE JOHNSON & CHARLES E. HANRAHAN, CONG. RESEARCH SERV., R40449, THE U.S.-EU BEEF HORMONE DISPUTE (2010). The EU has further continued to gather scientific evidence to justify its import ban and challenge U.S. retaliation. After another round of WTO litigation and a mixed and inconclusive Appellate Body ruling, both the EU's import ban and the United States' retaliation remain in force. *See* Press Release, Office of the U.S. Trade Representative, WTO's Appellate Body Vindicates Continued U.S. Imposition of Sanctions After the EU Claimed Compliance in the *EU–Hormones* Dispute (Oct. 16, 2008), *available at* http://www.ustr.gov/archive/assets/Document_Library/Press_Releases/2008/October/asset_upload_file626_15173.pdf.

suspended its retaliatory measures in anticipation of settlement or the EU's future compliance.[276] The difficulties the United States has faced in obtaining the EU's compliance suggests that the WTO provides even less relief for the EU's weaker trading partners. Authorizing a small developing country to punish its powerful trading partner hardly guarantees that this right will be used. Thus, retaliation rarely provides an effective remedy outside of attempts by powerful countries, such as the partially successful United States, to constrain the EU.

The WTO's ability to constrain individual countries' regulations is further limited by its restricted mandate. The WTO bans discrimination between importers and domestic producers.[277] Yet many of the EU regulations, while perhaps costly to foreign producers, are not discriminatory in their nature: EU companies are subject to the same rules. If the EU regulations have no disparate impact on foreign producers, allegations of protectionism are difficult to maintain. The WTO can do little to restrain such regulations that are costly yet not protectionist in their object or effect. Further, many areas—such as antitrust and privacy—do not fall within the purview of the WTO rules and its dispute settlement mechanism in the first place.[278] There have been several attempts to include antitrust, among other new issue areas, under the WTO framework. All those attempts have failed.[279] And expanding the scope of the WTO to new issue areas is even more unlikely today, as the consensus among over 150 countries that rarely agree on the content of the rules is increasingly beyond reach.

Indeed, the WTO does not only fail to adequately constrain the Brussels Effect; at times, it may even help to facilitate it. The WTO rules limit the ability of the EU's trading partners to respond to EU regulatory pursuits with unilateral retaliation.[280] Had the United States, for instance, imposed trade sanctions on the EU when faced with the EU's data transfer ban, it would have violated the WTO rules and subjected itself to a WTO complaint by the EU. In this sense, the WTO can also provide a shield for, and not only a limitation to, the Brussels Effect.[281]

---

[276] *See* HANRAHAN, *supra* note 178178. And even if the EU were to comply, access of GMOs to its markets would remain limited. The WTO only ruled on the EU's moratorium for authorization of GMOs. The EU's strict requirements on traceability and labeling of GMO products remain intact, considerably limiting the producers' ability to penetrate the European market given EU consumers' distrust of GMO foods.

[277] *See* GATT, *supra* note 266, art. III.

[278] On privacy, see the general exception clause in Article XIV of GATT, which explicitly authorizes states to restrict trade to "protection of the privacy of individuals." *See* Shaffer, *supra* note 96, at 50 (quoting GATT, *supra* note 266, art. XIV).

[279] *See* Bradford, *supra* note 231.

[280] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[281] *See* Shaffer, *supra* note 96, at 54–55.

B. Internal Constraints

The above discussion shows that the ability of other states or international institutions to constrain the EU's regulatory power is limited. Instead, the greatest check on the EU's regulatory power comes from within the EU itself. The discussion on the precise conditions required for the Brussels Effect to take place sets important limits on the EU's unilateralism. The growing diversity and discord within the EU will further constrain the EU's ability to promulgate new laws that could be externalized—whether unilaterally or though political harmonization. Thus, in as much as the emergence of the EU's external regulatory agenda was a product of its internal ambitions, the limits to its external influence are similarly set by its internal agenda.

