INTRODUCTION

It is common to hear Europe described today as the power of the past. Europe is perceived to be weak militarily. 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. Given its seemingly declining power status and inability to get its way alone, the EU must retreat to weak multilateralism and international institutions.

Contrary to this prevalent perception, this paper highlights a deeply underestimated aspect of European power that the discussion on globalization and power politics overlooks: Europe’s unilateral power to regulate. The European Union sets the rules for global markets 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. Few Americans are aware that EU regulations dictate the make-up they apply in the morning (EU Cosmetics Directive), the cereal they eat for breakfast (EU rules on Genetically Modified Organisms, “GMOs”), the software they use on their computer (EU Antitrust Laws), and the privacy settings they adjust on their Facebook page (EU Privacy Directive). And that’s just before 8:30 in the morning. The EU also sets the rules governing the interoffice phone directory they use to call a co-worker (EU Privacy Laws, again). EU regulations dictate what kind of air conditioners Americans use to cool their homes (EU electronic waste management and recycling rules) and are even the reason why their children no longer find soft-plastic toys in their McDonalds happy meals (EU Chemicals Directive). This phenomenon—the “Brussels Effect”—is the focus of this paper.

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This paper explains how and why the rules and regulations originating from Brussels have penetrated many aspects of economic life within and outside of Europe through “unilateral regulatory globalization.” Here, unilateral regulatory globalization refers to a globalization of regulatory standards where a single state is able to externalize its laws and regulations outside its borders through market mechanisms. This process can be distinguished from political globalization of regulatory standards where regulatory convergence results from negotiated standards, including international treaties or agreements between states or regulatory authorities. It is also different from unilateral coercion, where one jurisdiction imposes its rules on others through threats or sanctions. 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. Extensive literature has emerged regarding the “race to the bottom” (RTB) phenomenon—the idea that countries lower their regulatory standards in order to improve their relative competitive position in the global economy. Recently, many of the assumptions driving this influential literature have been discredited.² Fears of businesses relocating to pollution havens or of 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” (RTT), whereby domestic regulations have become more stringent as the global economy has become more integrated.³ Still, the RTB paradigm remains influential, shaping the debates among scholars and policy makers alike.

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 US: 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 having corporate laws that are most favorable to management. An opposite phenomenon is captured by the “California Effect”: due to its large market and preference for strict consumer and environmental regulations, California is, at times, able to set the regulatory standards in all the other states.⁴ Firms 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.⁵

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³ See David Vogel, Trading Up and Governing Across: Transnational Governance and Environmental Protection, 4 J. EUROP. PUB. POL. 556, 563 (1997); Vogel & Kagan, supra note 2, at 2–8. ; Debora Spar & David B. Yoffie, A Race to the Bottom or Governance from the Top?, in COPING WITH GLOBALIZATION 31, 31–51 (A Prakash & J.A. Hart eds., 2000);
⁵ See Vogel & Kagan, supra note 2, 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 §§ 25249.5-25249.13 (on labeling requirements in the presence of carcinogenic or reproductive toxins in consumer products or food).
This paper explores the dynamics of the California Effect in a global context. It focuses on the conditions under which a single country can externalize its regulations on other countries. It argues that the following conditions determine any given jurisdiction’s ability to dictate rules for global commerce: the jurisdiction must have a large domestic market, a 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 non-divisible, 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 the EU standards—which often represent the most stringent standards—or else forgo the EU market entirely. The latter is rarely an option. In addition, the EU rules cannot be undermined by moving the regulatory targets to another jurisdiction given that the EU regulates primarily (inelastic) consumer markets as opposed to (more elastic) capital markets. While the EU is only regulating 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 (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 (de jure Brussels Effect).

Further, this paper seeks to explain what motivates the EU to exercise this authority and what implications this regulatory leverage has on other countries, including the US. 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 choice to engage in “regulatory imperialism”.

After acknowledging the many benefits of global regulatory authority, this paper 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

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6 See VOGEL, supra note 4, at 562.
ambitions since regulation of areas such as privacy and antitrust do not fall within the purview of the WTO or other international institutions. This paper therefore argues that the greatest check on the EU’s regulatory powers comes from within the EU itself. As the EU’s powers grow, so do divisions within the EU. Thus, in the end, the boundaries of the EU’s regulatory reach are defined by the EU’s own evolving conception of the limits of its regulatory authority.

This paper contributes to the scholarship on convergence and regulatory divergence.\(^7\) It also engages directly with the literature on the direction of possible regulatory races \textit{i.e.}, whether the Delaware Effect or the California Effect is more pervasive in explaining regulatory outcomes globally.\(^8\) Yet it departs from these debates in the following 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, the scholarship has failed to explain its actual scope beyond anecdotes and individual examples. The existing literature has also focused on the country’s market size as the best proxy for its external regulatory influence. This paper shows that the market power alone does not explain the Brussels Effect and offers a more nuanced theory for its occurrence.

Second, the discussion shows that the Brussels Effect is more pervasive and widespread than thus far recognized. The existing literature on upward regulatory races focuses almost exclusively on environmental regulation. Even there, scholars claim that regulatory globalization through the California Effect is constrained to “only a highly limited subset of environmental laws” and largely excluded in case of production (as opposed to product) standards,\(^9\) or consumer protection.\(^10\) This view fails to capture the full impact of the phenomenon.

Third, the existing literature focuses on RTT that takes place when a foreign (lax) regulator adopts the (strict) rule of the lead regulator.\(^11\) This attention to “de jure regulatory convergence” fails to account for an important empirical phenomenon that takes in the absence of any change in legal rules. In reality, this type of formal “trading up” is often incomplete. Instead, we typically see only a “de facto regulatory convergence” whereby much of global


\(^8\) See Vogel & Kagan, supra note 2, at 9.


\(^10\) See Jonathan R. Macey, Regulatory Globalization as a Response to Regulatory Competition, 52 Emory L.J. 1353, 1359 (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).

\(^11\) See Vogel & Kagan, supra note 2, at 14 (focusing on de jure trading up as the foreign country switches its standards as a result of RTT); Simmons, supra note 7 (focusing on conditions under which other regulators have the incentive to adjust); John Braithwaite & Peter Drahos, \textit{Global Business Regulation} 518–19 (2000) (discussing both RTB and RTT and arguing that RTT is a result of countries adopting best practices that they consider to be in their interest).
business is conducted under unilateral EU rules even when other states continue to adhere to their own rules. This is true, for instance, with respect to US antitrust laws, privacy laws, and rules on food safety. Unilateral regulatory globalization has the advantage of not needing to elicit a regulatory response from another nation—often there is no RTT 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 through “trump standards” 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 standard. But even here, the path to regulatory convergence follows a different sequence than what we are traditionally accustomed to. 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.

Fourth, the theory of unilateral regulatory globalization departs from existing scholarship on the relationship between regulatory convergence 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. Which rival standard trumps the other depends on the regulatory powers’ relative ability to seek allies and reach a tipping point after which the rival states need to switch standards. In contrast to Drezner, this paper 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 is different in that 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. This amounts to a market-driven RTT 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.

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12 See Drezner, supra note 7, at 841.
13 See Simmons supra note 7, at 49.
14 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
In addition to advancing the literature on regulatory globalization, this paper makes a contribution to the literature on state power in international relations. While traditional tools of power have waned in importance—it is increasingly difficult to exert influence through raw military power or rely on economic sanctions or conditional incentives—regulatory power that the EU possesses is more durable, more deployable and less easily undermined by others.

This paper proceeds as follows. Section I outlines the conditions under which the Brussels Effect takes place. Section II illustrates the Brussels Effect through examples. Section III discusses the reasons that motivate the EU to externalize its regulations. Section IV explains when and why the EU pursues political (cooperative) regulatory globalization instead of market-driven (unilateral) regulatory globalization. Section V discusses the limits of the Brussels Effect. The Conclusion focuses on the implications of EU’s global regulatory role within and beyond the EU. The purpose of this discussion is descriptive. This paper will not discuss whether high 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 section 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 and 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. 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 a domestic preference for strict regulatory standards and the predisposition to regulate inelastic targets. Only strict standards regulating targets that cannot move ensure that the country’s regulations can trump alternative regulatory standards and make other jurisdictions’ regulatory authority obsolete without being punished by markets or constrained by other jurisdictions’ regulatory responses. Finally, The EU standard becomes a global standard 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 non-divisible.

