

## European Regulatory Imperialism

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### INTRODUCTION

The European Union sets the rules for global markets across a range of products and business practices—food, chemicals, competition, telecommunications and protection of privacy—to name a few. 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 on the computer they use (EU Antitrust Laws), and the settings of the Facebook page they open up (EU Privacy Directive). And that’s just before 8:30 in the morning. The EU also sets the rules governing the car they drive to the office (EU emission standards) and the interoffice phone directory they use (EU Privacy Laws, again). The EU regulations dictate what kind of containers Americans put their groceries in (EU waste management and recycling rules) and are the reason why their children no longer find plastic toys in their McDonalds happy meals (EU Chemicals Directive). And, as of next year, their holiday flights to Europe will cost more as the EU gears up to tax all airlines flying to or from Europe (EU’s climate change legislation).<sup>1</sup>

This Article explains how and why the 80,000 pages of rules and regulations originating from Brussels have penetrated nearly every aspect of economic life within and outside of Europe through “unilateral regulatory globalization.”<sup>2</sup> By unilateral regulatory globalization I refer to a market-driven 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

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<sup>1</sup> 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

<sup>2</sup> See Brandon Mitchener, *Standard Bearers: Increasingly, Rules of Global Economy Are Set in Brussels—To Farmers and Manufactureres, Satisfying EU Regulators Becomes a Crucial Concern—From Corn to SUV ‘Bull Bars’*, WALL ST. J., April 22, 2002, at A1; Jeremy Grant & Tom Braithwaite, *Geithner Urges EU to Fall in Line with Derivatives Rules*, FT, June 9, 2011, at 1.

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.

This phenomenon takes place against the backdrop of regulatory diversity where legislators and regulators in different markets adopt and apply different standards for the same conduct or product. The standard adopted and enforced in the EU is often more stringent vis-à-vis standards that prevail in other jurisdictions. The EU requires that companies—whether domestic or foreign—that do business in its market comply with this standard. Given the purchasing power of the EU’s 500 million consumers, foreign corporations choose, often reluctantly, to comply with the EU standard as they cannot afford the alternative of not trading in the EU. Furthermore, these corporations often adopt the EU standard worldwide because scale economies dictate that production to one standard is globally most efficient. They may even convince their domestic governments to adopt this high standard given that they have already incurred the adjustment costs associated with the commercial adaptation and stand to benefit if their remaining competitors in their home markets are forced to do the same. This phenomenon—the “Brussels Effect”—is the focus of this Article.

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.<sup>3</sup> Fears of businesses relocating to pollution havens or capital flights following higher levels of corporate taxation have not materialized in large numbers. Indeed, scholars have shown that international trade has frequently triggered a “race to the top” (RTT), whereby domestic regulations have become more stringent as the global economy has become more integrated.<sup>4</sup> Still, the RTB paradigm remains influential, shaping the debates among scholars and policy makers alike.

The discussion on global regulatory races mirrors debates of 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. Firms willing to export to California must meet its standards, while the prospect of scale economies from uniform production standards gives these firms an incentive to apply this same (strict) standard to their entire production.<sup>5</sup>

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<sup>3</sup> See David Vogel & Robert A. Kagan, *Introduction*, in *DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES* 4–5 (David Vogel & Robert A. Kagan eds. 2004)

<sup>4</sup> 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 3, 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);

<sup>5</sup> See Vogel & Kagan, *supra* note 3, at 9.

This Article explores the dynamics of the California Effect in the global context.<sup>6</sup> It focuses on the conditions under which a single country can externalize its regulations on other countries. It argues that the following supply and demand conditions determine any given jurisdiction's ability to dictate rules for global commerce: for a jurisdiction to *supply* global rules, it must have a large domestic market, a significant regulatory capacity, and the ability to enact and enforce strict rules over inelastic targets (*e.g.*, consumer markets) as opposed to elastic targets (*e.g.*, capital). In addition, *demand* for these rules exists when the benefits of market access exceed the foreign firm's adjustment costs and when the benefits of adopting a uniform global standard exceed the benefits of adhering to multiple, including laxer, regulatory standards.

Unpacking the determinants of regulatory supply and demand explains why the EU has become the predominant global regulator of commerce. It also helps us to understand why the EU can successfully export certain norms and not others. Further, this Article seeks to explain what motivates the EU to exercise this authority and what implications this regulatory leverage has on other countries, including the US. The relative significance of regulatory power is also discussed. 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.

After acknowledging the many benefits of global regulatory authority, this Article moves on to discuss the limits of European regulatory imperialism 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. Similarly, international institutions have only an imperfect ability to dampen the EU's regulatory ambitions since regulation of areas such as privacy and antitrust do not fall within the purview of the WTO or other international institutions. This Article therefore argues that the greatest check on the EU's regulatory powers comes from within the EU itself. As the EU's powers grow, so do divisions within the EU. Thus, in the end, the boundaries of the EU's regulatory imperialism are defined by the EU's own evolving conception of how far its regulatory powers ought to reach.

This Article builds on the work discussing conditions for regulatory convergence and regulatory divergence.<sup>7</sup> It also engages directly with the scholarship on the direction of possible regulatory races *i.e.*, whether the Delaware Effect or the California Effect is more pervasive in explaining regulatory outcomes globally.<sup>8</sup> Yet it departs from these debates in the following ways. First, 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

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<sup>6</sup> See Vogel, *supra* note 4, at 562.

<sup>7</sup> See Daniel W. Drezner, *Globalization, Harmonization, and Competition: the Different Pathways to Policy Convergence*, 12 J. EUROP. PUB. POL. 841, 841–859 (2005); Beth Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 42, 50–52 (David Vogel & Robert A. Kagan eds. 2004).

<sup>8</sup> See Vogel & Kagan, *supra* note 3, at 9.

exclusively on environmental regulation. Even there, scholars claim that regulatory globalization through the California Effect is limited to “only a highly limited subset of environmental laws” and largely excluded in case of production (as opposed to product) standards,<sup>9</sup> or consumer protection.<sup>10</sup> This view fails to capture the full impact of the phenomenon.

Second, the existing literature focuses on RTT that takes place when a foreign (lax) regulator adopts the (strict) rule of the lead regulator.<sup>11</sup> Yet in many instances, this type of “trading up” is incomplete and does not lead to a de jure regulatory convergence. Instead, we typically see only de facto regulatory convergence whereby much of the global 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 the suit or not. Seen in this light, unilateral regulatory globalization is more about one jurisdiction’s ability to override others through “trump standards” than it is about triggering an upward race. However, at times this de facto Brussels Effect is reinforced with a genuine de jure “trading up” phenomenon where other countries adopt the stricter standard as well.