1. The Missing Conditions for Unilateral Regulatory Globalization.—The preconditions for unilateral regulatory globalization outlined above set important limits to the scope of the Brussels Effect. Insufficient market power sets boundaries on the EU's global regulatory clout. For instance, the EU's attempts to deny market access to fish caught unsustainably has not triggered a Brussels Effect since exporters have been able to sell their catch in other markets.[282] The EU's limited market power with respect to GMOs was discussed above when explaining why the Brussels Effect has been incomplete. The EU has been even less effective in externalizing its regulations of automobiles to the United States. For instance, the EU's End-of-Life Vehicles Directive,[283] which regulates recyclable components and toxic heavy metals contained in automobiles, has had an insignificant impact on U.S. car manufacturers, who sell virtually no cars in the EU. At the same time, this directive has been successfully externalized on Korean and Japanese manufacturers.[284] In instances where adjustment costs are high and alternative markets exist, producers are likely to forgo the EU market and divert trade elsewhere.

Further, EU powers derived from market access are limited to imposing product standards for goods that are exported to the EU or, for the same reason, to prohibiting anticompetitive conduct that has an effect on the single market. These regulations can be contrasted with the EU's failed attempts to export its standards for management of hazardous waste. Strict standards for waste disposal are costly for domestic producers. Illegal transfers of hazardous waste remain common as producers have an

282 *See* Carr & Scheiber, *supra* note 232, at 76–79; Kate O'Neill, *The Changing Nature of Global Hazardous Waste Management: From Brown to Green?*, *in* DYNAMICS OF REGULATORY CHANGE, *supra* note 15, at 156, 156–58. However, the EU's denial of market access may still affect the global market price as the total demand is curtailed and the fish is sold in an alternative market, possibly at a lower price.

283 *See* Council Directive 2000/53/EC on End-of Life Vehicles, 2000 O.J. (L 53) 1.

284 *See* Schapiro, *supra* note 131, at 14.

incentive to evade regulations and find jurisdictions that do not enforce waste management standards. Waste is movable and producers gain nothing by trying to dump it in Europe. The EU has no leverage over this area unless it can monitor these flows and ban products that involve unsustainable waste management practices. Regulatory power is much harder to project externally when it consists of attempts to unilaterally limit exports to third countries versus preventing imports to one's own market.[285]

In some areas, the EU's market power is altogether irrelevant. First, the EU has little leverage over targets of regulation that are not subject to market access. Consider human rights, an area in which the EU has both regulatory capacity and a strong preference to pursue high levels of protection. But the EU has not been particularly successful in exporting its human rights norms or democratic values outside of its direct sphere of influence, such as countries in North Africa.[286] This raises questions about the view that the EU's "normative power" has universal appeal, leading countries to adopt the EU's norms and standards voluntarily. In the end, the EU derives its power from its ability to offer conditional access to its markets. For example, signing a human rights treaty can be a condition for a trade agreement with the EU.[287] Enforcing it is another matter. It is much easier to deny market access to a product that does not meet EU standards or to ban a transaction that has an effect on the EU market than it is for the EU to police international practices that involve individuals who never enter the European market.

Second, the EU is sometimes constrained by its limited regulatory capacity. The EU only has regulatory competence in any given area if the member states have granted it such competence. However, this is a largely theoretical limit since the EU has, over the years, acquired extensive regulatory capacity in all areas relating to the single market. And these are the very regulations that carry the attributes that lend themselves to externalization. However, there are important policy areas where EU member states have not transferred powers to the EU—including energy

---

[285] *See* O'Neill, *supra* note 282, at 156–58.

[286] *See* Zielonka, *Empire by Example*, *supra* note 190, at 478.

[287] The WTO recognizes very limited rights for any country to limit imports based on human rights violations in the exporting country. *See* GATT, *supra* note 266, art. XX(a), (e) (listing violation of "public morals" or the use of "the products of prison labour" as grounds for derogating from free trade). In contrast, protection of health and environment are explicitly listed as grounds for departing from WTO obligations. The EU has, however, included human rights provisions in its bilateral trade agreements and regularly conditions any country's Generalized System of Preferences (GSP) status on the country's agreement to ratify international conventions on human rights and subscribe to labor standards endorsed by the EU. *See also* Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593 (2005) (analyzing the relationship between human rights standards in preferred trade agreements and member states' human rights records).

policy and corporate taxation—imposing limits on the EU's external influence in these matters.