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.

15 See Drezner, supra note 7, at 846; See also David A. Wirth, The EU’s New Impact on U.S. Environmental Regulation, 31:2 Fletcher Forum World Aff. 96 (2007).
A. Market Power

In the global economy, power is correlated with the relative size of any given country’s internal market.\(^\text{16}\) To secure access to most important markets, producers gravitate towards the standards prevailing in those markets.\(^\text{17}\) 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.\(^\text{18}\) 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. It consists of a single market with 500 million consumers. The EU has a quarter of the world’s GNP and is the largest importer of goods and services. 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 $14 trillion, almost the same size as the EU, while China has an economy of $10 trillion and Japan has one of $4 trillion.\(^\text{19}\)

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 adjustments costs. The larger the importing (strict) market and the lower the adjustment costs relative to the benefits of market access, the more likely that adjustment will take place.\(^\text{20}\) 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 set-up costs and recurring compliance costs. They vary with the significance of cross-border differentials (determining 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, most producers are dependent on their ability to supply the EU market. 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

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\(^{16}\) See Drezner, supra note 7, at 843.

\(^{17}\) See id.


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.\(^{21}\) Without regulatory expertise and resources to enforce its rules, a country cannot effectively exert authority over market participants—within or outside of its jurisdiction. An important element of regulatory capacity is the authority to impose sanctions in case of non-compliance. Only jurisdictions with the capacity to impose significant costs on others by excluding non-complying firms from their markets can force regulatory adjustment.\(^{22}\)

The possession or absence of regulatory capacity set important limits to 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. Thus, acknowledging that sophisticated regulatory institutions are required to activate the power of sizable domestic markets, few jurisdictions outside the US or the EU have the capacity to be regulators with global reach.\(^{23}\)

The capacity of the US administrative agencies 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.\(^{24}\) 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.\(^{25}\) The European Commission enjoys substantial independent decision-making authority. It proposes legislation and ensures that the regulations and directives adopted by the Council and the Parliament are implemented in the Member States. The EU’s regulatory capacity varies across different policy areas, being most extensive in areas like trade and competition policy, which are necessary to establish and strengthen the single market, and most limited in sensitive areas such as common foreign and security policy, where the individual Member States have retained substantial authority.


\(^{22}\) See Id., at 832.


\(^{25}\) The Council of the European Union (representing the Member States), together with the European Parliament (representing the EU citizens), exercises legislative authority in the EU. The Council takes 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.
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. 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 unlikely to exercise rule-making 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 can trump more lenient standards by the simple virtue of being the most stringent. Until the 1980s, the US set the global norms, leading European firms to adjust to higher standards originating from the US. Since then, the roles have been reversed as the EU has increasingly adopted tighter standards of consumer and environmental protection while the US has failed to follow the EU’s lead. The only way for the US to override 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.

The EU’s domestic preference for high regulation reflects its aversion to risk and commitment to a social market economy. 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. 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 dangerous effects may be inconsistent with the chosen level of protection. In contrast, the risk must first be quantified and found to be unreasonable before regulatory intervention can be justified in the US. The US regulatory agencies are also guided by the cost-benefit analysis, which forces them to substantiate that the benefits of intervention outweigh its costs. To generalize, the US is, therefore, more sensitive to the costs of regulatory action and the “false-positive” regulations whereas the EU emphasizes the costs of inaction and the risks of

28 The EU’s commitment to the social market economy is explicitly mentioned as a common objective for Europe in Article 3 of the new Lisbon Treaty.
“false-negatives.” These differences in the two regulators’ approaches often lead to more extensive regulation originating from the EU.31

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 community. And once all European firms have incurred the adjustment costs of conforming to common European standards, they have preferred those standards to be 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 trump 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 is primarily regulating consumer markets. Unlike other regulatory targets such as capital, which is more mobile, consumers rarely move to another jurisdiction. 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 is sailing. While not perfectly elastic, capital is significantly more mobile than consumer markets are.32 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 was to impose a tax on financial transactions, trading activity could be diverted to financial centers outside the EU.33 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.

31 However, there are examples of regulatory areas where the US prefers a stricter rule. For instance, the US is more concerned than the EU is about the adverse effects of smoking, see Paulette Kurzer, European Citizens Against Globalization: Public Health and Risk Perceptions (April 2004). See also discussion on US financial regulation, infra, at p. 40-41.

32 International capital mobility is contingent on a numerous factors and assumes limited exchange controls and the ability of foreign corporations and individuals to engage in FDI and invest in foreign stock markets. See also discussion, infra at p 40-41 (discussing whether stock exchange listings, indeed, are elastic).

33 In the wake of the financial crises in the Eurozone, the Commission has proposed to impose a financial transaction tax. However, The UK, among others, is vehemently opposed. See Joshua Chaffin, Business attacks transaction tax plan, FT (September 28, 2011). See also discussion on the limits of the Brussels Effect, infra Section V.
E. Non-divisibility of Standards

The above conditions only ensure that the strict jurisdiction is able to regulate extraterritorially. This does not, by itself, mean that the strict standard is being 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, trump standards emerge only when corporations voluntarily opt for a single global standard, determined by the most stringent regulator, making other regulations obsolete in the process.

The exporter has an incentive to adopt a global standard whenever its production or conduct is non-divisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets. 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. Thus, unilateral regulatory globalization follows from the non-divisibility of a corporation’s production or conduct.

Non-divisibility of a corporation’s production or conduct stems from a variety of reasons. Global mergers cannot be consummated on a jurisdiction-by-jurisdiction basis—the most stringent antitrust jurisdiction gets to determine the fate of the transaction worldwide (legal non-divisibility). The same principle of non-divisibility often applies for the regulation of privacy. The EU is forcing companies like Google to amend their data storage and other business practices to conform to European standards of privacy. Unable to isolate its data collection for the EU, Google is forced to adjust its global operations to the most demanding EU privacy standard (technical non-divisibility). The EU also often sets the global health, environmental and other product standards. An illustrative example is European chemical regulation, which applies to all companies willing to enter the EU market. This allows the EU to effectively dictate the global product standards for numerous US manufacturers who would find it too costly to develop different products for different consumer markets (economic non-divisibility).

These examples can be contrasted with attempts to regulate, for example, labor standards. Labor markets are divisible and adhering to one global minimum wage, for instance, entails few scale economies. A corporation can maintain without difficulty different standards ranging from working hours, vacation policies, and overtime to retirement plans and collective labor strategies and in different jurisdictions. When employing labor in Europe, foreign firms have to follow the EU’s labor rules yet are able to take advantage of divergent (and presumably lower) standards in their home markets.

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35 Note that this paper does not argue that labor standards cannot be exported to other jurisdictions thorough other means. The argument is only that to the extent divisible, labor standards are not amenable to the Brussels Effect. See for instance, Brian Greenhill, Layna Mosley, & Aseem Prakash, “Trade-based Diffusion of Labor Rights: A Panel Study 1986-2002,” 103 APSR (2009).
Thus, a single jurisdiction is able to supply global standards whenever that jurisdiction has a large domestic market, sufficient regulatory infrastructure, and the preference for regulating inelastic targets with strict and non-divisible standards. Otherwise its regulatory authority can become irrelevant since other jurisdictions may trump 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 section illustrates a few 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. Yet the EU sets global standards in many other fields, including telecommunications and aspects of financial regulation.

A. Antitrust Laws

The strictest antitrust laws prevail in situations where conflict exists among different regulators. If a lenient antitrust jurisdiction A and a 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 State B’s market is large, abandoning it is not often a realistic option. At the international level, the EU antitrust law is, indeed, often the most stringent one. 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 around the world, to which the more permissive US antitrust laws must yield.

The reasons for the US-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. While the EU is more fearful of the harmful effects of non-intervention (so called “false-negatives” i.e., anti-competitive practices that the EU fails to regulate), the US authorities are often more mindful of the detrimental effects of inefficient intervention (so called “false-

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36 See Henrik Glimstedt, Competitive Dynamics of Technological Standardization: The Case of Third Generation Cellular Communications, 8 INDUS. & INNOV. 49, 49–78.
positives” *i.e.*, pro-competitive practices that the US erroneously restricts). 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. When the EU blocked this transaction involving two US companies, it was irrelevant that the US antitrust authorities had previously cleared the transaction: the acquisition was banned worldwide as it was legally impossible to let the merger proceed in one market yet prohibit it in another. In this sense, merger decisions are legally non-divisible. The GE/Honeywell case is emblematic of a difference in the antitrust regulatory approaches of the EU and the US. The US 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.