Third, 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.<sup>12</sup> 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 Article shows that de facto convergence can take place in the midst of a great power disagreement. When the conditions for unilateral regulatory globalization 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. Unilateral regulatory globalization is different in that it falls between the two. Beth Simmons, for instance, shows how in the case of

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<sup>9</sup> See Fritz Scharpf, *Negative and Positive Integration in the Political Economy of European Welfare States*, European University Institute, Jean Monnet Chair Papers 28 (1995); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 67–110 (1996).

<sup>10</sup> 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).

<sup>11</sup> See Vogel & Kagan, *supra* note 3, at 14 (focusing on de jure trading up as the foreign country switches its standards as a result of RTT); See Simmons, *supra* note (focusing on conditions under which other regulators have the incentive to adjust. JOHN BRAITHWAITE & PETER DRAHOS, 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).

<sup>12</sup> See Drezner, *supra* note 7, at 841.

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.<sup>13</sup> 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 by “go-it-alone power” by a dominant regulator.<sup>14</sup>

The Article proceeds as follows. Section I outlines the conditions under which unilateral regulatory globalization takes place. Section II discusses the reasons that motivate the EU to externalize its regulations. Section III explains when and why the EU pursues political (cooperative) regulatory globalization instead of market-driven (unilateral) regulatory globalization. Section IV discusses the limits of unilateral globalization. The Conclusion focuses on the implications of EU's global regulatory role within and beyond the EU. The purpose of this discussion is descriptive. The Article will not discuss whether high regulatory standards are efficient or desirable. It merely seeks to provide an account for why and how trade liberalization can lead to stringent standards, why this follows a process of unilateral regulatory globalization and why these global standards are set predominantly by the EU.

## I. UNILATERAL GLOBALIZATION THROUGH TRUMP STANDARDS

This Section discusses conditions under which unilateral regulatory globalization is feasible and the mechanism through which the externalization of one state's standards unfolds. It examines the supply and demand conditions for unilateral regulatory globalization, and explains why the EU is currently the only state that can wield unilateral regulatory 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.<sup>15</sup> 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. In addition to a large domestic market, the state must 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

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<sup>13</sup> See Simmons *supra* note 7, at 49.

<sup>14</sup> See Lloyd Gruber, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000). Gruber contests the positive-sum models of international cooperation and explains why states join institutions that are not Pareto-improving for them. When states that win from some cooperative arrangement are in a position to proceed even without the support of the losing states, losing states' interest calculation changes and they join the new institution even though they would have preferred that such an institution was never set up in the first place.

<sup>15</sup> See Drezner, *supra* note 7, at 846.

refer to 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 can trump alternative regulatory standards and make other jurisdictions' regulatory authority obsolete without being punished by markets or constrained by other jurisdictions' regulatory responses. In addition to these supply conditions, a presence of two demand conditions is needed. First, the benefits of market access must exceed the foreign firm's adjustment costs of complying with a new regulatory standard. Second, the benefits of adhering to a single global standard must be greater than the benefits of taking advantage of laxer standards in lenient jurisdictions.

### A. Supply Conditions

In the global economy, power is measured by *the relative size and diversity of any given country's internal market*.<sup>16</sup> To secure access to most important markets, producers gravitate towards the standards prevailing in those markets.<sup>17</sup> 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.<sup>18</sup> Or, more accurately, the greater the ratio of exports to the (strict) jurisdiction relative to sales on the (lenient) home or third country markets, the more likely the Brussels Effect will occur. If the exporter is able to divert trade to third markets or increase demand on its home market, the less dependent it is on the 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 it is annexing new countries into its single market by admitting new members to 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, roughly the same size as the EU, while China has an economy of \$10 trillion and Japan has one of \$4 trillion.<sup>19</sup>

However, 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. All states with large markets do not become sources of global standards. The state must also have the *regulatory capacity* to translate its market power into tangible regulatory influence.<sup>20</sup> 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

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<sup>16</sup> See Drezner, *supra* note 7, at 843.

<sup>17</sup> See *id.*

<sup>18</sup> See Sebastian Princen, A Comparison of the Leghold Trap and the Beef Hormone Issues between the EC and the US and Canada (1999) (unpublished paper read at European Community Studies Association Sixth Biennial International Conference) cited in Vogel & Kagan, *supra* note 3, at 13.

<sup>19</sup> See CIA WORLD FACTBOOK,

<https://www.cia.gov/library/publications/the-world-factbook/> (last visited Aug. 19, 2011).

<sup>20</sup> See David Bach & Abraham L. Newman, 14 J. EUROP. PUB. POL. 827, 831 (2007).

capacity to impose significant costs on others by excluding non-complying firms from their markets can force regulatory adjustment.<sup>21</sup> 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 the sizable domestic markets, few jurisdictions outside the US or the EU have the capacity to be potential regulators with global reach.<sup>22</sup>

Regulatory capacity must further be supplemented with the political will to deploy it. Thus, the jurisdiction must also have the *propensity to regulate*. To be a global regulator requires that the state subscribes to strict domestic standards that can trump more lenient standards by the simple virtue of being the most stringent. Up 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.<sup>23</sup> And 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 extent of regulation at the EU level 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. Firms have also engaged in “pre-emptive federalism”, whereby they have sought to avoid excessively stringent regulations in certain EU countries by preempting such standards by more moderate community regulation.<sup>24</sup> 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. The prevailing EU standard has often been more restrictive than the standards that apply to their competitors in other markets. Hence, to level the playing field and ensure the competitiveness of the European firms, the EU has sought to export these standards.

The EU’s preference for high level of regulation also reflects Europeans’ aversion to risk. 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.<sup>25</sup> 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.<sup>26</sup> In contrast, the US follows the “risk assessment” approach, which dictates that a risk must first be quantified and then controlled

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<sup>21</sup> See *id* at 832.

<sup>22</sup> See Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUROP. PUB. POL. 906, 908 (2006).