The EU also fails to become the source of global standards in areas where the regulatory propensity—the preference for high standards—is absent. This can be true EU-wide, where all or most member states share a preference for low regulation. Often the missing regulatory propensity, however, reflects a preference for heterogeneity within the EU. Online gambling is an example of an area where harmonization within the EU has failed, with the U.K. favoring legalization of online gambling, while countries like Germany and France have resisted legalization in an attempt to protect their state monopolies on gambling.[288] The EU is also divided on questions like corporate tax harmonization with countries like Ireland (with its 12.5% corporate tax rate) opposing any step towards tax harmonization and countries like France (with its 34% corporate tax rate) endorsing common rules.[289] And when it comes to financial regulation of any kind, the U.K.'s opposition is almost guaranteed.[290]

The EU's regulatory clout is also limited in instances where other states have a preference for higher standards. At times, the United States prefers higher standards than the EU does. For instance, the U.S. standard on automotive emissions remains more stringent than the European one even today.[291] Similarly, the United States' Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley), targeted at improving corporate responsibility in the post-Enron environment, is widely perceived as establishing the highest global standard for corporate governance.[292] Another manifestation of the United States' preference for strict financial regulation is the Dodd–Frank

---

[288] *Cf.* Bach & Newman, *supra* note 112, at 33–36 (describing the gambling legalization experience at the state level in the United States).

[289] *See* Stephen Castle, *Europeans Introduce Corporate Tax Plan*, N.Y. TIMES, Mar. 17, 2011, at B5; *EU Corporate Tax Plan Deals Blow to Irish*, EURACTIV.COM (Mar. 16, 2011), http://www.euractiv.com/euro-finance/eu-corporate-tax-plan-deals-blow-irish-news-503158 (discussing the "Common Consolidated Corporate Tax Base" that was recently put forth by the Commission); *see also Tax Wars: New Versus Old Europe*, ECONOMIST, July 24, 2004, at 61.

[290] *Tax Wars*, *supra* note 289 ("As they fight to keep corporate-tax rates low, the central Europeans can count on strong support from Britain . . . .").

[291] VOGEL, *supra* note 59, at 103, 119–20. The relatively less stringent EU standard is explained by the EU's prioritization of fuel efficiency over pollution control in its regulation of automobiles. This has led to a greater use of diesel engines within the EU, which, while improving fuel efficiency, produces more pollutants.

[292] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (2006)). However, while Sarbanes–Oxley is considered to be the highest standard, the United States' regulatory leverage over the EU was somewhat diluted by the EU's objection to subjecting its firms' auditing to the oversight by the Public Company Accounting Oversight Board created by Sarbanes–Oxley. After negotiations, the United States conceded that EU regulators could retain authority over auditing questions. The United States also agreed that the EU can use international—as opposed to U.S.—accounting standards in the United States. *See* NEWMAN, *supra* note 174, at 146.

Act.[293] Where the United States opts for strict standards, it can become the source of global standards, assuming the conditions for unilateral regulatory globalization are met. As the United States' recent regulatory pursuits have predominantly targeted the financial sector, it is less likely they will be converted to global standards because of the relative elasticity of capital. For instance, it has been debated whether the effect of Sarbanes–Oxley was to ratchet up standards worldwide or to cause U.S. stock exchanges to lose listings of foreign corporations.[294] In any event, it is evident that the EU's ability to set the global rules alone is always contingent on it having a preference for the highest rule, which may not always be the case.

In addition to the situation where the relatively permissive EU standard yields to a stricter foreign standard, there may also be situations where one country is stricter on one dimension of a regulation and another country stricter on another dimension. In instances where the corporations are unable to segment the markets, corporations may thus end up adhering to even stricter standards than any single regulator would have required. This situation would be an even more penetrating version of unilateral regulatory globalization, where the global rule would be ratcheted up by a combination of the strictest rules provided by different jurisdictions.