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

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39 See, for instance, Deborah Majoras: *GE/Honeywell: The U.S. Decision*, November 29, 2001, p. 16 (comparing US and EU enforcement approaches and noting that “in the United states, we have much greater faith in markets than we do in regulators […] the European Union comes from a more statist tradition that places greater confidence in the utility of governmental intervention in markets”)


41 Note that all antitrust decisions are not characterized by non-divisibility. For instance, a company may be able to retain different distribution systems in different markets. Thus, if the EU bans certain vertical agreement between a manufacturer and its dealer, the manufacturer can often hold onto a similar arrangement in another jurisdiction. See also discussion infra p. 42 (noting Microsoft’s decision to offer an unbundled product only in the EU as an example of divisibility).


43 See also, for instance, the EU’s decision to block the acquisition of DeHavilland by the ATR, which had been approved by the Canadian authorities, Case No. IV/M.053 *Aerospatiale-Alenia/Havilland* (October 2, 1991)


45 Case No. IV/M.877 *Boeing/McDonnell Douglas* (July 30, 1997)


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.\textsuperscript{48} However, the US has similarly restructured deals where parties’ productive assets are located offshore. Both the US and EU agencies are vested with extraterritorial regulatory capacity. Both recognize their authority to apply laws to foreign companies as long as anti-competitive “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 US counterparts: the Commission is empowered to prohibit mergers and impose behavioral and structural remedies without first obtaining a court judgment. Administrative delegation does not reach this far in the US where the agencies need federal court endorsement to enjoin a merger.\textsuperscript{49}

Critics of the EU’s antitrust activism express their concern for “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 US antitrust agencies’ decisions in the spirit of comity should give way to mutual recognition of antitrust decisions.\textsuperscript{50} This will not happen. The EU will continue to insist on its right to regulate its own market whenever competition on that market its affected. The US antitrust authorities know this, conceding that “we recognize that the EU is entitled to make and interpret its own laws.”\textsuperscript{51}

B. Privacy Regulation

As with antitrust regulation, the EU often sets the tone globally in the regulation of privacy. The EU has adopted a stricter privacy regulation than the US has.\textsuperscript{52} In the EU, privacy is widely regarded as a fundamental right which cannot, therefore, be contracted away.\textsuperscript{53} The EU favors comprehensive legislation that establishes privacy principles for both the public and private sector, enforced by independent regulatory agencies.\textsuperscript{54} In contrast, the US data privacy laws are restricted to the public sector and to some sensitive sectors, including health care and banking.\textsuperscript{55} The data privacy issues of the private sector are relegated to self-enforcement by the

\textsuperscript{48} See, for instance, Case COMP/B-2/38.381 – De Beers (the EU required De Beers to stop buying rough diamonds from a Russian company Alrosa as a commitment in an Art 102 dominance case); Case MN.5984 Intel/McAfee (Intel undertook to unbundle software and security solutions worldwide as a condition for a merger); Case M.5421 Panasonic/Sanyo (the EU approved a merger subject to an obligation to divest one of parties’ factories in Japan).
\textsuperscript{49} See discussion on this in Kovacic, supra note 45, at 851.
\textsuperscript{50} Europe vs. U.S. Business, Editorial, WSJ January 17, 2008.
\textsuperscript{51} Majoras, supra note 39, at 14.
\textsuperscript{52} See Mark F. Kightlinger, Twilight of the Idols? EU Internet Privacy and the Post Enlightenment Paradigm, 14 COLUM. J. EUR. L. 1, 5.
\textsuperscript{53} Id., at 19. 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.
industry. 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.\textsuperscript{56}

The EU approach to the protection of privacy rights is spreading outside its boundaries. Since the EU’s Data Protection Directive was passed, over 30 countries have adopted EU-type privacy laws, including most OECD countries.\textsuperscript{57} The US has been an exception, resisting the EU’s lead in protection of privacy. Still, EU privacy standards affect the business practices of many US companies. For instance, Yahoo! was prosecuted before French courts for the material that it made available on its US website because that material was accessible by French citizens.\textsuperscript{58} And this is just one example of the many lawsuits against US companies in European courts.\textsuperscript{59}

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.\textsuperscript{60} What constitutes “adequate” is defined case-by-case by the EU. US companies have strongly criticized the EU’s regulatory efforts, referring to “unreasonable restraints” on their business practices and the high costs of compliance.\textsuperscript{61} Their disapproval is only going to grow as the EU proceeds to bolster its enforcement efforts with tougher penalties.\textsuperscript{62} Yet many US corporations have already, reluctantly, adopted privacy policies that satisfy the EU requirements. Numerous US corporations have also voluntarily signed onto the EU-US negotiated “Safe Harbor Principles”, issued by the Department of Commerce after the EU Directive entered into force.\textsuperscript{63} The Safe Harbor Agreement stipulates that US firms active in the EU market comply with EU privacy rules even when their data are processed in the US.\textsuperscript{64} Despite being otherwise “strong-armed” to the Agreement,\textsuperscript{65} the US managed to negotiate one important exception: The EU conceded to allow airlines to transfer passenger records to the US Customs Office in the interest of US homeland security.\textsuperscript{66}

\textsuperscript{56} See Bach & Newman, supra note 21, at 833.
\textsuperscript{57} See Schaffer, supra note 55, at 43. (discussing, for instance, American Airlines being sued in Sweden after transferring data from Sweden to US electronic reservation system without prior customer consent). See also US-EU divergence with respect recent investigations on Google’s Street View, \url{http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102707827.html} (discussing the FTCC’s decision to close its investigation against Google in sharp contrast to European regulators);

\textsuperscript{58} See Articles 25 and 31 of the Data Protection Directive and discussion in Schaffer, supra note 55, at 21-23.
\textsuperscript{59} See Schaffer, supra note 55, at 17-20.
\textsuperscript{60} See Schaffer, supra note 55, at 21.
\textsuperscript{61} See Bach & Newman, supra note 21, at 833.
\textsuperscript{62} Kevin J. O’Brien, “E.U. to Tighten Web Privacy Law, Risking Trans-Atlantic Dispute” (November 9, 2011).
\textsuperscript{63} International Safe Harbor Privacy Principles, available at \url{http://export.gov/safeharbor/eg_main_018365.asp}.

While signing up 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 actions under Section 5 of the FTC Act against unfair or deceptive acts or practices. See \url{http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_European_Union_final.pdf}

\textsuperscript{64} See Bach & Newman, supra note 21, at 833.
\textsuperscript{65} See Bach & Newman, supra note 21, at 834, 836.
The non-divisibility of data has further facilitated the globalization of the EU’s privacy policy. While national regulations may differ from country to country, data “flow lightly and instantly across borders.” Multinational corporations have adjusted their global data management systems to reduce their compliance costs with multiple regulatory regimes. 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. Other times it may be feasible but too costly to create special websites or data-processing practices just for the EU. As a result, EU rules have prompted several US companies ranging from Google to General Motors to amend their global privacy practices. Indeed, today many multinational companies have only one companywide privacy protection policy—and it is Europe’s.

C. Health Protection: Regulation of Chemicals

The Registration, Evaluation, Authorization, and Restriction of Chemicals (“REACH”) is an EU toxic chemicals regulation that has had a substantial impact on a global scale. 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.