<sup>23</sup> See Zaki Laidi, *The Unintended Consequences of European Power*, LES CAHIERS EUROPEENS DE SCIENCES PO 8 (Aug. 08, 2011), available at [http://www.cee.sciences-po.fr/erpa/docs/wp\\_2007\\_5.pdf](http://www.cee.sciences-po.fr/erpa/docs/wp_2007_5.pdf)

<sup>24</sup> See Giandomnico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUROP. POL. 76, 87–88 (1994).

<sup>25</sup> See Laidi *supra* note 23, at 8.

<sup>26</sup> See The European Commission Communication on the Precautionary Principle (February 2, 2000); see also Sarah Harrell, *Beyond “REACH”?: An Analysis of the European Union’s Chemical Regulation Program Under World Trade Organization Agreement*, 24 WIS. INT’L L.J. 471, 480 (2010).

before regulatory intervention can be justified. This different allocation of the burden of proof leads to more extensive and invasive regulation originating from the EU.

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 moving to another jurisdiction. 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 elastic targets like capital, which can freely move, 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. This 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. The EU's choice of focusing on consumer markets further reinforces its role as a global standard setter whose regulations cannot be undermined by market forces and the elasticity of its targets.

Thus, for a state to be able to supply global standards, it must have a large domestic market, sufficient regulatory infrastructure, and the preference for regulating inelastic targets with strict standards. Otherwise its regulatory authority can become irrelevant as other jurisdictions may trump its standards or its chosen regulatory targets may move to less burdensome jurisdictions.

## B. Demand Conditions

In addition to the above supply conditions, a foreign producer will have an incentive to comply and globalize the importing jurisdiction's strict standard when the benefits of market access outweigh the adjustments costs and when the benefits of regulatory convergence to one standard outweigh the producer's costs of maintaining higher than necessary standards in more lenient jurisdictions.

The larger the importing (strict) market and the lower the adjustment costs relative to the benefits of market access, the more likely that this adjustment will take place.<sup>27</sup> 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 vary with the significance of cross-border differentials (determining the degree of adjustment) and the various compliance costs associated with the 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

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<sup>27</sup> See Alasdair R. Young, *Political Transfer and "Trading Up"? Transatlantic Trade in Genetically Modified Food and U.S. Politics*, 55 *WORLD POL.* 457, 459 (2003) citing Vogel & Kagan, *supra* note 3, at 10.

altogether and recoup the forgone revenue in other markets. The distinctly high value of market access to the EU explains why many producers are prepared to incur even significant adjustment costs to retain their ability to trade with the EU.

The first demand condition—that the exporter’s benefits from market access exceed its costs of regulatory adjustment—only ensures that the strict jurisdiction is able to regulate extraterritorially. This does not, by itself, mean that the strict standard is being globalized. Unilateral regulatory globalization is triggered when the exporter, after having converted its products or production processes 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 indivisible 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 often less costly than tailoring its production to meet divergent regulatory standards.<sup>28</sup> 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 to jurisdiction basis—the most stringent antitrust jurisdiction gets to determine the faith 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 Europe, 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 illustrating 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 instance, labor rights. Labor markets are divisible and adhering to one global wage, for instance, entails few scale economies. A corporation can without difficulty maintain different labor standards 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.

### C. 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 suggests that the EU is the only entity that can exercise global regulatory authority across a wide

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<sup>28</sup> See Drezner, *supra* note 7, at 844–45; David Lazer, *Regulatory Interdependence and International Governance*, 8 J. EUROP. PUB. POL. 474, 474–92 (2011).

range of regulatory areas. These same conditions also delineate the kind of standards that the EU can effectively externalize. This section focuses on three areas of regulatory policy that illustrate the EU's ability to set global rules through unilateral regulatory globalization: antitrust, privacy and chemical regulation. Yet the EU sets global standards in many other fields, including environmental protection,<sup>29</sup> telecommunications,<sup>30</sup> finance<sup>31</sup>, and food safety.<sup>32</sup>

### *1. Antitrust Laws*

The strictest antitrust laws prevail in situations where conflict exists among different regulators. If a lenient State A and a strict State B investigate the same transaction, State B prevails. 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 a realistic option for many corporations.<sup>33</sup> At the international level, the EU antitrust law is, indeed, often the most stringent one. The EU also consists of too large and important consumer market 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.

One of the most famous examples of the EU's global regulatory clout is its 2001 decision to prohibit the \$42 billion proposed acquisition of Honeywell International by General Electric. When the EU blocked the 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.<sup>34</sup> The prohibited GE/Honeywell merger is emblematic of a difference in the antitrust regulatory approaches of the EU and the US. The US authorities considered the GE/Honeywell merger to be efficient and hence welfare-enhancing. In contrast, the EU was concerned that any efficiencies that resulted from the transaction that might result in a short term decrease in price would later drive out competitors and result in a long term monopolistic increase in price.<sup>35</sup>

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.<sup>36</sup> Bowing to pressure from the EU, Microsoft has made changes to its .NET Passport authentication system. The Passport system allows users to enter personal information, such as e-mail address and password, once and then enter subsequent

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<sup>29</sup> See Vogel, *supra* note 4, at 557.

<sup>30</sup> See Henrik Glimstedt, *Competitive Dynamics of Technological Standardization: The Case of Third Generation Cellular Communications*, 8 *INDUS. & INNOV.* 49, 49–78.

<sup>31</sup> See Chris Brummer, *Stock Exchanges and the New Markets for Securities Laws*, 75 *U. CHI. L. REV.* 1435, 1469–71 (2008).

<sup>32</sup> See Young, *supra* note 27, at 470.

<sup>33</sup> See Anu Bradford, *Antitrust Law in Global Markets*, in Einer Elhauge (ed.): *RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW* (Einer Elhauge ed., forthcoming 2011).

<sup>34</sup> See Kyle Robertson, Comment, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31 *B.C. INT'L & COMP. L. REV.* 153, 153 (2008).

<sup>35</sup> See Bradford, *supra* note 33, at 5.

<sup>36</sup> See Miguel Helft, *Google Joins Europe Case Against Microsoft*, *N.Y. TIMES*, Feb. 25, 2009 at B6; *Europe v. U.S. Business*, *WALL ST. J.*, JAN. 17, 2008 at A16.

websites without re-entering the same information. Under the threat of EU sanctions, Microsoft has agreed to implement comprehensive data protection measures that meet EU standards.<sup>37</sup>

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-positives" *i.e.*, pro-competitive practices that the US might erroneously restrict through regulation). Yet given the logic of unilateral regulatory globalization, it is the EU approach that determines the outcome.