Further, the EU's leverage is compromised in the case of regulation of more elastic targets, such as capital. For instance, in the wake of the Euro crises, the EU proposed a tax on financial transactions. This proposed tax would cover a broad range of financial transactions between banks and other financial institutions, including securities, bonds, currency transactions, and derivatives.[295] However, the EU knows that the introduction of this tax would likely divert trading activity to financial centers outside the EU. Unable to unilaterally impose this tax globally, the

[293] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered sections of 12, 15, 22, and 26 U.S.C.). Given the current state of flux of European financial regulation, it is not clear how the United States and the EU will compare in terms of the relative stringency of their banking and other financial regulations.

[294] *See, e.g.*, Bob Sherwood, *Long Arm of the US Regulator*, FT.COM (Mar. 9, 2005, 6:37 PM), http://www.ft.com/intl/cms/s/1/be157b6a-90c6-11d9-9980-00000e2511c8.html#axzz2CJweoF8T; *see also* John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002) (discussing the impact of stock exchange "cross-listing" on global regulatory competition in the securities arena). A related question is whether the availability of securities class actions in the United States deters foreign companies from listing on a U.S. exchange. *See* COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT 11 (2006) ("Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market.").

[295] *See* Joshua Chaffin et al., *Business Lashes Out at Trading Tax Plans*, FIN. TIMES (London), Sept. 29, 2011, at 1. The tax would apply as long as "one party to the transaction were established in a Member State of the EU and that a financial institution established in the territory of the Member State concerned was party to the transaction." Press Release, European Comm'n, Common Rules for a Financial Transaction Tax—Frequently Asked Questions (Sept. 28, 2011), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/640.

EU is pursuing political harmonization in the G-20.[296] Yet, examples of elastic targets can be found outside of capital markets as well. The European Court of Justice's recent denial of the patentability of human cells is unlikely to lead to a global standard.[297] The critics claim that the EU's stringency only drives stem cell research and business out of the EU, highlighting the mobility of the industry.[298]

Also, when products do not call for a uniform standard, such as when markets are divisible or scale economies are insufficient to justify a uniform standard, the EU can at best achieve compliance with its standard, but not globalization of those standards. This is true, for example, with respect to labor laws that are not characterized by scale economies.[299] Another example comes from the antitrust domain. In 2007, the EU launched an antitrust investigation into whether Microsoft's practice of offering its Windows software with only one Internet browser, the Microsoft-owned Internet Explorer, presented antitrust concerns. In response, Microsoft presented Windows 7 E, a Europe-only version of Windows that came with no Internet browser.[300] Several other products are also divisible across the markets. Car manufacturers are responding to different national and regional emission standards with diversified technologies in an effort to minimize risks and maximize returns.[301] DVDs offer another example. They have different region codes allowing film distributors to segregate release dates, content restrictions, and price across regions. Patent protection, discussed above, is also divisible: the EU's ability to impose its rules on the patentability of human cells is constrained not only by the mobility of research firms but also by the ability of these firms to continue filing patents in other jurisdictions. Thus, the Brussels Effect is unlikely whenever the firm's costs of customizing its conduct or production to different rules are low.

---

[296] *See* European Comm'n, *supra* note 295. The financial transaction tax is an example where the other conditions for the Brussels Effect are also missing: the EU currently lacks the regulatory competence (or capacity) to impose this tax; the required regulatory propensity is also missing, as the U.K. opposes the proposal. There are also alternative markets for trading activity, reducing the EU's leverage. Finally, the tax is also divisible in the sense that all jurisdictions do not have to apply the same tax, but instead retain their autonomy to regulate trade in their jurisdictions.

[297] Case C-34/10, Brüstle v. Greenpeace eV., EUR-Lex 62010CJ0034 (Oct. 18, 2011).

[298] *See Scientists Fear Stem Cell Ruling Deals Blow to EU Research*, EURACTIV.COM (Oct. 19, 2011), http://www.euractiv.com/health/scientists-fear-stem-cell-ruling-deals-blow-eu-research-news-508404.

[299] *See supra* Part I.E.

[300] *See* Emil Protalinski, *Windows 7 to Be Shipped in Europe Without Internet Explorer*, ARSTECHNICA (June 11, 2009, 2:57 PM), http://arstechnica.com/microsoft/news/2009/06/windows-7-to-be-shipped-in-europe-sans-internet-explorer.ars.