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

69 Ryan Singel, EU Tells Search Engines to Stop Creating Tracking Databases, April 8, 2008 in Wired.com, available at http://www.wired.com/threatlevel/2008/04/eu-tells-search/ (discussing how EU privacy rules on search engines’ data retention practices extend to the US “due to technical difficulty of determining whether a particular user is or isn’t a citizen of an EU country”).
70 Standard Bearers, supra note 1.
71 See Kevin J. O’Brien, Google Data Admission Angers European Officials, N.Y. TIMES, May 15, 2010, at 4 (discussing personal information Google collected through street view); See Legal Confusion on Internet Privacy: The Clash of Data Civilizations, ECONOMIST, June 17, 2010, at 2 available at: http://www.economist.com/node/16377097 (discussing changes the EU demanded in Google Buzz, the firm’s social network service); See Tracy Gray et. al., US and EU Authorities Review Privacy Threats on Social Networking Sites, 19 ENT. L.R. 69, 69 (2008); See David Scheer, supra note 1. (Discussing GM’s, DuPont’s and Procter & Gamble’s practice of applying EU-like standards for its employee data worldwide); See also Mark Berniker, EU: Microsoft Agrees to .NET Passport Changes, DATAMATION (January 30, 2003); http://itmanagement.earthweb.com/entdev/article.php/1576901/EU-Microsoft-Agrees-to-NET-Passport-Changes.htm ; See Kightlinger, supra note 52, at 11.
72 Standard Bearers, supra note 1. (citing Microsoft’s Director of corporate privacy, who confirms that Microsoft applies one companywide privacy standard and that is the EU standard).
manufacturers and importers as opposed to regulators. 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. 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 chemicals” that had been placed on the EU market before they were regulated. According to Commission, these chemicals represent 99 percent of the total substances on the market. The implementation of REACH is also guided by the “precautionary principle”, which lowers the threshold for regulatory intervention.

REACH represents a stark departure from the US Toxic Substance Control Act (“TSCA”), which continues to place the burden of proof on regulators. 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”). The EPA also has a high evidentiary burden when requesting safety data, leading it to restrict or ban very few chemicals. TSCA is further weakened by its provision grandfathering 95% of the existing chemicals and thus forgoing any testing with respect to the vast majority of the chemicals on the market.

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 US chemical industry is profound. The critics claim that REACH poses a significant costs and challenges to manufacturers and importers, particularly in its impact on the supply chain, sales, and procurement. 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.

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76 See the Commission White Paper: Strategy for a Future Chemicals Policy, COM (2001) 88 final (the Commission refers to the “burden of the past” as a motivation for regulating existing chemicals).
77 Id., Section 2.1.
78 See Article 175 EC Treaty and Case C-180/96 United Kingdom and Northern Ireland v. Commission, 1996 E.C.R. I-3903, paras. 142-143.
80 See Motaal, supra note 49, at 647.
81 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 the cost-benefit analysis. This high standard of proof has led, for instance, to EPA’s failure to regulate asbestos. See Corrosion Proof Fittings, Inc. v EPA, 947 F 2d 1201 (5th Cir. 1991). See discussion in Scott, supra note 74.
82 See discussion in Wirth, supra note 15, at, supra note 15, at 102.
Despite this resistance, REACH is affecting change at a global level. 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. Here the non-divisibility 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 they have been identified by the EU as a “substance of very high concern.”

In addition to this kind of de facto Brussels Effect, REACH has triggered a more limited de jure Brussels Effect, prompting an international adoption of REACH style laws. 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 an EU compliant production processes. This process 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.

In the US, REACH has prompted state level regulatory reforms and the introduction of Congressional bills seeking to amend TSCA. These legislative efforts acknowledge the global nature of the chemical industry and the existing need for the US companies to comply with REACH, including collecting the safety information relevant for their production. 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.

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85 Wirth, supra note 15, at 101-103; Scott, supra note 74.
86 See Henrik Selin and Stacy D. VanDeveer, “Raising Global Standards: Hazardous Substances and E-Waste Management in the European Union” in Environment, Vol. 49, No. 10 (December 2006) p. 8, 14; Joanne Scott, supra note 74, at 939-940; This is consistent with VOGEL, supra note 4.
89 Scott, supra note 74, at 920-928.
90 Id. at 914-918 (discussing regulatory reforms in Maine and Massachusetts).
91 Id. at 914-921.
92 Id. at 910-914.
D. Environmental Protection

While REACH is often considered a health measure, its provisions are also directly geared at protecting the environment. Yet, among the environmental measures spread through the Brussels Effect, REACH does not stand alone. Before the REACH was adopted, the EU had already regulated the management of hazardous substances and electronic waste.\(^93\) 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. The Commission has this year extended the Directive to cover all electrical and electronic products.\(^94\)

The RoHS Directive has been exported to other jurisdiction through both a de facto and de jure Brussels Effect. Foreign manufacturers exporting into the EU prefer to comply with one set of standards and thus make their entire production RoHS compliant.\(^95\) This has led to a global change in the design of electronic products.\(^96\) In addition, several jurisdictions outside the EU have adopted RoHS-type laws, including China, Japan and South Korea.\(^97\) Also California responded to the EU’s strict electronic waste regulation by explicitly incorporating EU standards into its Electronic Waste Recycling Act of 2003.\(^98\) 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.\(^99\)

The EU’s most recent pursuit of 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 will include aviation within this scheme.\(^100\) 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


\(^99\) See §§ 25214.10 (b) of the California Health and Safety Code and discussion in Scott, supra note 74, at 942.

takes place in the European airspace, making the scheme non-divisible. 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 US, Canada and the high seas, respectively). Yet the airline must acquire emission permits for each tonne of emissions emitted across the entire flight since the point of landing is the EU.\footnote{See Statement of Nancy N. Young, ‘The European Union’s Emissions Trading Scheme: A Violation of International Law’, pp. 4-5, at: \url{http://republicans.transportation.house.gov/Media/file/TestimonyAviation/2011-07-27-%20Young.pdf} (July 27, 2011).}

United Continental and American Airlines, supported by the US Air Transport Association, challenged their inclusion into the scheme before UK courts, alleging that the UK’s decision to implement the EU Directive violates international law. The UK Court referred the question to the European Court of Justice. The Advocate General of the Court issued her opinion, concluding that the Directive is compatible with international law.\footnote{Opinion of the Advocate General Kokot in Case C-366/10, The Air Transport Association and Others (October 6, 2011). The Air Transport Association of America and Others. The full court, that often (but not necessarily) follows the Advocate General’s opinion, is expected to rule on the matter early next year.} The Advocate General did not even find the Directive to be extraterritorial, concluding that “an airport within the territory of the European Union provides an adequate territorial link for the whole of the flight in question to be included in the EU emissions trading scheme”.\footnote{Id.}

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.\footnote{See Recital 17 of the Directive 2008/101 amending Directive 2003/87, together with the Preamble to the Directive. See also discussion in Joanne Scott and Lavanya Rajamani, “EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme”, available at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952554} (November 1, 2011).} Whether domestic climate regulation in the US or China, for instance, would qualify as an equivalent provision is subject to the EU’s unilateral decision.\footnote{Id.} China, for instance, has already proposed domestic emissions-cutting measures and asked the EU to consider those as “equivalent” to what the EU requires.\footnote{Saqib Rahim, “U.S.-E.U. Showdown Over Airline Emissions Begins Today”, NYT (July 5, 2011).} 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 order entire fleets of planes that allow them to meet the stricter EU standards more cost-effectively, confirming the de facto Brussels Effect.

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 US take starkly opposing views on the regulation of biotechnology. The US regards GMO-products as substantially similar to products made using traditional production methods. They can therefore be cultivated and marketed without extensive pre-market safety studies or the need to specifically label them.\textsuperscript{107} In contrast, the EU subjects GMOs to extensive regulation based on their potential adverse health effects. The GMOs have to go through lengthy approval process, which entails an evaluation of the risk the GMOs pose to human health and the environment.\textsuperscript{108} The evaluation is also guided by the precautionary principle, which justifies regulatory intervention in the presence of scientific uncertainty.\textsuperscript{109} The EU further requires that most authorized foods, ingredients and animal feeds containing over 0.9% of GMOs must be labeled.\textsuperscript{110}

Several reasons explain the US-EU regulatory divergence.\textsuperscript{111} The US is the world’s leading GMO producer whereas GMOs are hardly cultivated in the EU.\textsuperscript{112} Biotechnology is seen as a key for retaining the US competitiveness in export markets while the EU places cultural importance on small-scale farming and remains skeptical of mass production technologies.\textsuperscript{113} Consequently, the US farmers and the entire biotechnology industry are influential players in the US political process whereas farmers producing non-GMO crops wield influence in the EU. At its root, however, lie very different consumer preferences with respect to food safety across the Atlantic. Survey data 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,\textsuperscript{114} whereas US consumers have shown little interest or concern for the issue.\textsuperscript{115}