## 2. Privacy Regulations

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.<sup>38</sup> In the EU, privacy is a human right, which 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 and, therefore, cannot be contracted away.<sup>39</sup> The EU favors comprehensive legislation that establishes privacy principles for the public and private sector, enforced by independent regulatory agencies. The US, in contrast, favors relegating data privacy issues to self-enforcement by the 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 that they want. Ideally, US government regulators only interfere if a company misrepresented its privacy policy to a consumer.<sup>40</sup>

The EU approach to the protection of privacy rights is spreading outside the boundaries of the EU, affecting companies in the US. One reason for this is the technical non-divisibility of information. While national regulations may differ from country to country, data "flows lightly and instantly across borders."<sup>41</sup> The EU Data Protection Directive requires that companies outside the EU adopt practices that "adequately" protect the privacy of European citizens. Stricter EU requirements have caused several US companies such as Google<sup>42</sup>, Facebook<sup>43</sup>, and Amazon<sup>44</sup> to amend their business practices. Internet companies find it difficult to create different programs for different markets and, therefore, tend to apply the strictest international

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<sup>37</sup> See 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>

<sup>38</sup> See Mark F. Kightlinger, *Twilight of the Idols? EU Internet Privacy and the Post Enlightenment Paradigm*, 14 COLUM. J. EUR. L. 1, 5.

<sup>39</sup> See Kightlinger, *supra* note 38, at 19.

<sup>40</sup> See Bach & Newman, *supra* note 20, at 833.

<sup>41</sup> 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>.

<sup>42</sup> See Kevin J. O'Brien, *Google Data Admission Angers European Officials*, N.Y. TIMES, May 15, 2010, at 4.

<sup>43</sup> See Tracy Gray et. al., *US and EU Authorities Review Privacy Threats on Social Networking Sites*, 19 ENT. L.R. 69, 69 (2008).

<sup>44</sup> See Kightlinger, *supra* note 38, at 11.

standards across the board. Since EU standards are the strictest and the EU market is large enough that companies would not want to be excluded from it, most countries have begun to adopt the EU standard.<sup>45</sup>

Similarly, the EU has met with some success in externalizing its food safety regulations, particularly in regards to GMO food. The US farmers can, in principle, produce different varieties for the EU and for domestic (and other export) markets. However, the specific processes through which US farmers gather and transport their crops for distribution often make their harvest inseparable in practice. The possibility that a non-EU approved variety can be found within the bulk means that the entire crop is unfit for exportation to the EU.<sup>46</sup> Multinational food processors are reluctant to make separate batches for the EU and refuse to buy corn that may cause them marketing problems in Europe. 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.<sup>47</sup> At minimum, separation of production is costly. Necessary measures include separating growing areas and establishing trait identification systems that allow farmers to segregate their products and therefore comply with different requirements imposed by an export market. 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.<sup>48</sup>

### 3. Regulation of Chemicals

Most often the non-divisibility is driven by cost considerations rather than legal or technical inability to produce different products or pursue different conduct in different markets. An illustrative example comes from the EU's 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. REACH, which was enacted in 2007, requires that substances entering the EU market undergo one or more of the following stages: registration, evaluation, authorization, and restriction. The vast majority of chemicals, which are already known to be harmless, must simply be registered. In this stage, manufacturers and importers are required to gather information on the properties of their substances, indicate how they intend to manage them safely, and provide this information to the EU authorities for the creation of a "central chemicals database". This reverses the burden of proof from regulators to manufacturers and importers.<sup>49</sup> Potentially new chemicals on which little information is available must also go through an evaluation. Chemicals that are already known to be highly toxic must be authorized. REACH is a 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 effects of chemicals on human health and the

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<sup>45</sup> See Sunni Yuen, *Exporting Trust with Data: Audited Self-Regulation as a Solution to Cross-border Data Transfer Protection Concerns in the Offshore Industry*, 9 COLUM. SCI. & TECH. L. REV. 41, 41 (2008).

<sup>46</sup> See Young, *supra* note 27, at 467–68.

<sup>47</sup> See Mitchener, *supra* note 2, at 3.

<sup>48</sup> See Young, *supra* note 27, at 467–68.

<sup>49</sup> See Doaa Abdel Motaal, *Reaching Reach: The Challenge for Chemicals Entering International Trade*, 12 J. INT'L ECON. L. 643, 645 (2009).

environment, the TSCA only requires companies to develop this information if directed to do so by the Environmental Protection Agency.<sup>50</sup>

Though intended primarily for the European market, REACH is affecting change at a global level. Even in the absence of legal change in non-EU countries, there are strong financial incentives for non-EU chemical firms to make all of their products REACH compliant. Chemical manufacturers in non-EU countries that import a significant amount of chemicals into the EU are switching to REACH standards to avoid being excluded from the large and lucrative EU market. Since manufacturers 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. In addition, it is possible that the international spread of REACH standards will facilitate the 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 go on to pressure their home governments to increase their domestic regulations to the level of REACH, since their exports already meet the stricter standards and they could then produce similar products for both markets at lower cost.<sup>51</sup>

The global spread of REACH has met with some resistance at the international level. As the regulation applies to approximately 30,000 chemicals, its impact on the \$500 billion chemical industry is, obviously, profound.<sup>52</sup> The critics claim that REACH poses a significant challenge 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.<sup>53</sup> Another concern is that even if REACH is beneficial for Europeans, it might actually be detrimental to many people in poorer countries where the potential health and environmental impacts of the production of industrial chemicals may not reach a sufficiently high level of concern to warrant the introduction of an expensive and sophisticated risk management regime, particularly when you factor in the acute threats to basic health and welfare that developing countries face.<sup>54</sup>

## II. 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. Yet even more compelling is the account of the EU being guided primarily by internal motivations stemming from its need to preserve the single market without hurting the competitiveness of

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<sup>50</sup> See Motaal, *supra* note 49, at 647.

<sup>51</sup> See Yoshiko Naiki, *Assessing Policy Reach: Japan's Chemical Policy Reform in Response to the EU's REACH Regulation*, 22 J. ENV. L. 171, 178 (2010).

<sup>52</sup> See Lawrence A. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise*, at 95 Washington Legal Foundation, available at <http://www.wlf.org/upload/110405MONOKogan.pdf>; See Mark Schapiro, *New Power for 'Old Europe'*, THE NATION, December 27, 2004, at 12.