[301] *See, e.g.*, KPMG INT'L, THE TRANSFORMATION OF THE AUTOMOTIVE INDUSTRY: THE ENVIRONMENTAL REGULATION EFFECT 16 (2010), *available at* http://www.kpmg.de/docs/transformation-automotive-industry.pdf (discussing technology-implementation strategies used by auto companies in complying with divergent national regulations).

With advances in technology, it is possible that goods will become increasingly divisible in the future.[302] It is likely to become technologically feasible and economically viable to produce a greater range of product varieties to serve the different consumer tastes and regulatory requirements prevailing in different markets. The acknowledgment of the Brussels Effect should further incentivize companies to develop technologies that allow for greater divisibility at lower costs. Such a development, to the extent that it applies to a significant number of product markets, may gradually erode the EU's ability to exert global regulatory clout in the future.

2. *Internal Conflicts and the Growing Diversity.*—Not everyone within the EU benefits from its aggressive regulatory stance. EU consumers, who value access to cheap imports, may occasionally question whether the higher product standard justifies the higher cost products, in particular in challenging economic times. Some EU corporations may also find that excessively high regulatory standards are unsustainable for the European economy. They argue that excessive reliance on the precautionary principle may slow economic growth and innovation[303] and price EU firms out of critical export markets.[304] Some companies in the EU might have benefited from the unlevel playing field and lax regulations in markets where the Brussels Effect has not taken hold. European companies have increased their foreign direct investment (FDI) and established themselves in third markets from which they import into the EU.[305] As a result of externalization of the EU standards, they can no longer reap gains from lower production costs that drove them to those markets in the first place. In addition, European companies whose competitiveness depends on their access to cheaper foreign inputs are hurt when those inputs are subjected to more burdensome regulations. Since approximately half of international trade consists of trade in intermediate goods,[306] it is difficult to identify exactly who is winning and who is losing when one country is regulating multinational corporations with worldwide supply chains. Thus, voices within the EU may join those outside to call for reining in the excesses of its regulatory accomplishments.

---

[302] *See The Third Industrial Revolution*, ECONOMIST, Apr. 21, 2012, at 15.

[303] *See* Kogan, *supra* note 193, at 94; *see also* Leo Cendrowicz, *Is Europe Finally Ready for Genetically Modified Foods?*, TIME (Mar. 9, 2010), http://www.time.com/time/business/article/0,8599,1970471,00.html (discussing the costs to Europe of continued rejection of GMO-derived food products).

[304] *See* Cendrowicz, *supra* note 303 (noting that the Brussels Effect is expected to be less likely when the EU is a net exporter of certain products). These companies take little comfort that the playing field in their home market is level.

[305] EVA R. SUNESEN ET AL., COPENHAGEN ECON., IMPACTS OF EU OUTWARD FDI 6 (2010) ("Over the last couple of decades, EU firms have increased their investments outside EU borders. Outward FDI has increased by a factor of five during the last fifteen years . . . .").

[306] Sébastien Miroudot et al., *Trade in Intermediate Goods and Services* 17 (OECD Trade Policy Working Paper No. 93, 2009).

As the EU's regulatory powers grow, divisions within the EU also grow. It becomes harder for the EU to pass new regulations amidst the growing heterogeneity of its population. One salient example is that the EU has been unable to create a common energy policy despite the EU member states' collective vulnerability to energy insecurity.[307] Enlargement magnifies this problem as preferences within the EU become more diverse while the EU institutions fail to adjust to more complex decisionmaking.

There is also great disparity among the EU governments on what the EU's global role ought to be and how it should exercise its power. All other powers have internal conflicts, yet the EU's decisionmaking is always subject to two potential veto points: support for any given policy must first be garnered at the level of the member states, followed by the EU.[308] At the same time, the internal constraints have at times been a source of power for the EU. Because of the visible internal divisions and resulting constraints in its mandate, the EU has been able to obtain more concessions in international trade negotiations than it would have had it been able to gain approval for trade deals through majority voting.[309] In pursuing negotiated harmonization, this internal conflict can be a source of strength. But the EU's ability to unilaterally externalize its internal market hinges on its ability to first agree on the internal rules capable of being exported.