The above discussion suggests that the EU certainly has the requisite propensity to regulate GMOs with the strictest standards. Arguably, the EU has also, over time, built the kind of institutional capacity that would allow it to exercise this regulatory authority.\textsuperscript{116} GMOs are

\textsuperscript{108} Regulation EC 1829/2003 on genetically modified food and feed (September 22, 2003) (2003) O.J. L 268/1
\textsuperscript{109} See discussion in Joanne Scott, European Regulation of GMOs and the WTO, COLUM. J. EUR. L Vol 9 Spring 2003 No 2 at 219-224.
\textsuperscript{111} See, however, discussion in Aseem Prakash and Kelly L. Kollman, Biopolitics in the EU and the U.S.: A Race to the bottom or Convergence to the Top? In International Studies Quarterly, (2003) 47, 617, 629-634 (discussing how US-EU regulatory approaches may be converging as state level legislative activity and court challenges against GMO are growing).
\textsuperscript{112} Id. at 627.
\textsuperscript{113} Id.
\textsuperscript{115} See discussion in Prakash & Kollman, supra note 111, at 617-641(citing an Environics poll, which reported that while 78% of Americans support agriculture biotechnology, the comparable figure is Germany was 54%, in France 52%, Britain 36% and Spain 29%).
\textsuperscript{116} ABRAHAM L. NEWMAN, PROTECTORS OF PRIVACY (2008), at 147. (Newman argues the regulatory capacity to be the key variable explaining global regulatory outcomes. He argues that the EU initially had fragmented institutional
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 US farmers, the EU is only the fifth largest export market and accounts for 8% of US agricultural exports. Many producers can afford to forgo the EU market, diverting their trade elsewhere. At the same time, an increasing number of other countries are adopting mandatory labeling schemes for GMO-products, which narrows the US 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, the US 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 fields to non-GMO fields. 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. The specific processes through which US farmers gather and transport their crops for distribution often make their harvests inseparable in practice. At the minimum, separation of production is costly. This 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.

The practical non-divisibility of production is enhanced by the influence and business practices of multinational food processors. They are reluctant to make separate batches for the EU and US and frequently refuse to buy corn that could potentially cause them marketing problems in the EU. 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 US farmers away from GMO products altogether.

capacity with respect to food safety, explaining its limited ability to export its preferences globally. However, the establishment of the European food Safety Agency “could substantially strengthen the European position”).

118 However, trade diversion may entail the producers being able to sell their crop at a lower price in alternative export markets.
119 See Prakash & Kollman, supra note 111, at 632.
120 Agricultural Biotechnology: The U.S-EU Dispute, at 5. See also Case C-442/09 Karl Heinz Bablok and Others v Freistaat Bayern (September 6, 2011) (in a case concerning honey that contained traces of GMOs due to accidental contamination from GMO-test fields that were 500 meters away, the EU’s General Court confirms that conventional food that was unintentionally contaminated by GMO-products “must always be regarded as food produced from a GMO”. The ruling is read as highlighting the difficulty of co-existence of GMO- and conventional agriculture).
121 Agricultural Biotechnology: The U.S-EU Dispute, at 5.
122 See Young, supra note 20, at 467–68.
123 id., at 467–68.
124 See Mitchener, supra note 2, at 3. See also Wirth, supra note 15, at 104 (referring to the “virtual collapse of the market for U.S. exports of corn” following EU’s labeling requirements, and noting that US rice and wheat farmers
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 US challenged the EU’s regulatory stance before the WTO and won the trade dispute in 2006. Yet, for the reasons discussed below in Section V, the negative ruling by the WTO has done little to compromise the EU’s regulation on GMOs. The US has failed to comply with the ruling and transatlantic trade involving GMOs remains restricted. As a result, the US 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 food 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. The charges of regulatory imperialism appear misguided. A more compelling account shows the EU as being 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.

1. External Motivations

In contrast to the US’s unilateralism in international affairs, the EU is often portrayed as a champion of multilateral cooperation and universal norms. 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 in the global stage, both unilaterally and multilaterally. In doing so, the EU acts like any great power with the desire to ensure that international norms reflect its preferences.125

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.126 The EU has significant leverage over countries that seek closer cooperation with or, eventually, membership in the EU.127 But even outside of its immediate sphere of influence, critics maintain that the EU

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127 See Laidi supra note 27, at 10; Zielonka supra note 30, at 476. The negotiations with candidate countries are highly asymmetrical, and the countries are presented with the option of adopting the entire body of EU laws and regulations as a condition for membership or not joining the club.
is engaged in a novel form of imperialism. Instead of pursuing its goals through military and political instruments, the EU is relying on economic and bureaucratic tools of dominion over countries that are dependent on access to its vast domestic market. Lawrence A. Kogan, in criticizing the EU’s extensive regulatory reach in environmental and food safety matters, puts it bluntly: “…the 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 do it hardly makes it more palatable to people who will be unable to feed themselves as a result”.

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 on its home market. Still, the EU’s regulatory stance reflects a genuine desire to shape the global regulatory environment and a conscious pursuit of global influence. In its 2007 policy paper “A Single Market for Citizens”, the European Commission envisions 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.”

In describing its global role, the EU legitimizes its strategies by claiming that its values and policies are normatively desirable and universally applicable. 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 rule-based world and offer an alternative to the more controversial and self-serving worldview advanced by the US. A commitment to a social welfare state and an attitude towards risk guides the EU’s global agenda and steers it towards extensive regulation of the global economy—the protection of the

128 See, for instance, discussion in Regulatory Imperialism, supra note 1 (the WSJ Editorial is referring to the EU “trying to force the rest of the world to play by its cumbersome rules” as well as “imposing its regulatory vision on other jurisdictions by setting the toughest standards”). See also Europe v. U.S. Business, WSJ January 17, 2008 s (the WSJ Editorial discussing EU antitrust enforcement and calling for Washington to “wake up to Europe’s regulatory imperialism”).


131 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 - Interim Report to the 2007 Spring European Council */COM/2007/0060 final */ See also the Commission’s justification for its decision to include aviation, including foreign carriers, into its emission trading scheme at http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm (“The intention is for the EU ETS to serve as a model for other countries considering similar national or regional schemes, and to link these to the EU scheme over time. Therefore, the EU ETS can form the basis for wider, global action”).
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.

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 halt 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. Yet the difficulties associated with international treaty negotiations have given the EU the imperative to act unilaterally. 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.

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.

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. More regulation 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.

Yet even if the EU was able to portray itself as a benevolent, normative power that is advancing universal norms, skeptics point out that the notion of a normative power has neo-

133 See discussion, supra p 19-20.
134 See Regulatory Imperialism, WALL ST. J., Oct. 26, 2007 at 1; Clean-air turbulence: Europe is right to include airlines in its emissions-trading scheme, ECONOMIST, July 9, 2011
136 See Laidi supra note 27, at 4.
137 See Zielonka supra note 56, at 475.
colonial undertones as the EU is exporting its “standards of civilization”. 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.

2. 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. According to the Czech president Vaclav Klaus, “the 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 more productive countries.”

A compelling explanation is that the EU’s global regulatory agenda is tied to its economic interests and driven primarily by its concern for competitiveness. Europe is committed 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. 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. 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.

140 See Laidi supra note 27, at 4.
141 See Kogan, supra note 52, at 3.
142 See Zielonka supra note 56, at 482–483.
143 See Commission communication of 1 June 2011, “A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020”, COM(2011)311 final (“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 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)
144 Emma Tucker, Plastic toy quandary that EU cannot duck, FT (December 9, 1998) (discussing the Commission’s attempt to reconcile its two central functions—demands for consumer protection and competitiveness of European industry).
145 See, for instance, Saqib Rahim, “U.S.-E.U. Showdown Over Airline Emissions Begins Today”, NYT (July 5, 2011) (referring to the Commission’s spokesman Isaac Valero-Ladron defending the EU’s inclusion of foreign airlines into 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”).
In fact, the Brussels effect can be seen as a desire 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, Netherlands and the Nordic countries were the pioneers of the EU’s environmental regulation.146 Similarly, regulators in France and Germany were some of the key member states who exported their privacy regulation upward within the EU.147 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 and then 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 character. At the same time, EU corporations gain a level playing field whereby foreign firms do not gain a competitive advantage at their expense.148 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. Already subject to the disclosure obligations, the EU corporations teamed up with environmental NGOs to lobby for the adoption of the same standards by US and Asian corporations. In the end, the campaign was successful and the European standards were converted into global standards by the ISO.149 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.150

While 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, 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.151 The external dimension of the single market was only fully realized when the EU’s trading partners

146 See Henrik Selin and Stacy D. VanDeveer, supra at 10-11 (discussing this phenomenon inside the EU in connection with environmental regulation).
147 NEWMAN, supra note 116, at 11.
expressed concerns that the single market might lead to protectionism vis-à-vis third countries. Thus, 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. Acknowledging this 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.