<sup>53</sup> See Anne Pouillot et. al., *REACH: Impact on the US Cosmetics Industry?*, 8 J. COS. DERM. 3, 5–6 (2009).

<sup>54</sup> See Veerle Heyvaert, *Globalizing Regulation: Reaching Beyond the Borders of Chemical Safety*, 36 J. L. Soc. 110, 120 (2009).

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*

The EU is interested in being an active and influential global player with the ability to shape the international order to its liking. It seeks to vigorously promote its interests in the global stage. In doing so, the EU acts like any great power with the desire to ensure that international norms reflect its preferences.<sup>55</sup>

Some scholars take this idea further by suggesting that the EU's motivations are imperialistic—that the EU is, in fact, seeking to exert political and economic domination over other countries. The most egregious form of this is the practice and the process through which the EU annexes countries to it.<sup>56</sup> The EU has significant leverage over countries that seek closer cooperation with or, eventually, membership in the EU. 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.<sup>57</sup> Even countries that have no current prospects of joining the EU often agree to approximate their laws to those in the EU in exchange for further trade liberalization with the EU. For instance, Euro-Mediterranean agreements call for a general approximation of North-African trading partners' legislation with that of EU, including accepting EU rules on standardization, quality control and conformity assessment.<sup>58</sup> In the end, agreements of this kind allow the EU to institutionalize its rule of law in Europe's periphery.<sup>59</sup>

But even outside of its immediate sphere of influence, critics maintain that the EU is engaged in a novel form of imperialism. Instead of pursuing its goals through military and political instruments, the EU 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".<sup>60</sup> While the critics claim that the EU is exporting its standards without the consent of other states, the EU counters the charges of domination by emphasizing 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.

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<sup>55</sup> See Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1.

<sup>56</sup> See Jan Zielonka, *Europe as a Global Actor: Empire by Example?*, 84 INT'L AFF. 471, 471 (2008); JAN ZIELONKA, EUROPE AS EMPIRE: THE NATURE OF THE ENLARGED EU 9–22 (2006) noted in Zielonka *supra* note 30, at 471 n. 17.

<sup>57</sup> See Laidi *supra* note 23, at 10; Zielonka *supra* note 30, at 476.

<sup>58</sup> See Zielonka, *supra* note 56, at 476 n. 24.

<sup>59</sup> See Zielonka *supra* note 56, at 476–77.

<sup>60</sup> See Kogan, *supra* note 52, at 98–99; Peter F. Drucker, *Trading Places*, NAT'L INT., Spring 2005, at 101.

Even if the EU's ambitions fell short of this type of modern form of imperialism, the EU's regulatory stance reflects a conscious pursuit of global influence.<sup>61</sup> 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."<sup>62</sup>

In describing its global role, the EU consistently avoids portraying its policies in an imperialistic light. 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. While the US believes in pre-emption, the EU believes in precaution. An attitude towards risk guides the EU's global agenda and steers it towards extensive regulation of the global economy—the protection of the environment, food safety, cultural diversity, public provision of education and health care, precaution in the field of biotechnology and various welfare rights. And by emphasizing the universal benefits of its global regulatory agenda, the EU often succeeds in hazarding 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. This has led the EU to lead efforts to conclude a new and more potent global climate change treaty.<sup>63</sup> Yet the difficulties associated with international treaty negotiations have given the EU the imperative to act unilaterally. The EU has created an EU-wide cap-and-trade system intended to price carbon emissions. Under this scheme, airlines, among others, are forced to buy emission permits. However, the system's restricted scope—compelling only European companies—limits its impact and compromises its goals. For this reason, the EU is moving to impose the same

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<sup>61</sup> According to polls, 70% of Europeans want Europe to assume this role. See Benito Ferrero-Waldner, *The European Union: a Global Power?*, Speech delivered at George Bush Presidential Library Foundation and Texas A&M University EU Center of Excellence, College Station, Texas, (Sept. 25, 2006); European Commission, *Taking Europe to the World: 50 Years of the European Commission's 'External Service'*, DG External Relations Brussels 59 (2004); Alaisdair R. Young & John Peterson, *The EU and the New Trade Politics*, 13 J. EUROP. PUB. POL. 795, 795–96 (2006).

<sup>62</sup> 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 \*/

<sup>63</sup> See Press Release, European Commission, *The Copenhagen climate change negotiations: EU position and state of play* MEMO/09/493, Sept. 11, 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/493&format=HTML&aged=0&language=EN&guiLanguage=en>.

obligation on foreign carriers—in the name of the collective, global interests of halting 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 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup>

Yet even if the EU was able to portray itself as a benevolent, normative power that is advancing universal norms,<sup>67</sup> skeptics point out that the notion of a normative power has neo-colonial undertones as the EU is exporting its “standards of civilization”.<sup>68</sup> 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 has always been 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.<sup>69</sup>

## 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 its concern for consumer and environmental health and safety.<sup>70</sup> According to the Czech president Vaclav Klaus, “the claims for quasi-universal social rights are disguised...attempts to protect high-cost

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<sup>64</sup> See Meunier & Nicolaidis, *supra* note 22, at 921–922.

<sup>65</sup> See Laidi *supra* note 23, at 4.

<sup>66</sup> See Zielonka *supra* note 56, at 475.

<sup>67</sup> See Ian Manners, Normative Power Europe: a Contradiction in Terms?, 40 J. COMM. MARKET STUD. 235, 235–58 (2002); MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY (2005); Karen E. Smith, *Still Civilian Power EU*, European Foreign Policy Unit Working Paper, London School of Economics (2005).

<sup>68</sup> See Manners, *supra* note 67; LEONARD, *supra* note 67; Smith, *supra* note 67; ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003); KALYPSO NICOLAIDIS, GLOBALIZATION WITH HUMAN FACES, IN THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS (Tommaso Padoa-Schioppa ed., 2005); Kalyпсо Nicolaidis & Robert Howse, *This is my EUtopia: Narrative as Power*, 40 J. COMM. MARKET STUD. 767, 767–92 (2002); Thomas Diez, *Europe's Others and the Return of Geopolitics*, 17 C.A.M.B. REV. INT'L AFF. 319, 319–35 (2006).

<sup>69</sup> See Laidi *supra* note 23, at 4.