Today, the EU faces a distinctive challenge to its authority. The concurrent deepening and widening of the EU's agenda has already created severe constitutional crises within the EU, with the difficulties surrounding the euro further testing the limits of solidarity within the union. The great political divide in Europe today is not between the right and the left but between those who are turned inwards and those who embrace globalization and further integration. The former would scale back the powers transferred to the EU in the name of reinstating the sovereignty of European nations. Fearful of these demands, even the integrationists are growing more timid in their calls for expanding EU powers at the expense of national sovereignty. More European regulation means less sovereignty. And less sovereignty means more unpredictability and loss of control akin to the crises surrounding the common European currency. Thus, the growing gap between these different visions within Europe for Europe in the end presents perhaps the greatest challenge to the European external regulatory agenda.

---

[307] *See* Laïdi, *supra* note 56, at 19.

[308] *See* Meunier & Nicolaïdis, *supra* note 49, at 908–09.

[309] *See id.* at 909; Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 459–60 (1988).

CONCLUSION

This Article has highlighted the unprecedented global power that the EU is exercising through its legal institutions and standards that it successfully exports to the rest of the world via the Brussels Effect. Without resorting to international institutions or seeking other nations' cooperation, the EU is able to promulgate regulations that become entrenched in the legal frameworks of developed and developing markets alike, leading to the "Europeanization" of important aspects of global commerce.

This discussion has been descriptive, intentionally omitting the normative inquiry on whether the Brussels Effect is socially desirable. It seems evident that corporations are not necessarily adjusting to EU standards because of the prospect of mutual gains or some Pareto-improving outcome. If existing regulations in other jurisdictions are optimal, the Brussels Effect is likely to lead to inefficiently high overall global regulation, adversely affecting global welfare.[310] But the Brussels Effects may also lead to an efficient outcome. If existing regulations in other jurisdictions are too permissive or weakly enforced, unilateral regulatory globalization might be a desirable means of overriding suboptimally low regulations elsewhere. The overall welfare effects of this phenomenon are thus difficult to disentangle.[311]

The Brussels Effect may also raise concerns of democratic accountability. The idea that unelected European civil servants have the ability to block global transactions by U.S. companies can be disconcerting to those involved. However, others might claim that the Brussels Effect does not undermine U.S. democracy. The EU's regulatory reach may have the effect of balancing the overrepresentation of business interests in American public life by empowering consumers.[312] These are some of the normative questions that this Article raises but intentionally leaves for others.

The acknowledgement of the existence and influence of the Brussels Effect has implications for how we think about power and the question of who is powerful and why. If you were to ask national security experts whether the EU is powerful, they would probably say no. If you were to ask economists whether the EU is powerful, they would probably discuss how the relative power of the EU is diminishing with the rise of China. But if

---

[310] We would also need to understand whether the possible costs of excessively strict global regulations outweigh the costs of having divergent, even if individually more optimally tailored, national regulations.

[311] Similarly, the EU's unilateralism can be thought to fill the void where collective action problems prevent countries from reaching efficient outcomes through treaties. Yet the failure to cooperate multilaterally may also be a sign that international agreement would not be welfare-enhancing, raising questions about the desirability of the EU providing a global regime alone.

[312] *See* Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009) (discussing how multilateral institutions can enhance domestic constitutional democracy).

you were to ask GE, Microsoft, Google, Monsanto, Dow Chemical, or Revlon whether the EU is powerful, the answer would be a resounding (and likely bitter) yes.

One key question is what type of power matters today. Much of international relations discussion has until the recent past been preoccupied by the traditional notion of military power. Yet the utility of military power is declining.[313] Economic concerns usually prevail over military imperatives. The EU is making a conscious choice not to build a powerful military—it rather free rides on the United States' use of it. For instance, the EU's ability to influence central and eastern European countries was significantly enhanced by the level of security and stability that existed there, thanks to U.S. military power.[314] Military free riding allowed the EU to devote its resources to other activities instead, including promoting its rules and standards in eastern European countries.