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 is compensating 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. 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 27 member states. At the same time, the Commission has been delegated the power to take all measures necessary to create and maintain 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 less than 1.3% of the GDP of the EU. 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.

IV. MARKET-DRIVEN VERSUS POLITICAL HARMONIZATION

The above discussion has focused on the conditions under which the Brussels Effect generates global standards, and the EU’s motivations to externalize its regulations through this process. However, unilateralism is not the exclusive path for global standards. It is more accurate to think that there are different paths to regulatory convergence, all of which operate in

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153 This can be contrasted to the US federal government spending, which exceeds 20% of the GDP.
154 See Majone, supra note 24, at 85 & 98.
parallel. The EU also exerts influence outside its borders through bilateral agreements—most glaringly, though accession agreements and partnership treaties155—and via its prominent role in international organizations and standard settings organizations.156 At times, EU rules diffuse more informally and lead to legislative borrowing through various benchmarking mechanisms.157

This Section compares and contrasts two identifiable avenues for regulatory globalization: the EU’s pursuit of regulatory convergence through treaties and institutions (political harmonization) and the EU’s unilateral reliance on the Brussels Effect to spread its norms (market-driven harmonization). This section argues that unilateral, market-driven harmonization has distinct advantages over political harmonization. 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. These processes have 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 US State Department to enforce US rules on insider trading. These efforts were complicated by the reluctance of foreign countries, particularly Switzerland, to cooperate with the US due to their domestic laws on bank secrecy. The US has had to spend extensive political capital to persuade

155 On conditions that prospective member states must meet, see http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm
157 On theories that highlight the central role of experimentalism, benchmarking and legislative borrowing in shaping global regulatory environment See, for instance, Charles F. Sabel and Jonathan Zeitlin, Learning from Difference: the New Architecture of Experimentalist Governance in the EU, European Law Journal, Vol 14, No 3 (May 2008), pp. 271-327. An example of how adoption of a high regulation in the EU can help build political pressure for a regulatory reform in the US, see Katerina Linos, Diffusion through Democracy, 55 American Journal of Political Science 678 (2011) (arguing how a key argument for the passage of the maternity leave in the US was that Europe and Japan already offered this benefit).
Swiss authorities to cooperate. This was considered worth the effort given that Swiss banks hold approximately half of the world’s private assets.\(^\text{158}\) The US’s 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 US 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 agreed on the benefits 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.\(^\text{159}\) Unilateral regulatory globalization avoids 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 is implemented and enforced. The treaty on the world’s marine fisheries is one of the many examples of negotiated global standards that fail to accomplish their goals: the treaty has not been successful in addressing the problem of over-fishing and propelling sustainable management of fishing stocks. 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.”\(^\text{160}\)

**B. Reasons for Persisting Multilateralism**

Given the many benefits of unilateral globalization, why does the EU still pursue multilateral standards in many areas, whether by directly influencing other states or pursuing multilateral solutions within an international institution? 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 some further predictions on when the EU is likely to pursue political harmonization. The EU would be expected to seek political harmonization when 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

\(^{158}\) See Macey, *supra* note 10, at 1368–69.


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 the 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 e.g., when China’s failure to limit its GHG emissions directly compromise the EU’s efforts to halt climate change. Another example would be the EU’s efforts to convince other countries to adopt tough domestic antitrust laws. 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 supra-competitive profits in markets that fail to control their collusive practices.\footnote{161} Foreign standards may also reinforce the desired effect of EU standards, for example, when standards are characterized by network effects i.e., benefits relative to the costs of adopting a standard increase when several countries have the same standard.\footnote{162}

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.\footnote{163}

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.\footnote{164} This can be a shrewd way to pre-empt 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

\footnote{161} The EU is not the lone aggressive regulator of cartels. The US takes equal tough stand vis-à-vis collusive practices of firms than the EU does. Indeed, the US has more invasive investigatory tools and remedies at its disposal than the EU does, due to more extensive discovery rules in the US and the US authorities’ ability to pursue criminal penalties. Third countries’ agencies can often free-ride on the US and the EU authorities’ investigations. Yet both agencies can see their laws’ deterrent effect be diluted if cartels can freely operate in third markets. See e.g., discussion in Empagran [add].

\footnote{162} See Vogel & Kagan, supra note 2, at 13. (However, these standards are more likely to spread unless the main economic activity is taking place on export markets).

\footnote{163} See Macey, supra note 10, at 1369.

\footnote{164} The European Commission has stated that “the EU aims at global standard setting by promoting ‘the adoption overseas of standards and regulatory approaches based on, or compatible with, international and European policies.’” Gstohl, supra note 75, at 19 (construing European Commission, Implementing Policy for External Trade in the Fields of Standards and Conformity Assessment: a Toolbox of Instruments 8 (Commission Staff Working Paper, 2001).); See European Commission, 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” (Interim report to the 2007 Spring European Council, 2007).
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 27 countries but use the same number strategically as a 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.\footnote{See Safrin, \textit{supra} note 82, at 1324–27.}

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: The EU first increases its sphere of influence within its neighborhood by requiring its standards to be adopted as a condition for closer economic and political relationship with the EU. It is then easier to later reach a critical mass that tips the balance in Europe’s favor in any international efforts to reach an agreement on harmonization of certain regulation.\footnote{In a similar vein, Wirth argues that de facto convergence of regulations and business practices increases the likelihood of regulatory consensus and thus paves way for international harmonization. See Wirth, \textit{supra} note 15, at 106; \textit{See also} Bradford, \textit{supra} note 159, at 439 (arguing that increased convergence may pave the way for an international antitrust agreement but also noting the declining net benefits of an such an agreement after de facto harmonization has taken place).}

V. LIMITS OF THE BRUSSELS EFFECT

The Brussels Effect is not unlimited. A set 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 Section 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 more 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 conforming to EU standards or forgoing the entire market. They rarely opt for the latter.

However, over time, the EU’s regulatory clout may gradually 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, the businesses’ dependence on their access to the EU market is diminishing. 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 its transactions and conduct with 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 a 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 new trump-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, 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 overall GDP is. 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. 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 US, have an incentive to constrain the EU. The EU policies impose adjustment costs on US corporations. The US consumers also end up paying more for goods when producers are forced to accommodate concerns that US consumers do not necessarily share. The US frequently views the EU’s regulatory policies as inefficient and detrimental to its welfare—in addition to being counter-majoritarian and thus undemocratic. Prompted by the American chemicals industry, the US government engaged in extensive efforts to block the REACH regulation. The US’s reaction to the EU’s interventionist antitrust laws has been equally hostile. And the recent plan to subject foreign airlines to the EU’s ETS system has been vehemently opposed by US airlines and the US government, as well as other foreign governments.