<sup>70</sup> See Kogan, *supra* note 52, at 3.

producers in highly regulated countries, with unsustainable welfare standards, against cheaper labor in more productive countries”<sup>71</sup>

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. If the EU can ensure that 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 also minimize the adjustment costs of European firms that compete in third markets and protect them from competitive disadvantage due to the higher standards they adhere to.

The push for externalization of the EU’s standards is also reinforced by a peculiar constellation of domestic politics, whereby environmentalists or consumer advocates and corporations join forces in lobbying for 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.<sup>72</sup> 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 and environmental NGOs teamed up 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.<sup>73</sup> 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.<sup>74</sup>

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

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<sup>71</sup> See Zielonka *supra* note 56, at 482–483.

<sup>72</sup> ELIZABETH DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY: INDUSTRY, ENVIRONMENTALISTS, AND U.S. POWER (2000).

<sup>73</sup> See Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in THE POLITICS OF GLOBAL REGULATION, at 35 (Walter Mattli & Ngaire Woods eds., 2009).

<sup>74</sup> See DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY, 67 (1995).

expressed concerns that the single market might lead to protectionism vis-à-vis third countries.<sup>75</sup> 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 powers 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, the legislator of the EU. 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.<sup>76</sup>

### III. MARKET-DRIVEN VERSUS POLITICAL HARMONIZATION

There are two primary ways the EU can pursue regulatory globalization: it can either seek regulatory convergence through treaties and institutions (political harmonization), or it can unilaterally use access to its markets as an incentive for foreign entrants to converge and spread its norms (market-driven harmonization).

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<sup>75</sup> See Sieglinde Gstohl, *Political Dimensions of an Externalization of the EU's Internal Market* 4 (DEP. EU INT'L REL. & DIPL. STUD., EU Diplomacy Papers, 2007), available at [http://aei.pitt.edu/9593/1/EDP\\_3-2007\\_Gst%C3%B6hl.pdf](http://aei.pitt.edu/9593/1/EDP_3-2007_Gst%C3%B6hl.pdf).

<sup>76</sup> See Majone, *supra* note 24, at 85 & 98.

Market-driven harmonization has a distinct advantage over political harmonization: it entails low contracting costs and limited enforcement costs. The EU may well prefer political globalization if this means more European standards adopted by other states. Yet the EU can rarely take other states' willingness to voluntarily endorse and adopt its rules for granted. In relying on unilateral measures, the EU is not forced to seek the consent of other states. Nor does it need to overcome collective action problems or extend costly transfer payments or undertake costly coercive measures towards countries reluctant to join a treaty or an institution. Unilateralism also avoids the costs and uncertainties associated with ratification of treaties by foreign legislators. The EU's recent, unsuccessful efforts to further the WTO's Doha Round negotiations or the UN-led process to negotiate a new global climate change treaty make the difficulties embedded in multilateral cooperation palpable. These processes have required extensive political capital and diplomatic efforts and yielded few results. In contrast, unilateral regulatory globalization has a direct impact on global business patterns even in the absence of consent by other states possessing regulatory authority. Instead of engaging in burdensome diplomacy to endorse its standards, the EU outsources 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.

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 on which to converge. Different points of convergence entail different distributional consequences, making some states prefer one standard over another. 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 effective 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 world's marine fisheries is one of the many examples of negotiated global standards that fail to accomplish their goals: the treaty has failed to address the problem of over-fishing and propel 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".<sup>77</sup>

The EU's unilateral regulatory agenda is also 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 request for cooperation due to their domestic laws on bank secrecy. The US has had to spend extensive

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<sup>77</sup> See Christopher Carr & Harry Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 76-79.

political capital to persuade Swiss authorities to cooperate. This was considered worth the effort given that Swiss banks hold approximately half of the world's private assets.<sup>78</sup> 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.

Given the many benefits of unilateral globalization, why does the EU still seek 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, obviously, multilateralism is often the only way to pursue regulatory globalization.

The EU is particularly likely 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. When the EU is a net exporter of a certain product, it is likely to care more about the standard of the export market than that of its home market. Further, it is precisely then that the process of unilateral regulatory globalization 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 unilateral regulatory globalization 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. 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.<sup>79</sup>

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.<sup>80</sup>

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<sup>78</sup> See Macey, *supra* note 10, at 1368–69.

<sup>79</sup> See Vogel & Kagan, *supra* note 3, at 13. (However, these standards are more likely to spread unless the main economic activity is taking place on export markets).

<sup>80</sup> See Macey, *supra* note 10, at 1369.

Finally, at times the EU may pursue political harmonization even when market-driven harmonization is taking place. This may reflect a willingness to “lock-in” certain EU standards by institutionalizing them.<sup>81</sup> 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 intergovernmental cooperation itself, the EU has extensive experience in promulgating rules that lend themselves to the 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. It often promotes internationally a single uniform standard, but casts 27 votes when it comes the time for the international organization to choose one standard over another. This strategy allowed the EU to persuade the IMO to ban certain types of vessels from international waters over the objection of many non-European members of the organization.<sup>82</sup> In international negotiations, it is similarly helpful to 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 tight and who can therefore only sign onto a set of policies that pass the various domestic veto points.<sup>83</sup>

Tim Buthe and Walter Mattli have argued that the EU has been much more successful than the US in incorporating its standards internationally. They claim that national institutional legacies determine the ability of a country to translate its standards into international ones. They argue that domestic standardization systems that involve high levels of hierarchy and coordination, such as the one employed by the EU, can better accommodate a transition from national to international standardization than can a system based on decentralization or institutional “anarchy,” such as the one employed by the US. The hierarchical structure of the EU system allows it to implement international regulations earlier than the US can.<sup>84</sup> In the realm of international standards, first movers set the agenda while other states follow. Since the domestic standardization system of the EU allows it to set international standards first, the EU standard becomes the de facto international standard.<sup>85</sup> The EU can thus accommodate and influence supranational standardization activity better than the US can.

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

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<sup>81</sup> 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 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).

<sup>82</sup> See Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 Vand. J. Transnat’l L. 1324–27 (2008).

<sup>83</sup> See Safrin, *supra* note 82, at 1324–27.

<sup>84</sup> See Walter Mattli & Tim Buthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD. POL. 1, 22 (2003).

<sup>85</sup> See *id* at 4.

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.