While the currency of international politics is increasingly economic power, its possession is difficult to translate into concrete forms of influence today. Economic power used to be associated with the United States, the EU, and Japan. Today, economic power is more dispersed as China and other emerging economies are growing in affluence. In the world of multiple powers and heterogeneous interests, exercise of unilateral economic power is rarely possible. The inability to conclude the WTO trade talks is one reminder that in the world where many are powerful, nobody alone is powerful enough to get anything done. Economic sanctions are rarely successful today because embargoed nations have an easier time finding alternative suppliers or markets for their products. Conditional aid and other rewards, traditionally used by powerful nations and institutions like the World Bank and the International Monetary Fund as means of leverage, are decreasingly effective as countries like China are prepared to extend aid to rogue and needy countries—no strings attached.

When power is defined in terms of the actual influence that a country can wield, the EU's ability to penetrate vast areas of global commerce is relevant. Contrary to traditional contours of influence, the Brussels Effect captures a phenomenon where the EU does not have to do anything except regulate its own market to exercise global regulatory power. The size and attractiveness of its market does the rest. By virtue of being the world's largest trading block, the EU can dictate what is traded. It is one of the few areas of influence where unilateralism still works. Regulatory power is a less costly, more deployable, and more durable type of power. Also, unlike other forms of power, it cannot easily be undermined by others.

Another advantage of regulatory power is its ability to generate leverage that has the greatest impact with the lowest political profile. Many

---

313 *See* Gelb, *supra* note 35.

314 *See* Zielonka, *Empire by Example*, *supra* note 190, at 482.

of the regulations appear technical but often have major implications on countries, corporations, and consumers around the world. Conflicts over regulatory power rarely elevate to the political level. Trade is a much less controversial way of pursuing foreign policy objectives, in particular when the EU can always, in principle, offer the choice of not complying with its rules. Subscribing to EU rules is the price of trading with Europe. All the EU is doing is exercising its right to protect its own consumers. This is a less controversial position to take compared to a regime change pursued in the name of laudable goals such as democracy or human rights. Thus, in falling between coercion and cooperation, regulatory power strikes a balance of legitimacy and potency that makes it a more efficacious option than its alternatives.

The EU's regulatory clout shows that the EU can be a superpower without a super state. It is a shrewd and influential actor that projects its values and makes the world to its liking by playing to its strengths. While the EU portrays itself as a champion of multilateralism, it is selectively supporting multilateralism in areas where it lacks unilateral power. The more the EU bolsters the authority of the UN Security Council, the more the EU can constrain the exercise of unilateral power by the United States. But when it comes to the regulation of global markets, the EU can go it alone and is hence less concerned about pursuing multilateral institutional cooperation.

The discussion also challenges the primacy of the narrative that the EU is a "normative power" that leads by example. The EU is often viewed as a power that relies on persuasion to change "hearts and minds" and thereby the preferences and identities of other actors. The EU is regularly portrayed as a new type of power that steers away from coercion and relies instead on positive incentives and soft power.[315] This Article has not argued that those propensities of influence are not within the EU's repertoire of influence. Yet, this Article has focused on what is a vast, unappreciated, and perhaps the most controversial aspect of the EU's global role: the EU's unilateral employment of tools of soft coercion that go against the preferences of its trading partners.

An understanding of the existence and the full impact of the Brussels Effect is likely to influence the perception of the EU by its trading partners. But it is also likely to change the perception of the EU within the EU itself. Acknowledgment of the EU's global regulatory power might give pause to both the EU's relentless critics, who emphasize the EU's weakness and irrelevance, as well as to its most ardent defenders, who call for increasing integration and a gradual move towards a federation that allows the EU to rise to global prominence. For the critics, the discussion has shown that to portray the EU as powerless focuses on a narrow and outdated vision of

[315] *See* Hugh Richardson, Head of the Delegation of the European Comm'n to Japan, Speech at Waseda University: Smartening the EU's Soft Power (May 16, 2008) (transcript on file with author).

what power and influence mean. For the defenders, the discussion has shown that the need to move towards a federation is probably not as pressing given the extent to which the EU is already able to advance its interests, within and beyond its borders.[316] The EU is already a superpower and, importantly, a superpower of a meaningful kind.

[316] *See also* LEONARD, *supra* note 203 (arguing in this spirit).