168 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.
170 See Matt Murray et. al., Oceans Apart: As Honeywell Deal Goes Awry for GE, Fallout May Be Global ---The U.S. Giant’s Troubles In Europe Could Chill Mergers of Multinationals --- Raining on Welch’s Parade, Wall St. J., June 15, 2001, at 1 (discussing how the result of the GE/Honeywell agreement might chill merger activity among other US multinationals interested in expanding globally).
171 See the ECJ case, supra. See also Joshua Chaffin and Andrew Parker: “Blow to US Airlines in the Emissions Fight”, FT.com (October 6, 2011) (mentioning how 21 countries have opposed the inclusion of non-EU airlines into the EU’s ETS scheme and how there have been several threats of retaliation and how China has threaten to cancel a contract for ten planes made by European manufacturer Airbus. India has similarly threatened with retaliation).
But there is very little the US 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 federal laws. But there is nothing akin to a doctrine of pre-emption that constrains the EU’s regulatory powers.\footnote{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, Administrator, EPA, to Arnold Schwarzenegger, Governor of California (Dec. 17, 2007), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epa-letter.pdf.} When the US producers are forced to either comply with higher standards or be shut out of the EU market, the US has four ways to respond: the US can 1) choose to voluntary converge to EU standard; 2) try to compel the EU to change its rules (i.e., 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 (e.g., pursuing an international standard that reflects some combination of US and EU preferences); or, finally, 4) choose to do nothing.\footnote{See Young, supra note 20, at 459.}

The most controversial strategy for the US or any other foreign government would be to threaten the EU with sanctions. 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.\footnote{Id.} In past US-EU antitrust enforcement conflicts, for instance, the US threatened the EU with trade sanctions unless the EU backed down.\footnote{See, for instance, Brian Coleman, U.S. May retaliate if EU Rejects Boeing Merger, wall St. J. July 18, 1997 (reporting that President Clinton threatened the EU with unilateral trade sanction or a WTO challenge if the EU were to block the deal).} Yet notwithstanding the escalated rhetoric of retaliation, the antitrust controversies led the US government to concede that “we have no power to change EU law.”\footnote{Majoras, supra note 39, at 14.}

A further challenge for the US is that it often gains nothing by defending its standard even if that standard was more efficient—as a less stringent regulator, the US simply becomes obsolete in the fields where the de facto Brussels Effect takes place. But the US is unlikely to adopt the EU standard as a regular course of action either. If we assume that the existing domestic regulation in the US 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.\footnote{See Drezner, supra note 7, at 845.} Governments incur costs relating to legislating and retraining its regulators.\footnote{See id.} And, most importantly, the US must forgo the efficiencies that its preferred regulation would generate. When holding onto its own domestic standards, the US can at least ensure that its standard governs the activity that is domestic in nature. And given how large the US 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 US 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 regulations. The US’s persistent and strongly voiced criticism of the banned GE/Honeywell transaction led the EU to pursue more sophisticated economic analysis in its future merger investigations. However, few in the US believe that the uncertain prospect of fostering changes through “feedback effects” that may (or may not) influence some areas of the EU’s policy constitutes a satisfactory response to the loss of US’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 US businesses may lead the US to support greater oversight by international institutions. Though often skeptical of international institutions’ ability to regulate the markets, the US 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 US 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. But this, of course, requires that the EU be prepared to forgo unilateralism for multilateralism, enhancing 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 the US corporations’ opposition to EU rules likely depends on whether they are large, export-oriented producers or small, non-export-oriented producers. If an export-oriented US firm is forced to adjust its global production to the (presumably more costly) EU-standard, the non-export-oriented US 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 US 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 at its home market at no additional cost to itself. In contrast, a non-export-oriented US firm is likely to resist the de jure Brussels Effect as it 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 US’s response to the Brussels Effect.

Some progressive states in the US endorse EU’s leadership, voluntarily choosing to incorporate EU regulations into their own state laws. Some developing country governments

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179 See Macey, supra note 10, at 1359. See Majoras, supra note 39, at 15 (after criticizing the GE/Honeywell decision, proposing to pursue greater international cooperation to avoid inconsistent decisions in the future. See also Saqib Rahim, “U.S.-E.U. Showdown Over Airline Emissions Begins Today”, NYT (July 5, 2011) (discussing how the Air Transport Association of America is urging global climate action in the wake of the EU’s decision to include foreign airlines into its ETS. The ATA endorses a non-binding international emissions agreement within the UN’s International Civil Aviation Organization).

180 See, for instance Helen Milner, RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE (1998) (discussing the divergent interests of exporting and non-exporting firms)

181 For California, REACH can be described as having been both a catalyst and a resource for regulatory reform. See discussion in Scott, supra note 74, at 898. See also discussion in Pohl, supra.
regard the Brussels Effect as 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 anti-competitive 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. US consumers who prefer higher levels of consumer protection and a civil society that advocates environmental protection often seize EU policies and use them in their attempts to forge change in the US. 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 US 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 27 different national standards, even if that standard was higher than the average standard before the upward harmonization took place in the EU. The US 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, US producers are likely to face less competition from EU producers.

Finally, the EU provides a forum for US 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 US company, to seek denial of their competitors’ (including domestic competitors) substances in the EU. In the antitrust realm, the US corporations have found the EU a valuable legal battle ground and frequently engage in forum shopping when they seek to halt practices of their (often domestic) competitors. The US-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 US company that brought charges against Microsoft in the EU, knowing that it was more likely to obtain remedies in the EU, which harbors a broader notion of what constitutes anti-competitive conduct. As the tables turned, Microsoft lodged an antitrust complaint before the European Commission against Google.

182 See Young, supra note 20, at 474; For instance, while the EU rules on GMO food has not led to a regulatory change in the US, the dispute surrounding the issue has heightened domestic debates on potential downsides of biotechnology. Civic interest groups have seized 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 consumer’s internet searches to gather marketing information—on personal computers. See Regulatory Imperialism, supra note 1; Otto Pohl, European Environmental Rules Propel Change in U.S., N.Y. TIMES, July 6, 2004: Scott, supra note 74, at 920-928 (discussing how US-based NGOs, including Environmental Defense Fund, have used REACH to advocate domestic reform).

183 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 discussion in Scott, supra note 74, at 930.
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. 184 These exceptions are subject to specific conditions to ensure that countries do not use them as disguised forms of trade protectionism. Much of WTO litigation therefore centers on the parties’ disagreement as to whether domestic regulations reflect a legitimate exercise of domestic regulatory authority or whether they serve protectionist goals and hence constitute impediments for international trade.

The US did resort to the WTO in challenging the EU’s prohibition on GMO food and hormone treated beef, eventually winning both trade disputes. 185 The US 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. The EU defended its measures on grounds of genuine consumer preferences, which in Europe reflect deep skepticism of GMOs and growth-promoting hormones, 186 and argued that scientific studies supported its health concerns. The WTO ruled for the US, urging the EU to lift its import ban of hormone-treated beef and similarly approve GMO products without “undue delay.” Most recently, the US has challenged the EU’s import ban of US poultry that is rinsed in chlorine—a process which, according to the US, makes poultry safe for consumption. 187 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 non-retroactive damages. In addition, the WTO system cannot compel a member state to lift its restrictive measures. It can merely authorize sanctions against a non-compliant member state. For instance, the EU has maintained its import ban on hormone-treated beef, preferring to endure US’s retaliation. 188 The EU has also repeatedly allowed the deadline for implementing the GMO-ruling to lapse, while the US has suspended its retaliatory measures in anticipation of settlement or the EU’s future

184 Art XX of the GATT.
186 See discussion supra, p 20-23.
188 See Renee Johnson and Charles E. Hanharan, The U.S.-EU Beef Hormone Dispute (Congressional Research Service, December 6, 2010). The EU has further continued to gather scientific evidence to justify its import ban and challenged the US retaliation. After another round of WTO litigation and a mixed and inconclusive Appellate Body ruling, both the EU’s import ban and the US’s retaliation remain in force. See USTR, “WTO’s Appellate Body Vindicates Continued U.S. Imposition of Sanctions after the EU Claimed Compliance in the EU-Hormones Dispute,” (October 16, 2008).
compliance. These difficulties the US has faced in obtaining EU’s compliance suggests that the WTO provides even less relief for the EU’s less powerful 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 US) to constrain the EU.

The WTO’s ability to constrain individual countries’ regulations is further limited by its restricted mandate. Many areas such as antitrust and privacy do not fall within the purview of the WTO rules and its dispute settlement mechanism. There have been several attempts to include antitrust, among other new issue areas, under the WTO framework. All those attempts have failed. 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. Had the US, 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 and not only a limitation for the Brussels Effect.