Finally, it is important to acknowledge that one mechanism of regulatory globalization is not necessarily always more desirable than another. Corporations and, at times, individual countries are not necessarily adjusting to EU standards because of the prospect of mutual gains or some Pareto-improving outcome. But unilateral regulatory globalization can lead to an efficient outcome. If existing regulations in other jurisdictions are too low or weakly enforced, the Brussels Effect might be a desirable means of overriding low or weakly enforced regulations elsewhere. However, if existing regulations in other jurisdictions are even close to optimal, the Brussels Effect is likely to lead to inefficiently high overall global regulation, adversely affecting global welfare. The overall welfare effects of unilateral regulatory globalization are difficult to entangle, and would require an understanding of whether the possible costs of excessively strict global regulation outweigh the costs of having divergent, even if individually more optimally tailored, national regulations.

#### IV. LIMITS OF REGULATORY HEGEMONY

The EU's ability to leverage its market size into unilateral regulatory globalization is not unlimited. Insufficient market power sets boundaries to EU's global regulatory clout. For instance, the EU's attempts to deny market access to fish caught unsustainably has not triggered a Brussels effect since exporters have been able to sell their catch in other markets.<sup>86</sup> EU's limited market power also explains why the EU has been only partially successful in exporting its standards on GMO food. For US farmers, domestic consumption of crops is more important than foreign consumption. The EU is only the fifth largest export market and accounts for 8 % of US agricultural exports.<sup>87</sup> 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,<sup>88</sup> 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.<sup>89</sup> In instances where adjustment costs are high and alternative markets exist, producers are likely to forgo the EU market and divert trade elsewhere.

Further, the EU's 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

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<sup>86</sup> 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).

<sup>87</sup> See United States Department of Agriculture, *Agricultural Statistics 2010* at xv3 (2010).

<sup>88</sup> Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles.

<sup>89</sup> See Schapiro, *supra* note 52, at 14.

waste remain common as producers have the 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 imperialism is much harder when it consist of attempts to unilaterally limit exports to third countries versus preventing imports to one's own market.<sup>90</sup>

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, including the countries in North Africa.<sup>91</sup> This suggests that it is not the EU's "normative power" with universal appeal that leads countries to adopt EU's norms and standards. 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 much easier to deny market access to a product that does not meet the 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 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 to EU's external influence in these matters.

Third, the EU's leverage is also compromised in the case of regulation of elastic targets, including capital and labor, as noted above]. 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. For example, in 2007, The EU launched an antitrust investigation into whether Microsoft's practice of packaging 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.<sup>92</sup>

A different question is what constrains the EU when preconditions for unilateral regulatory globalization are present. Conventionally, we think about markets as being able to punish inefficiently stringent regulators. An economic theory of regulatory competition among

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<sup>90</sup> See O'Neill, *supra* note 86, at 156–58.

<sup>91</sup> See Zielonka *supra* note 56, at 478.

<sup>92</sup> See Emil Protalinski, *Windows 7 to be shipped in Europe without Internet Explorer*, ONE MICROSOFT WAY (June 11, 2009),

<http://arstechnica.com/microsoft/news/2009/06/windows-7-to-be-shipped-in-europe-sans-internet-explorer.ars>.

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 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 the businesses have the choice of either providing them with goods conforming to EU standards or forgoing the entire market.

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 unlikely to be 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.

Other states, including the US, have an incentive to constrain the EU. The US is concerned about the adjustment costs the EU's policies impose on US corporations. The US frequently considers the EU's regulatory policies to be inefficient and detrimental to its welfare.<sup>93</sup> When its producers are shut out of the EU market unless they comply with higher standards, the US has four ways to respond: the US can 1) choose to voluntarily 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.<sup>94</sup>

Yet the 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.<sup>95</sup> And if the US was to adopt the same standard, it would incur additional costs relating

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<sup>93</sup> See Heyvaert, *supra* note 54 (criticizing the global spread of REACH as possibly creating a mismatch between global norms and local priorities); 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).

<sup>94</sup> See Young, *supra* note 27, at 459.

<sup>95</sup> See Drezner, *supra* note 7, at 845.

to legislating and retraining its regulators.<sup>96</sup> When holding onto its own 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 trump standards, its vocal criticism of those standards lead 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 limited availability of alternative, more effective counterstrategies, limits the options available for the US.

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 "pre-emptive 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 EU altogether.<sup>97</sup>

At the same time, foreign states' responses are complicated by the fact that some foreign states and corporations benefit from the EU's extensive regulatory activity. 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 also 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.<sup>98</sup>

Even powerful US corporations can have a mixed reaction to EU regulation. The export-oriented US companies trading across the common market benefit from facing one standard in the EU instead of 27 different national standards, even if that standard was higher than the

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<sup>96</sup> *See id.*

<sup>97</sup> *See* Macey, *supra* note 10, at 1359.

<sup>98</sup> *See* Young, *supra* note 27, 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.

average standard before the upward harmonization took place in the EU. The US competitors can also seize business opportunities in third markets if the EU bans certain products or production methods domestically but when there is demand for their products in third markets. In those markets, they are likely to face less competition from EU producers if the Brussels effect fails to take hold in those markets. Finally, the US corporations have found the EU a valuable legal battle ground and engage in forum shopping when they seek to halt practices of their (often domestic) competitors. It was 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 EU Commission against Google.

At times, international institutions have provided the most effective venue to challenge the EU regulations. The US did this with respect to the EU's prohibition on GMO food and hormone treated beef, eventually winning both trade disputes.<sup>99</sup> The WTO law prevents countries from restricting imports from less stringent countries 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.<sup>100</sup> These exceptions are subject to specific conditions to ensure that countries do not use them as disguised forms of trade protectionism. These few challenges suggest that the WTO does, indeed, impose some limits on the EU's regulatory pursuits.

Yet 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 that non-compliant member state. Authorizing a small developing country to punish its powerful trading partner does not, however, guarantee that this right will be used. Thus, retaliation is unlikely to provide an effective remedy outside of powerful countries like the US to constrain the EU—and even then, it constitutes an imperfect remedy at best. Many areas such as antitrust and privacy do not fall within the purview of the WTO rules and its dispute settlement mechanism. And expanding the scope of the WTO to new issue areas is increasingly unlikely today. The US and other states find it harder to negotiate new rules in the institution whose ability to close trade rounds today is constrained by the need to find consensus among over 150 countries that rarely agree on the content of the rules.

Thus, 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. 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.<sup>101</sup> Enlargement magnifies this

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<sup>99</sup> See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847

<sup>100</sup> Art XX of the GATT

<sup>101</sup> See Laidi *supra* note 23, at 19.

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.<sup>102</sup> 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.<sup>103</sup> In pursuing negotiated harmonization, this internal conflict can be a source of strength. But EU's ability to unilaterally externalize its internal market hinges on its ability to first agree on the internal rules capable of being exported.

Also, 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 are likely to argue that excessive reliance on the precautionary principle may slow economic growth and innovation.<sup>104</sup> 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. Also European companies whose competitiveness depends on their access to cheaper foreign inputs are hurt when those foreign imports are subjected to more burdensome regulations. As approximately half of international trade consists of trade in intermediate goods, it is more complex to identify who exactly 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 abolishing the excesses of its regulatory accomplishments.

## CONCLUSION

It is common to refer to Europe today as the power of the past. Europe is weak militarily. Its relative economic power is declining as Asia's is rising. On the world stage, the European Union is waning into irrelevance due to its inability to exercise one voice. Given its declining power status and inability to get its way alone, the EU advocates multilateralism and strong international institutions.

Yet this Article has highlighted an aspect of European power that the discussion on globalization and power politics underestimates: Europe's unilateral power to regulate. The EU

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<sup>102</sup> See Meunier & Nicolaidis, *supra* note 22, at 907–08.

<sup>103</sup> 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). IO,

<sup>104</sup> See Kogan, *supra* note 52, at 94.

exercises unprecedented global power not through its military or economic might but through law—through its legal institutions and standards that it actively, and successfully, exports to the rest of the world. Regulations promulgated by the EU become entrenched in legal frameworks in developed and developing markets alike, leading to the “Europeanization” of important aspects of global commerce.

This phenomenon has implications on how we think about power and the question of who is powerful and how. If you ask national security experts whether the EU is powerful, they are likely to say no. But ask GE, Microsoft, Google, Monsanto, Dow Chemical or Revlon, and they are likely to tell you otherwise. One key question is what type of power matters today. Much of the international relations discussion has been preoccupied by a traditional notion of military and economy power. Yet the utility of military power is declining. Leslie Gelb has evaluated the US’s false notion of power and influence in today’s economic-centric world:

“Most nations today beat their foreign policy drums largely to economic rhythms, but less so the United States. Most nations define their interests largely in economic terms and deal mostly in economic power, but less so the United States. Most nations have adjusted their national security strategies to focus on economic security, but less so the United States. Washington still principally thinks of its security in traditional military terms and responds to threats with military means. The main challenge for Washington, then, is to recompose its foreign policy with an economic theme, while countering threats in new and creative ways. The goal is to redefine “security” to harmonize with twenty-first-century realities”<sup>105</sup>

Gelb calls for a new way of thinking about interests and power in a world in which 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 much enhanced because of the level of security and stability that existed there, thanks to the US military power.<sup>106</sup>

But even traditional forms of economic power are difficult to translate into concrete forms of influence today. Economic power used to be associated with the US, EU and Japan. Today, economic power is dispersed as China and other emerging economies are growing in affluence. In the world of multiple powers and heterogeneous interests, exercise of unilateral economic power is rarely possible. The inability to conclude the WTO trade talks is one manifestation that in the world where many are powerful, nobody alone is powerful enough to get anything done. Economic sanctions are rarely successful nowadays as 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.

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<sup>105</sup> See Leslie Gelb, *GDP Now Matters More than Force*, FA, November/December 2010.

<sup>106</sup> See Zielonka *supra* note 56, at 482.

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. 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. It also cannot be undermined by others unlike other forms of power. 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, corporation 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 claims to be 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 of human rights. None of this suggests that the EU's regulatory power would be fungible and convertible into significant power in foreign affairs in general. Yet 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 above discussion suggests that the EU is a rational actor that is skillfully 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 unilateral use of that power by the UN. In areas of regulation, the EU can go it alone, and is hence less concerned about pursuing multilateral, institutional cooperation.

The discussion also counters the prevailing view of the EU as 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 often portrayed as a new type of power that steers away from coercion and relies instead on positive incentives and soft power.<sup>107</sup> This Article has not argued that those propensities of influence are not within the EU's repertoire of influence. But it has rather shown that the EU also employs tools of soft coercion that goes against preferences of its trading partners. By virtue of being the world's largest trading block, the EU can dictate what is traded. EU's regulatory clout shows that the EU can be a superpower without a super state. It is a shrewd and influential actor that builds on its strengths to project its values and make the world to its liking.

Seeing the EU in this light might also give pause to both EU's relentless critics, who emphasize EU's weakness and irrelevance, as well as to its most ardent defenders, that call for increasing integration and a gradual move towards a federation. 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

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<sup>107</sup> See Hugh Richardson, Head of the Delegation of the European Commission to Japan, Speech at Waseda University 'The European Union and Global Governance' symposium: Smartening the EU's soft power (May 16, 2008).

to advance its interests, within and beyond its borders.<sup>108</sup> The EU is already a superpower and, importantly, a superpower of a meaningful kind.

Any discussion on power begs the question of how persistent and long-lived any power is. Will it be counterbalanced and replaced? The above discussion on the limits of the EU's regulatory power mentioned the growing influence of countries like China. China will increasingly be able to constrain the EU by proving alternative markets to trade in. But 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. China has banned a few high profile global mergers but has not overtaken the EU Commission's DG Competition 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 an 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.<sup>109</sup> And by the time China might be able to overtake the EU, the EU hopes to have entrenched its norms in other jurisdictions and institutions by having changed them and the way business is conducted in a lasting way.

Yet all empires eventually fall. Paul Kennedy suggests that empires tend to fall when they become overextended.<sup>110</sup> This happened to the Great Britain whose investments in its military power eventually collapsed its economic power. Some commentators predict that the US may see the reverse happen.<sup>111</sup> These two instances show that different areas of power are interlinked. Overextending its norms and regulations will not necessarily erode the EU's economic power or (limited) military resources. But it can overreach in a way that creates an internal backlash. The concurrent deepening and broadening 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. The growing gap between these different visions within Europe for Europe, in the end, constitutes the most likely cause of an eventual decay of the European regulatory empire.

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<sup>108</sup> See also, arguing in this spirit, LEONARD, *supra* note 67.

<sup>109</sup> See Vogel & Kagan, *supra* note 3, at 9.

<sup>110</sup> See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1987).

<sup>111</sup> See Niall Ferguson, *Complexity and Collapse*, FA, March/April 2010, at 1.