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 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 constraint 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 Supply and Demand Conditions

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

189 See Charles E. Hanrahan, Agricultural Biotechnology: the U.S.-EU Dispute, Congressional Research Service, April 8, 2010). And even if the EU was 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 in GMO-foods.
190 On privacy, see the general exception clause in Article XIV of GATS, which explicitly authorizes states to restrict trade to “protect the privacy of individuals”. See discussion on this in See Schaffer, supra note 54, at 46-55.
191 See Bradford, supra note 159.
192 See Schaffer, supra note 55, at 54-55.
in other markets. 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 US. For instance, the EU’s End-of-life Vehicles Directive, which regulates recyclable components and toxic heavy metals contained in automobiles, has had an insignificant impact on US car manufacturers, who sell virtually no cars to the EU. At the same time, EU regulation has been successfully externalized on Korean and Japanese manufactures. 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 anti-competitive 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 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 consist of attempts to unilaterally limit exports to third countries versus preventing imports to one’s own market.

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. This questions the view that the EU’s “normative power” has universal appeal, leading countries to adopt EU’s norms and standards voluntarily. In the end, the EU derives its power from its ability to offer conditional access to its markets. Signing a human rights treaty can be a condition for a trade agreement with the EU. Enforcing it is another matter. It is

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193 See Carr & Scheiber, supra note 77, at 76–79; Kate O’Neill, Globalization and Hazardous Waste Management: From Brown to Green, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 156–58 (David Vogel & Robert A. Kagan eds. 2004). 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.


195 See Schapiro, supra note 52, at 14.

196 See O’Neill, supra note 86, at 156–58.

197 See Zielonka supra note 56, at 478.

198 The WTO recognizes very limited rights for any country to limit imports based on human rights violations in the exporting country. See Article 20 of the GATT Agreement, which lists violation of “public morals” or the “use of prison labor” 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 provision in its bilateral trade agreements and regularly conditions any country’s GSP-status (GSP refers to “Generalized System of Preferences or the “GSP” program) on these country’s agreement to ratify international conventions on human rights and subscribe to labor standards endorsed by the EU. See also Emilie Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 IO 593 (2005)
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 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 preference heterogeneity within the EU. Online gambling is an example of an area where harmonization within the EU has failed, the UK being hospitable to online gambling while countries like Germany and France resisting legalization in an attempt to protect their state monopolies on gambling. 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. And when it comes to financial regulation of any kind, the UK’s opposition is almost guaranteed.

EU’s regulatory clout is also limited in instances where other states have a preference for higher standards. At times, the US prefers higher standards than the EU does. For instance, the US’s Sarbanes Oxley Act of 2002, targeted at improving corporate responsibility in the post-Enron environment, is widely perceived as establishing the highest standard for corporate governance. Another manifestation of the US’s preference for strict financial regulation is the Dodd-Frank Act. Where the US opts for strict standards, it can become the source of global standards, assuming the conditions for unilateral regulatory globalization are met. As the US’s recent regulatory pursuits have predominantly targeted the financial sector, it is less evident that

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199 See Bach & Newman, supra note 64, at 33-36.
200 See “European Plan to Introduce Corporate Tax plan”, NYT (March 16, 2011) and “EU Corporate Tax Plan Deals Blow to Irish”, (March 16, 2011), available at http://www.euractiv.com/euro-finance/eu-corporate-tax-plan-deals-blow-irish-news-503158 (discussing the “common consolidated tax base” that was recently put forth by the Commission); see also Tax Wars: New versus Old Europe, THE ECONOMIST (July 22, 2004.)
201 Id.
202 Sarbanes-Oxley Act of 2002, Pub.L. 107-204, 116 Stat. 745 (July 30, 2002). However, while the SOX is considered to be the highest standard, the US’s 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 the SOX. After negotiations, the US conceded that EU regulators can retain authority over auditing questions. The US also agreed that the EU can use international as opposed to US accounting standards in the US. See NEWMAN, supra note 116, at 146.
203 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, H.R. 4173 (July 21, 2010). Given the current state of flux of European financial regulation, it is not clear how the US and the EU will compare in terms of the relative stringency of their banking and other financial regulations.
they are converted to global standards because of the relative elasticity of capital. For instance, it is debated whether the Sarbanes Oxley regulation ratchets up standards worldwide or whether it causes the US stock exchange to lose listings of foreign corporations. 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 some dimension of a regulation whereas another country can be stricter on some other 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, including capital, as noted above. For instance, in the wake of the Euro crises, the EU has proposed to impose 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. 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 EU is pursuing political harmonization in the G-20. 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. 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.

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204 See Bob Sherwood, Long Arm of the US Regulator, FT (March 9, 2005); John C. Coffee: Racing Towards the top? The Impact of Cross-listings and Stock Market Competition on International Corporate Governance, COLUM. L. REV. 102(7) (2002). A related question is whether the availability of securities class actions in the US deters foreign companies from listing on a US exchange. See Interim Report of the Committee on Capital Markets Regulation (November 30, 2006) at 11 (noting that “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.”).

205 See Joshua Chaffin, Business attacks transaction tax plan, FT (September 28, 2011). 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”, See European Commission, Common Rules for a Financial Transaction Tax – Frequently Asked Questions MEMO/11/640 (September 28, 2011)

206 See Common rules for the financial transaction tax, Id.; 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 (capacity) to impose this tax; the required regulatory propensity is also missing as the UK 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 retain their autonomy to regulate trades in their jurisdictions.

207 See C-34/10 Oliver Brüstle v Greenpeace e.V., OJ C 100/19 (2011).

208 See “Scientists fear stem cell ruling deals blow to EU research” EurActiv (October 20, 2011) http://www.euractiv.com/health/scientists-fear-stem-cell-ruling-deals-blow-eu-research-news-508404
Also, when products do not call for a uniform standard e.g., when markets are divisible or scale economies 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 with respect to labor laws, as discussed above. 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.\footnote{See Emil Protalinski, \textit{Windows 7 to be shipped in Europe without Internet Explorer}, ONE MICROSOFT WAY (June 11, 2009), \url{http://arstechnica.com/microsoft/news/2009/06/windows-7-to-be-shipped-in-europe-sans-internet-explorer.ars}} 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.\footnote{See, for instance, \url{http://www.kpmg.de/docs/transformation-automotive-industry.pdf}} 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.

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,\footnote{See Kogan, \textit{supra} note 52, at 94. See also Leo Cendrowicz, \textit{Is Europe Finally Ready for Genetically Modified Foods?}, Time (March 9, 2010).} and prices EU firms out of critical export markets.\footnote{See discussion \textit{supra}, 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.} 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 FDI, and established themselves in third markets from which they import into the EU. 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 foreign imports are subjected to more burdensome regulations. Since approximately half of international trade consists of trade in intermediate goods, it is difficult to identify exactly who is winning and who is losing when one country is regulating multinational corporations with world-wide supply chains. Thus, voices within the EU may join those outside to call for reining in the excesses of its regulatory accomplishments.

As the EU’s 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. Enlargement magnifies this problem as preferences within the EU become more diverse while the EU institutions fail to adjust to more complex decision-making.

There is also great disparity among the EU governments on what the EU’s global role ought to be and how the EU should exercise its power. All other powers have internal conflicts, yet the EU’s decision making 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. 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. 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.

CONCLUSION

This paper 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-

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213 See Laidi supra note 27, at 19.
214 See Meunier & Nicolaidis, supra note 23, at 907–08.
215 See id at 909; Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 INT’L ORG. 427, 427–60 (Summer, 1988).
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. 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 sub-optimally low regulations elsewhere. The overall welfare effects of this phenomenon are thus difficult to disentangle.

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 US companies can be disconcerting to those involved. However, others might claim that the Brussels Effect does not undermine domestic democracy in the US. The EU’s regulatory reach may have the effect of balancing the overrepresentation of business interest in the public life in the US by empowering consumers. These are some of the normative questions that this paper raises but intentionally leaves for others.

The acknowledgement of the existence and influence of the Brussels Effect has implications on 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 economist 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 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. Economic concerns usually prevail over military imperatives. The EU is making a conscious choice of not building a powerful military—it rather free rides on the US’s 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 US military power. Military free riding allowed the EU to devote its resources on other activities, including promoting its rules and standards in eastern European countries, instead.

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 US, 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

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

217 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, questioning the desirability of the EU providing a global regime alone.


220 See Zielonka supra note 56, at 482.
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 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 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 US. 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.221 This paper has not argued that those propensities of

influence are not within the EU’s repertoire of influence. Yet this paper 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 what power and influence means. 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.222 The EU is already a superpower and, importantly, a superpower of a meaningful kind.

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222 See also, arguing in this spirit, LEONARD, supra note 67.